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Children's Rights Team
Australian Human Rights Commission
Submitted via email

Youth Justice and Child Wellbeing Reform across Australia

Thank you for the opportunity to make a submission to the inquiry into Youth Justice and Child Wellbeing Reform across Australia. This submission

Relationships Australia's work in the youth justice space

Relationships Australia is a federation of community-based, not-for-profit organisations with no religious affiliations. Our services are for all members of the community, regardless of religious belief, age, gender, sexual orientation, lifestyle choice, cultural background or economic circumstances.

Relationships Australia provides a range of services, including counselling, dispute resolution, children's services, services for victims and perpetrators of family violence, services for older people, and relationship and professional education. We aim to support all people in Australia to live with positive and respectful relationships, and believe that people have the capacity to change how they relate to others. Relationships Australia has provided family relationships services for 75 years.

The core of our work is improving people's wellbeing through respectful relationships. Through our programs, we work with people to enhance not only family relationships, but also relationships with friends, colleagues, and across communities. We engage in research and conduct advocacy across many stakeholder groups, to broaden understanding of the issues that affect relationships, and ultimately, people's wellbeing.

This submission draws upon:

- our lengthy experience delivering diverse programs
- evidence-based programs and research, and
- our leadership and policy development experience.

What factors contribute to children's and young people's involvement in youth justice systems in Australia?

Significant research has explored the relationships between various sociocultural phenomena and children and young people's engagement with the youth justice systems in Australia and over the world. The findings are complex. While the evidence is overlapping and interwoven, with one challenge causing another, what is most striking is the prevalence of each form of disadvantage. There is no doubt that children and young people involved in Australia's youth justice system are met with systems of disadvantage. They are some of Australia's most disadvantaged people. Perplexingly, they also *conceptually* appear in a variety of other action plans and frameworks. Supposedly, they are the children who Australia espouses to be full of potential and deserving of inclusion, protection and safety. They are the children in the Close the Gap reports, Stronger Futures for Children, Australia's Disability Strategy, the National Children's Mental Health and Wellbeing Strategy and the National Plan to End Violence against Women and Children, as well as others. In fact, they are the focus of these reports. The enormously high prevalence of mental ill-health, disability, experiences with family violence and more engender them in most need of these plans and strategies. Yet because of their involvement with the justice system, a 'loss of innocence', their experiences are diminished by the need for justice, despite the evidence that suggests it is these webs of disadvantage that lead to their behaviours and imprisonment in the first place.

There are few other communities across Australia where children and young people appear across so many different sociocultural measures of disadvantage. These findings demonstrate that criminality, especially in childhood and adolescence, is dependent on and significantly affected by family dynamics, social realities and culturally entrenched systems of oppression. Relationships Australia notes that there is a large and growing body of literature that attempts to distinguish who, how and why children end up in the justice system. Rather than outline everything, we have included findings from the literature that are specifically relational in nature and, we believe, solution. In question two we will explore alternatives to imprisonment that address some of these disadvantages.

Demographics

The children and young people involved with the justice system in Australia includes a mix in community-based supervision (84%) and detention (76%), with a significant majority being First Nations boys.¹ They are usually from very remote areas which score very low on socioeconomic prosperity.² The average offender spends about 6 months under supervision.

Involvement in the child protection system

The Australian Institute of Health and Welfare found that more than half of young people (or 53%) aged 10 and over under in youth justice supervision during 2020-21 had received a child protection service since 2016 (AIHW 2022). In fact, children who encounter the statutory child protection services are at least nine times more likely than other young people to offend (AIHW

¹ Information taken from the Youth Justice National Minimum Data Set and includes information about young people in Australia who were under youth justice supervision during 2021-22. First Nations children were 19 times more likely to be under supervision and 24 times more likely to be in detention. Males were almost 4 times as likely as females to be under supervision.

² Young people from Very remote areas were about 7 times as likely as those from Major cities to be under supervision. Young people from the lowest socioeconomic areas were about 5 times as likely as those from the highest socioeconomic areas to be under supervision.

2018a). This then translates into much higher rates of contact with the criminal justice system in adulthood (Chen et al. 2005). Children involved in out-of-home-care (OOHC) also encounter the justice system at younger ages and are more likely to be First Nations and young girls or women (AIHW 2018c). Local and international inquiries and research has highlighted significant concern for this group of children (Armytage & Ogloff 2017; Australian Government 2017; Ryan 2012; Shaw 2016; Stanley 2017; Bala et al. 2015). To complicate things further, children who enter the OOHC system at older ages face higher risks of youth justice contact, despite studies showing that most child protection services had received notifications about these children from 10 years of age (Cutuli et al. 2016; Ryan 2012; Baidawi & Sheehan 2019). This highlights the importance of adequate responses to notifications which involve the whole family to avoid cumulative harms.

Maltreatment

While the links between involvement in the child protection system and experiences with maltreatment may be evident, there are specific aspects of maltreatment patterns and experiences that lead to future involvement with youth justice that should be considered.

