



Australia's National Institute for Aboriginal
and Torres Strait Islander Health Research

Youth Justice and Child Wellbeing Reform Across Australia

Submission to the Australian Human Rights Commission

Partnership for Justice in Health (P4JH) and Lowitja Institute, June 2023



Youth Justice and Child Wellbeing Reform across Australia
Human Rights Commission

Dear Commissioner,

Re: Human Rights Commission Youth Justice and Child Wellbeing Reform across Australia Submission

We welcome the opportunity to make a submission to the Australian Human Rights Commission's (AHRC) Youth Justice and Child Wellbeing Reform consultation.

The [Partnership for Justice in Health](#) and our members are deeply committed to improving Aboriginal and Torres Strait Islander health and justice outcomes. This work includes advocating for the elimination of racism and discrimination in our justice and health systems.

Our children and young people are our future and we want them to thrive, but the current justice and health systems are failing them. We encourage transformation of the current systems to enable our peoples' self-determination, community leadership, and approaches that are based on a holistic approach to health and wellbeing.

Please find our submission attached. We would welcome the opportunity to further discuss any of the issues contained therein.

Warm regards,

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CEO, National Association of
Aboriginal and Torres Strait Islander
Health Workers & Practitioners
Co-Chair, P4JH

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CEO, Lowitja Institute

1. About the Partnership for Justice in Health

The Partnership for Justice in Health (P4JH) is an alliance of self-determining Aboriginal and Torres Strait Islander academics, legal experts, and national peak health and justice organisations committed to working together to improve Aboriginal and Torres Strait Islander health and justice outcomes. As leaders operating at the interface of the health and justice systems, we commit to harnessing our leadership, influence, and networks towards realising our vision that 'Aboriginal and Torres Strait Islander people enjoy health and wellbeing that is free of racism in the health and justice systems'.

Our campaign is unlike any other. We have a unique understanding of the ongoing impact that racism and colonisation continues to have on our people. We fill a crucial gap by amplifying the voices and lived experiences of families severely impacted by racism in the health and justice systems. As experts in this area, we are well positioned to provide advice to decision-makers. Now, seek to elevate our profile in order to support our communities and influence a cultural shift across the health and justice systems.

2. About Lowitja Institute

Lowitja Institute is Australia's only national Aboriginal and Torres Strait Islander community-controlled health research institute, named in honour of its patron, Dr Lowitja O'Donoghue AC CBE DSG.

As a community-controlled organisation, it is working for the health and wellbeing of Australia's Aboriginal and Torres Strait Islander peoples through high-impact quality research and knowledge exchange. It focuses on supporting a new generation of Aboriginal and Torres Strait Islander health researchers and other Aboriginal and Torres Strait Islander community-controlled organisations.

Lowitja Institute operates on key principles of Aboriginal and Torres Strait Islander leadership, a broader understanding of health that incorporates wellbeing, and the need for the work to have a clear and positive impact.

3. General preamble

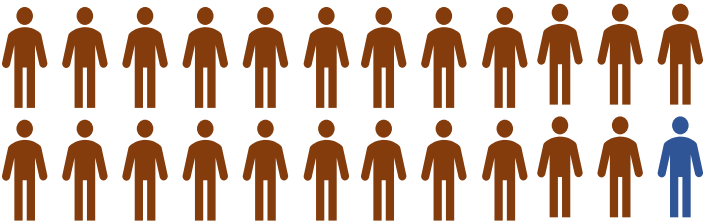
Before responding to the Commissioner's specific questions, we must contextualise our responses within this country's colonial and racist history.

Evidence of ongoing widespread racism and racial discrimination can be found in Reconciliation Australia's *Australian Reconciliation Barometer 2022 Report*. The survey found that 60% of Aboriginal and Torres Strait Islander people had experienced at least one form of racial prejudice in the past six months (up from 52% in 2020 and 43% in 2018).¹

We know that experiences of racism and racial bias significantly contribute to adverse health and wellbeing outcomes, including to social and emotional wellbeing, mental health, physical health, unhealthy behaviours, health conditions, and cultural and spiritual wellbeing. The *Mayi Kuwayu* study demonstrates clear evidence for this link² as well as the importance of culture to wellbeing (i.e. the cultural determinants of health).

