



**Law Council**  
OF AUSTRALIA

# **Australia's youth justice and incarceration system**

**Senate Legal and Constitutional Affairs References Committee**

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## About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
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Through this representation, the Law Council acts on behalf of more than 104,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

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The Chief Executive Officer of the Law Council is Dr James Pople. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is [www.lawcouncil.au](http://www.lawcouncil.au).

## Acknowledgements

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## Executive summary

Youth justice and incarceration around Australia are in crisis, and not for the first time.

It is important to note at the outset that, despite the title of this inquiry, we are not dealing with a single system. Each state and territory is responsible for criminal justice and community safety within its jurisdiction, and each approaches the task somewhat differently. However, there are common denominators, including 'tough on crime' policies purporting to promote community safety, that underpin the approach of the nation as a whole to criminalising and punishing the behaviour of children.

As observed by National Children's Commissioner Anne Hollonds in her recent, compelling report *Help Way Earlier! How Australia can transform child justice to improve safety and wellbeing*, Australia has international obligations, including under the *Convention on the Rights of the Child (CRC)*,<sup>1</sup> to people under 18 years.<sup>2</sup> Some of the most important principles contained in that instrument are that policies affecting children should be formulated with 'special safeguards and care' due to children's physical and mental immaturity,<sup>3</sup> and the best interests of the child as a primary consideration, and further that detention should only ever be a last resort as a punishment for children.<sup>4</sup> These principles, as amply demonstrated by the Commissioner's report, are not being respected in most Australian jurisdictions today. This submission includes a discussion of responsibility under international law, which cannot be seen solely as a matter for the Commonwealth Government.

As set out in this submission and numerous related reports over many years,<sup>5</sup> there are criminal justice policies across the nation that are leading, or may lead, to outcomes that are inconsistent with Australia's international human rights obligations, including:

- presumptions against bail for children and young offenders;
- extension to children of serious offences (including national security offences) attracting penalties of extended terms of imprisonment;
- inappropriately low minimum ages of criminal responsibility;
- detention of children in adult facilities, including watch houses and maximum-security facilities; and
- solitary confinement (however described) of children for 20 or more hours per day.

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<sup>1</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

<sup>2</sup> National Children's Commissioner (AHRC), *Help Way Earlier!* Report, September 2024: <<https://humanrights.gov.au/our-work/childrens-rights/publications/help-way-earlier>>, 4.

<sup>3</sup> Convention, Preamble.

<sup>4</sup> Convention, article 37(b).

<sup>5</sup> See eg Royal Commission into Aboriginal Deaths in Custody - *Final Report* (April 1991) (available via [AustLII](#)); *Victorian Youth Justice Review and Strategy: Meeting needs and reducing offending: Final Report* (June 2017); Royal Commission on the Protection and Detention of Children in the Northern Territory - *Final Report* (November 2017); Australian Law Reform Commission - *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (December 2017); Victorian Legislative Council Legal and Social Issues Committee - *Inquiry into Youth Justice Centres in Victoria: Final Report* (March 2018); NSW Legislative Assembly Committee on Law and Safety - *Inquiry into the adequacy of youth diversionary programs in NSW: Final Report* (September 2018); Victorian Commission for Children and Young People - *Our Youth, Our Way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system: Final Report* (May 2021); Victorian Yoorook Justice Commission - *With Purpose: Interim Report* (June 2022) and *Yoorook for Justice – Report into Victoria's Child Protection and Criminal Justice Systems* (2023); WA Office of the Inspector of Custodial Services, *2023 Inspection of Banksia Hill Detention Centre and Unit 18 at Casuarina Prison* (May 2023); WA Commissioner for Children and Young People - *Hear Me Out: Report of the Inquiry into Implementation Progress For Banksia Hill's Model Of Care Instruction* (August 2024).

Ironically, these harsh policies do not make our communities safer—especially in the long run. The detention and institutionalisation of children in their formative years is a proven key factor in recidivism rates.<sup>6</sup> It needs to be clearly understood and consistently communicated that policies of remanding and imprisoning children—popular as they may be during perceived youth crime waves—have been comprehensively debunked as effective community safety solutions.

It is important to acknowledge that young offenders can and do commit crimes that can have significant effects on their victims—and that our society needs to develop effective policy responses to such offending. However, we are concerned that the evidence on what such effective responses look like is being too often ignored by governments across the nation.

It is also very important to note that there is significant crossover between vulnerable children with disability and/or requiring mental health treatment and the detained population. This link has been set out in numerous publications, but in particular we would like to draw the Committee's attention in this regard to Volume 8 of the Final Report of the Disability Royal Commission.<sup>7</sup>

In addition, the role of the media, for example in portraying young offenders as particularly dangerous or in need of 'control' (code for imprisonment), feeds into a cycle of offending, punishment and recidivism.<sup>8</sup> This cycle not only fails to promote community safety, but also fails to acknowledge that these children are so frequently victims of crime, poverty and complex disadvantage themselves and need special care and attention—care and attention that governments have a responsibility to provide if their families are unable to do so. In this context, it is important to note that children under care and protection orders (including wards of the state) are imprisoned at disproportionate rates, indicating direct failures of governmental responsibility.<sup>9</sup>

Despite ample research into alternative pathways for vulnerable offenders<sup>10</sup> (some directly commissioned by the Commonwealth<sup>11</sup> or states/territories<sup>12</sup>), there has been no coordinated national effort to promote these pathways and demonstrate that they are likely to be both more effective and more consistent with Australia's human rights obligations. The constitutional division of responsibilities between the Commonwealth and the states and territories in this area cannot justify further inaction in this regard. We are all responsible for ensuring the safety and dignity of children in our society, and a national

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<sup>6</sup> See eg Australian Institute of Health & Welfare (AIHW), *Young people returning to sentenced youth justice supervision 2021-22* (August 2023): <<https://www.aihw.gov.au/reports/youth-justice/young-people-returning-to-sentenced-supervision/summary>>.

<sup>7</sup> Disability Royal Commission, *Final Report – Volume 8 – Criminal Justice and people with disability* (see in particular Part 3 on youth detention).

<sup>8</sup> See eg Riddle et al, 'Moving beyond deficit media figurations of young people: troubling the contemporary 'youth crime crisis'' (2023) 37(6) *Continuum* 756.

<sup>9</sup> This has been the case for many years – see eg Bessant, 'Parenting on trial: state wards' and governments' accountability in Australia' (1998) 26(2) *Journal of Criminal Justice* 145; and more recently *Incarceration of a Parent of Caregiver* (Public Defenders NSW Bar Book, November 2019):

<[https://www.publicdefenders.nsw.gov.au/Pages/public\\_defenders\\_research/bar-book/pdf/BBP\\_ParentalIncarceration\\_chapter-Nov2019.pdf](https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/bar-book/pdf/BBP_ParentalIncarceration_chapter-Nov2019.pdf)>; AIHW, *Young people under youth justice supervision and their interaction with the child protection system 2020–21* (December 2022): <<https://www.aihw.gov.au/reports/youth-justice/young-people-under-youth-justice-supervision/summary>>.

<sup>10</sup> See eg Walsh et al "Raise the Age and Then What? Exploring the Alternatives of Criminalising Children Under 14 Years of Age" (2021) 27 *James Cook University Law Review* 37 or O'Leary, 'Rethinking youth justice: there are alternatives to juvenile detention,' *The Conversation*, 4 August 2016: <<https://theconversation.com/rethinking-youth-justice-there-are-alternatives-to-juvenile-detention-63329>>.

<sup>11</sup> See eg Castan Centre, *Alternatives to Imprisonment for Vulnerable Offenders: International Standards and Best Practice* (July 2012).

<sup>12</sup> See eg Diagrama Foundation, *Blueprint for Change – Report on NT Youth Justice* (commissioned by NT Government agencies, 2019): <<https://ddhs.org.au/resources/blueprint-change-diagrama-foundation-report>>. This report is discussed further below in Part A.

approach is needed in which the Commonwealth Government works with the states and territories to achieve the necessary reforms in concert, in line with their respective roles and responsibilities. The emphasis must be on ensuring that children are connected with their families, education and culture. They must be safe, fed, housed, healthy, active and their wellbeing prioritised. This in turn, will contribute to community safety.

The Law Council's key recommendations are that:

- The Commonwealth, state and territory Governments implement the recommendations of the National Children's Commissioner's *Help Way Earlier!* Report—especially the overarching recommendations for a National Taskforce, a Cabinet Minister for Children, a Ministerial Council for Child Wellbeing reporting to National Cabinet and the implementation of treaty obligations concerning children into domestic law;
- Child detention in Australia be reformed according to expert evidence and therapeutic jurisprudence principles. Pilots as recommended by, for example, the Diagrama Foundation for the NT—as adapted in line with First Nations expertise and guidance—may form a basis for this approach (see Part A below);
- The recently announced National Commission for Aboriginal and Torres Strait Islander Children and Young People should be empowered and adequately funded to fulfil its mission of protecting the rights of First Nations children, including by guiding the implementation of preventive, diversionary and therapeutic measures to bring down overrepresentation in the criminal justice system, in line with Closing the Gap Target 11. Mainstream agencies must be clearly tasked with implementing these measures. First Nations leaders must be afforded a clear and authoritative voice in this process;
- The Productivity Commission's recommendations about achieving Closing the Gap Targets set out in its online reporting—in particular with respect to Target 11 and the Justice Policy Partnership (**JPP**)—should be heeded;
- The Law Council reiterates its long-standing recommendation that Australia should implement its international human rights obligations comprehensively in legislation—including in a standalone Commonwealth Human Rights Act;
- Australia must withdraw its reservation to article 37(c) of the CRC;
- The minimum age of criminal responsibility should be raised to 14 in line with international standards and previous Law Council recommendations;
- The Commonwealth Government should take the lead in implementing Australia's commitments under the Optional Protocol to the Convention against Torture (OPCAT) by fostering and contributing to an intergovernmental agreement on funding with states and territories in relation to a National Preventive Mechanism (indeed, such agreements should be reached with respect to all treaties requiring state/territory cooperation for implementation); and
- The Law Council reiterates its long-standing recommendation that Australia ratify the Optional Protocol to the Convention on the Rights of the Child on a communication procedure.

## Addressing the Terms of Reference

### A—The outcomes and impacts of youth incarceration in jurisdictions across Australia

1. It is readily apparent that the impact of youth incarceration can lead to dire and even fatal outcomes for the children who come into contact with the criminal justice system. From media reports about the tragedies which have occurred at Banksia Hill in Western Australia<sup>13</sup> to the use of Watch Houses in Queensland<sup>14</sup> to detain children, the message is the same—the human rights of these children are being breached or overlooked by governments seeking to take a hard stance on crime in order to foster community safety. In doing so, they are, ironically, likely to undermine this objective.
2. Australia has ratified a number of international conventions relating to youth detention. These include, in addition to the CRC, the:
  - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**);<sup>15</sup>
  - Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**);<sup>16</sup>
  - International Convention on the Elimination of All Forms of Racial Discrimination (**ICERD**);<sup>17</sup>
  - International Covenant on Civil and Political Rights (**ICCPR**);<sup>18</sup>
  - International Covenant on Economic, Social and Cultural Rights (**ICESCR**).<sup>19</sup>
3. Relevantly, Australia is also party to the OPCAT<sup>20</sup> and the individual communications procedures under the ICCPR, CAT, CEDAW AND ICERD, as well as a number of inquiry procedures (CEDAW AND CAT), the First Optional Protocol to the ICCPR (establishing a complaints mechanism to the UN Human Rights Committee).<sup>21</sup>
4. However, Australia is *not* party to one further relevant human rights treaty—namely:
  - The Third Optional Protocol to the Convention on the Rights of the Child on a communications procedure.<sup>22</sup>

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<sup>13</sup> Rhiannon Shine and Andrea Mayes, '[Banksia Hill teenager becomes the second child to die by suicide in WA's troubled youth detention system](#)', *ABC News* (online, 30 August 2024).

<sup>14</sup> Nicky Jones, '[Queensland is not only trampling the rights of children, it is setting a concerning legal precedent](#)', *The Conversation* (online, 29 August 2023).

<sup>15</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted 10 December 1984, GA/RES/39/46 (entered into force 26 June 1987).

<sup>16</sup> *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, GA/RES/34/180 (entered into force 3 September 1981).

<sup>17</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

<sup>18</sup> *International Convention on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>19</sup> *International Convention on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

<sup>20</sup> *Optional Protocol to the Convention Against Torture*, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006).

<sup>21</sup> *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>22</sup> *Optional Protocol to the Convention on the Rights of the Child on a communication procedure*, adopted 14 July 2011, 2983 UNTS 135 (entered into force 14 April 2014).

As a consequence, Australian children cannot make complaints to the United Nations Treaty Bodies about breaches of the CRC specifically, and are denied a child-friendly UN complaints procedure appropriate to their needs.<sup>23</sup>

5. In addition, Australia endorsed the terms of the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**)<sup>24</sup> in 2009, although implementation (as with the treaties above) remains inadequate.<sup>25</sup>
6. Despite failures across most Australian jurisdictions—most notably the Commonwealth—to implement international human rights legal obligations fully into domestic legislation, meaningful commitment to Australia's obligations under the CRC must nevertheless be a priority for leadership by the Australian Government. Failures by states and territories to take these obligations seriously must be addressed directly. A significant step forward in this regard would be the establishment of a National Taskforce and supporting overarching recommendations, such as for a National Cabinet-led response, as made by the National Children's Commissioner.<sup>26</sup>
7. The Australian legal system regards a child as any person aged less than 18 years.<sup>27</sup> In most states and territories, children as young as 10 are liable to detention where they come into the criminal justice system.

### **Social Determinants**

8. The National Children's Commissioner Anne Hollonds identifies in her latest report on child justice *Help Way Earlier!* that children who become involved with the child justice system are among the most disadvantaged and vulnerable, with complex social issues influencing their involvement with the system.<sup>28</sup>
9. These social determinants, which put children at greater risk of contact with the criminal justice system, spiral out from individual and family factors; to social, economic, environmental and political contexts; into the broader social determinants of justice including early abuse, systemic racism and discrimination, poverty and unequal access to resources, and ultimately into the operation of the criminal legal system itself.<sup>29</sup> The broader social determinants of justice need to be addressed in order to reduce crimes by children<sup>30</sup> and limit if not abolish child incarceration.
10. There is also a significant body of research documenting links between incarceration and mental health. This has been emphasised by the Royal Australian & New Zealand College of Psychiatrists, with prisoners two to three times more likely than those in the general community to have a mental illness and 10 to 15 times more

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<sup>23</sup> For more information on the OP, see eg Law Council, *Third Optional Protocol to the CRC* (April 2012). This Optional Protocol is also discussed in Part F below.