Neglect has been identified as an important risk factor for offending. In particular, children who experience neglect after the age of 12 are more likely to offend than those who experience it before age 12, a finding which is consistent with international studies (Thornberry et. al., 2010). Additionally, the presence of behavioural issues, poorer educational attainment, mental health problems and substance misuse also exacerbate the link between childhood maltreatment and offending (Goodkind et. al., 2012; Topitzes et. al., 2011).

The Australian Child Maltreatment Study has collected the first nationally representative data on how many people have experienced maltreatment in childhood. The Australian Maltreatment Study found that 40% have experienced at least one type of abuse, while 1 in 4 have experienced 3-5 types of abuse, with 3.7% experiencing all 5 types of abuse (Pacella et. al. 2023).³ Parental separation, family mental illness, family substance problems and family economic hardship doubles the risk of multi-type maltreatment. However, despite the high prevalence of childhood maltreatment in Australia, many do not end up in the youth justice system. The outcomes relating to contact with the criminal justice system are not yet released for this study, however we believe there will be important data that supports international findings around the detrimental effects of multi-type maltreatment. There will also be key data arising that highlights why some children who experience maltreatment enter the justice system and others do not.

Other Australian research has used state-based datasets to explore the role maltreatment plays in youth offending. Recurrent maltreatment is understood as a risk factor for contact with the justice system (Malvaso et. al. 2017), with First Nations children more likely to have experienced greater cumulative adversity than their non-Indigenous counterparts (Malvaso et. al. 2018). Children who have experienced maltreatment present with more serious crimes and encounter the justice system earlier (AIHW 2018b). Persistent and recurring maltreatment is

³ The types of maltreatment include:

1. Physical abuse
2. Sexual abuse
3. Emotional abuse
4. Neglect
5. Exposure to domestic violence

also associated with children involved in the OOHC system as well as the justice system (known as 'cross-over kids'). The presence of 'cross-over kids' highlights the need for a child protection system that alleviates and ends maltreatment decisively (Malvaso et. al. 2017). It also suggests patterns of maltreatment are more important to the likelihood of offending than the presence of maltreatment.

Parental involvement in the prison system

Incarceration is intergenerational. A recent study using data from two state-wide surveys conducted in NSW prisons and youth justice centres found that 53% of young people in youth justice centres reported a parent who had been imprisoned. Among Aboriginal participants 66% of young people reported a previously incarcerated parent (Remond et. al., 2023). For many Aboriginal people, the entrance into the criminal justice system is through the domestic violence order (DVO) system,⁴ where Aboriginal and Torres Strait Islander people are charged with contraventions of DVOs and are significantly more likely to receive a sentence of imprisonment compared to non-Indigenous people (Douglas & Fitzgerald 2018). Attempts to protect children from domestic and family violence may be the entry point into intergenerational interactions with the justice system, especially for First Nations people.

These findings are intersectional. Identifying as a woman, involvement in OOHC and fewer years of schooling also predicted a parent's involvement in the justice system. Other studies have controlled for these contextual risk factors and still found parental incarceration a risk factor for youth incarceration, as well as family conflict and victimisation (Aaron & Dallaire 2010). Notably, this study also found that family processes - e.g., level of family victimisation and levels of family conflict - predicted the child's maladjustment more than the effect of parental incarceration (Aaron & Dallaire 2010). This highlights the need for supports which target the family and buttress their capability to respond to fluctuating situations and needs.

Adverse childhood experiences (ACEs)

There is substantial evidence of the links between adverse childhood experiences (ACEs) and involvement in youth offending. Adverse childhood experiences are potentially traumatic events that occur in childhood (0-17 years). They can include experiencing violence, abuse or neglect, witnessing domestic and family violence or suicidal behaviours, substance use, mental illness or parental separation in the family unit. Malvaso and colleagues found that 89% of the population in the South Australian youth justice system had experienced ACEs (2022). We will discuss some specific ACEs below.

Domestic and family violence

There are some forms of family violence that are much more likely to lead to involvement in the youth justice system. The evidence strongly supports the assertion that experiencing physical violence in the family leads to youth offending. Experiencing physical abuse as a child is correlated with an increase in the odds of becoming a serious, violent and chronic juvenile offender (Fox et. al. 2015). Experiences with physical abuse are one of the most notable predictors of youth justice involvement (Murray & Farrington 2010). Similarly, experiencing sibling violence leads to youth offending, and sibling violence is predicted by parental conflict

⁴ In places like Newman, local organisations found that Aboriginal men and women were entering the justice system for breaching orders they did not comprehend, in many cases, by making contact with their perpetrator. In response, cultural groups like Kanyirninpa Jukurrpa have created picture cards for Martu people to explain the DVO system, as an effective form of crime prevention (Taylor 2023).

and abuse (Button & Gealt 2009; Hoffman 2005). The evidence is less clear on whether witnessing family violence can also impact a child's likelihood of entering the justice system. Some evidence suggests only a weak correlation between these experiences, however, witnessing or experiencing family violence is a known predictor of other behaviours like alcohol and drug dependence, which are correlated with offending (Windom et. al. 2006). For example, young people in the justice system are 30 times as likely as the general population to have received alcohol and other drug treatment services during that period (33% compared with just over 1%) (AIHW 2018). So, while witnessing domestic and family violence, or experiencing non-physical forms of violence may not be directly correlated, their indirect pathway to the justice system should be considered.

