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Submission to National Children's Commissioner: Youth Justice and Child Wellbeing Reform.

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Australian Centre for Health Law Research

2 June 2023

Anne Hollonds
National Children's Commissioner
Australian Human Rights Commission
By email: youthjusticereform@humanrights.gov.au

Dear Commissioner Hollonds,

Re: Call for submissions: Youth Justice and Child Wellbeing Reform

Thank you for the opportunity to provide comment on youth justice and child wellbeing reform. We are academics from QUT's Australian Centre for Health Law Research. Together, we have wide-ranging expertise in law, human rights, health and social justice.

We have enclosed a submission for your consideration, in which we draw on bodies of evidence from law, human rights, health, developmental science, economics and ethics. Our submission also draws on a study conducted by three authors of this submission, which we include as a separate attachment. Informed by this evidence, we make three recommendations:

- **Recommendation 1:** Sentencing legislation must be reformed to increase the use of diversion programs and to ensure incarceration of young people involved in the youth justice system is genuinely used only as a last resort.
- **Recommendation 2:** The minimum age of criminal responsibility must be increased to at least 12 years old.
- **Recommendation 3:** Programs responding to socio-economic disadvantage in young people involved in the youth justice system must be continued and expanded.

Further details are provided in the full submission below.

These recommended reforms are feasible, and will align Australia with our international human rights obligations. These recommendations apply equally to all Australian states and territories.

We would be pleased to provide you with any further information or advice that may assist.

Yours sincerely



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A handwritten signature in black ink, appearing to read 'Andrew McGee', with a long horizontal stroke extending to the right.

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Submission to the National Children's Commissioner



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Executive Summary

1. Socio-economic disadvantage is a central factor contributing to the involvement of young people in the criminal justice system.
2. Programs responding to socio-economic disadvantage have proven effective in lowering the risk of reoffending.
3. Incarceration of young people does not reduce reoffending; in fact, it exacerbates disadvantage and makes reoffending more likely.
4. We therefore, make three key **recommendations**:
 - **Recommendation 1:** Sentencing legislation must be reformed to increase the use of diversion programs and to ensure incarceration of young people involved in the youth justice system is genuinely used only as a last resort.
 - **Recommendation 2:** The minimum age of criminal responsibility must be increased to at least 12 years old.
 - **Recommendation 3:** Programs responding to socio-economic disadvantage in young offenders must be continued and expanded.

1. What factors contribute to young persons' involvement in the youth justice system?

- 1.1 Australian and international research has shown that socio-economic disadvantage is a major influence on involvement in the youth justice system. Specific types of disadvantages, including poor health, financial difficulties, poor education, and family conflict, make offending more likely. Aboriginal and Torres Strait Islander youth experience higher levels of disadvantage, and have correspondingly higher involvement in the youth justice system. Multiple early life disadvantages increase the likelihood of early offending. Inappropriate responses to such offending by the justice system – with incarceration being the most severe – amplify the likelihood of re-offending, creating a cycle of crime and incarceration.
- 1.2 Young people involved in the youth justice system have measurably higher levels of disadvantage. As researchers with the Australian Centre for Health Law Research, we have particular knowledge of the health problems experienced by this population [1]. Research has shown that young people involved in the youth justice system have higher rates of communicable and non-communicable diseases, mental illness, neurological disabilities, traumatic head injuries, foetal alcohol spectrum disorder, and have more dental problems than the general youth population. Moreover, young people involved in the justice system have difficulties accessing health care, owing to a lack of knowledge of, or access to, health services. As a result, their health care is compromised and fragmented.
- 1.3 The high level of disadvantage experienced by people involved in the youth justice system means reoffending is more likely. This is demonstrated by the data: 41% of Australian young people aged 10–17 who were under youth justice supervision between 2000–01 and 2019–20 returned to sentenced supervision before age 18 [2].

2. Incarceration is a major barrier to change

- 2.1 Incarceration of young people involved in the youth justice system is a massive barrier to positive outcomes and does not reduce reoffending. Rather than addressing disadvantage, incarceration exacerbates disadvantage and amplifies known risk factors for reoffending, adversely affecting health, family relationships, employment and education. Therefore, incarceration of young people makes reoffending more likely.
- 2.2 The rate of youth incarceration in Australia is dramatically higher than comparable countries. For example, the rate of incarceration is 2.6 times higher in Australia than in England and Wales [3]. The rates are even higher for Aboriginal and Torres Strait Islander young people; 60% of young people in detention in Australia are Indigenous [3]. Aboriginal and Torres Strait Islander young people are 18 times as likely to be incarcerated as non-Indigenous young people [3].
- 2.3 Concerningly, many young people in Australia are incarcerated for non-violent property offences. Thirty-one percent (31%) of young people in detention in 2019-20 in Queensland had only committed property offences [4]. In NSW, for 38% of young people in custody, their most serious offence was a property offence [5]. This is despite the fact that in all states and territories, sentencing legislation requires that detention for young people should only occur as a last resort [6]. The rate of incarceration for property offences represents a concerning misapplication of current fundamental legislative principles in sentencing legislation. It indicates these provisions are not sufficiently definitive about the circumstances warranting incarceration.

