

International Convention on the Elimination of All Forms of Racial Discrimination – Early Warning and Urgent Action submission

Introduction

1. We, as Aboriginal legal scholars and human rights law experts, including current and former expert members of the United Nations (“UN”) Permanent Forum on Indigenous Issues and the UN Expert Mechanism on the Rights of Indigenous Peoples, Associate Professor Hannah McGlade and Professor Megan Davis AC, respectfully request the Committee on the Elimination of Racial Discrimination (“Committee”) review the state of Australia’s youth justice laws, policy and state agency conduct (referred to collectively as “youth justice”) under the Committee’s Early Warning and Urgent Action procedure.
2. Our submission is endorsed by Professor Eddie Cubillo, the National Children’s Commissioner, the National Aboriginal and Torres Strait Islander Social Justice Commissioner, the Australian Human Rights Commission, National Aboriginal and Torres Strait Islander Legal Services, SNAICC – National Voice for our Children and the Human Rights Law Centre. More information about these supporters is at pages 52-53.
3. Criminal law in Australia’s federal constitutional system increasingly and disproportionately impacts and harms Aboriginal and Torres Strait Islander children. Recent state and territory laws and policies violate Australia’s international human rights law obligations and are having a deleterious effect on Aboriginal and Torres Strait Islander children.
4. We consider the status of youth justice in Australia to be dire and constitute, in many respects, a serious violation of the Convention on the Elimination of All Forms of Racial Discrimination (“Convention”),¹ as well as other UN treaties and instruments including United Nations standards and norms in juvenile justice. The situation requires your immediate attention.
5. Across Australia, there is a crisis of mass incarceration of Aboriginal and Torres Strait Islander children, who are put behind bars at rates that are grossly disproportionate to non-Indigenous children.² Australian governments are not on track to meet the nationally agreed target for reducing the incarceration rate of Aboriginal and Torres Strait Islander children by 2031.³

¹ Ratified by Australia in 1975.

² Expert Mechanism on the Rights of Indigenous Peoples, Rights of the indigenous child under the United Nations Declaration on the Rights of Indigenous Peoples: Study of the Expert Mechanism on the Rights of Indigenous Peoples (UN Doc A/HRC/48/74) (9 August 2021) 10 [48]; Australian Productivity Commission. (2025). Report on Government Services 2025, Part F, Section 17 (Youth justice services); Australian Institute of Health and Welfare, ‘First Nations young people’ in Youth detention population in Australia 2024 (December 2024) <<https://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2024/contents/first-nations-young-people/key-findings>>.

³ Australian Government, Productivity Commission, New Closing the Gap data shows focus on Priority Reforms by governments needed to see real improvement (Media Release, 13 March 2025) <<https://www.pc.gov.au/media-speeches/media-releases/2025/new-closing-the-gap-data-march-2025>>; Australian Government, Productivity Commission, Closing the Gap information repository (accessed 13 March 2025) <<https://www.pc.gov.au/closing-the-gap-data/dashboard>>.

6. Imprisoning children causes irreversible harm and even death. In 2023-24 alone, there were 162 recorded instances of self-harm and attempted suicide by Aboriginal and Torres Strait Islander children in custody across Australia.⁴ On an average day in November 2024, there were at least two self-harm attempts by children in Western Australian prisons, who are disproportionately non-Indigenous.⁵
7. Too many Aboriginal and Torres Strait Islander children are being subjected to extensive trauma, cruel, inhuman and degrading treatment, segregation from society, exclusion from their own community, exclusion from culture and loss of life because of the criminal legal system. No more can be lost or harmed.
8. There is a significant and persistent pattern of racial discrimination against Aboriginal and Torres Strait Islander children evidenced by harsh and punitive laws in all states and territories. This includes the proliferation of new laws, ongoing reports of Indigenous children being mistreated by the criminal legal system and persistent government inaction on recommendations made by independent entities and monitors for youth justice reform.
9. We are alarmed by escalation in this pattern in recent months, with the passage of unprecedented regressive and discriminatory legislation in the Northern Territory, Queensland and Victoria that will pipeline more Aboriginal and Torres Strait Islander children into the criminal legal system and prisons, including adult facilities. This dangerous trajectory is spreading and intensifying.⁶
10. The Commonwealth Government of Australia (“Commonwealth Government”) recognises that systemic racism has played a role in the overrepresentation of Aboriginal and Torres Strait Islander people in the justice system⁷ yet has failed to treat the escalating youth justice crisis with the urgency it requires. It has not responded to the National Children’s Commissioner’s landmark report on transforming the youth

⁴ Australian Productivity Commission. (2025). *Report on Government Services 2025, Part F, Section 17 (Youth justice services)*, table 17A.19.

⁵ Hennessy, A., Human Rights Watch, 'Western Australia's Indefensible Record on Children's Rights, (online, 11 February 2025) <<https://www.hrw.org/news/2025/02/12/western-australias-indefensible-record-childrens-rights>>.

⁶ For example, we note:

- The Queensland Government has appointed a panel to identify opportunities to expand its recently enacted laws that apply adult-length penalties to children, so that adult-length penalties apply to even more offences: Minister for Youth Justice and Victim Support and Minister for Corrective Services, *Making Queensland Safer laws: Expert Legal Panel appointed* (Media Release, 12 February 2025) <<https://statements.qld.gov.au/statements/102005>>;
- As the Victorian Government passed what it called the 'toughest bail laws ever' (Kolovos, B., The Guardian. 'As Labor vows to introduce the "toughest bail laws ever", is Victoria truly in a "crime crisis"?' (12 March 2025) <<https://www.theguardian.com/australia-news/2025/mar/12/bail-laws-victoria-jacinta-allan>>), it committed to introducing further regressive bail changes in mid-2025: Premier of Victoria, *State Gears Up For Tougher Bail – Starting Now* (Media Release, 18 March 2025) <<https://www.premier.vic.gov.au/state-gears-tougher-bail-starting-now>>;
- the South Australian Government has announced plans to make it harder for young people to obtain bail and to make penalties for young people more punitive: Government of South Australia, *New Young Offender Plan to tackle youth crime* (Media Release, 6 March 2025) <<https://www.premier.sa.gov.au/media-releases/news-items/new-young-offender-plan-to-tackle-youth-crime>>;
- the Western Australian Government has proposed changes to youth bail laws that would see young people charged with violent offences brought to trial within 28 days: Torre, G., National Indigenous Times, 'ALS slams WA government's "tawdry political move to garner votes" with youth bail changes' (10 January 2025) <<https://nit.com.au/10-01-2025/15707/aboriginal-legal-service-slams-wa-governments-tawdry-political-move-to-garner-votes-with-youth-bail-changes>>; and
- mainstream news outlets have published calls for Queensland's human rights incompatible laws that apply adult-length penalties to children to be replicated: Credlin, P., 'National "adult crime, adult time" laws needed to stop young crims' (23 March 2025), <<https://www.dailytelegraph.com.au/news/opinion/peta-credlin-national-adult-crime-adult-time-laws-needed-to-stop-young-crims/news-story/195abb2692f5a819f47d759363eb8f58>>.

⁷ Australian Government. (2025). *Commonwealth Closing the Gap 2024 Annual Report and 2025 Implementation Plan*, 62.

justice system,⁸ tabled in the Commonwealth Parliament in August 2024. The Commonwealth Government has also extended a parliamentary inquiry into the youth justice and incarceration system such that the inquiry cannot be completed before the federal election.⁹ The future of the inquiry is therefore uncertain.

11. We respectfully request the Committee issue a decision finding that the Commonwealth Government is in breach of the Convention and urging the Commonwealth Government to take immediate and proactive steps to protect and promote the rights of Aboriginal and Torres Strait Islander children and prevent further harm. These steps should include:
 - a. full and prompt response to the National Children’s Commissioner’s report;
 - b. ratification of the Optional Protocol to the Convention on the Rights of the Child;¹⁰
 - c. withdrawal of the reservation to article 37(c) of the Convention on the Rights of the Child, which requires that children not be detained with adults; and
 - d. full implementation of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (“OPCAT”), in particular by the Commonwealth Government ensuring robust National Preventive Mechanisms are operating in every state and territory.¹¹
12. Noting that the Commonwealth Government’s periodic report to the Committee is well overdue,¹² we also take this opportunity to request the Committee call for full compliance with the reporting process as a matter of urgency.

Overview of submission

13. The submission begins by outlining the crisis of mass incarceration of Aboriginal and Torres Strait Islander children in Australia and the role of government in maintaining and exacerbating this crisis (paragraphs 18 to 48).
14. The state of youth justice in Australia is incompatible with the Convention. It is also incompatible with Australia’s other international human rights law obligations. The extent of incompatibility with international law, including the Convention on the Rights of the Child, illustrates the gravity of the violations of the Convention. An overview of key aspects of the international human rights framework is provided at paragraphs 49 to 64.
15. The submission addresses four of the indicators for Early Warning and Urgent Action procedures:

⁸ Australian Human Rights Commission. (2024). *"Help way earlier!" How Australia can transform child justice to improve safety and wellbeing.*

⁹ Parliament of Australia, *Australia’s youth justice and incarceration system* (accessed 27 January 2025) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Incarceration47>.

¹⁰ Australia ratified the Convention on the Rights of the Child in 1990.

¹¹ Ratified by Australia in 2017.

¹² Australia’s last report was submitted on 2 February 2016. Under article 9 of the Convention, States Parties are required to report at least every two years.

- a. presence of a significant and persistent pattern of racial discrimination (paragraphs 65 to 201);
 - b. adoption of new discriminatory legislation (paragraphs 202 to 204);
 - c. segregation policies and exclusion from culture (paragraphs 205 to 211); and
 - d. lack of an adequate legislative framework prohibiting all forms of racial discrimination, and lack of effective mechanisms (paragraphs 212 to 235).
16. Our submission uses the terms ‘Aboriginal and Torres Strait Islander’, ‘First Nations’ and ‘Indigenous’ interchangeably.
 17. An index is on the last page of this submission.

Mass incarceration of Indigenous children and role of government

18. The entirety of this submission should be read in the context of the mass incarceration of Aboriginal and Torres Strait Islander children in Australia. Government inaction on this mass incarceration, laws and policies that actively contribute to mass incarceration and issues with the treatment of children by the criminal legal system all disproportionately impact Aboriginal and Torres Strait Islander children.
19. While the states and territories have primary constitutional responsibility for criminal law, the Commonwealth Government has primary responsibility for Indigenous peoples under the races power, as well as primary responsibility for international law and the implementation of international human rights law under the external affairs power.¹³

Mass incarceration

20. Aboriginal and Torres Strait Islander children have for too long been drastically overrepresented in the criminal legal system in Australia. The number and rate of Indigenous children aged 10 to 17 in detention on an average day has been increasing since 2020.¹⁴ Examining the rates at which Indigenous children were incarcerated across Australian jurisdictions in 2023–2024 paints an increasingly grim picture.¹⁵ Although around 6.5% of young people aged 10–17 in Australia are Aboriginal or Torres Strait Islander,¹⁶ almost *two thirds* (65%) of the young people aged 10–17 in detention on an average day in 2023–24 were Indigenous.¹⁷ Indigenous children aged 10 to 17 were almost 27 times more likely than their non-Indigenous counterparts to be in detention on an average day nationwide in 2023–2024,¹⁸ while Indigenous children aged 10 to 13 were almost 46 times more likely than their non-Indigenous counterparts to be in detention.¹⁹

¹³ Constitution of the Commonwealth of Australia, ss 51(xxvi) and (xxix).

¹⁴ Australian Productivity Commission. (2025). *Report on Government Services 2025, Part F, Section 17 (Youth justice services)*. Table 17A.5.

¹⁵ Australian Productivity Commission. (2025). *Report on Government Services 2025, Part F, Section 17 (Youth justice services)*; see also Australian Institute of Health and Welfare, ‘First Nations young people’ in *Youth detention population in Australia 2024* (December 2024) <<https://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2024/contents/first-nations-young-people/key-findings>>.

¹⁶ *Ibid* (Australian Productivity Commission), table 17A.28.

¹⁷ *Ibid*, table 17A.5.

¹⁸ *Ibid*.

¹⁹ *Ibid*, table 17A.9.

21. Over 2023-2024, the Northern Territory incarcerated Indigenous children at the highest average daily rates: 48.4 Indigenous children out of 10,000 Indigenous children.²⁰ The Northern Territory also had the largest gap between Indigenous and non-Indigenous children: average daily incarceration rates for Indigenous children were 32 times the rate for non-Indigenous children.²¹ Queensland incarcerated the most Indigenous children: on an average day in 2023-2024 there were at least 210 Indigenous children in detention.²²
22. As noted in Change the Record and the Human Rights Law Centre's October 2024 submission to the Senate Inquiry into Australia's youth justice and incarceration system:²³

This is not to say that First Nations children 'are doing more crime' – a narrative often perpetuated in media and political circles, but rather that there are inherent injustices faced by First Nations children that increase the likelihood of their contact with the criminal legal system. Understanding the mass incarceration of First Nations children in the criminal legal system requires us to understand that 'offending behaviours lie at the end of a continuum of risk. This continuum includes exposure to intergenerational and current trauma within the historical context of genocide, and the ongoing issues of generational poverty, social disadvantage and discrimination.'²⁴

Royal Commission into Aboriginal Deaths in Custody

23. In 1991, the Royal Commission into Aboriginal Deaths in Custody found that Aboriginal people were grossly overrepresented in police custody and prisons and made 339 recommendations to reduce the high numbers of Indigenous people in custody and end Aboriginal deaths in custody.²⁵ The Royal Commission into Aboriginal Deaths in Custody was 34 years ago, yet the recommendations are contravened, ignored or only partially implemented.²⁶ The number of First Nations people in custody continues to rise. First Nations deaths in custody reached a record high in 2022-23.²⁷ Disturbingly, Aboriginal children count among the victims.
24. The prevention of Indigenous deaths in custody, including deaths of Indigenous children, cannot occur without addressing the mass incarceration of Aboriginal and Torres Strait Islander children across Australia.

²⁰ Ibid, table 17A.5.

²¹ Ibid.

²² Ibid.

²³ Change the Record and Human Rights Law Centre. (2024). *Ending Youth Incarceration: Submission to the Senate Legal and Constitutional Affairs Committee on Australia's youth justice and incarceration system*.

²⁴ Milroy, H., Watson M., Kashyap, S., and Dudgeon P, First Nations peoples and the law (2021) 50 Aust Bar Rev, 510.

²⁵ Royal Commission into Aboriginal Deaths in Custody. (1991). *National report* (Vol. 1).

²⁶ McGlade, H. Sydney Morning Herald. 'What can we do to stop Indigenous deaths in custody (7 April 2021) <<https://www.smh.com.au/national/what-we-can-do-to-stop-indigenous-deaths-in-custody-20210405-p57gnq.html>>.

²⁷ Australian National Preventative Mechanism. (2024). *Submission to the Committee against Torture: Convention against Torture follow-up procedure: sixth periodic review of Australia*, 10.

Government inaction

25. Australian governments have demonstrated a lack of genuine commitment to address the mass incarceration of Aboriginal and Torres Strait Islander children.
26. Throughout this submission we refer to various reports and recommendations that governments across Australia have not actioned. The purpose of the current section is to highlight key formal commitments that Australian governments have made to closing the gap between outcomes for Indigenous and non-Indigenous people in Australia, as well as to highlight two current avenues for reform that the Commonwealth Government is ignoring or delaying. This is critical context for understanding the pervasiveness of the pattern of discrimination against Indigenous children addressed in the following section (**discriminatory action**, starting at paragraph 43).

Closing the Gap

27. In 2007, all Australian governments signed the Closing the Gap Strategy, a national framework to close key gaps between Indigenous and non-Indigenous people across seven impact areas, including life expectancy, child mortality rates and reading, writing and numeracy achievements. A decade later only two targets were on track and the life expectancy gap was again increasing.²⁸
28. Due to failure of the first agreement, a new agreement was fashioned. This new approach flipped the structure. Previously the Commonwealth Government was the 'leader' of the strategy.²⁹ The new approach was to redistribute core responsibility between Australian governments and the Coalition of Peaks, a representative body of more than 80 Aboriginal and Torres Strait Islander community-controlled peak organisations and members.³⁰ This significant change in leadership and Commonwealth ownership can be seen as an abdication of the Commonwealth Government's constitutional responsibility to be the primary partner in Indigenous affairs.
29. In 2020, all Australian governments, and the Coalition of Peaks³¹ signed the National Agreement on Closing the Gap 2019-2029 ("CTG").³² This Agreement sets out key reform areas, as well as 17 targets that impact life outcomes for Aboriginal and Torres Strait Islander people, intended to be addressed by 2031. Target 11 specifically aims to reduce the incarceration of Indigenous young people in the criminal legal system by at least 30% by 2031. The CTG also introduces a concept of 'shared decision making' to

²⁸ Department of the Prime Minister and Cabinet, *Closing the Gap: Prime Minister's Report 2017*, 6-7; ANTA, *About Closing the Gap* (March 2024) <<https://antar.org.au/issues/closing-the-gap/about-closing-the-gap>><https://antar.org.au/issues/closing-the-gap/about-closing-the-gap>.

²⁹ Consistent with its constitutional status and role in fiscal arrangements for the administration of Indigenous affairs. The Constitution of the Commonwealth of Australia, s 51(xxvi), gives the Commonwealth Parliament the power to make laws for peace, order and good government with respect to people of any race for whom it is deemed necessary to make special laws. We note that until 1967, this section expressly excluded Aboriginal people.

³⁰ See Coalition of Peaks, *'Who are we?'* (accessed 12 March 2025) <<https://www.coalitionofpeaks.org.au/>>.

³¹ A representative body of more than 80 Aboriginal and Torres Strait Islander community-controlled peak organisations and members.

³² Closing the Gap, *National Agreement on Closing the Gap* (accessed 24 December 2024) <<https://www.closingthegap.gov.au/national-agreement>>.

be coupled with the 'self-determination' of Aboriginal and Torres Islander people as vital to closing the gap.³³

30. This agreement, five years in, is also failing to elicit change. Over the last ten years, the number of Aboriginal and Torres Strait Islander people in prison has increased at a grossly disproportionate rate to non-Indigenous people in prison.³⁴ Target 11 is not on track to be met by 2031. Overall, only four of the 19 targets are on track for the 2031 deadline.³⁵ The targets and their purpose are frequently undermined by governments willing to, as the Productivity Commission describes, put 'the truck in reverse'.³⁶ This demonstrates an ongoing failure of Australian governments to genuinely listen and support Indigenous communities to make decisions and implement evidence-based, community-led solutions to close the gap.
31. In November 2024, newly appointed federal, state, and territory Indigenous Affairs Ministers joined the Coalition of Peaks members for a Joint Council CTG meeting in Boorloo (Perth).³⁷ The meeting appeared intended as a reminder of state and territory governments' commitment to CTG targets and the partnership of Commonwealth and states to work together to achieve this, in particular through the Justice Policy Partnership. The meeting followed the election of new governments in the Northern Territory and Queensland – governments elected on new and grossly draconian youth justice policies outlined later in the submission, which contradict the CTG targets. The meeting did not produce any tangible outcomes concerning these regressive laws, and demonstrated the Commonwealth Government's inertia in the face of escalating incarceration of Aboriginal and Torres Strait Islander children.³⁸

Recommendations of the National Children's Commissioner

32. As outlined in the introduction, in August 2024, the National Children's Commissioner released a landmark report on transforming the youth justice system.³⁹ The report raises the alarm about youth justice policy and makes 24 recommendations to Australian governments. The report also includes the voices of Aboriginal young people impacted by the criminal legal system. The report recommendations include nationally consistent, human rights compatible reform⁴⁰ and full adoption and implementation of the Convention on the Rights of the Child, the Optional Protocol to

³³ Closing the Gap, *National Agreement on Closing the Gap* (accessed 24 December 2024) <<https://www.closingthegap.gov.au/national-agreement>> Preamble, 2.