Fetal alcohol syndrome disorder (FASD)

An Australian study into young people sentenced in Western Australia found 36% of children had been diagnosed with FASD, while 89% had at least one domain of severe neurodevelopmental impairment (Bower et. al. 2018). Overseas, FASD has been found to affect 11-23% of young people involved in correctional services (Hughes et. al. 2016). While there are challenges associated with establishing the prevalence of FASD in the general Australian community, in the USA it is estimated to affect between 2-3% of the population (Burns et. al. 2013).

The overrepresentation of children with FASD is especially concerning when we consider how FASD affects criminal proceedings, including the *doli incapax* principle (discussed further in our response to question 4). FASD affects a child's ability to understand expectations, provide credible evidence in forensic interviews, their fitness to plead and capacity to stand trial through the process of sentencing. Without prior diagnosis, children with FASD may present with behaviours that refute the presumption of *doli incapax*, and the overrepresentation of children with FASD is exemplary of this.

Mental illness

Studies in Australia and internationally have found higher rates of mental health problems among young people in detention than on community-based orders, which may be because the experience of being in detention exacerbates symptoms (Degenhardt et al. 2015; Kinner et al. 2014; Reich 2014). For example, children in detention experience psychosis at 10 times the rate of those in the general community (Fazel et. al. 2008). Mental health treatment among these groups is also much lower, especially when they are released back into the community, despite the evidence that treatment extends their time in non-custodial community settings (Burke et. al. 2015; Kasinathan 2015).

Complex post-traumatic stress disorder (CPTSD) is not often spoken about as a predictor of youth involvement with the justice system, despite its prevalence being higher than other diagnoses such as schizophrenia or bipolar disorder. This is partly due to it being a relatively new diagnosis (Saha et. al. 2005). CPTSD is a complex psychological and psychosocial response to long-term interpersonal abuse (Salter & Hall 2020). CPTSD has been associated with disadvantaged communities who experience concentrated and enduring systems of violence and oppression, and it is now understood to be as prevalent, or more prevalent, as PTSD. Mental health responses are dominated by individualised psychological interventions that fail to address the social issues which perpetuate illness. CPTSD is also intergenerational, something which especially affects disadvantaged communities. CPTSD is understood to be perpetuated by shame and results in reduced functionality when coping mechanisms are

exceeded (Salter & Hall 2020; Stadtmann et. al. 2018). This impairment leads to social isolation, unemployment, and financial disadvantage, as well as involvement with OOHHC and the criminal justice system (Karatzias et. al. 2017; Salter & Breckenridge 2014). CPTSD is also uniquely positioned as a mental illness, as it is most effectively addressed at the community level through primary prevention. While other forms of primary prevention in the mental health and domestic and family violence sectors may go some way towards preventing CPTSD, “CPSTD is not the inevitable result of violence or inequality but rather it can be understood as a specific adaptation to acute experiences of betrayal and powerlessness” (Salter & Hall 2020, p. 909). As CPSTD is now understood to be caused by shame, as opposed to fear, a primary prevention model focused on reducing the shame associated with issues like the experience of child abuse, gendered violence, and mental illness is needed. This emerging literature begins to paint a picture of children and young people developing complex mental ill-health in response to the shame associated with complex disadvantage and trauma, who are then punished and shamed for their behaviours through the justice system. The youth justice system is centred around systems of shame. It relies upon processes and practices that are inadvertently humiliating, but also deploys intentional humiliation as a tool of social control. Relationships Australia believes that a trauma-informed justice system would recognise and begin to address its use of shame as a tool for control, and consider how the use of shame disproportionately affects children who have experienced concentrated and enduring systems of violence and oppression and perpetuates mental illness.

Poverty

Although poverty is conceptualised through an economic lens, poverty occurs with, or because of, a range of other experiences, including longstanding health restrictions, intimate partner violence, abuse or neglect of older people, poor mental health, housing insecurity and instability, employment precarity, misuse of alcohol and other drugs, and harmful gambling. Causation is not simply correlated and often the social, economic, political and legal systems exacerbate poverty and actively hinder escape from it. The interplay between poverty and youth involvement in the justice system is one illustration of this.

Children from areas of greatest socioeconomic disadvantage are 10 times more likely than those living in areas of least disadvantage to be under supervision (AIHW 2020). Yet when analysis digs deeper into why these children enter the justice system, it is often the *socio* element of socioeconomic disadvantage which plays the bigger role.

For example, homeless young people are at a higher risk of becoming involved in the criminal justice system (Stewart et. al. 2004). Engaging in illegal survival behaviours under increased visibility, such as stealing food or drug consumption in public places, is one part of this (Edalati & Nicholls 2017; Ferguson et. al. 2011). However, circular challenges such as lack of employment, stemming from no fixed address, leading to ineligibility for unemployment benefits, is one such example of a system that engenders poverty and criminal behaviour through bureaucratic complexity. The role of trauma is also notable. Trauma leads young people into homelessness but is also part of the unhoused experience. Trauma hinders self-regulation and coping skills, without which criminal behaviours become more likely (Heerde & Hemphill 2013). An Australian report from 1997 found that when exploring the link between poverty (in its simplest economic understanding) and youth offending, childhood neglect completely accounted for youth engagement with the justice system (Weatherburn & Lind). However, childhood neglect stemmed from issues interrelated with, and caused by, poverty, occurring mostly in single parent families and crowded dwellings.