<sup>24</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007).

<sup>25</sup> See Law Council, *Australia must formally adopt UNDRIP* (July 2022): <<https://lawcouncil.au/media/media-releases/australia-must-formally-adopt-un-declaration-on-rights-of-indigenous-people>>.

<sup>26</sup> National Children's Commissioner (AHRC), *Help Way Earlier!* Report, September 2024, Recommendation 1.

<sup>27</sup> The CRC similarly refers to a child as 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier (in article 1).

<sup>28</sup> National Children's Commissioner, *Help Way Earlier!* (Report, 2024) 16.

<sup>29</sup> *Ibid* 17.

<sup>30</sup> *Ibid*.

likely to have a psychotic disorder.<sup>31</sup> Young people within the justice system have higher rates of mental health disorders and cognitive disabilities when compared with general youth populations. People with disabilities (cognitive and/or psychosocial) are overrepresented in the justice system and particularly in prison populations.<sup>32</sup>

11. Furthermore, an alarming trend is that most children in detention are not even serving a custodial sentence. Almost 4 in 5 (77 per cent) of young people in detention on an average night in the March quarter of 2023 were in detention on remand—that is, waiting for their initial court appearance or sentencing; the remainder were serving a sentence.<sup>33</sup> The proportion has increased since. One fundamental reason why many children are remanded in detention rather than in the community is because they have no safe place to live while on bail and there is no appropriate alternative bail accommodation at which to stay.<sup>34</sup> In the National Children's Commissioner's report, some children and young people raised the impact of long remand periods either in custody or in the community, including not being able to access any therapeutic programs whilst on bail or on remand because the length of their remand was longer than their final sentence.<sup>35</sup>
12. Every state and territory in Australia administers a youth detention system. We provide a snapshot of some of the most pressing human rights issues and developments below for each state and territory jurisdiction in Australia.

### Australian Capital Territory

13. On 1 November 2023, the ACT Legislative Assembly passed the *Justice (Age of Criminal Responsibility) Legislation Amendment Act 2023* (ACT) (**Amending Act**) to raise the minimum age of criminal responsibility to 14, within two years after first raising it to 12 through the Amending Act.<sup>36</sup> This means that by 1 July 2025, the ACT will not hold children under the age of 14 criminally responsible, apart from exceptions for 12 to 14 year olds who commit serious offences.<sup>37</sup>
14. A 2020 review of the ACT's only youth detention centre, Bimberi, found that it was performing well overall, but still made recommendations to limit the number of 'time outs' (isolation) in the centre, and to take a more therapeutic approach.<sup>38</sup>

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<sup>31</sup> Royal Australian & New Zealand College of Psychiatrists, 'Involuntary mental health treatment in custody' (Position Statement, last updated November 2017) background; James Ogloff, '[Good mental health care in prisons must begin and end in the community](#)', *The Conversation* (online, 24 April 2015); Butler et al., 'Mental Disorders in Australian Prisoners: a Comparison with a Community Sample' (2006) 40(3) *Australian and New Zealand Journal of Psychiatry* 272; World Health Organization, 2014

<sup>32</sup> For example, in a Western Australian study, 89 per cent of 99 youths in detention were assessed as severely impaired in at least on area of functioning: Hayley M Passmore, Carol Bower and Raewyn Mutch, 'Almost every young person in WA detention has a severe brain impairment', *The Conversation* (online, 14 February 2018); Bower et al, 'Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia' (2018) *BMJ Open* <[Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia | BMJ Open](#)>.

<sup>33</sup> Australian Institute of Health and Wellbeing, *Youth detention population in Australia 2023* (Web report, last updated 13 December 2023) [Summary](#).

<sup>34</sup> National Children's Commissioner (n 2) 8.

<sup>35</sup> *Ibid* 52.

<sup>36</sup> ACT Government, '[The ACT is raising the minimum age of criminal responsibility to 14](#)' (Media Release, 8 May 2023).

<sup>37</sup> [Raising the minimum age of criminal responsibility | YourSay ACT](#)

<sup>38</sup> ACT Inspector of Custodial Services, *Healthy Centre Review: Bimberi* (2020):

<<https://www.ics.act.gov.au/reports-and-publications/healthy-prison-reviews/healthy-prison-reviews/healthy-centre-review-of-bimberi-youth-justice-centre>>, Recs 6 & 7.

## New South Wales

15. In New South Wales, child incarceration is trending upwards. In the quarter up to March 2024, 223 children were in custody, an increase from 172 in the previous quarters. Of those in custody, 169 (75.8%) were on remand.<sup>39</sup> Aboriginal and Torres Strait Islander young people made up 66.4% of those in custody on average.<sup>40</sup>
16. The New South Wales Law Society expressed their concern about the recent amendments<sup>41</sup> to the *Bail Act 2013* (NSW) which created new offences and higher penalties for young people, and which are intended to target young people in remote, regional and rural areas.<sup>42</sup> It is particularly concerning that these offences represent a more punitive approach than that taken for adults for equivalent offences.<sup>43</sup>

## Northern Territory

17. In 2016, the ABC's *Four Corners* programme revealed footage of boys being tear-gassed and put in spit hoods at Darwin's Don Dale Youth Detention Centre (**Don Dale**).<sup>44</sup>
18. The subsequent 2016 Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory made 227 recommendations, including the closure of Don Dale. The report noted there was an 'overwhelming impression of disrepair and despair' and found that the youth detention centres in the Northern Territory used during the relevant period of the inquiry 'were not fit for accommodating, let alone rehabilitating, children and young people'.<sup>45</sup> Not only was the detention centre found to be unfit for the children it housed, but it also created difficult and unsafe working environments for the staff.<sup>46</sup> However, Don Dale is still open, despite the recommendation, and the NT Government as of October 2024 has announced the reintroduction of some of the measures denounced in the Royal Commission, including spit hoods and a lower age of criminal responsibility.<sup>47</sup>
19. In October 2019, the NT Government invited representatives of the Diagrama Foundation<sup>48</sup> to visit youth detention facilities in the Territory and recommend

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<sup>39</sup> NSW Bureau of Crime Statistics and Research, [Custody Statistics](#) (last updated May 2024).

<sup>40</sup> Ibid.

<sup>41</sup> Amendments included limiting the grant of bail for young persons charged with certain offences: *Bail and Crimes Amendments Act 2024* (NSW).

<sup>42</sup> Law Society of NSW, Open letter to Members of the Legislative Council, 20 March 2024, <https://www.lawsociety.com.au/sites/default/files/202403/Letter%20to%20Members%20of%20the%20Legislative%20Council%20%20Bail%20and%20Crimes%20Amendment%20Bill%202024%20-%2020%20March%202024.pdf>

<sup>43</sup> The Law Society of New South Wales notes that this is inconsistent with the *Children (Criminal Proceedings) Act 1987* (NSW) s 6(e).

<sup>44</sup> Four Corners, '[Australia's Shame](#)', *ABC News* (online, 25 July 2016).

<sup>45</sup> Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Findings and Recommendations* (Report) [Findings and Recommendations](#) ([royalcommission.gov.au](http://royalcommission.gov.au)), 1.

<sup>46</sup> Ibid Volume 2A, 101.

<sup>47</sup> See Brennan, 'Spit hoods to be used on children in the NT again, Police Commissioner confirms' *National Indigenous Times*, 14 October 2024: <<https://nit.com.au/14-10-2024/14239/spit-hoods-to-be-used-on-children-in-the-nt-again-police-commissioner-confirms>>; Bowles, 'NT's CLP government passes legislation to lower the age of criminal responsibility from 12 to 10, in first week of parliament' *ABC News*, 18 October 2024: <<https://www.abc.net.au/news/2024-10-18/nt-parliament-lowers-age-of-criminal-responsibility-to-10-law/104480034>>.

<sup>48</sup> Diagrama Foundation: <<https://www.diagramafoundation.org.uk>>.

improvements based on its expertise in this area derived from work in Spain.<sup>49</sup> The Spanish work involved running youth centres oriented towards education under a therapeutic model, rather than a traditional punishment-focussed model. The Foundation, after its visit to the NT, found that:

*Although improved [since the Royal Commission], the purpose and working practices of NT youth detention facilities and bail accommodation are not yet designed to reduce recidivism and reintegrate young people into society, or to support young people with complex needs: this is not seen as their core purpose. Expectations for young people in detention are low. We would want more for our own children and during our time in the NT we could see that young people's communities want more for them too.*<sup>50</sup>

The Diagrama Foundation found that the model it adopted in the Spanish project could be implemented in the NT, and proposed a pilot program in NT youth detention centres in collaboration with local NGOs.<sup>51</sup> This could be one useful starting point. However, the Law Council firmly recognises that any model implemented must have the buy-in and leadership of First Nations communities and expand on their existing expertise in responding to the needs of their young people. Too often, we hear of successful pilot programs which fail due to lack of funding or ongoing Government commitment.

20. In 2024, a new youth detention centre was opened in Darwin to ostensibly replace Don Dale (although Don Dale remains open) and sits close to the Darwin Adult Correctional Centre. This is despite the Royal Commission's recommendation that the facility should not be rebuilt in close proximity to an adult jail.<sup>52</sup> It has a capacity of 44 beds and has been designed with training facilities alongside a school, health clinic and 'state of the art security features'. Despite the 1994 Royal Commission into Aboriginal Deaths in Custody recommending, 32 years ago, that padded cells cease to be used for at-risk people in custodial settings the new facility comes with a three-by-two metre room with padded walls called a 'low-stimulation room'.<sup>53</sup>
21. At the time of writing, the Northern Territory government has also just passed legislation to criminalise breaches of bail for children, as well as expanding the presumption against bail to include youth, colloquially known as 'Declan's Law'.<sup>54</sup> It also intends to expand the presumption against bail for all serious violent offences (not just those involving weapons), anyone found guilty of two or more serious offences in the previous two years, and anyone alleged to have committed a serious offence, while on bail for a serious offence.<sup>55</sup> This is despite experts consistently advocating against these types of punitive agendas, which only increase the risks of reoffending.<sup>56</sup>

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<sup>49</sup> *Blueprint for Change* – Diagrama Foundation Report on NT Youth Justice: <https://ddhs.org.au/resources/blueprint-change-diagrama-foundation-report>.

<sup>50</sup> *Ibid*, 3.

<sup>51</sup> *Ibid*, 3-4.

<sup>52</sup> Jacqueline Breen, 'Aboriginal groups condemn new youth detention centre location, call for federal intervention', *ABC News* (online, 15 August 2019).

<sup>53</sup> *Ibid*.

<sup>54</sup> Dechlan Brennan, 'Experts warn 'Declan's Law' won't make NT community safer', *National Indigenous Times* (online, 7 October 2024).

<sup>55</sup> Samantha Dick, 'A suite of NT bail changes known as Declan's Law is set to pass parliament. What will it do?', *ABC News online*, Monday 14 October 2024.

<sup>56</sup> Law Council of Australia and Australian Medical Association, *Recommendation to raise minimum age of criminal responsibility welcomed* (Media Release, 23 August 2024); Dechlan Brennan, 'Peak body for Indigenous legal services says new government agenda will only increase crime in the NT', *National*

## Queensland

22. In 2016, the Law Council emphasised the pressing need for all jurisdictions to conduct independent, arms-length review of their juvenile detention systems, following disturbing images aired by the ABC and taken from internal government reports by the Queensland Government's Youth Detention Inspectorate.<sup>57</sup> The catalyst for this was the ABC's revelations of reports and images of alleged mistreatment in Townsville's Cleveland Youth Detention Centre (**CYDC**) and the Brisbane Youth Detention Centre (**BYDC**).<sup>58</sup>
23. On 19 August 2016, an Independent Review of Youth Detention was ordered by Queensland's Attorney-General and Minister for Justice to investigate the allegations and concerns about the treatment of children detained at both CYDC and BYDC.<sup>59</sup> The Independent Review, headed by Commissioners Katheryn McMillan KC and Professor Megan Davis also examined the practices, operation and oversight in those detention centres and evaluated the effectiveness of current programs and services delivered in the centres.<sup>60</sup> Some of their key recommendations included improving cross-agency collaboration, transparency of record keeping and public reporting, and reducing unsentenced detention, all of which were either accepted or accepted in principle by the Queensland Government.<sup>61</sup>
24. On 5 October 2023, the Queensland Government announced that it would construct a 'fast-tracked' expanded youth detention facility in Wacol, in close proximity to several high security adult prisons and the BYDC.<sup>62</sup> The construction is expected to be complete by the end of 2024 and was designed to help reduce the number of children in watch houses.<sup>63</sup> In November 2023, the Queensland Law Society (**QLS**) recommended to the Queensland Youth Justice Reform Select Committee that all possible alternatives to detention should be examined where it is well-recognised that the more time a young person spends in youth detention the more likely they are to return and to be placed in the adult prison system.<sup>64</sup>
25. The Law Council has previously condemned the Queensland Government's practice (overriding the state's *Human Rights Act 2019* (Qld)) of holding children in police watch houses.<sup>65</sup> The practice has also been labelled a 'risk to public safety' by the Youth Advocacy Centre.<sup>66</sup> The Guardian and SBS The Feed exposed the conditions

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*Indigenous Times* (online, 5 September 2024); National Children's Commissioner, *Help Way Earlier!* Report, 8; 60-77 and 93-94.

<sup>57</sup> Law Council of Australia, 'Disturbing images from Qld underscore the need to review youth detention Australia-wide' (Media Release, 19 August 2016).

<sup>58</sup> *Ibid.*

<sup>59</sup> Independent Review of Youth Detention, *Confidential Report* (Final Report, December 2016) 6.

<sup>60</sup> Independent Review of Youth Detention, 'Final report on Youth Detention Review delivered to Government' (Media Statement, 14 December 2016).

<sup>61</sup> Department of Justice and Attorney-General, [Government Response to the Independent Review of Youth Detention](#) (Response, 26 April 2017).

<sup>62</sup> ABC News, '[Dedicated youth remand facility to be built at Wacol near existing Brisbane Youth Detention Centre and adult prisons](#)', ABC News (online, 5 October 2023).

<sup>63</sup> Queensland Police Service, 'Construction progressing on Wacol Youth Remand Centre' (Media Release, 23 September 2024).