³⁴ Australian National Preventative Mechanism. (2024). *Submission to the Committee against Torture: Convention against Torture follow-up procedure: sixth periodic review of Australia*, 9. See also for young people: Australian Productivity Commission. (2025). *Report on Government Services 2025, Part F, Section 17 (Youth justice services)*, Table 17A.5.

³⁵ Australian Government, Productivity Commission, *New Closing the Gap data shows focus on Priority Reforms by governments needed to see real improvement* (Media Release, 13 March 2025) <<https://www.pc.gov.au/media-speeches/media-releases/2025/new-closing-the-gap-data-march-2025>>; Productivity Commission, *Closing the Gap Information Repository: Dashboard* (accessed 18 February 2025) <<https://www.pc.gov.au/closing-the-gap-data/dashboard>>.

³⁶ Productivity Commissioners Natalie Siegel-Brown and Selwyn Button, *Youth justice policy setting back Closing the Gap* (17 September 2024) <<https://www.pc.gov.au/media-speeches/articles/closing-the-gap-youth-justice>>.

³⁷ McGlade, H., National Indigenous Times, 'Justice "gap" remains wider than ever' (26 November 2024) <<https://nit.com.au/26-11-2024/15033/dr-mcglade-opinion-piece>>.

³⁸ Ibid; Joint Council on Closing the Gap, *Thirteenth meeting of the joint council on Closing the Gap – Communique*. <<https://www.closingthegap.gov.au/joint-council-closing-gap>>.

³⁹ Australian Human Rights Commission. (2024). *"Help way earlier!" How Australia can transform child justice to improve safety and wellbeing*.

⁴⁰ Ibid, recommendations 1-4.

the Convention on the Rights of a Child on a Communications Procedure and OPCAT.⁴¹

33. The Commonwealth Government has not issued a response to this critical report, despite its utmost relevance to Aboriginal and Torres Strait Islander children.

Senate inquiry into youth justice and incarceration

34. On 11 September 2024, the Commonwealth Senate referred to the Legal and Constitutional Affairs References Committee an inquiry into Australia's youth justice and incarceration system. The Senate Committee was asked to report on the inquiry by 26 November 2024.
35. The Commonwealth Parliament has extended the reporting date for the inquiry twice, first to 28 February 2025 and subsequently to 1 July 2025. As noted in the introduction, this means the inquiry will not be completed before the federal election, which must be held on or before 17 May 2025. This puts the continuation and terms of the inquiry in the hands of the next parliament, which could be controlled by a new government.
36. It is clear the future of the inquiry is uncertain and that the Senate Committee is facing constraints. The Senate Committee has produced an interim report with recommendations appealing to the Senate to permit the inquiry to continue.⁴² The interim report also recommends that after the election the Senate 'consider' whether to refer the Senate Committee a further inquiry relating to the Commonwealth Government's responsibilities on certain matters such as the disproportionate incarceration of First Nations children and responding to the National Children's Commissioner report.⁴³
37. To date, the Senate Committee has held only one day of hearings to obtain oral evidence, largely from national, representative and statutory bodies, despite receiving 223 stakeholder submissions including numerous detailed submissions from frontline Aboriginal and Torres Strait Islander organisations.

Culture of inaction

38. Our concerns about inaction on CTG, the National Children's Commissioner's report and the Senate inquiry are grounded in our experience of Australian governments failing to engage with reports and processes that relate to the rights of Aboriginal and Torres Strait Islander people.
39. The discriminatory criminal legal system that Aboriginal and Torres Strait Islander children are subjected to is not being appropriately addressed by any government. Every day that governments do not make progressive reforms, more Aboriginal and

⁴¹ Ibid, recommendations 18, 22, 24.

⁴² Senate of Australia Standing Committee on Legal and Constitutional Affairs. (2025). *Australia's youth justice and incarceration system*, recommendation 6.11.

⁴³ Ibid, recommendation 6.12.

Torres Strait Islander children are being harmed through incarceration and other interaction with the criminal legal system.

40. As per paragraph 23 above, the recommendations of the Royal Commission into Aboriginal Deaths in Custody in 1991 have not been fully implemented.
41. There are also many recent examples. At the Commonwealth level, despite Australia endorsing the UN Declaration on the Rights of Indigenous Peoples (“UNDRIP”) in 2009, the Commonwealth Government has failed to incorporate it into domestic law and no government response has been published in response to the Parliamentary Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs’ November 2023 report on the application of UNDRIP in Australia.⁴⁴ Similarly, no Commonwealth Government response was ever published following the Joint Standing Committee on Northern Australia’s October 2021 report into the destruction of sacred caves at Juukan Gorge.⁴⁵ At state level, in April 2024, the Queensland Parliament dissolved a Select Committee that had been tasked with considering youth justice reform.⁴⁶
42. In terms of international protections for the rights of Aboriginal and Torres Strait Islander people and the obligation to eliminate all forms of racial discrimination, we note that the Commonwealth Government’s 21st and 22nd periodic reports to the Committee are overdue. The Committee’s concluding observations on the 18th to 20th periodic reports raised significant concerns about the incarceration of Indigenous children.⁴⁷ We also note that the Committee has since raised concerns about youth detention and requested an update on the implementation of recommendations of the Royal Commission into the Protection and Detention of Children in the Northern Territory.⁴⁸ To our knowledge no response has been provided.

Discriminatory action

43. In addition to its inaction on addressing the harm the criminal legal system causes Aboriginal and Torres Strait Islander children, Australian governments are actively introducing dangerous laws that accelerate the crisis of mass incarceration.⁴⁹
44. These actions are in direct contravention of international human rights law, state and territory human rights legislation (where it exists, in the Australian Capital Territory, Victoria and Queensland), Royal Commission and Commission of Inquiry recommendations. They also directly contradict Australian governments’ CTG targets:

⁴⁴ Parliament of Australia, *Inquiry into UN Declaration on the Rights of Indigenous Peoples* (accessed 21 March 2025) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Aboriginal_and_Torres_Strait_Islander_Affairs/UNDRIP>.

⁴⁵ Parliament of Australia, *A Way Forward: Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara Region of Western Australia* (accessed 21 March 2025) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Northern_Australia_46P/CavesatJuukanGorge/Report>.

⁴⁶ Queensland Parliament, *Youth Justice Reform Select Committee: youth justice reform in Queensland* (accessed 17 January 2025) <<https://www.parliament.qld.gov.au/Work-of-Committees/Committees/Committee-Details?cid=232&id=4295#:~:text=ABOUT%20THE%20INQUIRY,support%20for%20victims%20of%20crime>>.

⁴⁷ Committee on the Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Australia* (UN Doc CERD/C/AUS/CO/18-20) (26 December 2017).

⁴⁸ Committee on the Elimination of Racial Discrimination, Letter from Chair to Permanent Representative of Australia to the United Nations Office (UN Doc CERD/98th session/FU/MJA/ks) (10 May 2019).

⁴⁹ Human Rights Watch, *World Report 2025: Australia* (accessed 29 January 2025) <<https://www.hrw.org/world-report/2025/country-chapters/australia>>.

the introduction of these laws and policies flagrantly violates the commitment of all governments to reducing the incarceration of Indigenous children. Governments' commitment to change the way the criminal legal system treats Aboriginal and Torres Strait Islander people is at odds with their actions. They commit to 'closing the gap' at the same time as promising and introducing 'tough on crime' laws which are ineffective and involve serious breaches of human rights.

45. At the time of writing, all but one jurisdiction in Australia has a minimum age of criminal responsibility of 10 years old.⁵⁰ While First Nations-led campaigning has been undertaken to see the minimum age of criminal responsibility increased across the country,⁵¹ governments across Australia remain reluctant to implement this reform and invest in alternative, self-determined supports for children and young people.
46. As noted recently by the Law Council of Australia in its submission to the Senate inquiry into Australia's youth justice and incarceration system, there are significant criminal justice laws and policies across Australia resulting in outcomes that are incompatible with its international human rights obligations.⁵² In addition to the very low minimum age of criminal responsibility across Australia these include:
 - a. presumptions against bail for children and young people;
 - b. extension of serious offences to children, attracting penalties of extended terms of imprisonment;
 - c. detention of children in adult facilities, including watch houses and maximum-security facilities; and
 - d. solitary confinement of children for 20 or more hours per day.
47. In recent months alone:
 - a. Queensland introduced new laws that are incompatible with international human rights obligations, rights under the *Human Rights Act 2019* (Qld) and the CTG, for example by subjecting children to adult penalties, removing the principle of detention as a last resort as a consideration in arrest, bail and sentencing of children and, remarkably, going as far as prohibiting courts from considering the principle when sentencing children;⁵³
 - b. Victoria passed what it describes as 'the toughest bail laws in Australia', which remove the principle of remand as a last resort for children, expand the range of offences subject to reverse onus bail tests that presume that bail will be denied and revive bail offences which have had a disproportionate impact on Aboriginal people, women, children and people experiencing disadvantage;⁵⁴

⁵⁰ The Australian Capital Territory passed legislation in 2023 that raised the minimum age of criminal responsibility to 12. The Victorian Government passed legislation in 2024 that will raise the minimum age of criminal responsibility to 12. However, the provision that raises the age has not yet commenced and was accompanied by new powers to police and detain children.

⁵¹ Change the Record, *Our campaigns* (accessed 27 January 2024) <<https://www.changetherecord.org.au>>.

⁵² Law Council of Australia. (2024). *Australia's youth justice and incarceration system*, 6.

⁵³ *Making Queensland Safer Act 2024* (Qld).

⁵⁴ *Bail Amendment Act 2025* (Vic); Premier of Victoria, *Toughest Bail Laws in Australia Pass Parliament* (Media Release, 21 March 2025) <<https://www.premier.vic.gov.au/toughest-bail-laws-australia-pass-parliament>>; Premier of Victoria, *Tough Bail Laws to Keep Victorians Safe* (Media Release, 12 March 2025) <<https://www.premier.vic.gov.au/tough-bail-laws-keep-victorians-safe>>; Human Rights Law Centre, Victorian Aboriginal Legal Service, Federation of Community Legal Centre and

- c. The Victorian Government announced that more punitive bail changes will be progressed in mid-2025, which will ‘result in a further increase in the number of adult and youth offenders on remand’;⁵⁵
 - d. South Australia announced plans to make bail and sentencing laws for children more punitive;⁵⁶
 - e. the Northern Territory passed laws to reduce the minimum age of criminal responsibility from 12 years to 10 years, in contravention of the Convention of the Rights of the Child and the CTG;
 - f. the Northern Territory re-introduced the use of spit hoods, against the Royal Commission into the Protection and Detention of Children in the Northern Territory’s recommendations in 2017;⁵⁷
 - g. the Northern Territory announced that children detained in Mparntwe (Alice Springs) were being permanently moved to a prison in Garramilla (Darwin), approximately 1,500 kilometers away from their communities;⁵⁸
 - h. the Premier of New South Wales boasted of the alarming increases in the number of children in custody as a consequence of the new youth bails laws passed by his government despite the New South Wales Bureau of Crime Statistics and Research showing the number of young Aboriginal people in custody increased almost 22 per cent in the past year;⁵⁹ and
 - i. Western Australia continues to detain Aboriginal children in an adult men’s maximum-security prison (‘Unit 18’) despite the recent deaths of two children who self-harmed.⁶⁰
48. We provide more detail about the significant and persistent pattern of racial discrimination in youth justice from paragraph 76.

Flat Out, *Allan Government rams through dangerous and discriminatory bail laws, repeating mistakes of the past* (Media Release, 21 March 2025) <<https://www.hrlc.org.au/news/allan-government-rams-through-dangerous-bail-laws>>; Victorian Aboriginal Legal Service, *Granting Bail Saves Lives: Poccum’s Law is the only way forward* (Media Release, 12 March 2025) <<https://www.vals.org.au/granting-bail-saves-lives-poccurms-law-is-the-only-way-forward/>>; Human Rights Law Centre, *Granting bail save lives, but Allan Government’s proposed bail laws repeat past failures* (Media Release, 12 March 2025) <<https://www.hrlc.org.au/news/bail-saves-lives>>.

⁵⁵ Premier of Victoria, *State Gears Up For Tougher Bail – Starting Now* (Media Release, 18 March 2025) <<https://www.premier.vic.gov.au/state-gears-tougher-bail-starting-now>>.

⁵⁶ Government of South Australia, *New Young Offender Plan to tackle youth crime* (Media Release, 6 March 2025) <<https://www.premier.sa.gov.au/media-releases/news-items/new-young-offender-plan-to-tackle-youth-crime>>; Government of South Australia. (2025). *Young Offender Plan 2025*.

⁵⁷ Australian Associated Press, The Guardian, ‘Spit hoods to be used on Northern Territory children again as ban ends, police chief confirms’ (14 October 2024) <<https://www.theguardian.com/australia-news/2024/oct/14/northern-territory-spit-hood-ban-lifted-clp-ntwnfb>>

⁵⁸ Garrick, M., ABC News, ‘NT Police watch houses at capacity as prisoner numbers again hit record levels’ (7 January 2025) <<https://www.abc.net.au/news/2025-01-07/nt-police-watch-houses-full-as-prisoner-numbers-hit-new-record/104789666>>; Allison, C., ABC News, ‘Alice Springs Youth to be relocated to Darwin as part of NT Government’s “emergency” prison plans’ (21 October 2024) <<https://www.abc.net.au/news/2024-10-21/nt-government-reveals-emergency-plan-for-overcrowded-prisons/104496702>>.

⁵⁹ Brennan, D., National Indigenous Times, ‘Minns defends increase in Aboriginal child prisoners in NSW’ (26 February 2025) <<https://nit.com.au/26-02-2025/16504/minns-defends-increase-in-aboriginal-child-prisoners-in-nsw>>.

⁶⁰ Office of the Inspector of Custodial Services. (2024). *Review of youth custody: follow-up to 2023 inspection (part two)*, iii; Hennessy, A., Human Rights Watch, ‘Western Australia’s Indefensible Record on Children’s Rights’ (11 February 2025) <<https://www.hrw.org/news/2025/02/12/western-australias-indefensible-record-childrens-rights>>.

International human rights legal framework

The Convention on the Elimination of Racial Discrimination

49. The pattern of racial discrimination outlined in this submission relates directly to the articles of the Convention which require:
- a. States Parties to engage in no act or practice of racial discrimination, and to ensure that all public authorities and public institutions, national and local, act in conformity with this obligation (article 2(1)(a));
 - b. laws and regulations that have the effect of creating or perpetuating racial discrimination to be rescinded or nullified (article 2(1)(c));
 - c. prevention, prohibition and eradication of racial segregation (article 3);
 - d. States Parties to prohibit and bring racial discrimination to an end, by all appropriate means (article 4(b)); and
 - e. States Parties to undertake to prohibit and eliminate racial discrimination in all its forms and guarantee the enjoyment of rights by everyone, without distinction as to race or colour (article 5).
50. This is because the pattern of racial discrimination results in predominantly First Nations children being arrested and imprisoned in harmful conditions. This means there are distinctions based on race and colour for countless human rights – for example, First Nations children are being deprived of life, liberty, security of person, culture, health, housing and education, and being subjected to torture, cruel, inhuman and degrading treatment to a far greater extent than non-Indigenous children.
51. The rights under that First Nations children do not enjoy as fully as other children include rights listed under article 5 of the Convention and additional rights including (but not limited to) rights under the below treaties and rules. While we note the Committee's jurisdiction relates to the Convention, we raise these additional rights to demonstrate the depth and seriousness of the pattern of discrimination to which Aboriginal and Torres Strait Islander children are being subjected. In addition, the rights are highly relevant to the discrimination and segregation that Australia is required to eliminate and eradicate under the Convention.

Other treaties and instruments

52. As the effect of all laws and policies raised in this submission is the imprisonment of Aboriginal and Torres Strait Islander children and their cruel treatment behind bars, many of the laws and policies engage similar human rights. Given this, and the number of discriminatory laws and policies covered in this submission, to assist the Committee we summarise key rights and protections below rather than listing all applicable rights and protections under the heading for the relevant law or policy.
53. This is a non-exhaustive summary of rights relevant to Aboriginal and Torres Strait Islander children in the criminal legal system. We refer to the detailed overview of Indigenous children's rights in the 2021 study of the Expert Mechanism on the Rights

of Indigenous Peoples, 'Rights of the indigenous child under the United Nations Declaration on the Rights of Indigenous Peoples'.⁶¹

Treaties

54. The Convention on the Rights of the Child requires:
- a. the best interests of the child to be the primary consideration in all actions concerning children (article 3);
 - b. States Parties to recognise that every child has the inherent right to life and to ensure to the maximum extent possible the survival and development of the child (article 6);
 - c. protection from all forms of violence, abuse or maltreatment (article 19);
 - d. protection from torture or other cruel, inhuman or degrading treatment or punishment (article 37(a));
 - e. the detention of children to only be used as a last resort and for the shortest appropriate period of time (article 37(b));
 - f. children deprived of liberty to be treated with humanity and respect for the inherent dignity of the human person (article 37(c));
 - g. children deprived of liberty to be treated in a manner which takes into account the needs of persons of their age, and to be separated from adults unless it is not in their best interests (article 37(c));
 - h. children within the criminal legal system to be treated in a manner consistent with the promotion of the child's sense of dignity and self worth (article 40); and
 - i. the enjoyment of rights without discrimination (article 2).
55. We also note that the preamble to the Convention on the Rights of the Child recognises that children require 'special safeguards and care' due to their 'physical and mental immaturity'.
56. Rights under the International Covenant on Civil and Political Rights⁶² that are engaged include:
- a. the right to life (article 6);
 - b. protection against torture and cruel, inhuman or degrading treatment (article 7);
 - c. the right to liberty and security of person, including the general rule that persons awaiting trial should not be detained in custody (article 9);
 - d. treatment with humanity and respect for the inherent dignity of the human person when deprived of liberty (article 10(a));
 - e. the right of accused children to be separated from adults (article 10(b));
 - f. the right to be presumed innocent until proved guilty according to law (article 14);
 - g. consideration of age and rehabilitation in the determination of criminal charges against children (article 14);

⁶¹ Expert Mechanism on the Rights of Indigenous Peoples, [Rights of the indigenous child under the United Nations Declaration on the Rights of Indigenous Peoples: Study of the Expert Mechanism on the Rights of Indigenous Peoples](#) (UN Doc A/HRC/48/74) (9 August 2021).

⁶² Ratified by Australia in 1980, with various reservations, including article 10(2)(b) regarding the obligation to separate children from adults.

- h. the protection of family (article 23);
 - i. the right for every child to have special protection by the State due to being a child, without discrimination as to race (article 24); and
 - j. the right to equality before the law without discrimination (article 26).
57. The International Convention on Economic, Social and Cultural Rights⁶³ protects various rights, without discrimination (article 2), that are engaged by the incarceration of children given the conditions of police cells and prisons and difficulties accessing programs and supports. These include the right to the highest attainable standard of physical and mental health (article 12), the right to education (article 13), the right to take part in cultural life (article 15) and an adequate standard of living (article 11).
58. The Convention on the Rights of Persons with Disabilities⁶⁴ also protects rights that are engaged by the incarceration of children, as many have disabilities and complex needs. These rights include the right to non-discrimination (article 5), the rights of children with disabilities (article 7), the right to liberty and security (article 14), freedom from torture or cruel, inhuman or degrading treatment or punishment (article 15), the right to education (article 24) and the right to an adequate standard of living and social protection (article 28).
59. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁶⁵ obliges States Parties to prevent acts of cruel, inhuman or degrading treatment or punishment by public officials (article 16). Yet, children in the criminal legal system are subjected to various cruel, inhuman and degrading practices as outlined throughout this submission.