This “web of disadvantage” entraps people and communities to ensure that overcoming one disadvantage, such as unemployment, can be inhibited by related factors like limited funds, poor health, inadequate training or having a criminal record. Any steps forward are hindered by other sociocultural realities of living in poverty (Vinson 2009).

Poverty functions as a powerful barrier to enjoyment and assertion of human rights. Within the youth justice system, this is seen most powerfully in the case of First Nations children’s overrepresentation. The co-occurring nature of maltreatment, adverse childhood experiences, fetal alcohol syndrome, mental illness, intellectual disability and parental involvement with the justice system is exemplary of the role poverty plays in leading people to, and keeping families within, the justice systems. The causes, characteristics and consequences of poverty are known and experienced in distinct ways for Aboriginal and Torres Strait Islander people, with root causes being colonisation and its implications.

What needs to be changed so that youth justice and related systems protect the rights and wellbeing of children and young people? What are the barriers to change, and how can these be overcome?

Since 2016, almost all Australian states and territories have undertaken reviews into their youth justice systems, as well as a variety of reports and other inquiries conducted by oversight bodies, Commonwealth agencies and non-government organisations. According to the Australian Institute of Criminology, there have been 22 key reviews and inquiries between 2016-2019 (2020). There is no shortage of rumination on the issues that plague the youth justice systems. Key themes from these inquiries have been:

1. The need for youth detention as a last resort
2. Youth justice is often detrimental and is ineffective at reducing recidivism
3. Children and young people entering into the justice system are especially disadvantaged
4. These disadvantages are exacerbated by their involvement with the youth justice system
5. Where children must be detained, it should involve highly trained, trauma-informed staff, with educational and other supports available to the children. There should also be high operational integrity from the organisations detaining these children.

Despite these thematic similarities, there are philosophical differences between these reviews' foundational understandings of the purposes of youth detention. Are children offenders or victims first? In some reports, children are understood and conceptualised through their trauma and victimisation, while others focus on the criminogenic risks of these experiences, focusing on risk as opposed to potential. For example, In Armytage and Ogloff's review of the Victorian youth justice system, they rely on the 'big eight' criminogenic risk factors,⁵ to argue for an approach which focusses on addressing a young person's antisocial personality patterns, pro-criminal attitudes, social supports for crime and a history of antisocial behaviour. These are known as the 'big four'. The report then suggested addressing the 'other four' through welfare-based interventions (2018). They argue that welfare interventions cannot help young people address their own behaviours. In particular, they argue that reviews have overemphasized the role trauma plays, perpetuating a victim narrative. Relationships Australia takes issue with this approach. We believe it is an oversimplification to assume that a trauma-informed approach victimises children. A more accurate understanding of trauma would recognise that it affects someone's entire life experience and behaviours, is caused by systems bigger and more powerful than individuals and families, while also leaving space for accountability.

Trauma-informed care is not an add-on. Providing a trauma-informed counselling session one hour a week, while children are detained in unfit premises, with untrained staff using practices of torture and intimidation is not trauma-informed care. The ideal is not simply to tack-on specific interventions that are trauma-informed, but to embed this way of thinking in organisations and systems (Wall 2016). The reality of Australia's current youth justice system is that it is not trauma-informed. In fact, it uses trauma as its key tool for control. Any justice

⁵ Antisocial behaviours, criminal history/thinking, procriminal attitudes, antisocial personality patterns, procriminal associates, education/employment, family/marital dysfunction, substance abuse.

system that deems children as young as age ten with complex histories of trauma, oppression and victimisation as responsible for their actions cannot be trauma-informed.

Racism and colonialism

The overrepresentation of Aboriginal and Torres Strait Islander children in Australia's youth justice system is exemplary of a worldwide pattern of First Nations overincarceration. The argument that children and young people who offend have especially problematic behaviours that should be internalised and addressed as unique to them, by extension, suggests that First Nations people are uniquely criminogenic.

The role race and colonialism plays in our youth justice system is apparent. Even when detained, Aboriginal children experience harsher forms of punishment. For example, 80% of the children placed in solitary confinement in Queensland are Aboriginal and Torres Strait Islander (Torre 2022). This is sometimes referred to as hyperincarceration, a phenomenon that affects Australia uniquely. Rather than enacting a pattern of mass incarceration that is seen in the United States, hyperincarceration describes the law, policy and practices that converge to overincarcerate racialised groups. In Australia's case, this is the fate of Aboriginal and Torres Strait Islander children and young people. Australia's justice system is plagued by a tendency to bifurcation cases, where 'soft' cases are dealt with leniently, developmentally and at front end of system, and 'hard' cases are dealt with harshly, and involve targeted populations (White 2015). This approach shifts particular young people toward the back end of the criminal justice system. Any analysis of a justice system that focuses on offenders first, fails to accommodate for the racialised systems of law, policies and practices that lead the child into the justice system. The justice system is merely the final stop in a long line of interactions with these systems that treat Aboriginal and Torres Strait Islander children differently. For example, the recent findings from the childhood maltreatment study show that 25% of all Australians have experienced 3-5 types of child abuse, yet 43% of children in OOHC are Aboriginal or Torres Strait Islanders (Productivity Commission 2022). Even if a First Nations' child were to 'take responsibility' for their behaviours, as suggested by these reviews, the justice system they encounter is riddled with racialised responses that make them more likely to be considered a 'hard' case. Finally, the assumption that the justice system is the only, or best place to support traumatised children to conceptualise their behaviour and then take responsibility for it is erroneous and invalidated by the same reports.

