



Australia's Youth Justice and Incarceration System

Senate Legal and Constitutional Affairs References Committee
19 December 2025

[International Commission of Jurists \(AS\)](#)

PO Box Q1052,
Queen Victoria Building
NSW 1230 Australia

secretary@icjaustralia.org

About the International Commission of Jurists – Australian Section

The International Commission of Jurists Australian Section (ICJ(AS)) is a non-governmental, non-political section of the ICJ Geneva established in 1958.

Its members include judges, lawyers, law academics and law students. Its objectives are, by various means, to protect and sustain the rule of law and promote the observance of human rights and fundamental freedoms particularly in Australasia, the Pacific and South-East Asia.

The International Commission of Jurists, founded in Berlin in 1952, is an international non-governmental organisation with consultative status to the United Nations, UNESCO, the Council of Europe, and the Organisation of African Unity.

Its headquarters are in Geneva, with autonomous national sections and affiliates around the world.

The ICJ is active in promoting human rights and the rule of law at the international, regional, and national levels.

The ICJ's International Law and Protection Programme works to promote the application of international law to violations of a civil, political, social or economic nature. The focus is on the international obligations of states to respect human rights, protect victims, and hold state and non-state actors accountable for violations and abuses.

The Australian Section was founded in 1958 by the then Chief Justice of the High Court of Australia, Sir Owen Dixon, OM, GCMG

ICJ (AUSTRALIAN SECTION) EXECUTIVE COMMITTEE:

President Her Honour Judge Robyn Tupman District Court of NSW

Secretary-General Dr Elizabeth Biok

Treasurer Steve Mark AM

ICJ (AUSTRALIAN SECTION) STATE BRANCH PRESIDENTS:

New South Wales Dr Keith Suter

Queensland Carla Klease

Victoria The Hon Justice Lesley Taylor Supreme Court of Victoria

Western Australia Adjunct Professor Greg McIntyre SC

Australia's International Law obligations

1. Australia has ratified a number of international conventions relating to youth detention. These include the:

- ☐ Convention on the Rights of the Child (CRC),¹
 - ☐ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);²
 - ☐ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);³
 - ☐ International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);⁴
 - ☐ International Covenant on Civil and Political Rights (ICCPR);⁵
 - ☐ International Covenant on Economic, Social and Cultural Rights (ICESCR);⁶
 - ☐ Convention on the Rights of Persons with Disabilities;⁷
 - ☐ Declaration on the Rights of Indigenous Peoples.⁸
2. Article 37(b) of the CRC, in particular, 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.⁹
3. The Commonwealth has also adopted the Optional Protocol on the Convention Against Torture.¹⁰
4. The Commonwealth Government, having ratified these international treaties and adopted the OPCAT, has an obligation to ensure that the states and territories of the Commonwealth comply with the obligations in those treaties and the OPCAT, which the Commonwealth has agreed are fundamental to observation and protection of the human rights in Australia.
5. The many ways in which states and territories of the Commonwealth are failing to do that are set out in much detail in the submissions to this Committee of the Law Council of Australia in October 2024, February 2025 and are anticipated to be updated in its submission in December 2025.

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

² 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).

³ 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).

⁴ 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).

⁵ International Convention on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁶ International Convention on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

⁷ Opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

⁸ Declaration adopted by General Assembly 13 September 2007 (UN Doc HR/PUB/13/2).

⁹ Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

¹⁰ Opened for signature 18 December 2002, 2375 UNTS 237 (entered into force 22 June 2006).

6. The ICJ-AS is particularly concerned about the removal of distinctions between children and adults in the sentencing provisions for a range of offences and limitation of the opportunities for bail which have been introduced in New South Wales, the Northern Territory, Queensland and Victoria and the high level of youth detention and over-representation of First Nations Youth in detention in all states and the Northern Territory.¹¹
7. The introduction of section 22C into the *Bail Act 2013* (NSW) in May 2024 mandating the refusal of bail for young people accused of specified serious offences unless there is a “high degree of confidence the young person will not commit a serious indictable offence” departs from the principle of detention as a last resort in article 37(b) of the Convention on the Rights of the Child.
8. The *Bail and Youth Justice Legislation Amendment Act 2025* (NT) requirements that –
 - ☐ judicial decision makers do not grant bail unless they have a “high degree of confidence, when considered in isolation from the other requirements, that the person will not commit a prescribed offence or a serious violence offence or otherwise endanger the safety of the community”;¹²
 - ☐ apply a paramount consideration when granting bail being the risk to the safety of the community that would result from the accused person’s release on bail¹³ and
 - ☐ no longer consider when granting bail that the incarceration of children should be a last resort and should only occur for the shortest appropriate period of time.¹⁴

¹¹ Australian Human Rights Commission, *Help Way Earlier!* (Report, National Children’s Commissioner, September 2024), 21; 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).

¹² *Bail Act 1982* (NT), s 7A(2AB).

¹³ *Bail Act 1982* (NT), s 7A(2AA), see also s 24(1)(aa).