Declarations and Rules

60. Rights under the United Nations Declaration on the Rights of Indigenous Peoples⁶⁶ that are engaged include the right of Indigenous peoples to:
- a. be free from any kind of discrimination in the exercise of their rights (article 2);
 - b. life, physical and mental integrity, liberty and security of person (article 7(1));
 - c. not be subjected to forcible removal of children (article 7(2));
 - d. improvement of economic and social conditions (article 21); and
 - e. enjoyment of the highest attainable standard of physical and mental health (article 24(2)).
61. Under the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“the Beijing Rules”)⁶⁷:
- a. the age of criminal responsibility should not be fixed at too low an age level, taking into account emotional, mental and intellectual maturity (rule 4);

⁶³ Ratified by Australia in 1975.

⁶⁴ Ratified by Australia in 2008.

⁶⁵ Ratified by Australia in 1985.

⁶⁶ Endorsed by Australia in 2009.

⁶⁷ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“Beijing Rules”), UN Doc A/RES/40/33.

- b. the two most important objectives of youth justice are the wellbeing of the child and that the criminal legal system’s reaction is proportionate (rule 5);
 - c. detention pending trial should only be used as a last resort, for the shortest possible period of time and separately to adults (rule 13); and
 - d. conditional release should be used to the greatest possible extent, and as early as possible (rule 28).
62. The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (“Havana Rules”)⁶⁸ provide that:
- a. detention before trial shall be avoided to the extent possible and limited to exceptional circumstances (rule 17);
 - b. young people deprived of liberty should have the facilities and services that meet all the requirements of health and human dignity (rule 31);
 - c. use of restraint and force should only be used in exceptional circumstances, where other options have been exhausted, only as explicitly authorised by law, for the shortest possible period of time and if they do not cause humiliation or degradation (rule 64); and
 - d. the use of solitary confinement, and any other disciplinary measure that constitutes cruel, inhuman or degrading treatment, is prohibited (rule 67).
63. Under the United Nations Standard Minimum Rules for the Treatment of Prisoners (“the Nelson Mandela Rules”).⁶⁹
- a. the use of solitary confinement on children is strictly prohibited (rule 45);
 - b. the use of restraints that are inherently degrading or painful are prohibited (rule 47.1); and
 - c. any other instruments of restraint should only be used as authorised by law and in extremely narrow and limited circumstances (rule 47.2).
64. The United Nations Standard Minimum Rules for Non-custodial Measures (“Tokyo Rules”) similarly provides that detention of people awaiting trial must be the last resort.⁷⁰

Racial discrimination

65. Contemporary racial discrimination recognises both institutionalised racism, such as institutionalised government policies, and indirect or systemic forms of racism.⁷¹ The Committee has confirmed that the Convention prohibits indirect discrimination on the basis of race in General Recommendation 14 (1993):⁷²

⁶⁸ United Nations Rules for the Protection of Juveniles Deprived of their Liberty (“Havana Rules”), UN Doc A/RES/45/113.

⁶⁹ United Nations Standard Minimum Rules for the Treatment of Prisoners (“Nelson Mandela Rules”), UN Doc A/RES/70/175.

⁷⁰ United Nations Standard Minimum Rules for Non-custodial Measures, UN Doc A/RES/45/110 [6.1- 6.3].

⁷¹ Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Implementation of the programme of action for the second decade to combat racism and racial discrimination, (UN Doc E/CN.4/1994/66) (2 February 1994), 4 [16-17].

⁷² Committee on the Elimination of all Forms of Racial Discrimination, General Recommendation XIV on article 1, paragraph 1, of the Convention, UN Doc A/48/18. Reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, Un Doc HRI/GEN/1/Rev.6

In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.

66. The UN has recognised the over-incarceration and mistreatment of Indigenous peoples in criminal legal systems as a form of contemporary racial discrimination.⁷³ Following his visit to Australia in 2016, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance raised concern about the overrepresentation of Indigenous children in Australia's detention systems and reported that the policing of Indigenous communities was 'too punitive and needs to change urgently'.⁷⁴ Similar concerns were raised in the Special Rapporteur's first visit to Australia in 2001.⁷⁵
67. The evidence is that Aboriginal and Torres Strait Islander people, including children, are disproportionately more likely to be:⁷⁶
- a. stopped, questioned, and searched by police;
 - b. arrested, rather than receive a caution or formal warning;
 - c. taken into custody once arrested, instead of being summonsed to appear in court; and
 - d. remanded in custody rather than granted bail.
68. There are inherent injustices faced by First Nations children that increase the likelihood of their contact with the criminal legal system. The mass incarceration of Indigenous children must be understood as a consequence of policies, practices and

⁷³ Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on his mission to Australia (UN Doc A/HRC/35/41/Add.2) (9 June 2017), 9 [43]; United Nations High Commissioner for Human Rights, Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers (UN Doc A/HRC/47/53) (1 June 2021), 4 [3].

⁷⁴ *Ibid*, Special Rapporteur Report, 12 [44], [47].

⁷⁵ Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Report by Mr. Maurice Glèlè-Ahanhanzo, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on his mission to Australia, (UN Doc E/CN.4/2002/24/Add.1) (26 February 2002), 36-9 [76-80].

⁷⁶ Australian Productivity Commission. (2025). Report on Government Services 2025, Part F, Section 17 (Youth justice services), table 17A.18; Australian Institute of Health and Welfare, 'First Nations young people in detention by legal status' in Youth detention population in Australia 2024 (December 2024) <<https://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2024/contents/first-nations-young-people/first-nations-young-people-in-detention-by-legal-s>>; Victorian Government. (2023). Aboriginal Affairs Report 2023, 133-137; The Racial Profiling Data Monitoring Project, Key Findings (based on available data) (accessed 18 February 2025) <<https://www.racialprofilingresearch.org/keyfindings>>; NSW Bureau of Crime Statistics and Research. (2024). The involvement of young people aged 10 to 13 years in the NSW criminal justice system; Yussuf, A., ABC News, 'First Nations and diverse communities disproportionately stopped and searched in NSW' (14 February 2025) <<https://www.abc.net.au/news/2025-02-14/first-nations-and-diverse-communities-disproportionately-stopped-and-searched-in-nsw-police/104642914>>; NSW Bureau of Crime Statistics and Research, Youth custody numbers in NSW up by almost a third since 2023 due to a rise in bail refusal (Media Release, 18 February 2025) <<https://bocsar.nsw.gov.au/media/2025/mr-custody-dec2024.html>>; Harris, L., ABC News, 'Former NSW Police officers say racist culture leading to higher Indigenous incarceration rates' (26 November 2024) <<https://www.abc.net.au/news/2024-11-26/former-nsw-police-officers-indigenous-racism-incarceration/104635852>>; Office of the Children's Commissioner Northern Territory. (2024). Our most vulnerable children bearing the consequences of a failed system: A thematic analysis of the needs of children aged 10 to 13 years held in Northern Territory youth detention in 2022/23, 20, 35; WA Today, 'Racism fear amid WA police report on driver fines' (6 February 2020) <<https://www.watoday.com.au/national/western-australia/racism-fear-amid-wa-police-report-on-driver-fines-20200206-p53ycf.html>>; Australian Law Reform Commission. (2017). Pathways to Justice - An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, 90 [3.2]; O'Brien, G., Racial Profiling, Surveillance and Over-Policing: The Over-Incarceration of Young First Nations Males in Australia (2021), Social Sciences 10 (2), 68.

laws which directly and indirectly discriminate against Indigenous people.⁷⁷ Indeed, the Commonwealth Government has even acknowledged ‘the role that systemic racism has played in driving the overrepresentation of First Nations people in the justice system’.⁷⁸

69. The UN Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“SPT”) reported in 2023 that it had ‘received frequent reports during its 2022 visit to Australia that over policing of Indigenous communities, profiling, discrimination and prejudice contributed to [their] disproportionate incarceration rates’.⁷⁹
70. The Australian Human Rights Commission has repeatedly acknowledged that there is structural racism against Indigenous peoples in Australia’s criminal legal system.⁸⁰

Consultations with First Nations and other negatively racialised communities identified the justice system as a sector where racism is especially present and requires urgent attention. This is particularly in relation to the systemic racism, racial profiling by law enforcement, overpolicing, harsher sentencing, over-incarceration, and deaths in custody experienced by First Nations communities.

In consultations with First Nations and other negatively racialised communities, including dedicated consultations with First Nations justice sector practitioners, participants advised the Commission that systemic discrimination is perpetuated in the criminal justice system through the often racialised nature of institutional practices, such as in the police and legal systems. This harms First Nations and other negatively racialised communities and leads to their disproportionate representation in the criminal justice system. Aboriginal and Torres Strait Islander communities are at heightened risk of facing serious harms in the justice system, as evidenced by significant rates of overincarceration and deaths in custody.

71. These findings echo the Royal Commission into Aboriginal Deaths in Custody, which in 1991 found:⁸¹

[W]hat has happened, and is still happening, in all too many places, is that Aboriginals are ‘criminalised’ at an early age by a policing and justice system that is intolerant of cultural differences, and which targets and overpolices Aboriginal communities and deals harshly with resulting resentment ... [this] comes to be seen ... as a natural condition for Aboriginals.

⁷⁷ See e.g. Change the Record and Human Rights Law Centre. (2024). *Ending Youth Incarceration: Submission to the Senate Legal and Constitutional Affairs Committee on Australia’s youth justice and incarceration system*; Queensland Indigenous Family Violence Service. (2022). *Submission to the Senate Inquiry into Missing and Murdered First Nations Women and Girls (Submission 3)*; O’Brien, G., Racial Profiling, Surveillance and Over-Policing: The Over-Incarceration of Young First Nations Males in Australia (2021), Social Sciences 10 (2), 68.

⁷⁸ Australian Government. (2025). *Commonwealth Closing the Gap 2024 Annual Report and 2025 Implementation Plan*, 62.

⁷⁹ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), *Visit to Australia undertaken from 16 to 23 October 2022: recommendations and observations addressed to the State party* (UN Doc CAT/OP/AUS/ROSP/1) (20 December 2023), 17 [104].

⁸⁰ Australian Human Rights Commission. (2024). *The National Anti-Racism Framework: A roadmap to eliminating racism in Australia*, 29.

⁸¹ Royal Commission into Aboriginal Deaths in Custody. (1991). *Regional Report of Inquiry In New South Wales, Victoria & Tasmania*, 22.

72. Imprisoning children fails to address the continuum of risk that ends with offending behaviour. Rather, it increases the likelihood of recidivism, entrenches cycles of disadvantage and adds to the re-traumatisation and complexity of rehabilitation.⁸²
73. Further, imprisoning children disproportionately impacts Indigenous children with complex needs and disability, including childhood trauma, substance use disorder and cognitive and neurological disability. For example, almost 1 in 4 Indigenous children in detention have an intellectual disability, compared with 1 in 12 non-Indigenous children.⁸³ Incarceration is known to exacerbate disability, increase risk of suicide, and also create disability through harsh inhumane practices and treatment.⁸⁴
74. When governments pursue carceral and punitive responses to Indigenous children this only deepens the trauma children have experienced. Incarcerated children face significantly increased risk of depression, self-harm, suicidality, and impaired emotional and social development. Solitary confinement and isolation, often used in youth detention settings, has devastating, long-term, and sometimes irreversible impacts on a child's mental health and well-being.⁸⁵ Children with lived experience of incarceration have identified the impact of incarceration – from police contact to exposure to harmful practices in prison like solitary confinement – as worsening their condition.
75. This evidence is well known, yet still successive Australian governments continue to lock up and subject Indigenous children to human rights abuses, contrary to Australia's obligations at international law and its own CTG targets.

Pattern of racial discrimination

76. There is a significant, persistent pattern of racial discrimination in Australia. This is demonstrated by numerous laws and policies across every state and territory that heighten the risk of First Nations children coming into contact with the criminal legal system and experiencing mass incarceration, cruel, inhuman and degrading treatment and poor social and health outcomes. As above, some of these laws and policies exist because of a failure of governments to act and to prevent systemic discrimination, and others are recently enacted laws.

⁸² See e.g. Australian Institute of Health and Welfare. (2023). *Young people returning to sentenced youth justice supervision 2021-2022*, 14; Sentencing Advisory Council Victoria, 'Children who enter youth justice system early are more likely to reoffend' (Media Release, 4 October 2023) <<https://www.sentencingcouncil.vic.gov.au/news-media/media-releases/children-who-enter-youth-justice-system-early-are-more-likely-reoffend>>; Victorian Parliament Legal and Social Issues Committee. (2022). *Final Report: Inquiry into Victoria's Criminal Justice System* (24 March 2022); Walsh T, Beilby J, Lim P, Cornwell L. (2023). *Safety through support: building safer communities by supporting vulnerable children in Queensland's youth justice system*, 14; Minister for Youth Justice and Minister for Corrective Services, *Response to Question on Notice No. 1177-2024 asked on Tuesday, 10 December 2024*, 1.

⁸³ Australian Human Rights Commission. (2024). *"Help way earlier!" How Australia can transform child justice to improve safety and wellbeing*, 21.

⁸⁴ McGlade, H., 'Australia's treatment of Indigenous prisoners: the continuing nature of human rights violations in West Australian jail cells' in *Routledge Handbook of Disability Activism*, Berghs, M., Chataika, T., El-Lahib, Y. & Dub, A.K. (eds.) 2020, London and New York: Routledge, 274 – 289.

⁸⁵ Singh Y., Old enough to offend but not to buy a hamster: the argument for raising the minimum age of criminal responsibility (2023) 30(1) *Psychiatry, Psychology and Law*, 51-67.

77. In the paragraphs that follow, we demonstrate the ongoing pattern of First Nations children being targeted and disproportionately impacted by discriminatory, ineffective ‘tough on crime’ policies. These include policies that ignore or blatantly contradict well-documented independent recommendations and government targets. All of this leads to the conclusion that First Nations children are being subject to direct and systemic racial discrimination in the criminal justice systems.
78. This section covers the following policies and laws:
- a. refusal to raise the minimum age of criminal responsibility (paragraphs 80 to 98);
 - b. mandatory detention laws (paragraphs 99 to 106);
 - c. broken and discriminatory bail laws (paragraphs 107 to 130);
 - d. use of isolation and solitary confinement (paragraphs 131 to 146);
 - e. use of strip searching (paragraphs 147 to 157);
 - f. use of spit hoods and other restraints (paragraphs 158 to 172);
 - g. detention of children in adult facilities (paragraphs 173 to 186);
 - h. adult penalties (paragraphs 187 to 192);
 - i. removal of the principle of detention as a last resort (paragraphs 193 to 198); and
 - j. inclusion of non-custodial events in criminal histories (paragraphs 199 to 201).
79. In some sections we highlight laws, policies or events in particular states and territories to demonstrate the pattern of racial discrimination. However, this submission does not claim to provide an exhaustive list of all racially discriminatory youth justice laws and policies across Australia.

Refusal to raise the minimum age of criminal responsibility

80. In almost all jurisdictions across Australia, the minimum age of criminal responsibility is just 10 years old. This means that children as young as 10 can be arrested, charged with an offence, hauled before a court, locked away in detention and deprived of their liberty and ultimately their wellbeing.
81. The Convention on the Rights of the Child requires governments to establish a minimum age of criminal responsibility, and the Committee on the Rights of the Child has recommended countries set a minimum age no lower than 14 years, without exception.⁸⁶ Medical experts, psychologists and criminologists agree that children under the age of 14 years have not developed the social, emotional and intellectual maturity necessary for criminal responsibility.⁸⁷
82. The current low age of criminal responsibility especially impacts and harms Aboriginal and Torres Strait Islander children, given their disproportionate representation in the criminal legal system. As children, particularly Indigenous children, in the criminal legal system are more likely to have disability and neurodevelopment impairment, complex

⁸⁶ 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).

⁸⁷ Jesuit Social Services. (2015). Too much too young: raise the age of criminal responsibility to 12, 4.

trauma, mental health disorders and drug and alcohol use disorders,⁸⁸ the current approach amounts to the criminalisation of unmet health, disability and trauma needs. Governments have failed to effectively address underlying issues such as poverty, homelessness and exposure to violence.

83. The evidence is clear: criminalising children does not build safer communities but increases the likelihood of children's harm and entrenchment in the criminal legal system.⁸⁹ Recent Australian Institute of Health and Welfare data confirms the increased likelihood of recriminalisation the younger a child is when they come into contact with the criminal legal system.⁹⁰
84. For years, governments across Australia have failed to act on evidence and advice about the discriminatory impact and ineffectiveness of incarcerating children as young as 10, who are overwhelmingly Indigenous. Alarming, there has been backtracking on raising the age in the Northern Territory and Victoria. In addition, as per paragraphs 92, 96 and 98, three of the four jurisdictions that have committed to, or are consulting on, raising the age have either created, or propose, exceptions for particular offences or new powers for the State to police children.
85. This ongoing failure and inaction in relation to raising the minimum age of criminal responsibility to at least 14 across all Australian jurisdictions forms part of a broader pattern of racial discrimination against Indigenous children.

Commonwealth

86. In the federal jurisdiction, the minimum age of criminal responsibility is 10 years old. The Commonwealth government has made no public commitment to raise the age.⁹¹

⁸⁸ Australian Human Rights Commission. (2024). *"Help way earlier!" How Australia can transform child justice to improve safety and wellbeing*, 21; Baidawi, S, et al. (2024). *Children aged 10 to 13 in the justice system: characteristics, alleged offending and legal outcomes*; Australian Human Rights Commission. (2008). *Preventing crime and promoting rights for Indigenous young people with cognitive disabilities and mental health issues*, 9; McGlade, H., 'The continuing nature of human rights violations in Western Australia jail cells' in *The Routledge Handbook of Disability Activism*, Berghs, M., Chataika, T., El-Lahib, Y. & Dub, A.K. (eds.) 2020, London and New York: Routledge, 274 – 289.

⁸⁹ See e.g. Sentencing Advisory Council Victoria, 'Children who enter youth justice system early are more likely to reoffend' (Media Release, 4 October 2023) <<https://www.sentencingcouncil.vic.gov.au/news-media/media-releases/children-who-enter-youth-justice-system-early-are-more-likely-reoffend>>; Victorian Parliament Legal and Social Issues Committee., (2022). *Final Report: Inquiry into Victoria's Criminal Justice System* (24 March 2022); Walsh T, Beilby J, Lim P, Cornwell L. (2023). *Safety through support: building safer communities by supporting vulnerable children in Queensland's youth justice system*, 14; Minister for Youth Justice and Minister for Corrective Services, *Response to Question on Notice No. 1177-2024 asked on Tuesday, 10 December 2024*, 1; Office of the Children's Commissioner Northern Territory. (2024). *Our most vulnerable children bearing the consequences of a failed system: A thematic analysis of the needs of children aged 10 to 13 years held in Northern Territory youth detention in 2022/23*, 46.

⁹⁰ Australian Institute of Health and Welfare. (2023). *Young people returning to sentenced youth justice supervision 2021-2022*, 14. See also the studies referred to in the Australian Institute of Health and Welfare report showing the relationship between the likelihood of returning to sentenced supervision (and the criminal legal system more broadly) and offending history: Chen S, Matruggio T, Weatherburn D and Hua J (2005) 'The transition from juvenile to adult criminal careers', Crime and Justice Bulletin no. 86, NSW Bureau of Crime Statistics and Research, Sydney; Lind B (2011) 'Screening juvenile offenders for further assessment and intervention', Crime and Justice Bulletin no. 149, NSW Bureau of Crime Statistics and Research, Sydney; Payne J, (2007) *Recidivism in Australia: findings and future research*, Australian Institute of Criminology, Canberra; Payne J and Weatherburn D (2015) 'Juvenile reoffending: a ten-year retrospective cohort analysis' Australian Journal of Social Issues 50(4):349–371; Stewart A, Allard T, Gray B and Ogilvie J (2007) *Understanding initiation of offending and recidivism across the juvenile and adult systems*, Australia, Griffith University, Queensland.

⁹¹ Senate of Australia Standing Committee on Legal and Constitutional Affairs. (2025). *Australia's youth justice and incarceration system*, 103 [Table 4.1].