The ongoing impacts of colonisation include decreased wellbeing and mental ill-health, which increases the likelihood of our peoples coming into contact with the justice system.³ We often experience further racism and adverse impacts to our health and wellbeing within this system, including our children, who are incarcerated at hugely disproportionate numbers.

Nationally in 2020-21, the rate of our young people aged 10-17 years in detention was 23.2 per 10,000 young people in the population compared with 1.3 in 10,000 non-Indigenous young people:⁴




¹ Reconciliation Australia, 2022, '2022 Australian Reconciliation Barometer', Accessed 7 June 2023, <https://www.reconciliation.org.au/wp-content/uploads/2022/11/Australian-Reconciliation-Barometer-2022.pdf>, p. 5.

² Thurber, K.A., Colonna, E., Jones, R., Gee, G.C., Priest, N., Cohen, R., Williams, D.R., Thandrayen, J., Calma, T., & Lovett, R., 2021, 'Prevalence of Everyday Discrimination and Relation with Wellbeing among Aboriginal and Torres Strait Islander Adults in Australia', *International Journal of Environmental Research and Public Health*, vol. 18, issue. 6577, <https://doi.org/10.3390/ijerph18126577>, p. 13.

³ Australian Law Reform Commission, (n/d), Social determinants of incarceration, Accessed 7 June 2023, <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/2-context/social-determinants-of-incarceration/#:~:text=2.49%20Mental%20health%20disorders%20have>, para 2.49.

⁴ Productivity Commission, (n/d), Socioeconomic outcome area 11, Accessed 7 June 2023, <https://www.pc.gov.au/closing-the-gap-data/dashboard/socioeconomic/outcome-area11>.



This is the result of colonisation, deep systemic inequities, and institutional racism – all of which still have profound impacts today.

We kept our communities healthy for millennia with holistic approaches that see individual and community health as intertwined, and physical, social, emotional and cultural wellbeing as interconnected and equally important.⁵ This means that there are a range of non-medical influences on health and wellbeing. These are the cultural and social determinants of health, which are elaborated on in Lowitja Institute's discussion paper, *Culture is Key: Towards cultural determinants-driven health policy*.⁶

Prior to colonisation, our societies were structured to support the determinants of health and wellbeing. Colonisation sought to strip these things away, including by removing our children from their families. Removing our children leaves them without the protective factors of strong cultural identity and connection to community. As clearly outlined in *Our Youth, Our Way*, child removal increases the risk of our children coming into contact with the justice system.⁷

The child protection systems and the youth justice systems are deeply connected at a systemic level – they share the same colonial legacy – and lead to self-perpetuating cycles across lifetimes and generations. They create webs in which our children and young people become entangled.⁸

The systemic nature of the issues and our peoples' holistic understanding of health and wellbeing is included in the *National Agreement on Closing the Gap* (2021) ('the National Agreement'). The National Agreement's priority reform areas⁹ and included targets recognise the cross-cutting contributing factors. For example, the numbers of our young people being incarcerated (Target 17) can be reduced by transforming mainstream systems and services to be more culturally safe (Priority Reform 3). Improvements across other socioeconomic outcomes will also positively impact, such Targets 2, 3 and 7.¹⁰

⁵ Salmon et al., 2019, *Defining the indefinable: descriptors of Aboriginal and Torres Strait Islander Peoples' cultures and their links to health and wellbeing*, Aboriginal and Torres Strait Islander Health Team, Research School of Population Health, The Australian National University, Canberra, p. 1.

⁶ Lowitja Institute, 2020, *Culture is Key: Towards cultural determinants-driven health policy – Final Report*, Lowitja Institute, Melbourne. Accessed 07 June 2023, DOI: 10.48455/k9vd-zp46.

⁷ Commission for Children and Young People (Victoria), 2021, *Our Youth, Our Way*, p. 27. Accessed 31 May 2023, <https://ccyp.vic.gov.au/assets/Publications-inquiries/CCYP-OYOW-Final-090621.pdf>

⁸ Ibid.