<sup>64</sup> Queensland Law Society, Submission to the Youth Justice Reform Select Committee, *Youth Justice Reform in Queensland* (Submission, 20 November 2023) 8; National Children's Commissioner (n X) 88; Australian Institute of Health and Welfare, [Youth Detention Population in Australia 2023](#) (Web Report, 13 December 2023); The Sentencing Project, [Why Youth Incarceration Fails: An Updated Review of the Evidence](#) (Report, 1 March 2023).

<sup>65</sup> Law Council, *Adult watch houses no place for children* (Media Release, 14 May 2019): <https://lawcouncil.au/media/media-releases/adult-watch-houses-no-place-for-children-law-council>.

<sup>66</sup> Paula Doneman, '[Government's practice of holding children in watch houses 'a risk to public safety'](#)', *InQueensland* (online, 20 March 2024).

for children detained in adult watchhouses in Queensland.<sup>67</sup> Queensland also has the highest average of children in detention or on remand in detention in Australia, a majority of whom are First Nations.<sup>68</sup>

### South Australia

26. In 2012, the South Australian Government closed its only youth detention centre, the Magill Training Centre, after announcing that a new facility would be constructed. The Magill Centre had once been described by the United Nations as a 'living child rights abuse'.<sup>69</sup> The Magill Training Centre had its origins in the Boys Reformatory, Magill, which opened in 1869. In 2008, the Magill Training Centre (and its different iterations of existence) was at the heart of a Commission of Inquiry into Children in State Care. The Commission's report investigated allegations of sexual abuse and death from criminal conduct, and during that process the Department of Human Services acknowledged that 'due to its significant age, the facility at Magill [was not] conducive to the rehabilitation and care of young peoples' and was 'an urgent priority for redevelopment'.<sup>70</sup>
27. The Adelaide Youth Training Centre (**AYTC**) which replaced the Magill Centre, currently houses children and young people between 10 and 18 years old who have been sentenced to a period of detention or remanded in custody. It has a Charter of Rights for Children and Young People Detained in Training Centres.<sup>71</sup> The Charter includes the right to be treated equally, with respect and dignity, to see a doctor or nurse whenever a detainee needs to, to have regular contact with family, to continue being educated, not to be punished unfairly nor to have force used against the child, among others.<sup>72</sup>
28. In March 2024, the South Australian Training Centre Visitor, Shona Reid, released *From Those Who Know—Minimum Age of Criminal Responsibility*, a compilation of the views and perspectives of children and young people who were detained, either on remand or detention, at the Adelaide Youth Training Centre during March 2024.<sup>73</sup> The report directly quotes from the experiences of the children and young people detained at AYTC, including their own ideas about what would be better for children. Two young people said this about the need for youth engagement: "build a youth centre where all the kids can go", "but not, like be trapped in there", "outside where they can go to stop getting in trouble", "but not be like locked up, just like you can go there. Go play games with other kids. Go do like...I don't know. Go out!".<sup>74</sup>
29. It is clear from the words of the children interviewed by Training Visitor Reid that they crave to be outside and engaging in the world around them, rather than detained with very little to keep their sense of place in the world alive.

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<sup>67</sup> Jennifer Luu and Michelle Elias, '[Unfit for court with the capacity of a 5-year-old: The kids being locked up in a crime crackdown](#)', *SBS the Feed* (online, 18 July 2024); SBS the Feed, '[In the Box: Inside the Isolation cells where Australian kids are imprisoned](#)', *SBS the Feed* (online documentary, 17 July 2024).

<sup>68</sup> Ibid; Australian Institute of Health and Wellbeing, *Youth Justice in Australia 2023* (Report, 13 December 2023) [State and territory trends](#).

<sup>69</sup> ABC News, '[Magill Training Centre 'child abuse'](#)', *ABC News* (online, 31 August 2009).

<sup>70</sup> Commissioner the Hon EP Mullighan QC, *Children in State Care: Commission of Inquiry – Allegations of Sexual Abuse and Death from Criminal Conduct* (Report, 31 March 2008) 316; Department of Family and Community Services, *Annual Report 1990-91* (Report, 1991), 26.

<sup>71</sup> South Australian Government, '[Adelaide Youth Training Centre – Kurlana Tapa](#)' (Online).

<sup>72</sup> Ibid.

<sup>73</sup> South Australian Training Centre Visitor, *From Those Who Know – Minimum Age of Criminal Responsibility* (Report, March 2024).

<sup>74</sup> Ibid 36.

## Tasmania

30. From 2021 to 2023, the Ashley Youth Detention Centre in Tasmania, which is the state's only youth detention centre, was the subject of a Commissioners' inquiry into the responses of the Tasmanian Government to allegations of child sexual abuse dating back more than 20 years. In 2023, the Commissioners submitted their report to the Government of Tasmania. The report highlighted grave failings in multiple government agencies. It recommended the immediate closure of the detention centre, the outsourcing of out-of-home care to non-government agencies, a new Commission for Children and Young People and a ban on strip searches for young people in custody.<sup>75</sup> These were just some of the 191 recommendations.<sup>76</sup>
31. Prior to the Commissioners' report, the ABC reported in 2022 on the dire conditions at the Ashley Youth Detention Centre, including where detainees spent up to 23 hours a day locked in their cells, due to staffing shortages at the centre.<sup>77</sup> More than 100 former detainees lodged a class action over the alleged abuse they received while at the detention centre, with the earliest claims dating back to 1961 and the most recent from 2019.<sup>78</sup> In June 2024, the claimants reached an in-principle agreement to settle their class action with the Tasmanian Government for \$75 million.<sup>79</sup> Furthermore, the Tasmanian Government had previously promised to close the detention centre by the end of 2024 but has revised its commitment to do so by mid-2026.<sup>80</sup>
32. Tasmania has also announced it will raise the minimum age of detention to 14 years by 2029, with exceptions for young people who commit the most serious offences.<sup>81</sup>

## Victoria

33. In a 2017 review of Victoria's youth justice system, it was highlighted that depriving children and young people of their liberty is detrimental to their health and development, and significantly disrupts their protective factors.<sup>82</sup> Further, that incarcerating children and young people traumatises them, exposes them to serious risks of long-term psychiatric and developmental harms, disrupts their education and severs their links with families, communities and cultures.<sup>83</sup>
34. In fact, the Victorian Sentencing Advisory Council once found that more than 80 per cent of children and young people on a custodial order reoffended,<sup>84</sup> which leads to

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<sup>75</sup> Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings, [Who was looking after me? Prioritising the safety of Tasmanian children](#) (Report, August 2023) Volume 1: Summary, recommendation and findings.

<sup>76</sup> Ibid.

<sup>77</sup> Lucy MacDonald, '[Inside Ashley Youth Detention Centre Prison for Kids in Tasmania](#)', ABC News (Online, 5 December 2022).

<sup>78</sup> Lucy MacDonald, 'Former Ashley Youth Detention Centre detainees lodge class action over alleged abuse', ABC News (12 August 2022).

<sup>79</sup> Jano Gibson, '[Ashley Youth Detention Centre class action complainants reach \\$75 million in-principle agreement](#)', ABC News (online, 21 June 2024).

<sup>80</sup> Ibid.

<sup>81</sup> Tasmanian Department for Education, Children and Young People, *Youth Justice Blueprint 2024-2034: Keeping children and young people out of the youth justice system* (Report, December 2023) 5.

<sup>82</sup> Penny Armytage and James Ogloff, *Youth Justice Review and Strategy* (Executive Summary, July 2017) 14.

<sup>83</sup> Victorian Commissioner for Children and Young People, *Submission – Statutory Review of the Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Vic) (Submission, 7 April 2022) 2; Sentencing Advisory Council, *Children Held on Remand in Victoria: A Report on Sentencing Outcomes* (Report, September 2020) 5; Victorian Ombudsman, *OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people* (Report, September 2019) 73-74.

<sup>84</sup> Sentencing Advisory Council, *Reoffending by Children and Young People in Victoria* (Report, December 2016) 37-39.

the conclusion that custodial orders do not deter children and young people from reoffending. Being arrested, remanded or sentenced to detention all increase the risk that a child will commit further offences and become involved further with the criminal justice system.<sup>85</sup> Prior contact with the justice system 'is not only a predictor of ongoing contact with the system but also an indirect contributor to it' where 'each contact...exacerbates the risk of further contact'.<sup>86</sup>

35. On 19 June 2024, Victorian Coroner Simon McGregor delivered his report on the Inquest into the Passing of XY on 18 July 2021 at the age of 17.<sup>87</sup> XY was a young Wemba Wemba woman who was disconnected from her family, her culture and her community at the time of her death.<sup>88</sup> Having been under the care of the Victorian Department of Families, Fairness and Housing since the age of 13 when she was removed from her family home by Child Protection, XY lived in seven care placements.<sup>89</sup> The Coroner noted that from the time of her removal from the family home, XY had complex mental health needs which continued to increase.<sup>90</sup> On 17 December 2020, XY herself stated in a letter that she 'would like support with connecting with [her] aboriginal heritage, elders and community, I would like the aboriginal community to support me'.<sup>91</sup> While XY did not have contact with the criminal justice system, this is just one example of where support systems for children are not serving their purpose and may be exacerbating the social determinants which contribute to children coming into contact with the criminal justice system.
36. Relatedly, the Australian Institute of Criminology notes that among the most troubling outcomes of child protection-involved youth is their over-representation in the criminal justice system: children who come to the attention of statutory child protection services due to abuse, neglect or parental incapacity are at least nine times more likely than other young people to offend and come under the supervision of youth justice services.<sup>92</sup>

### Western Australia

37. In 2018, research conducted in Western Australia's only youth detention centre at that time, Banksia Hill, reviewed that nine out of ten people in Western Australian youth detention were severely impaired in at least one area of brain function, including memory, language, attention, and executive function (planning and understanding consequences).<sup>93</sup> That research also found that one in three young people assessed had foetal alcohol spectrum disorder (FASD) which is a lifelong and severe disorder of brain development that occurs as a result of exposure to alcohol in the womb.<sup>94</sup>

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<sup>85</sup> Sentencing Advisory Council, *Children Held on Remand in Victoria: A Report on Sentencing Outcomes* (Report, September 2020) xi.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Inquest into the Passing of XY* (2024) Coroners Court of Victoria, 1.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.* 2.

<sup>92</sup> Australian Institute of Criminology, [Trends & issues in crime and criminal justice](#) (online, Bulletin No 582, December 2019) 2.

<sup>93</sup> Hayley M Passmore, Carol Bower and Raewyn Mutch, 'Almost every young person in WA detention has a severe brain impairment', *The Conversation* (online, 14 February 2018); Bower et al, 'Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia' (2018) *BMJ Open* <[Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia | BMJ Open](#)>.

<sup>94</sup> *Ibid.*

38. Promisingly the research also found that juvenile justice staff in WA were enthusiastic about research-informed training to provide appropriate support for young people in their care.<sup>95</sup> However, the researchers also urged that Australia needs 'to take a national approach to this problem, sharing our knowledge of what works, so government and researchers can move forward together to inform best practice nationwide'.<sup>96</sup>
39. Unfortunately, that has not happened. Since 2023, there have been two deaths in custody of children detained in WA youth detention centres. Yamatji boy Cleveland Dodd was just 16 years old when he died after self-harming in 2023 while detained in Unit 18 of the adult Casuarina Prison which had been turned into a youth detention unit.
40. The coronial inquest into Cleveland Dodd's death is ongoing and has had 5½ weeks of hearings, and the tragedy also sparked an internal probe and investigation by the West Australian Corruption and Crime Commission (CCC). While the CCC found no evidence of serious misconduct among the staff, the report said the Unit 18 youth facility at Casuarina Prison was 'trapped in a cycle of destruction' with little to no support or training for staff to judge the severity of hundreds of self-harm threats.<sup>97</sup>
41. Less than a year after the events leading to Cleveland Dodds' death and a week after the release of the Children's Commissioner's Report in August 2024, another child died by suicide at Banksia Hill.<sup>98</sup>
42. Incarcerating children and young people does not achieve its objective of maintaining community safety in the long-term. Indeed, the evidence shows that youth incarceration is in fact detrimental to this objective.<sup>99</sup> Nor does it help these children in breaking out of the youth justice system.<sup>100</sup>
43. Therapeutic justice-based youth detention pilots such as those proposed by the Diagrama Foundation for the NT based on the Foundation's experience with reform of the Spanish youth justice system, may provide a useful starting point for reform. As noted above, any pilots or responses adopted must have the backing of First Nations leaders and build on their existing expertise in responding to the needs of the children and young people in their communities.
44. A rehabilitative approach in line with Australia's international human rights obligations, would also be consistent with the research of Australian therapeutic jurisprudence experts,<sup>101</sup> including that produced by the dedicated Centre for Innovative Justice at RMIT University.<sup>102</sup>

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<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

<sup>97</sup> Corruption and Crime Commission, '[Commission report into Unit 18 at Casuarina Prison](#)' (Media Release, 11 June 2024); Keane Bourke, '[CCC inquiry into Cleveland Dodd's death finds no evidence of serious misconduct at Unit 18, but says facility set up to fail](#)', *ABC News* (online, 11 June 2024).

<sup>98</sup> Rhiannon Shine and Andrea Mayes, '[Banksia Hill teenager becomes the second child to die by suicide in WA's troubled youth detention system](#)', *ABC News* (online, 30 August 2024).

<sup>99</sup> National Children's Commissioner(n 2) 73, 88.

<sup>100</sup> Ibid.

<sup>101</sup> See eg Mackay, *A Children's Rights Assessment of Juvenile Detention in Australia* (Routledge, 2024), esp Part III: Strategies for Reform.

<sup>102</sup> See CIJ, *A call for innovative responses to youth justice* (2016): <<https://cij.org.au/news-and-views/a-call-for-innovative-responses-to-youth-justice>>.