Western Australia

87. In Western Australia, there has been no public commitment to raising the minimum age of criminal responsibility from 10 years old.⁹²

Northern Territory

88. In October 2024, the newly elected Northern Territory government lowered the age of criminal responsibility from 12 to 10, reversing the previous government's move to raise the age to 12 less than two years prior and ignoring warnings from experts, Indigenous communities and children's commissioners.⁹³
89. This is particularly concerning given the damning findings of the 2016 Royal Commission into the Protection and Detention of Children in the Northern Territory. Eight years later, the Northern Territory Children's Commissioner has documented ongoing alarming experiences of children aged 10 to 13 in prison over 2022-2023. 94% of these children were Aboriginal and the majority had cognitive disabilities or mental health needs.⁹⁴

Queensland

90. In Queensland, which incarcerated the most Indigenous children in 2023-2024, the minimum age of criminal responsibility is 10 years old. The Queensland Government has not made any public commitments to raise the age.⁹⁵

New South Wales

91. In New South Wales, the minimum age of criminal responsibility is 10 years old. The New South Wales Government has not made any public commitments to raise the age.⁹⁶

Australian Capital Territory

92. In the Australian Capital Territory, the minimum age of criminal responsibility is 12 years old. While the age will rise to 14 years on 1 July 2025, there are exceptions for particular offences.⁹⁷

⁹² Ibid.

⁹³ *Criminal Code Amendment Act 2024* (NT), s 4; ABC News, 'Northern Territory accused of walking away from its commitment to reduce Indigenous incarceration' (29 August 2024) <<https://www.abc.net.au/news/2024-08-29/spithoods-and-lower-age-of-criminal-responsibility-nt-chief/104279814>>.

⁹⁴ Office of the Children's Commissioner Northern Territory. (2024). *Our most vulnerable children bearing the consequences of a failed system: A thematic analysis of the needs of children aged 10 to 13 years held in Northern Territory youth detention in 2022/23*, 20, 35.

⁹⁵ Senate of Australia Standing Committee on Legal and Constitutional Affairs. (2025). *Australia's youth justice and incarceration system*, 103 [Table 4.1].

⁹⁶ Ibid.

⁹⁷ Ibid; ACT Government, 'ACT raises the minimum age of criminal responsibility' (Media Release, 1 November 2023) <https://www.cmtedd.act.gov.au/open_government/inform/act_government_media_releases/davidson/2023/act-raises-the-minimum-age-of-criminal-responsibility>.

Victoria

93. The Yoorrook Justice Commission (“Yoorrook”), a statutory Commission of Inquiry or ‘truth-telling inquiry’ regarding historical and contemporary injustices experienced by Indigenous people in Victoria, recently cautioned:⁹⁸

We are imprisoning traumatised, developmentally compromised and disadvantaged young people, where imprisonment itself adds to the re-traumatisation and complexity of supporting rehabilitation and recovery

94. Yoorrook called for the Victorian Government to raise the minimum age of criminal responsibility to 14 years and to prohibit the detention of children under 16 years of age,⁹⁹ adding to the chorus of Aboriginal and Torres Strait Islander experts and communities, medical and legal experts, inquiries, United Nations bodies and justice departments recommending that the minimum age of criminal responsibility be raised to at least 14 years old.
95. The Victorian Government appeared before Yoorrook and apologised for the treatment of Indigenous peoples and the criminal justice system. It committed to raising the age to 14 by 2027.¹⁰⁰ Yet, it quickly resiled on that commitment, meaning that the minimum age will rest at 12.¹⁰¹
96. Concerningly, when the Victorian Government passed legislation that will, when commenced, raise the age to 12,¹⁰² it simultaneously handed the police new powers over children aged 10 and 11. These include powers to: transport children in a police vehicle; detain them, including at police stations, without any express time limits; use force on them; and subject them to searches.¹⁰³ These powers are on top of existing common law and statutory powers available to police. Granting police additional powers over children under the minimum age of criminal responsibility undermines the entire purpose of raising the age and risks causing further harm to children, and entrenchment in the criminal legal system.

⁹⁸ Yoorrook Justice Commission. (2023). *Report into Victoria's child protection and criminal justice systems*, 20.

⁹⁹ *Ibid*, 37.

¹⁰⁰ Ilanbey, S., and Smethurst, A., The Age, ‘Victoria to raise age of criminal responsibility to 12’ (25 April 2023) <<https://www.theage.com.au/politics/victoria/victoria-to-raise-age-of-criminal-responsibility-to-12-20230424-p5d2vw.html>>.

¹⁰¹ Parliament of Victoria, *Hansard record of proceedings (proof)*, 20 March 2025, 95; Senate of Australia Standing Committee on Legal and Constitutional Affairs. (2025). *Australia's youth justice and incarceration system*, 103 [Table 4.1]; Smethurst, A., The Age, ‘Premier walks back support for raising age of criminal responsibility to 14’ (11 August 2024); <report <https://www.theage.com.au/politics/victoria/premier-walks-back-support-for-raising-age-of-criminal-responsibility-to-14-20240811-p5k1qr.html>>; Yoorrook Justice Commission, ‘Yoorrook laments major setback as Government backflips on raising the age’ (Media Release, 13 August 2024) < <https://yoorrookjusticecommission.org.au/individual-articles/yoorrook-laments-major-setback-as-government-backflips-on-raising-the-age>>; Commission for Children and Young People, ‘Backflip on raising the age of criminal responsibility to 14 a step backwards for community safety’ (Media Release, 13 August 2024) <<https://ccyp.vic.gov.au/news/backflip-on-raising-the-age-of-criminal-responsibility-to-14-a-step-backwards-for-community-safety>>.

¹⁰² *Youth Justice Act 2024* (Vic), s 10 (however, while certain sections of the Act are in force, s 10 has not yet commenced).

¹⁰³ *Youth Justice Act 2024* (Vic), ss 66-79.

Tasmania

97. In December 2023, the Tasmanian Government committed to raising the minimum age of criminal responsibility from 10 to 14, alongside raising the minimum age of detention to 16. However, it has only committed to do so by 2029.¹⁰⁴

South Australia

98. In January 2024, the South Australian Government released a discussion paper on raising the minimum age of criminal responsibility from 10 to 12. At the time of writing, there has been no further action to raise the age. Concerningly, the discussion paper proposed powers to police children younger than the minimum age, as well as exceptions to raising the minimum age of criminal responsibility for particular offences.¹⁰⁵

Mandatory detention laws

99. Mandatory detention laws for children are incompatible with international human rights obligations, including article 40 of the Convention on the Rights of the Child, which requires criminal justice responses for children to be age-appropriate, proportionate and rehabilitative.
100. They are also incompatible with rights under the International Covenant on Civil and Political Rights relating to liberty and security (article 9), rehabilitation of prisoners (article 10), 'juvenile offenders' and appeal rights (article 14), rights of the child (article 24) and non-discrimination and equality (articles 2 and 26).¹⁰⁶
101. Both Western Australia and the Northern Territory have refused to heed UN advice¹⁰⁷ to repeal mandatory detention laws, which deny judicial discretion in relation to sentencing and result in high incarceration rates.
102. Mandatory detention laws disproportionately impact Indigenous children who are overrepresented in the criminal legal system and who find themselves disproportionately charged with offences to which mandatory sentencing applies, such as property offences and acts intended to cause injury.¹⁰⁸
103. As both the Australian Law Reform Commission and the Australian Human Rights Commission have noted, mandatory sentencing for property offences is particularly problematic because of the variance in the nature and gravity of the conduct of

¹⁰⁴ Human Rights Law Centre, 'Landmark win as Tasmania commits to raising the age of criminal responsibility to 14' (Media Release, 6 December 2023) <<https://www.hrlc.org.au/news/2023/12/6/tas-raise-the-age>>.

¹⁰⁵ Government of South Australia, Attorney-General's Department. (2024). *Discussion Paper: Minimum Age of Criminal Responsibility – alternative diversion model*.

¹⁰⁶ Australian Human Rights Commission. (2001). *Mandatory detention laws in Australia*.

¹⁰⁷ See 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), 14 [47(f), 48(f)]; Committee on the Elimination of All Forms of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Australia* (UN Doc CERD/C/AUS/CO/18-20) (26 December 2017) 6 [26(b)].

¹⁰⁸ Australian Law Reform Commission. (2017). *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, 76 [4.16]; Law Council of Australia, (2014). *Mandatory Sentencing*, 32 [125]; Australian Human Rights Commission. (2001). *Mandatory detention laws in Australia*.

children charged with burglary. As stated by the Australian Human Rights Commission:¹⁰⁹

Although the legislation assumes that every offence of home burglary is equally serious, home burglary covers a wide range of circumstances. In one case, a 12-year-old Aboriginal boy from a regional area, with a history of welfare intervention, educational problems and substance abuse, was sentenced to 12 months detention for entering a house in company with others and taking a wallet containing \$4.00. His previous burglaries consisted of entering a laundry room in a hotel where nothing was removed and a school canteen where a can of soft drink was taken.

104. Like low minimum ages of criminal responsibility, mandatory detention significantly increases Indigenous children's risk of incarceration and exposure to harmful and degrading practices. These include solitary confinement, strip searching and spit hoods and other restraints, each of which are considered further below, starting at paragraph 131.

Western Australia

105. In Western Australia, mandatory sentencing laws have applied to children committing property offences since 1996, when the Western Australian Government introduced amendments to the *Criminal Code 1913 (WA)* imposing an obligation on judges to sentence people to 12 months' imprisonment for committing a third home burglary.¹¹⁰

Northern Territory

106. In the Northern Territory in 1997, mandatory sentencing applied to a range of property offences after 'three strikes'. These laws were repealed in 2001 following the suicide of a 15-year-old Aboriginal boy mistakenly mandatorily detained for a 'second strike' offence, being theft of \$50 worth of stationery from a council building.¹¹¹ Despite many calls for mandatory sentencing to be abolished in the Northern Territory, children are still subject to mandatory sentencing if their matter is dealt with under the *Sentencing Act 1995* rather than the *Youth Justice Act 2005*.¹¹²

Broken and discriminatory bail laws

107. In December 2023, the SPT urged Australia to reduce the 'extraordinary number of people deprived of their liberty on remand'.¹¹³
108. Despite the SPT's urgent warning, almost a year later, the National Children's Commissioner found most incarcerated children in Australia are unsentenced, with

¹⁰⁹ Australian Human Rights Commission. 2002. 'Chapter 4: Laws mandating minimum terms of imprisonment ('mandatory sentencing') and Indigenous people, *Social Justice Report 2001*.

¹¹⁰ Australian Human Rights Commission. (2001). *Mandatory detention laws in Australia*.

¹¹¹ Australian Law Reform Commission. (2017). *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*. 76-7 [4.18].

¹¹² *Sentencing Act 1995 (NT)*, e.g. Part 3, Division 3A.

¹¹³ SPT, *Visit to Australia undertaken from 16 to 23 October 2022: recommendations and observations addressed to the State party* (UN Doc CAT/OP/AUS/ROSP/1) (20 December 2023), 6 [33].

some detained because there is no safe place for them to live while on bail.¹¹⁴ Concerningly, by 2024, the proportion of people in unsentenced detention had increased nationally, with most young people in unsentenced detention being on remand.¹¹⁵

109. There is no evidence that stricter bail laws improve community safety, and they fail to serve any rehabilitative purpose. As reported by the National Children's Commissioner, access to therapeutic programs is limited or non-existent for children on remand, and children are largely unable to engage in such programs as the length of their remand may be longer than their final sentence.¹¹⁶
110. Given Indigenous children are disproportionately more likely to be remanded in custody than granted bail,¹¹⁷ strict bail laws have a discriminatory and harmful impact on Indigenous children and only serve to entrench them in the criminal legal system.
111. Strict bail conditions and the criminalisation of breaches of bail conditions also unnecessarily expose children to detention. As reported by the SPT in December 2023, and admitted by the Victorian Government, the cost and conditions of bail disproportionately affect First Nations peoples.¹¹⁸
112. The crisis of children behind bars has been fueled by dangerous and discriminatory bail laws across the country. We refer to the below examples, and note that they engage numerous human rights issues.
113. With specific regard to children, under Article 37(b) of the Convention on the Rights of the Child, Australia is obliged to ensure that 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'. Children are also protected by broader rights applicable to all persons, including rights under the International Covenant on Civil and Political Rights regarding it not being the general rule that persons awaiting trial should be detained in custody (article 9) and the presumption of innocence (article 14). In line with this, the Beijing Rules provide that the detention of children awaiting trial must be the last resort (rule 13) and the Havana Rules provide that the deprivation of children's liberty should be limited to exceptional cases and the minimum necessary period (rule 2).

¹¹⁴ Australian Human Rights Commission. (2024). *"Help way earlier!" How Australia can transform child justice to improve safety and wellbeing*, 8.

¹¹⁵ Australian Institute of Health and Welfare, 'Trends in sentenced and unsentenced detention' in *Youth Detention Population in Australia 2024* (13 December 2024) <<https://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2024/contents/trends-in-sentenced-and-unsentenced-detention?request=smoothstate>>.

¹¹⁶ Australian Human Rights Commission. (2024). *"Help way earlier!" How Australia can transform child justice to improve safety and wellbeing*, 52.

¹¹⁷ Australian Institute of Health and Welfare, 'First Nations young people in detention by legal status' in *Youth detention population in Australia 2024* (December 2024) <<https://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2024/contents/first-nations-young-people/first-nations-young-people-in-detention-by-legal-s>>; Victorian Government. (2023). *Aboriginal affairs report 2023*, 133-137; NSW Bureau of Crime Statistics and Research. (2024). NSW Bureau of Crime Statistics and Research, *Youth custody numbers in NSW up by almost a third since 2023 due to a rise in bail refusal* (Media Release, 18 February 2025) <<https://bocsar.nsw.gov.au/media/2025/mr-custody-dec2024.html>>; Office of the Children's Commissioner Northern Territory. (2024). *Our most vulnerable children bearing the consequences of a failed system: A thematic analysis of the needs of children aged 10 to 13 years held in Northern Territory youth detention in 2022/23*, 20.

¹¹⁸ SPT, *Visit to Australia undertaken from 16 to 23 October 2022: recommendations and observations addressed to the State party* (UN Doc CAT/OP/AUS/ROSP/1) (20 December 2023), 6 [33]; Premier of Victoria, *New Reforms to Make Victoria's Bail Laws Fairer* (Media Release, 14 August 2023) <<https://www.premier.vic.gov.au/new-reforms-make-victorias-bail-laws-fairer>>.

Western Australia

114. On 11 February 2025, Human Rights Watch reported that more than half of the children detained in Western Australia, where Indigenous children are nearly 25 times more likely to be detained than non-Indigenous children, are unsentenced.¹¹⁹

Northern Territory

115. In May 2021, the Northern Territory Government passed the *Youth Justice Legislation Amendment Bill 2021*. This Bill removed the presumption in favour of bail for various offences (including non-violent offences). It also removed judicial discretion to grant bail in certain circumstances.
116. These reforms ignored the warnings of the Northern Territory Children's Commissioner that these laws would entrench children in the criminal legal system, as well as the evidence which underpinned the recommendations of the Royal Commission into the Protection and Detention of Children in the Northern Territory. According to the Northern Territory Children's Commissioner, in February 2023, the number of children in detention almost tripled from a year before the reforms.¹²⁰ In October 2024, the Northern Territory Children's Commissioner reported that 94% of children in detention in the Northern Territory were Aboriginal and 93% were on remand.¹²¹
117. In October 2024, the newly elected Northern Territory Government introduced 'tough on crime' legislation, including measures to expand the presumption against bail for various offences for children aged 10 to 17. The changes were rushed through parliament, despite warnings from Indigenous people and both the Northern Territory and National Children's Commissioner about the drastic impact this would have on children.¹²² Even two days after the changes commenced, there were reports of courts being under significant stress.¹²³ Courts have since stopped considering bail applications outside of court sitting hours.¹²⁴
118. Broken and discriminatory bail laws for adults are also impacting children in the Northern Territory. In January 2025, in response to prisons overflowing because of exponential increases in the number of incarcerated adults, the Northern Territory Government said it would be moving children in detention in Mparntwe (Alice Springs) to Garramilla (Darwin), approximately 1,500 kilometres away from their families.¹²⁵

¹¹⁹ Hennessy, A., Human Rights Watch, 'Western Australia's Indefensible Record on Children's Rights' (11 February 2025) <<https://www.hrw.org/news/2025/02/12/western-australias-indefensible-record-childrens-rights>>.

¹²⁰ Office of the Children's Commissioner Northern Territory. (2024). *Our most vulnerable children bearing the consequences of a failed system*, 14-5.

¹²¹ Ibid, 20.

¹²² Boltje, S and Jash, T., ABC News, 'Northern Territory accused of walking away from its commitment to reduce Indigenous incarceration' (29 August 2024) <<https://www.abc.net.au/news/2024-08-29/spithoods-and-lower-age-of-criminal-responsibility-nt-chief/104279814>>.

¹²³ Lathouris, O., ABC News, 'Rising arrest numbers could 'choke' NT court system, lawyers warn' (8 January 2025) <<https://www.abc.net.au/news/2025-01-08/nt-judge-threatens-to-release-remand-prisoners/104795976>>.

¹²⁴ Dick, S., ABC News, 'Detainment of 15-year-old girl in NT police watch house reignites human rights concerns' (25 March 2025) <<https://www.abc.net.au/news/2025-03-25/nt-teenager-held-in-palmerston-police-watch-house-three-nights/105089906>>.

¹²⁵ Garrick, M., ABC News, 'NT Police watch houses at capacity as prisoner numbers again hit record levels' (7 January 2025) <<https://www.abc.net.au/news/2025-01-07/nt-police-watch-houses-full-as-prisoner-numbers-hit-new-record/104789666>>; Allison, C., ABC News, 'Alice Springs youths to be relocated to Darwin as part of NT government's "emergency" prisons plan' (21 October 2024) <<https://www.abc.net.au/news/2024-10-21/nt-government-reveals-emergency-plan-for-overcrowded-prisons/104496702>>.

Queensland

119. In 2023, the Queensland Government overrode the Queensland Human Rights Act 2019 to make it an offence for children to breach bail, acknowledging that it was inconsistent with international standards about the best interests of the child.¹²⁶
120. The Queensland Government has also progressed legislation to extend a ‘trial’ of electronic monitoring as a bail condition for children, despite there being no evidence, four years after it started, that the trial achieves its stated purpose of reducing recidivism.¹²⁷ Without this evidence, electronic monitoring is simply a surveillance tool that contributes to the criminalisation of children.¹²⁸

New South Wales

121. The *Bail and Crime Amendment Bill 2024*, passed by the New South Wales Parliament in March 2024, made it harder for children to obtain bail for certain offences by creating a presumption against bail that is rebuttable only if the young person can show their detention is not justified.
122. This is an extremely high threshold and arguably treats children, which will disproportionately be Indigenous children, worse than adults.¹²⁹

Victoria

123. Changes to Victorian bail laws in 2017 and 2018 triggered an increase in the number of Aboriginal children on remand. The coronial inquest into the tragic and preventable death in custody of Gunditjmara, Dja Dja Wurrung, Wiradjuri and Yorta Yorta woman Veronica Nelson found that these laws were a ‘complete and unmitigated disaster’ disproportionately impacting First Nations people.¹³⁰ The Victorian Government has since acknowledged that bail offences have historically had a disproportionate impact on ‘Aboriginal people, women, children and people experiencing disadvantage’.¹³¹
124. In 2023, as a result of sustained advocacy for bail reform by Veronica Nelson’s family, the Victorian Parliament passed legislation to address some of the issues with the disastrous bail framework, including by repealing ‘breaching bail conditions and committing further offences while on bail’ as offences.¹³² However, the changes were fleeting. As outlined below, the Victorian Government has since made numerous

¹²⁶ [Statement of compatibility](#) for the *Strengthening Community Safety Bill 2023*, 2.