Relationships Australia believes that a justice system that recognises the role race, culture and colonisation plays, while also providing safe spaces to explore responsibility is possible. Relationships Australia's Ngartuitya Family Group Conferencing service is an example of family-led decision making in the OOHC space that prioritises responsibility in the context of culture. It enables families to make their own decisions about how they will all work together to ensure their child's safety and promote wellbeing. This work focuses on responsibility rather than fault finding and understands families are resources rather than a problem. A binary between victim and offenders is insufficient. Relationships Australia would like to see a justice system that works harder to recognise the truth of both. Children, and all humans, are neither one nor the other. They are responding to their environment using the tools they have, which are determined by a variety of personal, social, cultural and historical realities. And because disadvantageous conditions are often 'bundled' in webs, efforts must be directed to loosening systemic constraints on people's life opportunities if progress is to be achieved. Policies, systems and processes which can reflect this complexity are necessary if we ever hope to reduce crime.

Can you identify reforms that show evidence of positive outcomes, including reductions in children's and young people's involvement in youth justice and child protection systems, either in Australia or internationally?

In preparing this and other submissions on youth involvement with the criminal justice system, Relationships Australia has noted there is significant, but at times incompatible, evidence about outcomes. Partly, this is caused by evidence inconsistency. State-based systems lead to limitations in how data can be collected and collated and creates cost-barriers that prevent the average researcher from conducting nationally applicable studies. Another confounding issue is the socially complex nature of the evidence. As mentioned, most of the children, young people and families involved in the justice system have experienced webs of disadvantage with complex trauma histories. This makes for additional complexities when analysing the data and drawing conclusions, as there are no simple cause and effect relationships that can be gleaned. While this could be understood as evidence to treat these children and young people with extra care, it is sometimes used as evidence that the issue is too complex to address. Relationships Australia believes that there is ample evidence of positive outcomes in youth justice reform, but any action based on that evidence is hindered by a lack of political will. Aboriginal and Torres Strait Islander children are often used as a political scapegoat, weaponised in political attempts to appear tough on crime. There is significant evidence for better youth justice systems, which are ignored for the sake of ideology and votes.

The Australian Institute of Criminology has taken effort to summarise and simplify findings from the 22 inquiries into evidence-informed recommendations (Clancey, Wang & Lin 2020). Key recommendations include:

1. Raising the minimum age of criminal responsibility
2. Far greater use of diversion
3. Offering alternatives to remanding children and young people in custody
4. Providing education and other psychosocial supports
5. Staff in detention centres should have appropriate training and supervision
6. Centres should operate with integrity and in the interests of the child

Despite 22 inquiries agreeing on the need for these six pieces of reform, based on robust evidence of success overseas, it has not yet been enacted.

Raising the minimum age of criminal responsibility

There is significant evidence regarding the impact raising the minimum age of criminal responsibility would have on the criminal justice system, especially for Aboriginal and Torres Strait Islander communities. This evidence is covered at length in the various reports and inquiries, yet for complex state-based reasons, has not yet been enacted nationally. We discuss this further in question 4.

Greater use of diversion

Diversion is the practice of diverting young people away from the justice system, and ensures that children who have not committed a crime are not siphoned into the justice system. Where diversion is used in Australia, 85% did not reoffend (RCPDCNT 2017, p.259). Diversion is found to create safer communities, be more cost-effective and reduce Aboriginal over-representation (Armytage & Ogloff 2017). However, diversion is usually reserved for children considered low- and medium-risk, reducing its ability to address racial practices within the justice system. As aforementioned, due to the hyperincarceration experienced by Aboriginal

and Torres Strait Islander children, and children with complex trauma histories, these groups are least likely to be considered low or medium risk, leaving this community-based alternative inaccessible. Additionally, diversion is often reliant on individual police practices, meaning it is underused and discretionary (Office of the Auditor General Western Australia 2017). Without investing adequate time, money and effort into adopting national approaches to diversion, community-based alternatives are seen as too difficult, too time-consuming or too risky. They rely on 'good apples' to invest their time and passion into diversion projects, rather than a nationalised approach. Effective diversion requires adequate resourcing, policy and practices and more uniform responses to be effective at reducing recidivism.