⁹ Australian Government, 2020, *National Agreement on Closing the Gap – Priority Reforms*, Accessed 7 June 2023, <https://www.closingthegap.gov.au/national-agreement/priority-reforms>.

¹⁰ Children being born healthy and strong (Target 2), children being engaged in high quality, culturally

Yet despite the evidence, denial of the existence and impacts of racism in the justice system runs deep. Multiple coronial inquests look at inherent issues in the justice and health systems, including “the heavy presence of race”.¹¹ But it still took until 2020 for a coronial inquest to specifically assess whether systemic racism contributed to the passing of one of our peoples in custody, Yorta Yorta woman Ms. Tanya Day.¹²

Our peoples know what racism looks, sounds and feels like. Given its prevalence this is irrefutable. Yet, even with strong evidence, including testimonial evidence from Aboriginal families and communities, the Coroner was unwilling to draw a line “between statistical evidence about the over-representation of Aboriginal women in custody and Ms. Day’s circumstances”.¹³

While we acknowledge that the AHRC is developing a National Anti-Racism Framework, as noted in the scoping paper, the initial AHRC’s concept paper failed to define key concepts like ‘race’, ‘racism’ or ‘anti-racism’. The lack of consistent definition contributes to the unwillingness to call out racism.

Lowitja Institute and the P4JH are particularly focused on advocating for a consistent national anti-racism strategy and related definitions. Clearly defining the terms ‘systemic racism’, ‘institutional racism’, and ‘anti-racism’ is necessary in order to clearly call out and then address racism within the justice and health systems.

We recommend that the Commissioner:


- 1. Drives the development of nationally consistent definitions of ‘systemic’ and ‘institutional’ racism.**
- 2. Encourages the health and justice systems to make commitments to cultural safety, antiracism and enacting anti-racism policies to effect systems change, including a specific focus on:**
 - a. decolonising approaches,**
 - b. proper implementation of the National Agreement on Closing the Gap, and especially Priority Reform 3.**

appropriate education in their early years (Target 3), and youth being engaged in employment or education (Target 7). See Closing the Gap (n/d), *Closing the Gap Targets and Outcomes*, Accessed 7 June 2023, <https://www.closingthegap.gov.au/national-agreement/targets>

¹¹ Watego, C., Singh, D. & Macoun, A., 2021, *Partnership for Justice in Health: Scoping Paper on Race, Racism and the Australian Health System*, Discussion Paper, The Lowitja Institute, Melbourne, p. 1.

¹² Ibid.

¹³ Ibid.



Further, we welcome the Commissioner's elevation of the importance of rights set out in the UN Convention on the Rights of the Child (CRC). It is important to note that our children also have Indigenous rights, set out in the United Nations Declaration on the Rights of Indigenous Peoples, which outlines our right to practice culture, traditions and customs. These rights seek to ensure our peoples' ability to practice and keep culture strong, speak our languages, and maintain our connections to Country; things that we know help support our young peoples to have bright futures and reduced contact with the justice system.

We recommend that the Commissioner encourage and support the Australian government to fully implement the UNDRIP, including system reform to ensure that our peoples' rights under the UNDRIP are protected and elevated.

It is also important to note that our children with disability have rights set out in the Convention on the Rights of Persons with Disabilities. These rights are equally important to ensuring that our children are not only healthy and well, but they have access to a world in which they can thrive. Those of our peoples with disability experience even greater social, health and wellbeing inequality than those without.¹⁴ We encourage the Commissioner to consider these intersecting rights in youth justice reform.

4. Consultation questions


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

As noted above, this is a systemic issue with cross-cutting contributing factors, including child removal, experiences of racism and over-representation and incarceration of our peoples. Another contributing factor is the intergenerational trauma resulting from the impacts of colonisation. Tackling systemic and institutional racism is a key step to improving outcomes for our peoples.

1. ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN AND YOUNG PEOPLE WITH DISABILITY

It is estimated that 95% of Aboriginal and Torres Strait Islander peoples charged with criminal offences have an intellectual disability, cognitive impairment or

¹⁴ Avery, S., 2020, 'Aboriginal and Torres Strait Islander people with disability: Falling through the cracks', *Precedent*, Australian Lawyers Alliance, vol. 129, issue 12, Accessed 7 June 2023, <http://classic.austlii.edu.au/au/journals/PrecedentAULA/2020/42.html>.



psychosocial disability.¹⁵ It is common for our peoples with disability to live without any supports or adequate management of their disability. As Dr Scott Avery has highlighted, “The legacy of undiagnosed or unsupported disability in early childhood years carries forward into the schooling years.”¹⁶ Instead of curiosity about our children’s behaviours and learning needs, schools act punitively with the mindset of ‘bad black kid syndrome’.¹⁷

Instead of receiving appropriate diagnoses and supports, our children with disability end up on a trajectory – the ‘matriculation pathway into prison’¹⁸ – that increases their chances of unemployment in adulthood, and almost inevitable contact with police, courts, juvenile detention and prison. We encourage the Commission to refer to Dr Avery’s work on this for more information.

There is a need to ensure that our early childhood and school systems are culturally safe, trauma-informed and include an awareness of and support for children with disability to stop this matriculation pathway at the start.

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?

2. RAISE THE AGE

One change that would make an immediate and significant impact to protect the rights and wellbeing of our children and young people is for all states and territories to raise the age of criminal responsibility to at least 14-years-old . This is something that the Raise the Age Alliance and members of the P4JH have been advocating for many years.

Such a reform is backed by strong international evidence that sending children to prison at young ages only causes harm, breaches the rights of the child (UNCRC),¹⁹ and increases chances of repeat contact with the justice system and

¹⁵ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 2020, *Overview of responses to the Criminal Justice System Issues Paper*, p. 3.

¹⁶ Avery, S., 2020, ‘Aboriginal and Torres Strait Islander people with disability: Falling through the cracks’, *Precedent*, Australian Lawyers Alliance, vol. 129, issue 12, Accessed 7 June 2023, <http://classic.austlii.edu.au/au/journals/PrecedentAULA/2020/42.html>.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ United Nations, 2007, *United Nations Declaration on the Rights of Indigenous Peoples*, Accessed 7 June 2023, https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf

reincarceration in future; the younger a child is when first sentenced, the higher the chance of reoffending as an adult.²⁰ Medical evidence shows that children under 14 years old are not developmentally able to comprehend the consequences of their actions and therefore are unable to be legally culpable.²¹

3. ACCESS TO MBS, PBS, NDIS IN DETENTION

Along with our concerns regarding the gaps in NDIS services, which cause our peoples to end up in detention unnecessarily and prevent our young people from accessing necessary supports, we also see the unavailability of the Medical Benefits Scheme, Pharmaceutical Benefits Scheme and NDIS in prison (or detention) as deeply problematic.²² These restrictions on access mean that the 715 health check²³ for Aboriginal and Torres Strait Islander peoples are not being accessed by incarcerated Indigenous youth and vital medications cannot be obtained, especially in remand where our young peoples are sometimes waiting for months or more than a year. This further widens the existing health gap between Aboriginal and Torres Strait Islander and non-Indigenous peoples.

Further, according to First Peoples Disability Network, gaps in NDIS services mean that sometimes the only way that a young Aboriginal person with disability can be housed is prison.

We encourage the Commission to also refer to Lowitja Institute's research paper, *Understanding Disability through the lens of Aboriginal and Torres Strait Islander people – challenges and opportunities*.²⁴

4. ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN AND YOUNG PEOPLE WITH DISABILITY

Another significant barrier for our peoples with disability accessing the healthcare and disability supports and accommodations they require is that Aboriginal and Torres Strait Islander peoples are not screened for disability prior to, or upon, entry

²⁰ Victorian Aboriginal Legal Service, 2022, *VALS Policy Brief – Raising the Age of Criminal Responsibility*, Accessed 7 June 2023, <https://vals73.wpengine.com/wp-content/uploads/2022/08/Raising-the-Age-of-Criminal-Responsibility-Policy-Brief-August-2022.pdf>, p. 4.

²¹ Ibid.