¹²⁷ Queensland Parliament, *Justice, Integrity and Community Safety Committee – Youth Justice (Monitoring Devices) Amendment Bill 2025* (accessed 21 March 2025) <<https://www.parliament.qld.gov.au/Work-of-Committees/Committees/Committee-Details?cid=275&id=4498>>.

¹²⁸ [Human Rights Law Centre submission](#) to the Queensland Parliament Justice, Integrity and Community Safety Committee inquiry into the *Youth Justice (Monitoring Devices) Amendment Bill 2025*.

¹²⁹ Hoerr, K, LSJ Online, ‘Law Society warns youth bail reforms are ‘unprecedented’ (21 March 2024) <<https://lsj.com.au/articles/law-society-warns-youth-bail-reforms-are-unprecedented>>.

¹³⁰ Coroner’s Court of Victoria, *Finding into the passing of Veronica Nelson* (30 January 2023 (as amended)) 132 [372]-[375], [377].

¹³¹ [Statement of compatibility](#) for the *Bail Amendment Bill 2025* (Vic).

¹³² Premier of Victoria, *New Reforms To Make Victoria’s Bail Laws Fairer* (Media Release, 14 August 2023) <<https://www.premier.vic.gov.au/new-reforms-make-victorias-bail-laws-fairer>>.

regressive changes, including changes that wind back the hard-fought reforms made after Veronica Nelson's death.

125. In 2024, the Victorian Government re-introduced specified bail offences for children, together with stricter bail tests.¹³³ Additionally, instead of actioning its promise to repeal almost all reverse onus bail provisions for children, as previously promised, the Victorian Government introduced a trial of electronic monitoring in the Youth Justice Act.¹³⁴ Far from an alternative to incarceration, electronic monitoring is another way of punishing children – indeed, the *Youth Justice Act 2024* includes further provision to remand children while the suitability of electronic monitoring is explored.¹³⁵
126. In March 2025, the Victorian Government rushed new legislation through parliament which it heralded as ‘the toughest bail laws ever’¹³⁶ This legislation removes the principle of remand as a last resort as a mandatory consideration for bail decision-makers in relation to children and makes ‘community safety’ the overarching principle when deciding bail. It expands the range of offences subject to harsh, reverse onus bail tests which presume that bail will be denied. Such tests have been found to be incompatible with the right to liberty under Victoria’s Charter of Human Rights, particularly the right not to be automatically detained in custody under section 21(6) which reflects Article 9 of the International Covenant on Civil and Political Rights. The legislation also revives bail offences for adults and children, including by making it an offence for children to commit an indictable offence while on bail.
127. The Victorian Government’s position is that the legislation does not unreasonably limit any rights under the Charter of Human Rights. This is despite the Queensland Government determining that similar legislation was incompatible with human rights¹³⁷ and the Victorian Government not making any reference to applicable international human rights law, not identifying all human rights that are arguably limited and not providing a credible evidence base, all while acknowledging both the disproportionate impact of bail offences on Aboriginal people including children and the criminogenic effect of bail offences.¹³⁸
128. The Victorian Government plans to progress a second tranche of punitive bail reform in mid-2025, which will ‘result in a further increase in the number of adult and youth offenders on remand’.¹³⁹

¹³³ Premier of Victoria, *Cracking Down on Repeat Serious Offenders* (Media Release, 13 August 2024) <<https://www.premier.vic.gov.au/cracking-down-repeat-serious-offenders>>; Premier of Victoria, *Stronger Youth Offender Laws Pass Parliament* (Media Release, 27 August 2024) <<https://www.premier.vic.gov.au/stronger-youth-offender-laws-pass-parliament>>.

¹³⁴ *Youth Justice Act 2024* (Vic), part 22.

¹³⁵ *Ibid.*, part 22.1, s 903, inserting new Part 2A, s 17G, into the *Bail Act 1977* (Vic).

¹³⁶ Premier of Victoria, *Tough Bail Laws to Keep Victorians Safe* (Media Release, 12 March 2025) <<https://www.premier.vic.gov.au/tough-bail-laws-keep-victorians-safe>>; Victorian Aboriginal Legal Service, *Granting Bail Saves Lives: Poccum’s Law is the only way forward* (Media Release, 12 March 2025) <<https://www.vals.org.au/granting-bail-saves-lives-poccums-law-is-the-only-way-forward/>>; Human Rights Law Centre, *Granting bail save lives, but Allan Government’s proposed bail laws repeat past failures* (Media Release, 12 March 2025) <<https://www.hrlc.org.au/news/bail-saves-lives>>.

¹³⁷ *Making Queensland Safer Act 2024* (Qld) Statement of Compatibility, 6.

¹³⁸ *Statement of compatibility for the Bail Amendment Bill 2025* (Vic).

¹³⁹ Premier of Victoria, *State Gears Up For Tougher Bail – Starting Now* (Media Release, 18 March 2025) <<https://www.premier.vic.gov.au/state-gears-tougher-bail-starting-now>>.

South Australia

129. In March 2025, the South Australian Government announced a new plan to make bail and sentencing laws for young people more punitive.¹⁴⁰ The plan notes that other Australian jurisdictions have bail provisions which limit the grant of bail for young people.¹⁴¹
130. As in other jurisdictions, harsher bail laws will have a disproportionate impact on Indigenous children in South Australia.

Use of isolation and solitary confinement

131. Under the Nelson Mandela Rules, solitary confinement – defined as the confinement of prisoners for 22 hours or more a day without meaningful human contact – is only to be used in exceptional cases when authorised as a last resort, for as short a time as possible and subject to independent review.¹⁴²
132. The Nelson Mandela Rules and the Havana Rules strictly prohibit the use of solitary confinement on children¹⁴³ and all disciplinary measures constituting cruel, inhuman or degrading treatment.¹⁴⁴ The practice can cause immeasurable and lasting trauma to children, especially those with experiences of significant disadvantage and marginalisation.¹⁴⁵
133. Solitary confinement has profound impacts on the mental health and development of children and fails to address the underlying causes of behaviour.¹⁴⁶ These impacts are amplified for many First Nations children, who are overrepresented in detention. For example, the Royal Commission into the Protection and Detention in the Northern Territory recognised the psychological effects of isolation can be worse for First Nations children and young people because of their specific, unmet cultural needs.¹⁴⁷ Similarly, the Royal Commission into Aboriginal Deaths in Custody found in 1991 that solitary confinement causes ‘extreme anxiety’ and has a particularly detrimental impact

¹⁴⁰ Government of South Australia, *New Young Offender Plan to tackle youth crime* (Media Release, 6 March 2025) <<https://www.premier.sa.gov.au/media-releases/news-items/new-young-offender-plan-to-tackle-youth-crime>>

¹⁴¹ Government of South Australia. (2025). *Young Offender Plan 2025*, 4.

¹⁴² United Nations Standard Minimum Rules for the Treatment of Prisoners (“Nelson Mandela Rules”), UN Doc A/RES/70/175, [44-45].

¹⁴³ *Ibid* [45(2)]; and United Nations Rules for the Protection of Juveniles Deprived of their Liberty (“Havana Rules”) Un Doc A/RES/45/113 [67].

¹⁴⁴ *Ibid*, Havana Rules.

¹⁴⁵ See e.g. Queensland Child Death Review Board. (2023). *Child Death Review Board Annual Report 2022–23*, 38; Yoorrook Justice Commission. (2023). *Yoorrook for Justice: Report into Victoria’s Child Protection and Criminal Justice Systems*, 322-4; Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory. (2017). *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, Volume 2A*, 285-8; Baldry, E and Cunneen, C., The Conversation, ‘Locking up kids damages their mental health and sets them up for more disadvantage. Is this what we want?’ (21 June 2019) <<https://theconversation.com/locking-up-kids-damages-their-mental-health-and-sets-them-up-for-more-disadvantage-is-this-what-we-want-117674>>; Dudgeon, P., UWA Online, ‘Locking up kids has serious mental health impacts and contributes to further reoffending’ (18 November 2022) , <<https://www.uwa.edu.au/news/Article/2022/November/Locking-up-kids-has-serious-mental-health-impacts-and-contributes-to-further-reoffending>>

¹⁴⁶ *Ibid*.

¹⁴⁷ Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory. (2017). *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, Volume 2A*, 286

on incarcerated Indigenous people.¹⁴⁸ Solitary confinement has also been linked to the deaths of Aboriginal children in Western Australia and Queensland.¹⁴⁹

134. Despite the prohibitions on the use of solitary confinement imposed by international law, and three jurisdictions in Australia (the Australian Capital Territory, Victoria and Queensland) having human rights legislation, no jurisdiction in Australia prohibits solitary confinement. Concerningly, while Australian jurisdictions tend not to use the term 'solitary confinement', practices akin to solitary confinement are effectively permitted by law and policy in various guises: 'separation', 'segregation', 'seclusion' or 'isolation'.
135. While the laws governing the use of confinement on children and young people in prison vary across states and territories, they have proved insufficient to prevent children and young people from being subjected to solitary confinement or otherwise isolated in circumstances which may amount to cruel, degrading and inhuman treatment. They have also led to deaths in custody, which is addressed in more detail below.
136. In December 2022, the United Nations Committee against Torture expressed serious concern about the solitary confinement of children, in particular at Banksia Hill in Western Australia, the Don Dale youth prison in the Northern Territory and the Ashley youth prison in Tasmania.¹⁵⁰

Western Australia

137. Following the SPT's terminated visit to Australia in October 2022, it reported 'especially poor' conditions in youth prisons, including children being left alone in their cells for up to 23 hours per day in Banksia Hill Detention Centre in Western Australia.¹⁵¹
138. Many of the disturbances at Banksia Hill Detention Centre in West Australia have been in direct response to rolling lockdowns and solitary confinement.¹⁵² In 2023, the Supreme Court of Western Australia found Banksia Hill Detention Centre and Unit 18 at Casuarina Prison were unlawfully locking young people in their cells for long periods and 'subjecting young people – children – to solitary confinement on a frequent basis'.¹⁵³ This predominantly affected Aboriginal children and young people.

¹⁴⁸ Queensland Child Death Review Board. (2023). *Child Death Review Board Annual Report 2022–23*, 39.

¹⁴⁹ Bunch, A, National Indigenous Times, "Cruel and inhumane": teen's solitary cell before death' (29 July 2024) <<https://nit.com.au/29-07-2024/12776/top-official-hires-lawyer-following-inquest-revelations>>; Torre, G, National Indigenous Times, 'Shocking details of alleged abuse in WA youth detention revealed in 57 letters from Aboriginal Legal Service' (18 May 2023) <<https://nit.com.au/18-05-2023/6024/shocking-details-of-alleged-abuse-in-wa-youth-detention-facilities-revealed-in-almost-60-letters-from-aboriginal-legal-service>>.

¹⁵⁰ Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Concluding observations on the sixth periodic report of Australia (UN Doc CAT/C/AUS/CO/6) (5 December 2022) 11 [37(d)].

¹⁵¹ SPT, Visit to Australia undertaken from 16 to 23 October 2022: recommendations and observations addressed to the State party (UN Doc CAT/OP/AUS/ROSP/1) (20 December 2023) 12 [72].

¹⁵² Office of the Inspector of Custodial Services. (2018). *Directed Review of Allegations made by Amnesty International Australia about ill-treatment at Banksia Hill Detention Centre*.

¹⁵³ *Cru By Next Friend Cru2 v Chief Executive Officer of the Department of Justice* [2023] WASC 257, [7]; Aboriginal Legal Service of Western Australia, *Supreme Court of WA orders government to comply with the law after finding frequent use of solitary confinement* (Media Release, 11 July 2023) <<https://www.als.org.au/supreme-court-of-wa-orders-government-to-comply-with-the-law-after-finding-frequent-use-of-solitary-confinement>>.

139. The West Australian Coroner is finalising the inquest into the death of 16-year-old Cleveland Dodd in Unit 18 at Casuarina Prison.¹⁵⁴ The Coroner has found that Cleveland Dodd had experienced solitary confinement for most of the time he was incarcerated in the 93 days before his death by suicide and has indicated he will call for immediate closure of the controversial Unit 18.¹⁵⁵
140. It is unclear if this recommendation will be responded to by the Western Australian Government, which has previously indicated it will not close Unit 18 until a new prison is built.¹⁵⁶ Frustratingly, the government has maintained this position in the face of the death of a second Indigenous young person in similar circumstances, that clearly shows the link between solitary confinement and suicidality.¹⁵⁷ Further concerns about the Western Australian Government's continuation of Unit 18 is raised at paragraphs 177-180 (see *detention of children in adult facilities*).

Northern Territory

141. During the Royal Commission into the Protection and Detention of Children in the Northern Territory, the Commission heard disturbing findings about the use of 'isolation' as a tool for behaviour management and punishment for children in Don Dale and Alice Springs youth prisons. Throughout the hearings that took place, many young people who served sentences at Don Dale or Alice Springs advocated for the abolition of isolation entirely,¹⁵⁸ but their calls remain unheeded.

Queensland

142. A report into the deaths of children across Queensland highlighted the 'preventable' deaths of two First Nations children following extensive periods of solitary confinement during their time in Queensland's youth detention.¹⁵⁹ Both boys spent over 100 days collectively in solitary confinement in the 12 months before their deaths from suicide and drug overdose. The report found:¹⁶⁰

Staff shortages directly led to isolation and treatment that ran counter to the objectives and principles of the Youth Justice and Human Rights Acts. The two boys were denied the opportunity for a rehabilitative and transformative experience

¹⁵⁴ Bourke, K., ABC news, 'Why don't you care?' (19 October 2024) <<https://www.abc.net.au/news/2024-10-19/fiona-stanley-hannah-mcglade-gerry-georgatos-cleveland-dodd-/104481052>>; Social Reinvestment Western Australia, *Coronial inquest into the death of Cleveland Dodd – summary as at 20 December 2024*.

¹⁵⁵ Bourke, K., ABC News, 'Coroner in Cleveland Dodd inquest indicates he may call for urgent closure of Unit 18' (11 December 2024) <<https://www.abc.net.au/news/2024-12-11/cleveland-dodd-inquest-coroner-may-call-for-closure-of-unit-18/104712784>>.

¹⁵⁶ Office of the Inspector of Custodial Services. (2023). *2023 inspection of Banksia Hill Detention Centre and Unit 18 at Casuarine Prison (Part One)*, 23.

¹⁵⁷ Office of the Inspector of Custodial Services. (2024). *Review of youth custody: follow-up to 2023 inspection (part two)*, iii; Morse, C., National Indigenous Times, "'A horrible, horrible event": Second teenager dies in Western Australia's troubled youth detention system' (30 August 2024), <<https://nit.com.au/30-08-2024/13428/breaking-second-indigenous-teenager-dies-in-western-australias-troubled-youth-detention-system>>; Withers, C., ABC News, 'Protesters call for immediate closure of Unit 18 juvenile wing in Perth's Casuarina maximum security prison' (20 September 2024) <<https://www.abc.net.au/news/2024-09-20/protesters-call-for-closure-of-unit-18-detention-wing/104368484>>.

¹⁵⁸ Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory. (2017). *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, Volume 2A*, 332.

¹⁵⁹ Queensland Child Death Review Board. (2023). *Child Death Review Board Annual Report 2022–23*, 28, 38.

¹⁶⁰ *Ibid*, 41.

in detention. Instead, their experiences are likely to have caused further harm and impacted their physical and social and emotional wellbeing.

143. The Office of the Public Guardian's 2023-24 annual report states that:¹⁶¹

We remain concerned about the use of separation in youth detention centres primarily due to staff shortages, particularly about the regular separation and extended periods of isolation for children.

144. The report explains the harms of solitary confinement, noting that it:¹⁶²

Restricts children's movement and their freedom beyond what is normal for their age; limits their access to and participation in services and support, including education and reintegration services; results in a decline in mental health for children and young people, particularly those with complex trauma, disability, or histories of abuse; increases frustration, boredom, anger, and emotional dysregulation, which can manifest as combative behaviours and trigger the use of force and restraints by detention centre staff; and limits the ability of children and young people to have contact with family members.

Victoria

145. After an inquiry into the treatment of a client of the Victorian Aboriginal Legal Service, the Commissioner for Children and Young People found 'the young person's health and wellbeing had been significantly impacted by the extended time separated from others, reflecting a range of evidence about the impact of solitary confinement'.¹⁶³

South Australia

146. There have been reports of children self-harming to escape prolonged confinement in their cells in South Australia's youth prison, Kurlana Tapa.¹⁶⁴

Use of strip searching

147. Strip searching is a degrading, dehumanising and deeply harmful practice. It involves children being forced to remove their clothing for inspection by prison guards, as well as intrusive bodily inspections by adult prison guards.

148. The Nelson Mandela Rules provide that intrusive searches such as strip searches should be undertaken only if absolutely necessary, with prison administrations encouraged to develop and use appropriate alternatives to intrusive searches.¹⁶⁵ Strip

¹⁶¹ The Office of the Public Guardian. (2024). *Annual report 2023-24*, 37.

¹⁶² Ibid, 38.

¹⁶³ Victorian Aboriginal Legal Service. (2024). *Submission to Australia's youth justice and incarceration system Senate Inquiry*, 29.

¹⁶⁴ Collard, S., The Guardian, 'Children self-harming to escape prolonged confinement in cells, South Australian watchdog says' (30 June 2023) <<https://www.theguardian.com/society/2023/jun/29/children-locked-in-cells-for-up-to-23-hours-at-south-australias-youth-detention-centre>>.

¹⁶⁵ United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), UN Doc A/RES/70/175, rule 52.

searching was condemned by the Committee on the Elimination of Discrimination Against Women in its last review of Australia.¹⁶⁶

149. Strip searching would be criminal if carried out in the wider community, yet – by virtue of the state’s dehumanisation of incarcerated children – it is made lawful across Australia.
150. Like other forms of sexual violence, strip searching can amount to inhumane and degrading treatment under international law.¹⁶⁷ Strip searching is used too often, including unnecessarily. It is a serious and unjustified limitation on the rights of people in prison, which are protected under international law and domestic human rights laws in the Australian Capital Territory, Victoria and Queensland.¹⁶⁸ Relevant rights include the right to: humane treatment in detention; freedom from cruel, inhumane and degrading treatment or punishment; non-interference with privacy, including bodily integrity; protection of families and children; and equality.
151. The laws governing strip searching of children and young people vary across Australian jurisdictions. In many states and territories, overly broad laws permit strip searching, including as a matter of prison routine, without consideration of less intrusive technologies such as scanning technologies.
152. For instance, data obtained by the Human Rights Law Centre reveals that:
 - a. in April 2022, out of 127 strip searches conducted on children in the New South Wales prisons for data could be obtained,¹⁶⁹ the reason recorded for 119 (93.7%) of the strip searches was ‘new admission’; and
 - b. between February and April 2022, out of 430 recorded strip searches conducted on children in Queensland’s youth prisons, 277 – or 64.42% - of strip searches were conducted upon admission to prison.
153. The data, as well as successive inquiries,¹⁷⁰ show strip searching is ineffective at improving prison safety, with no evidence of any relationship between strip searching and drug detection in prison. Only infrequently do strip searches yield discovery of items, and such items rarely pose a significant risk to the safety of people in prison.

¹⁶⁶ Committee on the Elimination of Discrimination against Women, Concluding observations on the eighth periodic report of Australia (UN Doc CEDAW/C/AUS/CO/8) (25 July 2018), [55]-[56].

¹⁶⁷ See e.g. the European Court of Human Rights’ decision in *Van der Ven v. the Netherlands* (50901/99), 61 – 63. The Queensland Human Rights Commission similarly recognised that strip searches may violate the prohibition on inhuman and degrading treatment in section 17 of the *Human Rights Act 2019* (Qld): Queensland Human Rights Commission. (2023). *Stripped of our dignity: a human rights review of policies, procedures, and practices in relation to strip searches of women in Queensland prisons*, 65. The Victorian Court of Appeal has also found that instances of strip searches before a random, supervised urine test severely limited the right to privacy and humane treatment when deprived of liberty under the *Charter of Human Rights and Responsibilities Act 2006* (Vic): *Thompson v Minogue* [2021] VSCA 358.