### Recommendation

- **There should be therapeutic justice-based youth detention pilots such as that proposed by the Diagrama Foundation for the NT based on the Foundation's experience with reform of the Spanish youth justice system.**
- **Any pilots or responses adopted must have the backing of First Nations leaders and build on their existing expertise in responding to the needs of the children and young people in their communities.**

## B—The over-incarceration of First Nations children

45. Children and young people who identify as First Nations people are disproportionately overrepresented in the youth justice system.<sup>103</sup> The Law Council strongly supports the domestic implementation of the UNDRIP in Australia as one tool to ensure that the rights of First Nations children are front and centre when considering law reform in child justice. The Law Council is committed to working in partnership with First Nations peoples to promote implementation of this international instrument and awareness of its provisions amongst the Australian legal profession and community.<sup>104</sup>
46. As the National Children's Commissioner Anne Hollonds noted in her 2024 *Help Way Earlier!* report on child justice: 'First Nations children, who are struggling with the effects of intergenerational disadvantage and trauma, with its roots in colonisation and dispossession from their lands, make up a disproportionate percentage of the child justice population'.<sup>105</sup> While Commissioner Hollonds' report is the most recent, it is preceded by a long list of reviews, commissions and inquiries conducted in the last several decades, most prominently since the 1987 Royal Commission into Aboriginal Deaths in Custody.<sup>106</sup>
47. Government policies on youth justice have historically focused on punishment rather than prevention and early intervention.<sup>107</sup> Clearly these have not been serving their intended purpose. The Children's Commissioner identifies key statistics illustrating

<sup>103</sup> Australian Human Rights Commission, *Help Way Earlier!* (Report, National Children's Commissioner, September 2024) 14, 22.

<sup>104</sup> Law Council of Australia, [Policy Statement: Indigenous Australians and the Legal Profession](#) (February 2010) [16].

<sup>105</sup> *Ibid.*

<sup>106</sup> Australian Institute of Criminology, '[Indigenous deaths in custody: 25 years since the Royal Commission into Aboriginal Deaths in Custody](#)' (February 2019) *Statistical Bulletin 17*. See also: Royal Commission into Aboriginal Deaths in Custody, (Final Report, April 1991); Victorian *Youth Justice Review and Strategy: Meeting needs and reducing offending* (Final Report, June 2017); Royal Commission on the Protection and Detention of Children in the Northern Territory (Final Report, November 2017); Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report, December 2017); Victorian Legislative Council Legal and Social Issues Committee, *Inquiry into Youth Justice Centre in Victoria* (Final Report, March 2018); NSW Legislative Assembly Committee on Law and Safety, *Inquiry into the adequacy of youth diversionary programs in NSW* (Final Report, September 2018); Victorian Commission for Children and Young People, *Our Youth, Our Way: Inquiry into the Over-Representation of Aboriginal Children and Young People in the Victorian Youth Justice System* (Final Report, May 2021); Victorian Yoorrook Justice Commission, *With Purpose: Interim Report* (Interim Report, June 2022) and *Yoorrook for Justice – Report into Victoria's Children Protection and Criminal Justice Systems* (Report, 2023); Western Australia Commissioner for Children and Young People, *Hear Me Out: Report of the Inquiry into Implementation Progress for Banksia Hill's Model of Care Instructions* (August 2024).

<sup>107</sup> *Ibid* 14.

the extent to which First Nations children are over-represented in the criminal justice system:

- (i) About 57 per cent of children under supervision were First Nations children,
  - (ii) First Nations children were 23 times as likely as non-indigenous children to be under supervision,
  - (iii) First Nations children were 28 times as likely as non-indigenous children to be in detention,
  - (iv) First Nations children were over-represented under youth supervision in every state and territory,
  - (v) First nations children were younger than non-indigenous children (6.1 per cent aged 10–13, compared with 2.3 per cent for non-Indigenous children),
  - (vi) Children in the child protection system are 12 times as likely as the general population to be under youth justice supervision,
  - (vii) Almost 1 in 4 First Nations children in detention have an intellectual disability, compared with 1 in 12 non-Indigenous children.<sup>108</sup>
48. In addition, children aged 10–17 from very remote areas were 11 times more likely to be under supervision compared to those from major cities.<sup>109</sup> The Australian Institute of Health and Welfare (**AIHW**) suggests that this is largely reflective of the higher proportions of First Nations Australians living in these areas.<sup>110</sup> National data also shows that First Nations children (aged 10–16) are more likely to return to youth justice supervision.<sup>111</sup>
49. Research commissioned by the National Children's Commissioner for the Child Justice Report and conducted by the Australian Institute of Family Studies (**AIFS**) reviewed 12 years of reports and inquiries on child protection and youth justice in Australia from 2010 to 2022.<sup>112</sup> It found that there were 6 recurring and overlapping systemic issues in child justice and child protection systems:
- (i) Inadequate cross-system information sharing, collaboration and coordination;
  - (ii) Limited First Nations partnership and self-determination;
  - (iii) Limited child protection and child justice workforce capacity and support;
  - (iv) Inadequate levels of investment;
  - (v) Lack of mechanisms for oversight, monitoring and transparency, and

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<sup>108</sup> Ibid, 21.

<sup>109</sup> Ibid 22; Australian Institute of Health and Welfare, Youth Justice in Australia 2022–23 ([online](#), 28 March 2024).

<sup>110</sup> Ibid.

<sup>111</sup> Ibid 22.

<sup>112</sup> Nation Children's Commissioner (n X) 15; Emily Stevens and Luka Gahan, *Improving the safety and wellbeing of vulnerable children: A consolidation of systemic recommendations and evidence* (Report, Australian Institute of Family Studies, 2024) 4.

(vi) Limited opportunities for child voice and participation.<sup>113</sup>

50. The Law Council has also previously expressed concern about the striking overrepresentation of First Nations children with disability in the criminal justice system.<sup>114</sup> Children with disability, particularly First Nations children with disability, are disproportionately charged with criminal offences and enter youth justice systems at a significantly higher rate than children without disability.<sup>115</sup>
51. It is also worth repeating in this context key findings of the Australian Law Reform Commission (**ALRC**) in its *Pathways to Justice* report of 2017.<sup>116</sup> According to expert evidence and statistics canvassed by the ALRC, First Nations people fare worse at every stage of the criminal justice process compared to non-Indigenous people.<sup>117</sup> They are much more likely to be questioned by police; charged by police with a criminal offence; arrested than proceeded against by summons; held on remand in prison than given bail; convicted at trial; and sentenced to imprisonment.<sup>118</sup> While the ALRC report focused on adult over-incarceration, these findings have likely implications for First Nations children and young people, especially those who progress to adult criminal justice.

### Prevention and early intervention over punishment

52. The Law Council has been a long-standing and vocal advocate for child justice reform, based on evidence-based policy making, and preventative, diversionary, multi-portfolio responses that address the underlying needs of Australia's children.<sup>119</sup> This is of paramount importance for First Nations children, where it has been statistically proven that these children bear the brunt of a failure in Australia's policies to support their diversion and rehabilitation away from the criminal justice system.
53. There are multiple examples across the country which show a blatant disregard for evidence-based policy making and where harmful criminal justice responses continue to entrench disadvantage. We highlight some examples below.
54. For example, the Law Society of New South Wales has noted that in NSW fines have become the most common means by which children first come into contact with the NSW criminal justice system.<sup>120</sup> This was particularly prevalent during the COVID-19 pandemic, where an independent review found a practice of issuing fines to children during that time that were too high for children to pay, unevenly issued, and disproportionately affected socio-economically disadvantaged and vulnerable

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<sup>113</sup> Stevens and Gahan (n X) 18.

<sup>114</sup> See Law Council of Australia, [Final Report of the Justice Project](#) and [Final Report – Part 1: People with Disability](#) (August 2018) 20; Law Council of Australia, Review of Australia's Disability Strategy ([online](#), 11 September 2024) 4.

<sup>115</sup> NSW Bureau of Crime Statistics and Research, Offending by young people with disability: A NSW linkage study (2023), No. CJB254; Australian Institute of Health and Welfare - Crime and Justice Bulletin, Youth detention population in Australia 2022 (13 December 2022).

<sup>116</sup> Australian Law Reform Commission, [Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples](#) (Final Report, December 2017).

<sup>117</sup> *Ibid* 89-121.

<sup>118</sup> *Ibid*.

<sup>119</sup> For an overview, see e.g. Law Council of Australia, Submission to the National Children's Commissioner, [Youth Justice and Child Wellbeing Reform](#) (Submission, July 2023). Youth justice was also a major focus of the Law Council's *Justice Project*: Law Council of Australia, *The Justice Project* (Report, 2018) Part 1, [Children and Young People](#).

<sup>120</sup> Law Society of New South Wales, Submission to the Legislative Assembly Committee on Law and Safety, *Inquiry into community safety in regional and rural communities* (Submission, 30 May 2024).

children, including Aboriginal and Torres Strait Islander children.<sup>121</sup> A fine is often beyond a child's capacity to pay, let alone to navigate the payment and court election systems.<sup>122</sup> Legal practitioners in NSW have found that the 'snowball' effect of unpaid fines can create further financial stress, and lead to more serious offending and, in some cases, incarceration.<sup>123</sup>

55. The Law Institute of Victoria has raised a 2017 review into Victoria's youth justice system which also found that there was very little expertise in the criminal justice system about how to work with First Nations offenders in a culturally appropriate manner.<sup>124</sup>
56. In September 2022, the Queensland Family and Child Commission (QFCC) released its report *Yarning for Change: Listen to my Voice* which observed amongst other things, 'the rights and aspirations of First Nations children and young people with a lived experience of the youth justice system are largely rendered invisible in the discourse in the policy and practice of "justice"'.<sup>125</sup> Notably, of more than 100 children and young people aged between eight and 25 who participated in the study, the vast majority were First Nations.<sup>126</sup> The report highlights the importance of embedding effective evaluation mechanisms into program design and practice in order to effectively harness the important empirical data to readily assess the progress or the lack thereof.<sup>127</sup>
57. Increasingly punitive responses to crimes committed by children—particularly bail and sentencing laws—do not keep either those children or the community safe in the long term. The plethora of reports and inquiries into youth justice consistently find that the best way to lower youth incarceration rates, particularly for First Nations children, is to invest in services designed to strengthen families and communities so that children are given the best chance of a life without any contact with the criminal justice system, or are diverted to therapeutic responses—including health, disability, education, housing, substance abuse and broader supports—if they do come into contact with that system.

#### **Indigenous-led culturally competent solutions: diversionary programs to connect with culture and to move forward**

58. The most effective early intervention, diversion and rehabilitation programs for First Nations children are designed and led by First Nations communities and leaders.<sup>128</sup> Connection to culture is a strong factor which prevents First Nations children and young people from coming into contact with the criminal justice system.<sup>129</sup> First Nations children and young people 'desire to connect with culture, to be heard, to

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<sup>121</sup> J Quilter et al, *Children and Covid-19 Fines in NSW: Impacts and Lessons for the Future Use of Penalty Notices*, 2024, 5-9.

<sup>122</sup> Ibid, 10.

<sup>123</sup> Law Society of New South Wales, Submission to the Legislative Assembly Committee on Law and Safety, *Inquiry into community safety in regional and rural communities* (Submission, 30 May 2024).

<sup>124</sup> Penny Armytage and James Oglhoff, *Youth Justice Review and Strategy* (Executive Summary, July 2017) 19.

<sup>125</sup> Queensland Family and Child Commission, *Yarning for Change: Listen to My Voice – Conversations with Aboriginal and Torres Strait Islander Peoples* (Report, September 2022) ii.

<sup>126</sup> Ibid 3-4.

<sup>127</sup> Ibid.

<sup>128</sup> Law Council of Australia, *The Justice Project* (Final Report, August 2018) [Part 1 – Aboriginal and Torres Strait Islander People](#), 46-47.

<sup>129</sup> Smart Justice for Young People, Working Together: Action Plan to end the over-representation of particular groups of young people in the criminal justice system (Action Plan, October 2023) 22.

feel safe and protected, and to move forward'.<sup>130</sup> There have been some promising justice reinvestment initiatives in recent years.

59. The Law Council has consistently called for justice reinvestment approaches to be adopted over many years,<sup>131</sup> a recommendation that was reflected in the *Pathways to Justice* report.<sup>132</sup> It therefore welcomed the Australian Government's announcement in October 2022 of \$81.5 million to be invested in up to 30 community-led justice reinvestment initiatives across Australia and the establishment of an independent national justice reinvestment unit.<sup>133</sup>
60. On 30 September 2024, the Hon Mark Dreyfus KC MP and Senator the Hon Malarndirri McCarthy announced six further initiatives as part of the Government's national justice reinvestment program. The Law Council welcomes the investment in the six community-led initiatives across the Northern Territory, South Australia, Queensland, Victoria and Western Australia but urges that the program be expanded.<sup>134</sup>
61. Notably, the recently passed *Youth Justice Act 2024* (Vic) (YJ Act) includes measures specific to First Nations children and young people.<sup>135</sup> In particular, the Law Institute of Victoria has noted the welcome inclusion of additional guiding principles specific to First Nations children and young persons. These include: the obligation on the Secretary of the Victorian Department of Justice and Community Safety to develop strategic partnership with Aboriginal communities and consult with representatives of the Aboriginal community on justice-related issues; the establishment of Aboriginal youth justice agencies; and the provision of additional measures for Aboriginal children and young persons at every step of their way through the criminal justice system.<sup>136</sup>
62. One example of community-led solutions is the Maranguka Bourke Justice Reinvestment Program (**Maranguka**), which is located in north-west New South Wales, and was the first major pilot site in Australia to adapt and implement an Aboriginal-led place-based model of justice reinvestment when it was stood up in 2013.<sup>137</sup> In April 2022, Maranguka successfully transitioned to independence and became its own legally constituted entity—Maranguka Limited.<sup>138</sup> It has since expanded to Moree, Mt Druitt and Kempsey.<sup>139</sup>
63. Maranguka is a collaboration between the Bourke Tribal Council, Just Reinvest NSW and the community of Bourke, and is focused on empowering the community to lead change through self-governance linked with practical action and positive role modelling.<sup>140</sup> This works in tandem with changing the way services and the justice

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<sup>130</sup> Commission for Children and Young People, *Our Youth, Our Way: Inquiry into the Over-Representation of Aboriginal Children and Young People in the Victorian Youth Justice System* (Report, June 2021).

<sup>131</sup> See for example Law Council of Australia, Submission to the Australian Law Reform Commission, [Incarceration Rates of Aboriginal and Torres Strait Islander People](#) (Discussion Paper 84, 6 October 2017).

<sup>132</sup> Australian Law Reform Commission, [Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples](#) (Final Report, December 2017)137-144.

<sup>133</sup> The Hon Mark Dreyfus KC MP, 'Albanese Government delivers landmark first nations justice investment' (Media Release)

<sup>134</sup> The Hon Mark Dreyfus KC MP and Senator the Hon Malarndirri McCarthy, '[New Justice Reinvestment initiatives announced](#)' (Media Release, 30 September 2024).

<sup>135</sup> *Youth Justice Act 2024* (Vic) Division 3 – Guiding youth justice principles and matters specific to Aboriginal children and young people.