3. What needs to change?

Recommendation 1 - Reform sentencing legislation to ensure incarceration is a last resort

Recommendation 1: Sentencing legislation must be reformed to increase the use of diversion programs and to ensure incarceration of young people involved in the youth justice system is genuinely used only as a last resort.

These changes would be consistent with human rights obligations under the United Nations Convention on the Rights of the Child in Article 37(b) that require detention only as a 'last resort'.

The general high rates of incarceration of young people in Australia and the high proportion of young people incarcerated for property offences indicate that detention for young people is not currently being used as a last resort, despite the obligation present in sentencing legislation. Theoretical, economic, and jurisprudential analyses would conclude that only the most exceptional case of property offences would justify incarceration of a youth offender.

In order to achieve this, we recommend that all other options must be shown to be insufficient and inappropriate before a young person could be given a custodial sentence.

Feasibility

This change does not represent a radical departure from the existing legislation and literature. Rather, it gives meaningful effect to the current provisions. We believe there is room for expansion of non-custodial sentencing options in Australia.

We note that diversion programs, like restorative justice programs, are effective at reducing reoffending, and avoid the problems associated with incarceration [7]. These programs should be extended and expanded. The economic gains would also be substantial, given the extremely high cost associated with incarceration both in the short-term and the long-term [8].

Recommendation 2 - Raise the criminal age of responsibility

Recommendation 2: The minimum age of criminal responsibility must be increased to at least 12 years old.

Currently, the age of criminal responsibility is 10 years old in all Australian states and territories, although it will soon be increased to 12 in Victoria and the ACT. We argue that 12 years old should be the absolute minimum for the age of criminal responsibility in Australia, and consideration should be given to raising it further to 14.



In 2016, the most common minimum age across 90 countries was 14 [9]. The United Nations Committee on the Rights of the Child has recommended the minimum age of criminal responsibility to be 12 years. As a result of this discrepancy, Australia has been subject to significant international criticism for its low age of criminal responsibility [10, 11].



Moreover, evidence on development maturity shows that younger children lack the physiological and cognitive capacity to be held responsible for criminal behaviour [12, 13]. This suggests that criminalising children for behaviour they may not fully comprehend, and may grow out of with maturity, is highly inappropriate [11].



Finally, raising the age of criminal responsibility will reduce the risk of reoffending for young people. We have already noted that incarceration for young people increases the risk of reoffending. This effect appears to be more pronounced for younger children, as data shows that those aged 10-12 at their first sentenced supervision have a 90% return rate to sentenced supervision [14].

Recommendation 3 - Programs that address disadvantage

Recommendation 3: Programs responding to socio-economic disadvantage in young offenders must be continued and expanded.

Programs that address the disadvantage of young people involved in the youth justice system can make a difference [15]. Recently, three authors of this submission studied the results of the 'Navigate Your Health' program in Queensland (see paper 'Improving Health to Reduce Youth Reoffending' [1] in separate attachment). This study was done with Queensland Government partners. Under this program, delivered by Children's Health Queensland Hospital and Health Services, young people who had non-custodial youth justice orders were provided dedicated nurses who coordinated the young person's healthcare based on their specific needs.

Results showed that involvement with the Navigate Your Health program led to substantial overall improvements in health, from a low base. Significantly, results of our study also showed significant improvements in participants' other areas of disadvantage that are known risk factors for offending: family relationships, connection to community, participation in learning, and engagement in employment. These improvements occurred despite the fact that no assistance was given in these areas.

This research demonstrates that young people involved in the youth justice system are highly disadvantaged. It shows the connected and compounding nature of different dimensions of disadvantage. Finally, it demonstrates that targeted assistance can have real impact on youth wellbeing, which in turn, reduces the risk and ultimately incidence of youth reoffending.

Direct assistance to address disadvantage is an appropriate policy response to youth offending. We recommend the continuation and expansion of programs that address socio-economic disadvantage of young people involved in the justice system.

An optimal multidimensional response to youth justice is to increase the age of criminal responsibility, ensure incarceration is a last resort, and expand programs for health and wellbeing.

Conclusion

Young people involved in the youth justice system typically experience multiple levels of disadvantage. Addressing this disadvantage is key to lowering reoffending. The community interest in ensuring legitimate responses to youth crime can be achieved without worsening the problem. Effective responses can still be provided, and accountability for offending can be secured, without incarceration.

We therefore recommend changes to law that **concretise the legal intent to incarcerate young people as a last resort** and **raise the criminal age of responsibility**, as well as **investment in programs that address disadvantage** that are consistent with scientific literature and reduce economic cost.

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- [6] See e.g., *Young Offenders Act 1994* (WA) s 7(h); *Youth Justice Act 1992* (Qld) Sch 1 s 18; *Youth Justice Act 1997* (Tas) s 5(1)(g); *Children and Young People Act 2008* (ACT) s 94(1)(f); and *Youth Justice Act 2005* (NT) s 4(c). The remaining states include similar objectives or instructions to the court that require detention for young offenders to be used in restricted or more serious cases only.
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