¹⁶⁸ *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2019* (Qld).

¹⁶⁹ The Human Rights Law Centre obtained data from Frank Baxter and Cobham youth prisons, but was unable to access data for Acmena, Orana, Reiby and Riverina youth prisons.

¹⁷⁰ Office of the Inspector of Custodial Services. (2019). *Strip searching practices in Western Australian prisons*, 8-9; Victorian Ombudsman. (2017). *Implementing OPCAT in Victoria: Report and inspection of Dame Phyllis Frost Centre*, 59; Queensland Human Rights Commission. (2023). *Stripped of our dignity: a human rights review of policies, procedures and practices in relation to strip searches of women in Queensland prisons*, 5.

154. Strip searching is often deployed as tool of punishment or coercive control. As in a violent family setting, incarcerated children are required to conform to the demands of prison staff, no matter how arbitrary and degrading.
155. For children in prisons, strip searching is a particularly stark ‘manifestation of power relations’,¹⁷¹ involving adults forcing children to undress in front of them, often for arbitrary, routine reasons.
156. Aboriginal and Torres Strait Islander peoples, women, trans and gender diverse people and children in prison are disproportionately harmed by strip searching, due to their lived experience of violence, including sexual violence, mass incarceration and discriminatory treatment by prison staff. This is supported by data obtained by the Human Rights Law Centre regarding the Australian Capital Territory, which shows that Aboriginal and Torres Strait Islander people are disproportionately subjected to prison strip searches.
157. Strip searching, and the abuses of power connected to it, cause trauma to incarcerated children and compound previous trauma from child abuse, institutional abuse, family violence and sexual assault. Inflicting trauma on children activates toxic stress which, given it is experienced at a time when their brains are undergoing critical development, can lead to lifelong problems in learning, behaviour and physical and mental health.

Use of spit hoods, other restraints and violence

158. The Nelson Mandela Rules prohibit the use of restraints which are inherently degrading or painful and provide that any other instruments of restraint should only be used as authorised by law and in extremely narrow and limited circumstances.¹⁷²
159. Contrary to these rules, spit hoods, other degrading restraints and excessive force are used across Australia, including jurisdictions with human rights legislation, and are often characterised by a failure to comply with the patchwork of laws and policies which attempt to regulate their use.
160. Nationally, there is a lack of data collection and reporting on the use of force and restraint in custody. This means the extent of such dangerous practices in the youth criminal legal system is unclear. However, it is clearly occurring.
161. The Royal Commission into the Protection and Detention of Children in the Northern Territory found that the use of spit hoods and restraints on children cause distress and risk of harm and called for their use to be banned.¹⁷³ Spit hoods have been implicated in the deaths of people in custody, including First Nations people.

¹⁷¹ Lord Carlile of Berriew QC. (2006). *An independent inquiry into the use of physical restraint, solitary confinement and forcible strip searching of children in prisons, secure training centres and local authority secure children's homes*, 58.

¹⁷² United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), UN Doc A/RES/70/175, rule 47.

¹⁷³ Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory. (2017). *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, Volume 2A*, 248.

162. While there have been attempts to justify the use of spit hoods and restraints as giving a child 'a chance to calm down',¹⁷⁴ according to a report of the Northern Territory Children's Commissioner, there is no evidence that demonstrates their therapeutic or calming effect, nor any studies that confirm they are safe to use on children. Rather, the child is likely to be vulnerable, making the use of spit hoods 'dehumanising and dangerous' with the potential to cause long term adverse impacts on the child's life.¹⁷⁵
163. Like strip searching, the use of spit hoods and other degrading restraints especially impacts Indigenous children, due to disproportionate representation in the criminal legal system, as well as their lived experience of violence and intergenerational trauma, mass incarceration and discriminatory treatment by prison staff.
164. Australian governments were warned by the Office of the High Commissioner for Human Rights in relation to disturbing footage of Aboriginal children at the Don Dale Detention Centre, that such treatment of children violated international law.¹⁷⁶
165. According to the Guardian Australia's Deaths Inside database,¹⁷⁷ from 2008-2021 at least 15 Indigenous people died in custody as a direct result of a medical episode following use of physical, mechanical and/or chemical restraint.

Western Australia

166. The use of violence and dangerous holds against Indigenous children at Banksia Hill Detention Centre in Western Australia has been well documented in disturbing video footage as well as the reports of children and former staff.¹⁷⁸

Northern Territory

167. According to the Northern Territory Children's Commissioner, Northern Territory Police confirmed that spit hoods had been used 27 times on children in police custody between 2018 and 2022, including on a 12-year-old child and restraint chairs had been

¹⁷⁴ Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory. (2017). *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, Volume 2A*, 250.

¹⁷⁵ Office of the Children's Commissioner Northern Territory. (2023). *Use of Spit Hoods and Other Restraint Chairs on Children*, 26-7.

¹⁷⁶ UN News, 'UN rights office shocked by inhumane treatment of children in Australian detention centre' (29 July 2016) <<https://news.un.org/en/story/2016/07/535722>>.

¹⁷⁷ The Guardian, 'Deaths inside: Indigenous Australian deaths in custody 2021' (5 April 2021)

<<https://www.theguardian.com/australia-news/ng-interactive/2018/aug/28/deaths-inside-indigenous-australian-deaths-in-custody>>.

¹⁷⁸ Amnesty International, 'Banksia Hill riot squad uses force on 16-year old boy' (4 January 2024).

<<https://www.amnesty.org.au/banksia-hill-riot-squad-uses-force-on-16-year-old-boy>>; Bourke, K, ABC News, 'Ex-youth justice boss recalls coercive control, frequent use of force at WA detention centre, inquest hears' (7 August 2024)

<<https://www.abc.net.au/news/2024-08-07/inquest-hears-coercive-control-claims-wa-department-of-justice/104195220>>; Torre, G, National Indigenous Times, 'Shocking details of alleged abuse in WA youth detention revealed in 57 letters from Aboriginal Legal Service' (18 May 2023) <<https://nit.com.au/18-05-2023/6024/shocking-details-of-alleged-abuse-in-wa-youth-detention-facilities-revealed-in-almost-60-letters-from-aboriginal-legal-service>>; Tobin, G, ABC News, 'How Four Corners' Locking Up Kids exposed use of a controversial 'folding up' restraint in West Australian youth detention centre' (26 November 2022)

<<https://www.abc.net.au/news/backstory/2022-11-26/behind-the-scenes-four-corners-locking-up-kids/101694106>>; Collard, S, The Guardian, "Lives placed at serious risk": Four Corners report sparks new calls for youth justice overhaul' (15 November 2022) <<https://www.theguardian.com/australia-news/2022/nov/15/lives-placed-at-serious-risk-four-corners-report-sparks-new-calls-for-youth-justice-overhaul>>.

used six times.¹⁷⁹ In October 2024, just over two years since the discontinuation of the use of spit hoods on children in police custody, the Northern Territory Police Commissioner announced the reintroduction of this degrading practice.¹⁸⁰

168. The move ignores the advice of the Royal Commission into the Protection and Detention of Children in the Northern Territory,¹⁸¹ the Northern Territory Ombudsman,¹⁸² and the Northern Territory Children's Commissioner¹⁸³ to prohibit the use of spit hoods on children in police custody. The move was also condemned by the members of the Australian National Preventative Mechanism.¹⁸⁴

Queensland

169. In 2016, one month after the Royal Commission into the Protection and Detention of Children in the Northern Territory was ordered, an independent review of youth detention was announced in Queensland, sparked by media reports about excessive use of force.¹⁸⁵
170. There continue to be numerous media reports and distressing video footage of Indigenous children being subjected to unnecessary and disproportionate violence and force, particularly in in watch houses.¹⁸⁶

South Australia

171. The South Australian Ombudsman raised doubt as to whether the use of force in some spit hood cases it investigated at Adelaide Youth Training Centre de-escalated the situation, was a last resort or proportionate to the risk presented by the child.¹⁸⁷ The South Australian Ombudsman was also concerned about the risk of potentially fatal asphyxiation from spit hoods and recommended that the practice be phased out over 12 months.¹⁸⁸ In the 12 cases it investigated, all but one involved the child being forced to the floor.

¹⁷⁹ Office of the Children's Commissioner Northern Territory. (2023). *Use of Spit Hoods and Other Restraint Chairs on Children*, 2.

¹⁸⁰ Brennan, D., National Indigenous Times, 'Spit hoods to be used on children in the NT again, Police Commissioner confirms' (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>>.

¹⁸¹ Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory. (2017). *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory. Findings and Recommendations*, 30.

¹⁸² Ombudsman Northern Territory. (2023). *Extraordinary restraint: Spit hood & emergency restrain chair use on children in police custody*, 95 [339-340].

¹⁸³ Office of the Children's Commissioner Northern Territory. (2023). *Use of Spit Hoods and Other Restraint Chairs on Children*, 2.

¹⁸⁴ Australian National Preventative Mechanism, *Reintroduction of spit hoods for children in the NT is not the answer* (Joint Statement, 22 October 2024) <<https://ombudsman.nt.gov.au/news-and-publications/2024/statement-opcat-australian-npm-spit-hood-use>> .

¹⁸⁵ McMillan, K. and Davis M. (2016). *Independent review of youth detention*.

¹⁸⁶ SBS The Feed, 'Inside the isolation cells where Australian kids are imprisoned' (17 July 2024).

<<https://www.youtube.com/watch?v=pFT-Ts0g4VA>>; Wedesweiler, M and Luu, J., SBS News, 'Exclusive footage shows children being placed in isolation cells in Queensland' (17 July 2024) <<https://www.sbs.com.au/news/article/exclusive-footage-shows-children-being-placed-in-isolation-cells-in-queensland/s23wwwyygw>>; Blucher, A., ABC News, "Jason" was beaten repeatedly with a baton in a watch house. An investigation found the use of force was 'reasonable'" (10 July 2024)

<<https://www.abc.net.au/news/2024-07-10/indigenous-teenager-beaten-brisbane-police-watch-house-cctv/104070840>>; Smeed, B., 'Harrowing' footage sparks calls for Queensland government to remove children from police watch houses' (19 July 2024) <<https://www.theguardian.com/australia-news/article/2024/jul/19/queensland-children-police-watch-houses-investigation-ntwnfb>>.

¹⁸⁷ Ombudsman South Australia. (2019). *Investigation concerning the use of spit hoods in the Adelaide Youth Training Centre*, 29.

¹⁸⁸ Ibid, 1, 30.

172. In 2019, Wiradjuri, Kookatha and Wirangu man Wayne “Fella” Morrison tragically died in pre-trial detention after being forcefully restrained with a spit hood.¹⁸⁹ Following strong advocacy by his family, the South Australian Parliament legislated to ban spit hoods. South Australia is only one of two Australian jurisdictions where spit hoods are banned in law.¹⁹⁰

Detention of children in adult facilities

173. While Australia has ratified the Convention on the Rights of the Child it has made a reservation to Article 37(c), which provides that ‘every child deprived of liberty must be separated from adults unless it is considered in the child’s best interests not to do so’. The safety of children is at risk when they are imprisoned in the same facilities as adults. The Commonwealth Government has previously sought to justify this reservation on the basis that Australia’s geography makes it difficult to comply with this right while also ensuring that children are able to maintain contact with their families.¹⁹¹

174. However, as noted by the National Children’s Commissioner, ‘[c]hildren have been detained alongside adults predominately in major metropolitan centres and towns, and where considerations of geography are not the relevant barrier’.¹⁹²

175. In Queensland, children are commonly detained in police watch houses. The Queensland Public Guardian’s latest annual report states ‘[t]hese are high-risk environments that are not conducive to the safety and psychological wellbeing of children and young people’.¹⁹³ The Queensland Family and Child Commission notes that ‘watch houses are not suitable places to detain young people for extended periods due to their design (for example, no access to natural light), lack of trained staff, and lack of youth-focused policies, services and programs designed to uphold the rights of children while detained’.¹⁹⁴

176. The detention of children in adult facilities disproportionately affects Aboriginal and Torres Strait Islander children. For example, between January 2023 and June 2024, up to 93% of children in Unit 18 in Western Australia were Aboriginal.¹⁹⁵ Similarly, 93% of the case studies in the Queensland Family and Child Commissioner’s review into the detention of children in Queensland watch houses were Aboriginal and Torres Strait Islander.¹⁹⁶

¹⁸⁹ Kurmelovs, R., NITV, ‘Three missing minutes, and more questions: why did Wayne Fella Morrison die in custody?’ (September 2018), <<https://www.sbs.com.au/nitv/creative/three-missing-minutes-and-more-questions-why-did-wayne-fella-morrison-die-in-custody/scluit5h8>>.

¹⁹⁰ Brennan, D., National Indigenous Times, ‘New South Wales enacts complete ban on spit hoods’ (8 February 2024), <<https://nit.com.au/08-02-2024/9707/breaking-nsw-completely-bans-spit-hoods>>.

¹⁹¹ Australian Government, *Australia’s Combined Second and Third Reports under the Convention on the Rights of the Child* (UN Doc CRC/C/129/Add.4) (29 December 2004) 74 [467].

¹⁹² Australian Human Rights Commission. (2024). *“Help way earlier!” How Australia can transform child justice to improve safety and wellbeing*, 90.

¹⁹³ Office of the Public Guardian. (2024). *Annual report 2023-24*, 12.

¹⁹⁴ Queensland Family and Child Commission. (2023). *Who’s responsible: understanding why young people are being held longer in Queensland watch houses*, 43.

¹⁹⁵ Office of the Inspector of Custodial Services. (2024). *Review of youth custody: follow-up to 2023 inspection (part two)*, 2.

¹⁹⁶ Queensland Family and Child Commission. (2023). *Who’s responsible: understanding why young people are being held longer in Queensland watch houses*, 7.

Western Australia

177. Paragraph 139 above (see ***use of isolation and solitary confinement***), discusses the tragic and preventable death of Cleveland Dodd in Unit 18 at Casuarina Prison (a maximum-security adult facility) and a second Indigenous young person in Banksia Hill Youth Detention Centre, who had reportedly previously been held at Unit 18.¹⁹⁷ The coronial inquest into Cleveland Dodd's death heard that conditions in Unit 18 were 'cruel, degrading and inhuman'. The Coroner has indicated that he will recommend the urgent closure of Unit 18.¹⁹⁸

178. The Western Australian Office of the Inspector of Custodial Services in its second report on Banksia Hill Youth Detention Centre has also stated:¹⁹⁹

Unit 18 is not fit for purpose. It is cold and bleak... it is a standard accommodation block designed for a maximum-security adult facility

179. Aboriginal experts Associate Professor Hannah McGlade and Associate Professor Jocelyn Jones have provided expert witness reports to the Western Australian Coroner concerning the violations of international law, and lack of culturally safe health care, in relation to the treatment of Cleveland Dodd and Aboriginal children at Unit 18. Associate Professor Hannah McGlade, Aboriginal and Torres Strait Islander Social Justice Commissioner Katie Kiss and National Children's Commissioner Anne Hollonds also wrote to the Western Australian Government, urging reform to the state's youth detention system, including closure of Unit 18, two days before the second young person died in custody.²⁰⁰

180. To date, notwithstanding these tragic deaths, the Western Australian Government has yet to close Unit 18 and has not committed to any deadline for moving children out of the Unit despite having built another, less inappropriate, wing at Banksia Hill Youth Detention Centre.²⁰¹

Queensland

181. In Queensland, children as young as 10 years old²⁰² are being detained in deplorable conditions in adult watch houses. These are designed to imprison adults for short periods of time, yet children are detained there for extended periods of time (weeks and even months). A recent Queensland Audit Office Report outlined that

¹⁹⁷ Withers, C., ABC News, 'Protesters call for immediate closure of Unit 18 juvenile wing in Perth's Casuarina maximum security prison' (20 September 2024) <<https://www.abc.net.au/news/2024-09-20/protesters-call-for-closure-of-unit-18-detention-wing/104368484>>.

¹⁹⁸ Bourke, K., ABC News, 'Coroner in Cleveland Dodd inquest indicates he may call for urgent closure of Unit 18' (11 December 2024) <<https://www.abc.net.au/news/2024-12-11/cleveland-dodd-inquest-coroner-may-call-for-closure-of-unit-18/104712784>>; Bunch, A., National Indigenous Times, 'WA Coroner calls for urgent closure of notorious youth prison Unit 18' (11 December 2024) <<https://nit.com.au/11-12-2024/15376/wa-coroner-calls-for-urgent-closure-of-notorious-youth-prison-unit-18#.>>.

¹⁹⁹ Office of the Inspector of Custodial Services. (2024). *Review of youth custody: follow-up to 2023 inspection (part two)*, 17.

²⁰⁰ Torre, G., National Indigenous Times, 'Human rights advocates wrote to WA Premier to urge justice reforms days before death of child in custody' (30 August 2024) <<https://nit.com.au/30-08-2024/13440/childrens-and-human-rights-advocates-wrote-to-wa-premier-to-urge-reforms-days-before-death-of-child-in-custody>>.

²⁰¹ Office of the Inspector of Custodial Services. (2024). *Review of youth custody: follow-up to 2023 inspection (part two)*, 17.

²⁰² Queensland Family and Child Commission. (2023). *Queensland Child Rights Report 2023*, 31–32.

Queensland's youth detention facilities are consistently operating above safe capacity.²⁰³

182. Children in watch houses can see and hear adults who are detained there, and children even report hearing adults who are 'drunk, abusive, psychotic or suicidal'.²⁰⁴ In 2023, a Queensland watch house officer reported that there were incidents of adult prisoners exposing their genitals and imitating sexual acts to children of the opposite sex, and an incident where a girl was placed in a cell with two adult male prisoners.²⁰⁵
183. Queensland is one of three Australian jurisdictions with human rights legislation. The harmful practices in adult facilities occur despite this legislation stating expressly and very clearly that 'an accused child who is detained must be segregated from all detained adults' and a convicted child 'must be treated in a way that is appropriate for the child's age'.²⁰⁶ In 2023, following a Queensland Supreme Court decision which ordered the urgent transfer of three children from watch houses where they had been detained for extended periods,²⁰⁷ the Queensland Parliament voted to override these human rights protections to enable children to continue to be detained in watch houses.²⁰⁸
184. In December 2024, the Queensland Parliament overrode Queensland's human rights legislation to pass laws it conceded 'is likely at least in the short term that the increase in custodial sentences will further strain capacity in youth detention centres in Queensland and may result in children being held in watch houses for extended periods of time'.²⁰⁹
185. Recent media reports that the number of children in adult watch houses in Queensland increased 50% in 2023-24.²¹⁰ This does not account for increases following regressive laws passed in December 2024 or the impact of various arrest blitzes.²¹¹

Victoria

186. In Victoria, another of the three Australian jurisdictions with human rights legislation, the *Youth Justice Act 2024* allows for the transfer of children aged 16 and over to adult prisons. The Victorian Aboriginal Legal Service ("VALS") condemned the move in their submission to the Senate inquiry into Australia's youth justice and incarceration system. One of VALS' clients was forcibly transferred at age 16 to Port Phillip Prison, a

²⁰³ Queensland Audit Office. (2024). *Reducing serious youth crime (Report 15: 2023–24)*, 13-4.

²⁰⁴ *Re Richard Jones (a pseudonym)* [2023] QChCM 1, 11.

²⁰⁵ Gillespie, E., The Guardian, "Illegal' strip searches of children among claims made by Queensland watch-house whistleblower' (27 February 2023) <<https://www.theguardian.com/australia-news/2023/feb/27/strip-searches-of-children-among-claims-made-by-queensland-watch-house-whistleblower>>.

²⁰⁶ *Human Rights Act 2019* (Qld), ss 33(1) and 33(3).