¹⁴ See *BYJ Amendment Act* s 7.

limit the power of Courts to consider the interests of the accused person, including cultural obligations, disability, the strength of the evidence against them and their ability to obtain legal advice¹⁵ and comprise a failure to consider relevant obligations under the Convention of the Rights of the Child.¹⁶

9. The *Youth Justice Legislation Amendment Act 2025* (NT) reintroducing banned restraints in youth detention, including ankle cuffs, waist belts and spit guards¹⁷ and youth detention policies of isolation for up to 72 hours and use of correctional services dogs¹⁸ fail to comply with the International Covenant on Civil and Political Rights and CRC obligations that all persons deprived of their liberty are treated with humanity and with respect for the inherent dignity of the human person.
10. The *Making Queensland Safer Act 2024* (Qld) removed the principle that children should be detained only as a last resort from the *Youth Justice Act 1992* (Qld)¹⁹ contrary to the CRC.
11. The *Bail Amendment Act 2025* (Vic) removed the principle of remand as a last resort for children. The *Justice Legislation Amendment (Community Safety) Act 2025* (Vic) also removes the requirement to consider prison as a last resort for underage offender and prescribes that certain offences committed by children be tried in adult courts.
12. In South Australia the *Statutes Amendment (Recidivist Young Offenders) Bill 2025*, *Criminal Law Consolidation (Street Gangs) Amendment Bill 2025* and *Summary Offences Knives and Other Weapons) Amendment Bill 2025* will reduce judicial discretion in sentencing and, reversing the onus in bail applications for youth who have breached bail, will result in a significant increase in youths held in detention, taking it beyond a measure of last resort, contrary to the CRC.
13. The ICJ-AS submits that the Commonwealth Government has obligations, in line with its international law commitments, to take concrete steps to reverse the trend of its constituent states and territories away from compliance with the international law obligations the Commonwealth has undertaken as a member of the international community.
14. The Commonwealth Government has the capacity to influence the way in which the states and territories deal with children coming into contact with the justice system by legislating, in exercise of the external affairs power of the *Constitution* (Cth), to set minimum standards for the treatment of children by state and territory justice systems which are consistent with Australia's treaty obligations.

¹⁵ *Bail Act 1982* (NT), s 24(1).

¹⁶ Art 37(b).

¹⁷ *Youth Justice Regulations 2006* (NT), Reg 70, as amended.

¹⁸ *Youth Justice Act 2005* (NT), ss 147C(5) & (6), also s 158F, as amended.

¹⁹ *Youth Justice Act 1992* (Qld), s 150, as amended.

15. Section 51(xxix) of the Australian Constitution gives the Commonwealth Parliament of Australia the right to legislate with respect to "external affairs" to pass legislation giving effect within Australia to its obligations under international treaties and conventions.²⁰
16. The time has come to exercise that legislative power in the wake of the failure of states and territories, other than Tasmania and the Australian Capital Territory, to act in accordance with the best practice guides and information provided by the Standing Council of Attorneys-General in relation to evidence-led approaches to child justice and Australia's international law obligations in relation to children.²¹
17. Given the current approaches of the states of New South Wales, Queensland, Victoria, South Australia and the Northern Territory towards child justice, which run counter to Australia's international human rights obligations towards children, the time is now right for the Commonwealth of Australia to enact national Human Rights legislation which reflects Australia's international human rights obligations.
18. This has been reinforced by the Final Report of the Disability Royal Commission which drew attention to the plight of children in detention with disabilities and requiring mental health treatment.²² It has long been known that young people within the justice system have higher rates of mental health disorders and cognitive and psychosocial disabilities than the general youth populations.²³
19. As an immediate response to the current situation regarding youth Justice in the states and territories the Commonwealth should be encouraging the states and territories by every means at its disposal to deal with youth justice in manner which is consistent with Australia's international law obligations.
20. It can do so by ensuring that its funding arrangements with the states and territories are directed to enhancing compliance with those obligations through support of the National Justice Reinvestment Program, providing incentives towards achieving Closing the Gap outcomes and expanding legal assistance, informed by the National Legal Needs

²⁰ *Koowarta v Bjelke-Petersen* [1982] HCA 27, (1982) 153 CLR 168; *Commonwealth v Tasmania* ("Tasmanian Dam case") [1983] HCA 21; (1983) 158 CLR 1; *Richardson v Forestry Commission of Tasmania* [1988] HCA 10, (1988) 164 CLR 261; *Queensland v Commonwealth (the Wet Tropics Case)* [1989] HCA 36, (1989) 167 CLR 232; *Victoria v Commonwealth (Industrial Relations Act case)* [1996] HCA 56, (1996) 187 CLR 416 at 487-488.

²¹ See Parliamentary Debates, Senate Hansard, Legal and Constitutional Affairs References Committee, Australia's youth justice and incarceration system, Monday, 3 February 2025, pp 89-92 (AGD evidence) and the SCAG Age of Criminal Responsibility Working Group Report, September 2023 [Age of Criminal Responsibility Working Group report: September 2023](#).

²² Disability Royal Commission, Final Report – Volume 8 – Criminal Justice and people with disability (see in particular Part 3 on youth detention).

²³ 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.

survey recommended by the Independent Review of the National Legal Assistance Partnership.

21. The Commonwealth should also be leading by example in relation to the operation of Commonwealth law by reviewing the operation of section 20C of the *Crimes Act 1914*, adopting the recommendation of the Australian Law Reform Commission for greater consistency in sentencing young federal offenders and using detention as a measure of last resort for the shortest appropriate period²⁴ and raising the minimum age of criminal responsibility for federal offences to 14 years.
22. The Australian Government should be playing an active role in defending and promoting the human rights of children impacted by the criminal justice system within its borders in accordance with the international law obligations it has adopted as a member of the United Nations and a leading example of a stable Western democracy in the world.

²⁴ Australian Law Reform Commission, *Same Crime, Same Time: Sentencing for Federal Offenders* (Report No 103, April 2006), recommendation 27-1(b).