Alternatives to remand

While rates of youth involved in the justice system may be trending downwards, the number of children and young people remanded to youth justice custodial centres is increasing. At times, this group represents up to 50% of children in custody (AIHW 2019). Remand is shown to have little rehabilitative effect but comes with great risk. It infringes upon a child's ability to access their human rights. Children and young people in remand lose access to education, employment, support services, and other programs. Further, it is a pathway to detention: children end up in the justice system for breaching minor bail conditions, such as breaking curfew, rather than committing a new offence (LACLS 2018). These also work in tandem. There is an obvious link between children on remand, without access to education and vocations, who are also closely monitored and sent to detention for breaching their strict conditions. A Victorian review found that most children don't go on to detention, and those who do often have already served their time. 66% of children held in remand ended up with non-custodial cases, with only 29% of remanded children sentenced to a custodial sentence longer than the time they had already spent on remand (McGorrery 2020). The use of remand in these cases is not appropriate given the risks involved with pushing children into detention and the loss of access to human rights while on remand.

Despite this, the NSW government recently rejected the opportunity to amend the Children (Criminal Proceedings) Act 1987 to state that the arrest, detention or imprisonment of a person should be used only as a measure of last resort and for the shortest appropriate period of time. The review acknowledged the evidence for the need to reduce remand but was unwilling to change law or policy to make it a reality.

Education and psychosocial provisions

The importance of education and psychosocial supports for children is evident. A system based on restoration rather than punishment should include education and psychosocial provisions. Previously discussed evidence has shown that education reduces reoffending (Goodkind et. al., 2012). In fact, for some young people their time in detention represents the first time of educational stability in their lives, increasing the potential of rehabilitation (LSIC 2018). Consistent education leads to better future employment outcomes, continued education outside of detention and lower rates of arrest (VAGO 2018). Similarly, rehabilitative systems should provide programs to address offending behaviours, including more individualised programs as opposed to only implementing group work, which is shown to have limited effect on behavioural change in young people (Armytage & Ogloff 2017).

Most importantly, programs need to be culturally responsive. Evidence of the impact connecting young people to culture and Country can have on Aboriginal and Torres Strait Islander people is apparent both inside and outside the justice system.

When providing services and programs to adult offenders in the justice system, Relationships Australia has noted significant difficulty in gaining access to these cohorts despite specific provisions in grants that specify we do so. Part of the challenge of providing consistent education and psychosocial provisions is the cross-service and whole of government approach required. The NSW Parliament have suggested establishing a taskforce to develop a whole of government approach to therapeutic pathways that integrate health, education and housing approaches to youth behaviour for children in detention (Knudsen & Roth 2023).

Training and supervision

The incidences that lead to the Royal Commission into the Protection and Detention of Children in the Northern Territory were shameful examples of the results of an unregulated hiring, training and supervision model for people working in youth justice (RCPDCNT 2017, Vol 2A, p. 462, Vol 2B, p. 39-41). The importance of adequately trained and supervised staff in detention centers is key to creating a system of youth justice that is based on the principles of rehabilitation. The findings from this Royal Commission, as well as other enquiries have found the work to be demanding and challenging, with few or no requirements to entry, and little training, pathways or supervision once in the role (RCPDCNT 2017; Shearer 2019). There is an over-casualisation of the workforce, making standardised training difficult (Shearer 2019; RCPDCNT 2017 Vol 2B, p. 41). It is also more difficult for ever-changing staff to build relationships with the children and young people, adding to their challenges in managing their behaviour, as well as compounding the children and young people's attachment and trauma histories (. Staff are asked to perform duties they have no training in and there is little or no trauma-informed training which has been found would prevent use of force by staff (NSW Inspector of Custodial Services 2018). Despite the evidence supporting the need to address these issues, governments are acting in adhoc fashions, without clear policy-guidelines or strategic plans to address these workforce issues.

Alternative futures

Relationships Australia knows that Australia can do better for our children and youth in the justice system. Much like the evidence base for entry into the youth justice system, there is complex and vast evidence for valuable alternatives to our current system. However, we note that while there is ample evidence about the flaws in our current system and many recommendations for tangible changes that should occur, there are fewer success stories about the implementation of these recommendations, either in Australia or overseas. This is especially true for the youth cohort. We believe there are several issues which conflate to complicate this issue. Firstly, while there has been significant funding to research the issues with the youth justice system, less money has been spent on implementing recommendations that arise from these research projects. Secondly, there is political 'feet-dragging' on the issue of youth justice, with state governments often unwilling to implement trials or community-based alternatives that may paint them as soft on crime. Thirdly, we note an incomplete knowledge translation pipeline, from research to practice. Despite the ample evidence available, it is not easily accessible to governments, policy-makers, companies who manage facilities and staff working in the facilities. This blocked pipeline is further complicated by a Federated model which requires individualised reviews, assessments and responses to youth justice issues, painting a complex scene of a fragmented youth justice system with complex and interwoven issues. This makes it difficult for policy-makers to recognise the similarities across these inquiries and implement the changes that need to be made. Finally, the complexity of the social issues among this cohort makes success difficult to measure. What is success? Youth crime

rates have been steadily dropping at a national level, yet some sub-populations are experiencing higher rates of incarceration than ever before. Intergenerational patterns of criminal behaviour are also on the rise in these discrete communities. Are we trying to punish children and deem them solely responsible for their behaviour, or are we trying to rehabilitate them and address the complex web of disadvantage that led them to their current position? Without a firm understanding of what we want our youth justice system to achieve, measuring success remains out of reach.