²⁰⁷ *Youth Empowered Towards Independence Inc v Commissioner of Queensland Police Service* [2023] QSC 174.

²⁰⁸ *Child Protection (Offender Reporting and Offender Prohibition Order) and Other Legislation Amendment Act 2023* (Qld).

²⁰⁹ *Statement of compatibility for the Making Queensland Safer Bill 2024* (Qld), 4.

²¹⁰ Brennan, D., National Indigenous Times, '50% increase in children under 14 being housed in Queensland adult watch houses' (8 January 2025) <<https://nit.com.au/08-01-2025/15661/children-under-14-in-queensland-watch-houses-up-50-per-cent#>>.

²¹¹ Plessner, B., The Australian, 'Hundreds of kids arrested in the first three weeks of Queensland's tough youth crime laws' (6 January 2025) <[https://www.theaustralian.com.au/nation/hundreds-of-kids-arrested-in-the-first-three-weeks-of-queenslands-tough-youth-crime-laws/news-story/c7f1d11f630a94e36838e96619d1af07?>](https://www.theaustralian.com.au/nation/hundreds-of-kids-arrested-in-the-first-three-weeks-of-queenslands-tough-youth-crime-laws/news-story/c7f1d11f630a94e36838e96619d1af07?); Queensland Government, *176 arrests in state-wide police sting* (Media Release, 28 February 2025) <<https://statements.qld.gov.au/statements/102111>>

maximum-security prison for adult men, notorious for significant harm and torture. In the adult prison, the boy was subject to excessive periods of solitary confinement, placed in a spit hood and had water in his cell turned off by authorities for 22 hours.²¹²

Adult penalties

187. Recent Queensland legislation substantially changed how children are treated by police, courts and prisons, including by applying minimum, mandatory and maximum adult sentences to children as young as 10 years old for 13 offences.²¹³ This at least doubles maximum periods of detention for children, with penalties for some offences increasing to life detention.²¹⁴
188. This change violates domestic and international human rights law. The Queensland Government overrode Queensland's human rights legislation to enact it.²¹⁵ Under Article 37(b) of the Convention on the Rights of the Child, Australia is obliged to ensure that detention and imprisonment of a child are for the shortest appropriate period of time.
189. Given over 70% of children in Queensland prisons are Aboriginal or Torres Strait Islander, rising to more than 80% for children aged 10-13,²¹⁶ these harsh sentences that breach human rights law will disproportionately impact First Nations children. This was expressly acknowledged by the Queensland Government yet it drew an illogical and unpersuasive conclusion that 'the amendments do not directly or indirectly discriminate based on race'.²¹⁷
190. The objective of the laws, as stated in their explanatory notes, include punishment and denunciation.²¹⁸ The human rights statement provides that the laws are 'more punitive than necessary to achieve community safety'.²¹⁹ Despite the Queensland Government seeking to extract itself from discussion about race, it is very clear that the laws are also about punishing Aboriginal and Torres Strait Islander children.
191. When coupled with the evidence that 'tough on crime' policies cause profound harm to First Nations children and do not result in safer communities, these shocking concessions indicate the Queensland Government is, at best, willing to overlook racial discrimination and forsake the rights and lives of First Nations children in the name of populist politics, and at worst, directly discriminating against First Nations children.

²¹² Victorian Aboriginal Legal Service. (2024). *Submission to Australia's youth justice and incarceration system Senate Inquiry*, 29.

²¹³ *Making Queensland Safer Act 2024*

²¹⁴ *Briefing for the Justice, Integrity and Community Safety Committee: Making Queensland Safer Bill 2014*, 14.

²¹⁵ *Making Queensland Safer Act 2024*, section 19 (see new section 175A(11)).

²¹⁶ Australian Productivity Commission. (2025). *Report on Government Services 2025, Part F, Section 17 (Youth justice services)*, table 17A.9.

²¹⁷ *Statement of compatibility* for the *Making Queensland Safer Bill 2024* (Qld), 5.

²¹⁸ *Explanatory notes* for the *Making Queensland Safer Bill 2024* (Qld), 1.

²¹⁹ *Statement of compatibility* for the *Making Queensland Safer Bill 2024* (Qld), 5.

192. We note that the adult sentencing laws passed in December 2024, and the Queensland Government has already appointed a panel to identify how the regime could be expanded.²²⁰

Removal of detention as a last resort

193. We understand that Australia may be the only country that has ever removed the principle of detention as a last resort for children.²²¹

Queensland

194. The recent Queensland legislation that applied adult penalties to children also removed – and, even more concerningly, *prohibited* – consideration of detention as a last resort. Previously, detention as a last resort underlined the entire operation of the *Youth Justice Act 1992* (Qld) and was a consideration in police powers of arrest, bail decisions and sentencing.²²² The legislation removed all references to detention as a last resort²²³ and added the following requirement to sentencing principles for children:²²⁴

in sentencing a child for an offence, a court must not have regard to –

- a) any principle that a detention order should only be imposed as a last resort; or*
- b) any principle that a sentence that allows the child to stay in the community is preferable.*

195. The same legislation removed restorative justice orders as a sentencing option. Courts may still refer children to restorative justice conferencing but cannot choose it as an alternative to a detention order.²²⁵ The Queensland Government was, in its own words, ‘using restorative justice processes to reduce the overrepresentation of Aboriginal and Torres Strait Islander children in the justice system’.²²⁶ It follows that removing it as a sentencing option will lead to more Aboriginal and Torres Strait Islander children in custody, exacerbating the consequences of removing detention as a last resort.

196. As with the adult penalty amendments at paragraph 187, the Queensland Government overrode Queensland’s human rights legislation to remove and prohibit detention as a last resort.²²⁷ This violates section 37(b) of the Convention on the Rights of the Child. In addition to contravening human rights, the amendments have the bizarre, shocking effect of the principle of detention as a last resort applying to adults but not children.²²⁸

²²⁰ Minister for Youth Justice and Victim Support and Minister for Corrective Services, *Making Queensland Safer laws: Expert Legal Panel appointed* (Media Release, 12 February 2025) <<https://statements.qld.gov.au/statements/102005>>

²²¹ See the National Children’s Commissioner’s evidence before the Senate Legal and Constitutional Affairs References Committee regarding Australia’s youth justice and incarceration system Senate Inquiry, *Hansard record of proceedings (proof)*, 3 February 2025, 77.

²²² *Youth Justice Act 1992* (Qld) (as at 19 September 2024), schedule 1 principle 18, s 13, s 150(1)(b), s48AA(b)(i).

²²³ *Making Queensland Safer Act 2024* (Qld), s 10, s 15(5), s 48.

²²⁴ *Making Queensland Safer Act 2024* (Qld), s 15(1).

²²⁵ *Making Queensland Safer Act 2024* (Qld), s 19 (see new section 175A(8)).

²²⁶ Queensland Government, *About restorative justice conferences* (October 2018) <<https://www.qld.gov.au/law/sentencing-prisons-and-probation/young-offenders-and-the-justice-system/youth-justice-community-programs-and-services/restorative-justice-conferences/about>>.

²²⁷ *Making Queensland Safer Act 2024* (Qld), s 15(7).

²²⁸ *Penalties and Sentences Act 1992* (Qld), s 9(2)(a).

197. It is already the case that most children in custody in Queensland are Aboriginal or Torres Strait Islander. The removal of detention as a last resort and restorative justice sentencing options for children will only exacerbate existing discrimination within the system and contribute to the pattern of discrimination documented in this submission. The Queensland Government has admitted removing detention as a last resort 'will likely have a greater impact on Aboriginal and Torres Strait Islander children'.²²⁹

Victoria

198. Concerningly, the Victorian Government recently followed in Queensland's footsteps by passing laws that remove the principle of remand as a last resort as a factor that must be considered in bail applications for children. The Victorian Government has acknowledged that this will increase the likelihood of children being remanded in custody,²³⁰ which in turn will disproportionately affect Aboriginal children. Despite Victoria having a charter of human rights, the Victorian Government considers that removing detention as a last resort is justifiable on the basis of community safety. This argument is contrary to the available evidence, international human rights law and the human rights analysis in Queensland.

Inclusion of non-custodial events on criminal histories

199. In Queensland, children's criminal records have also been vastly expanded to include police cautions, restorative justice orders, supervised release orders and all relevant decisions, findings and orders under these.²³¹ The expanded criminal histories will be able to be used in arrest, bail and sentencing decisions.

200. The obvious aim of these amendments is to increase the likelihood that children will be sentenced to detention. Given that Aboriginal and Torres Strait Islander children are already grossly overrepresented in custody in Queensland, it is largely First Nations children that the expanded criminal histories will pipeline into the criminal legal system and its prisons. Again, the Queensland Government has admitted that it is likely that Aboriginal and Torres Strait Islander children will be impacted to a greater extent than non-Indigenous children.²³²

201. While in this submission we focus on certain provisions of Queensland's recent legislation, almost all of it has disproportionate impact on First Nations children. Further information is available in the Human Rights Law Centre's explainer on the legislation and its joint submission with Change the Record to the parliamentary inquiry into the laws.²³³

²²⁹ Statement of compatibility for the *Making Queensland Safer Bill 2024* (Qld), 6.

²³⁰ Statement of compatibility for the *Bail Amendment Act 2025* (Vic).

²³¹ Explanatory notes for the *Making Queensland Safer Bill 2024* (Qld), 12-3. See also explanatory notes for Amendments moved during Consideration In Detail By The Honourable Deb Frecklington MP, Attorney-General and Minister for Justice and Minister for Integrity, 1.

²³² Statement of compatibility for the *Making Queensland Safer Bill 2024* (Qld), 7.

²³³ Human Rights Law Centre and Change the Record. (2024). *Ending youth incarceration in Queensland: A joint submission to the Queensland Parliament Justice, Integrity and Community Safety Committee's inquiry into the Making Queensland Safer Bill 2024*; Human Rights Law Centre, *Explainer: Making Queensland Safer Act* (19 December 2024) <<https://www.hrlc.org.au/reports-news-commentary/queensland-adult-time>>.

Adoption of new discriminatory laws and policies

202. This Queensland and Victorian legislation are just some of the latest developments in a pattern of Australian governments introducing, and in some cases – reintroducing, discriminatory legislation and policies that both disregard and contradict evidence of experts, government inquiries, impacted First Nations communities and in some cases, their own rationale.
203. In recent years, the pattern of direct and indirect racial discrimination against Indigenous children in Australia’s criminal legal system has escalated and worsened the crisis of children behind bars.
204. Below is a non-exhaustive timeline of the flurry of new discriminatory laws and policies that have been introduced by Australian governments to the detriment of Indigenous children in the last four years alone. Most of these laws and policies, and their impact, are considered in more detail above.
- a. In 2020, the *High Risk Serious Offenders Act 2020* in Western Australia enabled indefinite detention of incarcerated people. The law has been typically used against Aboriginal prisoners, most who were incarcerated since childhood, and uses childhood records in support of indefinite detention.
 - b. In 2021, the Northern Territory Government’s *Youth Justice Legislation Amendment Bill 2021* removed the presumption in favour of bail for various offences (including non-violent offences) for a young person as well as judicial discretion for granting bail in certain circumstances.
 - c. In 2022, the Western Australian Government announced that it would transfer children from the Banksia Hill Youth Detention Centre to the Casuarina adult men’s maximum-security prison. The following year the Supreme Court of Western Australia found the treatment of children at these facilities was unlawful.
 - d. In March 2024, the New South Wales Parliament passed the *Bail and Crimes Amendment Act 2024*, limiting grants of bail for young persons charged with certain offences, and introducing a more stringent test for bail for young people in certain circumstances than for adults.
 - e. In September 2024, the Victorian Parliament passed the *Youth Justice Act 2024*, raising the age of criminal responsibility to 12 instead of 14, handing the police new powers over children aged 10 and 11 and re-introducing specified bail offences for children, together with stricter bail tests and trialing electronic monitoring.
 - f. In October 2024, the newly elected Northern Territory Government pushed through discriminatory legislation to lower the age of criminal responsibility to 10, reversing the previous government’s move to raise the age to 12, and expanding the presumption against bail for various offences for children aged 10 to 17.
 - g. In October 2024, the Northern Territory Police Commissioner announced that the use of spit hoods to restrain children would be reintroduced in police watch houses.
 - h. In December 2024, the newly elected Queensland Government passed laws implementing adult-length penalties for children, removing detention as a last resort, subjecting children to longer probation periods, repealing judges’ powers to close the court to media and other persons and removing safeguards, flexibility and

procedural fairness in the process for transferring children from youth prisons to adult prisons when they turn 18.²³⁴

- i. In January 2025, the Northern Territory Government confirmed that children detained in Mparntwe (Alice Springs) were scheduled to be moved that month to a newly opened prison in Garramilla (Darwin), approximately 1,500 kilometers away.
- j. In February 2025, Queensland introduced a Bill to extend electronic monitoring of children as a bail condition, despite no conclusive evidence that electronic monitoring reduces recidivism, and appointed a panel to identify more offences for which adult-length penalties will apply to children.
- k. In March 2025, Victoria passed amendments to bail, which removed the principle of remand as a last resort for children, introduced harsher bail tests for certain offences and re-introduced bail offences which have previously had a disproportionate impact on Aboriginal people and children, and announced that further punitive measures would be progressed in mid-2025.
- l. In March 2025, the Victorian Government confirmed in Parliament it did not intend to raise the minimum age of criminal responsibility to at least 14.
- m. In March 2025, the South Australian Government released a plan for harsher bail, sentencing and police powers for children.

Segregation policies and exclusion from culture

205. The removal of incarcerated Indigenous children from their family and community too often starts with their removal into 'child protection'. The link between child protection, youth detention and adult incarceration for Indigenous people is well documented.²³⁵ For example, children in the child protection system are 12 times as likely as the general population to be under youth justice supervision.²³⁶ In 2021-22, the Australian Institute of Health and Welfare found that about 58,000 Aboriginal and Torres Strait Islander children came into contact with child protection systems (170 per 1000 children).²³⁷
206. The removal of Indigenous children into out-of-home care and criminal legal systems, and the harm inflicted on Indigenous communities by the State, must be understood in the context of Australia's historical statutory regime of 'protection' which authorised the removal of Indigenous children. Professor Davis' inquiry 'Family is Culture' examined this connection between child protection and youth detention in New South Wales. Associate Professor Hannah McGlade also documents this history in relation to Western Australian prisons which saw Aboriginal people, including children,

²³⁴ Prisoners' Legal Service. (2024). *Submission to inquiry into the Making Queensland Safer Bill 2024*.

²³⁵ Royal Commission into Aboriginal Deaths in Custody. (1991). *National report* (Vol. 1), 52; Human Rights and Equal Opportunity Commission. (1997). *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, 164; Australian Institute of Health and Welfare. (2016). *Young People in Child Protection and under Youth Justice Supervision 2014–15*; Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory. (2017). *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, Volume 3B*; Australian Law Reform Commission. (2017). *Pathways to Justice - An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Chapter 15 - Child Protection and Adult Incarceration, [15.5-14].

²³⁶ Australian Human Rights Commission. (2024). *"Help way earlier!" How Australia can transform child justice to improve safety and wellbeing*, 21.

²³⁷ Australian Institute of Health and Welfare. (2024). *Child protection Australia 2021–22*.

incarcerated for resisting slavery like laws and resulting in the deaths of many Aboriginal people.²³⁸

207. For many Aboriginal and Torres Strait Islander people, the ‘past is the present’.²³⁹ Indigenous children are still disproportionately removed from their families and put into detention. As noted at paragraph 20 above, in 2025, the Australian Productivity Commission found that although only about 6.5% of young people aged 10–17 in Australia are Aboriginal or Torres Strait Islander,²⁴⁰ almost two thirds (65%) of the young people aged 10–17 in detention on an average day in 2023–24 were Indigenous.²⁴¹
208. For Indigenous children, detention is often synonymous with the exclusion from culture. As the SPT observed in December 2023, most of Australia’s prisons are located in urban centres, ‘meaning that imprisoned members of Indigenous communities are often detained far from their families, communities and areas of cultural relevance’.²⁴² Another example of segregation policies in action is the Northern Territory Government’s intention to transfer children in custody in Mparntwe (Alice Springs) to Garramilla (Darwin), approximately 1,500 kilometres away.²⁴³
209. Prisons, segregation and exclusion from culture are interconnected regardless of prison location. Previously incarcerated Indigenous children in the Northern Territory told the Royal Commission into the Protection and Detention of Children in the Northern Territory that they experienced a lack of cultural connection and cultural safety.²⁴⁴ Yoorrook also heard evidence about the lack of cultural connection and programs in Victoria’s prison system.²⁴⁵
210. Alarmingly, children told the Northern Territory Royal Commission of being prevented from speaking their Indigenous language while in detention:²⁴⁶

When I was in Don Dale, I was not always able to speak my language, and this made me upset. There were some other boys there [from the same language group] and sometimes we would try to sit down and talk stories in our language. We would sit around and talk about why each of us was in detention, how long we have

²³⁸ McGlade, H., ‘Australia’s treatment of Indigenous prisoners: the continuing nature of human rights violations in West Australian jail cells’ in *Routledge Handbook of Disability Activism*, Berghs, M., Chataika, T., El-Lahib, Y. & Dub, A.K. (eds.) 2020, London and New York: Routledge, 274 – 289.

²³⁹ Ibid.

²⁴⁰ Australian Productivity Commission. (2025). *Report on Government Services 2025, Part F, Section 17 (Youth justice services)*, table 17A.28.

²⁴¹ Australian Productivity Commission. (2025). *Report on Government Services 2025, Part F, Section 17 (Youth justice services)*, table 17A.5.

²⁴² SPT, *Visit to Australia undertaken from 16 to 23 October 2022: recommendations and observations addressed to the State party* (UN Doc CAT/OP/AUS/ROSP/1) (20 December 2023), 17 [108].

²⁴³ Allison, C., ABC News, ‘Alice Springs youths to be relocated to Darwin as part of NT government’s ‘emergency’ prisons plan’ (21 October 2024) <<https://www.abc.net.au/news/2024-10-21/nt-government-reveals-emergency-plan-for-overcrowded-prisons/104496702>>; Garrick, M., ABC News, ‘NT Police watch houses at capacity as prisoner numbers again hit record levels’ (7 January 2025) <<https://www.abc.net.au/news/2025-01-07/nt-police-watch-houses-full-as-prisoner-numbers-hit-new-record/104789666>>.

²⁴⁴ Ewenson, L., Lived experiences of youth justice detention in Australia: reframing the institution in a decarcerated state (2024), *Australia Journal of Human Rights*, DOI: 10.1080/1323238X.2024.2412386, 11-2.

²⁴⁵ Yoorrook Justice Commission. (2023). *Report into Victoria’s child protection and criminal justice systems*, 21.

²⁴⁶ Statement from young First Nations person BW (17 years old), tendered to the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, 31 March 2017. Exhibit number 260.001 - paragraph 21.

been in detention and how long we had to go. We would also ask each other questions about what was going on back home. On more than one occasion the guards would break up these conversations. They told us to stop speaking in our language and to speak in English instead. They said it was 'too risky' and that we could be talking about was to escape.

211. This is a clear breach of international human rights law, including the right to freedom of expression in Article 19 of the International Covenant on Civil and Political Rights and the right to language in Article 13 of the United Nations Declaration of the Rights of Indigenous Peoples, and is yet another example of the disregarded cultural need and harm resulting from incarcerating Indigenous children.