<sup>136</sup> *Ibid.*

<sup>137</sup> KPMG, [Maranguka Justice Reinvestment Project: Impact Assessment](#) (November 2018) 8.

<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.*

sector operate to rethink program design and delivery models, to police force procedures and court processes.<sup>141</sup>

64. When KPMG assessed its performance from 2016 to 2017 and based the key indicators within the areas of family strength, youth development and adult empowerment, they found promising—if early—signals:<sup>142</sup>
- a 23 per cent reduction in police-recorded incidents of domestic violence and comparable drops in rates of re-offending;
  - a 31 per cent increase in year 12 student retention rates and a 38 per cent reduction in charges across the top five juvenile offence categories;
  - amongst adults, a 14 per cent reduction in bail breaches and a 42 per cent reduction in days spent in custody, and
  - the \$600,000 operating costs of the program in 2017 resulted in a gross economic impact/saving of \$3.1 million that was not spent on activities related to both the justice and non-justice systems.
65. Since KPMG's assessment, the Maranguka Justice Reinvestment Project has continued to evolve. In 2021, the University of Sydney's Policy Lab reported on the Maranguka Cross Sector Leadership Group, describing the group as 'a case study of government and non-government organisations aligning policy and resources towards an Aboriginal community-led agenda'.<sup>143</sup> Furthermore, the Bourke Tribunal Council's *Growing our Kids Up Safe, Smart and Strong Strategy*, which is supported by data and community consultation and with assistance from organisations including Just Reinvest NSW and funding entities, takes a whole-of-life approach to building community strength through community-led local initiatives, systems reform and reducing harmful contact between local young people and the criminal justice system.<sup>144</sup>
66. The Law Council urges all Australian Governments to prioritise investments in prevention and early intervention through Aboriginal Community Controlled Organisations,<sup>145</sup> and to support the expansion of the availability of evidence-based diversionary programs for children, including those by Aboriginal and Torres Strait Islander Community-Controlled Organisations, and other culturally safe programs.<sup>146</sup>

### **The National Agreement on Closing the Gap and the Justice Policy Partnership**

67. Target 11 of the Closing the Gap justice targets promises to reduce the rate of Aboriginal and Torres Strait Islander young people aged 10–17 in detention by at least 30 per cent by 2031.<sup>147</sup> According to the Productivity Commission, 'nationally in 2022–23, the rate of Aboriginal and Torres Strait Islander young people aged 10–17 years in detention on an average day was 29.8 per 10,000 young people in the population'. This was an increase from the previous three years (from a low of 23.6 per 10,000 young people in 2020–21) but it is a decrease from 32.1 per 10,000

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<sup>141</sup> Ibid.

<sup>142</sup> Ibid 24, 28.

<sup>143</sup> Maranguka Community Hub, [Maranguka Limited: Strategic Plan 2023-2025](#) (Strategic Plan, 2023) 4.

<sup>144</sup> Ibid 6.

<sup>145</sup> National Children's Commissioner, Recommendation 10.

<sup>146</sup> Ibid, Recommendation 12.

<sup>147</sup> Productivity Commission, *Closing the Gap Information Repository* (<https://www.pc.gov.au/closing-the-gap-data>) [Socio-economic outcome area 11 – Aboriginal and Torres Strait Islander young people are not overrepresented in the criminal justice system](#).

young people in 2018–19.<sup>148</sup> The Productivity Commission also notes that nationally, the trend for the target shows no change from the baseline.<sup>149</sup>

68. A recent study provided more evidence of the 'incarceration gap' within Aboriginal and Torres Strait Islander populations across important health and socio-economic markers by incarceration status.<sup>150</sup> This has been known for some time, and the Law Council urges the federal government to take a stronger lead on reform through existing mechanisms with state and territory governments.
69. For example, the Justice Policy Partnership (**JPP**) is the first of five formal policy partnerships established under Priority Reform One of the National Agreement on Closing the Gap.<sup>151</sup> It is comprised of members representing federal, state and territory governments, Aboriginal and Torres Strait Islander community-controlled organisations, and Aboriginal and Torres Strait Islander Justice experts (the **Joint Council**).<sup>152</sup> The Joint Council was established to create a joined-up policy approach to five different elements including adult and youth incarceration as a matter of social justice.<sup>153</sup> The JPP and the commitment by Closing the Gap stakeholders to the justice targets was, we understand from feedback provided to us, taken by First Nations communities as a real commitment to, and lever for, change.
70. Since its establishment in 2021, the Law Council has received disappointing feedback from First Nations legal and justice experts who participate in the JPP who say that it is not being effectively used by state and territory government participants and that there has been a real lack of broader commitment to changing how government operates in this area. This is particularly so with respect to social justice and the underpinning criminal law reform developments. The JPP is the major federalised mechanism for tackling Closing the Gap justice targets for First Nations communities between the federal government, state and territory governments, and First Nations communities. Feedback provided to us, however, is that the JPP is not operating in the way envisaged when it first came to fruition as a lever for open dialogue and evidence-based change.
71. Broader discussions nationally about youth justice appear to be occurring in parallel with and separate from JPP discussions, notwithstanding the overwhelming evidence of the hyper-incarceration of Indigenous children and young people. This concern was also echoed in the Productivity Commission's first review of the National Agreement on Closing the Gap released in early 2024.<sup>154</sup> Now, nearing the end of 2024, the gulf between some state and territory 'tough on crime' policies and the commitment to change outlined in the Closing the Gap Agreement is widening.
72. The disproportionate overrepresentation of Indigenous children in custodial settings is one of the primary focal points of the JPP,<sup>155</sup> and yet the Productivity Commission has not only found that some governments are 'ignoring' their commitments under

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<sup>148</sup> Ibid.

<sup>149</sup> Ibid.

<sup>150</sup> S Shepherd et al, '[Closing the \(incarceration\) gap: assessing the socio-economic and clinical indicators of indigenous males by lifetime incarceration status](#)' (2020) 20 *BMC Public Health* 720.

<sup>151</sup> Australian Government, *National Agreement on Closing the Gap* (July 2020) [Priority Reform Areas for Joint National Action](#).

<sup>152</sup> Attorney-General's Department, '[Justice Policy Partnership](#)' (online).

<sup>153</sup> Attorney-General's Department, '[Justice Policy Partnership Terms of Reference](#)' (Updated march 2024) 1.

<sup>154</sup> Productivity Commission, *Review of the National Agreement on Closing the Gap* (Final Report, January 2024) Study Report, Volume 1, 44.

<sup>155</sup> Attorney-General's Department, *Justice Policy Partnership Terms of Reference* (Updated March 2024) 1.

the Closing the Gap Agreement but are 'actively putting the truck in reverse'.<sup>156</sup> For example, in NSW the Police Force has publicly stated that it has no responsibilities under the Closing the Gap scheme.<sup>157</sup>

73. Before the JPP becomes a missed opportunity, the Law Council recommends that the Productivity Commission's recommendations for improving the implementation of Priority Reform 1 under the Closing the Gap Agreement (which includes the JPP) be implemented by the federal government in consultation with the state and territory governments.<sup>158</sup> We particularly emphasise Recommendation 1, to ensure power is shared with Aboriginal and Torres Strait Islander peoples, and Recommendation 3, to fundamentally transform mainstream government systems and culture and the way they reform policy and law with respect to First Nations peoples.<sup>159</sup>
74. As noted above, the JPP does have a wider remit beyond First Nations social justice policy reform, which makes it necessary to consider other support mechanisms that could be pursued to specifically lead recommendations on improving the rates of incarceration for First Nations children and young people.
75. In that respect, the Law Council considers it paramount that a National Taskforce be established to lead reform of child justice systems, which is subject to National Cabinet oversight, as recommended by the National Children's Commissioner.<sup>160</sup> There are multiple examples of national leadership and shared responsibility across jurisdictions in health, agriculture, housing, and education which provide a precedent.<sup>161</sup>

#### **The role of the National Commission for Aboriginal and Torres Strait Islander Children and Young People in Closing the Gap for child justice**

76. On 4 October 2024, Senator McCarthy and the Minister for Social Services, the Hon Amanda Rishworth MP, announced the establishment of the National Commission for Aboriginal and Torres Strait Islander Children and Young People (the **Commission**).<sup>162</sup> The Commission has been established as an Executive Agency under the *Public Service Act 1999* (Cth) and will be operational from 13 January 2025.<sup>163</sup>
77. The Law Council welcomes the establishment of the Commission and notes that it 'will be dedicated to protecting and promoting the rights, interests and wellbeing of Aboriginal and Torres Strait Islander children and young people across a range of issues, including the over-representation of Indigenous children in out-of-home care'.<sup>164</sup>

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<sup>156</sup> Natalie Siegel-Brown and Selwyn Button, 'A criminal reversal on commitment to Closing the Gap', *The Australian* (online, 16 September 2024).

<sup>157</sup> Michael McGowan, 'Police should not be responsible for Closing the Gap targets, says commissioner', *The Sydney Morning Herald* (online, 23 October 2023).

<sup>158</sup> See Productivity Commission, *Review of the National Agreement on Closing the Gap* (Study Report, 7 February 2024) 45-46.

<sup>159</sup> *Ibid* 11-14, 17-21.

<sup>160</sup> See National Children's Commissioner (n X) 27.

<sup>161</sup> *Ibid* 27.

<sup>162</sup> Senator the Hon Malarndirri McCarthy and the Hon Amanda Rishworth MP, 'Establishment of the National Commission for Aboriginal and Torres Strait Islander Children and Young People' (Media Release, 4 October 2024).

<sup>163</sup> *Ibid*.

<sup>164</sup> *Ibid*.

78. It is unclear at this point to which Minister the Commission and Commissioner will be responsible. As pointed out by the National Children's Commissioner in her Child Justice Report, federal government responsibility for children's affairs is spread across mainstream portfolios with little apparent interaction or collaboration across education, health, child justice, and social services.<sup>165</sup> A separate National Commission for Aboriginal and Torres Strait Islander Children and Young People, while a valuable step, will not itself be in charge of the mainstream portfolio resourcing and policymaking decisions which will lead to tangible change. This is why the Children's Commissioner's overarching recommendations to enable national reform are important.
79. The role of the Minister for Youth, which is presently held by the Hon Dr Anne Aly MP, presently sits within the Education portfolio and is a junior ministerial role which does not sit within Cabinet. We also note the Department of Social Services' strategy document *Safe and Supported: The National Framework for Protecting Australia's Children 2021–2031*, which sets out how all governments, Aboriginal and Torres Strait Islander leaders and the non-government sector will work together to help children, young people and families in need of support from and to prevent neglect and abuse of children.<sup>166</sup> However, none of its four 'focus areas' specifically target diversion from the criminal justice system.
80. These elements are relevant and steps towards a coherent approach to support First Nations children. However, one of the key barriers to a national child rights approach to reform is the presently siloed and fragmented approach to the delivery of services for child wellbeing.<sup>167</sup> There is a need to address fragmentation of responsibility for children and their wellbeing generally, across different portfolios of the federal Government. The Law Council considers the time to be ripe for the introduction of a Cabinet Minister for Children with designated responsibilities for child wellbeing, as recommended by the National Children's Commissioner.<sup>168</sup>
81. Furthermore, a Minister for Children could be responsible for a National Taskforce on reforming child justice, to play a coordinating role across policy and law reform for all children in Australia, and to ensure that policies which are designed to support First Nations children are coherent and joined-up at the federal level. National leadership on child justice reform is essential to progressing the Closing the Gap objectives for First Nations children. The Minister should further, as recommended by the Children's Commissioner, chair the Ministerial Council for Child Wellbeing, which would report to National Cabinet.

#### Recommendation

- **The recently announced National Commission for Aboriginal and Torres Strait Islander Children and Young People should be empowered and adequately funded to fulfil its mission of protecting the rights of First Nations children, including by implementing preventive measures to bring down overrepresentation in the criminal justice system, in line with Closing the Gap Target 11.**
- **The Productivity Commission's recommendations with respect to achieving Closing the Gap Targets set out in its online reporting—in particular with respect to Target 11 and the JPP—should be heeded.**

<sup>165</sup> National Children's Commissioner (n X) 27.

<sup>166</sup> Department of Social Services, [Safe and Supported: the National Framework for Protecting Australia's Children 2021-2031](#) (2021).

<sup>167</sup> National Children's Commissioner (n X) 27.

<sup>168</sup> See Recommendation 2: National Children's Commissioner (n X) 12.

## C—The degree of compliance and non-compliance by state, territory and federal prisons and detention centres with the human rights of children and young people in detention

### Brief Historical Context

82. Although this submission focuses mainly on contemporary compliance with international obligations of youth prisons and detention centres in Australia, it should be noted that there is a considerable history of non-compliance with international obligations concerning people of all ages in detention. This history underlines the need for far greater national attention to the human rights of detained children.
83. The UN Human Rights Committee (**HRCtte**) provided Views more than 20 years ago that Australia's mandatory immigration detention system and deportation policies concerning children and families contravened its obligations relating to arbitrary detention, discrimination and protection of the family under the International Covenant on Civil and Political Rights (**ICCPR**).<sup>169</sup> Communications such as *Winata and Li v Australia* (2001)<sup>170</sup> and *Bakhtiyari & Bakhtiyari v Australia* (2003)<sup>171</sup> are examples of such findings.
84. Criminal detention has also figured in the HRCtte's jurisprudence concerning Australia. In *Brough v Australia*<sup>172</sup> in 2006, the HRCtte found that Corey Brough, a First Nations child with a disability, was confined to inappropriate isolation cells in a NSW adult correctional facility, abused when he struggled with this confinement, and eventually dosed with anti-psychotic medication by prison officials. The HRCtte observed, in a passage that is generally applicable to such cases:
- The Committee recalls that persons deprived of their liberty must not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Inhuman treatment must attain a minimum level of severity to come within the scope of article 10 of the Covenant. The assessment of this minimum depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical or mental effects and, in some instances, the sex, age, state of health or other status of the victim.*<sup>173</sup>
85. The HRCtte concluded that Brough's confinement and (non-consensual and inappropriate) medical treatment both disclosed violations of the ICCPR; specifically, article 10 in combination with article 24 required treatment appropriate to his age and legal status, and this had not been provided. The State party, the HRCtte observed, not only should provide adequate compensation to Mr Brough, but was also 'under an obligation to ensure that similar violations do not occur in the future.'<sup>174</sup> Compensation was never forthcoming,<sup>175</sup> and the obligation to prevent future violations remains aspirational, as amply demonstrated by the Royal

<sup>169</sup> Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>170</sup> HRCtte Communication 930 of 2000, UN Doc CCPR/C/72/D/930/2000 (Views of 16 August 2001).