Regardless of these theoretical challenges, many scholars and community workers have imagined alternative futures. We have outlined a few of these alternatives below:

- Therapeutic Jurisprudence
- Restorative Justice
- Justice reinvestment

Therapeutic Jurisprudence

Therapeutic Jurisprudence explores how the processes of the legal system, including courts, judicial officers, lawyers and other justice system personnel can affect the wellbeing of the offender, and their community, and their future relationship with the judicial system. It encourages those working within the system to consider how the law, and their decision-making power within it, acts a social force. This legal practice reform attempts to centre the wellbeing of offenders. There is evidence it is an important element of justice reform (Larsen & Milnes 2011). In practice, it often results in offenders moving through treatment and rehabilitation programs, in an attempt to avoid the negative effects of detention. However, it has been criticised on the basis that it can be used to coerce offenders into 'voluntary' treatment programs, as well as having the result of obscuring responsibility and punishment, using treatment as a form of punishment (Larsen & Milnes 2011). Researchers found that, especially in the case of youth offending, "despite the rhetoric of care endorsed by therapeutic jurisprudence reformers, offenders are tied to the legal system longer, and monitored more closely than they might otherwise have been" (Larsen & Milnes 2011). Critiques suggest that therapeutic jurisprudence courts place too much emphasis on judges as social arbitrators, as well as reducing responsibility from offenders – however most analysis explore adult offending and the usefulness of therapeutic jurisprudence for young offenders is not fully understood.

Restorative Justice

Relationships Australia Canberra and Region has developed an active community partnership with Restorative Justice- Galambany Circle sentencing panel which provides effective and restorative processes to Aboriginal and Torres Strait Islander defendants through community involvement in sentencing. Restorative approaches draw from Indigenous practices and provide a culturally specific, safe and appropriate response for Aboriginal young people, based on the principles of reparation and self-determination. These approaches provide non-criminalised mechanisms and pathways for children, young people and their families.

Restorative approaches are associated with:

- Improved social skills, reduced aggression and reduced exclusion of students in education settings (Weber & Vereenoghe 2020);

- A reduction in the number of children in out of home care, as well as the number of families with a child protection plan and children at risk in social care environments (Victoria Legal Aid 2016);
- Reductions in re-offending in youth justice across different offence types and regardless of the gender, criminal history, age or cultural background of the offenders (Daly & Hayes 2001); and
- Improved health outcomes and reduced dependence on the health system (O'Brien, Welsh & Barnable 2016).

Relationships Australia would like to see a greater commitment to the introduction of restorative practices across Australian jurisdictions.

Justice reinvestment

Justice reinvestment (JR) is the use of evidenced-based interventions that reduce costs of incarceration and use these savings to strengthen communities and reduce the incidences of crime in the first place. This could include reinvestments into things like education, housing, healthcare and jobs. It was developed in the United States to address racial disparities and growing imprisonment rates, but has also grown in popularity in the United Kingdom in recent years. In Australia, JR is understood as a key aspect of reducing the over-representation of Aboriginal and Torres Strait Islander people in the justice system. Some of the changes can include:

- Changes to policy and legislation that would otherwise tend to increase the likelihood of people being imprisoned – e.g., raising the age of criminal responsibility
- Improved treatment programs and models of supervision for individuals at the most risk of offending
- Investing in neighbourhoods that house a disproportionately high number of offenders
- development of interventions based on locally identified needs and sound evidence
- Improving drug addiction and mental health outcomes – e.g., providing access to services for children and young people involved in the justice system, especially those within the detention system, as well as increasing the use of risk and needs assessments.
- Engagement of interested and motivated supporters, including those providing financial and in-kind contributions for developing and implementing JR approaches – e.g., state-level commitment.

JR is used widely across the United States in response to a need to reduce the growing cost of incarceration. Evaluations suggest that cost savings have been achieved across many states, however in some states these savings have not been returned to the initiatives. Strategies in the US have largely involved changes to practices and processes back by legislative change (Willis & Kapira 2018). Australia is less likely to achieve such impactful economic outcomes, due to the lower rates of incarceration. As such, some have suggested that the success of a true JR interpretation in Australia would be less successful, particularly because those who would benefit from these reinvestments most, remote Aboriginal and Torres Strait Islander communities, require expensive investments. The relatively small numbers of children and young people in detention will not create large reductions in state expenditure which could be diverted and therefore, this specific model may not make as much

sense in the Australian context. Additionally, others have noted the ambiguous definitions and theoretical underpinnings of JR, which could be considered both a limitation, or an opportunity, in the case of a lack of bipartisan approach to youth justice (Brown et. al. 2012).

Principles identified in the multitude of reports mentioned above require a commitment to reform, and we consider that Therapeutic Jurisprudence, Restorative Justice and Justice Reinvestment, or a combination of these, could be appropriate methods for achieving those principles and improving the youth justice system. Relationships Australia recognises that any approach to reform, especially for groups which are so politicised, need to be supported by a rigorous policy reform, requiring cross- government cooperation and will necessarily take an incremental approach. Additionally, quality control and oversight mechanisms must be implemented; as well as developing a sustainability plan with good public relations. Without these, no matter the evidence-base, reforms are less likely to succeed.