²² Hendrie, D.. 2019, 'Expert backs RACGP calls for access to specific MBS items in prison', *NewsGP*, Accessed 7 June 2023, <https://www1.racgp.org.au/newsq/clinical/expert-backs-racgp-calls-for-access-to-specific-me>

²³ Department of Health and Aged Care, (n/d), *715 Health Check*, Accessed 7 June 2023, <https://www.health.gov.au/news/715-health-check>

²⁴ Lowitja Institute, 2019, *Understanding Disability Through the Lens of Aboriginal and Torres Strait Islander Peoples*, Lowitja Institute, Melbourne, p. 2. Accessed on 07 June 2023 at: [Lowitja UnderstandingDisability_291019_D4_WEB.pdf](https://www.lowitja.org.au/~/media/Files/2019/04/UnderstandingDisability_291019_D4_WEB.pdf)

in detention. Screening should be culturally appropriate, but such screening tools do not exist.

Many of our peoples with disability are undiagnosed, so they are unable to self-disclose. This is particularly problematic for Aboriginal and Torres Strait Islander peoples with psychosocial disability who enter remand, where the risk of self-harm and suicide are greatest.²⁵ There is a need for culturally appropriate assessment and diagnostic tools for Aboriginal and Torres Strait Islander children and young people to be administered upon entry to any form of detention.

Another barrier is caused by a lack of communication between legal services and medical services. If a young Aboriginal or Torres Strait Islander person has a diagnosed disability, the medical service will not share this with the legal service. This means that the plea entered for that young person often does not utilise appropriate sentencing options or court processes.

Further, there are not enough Justice Liaison Officers (JLOs) across the country. For example, there is only one in the Northern Territory and only one in South Australia. Increasing the number of JLOs would help support our young peoples with disability in the justice system.

We refer the Commission to the First Peoples Disability Network's submission to the Senate Inquiry on the Indefinite Detention of People with Cognitive Impairment and Psychiatric Impairment for more in-depth information.²⁶

5. Overcoming barriers through self-determination


Self-determination – the fundamental right of people to shape their own lives²⁷ – is enshrined in the UNDRIP and outlined in the 1997 *Bringing Them Home Report*.²⁸

²⁵ Australian Institute of Criminology, 1998, 'Australian Deaths in Custody and Custody-Related Police Operations', *Deaths In Custody Australia*, p. 13; McDonald, D., & Biles, D., 1992, 'Methodological Issues in the Calculation of Over Representation and Exposure to Risk in Custody', *Deaths in Custody Australia*, p. 444.

²⁶ First Peoples Disability Justice Consortium 2016, *Submission to Inquiry on the Indefinite Detention of People with Cognitive Impairment and Psychiatric Impairment*, Senate Standing Committees on Community Affairs, Australian Parliament House, Accessed 6 June 2023, <https://www.aph.gov.au/DocumentStore.ashx?id=1206767c-a74a-4317-a107-b44ad2e8411b&subId=412059>

²⁷ Australian Human Rights Commission, (n/d), *Self-determination*, Accessed 7 June 2023, <<https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/self-determination#:~:text=Self%2Ddetermination%20means%20that%3A,recognition%20of%20our%20group%20identities>>

²⁸ Commonwealth of Australia, 1997, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Accessed 7 June 2023, https://bth.humanrights.gov.au/sites/default/files/documents/bringing_them_home_report.pdf



Research shows that self-determination is linked with positive social and economic outcomes, including reduced crime.²⁹ However, the youth justice system does not protect this right.

Further, Lowitja Institute's 2022 discussion paper, *Indigenous Nation Building and the Political Determinants of Health and Wellbeing*, highlights the importance of the political determinants of health and wellbeing.³⁰

²⁹ Behrendt, L., Porter, A., Vivian, A., 2017, 'Indigenous self-determination within the justice context: Literature review', University of Technology Sydney – Jumbunna Institute for Indigenous Education and Research, Accessed 7 June 2023, <https://opus.lib.uts.edu.au/bitstream/10453/94284/1/Accepted%20version.pdf>

³⁰ Rigney, D., Bignall, S., Vivian, A., & Hemming, S., 2022, *Indigenous Nation Building and the Political Determinants of Health and Wellbeing*, Discussion Paper, Lowitja Institute, Melbourne, DOI:10.48455/9ace-aw24.