<sup>171</sup> HRCtte Communication 1069/2002, UN Doc CCPR/C/79/D/1069/2002 (Views of 6 November 2003).

<sup>172</sup> HRCtte Communication 1184 of 2003, UN Doc CCPR/C/86/D/1184/2003 (Views of 27 April 2006).

<sup>173</sup> *Ibid.*, [9.2].

<sup>174</sup> *Ibid.*, [11].

<sup>175</sup> See Remedy Australia, *Brough v Australia* (HRC, 2006): <<https://remedy.org.au/cases/4>>.

Commission into the Protection and Detention of Children in the Northern Territory.<sup>176</sup>

### Contemporary Compliance

86. Although the examples given above are of youth detention practices that are unlikely to comply with Australia's international human rights obligations, the Committee on the Rights of the Child and other UN Human Rights Treaty Bodies have identified other practices and situations as non-compliant with Australia's treaty obligations.
87. For example, in its 2019 Concluding Observations on Australia's combined fifth and sixth report under the CRC, the Committee on the Rights of the Child stated that it 'remained seriously concerned' about compliance with the CRC in respect of:
- An excessive reliance on the police and the criminal justice system when dealing with children's behavioural problems and an insufficient reliance on appropriate therapeutic services;<sup>177</sup>
  - The very low age of criminal responsibility;<sup>178</sup>
  - The enduring overrepresentation of Aboriginal and Torres Strait Islander children and their parents and carers in the justice system;<sup>179</sup>
  - Reports that children in detention are frequently subjected to verbal abuse and racist remarks, deliberately denied access to water, restrained in ways that are potentially dangerous and excessively subjected to isolation;<sup>180</sup>
  - The high number of children in detention, both on remand and after sentencing;<sup>181</sup>
  - Children in detention not being separated from adults;<sup>182</sup>
  - The continuing existence of mandatory minimum sentences applicable to children in the Northern Territory and Western Australia;<sup>183</sup>
  - The continuing overrepresentation of children with disabilities in the justice system;<sup>184</sup> and
  - Children's lack of awareness about their rights and how to report abuses.<sup>185</sup>
88. In addition, the Human Rights Committee published Views in the Communication *AK et al v Australia* in January 2022 in which it concluded that Australia continues to breach the prohibition on arbitrary detention in article 9 of the ICCPR in respect of detention of child asylum seekers.

### Minimum age of criminal responsibility

89. Australia remains one of the few developed countries in the world to prosecute and detain children as young as 10 years old, which remains the minimum age of criminal responsibility across most Australian jurisdictions. The Northern Territory Government elected in August 2024 recently legislated to lower the minimum age of

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<sup>176</sup> Royal Commission into the Protection and Detention of Children in the Northern Territory: <<https://www.royalcommission.gov.au/child-detention>>.

<sup>177</sup> Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, UN Doc CRC/C/AUS/CO/5-6 (1 November 2019), [33].

<sup>178</sup> *Ibid.*, [47].

<sup>179</sup> *Ibid.*

<sup>180</sup> *Ibid.*

<sup>181</sup> *Ibid.*

<sup>182</sup> *Ibid.* (see further comments on Australia's reservation to article 37(c) below).

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.*

<sup>185</sup> *Ibid.*

criminal responsibility from 12 (an increase which had commenced only in August 2023<sup>186</sup> following recommendations made by the Royal Commission into the Protection and Detention of Young People in the Northern Territory<sup>187</sup>), to 10 years of age.<sup>188</sup> The Victorian government has also reneged on its promise to increase the minimum age of criminal responsibility to 14 years old and has instead settled on 12 years.<sup>189</sup> In the Australian Capital Territory legislation was passed in November 2023 which initially raised the minimum age from 10 to 12, and as a second stage, in 2025 to 14.<sup>190</sup> While Tasmania has announced it will raise the minimum age of detention to 14 years by 2029, with exceptions for young people who commit the most serious offences,<sup>191</sup> it has not passed legislation on the age of responsibility.

90. Other states, such as NSW, Queensland and South Australia, have made no move to increase the age from 10 despite recommendations over the years.<sup>192</sup> Children between 10 and 14 are subject to a rebuttable legal presumption known as *doli incapax*, embedded into common law and statute. This stems from the ancient common law doctrine of *doli incapax*, and holds that children between the ages of 10 and 14 generally lack the capacity to know that an act is seriously wrong in the criminal or moral sense.<sup>193</sup> However, the Law Council has previously pointed out that this rebuttable presumption is highly problematic due to its complexity and inconsistencies in practice in applying it. This undermines the extent to which it can be said to provide a sufficient safeguard.<sup>194</sup>
91. These positions have attracted considerable criticism from the Committee on the Rights of the Child, which five years ago urged CRC member states including Australia to raise the age of criminal responsibility to at least 14 years of age.<sup>195</sup> This constitutes international best practice and accords with medical advice on child brain development, which states that children under 14 are undergoing significant growth and development which means that they do not have the required capacity for criminal responsibility at an adult level.<sup>196</sup>
92. The Australian Human Rights Commission (**AHRC**) has also endorsed and reiterated this recommendation.<sup>197</sup> The social case to raise the age of criminal responsibility to 14 years has been expounded repeatedly and urgently for years. The AHRC has summarised the evidence showing that<sup>198</sup>:

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<sup>186</sup> Under the *Criminal Code Amendment Act 2022* (NT).

<sup>187</sup> Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, Final Report (2017), Recommendation 27.1.

<sup>188</sup> ABC News, NT chief minister says government has 'mandate' to lower age of criminal responsibility, despite Productivity Commission warning ([online](#), 17 September 2024).

<sup>189</sup> ABC News, Victorian government cops criticism over youth crime as crucial debate over justice bill approaches ([online](#), 13 August 2024).

<sup>190</sup> *Justice (Age of Criminal Responsibility) Legislation Amendment Act 2023* (ACT).

<sup>191</sup> Tasmanian Department for Education, Children and Young People, *Youth Justice Blueprint 2024-2034: Keeping children and young people out of the youth justice system* (Report, December 2023) 5.

<sup>192</sup> See eg Krishna and Moulds, 'Old Enough to Know Better? Reform Options for South Australia's Age of Criminality Laws' (2020) 41(1) *Adelaide Law Review* 313, 315-316 and 322-323.

<sup>193</sup> C v DPP (1995) 2 All ER 43; R v Gorrie (1918) 83 JP 136; R v ALH (2003) 6 VR 276; R v M (1977) 16 SASR 589; R v CRH unreported NSWCA 1996).

<sup>194</sup> Law Council of Australia, Council of Attorneys-General – Age of Criminal Responsibility Working Group Review, [Submission](#) to the Age of Criminal Responsibility Working Group, 2 March 2020.

<sup>195</sup> United Nations Committee on the Rights of the Child, General comment No 24 (2019) on children's rights in the child justice system, UN Doc CRC/C/GC/24 (18 September 2019) [22].

<sup>196</sup> Law Council of Australia, Minimum Age of Criminal Responsibility: Policy Statement ([online](#), 2019).

<sup>197</sup> Australian Human Rights Commission, Review of the age of criminal responsibility: Submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group ([online](#), 26 February 2020).

<sup>198</sup> AHRC, The Minimum Age of Criminal Responsibility: Australia's Third UPR ([online](#), 2021).

- 'Many children involved in the criminal justice system come from disadvantaged backgrounds and have complex needs better addressed outside the criminal justice system';
  - 'Research on brain development shows that 10 year olds have not developed the requisite level of maturity to form the necessary intent for full criminal responsibility';
  - 'Children under the age of 12 years lack the capacity to properly engage in the criminal justice system, resulting in a propensity to accept a plea bargain, give false confessions or fail to keep track of court proceedings';
  - 'Criminal offending by children is generally non-violent and more than 50 percent of crimes committed by children between ages 10 and 14 are theft, burglary or property related offences'; and
  - 'Studies have shown that the younger the child is when encountering the justice system, the more likely they are to reoffend'.
93. The Law Council notes that most children aged 10–13 years who are charged are charged with non-violent offences. The Law Council is concerned that significant injustice occurs as a result, including disproportionately adverse outcomes for First Nations children and children living in regional, rural and remote locations. The Bureau of Crime Statistics and Research recently published a paper, 'The involvement of young people aged 10 to 13 years in the NSW Criminal Justice System',<sup>199</sup> which highlighted such concerns, finding that:
- 41.3 percent of young people aged under 14 years who were legally proceeded against by police at least once in 2023 were Aboriginal.
  - The rate of legal proceedings against young people under 14 years of age was more than three times as high in regional/remote/very remote areas compared with major cities.
94. We are greatly concerned by the significant extent of non-compliance on this issue across Australia and strongly support increasing the minimum age of criminal responsibility to 14 years old across all Australian jurisdictions without exception.<sup>200</sup> This has been and remains a core position of the Law Council. An expanded discussion of this issue follows in section E.

### **Treatment and conditions in youth detention**

#### *Solitary confinement and other inhuman or degrading treatment*

95. Article 37(a) of the CRC<sup>201</sup> provides that 'no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.' In 2019, the UN Committee on the Rights of the Child published a general comment on children's rights in the child justice system which noted that:

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<sup>199</sup> BOCSAR, 'The involvement of young people aged 10 to 13 years in the NSW criminal justice system' ([online](#), 14 August 2024).

<sup>200</sup> Law Council of Australia, Minimum Age of Criminal Responsibility: Policy Statement ([online](#), 2019); Law Council of Australia, Responses to Children under the Minimum Age of Criminal Responsibility: Position Paper ([online](#), 25 June 2022).

<sup>201</sup> N 15 CRC, art 37(a).

Disciplinary measures in violation of article 37 of the Convention must be strictly forbidden, including corporal punishment, placement in a dark cell, solitary confinement or any other punishment that may compromise the physical or mental health or well-being of the child concerned...<sup>202</sup>

96. Furthermore, article 40(1) of the CRC mandates that States Parties ensure accused children be treated in a manner that promotes their sense of dignity and worth, and which takes into account 'the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.'
97. The UN Committee on the Rights of the Child has further stated that 'solitary confinement should not be used for a child.'<sup>203</sup>
98. A consistent theme emerging from reports published by independent oversight bodies is that too often youth justice centres fail to comply with the human rights of children and young people in detention.<sup>204</sup> The Law Council is concerned that the utilisation of certain practices, such as the use of solitary confinement (variously described as, for example, 'isolation' or 'time out'), cutting water supplies off to cells, and in one case last year in Victoria, the use of a spit hood to manage children and young people's complex needs and behaviours, is problematic and contravenes Australia's obligation under article 37 of the CRC. Other concerning practices include preventing children and young people from accessing medical assistance, legal advice and contact with their families.
99. The Law Council's constituent bodies have informed us that legal practitioners have witnessed some recent examples of non-compliant detention and incarceration practices, the most troubling of which include:
  - A child in adult custody who had been subject to truly appalling human rights abuses, having had had a spit hood placed on him, was placed in solitary confinement for an extended duration and had the water to his cell cut off;
  - A young boy whose psychological needs went unaddressed in youth detention when he was actively self-harming and suicidal because treatment in custody is not confidential in the same way as it is for children in the community;
  - A young boy who has a severe intellectual disability and was placed in a unit alone in custody, preventing him from being able to properly engage with his lawyer, treatment and education.
100. The Law Council is extremely concerned about these recent reports of serious non-compliance. We support Commonwealth action and leadership in respect of this issue, including consideration of the development of national minimum standards for youth detention facilities that include a prohibition on disciplinary measures in violation of article 37 of the CRC, and better defining and regulating the use of practices that may amount to solitary confinement. Further discussion of this issue follows in section E.

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<sup>202</sup> Committee on the Rights of the Child, General Comment No. 24 (2019) on children's rights in the child justice system, United Nations, 18 September 2019, [95(g)].

<sup>203</sup> Ibid [95(h)].

<sup>204</sup> Commission for Children and Young People, *Our Youth, Our Way: Inquiry into the over-Representation of Aboriginal Children and Young People in the Victorian Youth Justice System* (Report, June 2021); Australian Institute of Health and Welfare, *Youth Justice in Australia 2022-23* (Report, 28 March 2024).

### Detention as a last resort

101. Article 37(b) of the CRC provides that:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.<sup>205</sup>

102. We are concerned that recent developments in criminal law reform and policy demonstrate a departure from this principle. For example, the *Bail and Crimes Amendment Act 2024* (NSW), assented to in May 2024, made amendments to the *Bail Act 2013* (NSW) that limited grants of bail for young persons charged with certain offences. The amendments introduced a more stringent test for bail of young people in certain circumstances than applies to adults. As noted, under 'Declan's Law', the Northern Territory Government has, at the time of writing, announced that it would amend the *Bail Act 1982* (NT) to expand the presumption against bail (inter alia) for children aged 10 to 17 years old.<sup>206</sup>

103. In our view, the amendments significantly risk the incarceration of children and young people who would not otherwise have been incarcerated and are inconsistent with Article 37 of the CRC and the principle of using detention as a last resort.<sup>207</sup> We also note with concern propositions to remove 'detention as a last resort' for young people in Queensland.<sup>208</sup>

104. Upholding Australia's commitment to Article 37(b) and ensuring that the arrest, detention or imprisonment of a child is only used as a measure of last resort is essential to protecting the human rights and wellbeing of children in Australia. The Law Council therefore encourages consideration of action by the Commonwealth Government to ensure national compliance. In this regard, the Law Council reiterates its earlier recommendation that the Government should implement its obligations under the principal UN human rights treaties, including the CRC, by enacting a federal Human Rights Act.<sup>209</sup>

### Rule of law concerns

105. In addition to the above, the Law Council has strong rule of law concerns about laws which expand the presumption against bail for children and for blanket categories of offences.<sup>210</sup>

106. The rule of law requires that all persons are entitled to the presumption of innocence and to a fair and public trial. In particular, no one should be subject to punitive action by the state unless he or she has first been found guilty of an offence by an independent, impartial and competent trial.<sup>211</sup>

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<sup>205</sup> N 15 CRC, art 37(b).

<sup>206</sup> As well as expanding the presumption against bail in other circumstances, as discussed above.

<sup>207</sup> Law Society of NSW, Open letter to Members of the Legislative Council, *Bail and Crimes Amendment Bill*, ([online](#), 20 March 2024).