From your perspective, are there benefits in taking a national approach to youth justice and child wellbeing reform in Australia? If so, what are the next steps?

Fragmented approaches

The state and territory-based approaches to legislation, policies and practices which take place across Australia has led to differing approaches to justice. While detention is supposedly considered as a 'last resort' for children, the Federated model allows individualised approaches that do not always respect the *doli incapax* principle and ultimately, change the nature (and effectiveness) of children's access to their human rights, based on the jurisdiction in which they offend. This is especially true for states and territories that contain the greatest number of Aboriginal and Torres Strait Islander youth.

For example, Queensland recently rejected a Bill to raise the criminal age of responsibility as 'there is more work to be done before the minimum age of criminal responsibility is raised in Queensland', citing community safety and a need to address the complex problems that lead children into the justice system (Community Support and Services Committee 2022). First Nations' people makeup 4.6% of the Queensland population yet Aboriginal and Torres Strait Islander children made up 62% of the Queensland youth detention cohort (ABS 2022).

Similarly, although New South Wales has made the most substantial moves towards justice reinvestment with their adult population through programs such as Maranguka Justice Reinvestment Program in Bourke, they have rejected a Bill to raise the age of criminal responsibility. This demonstrates inconsistent approaches within state justice systems, where punitive and restorative approaches sit side by side.

Notably, those states and territories that have agreed to increase the age of criminal responsibility (Australian Capital Territory, Tasmania, Western Australia, Northern Territory, Victoria) are moving at different paces with different commitments to alternative investments. Some states, for example South Australia, have specifically requested a national approach to this issue. South Australian Attorney General Vickie Chapman said:

"My preference has always been that we pursue a nationally consistent approach to the minimum age of criminal responsibility ... I will continue to discuss this matter with my colleagues interstate and nationally, as well as work with those on the ground in South Australia who best understand the system and possible implications of change." (Bucci, 2021)

Relying on the *doli incapax* principle

Without raising the age, children must rely on the *doli incapax* principle. However, there is limited evidence that the *doli incapax* principle, which supposedly protects the rights of children to avoid unnecessary incarceration, is applied consistently in practice in these jurisdictions. To rebut the presumption of *doli incapax*, the prosecution may rely on various forms of evidence, including:

- statements/admissions made by the child
- behaviour of the child before and after the act
- prior criminal history
- evidence of parents/home background
- evidence provided by teachers, and
- evidence provided by psychologists and psychiatrists.

Notably, the aforementioned factors which contribute to children's and young people's involvement in youth justice systems, like FASD, have important impacts on these rebuttals. For example, children with FASD may make statements of admission and show behaviours before and after the act that suggest guilt when considered in isolation from the existence of FASD. Furthermore, these children are more likely to struggle with formal education and therefore may be less likely to have supportive evidence from teachers. Indeed, many of the pieces of 'evidence' that rebut the presumption are affected and compounded by social, economic and cultural issues. The children most likely to encounter the justice system are also most likely to present with behaviours that challenge the *doli incapax* principle. Finally, even if children were protected by the *doli incapax* principle, they must wait in remand while a *doli incapax* assessment is completed, exposing them to risks associated with the justice system.

Aboriginal-led organisations are especially concerned about the effect this has on Aboriginal communities. Australia has also received pressure from the United Nations Committee on the Rights of the Child and Amnesty International to raise the age of criminal responsibility (2022, pg. 79).

A national approach

Relationships Australia believes a national approach would help address fragmentation and differing approaches to youth justice, including those outlined above. Many of the issues within this submission arise from inconsistent approaches to diversion, remand, education, supports, resourcing and staff hiring and training. Despite the mountains of evidence and inquiries in agreement that something must be done, little progress has been made.

A broader, national approach to childhood wellbeing may expand this and allow, for example, child protection and family law systems more open communication channels, creating more robust responses to childhood maltreatment, among others. This would enhance information sharing and provide opportunities for early intervention to divert children and young people away from the youth justice system altogether.

To truly address the issues in the youth justice system, the wellbeing of the children and young people within it must be prioritised. This requires a national and unified philosophical restructure that envisions *all* children as full of potential and deserving of inclusion, protection and safety. Discarding the simplistic binary of victim or offender, we urge for a more nuanced and complex understanding that children and young people can be both. Across our services, including in redress, domestic, family and sexual violence and child protection services, we see individuals and families who occupy both identities concurrently. Children and young people entering the justice system have had challenging lives. They deserve compassion, as well as respect and support that allows them to take responsibility and make change. A national approach to youth justice could bring these children and young people out of the shadows of the other action plans and frameworks and recognise that if we do not do more to prioritise children's wellbeing, the most disadvantaged risk a future entrenched in the justice system.

Conclusion

Thank you for the opportunity to contribute to this critical inquiry. Should you require any clarification of, or elaboration on, any aspect of this submission, or information on the services that Relationships Australia provides, please contact me or Claire Fisher, Senior

Research and Projects Officer, Relationships Australia (ntebbey@relationships.org.au and cfisher@relationships.org.au).

Kind regards

A handwritten signature in black ink, appearing to read 'Nick Tebbey', with a stylized flourish at the end.

Nick Tebbey
National Executive Officer

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