<sup>208</sup> The Guardian: Eden Gillespie, 'Queensland to ditch detention as last resort approach to youth crime' (26 March 2024).

<sup>209</sup> Law Council of Australia, [Federal Human Rights Charter: Policy Position](#) (November 2020).

<sup>210</sup> As noted above, under Declan's Law, the NT will also expand the presumption against bail for all serious violent offences (not just those involving weapons), anyone found guilty of two or more serious offences in the previous two years, and anyone alleged to have committed a serious offence, while on bail for a serious offence.

<sup>211</sup> Law Council of Australia, [Policy Statement, Rule of Law Principles](#), (March 2011), Principle 3.

107. Inherent in this is a prohibition on indefinite detention without trial. This means that persons awaiting trial should not generally be detained in custody, unless they are a demonstrated flight risk or their release poses a demonstrated risk to the community or ongoing investigation.<sup>212</sup>
108. The Law Council's Policy Statement on Principles Applying to Detention in a Criminal Law Context (2013)<sup>213</sup> elaborates on these points, noting that:
- A person who has been charged with a criminal offence, including an indictable offence, and is awaiting trial, should not generally be detained in custody. For that reason, there should be a presumption in *favour* of bail in all cases.
  - This presumption may be rebutted where the court is satisfied there is an unacceptable risk, which cannot be mitigated by the imposition of conditions, that the person:
    - will not appear in court when required; or
    - will reoffend; or
    - will interfere with the investigation; or will intimidate or attempt to influence potential witnesses; or
    - will threaten or cause harm to another person or the community at large.
  - The presumption in favour of bail should not be reversed regardless of the nature of the offence. Although the seriousness of the offence with which a person is charged may be taken into account in determining whether he or she is: a flight risk; at risk of reoffending; or a risk to the community, the seriousness of the offence alone should not determine whether bail is granted.
  - Throughout any pre-trial detention, the right to the presumption of innocence should be guaranteed. For this reason, a person in detention awaiting trial should be held separately from convicted persons.
  - Any person who is subject to a criminal charge should be tried within a reasonable time. In determining what is reasonable, whether or not a person is in pre-trial detention is a significant consideration. For that reason, where a person has been denied bail, the state has an increased obligation to ensure that he or she is tried in a timely way. If delays do arise, the question of bail should be reconsidered in view of the likely prejudice caused to the person by their ongoing detention.
  - A person in detention awaiting trial should have access to his or her legal adviser, for the purposes of preparing a response to the case against him or her. This requires that a person not be detained in a remote or inaccessible location, that undue restrictions are not placed on when and for how long a person may confer with his or her legal adviser and that adequate facilities are available to allow for confidential communication between a person and his or her legal adviser.

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<sup>212</sup> Ibid. See also ICCPR article 9 and HRCtee *General Comment 35*, esp para 38: <https://documents.un.org/doc/undoc/gen/g14/244/51/pdf/g1424451.pdf>.

<sup>213</sup> Law Council of Australia, [Policy Statement on Principles Applying to Detention in a Criminal Law Context](#) (2013).

109. Presumptions against bail for children extend the likelihood that they will be subject to lengthy periods of detention, in potentially unsafe and harmful circumstances, without having been convicted of a crime. They are discriminatory and should not be used.

#### Recommendation

- **The Law Council reiterates its recommendation that Australia should implement its international human rights obligations comprehensively in legislation—including in a standalone Commonwealth Human Rights Act. At present, many of the CRC obligations discussed in this submission are not adequately reflected in domestic legislation (with notable exceptions such as the recently-revised *Youth Justice Act 2024* (Vic)).**

## D—The Commonwealth's international obligations in regards to youth justice including the rights of the child, freedom from torture and civil rights

### The Responsibility Dilemma

110. In the context of child detention in Australia, a pressing issue from a human rights law perspective is that the federal constitutional division of responsibilities for various types of detention enables blame-shifting and disclaiming of obligation at both the state/territory and federal (Commonwealth) levels of government.<sup>214</sup>
111. The issue of state and territory responsibility for the fulfilment of international obligations incurred by federal Government treaty action is a vexed one. Under international law, the international responsibility for giving effect to the provisions of a treaty lies with the Commonwealth. At the same time, the acts or omissions of the states and territories in areas where they exercise legislative or executive power as a result of the constitutional allocation of power or as a result of political agreement and practice, are attributable to the Commonwealth (Australia) on the international level. Thus, the Commonwealth government may be found to have violated its international obligations as a result of state or territory actions that the Commonwealth is effectively unable to override for constitutional reasons or because of the agreed allocation of roles under the federal system. Thus, the Commonwealth may be hamstrung in ensuring obligations are implemented.

### Detention Context—OPCAT

112. In the context of the present inquiry, the issue of responsibility for upholding treaty obligations is of more than abstract, historical concern. Take, for example, the UN treaty that requires States parties to establish National Preventive Mechanisms (NPMs) and standards for places of detention—the Optional Protocol to the

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<sup>214</sup> See eg Rose, 'NSW's refusal to allow UN inspectors in prisons 'raises questions', human rights commissioner says', *The Guardian*, 18 October 2022: <<https://www.theguardian.com/australia-news/2022/oct/18/nsws-refusal-to-allow-un-inspectors-in-prisons-raises-questions-human-rights-commissioner-says>>.

Convention against Torture (**OPCAT**).<sup>215</sup> The implementation of OPCAT in federal or decentralised States presents issues that have been recognised by proponents of the treaty for some time.<sup>216</sup> In fact, the OPCAT itself contains an acknowledgment of political decentralisation specifically in article 29 (which incidentally mirrors article 50 of the ICCPR, drafted 50 years earlier<sup>217</sup>): 'The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.'

113. The position of international law that States parties are bound regardless of their internal division (and any dissenting subnational units) is important. It must be clearly understood and reflected in the Australian debate about international law obligations.
114. However, the international position lacks practical guidance for governments of federal States. A clearly articulated settlement based on ample consultation and negotiation between federal and state/territory governments would be the best way to proceed.<sup>218</sup> Such a settlement should detail responsibility not only for implementation measures, but also for funding of those measures.<sup>219</sup>
115. In 2004, before the OPCAT had entered into force, the Joint Standing Committee on Treaties (**JSCOT**) undertook an inquiry into whether Australia should become a party to the treaty; it conducted a second inquiry into the question in 2012.<sup>220</sup> The first JSCOT review, by a majority, recommended against signature or ratification, citing, among other evidence, input from the Attorney-General's Department (**AGD**) that 'Australia has extensive mechanisms in place for ensuring that torture is not committed' and that there has never been a case of alleged torture communicated to the Committee against Torture in relation to Australia.'<sup>221</sup>
116. This argument missed the point that the Convention and Optional Protocol also address 'other cruel, inhuman and degrading treatment or punishment' and also that the mechanism is preventive. Nevertheless, in 2004, a majority of JSCOT was persuaded that ratification was not necessary.<sup>222</sup> In contrast, the ACT and WA governments gave evidence in support of ratification.<sup>223</sup>
117. In 2012, the JSCOT revised its 2004 conclusion and recommended ratification.<sup>224</sup> With respect to predicted implementation difficulties, the JSCOT's recommendation was that Australia make a declaration under article 24 delaying implementation of the obligation to designate its NPM.<sup>225</sup> The NIA noted that an officials' working group with participation from all states and territories had been established by the Attorney-General and this group had met on several occasions in 2010 and 2011, and had also met with the SPT in 2011.<sup>226</sup> The Attorney-General had also written to all States and Territories seeking in-principle agreement to ratification with generally

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<sup>215</sup> Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 18 December 2002, 2375 UNTS 237 (entered into force 22 June 2006).

<sup>216</sup> See APT, *Implementation of the OPCAT in Federal and other Decentralised States*, March 2011: <<https://www.apr.ch/sites/default/files/publications/OPCAT%20and%20Federal%20States%20-%20Eng.pdf>>.

<sup>217</sup> It is also mirrored in article 28 of the *International Covenant on Economic, Social and Cultural Rights* [opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976)].

<sup>218</sup> See APT, *Implementation of the OPCAT in Federal and other Decentralised States*, 6-14.

<sup>219</sup> Ibid, 14-16 (APT gives the example of Swiss implementation, in which Cantonal objections were overcome in part by promises of federal funding).

<sup>220</sup> JSCOT Report 125, tabled June 2012: <<https://www.austlii.edu.au/au/other/jscot/reports/125/125.pdf>>.

<sup>221</sup> JSCOT Report 58, tabled March 2004: <<https://www.austlii.edu.au/au/other/jscot/reports/58/58.pdf>> 18-20 (evidence from witness Renee Leon).

<sup>222</sup> See further arguments from the Commonwealth Government at 29-34.

<sup>223</sup> Ibid, 20-21.

<sup>224</sup> JSCOT, [2009] ATNIF 10: <<https://www.austlii.edu.au/au/other/dfat/nia/2012/6.html>> [6].

<sup>225</sup> JSCOT Report 125, [6.33]-[6.37].

<sup>226</sup> Australian Treaty National Interest Analysis [2012] ATNIA 6, [44]

favourable responses: '[a]s regards ratification all States and Territories, apart from Western Australia, responded positively to the Attorney's letter.'<sup>227</sup> However, just as the WA Government's position had shifted between 2004 and 2011, the political landscape in 2017—when Australian eventually ratified the treaty—was different again.

118. The second JSCOT report cited Commonwealth Government evidence that for the cost of facilitating visits by the UN Subcommittee on Prevention of Torture (**SPT**) would be 'minimal'<sup>228</sup> and:

*...the cost of a National Preventive Mechanism in Australia will be the lowest if reliance is placed on use of existing bodies to undertake this role. Individual jurisdictions should bear their own costs because of their responsibility for the welfare of detainees. As significant changes are not expected to be necessary, the costs are expected to be modest.*<sup>229</sup>

119. In recommending ratification in 2012, the JSCOT report also highlighted potential financial *benefits* to jurisdictions, noting that other countries' prevention efforts had reduced the need for costly investigations and compensation settlements.<sup>230</sup> Subsequent inquiries such as the WA Coroner's inquest into Banksia Hill deaths in custody<sup>231</sup> and the NT Royal Commission have amply borne out predictions about the need for a preventative approach. However, seven years on, the Law Council understands that only the ACT and Tasmania have put in place the necessary legislation, appointments and funding for full implementation.<sup>232</sup> As of August 2024, The Tasmanian NPM (a sole inspector, Mr Richard Connock) has stated that the funding allocated to his office in 2024/2025 will make it impossible to carry out his statutory functions.<sup>233</sup> While various jurisdictions, including the Commonwealth in appointing the National NPM Coordinator, have made some progress towards implementation, the overall picture is that implementation has been sporadic, uneven and insufficient.
120. In addition to the NPM implementation issue, the first visit of the UN SPT to Australia as a State party in October 2022 was suspended when NSW—and, to some extent Queensland—Government officials refused to cooperate with the international inspectors, and the visit was formally terminated in February 2023.<sup>234</sup> This was an internationally embarrassing incident, which highlighted the failure of governments at all levels in Australia to cooperate to implement the treaty properly.
121. So, despite a finding by JSCOT that ratification of the OPCAT would be in the national interest in 2012, and a decision to proceed by Government in 2017, implementation (with the exception of the ACT) has been largely unsatisfactory. There needs to be a shared understanding that Australia's international obligations apply to those who have relevant jurisdiction and/or responsibility, even though it is

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<sup>227</sup> Ibid, [46].

<sup>228</sup> Ibid, [6.41].

<sup>229</sup> Ibid, [6.42].

<sup>230</sup> Ibid, [6.43]-[6.45].

<sup>231</sup> For an overview, see ek Bourke, 'Ex-youth justice boss recalls coercive control, frequent use of force at WA detention centre, inquest hears' *ABC News*, 7 August 2024: <<https://www.abc.net.au/news/2024-08-07/inquest-hears-coercive-control-claims-wa-department-of-justice/104195220>>.

<sup>232</sup> Evidence provided by AGD in informal meetings.

<sup>233</sup> See Parliament of Tasmania Hansard, 6 August 2024:

<[https://www.parliament.tas.gov.au/\\_data/assets/pdf\\_file/0028/83953/LC-Tuesday-6-August-2024.pdf](https://www.parliament.tas.gov.au/_data/assets/pdf_file/0028/83953/LC-Tuesday-6-August-2024.pdf)>, 30-32. The funding allocated is \$300,000, against an estimated need of \$2.8m.

<sup>234</sup> See UN OHCHR, *UN torture prevention body terminates visit to Australia...*, Media release, 20 February 2023: <<https://www.ohchr.org/en/press-releases/2023/02/un-torture-prevention-body-terminates-visit-australia-confirms-missions>>.

only the Commonwealth Government that actually ratifies. National implementation agreements, detailing funding and steps required for full compliance, should be made on this basis.

#### Recommendation

- **The OPCAT should be implemented fully as soon as possible, given its potential both to protect detainees'—including child detainees'—rights, and to reduce the need for costly inquiries and Royal Commissions into mistreatment.**

#### Reservation to CRC

122. As the Law Council has noted previously, Australia's reservation to article 37(c) of the Convention on the Rights of the Child (**CRC**), which requires children to be separated from adults in prison, unless it is in the child's best interests not to do so, is a barrier to full implementation of the treaty and should be withdrawn.<sup>235</sup> The UN Committee on the Rights of the Child has also recommended withdrawal of this reservation.<sup>236</sup>
123. The Law Society of WA has also adopted a policy position calling on the WA Government to 'legislate to ensure that children and adults are detained in separate facilities.'<sup>237</sup> Despite warnings and recommendations from the WA Office of the Inspector of Custodial Services,<sup>238</sup> multiple child deaths in WA prisons<sup>239</sup> confirm that placing children in adult facilities is unacceptable.
124. Recently, the National Children's Commissioner Anne Hollonds, in her major *Help Way Earlier!* Report, also recommended Australia withdraw its reservation to article 37(c).<sup>240</sup>

#### Recommendation

- **Australia must withdraw its reservation to article 37(c) of the CRC.**

<sup>235</sup> Law Council, *Australia's Draft Report to the Committee on the Convention on the Rights of the Child* (2017 Submission): <<https://lawcouncil.au/resources/submissions/australias-draft-report-to-the-committee-on-the-convention-on-the-rights-of-the-child>>[1]-[3]. See also Law Council, *Alternative Report to the UN Committee on the Rights of the Child* (November 2018) [1]-[3].

<sup>236</sup> Ibid.

<sup>237</sup> LSWA, *Briefing Paper: Issues Affecting Incarceration Rates of Aboriginal and Torres Strait Islander Children* (August 2020): <[https://lawsocietywa.asn.au/wp-content/uploads/2023/01/BriefingPapers\\_Issues\\_Incarceration\\_ATSI\\_Children-2.pdf](https://lawsocietywa.asn.au/wp-content/uploads/2023/01/BriefingPapers_Issues_Incarceration_ATSI_Children-2.pdf)>.

<sup>238</sup> See WA OICS, Report 148: Inspection of Banksia Hill Detention Centre and Unit 18 at Casuarina Prison.

<sup>239</sup> See AHRC, *Call for urgent child justice reforms following death of a teenager in WA youth detention centre* (Media release, 30 August 2024): <<https://humanrights.gov.au/about/news/media-releases/call-urgent-child-justice-reforms-following-death-teenager-wa-youth>>, see further Bourke, 'Cleveland Dodd inquest lengthy and shocking but loved ones wonder what the point of it all is', ABC News, 18 August 2024:

<<https://www.abc.net.au/news/2024-08-18/cleveland-dodd-inquest-shocking-but-is-there-any-point-to-it/104222820>> (the inquest, being conducted by the Coroner's Court of WA, is ongoing at the time of writing).

<sup>240</sup> National Children's Commissioner, *Help Way Earlier! How Australia can transform child justice to improve safety and wellbeing* (September 2024): <<https://humanrights.gov.au/our-work/childrens-rights/publications/help-way-earlier>>, Recommendation 18.

## E—The benefits and need for enforceable national minimum standards for youth justice consistent with our international obligations

125. The Law Council considers that the Commonwealth Government is well placed to take a leadership role and meaningful action to ensure compliance with international obligations related to youth justice and incarceration arising from human rights conventions, including the CRC and OPCAT. As noted in section C, we are concerned by the significant extent of non-compliance on youth justice which gives rise to an urgent need for enforceable national minimum standards consistent with Australia's international obligations. We encourage the development and enforcement of national minimum standards in relation to the following:

- the minimum age of criminal responsibility; and
- solitary confinement and other degrading treatment in detention.

126. In this regard, we support and endorse many of the national standards proposed by the Australasian Youth Justice Administrators (**AYJA**) in its revised 2023 Report on National Standards for Youth Justice in Australia.<sup>241</sup> This sets out aspirational standards of practice for child-centred youth justice services in Australia, which are the product of extensive jurisdictional consultations including comprehensive review exercises by two of AYJA's key advisory groups: the Aboriginal, Torres Strait Islander, and Māori Advisory Group (IAG); and the Australasian Detention Centre Management Advisory Group (DCM).

### Minimum age of criminal responsibility

127. As noted in Section C above, and in our previous work on this topic,<sup>242</sup> the Law Council considers that the minimum age of criminal responsibility should be increased to 14 years. This would bring Australia into line with international human rights standards and would be consistent with the medical consensus on child brain development.<sup>243</sup> We reiterate our previous recommendations and guiding principles relating to the minimum age of criminal responsibility, including *inter alia*:<sup>244</sup>

- In all responses to children under the minimum age of criminal responsibility, the best interests of the child should be a primary consideration.
- All levels of government should provide long-term, stable investment in early intervention, diversionary, rehabilitative, and therapeutic programs and services for children under the minimum age of criminal responsibility.
- Children under the minimum age of criminal responsibility should not be primarily dealt with by police.
- Children under the minimum age of criminal responsibility should primarily be engaged with on a voluntary basis.

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<sup>241</sup> Australasian Youth Justice Administrators (AYJA), National Standards for Youth Justice in Australia 2023 ([online](#), 2023).

<sup>242</sup> Law Council of Australia, Minimum Age of Criminal Responsibility: Policy Statement ([online](#), 2019); Law Council of Australia, Responses to Children under the Minimum Age of Criminal Responsibility: Position Paper ([online](#), 25 June 2022).

<sup>243</sup> n 21, 2.

<sup>244</sup> n 26, Position Paper, 5-6.

- Responses to children under the minimum age of criminal responsibility should avoid an over-reliance on child protection frameworks. In particular, the principle of keeping First Nations children safe within their families, communities and kinship systems should be observed.
  - Institutions, services and programs responding to children under the minimum age of criminal responsibility must avoid, at all costs, effectively resembling the juvenile criminal justice system.
  - Responses to children under the minimum age of criminal responsibility should accord with Australia's international obligations and international standards with respect to children.
128. In addition, given the over-representation of First Nations children in custody in the 10–13 year age bracket, raising the minimum age of criminal responsibility in the states and territories is a direct and tangible means to reduce the rate of First Nations youth incarceration (both generally and relatively). First Nations children for the most part do not commit Commonwealth offences but federal leadership on this issue is important.
129. The Law Council recognises this would mean that children aged 10, 11, 12 and 13 years old would no longer be charged with a criminal offence in Australia. There have accordingly been calls from governments for guidance from stakeholders on what should replace the current criminal justice response to these children.
130. In response to these calls, as an Addendum to its 2019 Policy Statement on the Minimum Age of Criminal Responsibility, the Law Council has developed a subsequent position paper on *Responses to Children under the Minimum Age of Criminal Responsibility (2022)*.<sup>245</sup> These are both **attached** to this submission.

#### Recommendation

- **The Law Council reiterates its recommendation that the minimum age of criminal responsibility be raised to 14 years old at the federal level and across all Australian states and territories without exception.**

#### **Solitary confinement and other degrading treatment**

131. As outlined in Section C, the Law Council is extremely concerned about examples of serious non-compliance in Australia exemplified by the solitary confinement and degrading treatment of children in detention from as recently as this year and last year. We support Commonwealth action and leadership in respect of this issue, including consideration of the development of national minimum standards for youth detention facilities that include a prohibition on disciplinary measures in violation of article 37(a) of the CRC, and better defining and regulating the use of practices that may amount to solitary confinement. We also reiterate our support for the Commonwealth Government to take action in line with Australia's obligations under article 37(b) of the CRC to ensure that detention is used as a measure of last resort.
132. However, this does not excuse decision-making or inaction by state and territory governments which breaches Australia's obligations. From an international law perspective, failure by governmental authorities with relevant powers and responsibilities to take appropriate steps to implement treaty obligations may give

<sup>245</sup> See also the Law Council's policy and addendum position paper [here](#).

rise to international responsibility for Australia for failure to carry out treaty obligations: that is, federal, state and territory governments must work together to ensure Australia's compliance.

133. In this regard, we support and endorse the national standards proposed by AYJA under 'Domain 11: Safety and security' in relation to youth incarceration and detention practices, including<sup>246</sup>:

1. Custodial environments should be designed to be therapeutic, safe and secure.
2. Management of emergencies or critical incidents prioritises the protection of life.
3. The least intrusive developmentally appropriate options are deployed in responding to security and safety risks posed by children and young people in custody.
4. Staff engage respectfully at all times when using force, restraints, and separation/isolation, and separation/isolation is only used as a last resort and when absolutely necessary.
5. Force, restraints and separation are only used as a last resort and when they are absolutely necessary.
6. Decisions to initiate the use of force, restraints and separation are communicated to young people (where possible).
7. If force, restraints and separation are used, they are used in accordance with legislation and for the shortest possible period of time.
8. Young people are provided with a range of supports (including multi-disciplinary support, cultural support, access to complaints mechanisms, and restorative practice) if they feel that they were not treated fairly and respectfully.

134. In addition, we remain concerned that, notwithstanding the Commonwealth Government's ratification of OPCAT in 2017 and its entry into force in January 2018, several states have not yet designated a National Preventive Mechanism. NPMs undertake functions that are particularly relevant to youth justice outcomes, including to examine the treatment of, and conditions experienced by, incarcerated children and young people, and to identify processes that may lead to harm or torture. We support the AHRC's recommendation that "Governments resource NPMs sufficiently to allow them to effectively fulfil their OPCAT functions, including the outward-facing functions contained in the 'preventive package.'"<sup>247</sup> However, we understand that a key obstacle for a number of states to progressing this issue is a continued lack of an intergovernmental agreement on funding.<sup>248</sup>

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<sup>246</sup> n 104 AYJA, 18.

<sup>247</sup> Australian Human Rights Commission, Road Map to OPCAT Compliance, 17 October 2022, 12.

<sup>248</sup> Ibid AHRC citing the following references at footnote 26: The Hon. Mark Speakman. Budget Estimates 2021 Questions Taken on Notice Portfolio Committee No. 5 – Legal Affairs (26 March 2021), Question 14, 35; The Hon. Elise Archer. House of Assembly Estimates Committee B. (8 September 2021), 25; Jack Latimore. "Deaths in custody oversight missing as government deadline passes." The Sydney Morning Herald (20 January 2022); Parliament of Victoria Legislative Council Legal and Social Issues Committee. Inquiry into Victoria's criminal justice system Volume 2 (March 2022), 630; The Hon. Leanne Linnard. Queensland Parliament. Record of Proceedings (26 May 2022), 1479.

135. Domestically, oversight mechanisms, complemented by legislative mandates and sufficient funding, would ensure that the protections for children and young people detained in youth justice centres are adhered to. Implementing the OPCAT and CRC would provide a valuable opportunity to create a regulatory system that supports a therapeutic approach to youth justice and would enable organisations involved in detention management and oversight to share best practices in managing the children and young people in their care.
136. We also note with concern the related decision of the UN Subcommittee on the Prevention of Torture to suspend its visit to Australia in 2022, following NSW (and Queensland) resistance to facilitating the Subcommittee's access to places of detention.<sup>249</sup> We would support Commonwealth commitment to an appropriate share of funding to ensure that states move forward on implementing the OPCAT without further delay, including to avoid, among other things, another UN Subcommittee inspection being suspended.

### Recommendations

- The Commonwealth Government should take the lead in implementing Australia's commitments under the OPCAT by fostering and contributing to an intergovernmental agreement on funding with states and territories in relation to a National Preventive Mechanism.

## F—Justice consistent with our international obligations

### Third Optional Protocol to the CRC

137. Avenues for justice and effective remedies for children in Australia are limited, as set out in the Law Council's recent submission to the UN Committee on the Rights of the Child in respect of its planned General Comment 27.<sup>250</sup>
138. It is recommended that Australia ratify the third Optional Protocol to the CRC.<sup>251</sup> Ratification of this instrument would indicate Australia's acceptance of a procedure permitting the submission to the Committee on the Rights of the Child of individual communications by children under Australia's jurisdiction or control who claim that they are victims of a violation (or violations) of the rights guaranteed to them under the CRC.
139. Although technically Australian children may lodge communications with some of the other UN human rights treaty bodies under similar procedures (this appears to be the principal basis for the Commonwealth Government's objection to ratification),<sup>252</sup>

<sup>249</sup> OHCHR, 'UN torture prevention body suspends visit to Australia citing lack of co-operation' ([online](#), 23 October 2022).

<sup>250</sup> Law Council, *General Comment No 27 on Children's Rights to Access to Justice and Effective Remedies* (Submission, September 2024): <<https://lawcouncil.au/resources/submissions/general-comment-no--27-on-children-s-rights-to-access-to-justice-and-effective-remedies>>.

<sup>251</sup> *Optional Protocol to the Convention on the Rights of the Child on a communications procedure*, opened for signature 19 December 2011, 2983 UNTS 135 (entered into force 14 April 2014).

<sup>252</sup> See Australian Government, *Combined fifth and sixth periodic reports submitted under article 44 of the Convention*, UN Doc CRC/C/AUS/5-6 (22 November 2018), available at: <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/united-nations-human-rights-reporting/treaty-body-reporting#convention-on-the-rights-of-the-child-crc>> [369].

a child-specific complaints avenue taking into account children's particular needs and vulnerabilities would be desirable.

140. Successive National Children's Commissioners have also recommended ratification of this Optional Protocol since 2013.<sup>253</sup>

#### Recommendation

- **The Law Council reiterates its recommendation that Australia ratify the Optional Protocol to the Convention on the Rights of the Child on a communications procedure.**

## G—Related matters

141. There has been a great deal of research on youth justice reform in Australia over the years. Some examples are cited throughout this submission; more will no doubt be cited by other submissions to this inquiry.
142. However, in addition to the evidence presented directly to this inquiry, the Law Council would like to draw the Committee's attention to the approximately 150 submissions made in 2023 to the National Children's Commissioner's consultation *Transforming child justice to improve safety and wellbeing*<sup>254</sup>—including one from the Law Council.<sup>255</sup> Even if some of these submissions are not publicly available, their substance is reflected in the *Help Way Earlier!* Report, which should be a touchstone for this inquiry (and for reform in this area).
143. There are many specific recommendations in this report, which should be considered as a way forward for reform, including about: the role of specialist courts, therapeutic jurisprudence, First Nations sentencing courts, evidence-based diversionary programs for children, culturally appropriate bail support programs and housing, restorative justice conferencing.
144. An additional key point which the Law Council would emphasise is the unaddressed level of demand for specialised, targeted legal assistance services for children, including First Nations children. Dr Warren Mundy's recent independent review report concerning the National Legal Assistance Partnership made recommendations for significant investment in legal assistance funding by federal, state and territory governments. The Law Council is greatly concerned that, to date, the responses to those recommendations are clearly inadequate.

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<sup>253</sup> AHRC, *Information relating to Australia's joint fifth and sixth report under the Convention on the Rights of the Child, second report on the Optional Protocol on the sale of children, child prostitution and child pornography, and second report on the Optional Protocol on the involvement of children in armed conflict* (November 2018):

[https://humanrights.gov.au/sites/default/files/document/publication/AHRC\\_CRC\\_Report2018\\_0.pdf](https://humanrights.gov.au/sites/default/files/document/publication/AHRC_CRC_Report2018_0.pdf), [34].

<sup>254</sup> AHRC, *Transforming child justice to improve safety and wellbeing* (Consultation, 2023):

<https://humanrights.gov.au/our-work/childrens-rights/projects/youth-justice-and-child-wellbeing-reform-across-australia>.

<sup>255</sup> Law Council, *Youth justice and child wellbeing reform* (Submission, July 2023):

<https://lawcouncil.au/resources/submissions/youth-justice-and-child-wellbeing-reform>.

145. 'Tough on crime' approaches adopted to youth justice issues will only drive up this unmet demand even further. Legal assistance is crucial to ensuring a fair and just outcome for children and young people who come into contact with the criminal justice system. If Australia wishes to remain a society that is based on the rule of law—rather than law and order—it must prioritise legal assistance service funding alongside the broader reforms recommended above.