Lack of adequate legislative frameworks and mechanisms addressing racial discrimination

Racial discrimination legislation

212. Australia lacks an adequate, comprehensive national framework that prohibits all forms of racial discrimination and harmonises protections across all jurisdictions.
213. Over the past 30 years, each Australian jurisdiction has introduced anti-discrimination laws that make race-based discrimination unlawful.²⁴⁷ Governments continue to introduce discriminatory and harmful youth justice policies which indicates that these laws offer limited protection.
214. The federal *Racial Discrimination Act 1975* was intended to incorporate Australia's obligations under the Convention. However, in 2007, the Commonwealth Government unlawfully suspended the *Racial Discrimination Act 1975* to introduce the 'Northern Territory Emergency Response'. The move was widely condemned, including by the Committee, for being inconsistent with Australia's obligations under the Convention and for not adequately consulting Indigenous people in the Northern Territory.²⁴⁸
215. The Australian Human Rights Commission recently reported that Indigenous people have great difficulty using the *Racial Discrimination Act 1975* to seek redress. Indigenous people told the Australian Human Rights Commission that the law fails to take an anti-racist and systemic approach or create a positive duty to eliminate racial discrimination and puts a heavy burden on Aboriginal people impacted by racism to bring about change.²⁴⁹
216. In Victoria, Yoorrook heard evidence about a serious gap in the protection offered by Victoria's anti-discrimination laws for people who experience discrimination within the

²⁴⁷ For an overview, see Australian Human Rights Commission, 'A quick guide to Australian discrimination laws' via https://humanrights.gov.au/sites/default/files/2024-06/GPGB_quick_guide_to_discrimination_laws.pdf.

²⁴⁸ Committee for the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding observations of the Human Rights Committee (Australia)*, (UN Doc CCPR/C/AUS/CO/5) (7 May 2009), 3 [14]; Australian Human Rights Commission. (2007). *Social Justice Report 2007 - Chapter 3: The Northern Territory 'Emergency Response' Intervention*.

²⁴⁹ Australian Human Rights Commission. (2024). *The National Anti-Racism Framework: A roadmap to eliminating racism in Australia*, 31.

criminal justice system. Witnesses told Yoorrook that if a police or prison officer mistreats someone because of their race, the person is unlikely to be able to bring a racial discrimination complaint in the Victorian jurisdiction.²⁵⁰

217. Similarly, the Queensland Human Rights Commission (“QHRC”) recently found that prisoners, particularly Indigenous prisoners, face significant barriers to making discrimination complaints. Under the Queensland *Corrective Services Act 2006*, prisoners must first go through a four-month internal paper-based complaints process before they can make a discrimination complaint to the QHRC. This creates a significant challenge for prisoners to bring a complaint to the QHRC within the prescribed 12-month timeframe.²⁵¹
218. The QHRC also noted that this modified process has a disproportionate impact on Indigenous people in prison:²⁵²

Several submissions noted the additional challenges for people with disability, low literacy, and/ or Aboriginal and Torres Strait Islander people to comply with the requirements of the Corrective Services Act that are onerous and paper based. These issues are magnified for people who experience intersectional discrimination. The impact of an inaccessible process is significant when considering that around half of prisoners have a disability and 28% of prisoners are of Aboriginal or Torres Strait Islander descent.

219. When the Queensland Government released draft reforms to its discrimination legislation, concerning, the proposal was to remove the modified complaints process under the *Corrective Services Act 2006* for a prisoner on parole or a person subject to a community-based order, but not for other people in prison.²⁵³ At the time of this submission, the four-month pre-complaint requirement remains.
220. In Western Australia, following a review of Western Australia’s anti-discrimination legislation, the Law Reform Commission of Western Australia noted uncertainty as to whether the law would apply to services provided by the state, including police, prisons and detention centres, following the High Court’s decision in *IW v City of Perth*.²⁵⁴ The Commission recommended it apply to more protected areas of public life.²⁵⁵ While the state committed to reforming the law, the final form of legislation is yet to be released at the time of this submission. Further, there appears to have been no consultation with Aboriginal people about the laws and concerns about ineffectiveness.

²⁵⁰ Yoorrook Justice Commission. (2023). *Report into Victoria’s child protection and criminal justice systems*, 20.

²⁵¹ Queensland Human Rights Commission. (2022). *Building belonging: Review of Queensland’s Anti-Discrimination Act 1991*, 188.

²⁵² Ibid.

²⁵³ Queensland Department of Justice and Attorney-General. (2024). *Anti-Discrimination Bill 2024 (Exposure draft): Consultation guide*, 44-5.

²⁵⁴ *IW v The City of Perth* [1997] HCA 30; (1997) 191 CLR 1; Law Reform Commission of Western Australia. (2022). *Review of the Equal Opportunity Act 1984 (WA): Project 111 Final Report*, 134-5.

²⁵⁵ Law Reform Commission of Western Australia. (2022). *Review of the Equal Opportunity Act 1984 (WA): Project 111 Final Report*, 137.

Failure to ratify, incorporate and fully adopt international law

221. Australia has failed to directly and adequately incorporate the Convention, as well as other international human rights instruments relevant to youth justice – such as OPCAT – into domestic law.
222. While Australia has committed to uphold the Convention on the Rights of the Child, it has refused to ratify the Optional Protocol to the Convention on the Rights of the Child on a communications procedure which would allow children who are subject to violations to have recourse under international human rights law, effectively shielding the State from international exposure of human rights abuses. It also refuses to withdraw its reservation to Article 37(c), which speaks to the treatment of children when deprived of their liberty, and the need to detain them separately from adults.

Lack of adequate domestic human rights protections

223. Australia is one of the few developed nations without a constitutional Bill of Rights, a national Human Rights Act, or Child Rights Act, which enshrines its obligations into law. The federal *Racial Discrimination Act 1975* has failed to provide adequate protection for Aboriginal and Torres Strait Islander children. State and territory human rights legislation, where it exists, is a patchwork, has clear deficiencies and similarly offers insufficient human rights protection.
224. Recognising that police and prisons are primarily the domain of states and territories, Australia needs human rights protections in every state and territory. In jurisdictions without human rights legislation, people are readily deprived of their rights, including the right to protection from cruel, inhuman and degrading treatment and torture.
225. Human rights Acts or Charters exist in the Australian Capital Territory, Victoria and Queensland, and have had some success in protecting and promoting the rights of children. For example, in Victoria, children detained in the Barwon maximum security adult prison were able to challenge their transfer to that prison based on breaches of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).²⁵⁶
226. However, even in the few jurisdictions with human rights legislation, there remain significant barriers to people enforcing their rights. In Victoria and Queensland, claims under their human rights laws must ‘piggyback’ another primary claim, preventing standalone human rights challenges.²⁵⁷ The remedies available for breaches of human rights are also limited in the Australian Capital Territory, Victoria and Queensland, which do not permit the recovery of damages.²⁵⁸ As outlined above, when a successful challenge was made about the detention of children in police watch houses in Queensland, the Queensland Government did not look at alternatives to incarceration and instead passed legislation to make its actions lawful.

²⁵⁶ *Human Rights Law Centre and Certain Children v Minister for Families and Children* [2017] VSC 251.

²⁵⁷ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 39; *Human Rights Act 2019* (Qld) s 59(1).

²⁵⁸ *Human Rights Act 2004* (ACT), s 40C(4); *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 39(3); *Human Rights Act 2019* (Qld), s 59(3).

227. In addition, domestic human rights legislation can be overridden with the effect that people cannot make claims at all. The Queensland Government has suspended its human rights legislation three times to pass laws violating human rights, each instance relating to youth justice laws and disproportionately impacting Indigenous children:
- a. in March 2023, to criminalise children who breach bail conditions;
 - b. in September 2023, to enable children to continue to be detained in police watch houses; and
 - c. in December 2024, to pass legislation that removed the principle of detention as a last resort for children and applied adult-length penalties for certain offences.
228. We also note that the extent or appropriateness of government’s engagement with human rights analyses is not practically impacting their ability to pass legislation. While the Queensland Government considered criminalising breach of bail and removing the principle of detention as a last resort were incompatible with Queensland’s human rights laws, it passed the legislation by overriding those laws. In Victoria, similar legislation was passed by parliament with the government claiming that no rights under the Victorian human rights laws were unreasonably limited.²⁵⁹

Lack of independent oversight of police and prisons

229. Ratified by the Australian Government in 2017, OPCAT provides an oversight framework to address cruel and degrading treatment by requiring governments to facilitate visits by the SPT and designate independent bodies to undertake inspections of places of detention.
230. Australia’s compliance with OPCAT is dismal. The SPT even terminated its last visit to Australia in October 2022 after being blocked from carrying out its mandate to visit places of detention in New South Wales and Queensland.
231. Additionally, to date, only 6 of the 9 jurisdictions have formally nominated their independent detention oversight bodies, or National Preventive Mechanisms (“NPM”), with the Victorian, New South Wales and Queensland Governments having failed to implement this bare minimum safeguard to protect against mistreatment in prisons.²⁶⁰ We understand it is the position of these governments that the Commonwealth Government should provide funding for independent detention oversight. So long as this funding standoff persists, people in all places of detention – including First Nations children in prison and police watch houses – will remain at risk of mistreatment.
232. Even with a NPM in place, it is imperative that Indigenous peoples have meaningful involvement and input in the oversight mechanisms through employment, external engagement and consultation. Anecdotal evidence suggests this has not happened in existing NPMs.

²⁵⁹ Statement of compatibility for the *Bail Amendment Bill 2025*.

²⁶⁰ Association for the Prevention of Torture, *Australia* <<https://www.apr.ch/knowledge-hub/opcat/australia>>.

233. There is also an urgent need for greater police accountability in Australia given the mistreatment of children and young people by police and the ability of any police interaction to pipeline children into the criminal legal system. Police will continue to act with impunity so long as the status quo of police investigating police persists across Australia.
234. Given well documented reports of racism within police forces,²⁶¹ Indigenous people are especially harmed by the lack of independent oversight of police. For example, Yoorrook heard that Victoria's police complaints system is failing Indigenous Victorians as 'the system routinely denies or justifies police misconduct and fails to hold officers or management to account. The vast majority of complaints about police are investigated by police which undermines effectiveness and generates mistrust'.²⁶² This issue has also been raised by a Western Australian parliamentary body which made numerous recommendations for improvements to the state's Corruption and Crime Commission in light of the mistreatment of Aboriginal children, including use of police dogs and serious injuries to Aboriginal children resulting in hospitalisation.²⁶³
235. Between 1 July 1991 and 30 June 2023, there have been 545 officially recorded Indigenous deaths in custody (for example, prison custody, police custody and custody-related operations and youth detention).²⁶⁴ At the time of writing, there have been only a few prosecutions of police in relation to deaths in custody, trials without Aboriginal jury members²⁶⁵ and no convictions for any of these deaths.

Conclusion

236. Racial discrimination is embedded throughout Australia's youth justice system – a system that targets and disproportionately impacts Indigenous children. These discriminatory laws violate international law obligations (including those under the Convention and the Convention on the Rights of the Child). The system continues to disregard the voices of Indigenous peoples.
237. Governments across the country have consistently invested in police and prisons over public housing, support services and community-based, self-determined alternatives to criminalisation and incarceration. They have consistently ignored mounting evidence that the carceral, punitive approach does not reduce crime or protect the community.

²⁶¹ See, for example, Harris, L., ABC News, 'Former NSW Police officers say racist culture leading to higher Indigenous incarceration rates' (26 November 2024) <<https://www.abc.net.au/news/2024-11-26/former-nsw-police-officers-indigenous-racism-incarceration/104635852>>; Lathouris, O., ABC News, 'Aboriginal NT police officers allege 'countless incidents' of racial discrimination in human rights complaint' (24 September 2024) <<https://www.abc.net.au/news/2024-09-24/nt-police-aboriginal-officers-human-rights-complaint/104383814>>; McGlade, H., Reconciliation Australia, 'Dr Hannah McGlade on Australian Policing' (24 April 2024) <<https://www.reconciliation.org.au/dr-hannah-mcglade-the-racist-heart-of-australian-policing>>; Brennan, D., National Indigenous Times, 'Police Commissioner knew about racist awards despite denying knowledge of racism in NT Force' (29 May 2024) <<https://nit.com.au/29-05-2024/11694/police-commissioner-knew-about-racist-awards-despite-denying-knowledge-of-racism-in-the-nt-force>>.

²⁶² Yoorrook Justice Commission. (2023). *Report into Victoria's child protection and criminal justice systems*, 20.

²⁶³ Joint Standing Committee on the Corruption and Crime Commission. (2020). *If not the CCC... then where? An examination of the Corruption and Crime Commission's oversight of excessive use of force allegations against members of the WA Police Force*; Bourke, K., ABC News, 'Corruption and Crime Commission slams WA Police use of dogs against young Aboriginal people' (14 March 2023) <<https://www.abc.net.au/news/2023-03-15/ccc-condemns-wa-police-use-of-dogs-on-young-and-indigenous/102097636>>.

²⁶⁴ Australian Institute of Criminology. (2023). *Deaths in custody in Australia 2022–23*, 1.

²⁶⁵ McGlade, H., Crikey, 'Death in Geraldton: how Joyce Clarke became another Indigenous statistic' (25 October 2021) <<https://www.crikey.com.au/2021/10/25/death-in-geraldton-how-joyce-clarke-became-another-indigenous-statistic>>

Instead, they campaign on 'tough on crime' agendas that lead to increasing arrest and incarceration of children, largely Indigenous.²⁶⁶

238. Successive failures by governments to pursue evidence-based reform in favour of 'tough on crime' politics has caused immense harm to First Nations children and communities, including deaths, attempted suicides and self-harm. These serious harms, and the role of disadvantage and trauma in Aboriginal children's incarceration, have been repeatedly documented by Aboriginal communities and experts, medical, legal and human rights organisations, independent government inquiries and United Nations bodies. Yet Australian governments continue to ignore and dismiss them.
239. The cruel and degrading practices in Australia's youth justice system toward Indigenous children are a clear pattern of direct and indirect racial discrimination. This is worsening and intensifying with the shocking laws we have outlined in this submission. We urge the Committee to exercise its Early Warning and Urgent Action function in relation to these systemic and serious violations.
240. We consider the gravity and scale of violations of the Convention serious, systematic and widespread, and respectfully ask the Committee to deal with this submission with the utmost urgency.
241. Significant international attention is required for all Australian governments to respect the rights of Aboriginal and Torres Strait Islander children. This attention is urgent given the substantial harm Aboriginal and Torres Strait Islander children are experiencing – harms that most non-Indigenous children do not face. For the reasons described above, domestic legal recourse and advocacy has not proven effective to prevent the ongoing harm and further regressive measures we are witnessing.
242. As noted at the outset of this submission, we respectfully ask that the Committee issue a decision finding that the Commonwealth Government is in breach of the Convention and urging it to take immediate and proactive steps to protect and promote the rights of Indigenous children and prevent further harm. To ensure access to justice and international accountability, these steps should include prompt and full response to the National Children Commissioner's report, ratification of the Optional Protocol to the Convention on the Rights of the Child, withdrawal of the reservation to article 37(c) of the Convention on the Rights of the Child and full implementation of OPCAT, in particular by the Commonwealth Government ensuring robust NPMs are operating in every state and territory. We also request that the Committee seek reasons from the Commonwealth Government as to why it has not complied with the reporting process under the Convention, and request full compliance as a matter of priority.
243. We thank the Committee for consideration of this submission and are available to provide further information.

²⁶⁶ Brennan, D., National Indigenous Times, 'Queensland government slammed for 'celebrating' youth arrest numbers' (13 March 2024) <<https://nit.com.au/13-03-2024/10237/queensland-government-slammed-for-celebrating-youth-arrest-numbers>>; Premier of Victoria, *Tough Bail Laws to Keep Victorians Safe* (Media Release, 12 March 2025) <<https://www.premier.vic.gov.au/tough-bail-laws-keep-victorians-safe>>; Brennan, D., National Indigenous Times 'Minns defends increase in Aboriginal child prisoners in NSW' (26 February 2025) <<https://nit.com.au/26-02-2025/16504/minns-defends-increase-in-aboriginal-child-prisoners-in-nsw>>.

Authors

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Associate Professor Hannah McGlade is from the Kurin Minang people in Western Australia. She holds degrees in law, international human rights law and Aboriginal studies. Her PhD received the Stanner award and is published: 'Our Greatest Challenge, Aboriginal children and human rights'. Hannah has advocated extensively for Aboriginal children's human rights, including before UN treaty bodies. She is an expert member of the UN Permanent Forum for Indigenous Issues and a Director of the Noongar Council for Family Safety and Wellbeing.

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Professor Davis is a constitutional lawyer and public law expert. She is a former expert member and Chair of the UN Permanent Forum on Indigenous Issues (2011-2016) and the UN Expert Mechanism on the Rights of Indigenous Peoples (2017-2022). She was co-Commissioner on the 2016 Independent Review of Youth Detention Centres in Queensland and led an inquiry into Aboriginal Out of Home Care in New South Wales, "Family is Culture". She is an Aboriginal woman from South East Queensland.

Supporters

Professor Eddie Cubillo, Director, Mabo Centre

Professor Eddie Cubillo, University of Melbourne, is currently an Independent Representative on the Justice Policy Partnership under the Closing the Gap Agreement. Prior to his role at the Mabo Centre, he led Melbourne Law School's Indigenous Law and Justice Hub. Professor Cubillo is a descendant of the Larrakia, Wadjigan and Central Arrernte peoples with strong family links in both the urban and rural areas throughout the Northern Territory.

National Children's Commissioner

Anne Hollonds has been the National Children's Commissioner since 2020. Commissioner Hollonds' report, 'Help way earlier!' How Australia can transform child justice to improve safety and wellbeing, centres the voices of children, examines Australia's failure to implement evidence-based reforms to protect child rights and provides the foundations for a national reform roadmap.

Aboriginal and Torres Strait Islander Social Justice Commissioner

Katie Kiss has been the Aboriginal and Torres Strait Islander Social Justice Commissioner since 2024. Commissioner Kiss is a proud Kaanju and Birri/Widi woman who grew up on the lands of the Darumbal People. She was previously the Executive Director of the Interim Truth and Treaty Body supporting Queensland's Path to Treaty.

Australian Human Rights Commission

The Commission is Australia's 'A' Status National Human Rights Institution. It is an independent statutory organisation, established by an Act of Federal Parliament. Its functions include:

- investigating and conciliating discrimination and human rights complaints

- advocacy to government and others for human rights to be considered in laws and policy making
- education, promotion and awareness of human rights in Australia
- research into human rights and discrimination issues in Australia, including national inquiries
- provision of legal advice on human rights obligations to courts and appearances as an amicus curiae – or ‘friend of the court’
- production of guidelines, training and resources to assist organisations to uphold human rights in their policies and processes
- provision of international education and training programs for other human rights institutions in the Asia Pacific region
- independent monitoring and scrutiny of Australia’s performance in meeting its international human rights commitments.

National Aboriginal and Torres Strait Islander Legal Services

The National Aboriginal and Torres Strait Islander Legal Services represents and is the national voice of community-controlled Aboriginal and Torres Strait Islander Legal Services. It advocates at the national level for the rights of Aboriginal and Torres Strait Islander peoples within the justice system and work to ensure that their peoples have equitable access to justice. It is chaired by Karly Warner, CEO of the Aboriginal Legal Service (NSW/ACT), a palawa woman who grew on Bangerang and Dhudhuroa country. The deputy chair is Nerita Waight, CEO of the Victorian Aboriginal Legal Service, a Yorta Yorta and Narrandjeri woman with Taungurung connections.

SNAICC – National Voice for our Children

SNAICC is the national non-government peak body for Aboriginal and Torres Strait Islander children. Since 1981 it has worked to uphold the rights of children and to ensure their safety, development and wellbeing, as well as representing the interests of Aboriginal and Torres Strait Islander families, communities and organisations across Australia. Its CEO, Ms Catherine Liddle, is an Arrente/Luritja woman from Central Australia. She is a key member of the Coalition of Peaks and is involved in ongoing work under the Closing the Gap Agreement.

Human Rights Law Centre

The Human Rights Law Centre is a national human rights legal and advocacy organisation based on Wurundjeri Woi-Wurrung and Gadigal country. The Centre uses a combination of strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. The Centre has held consultative status accreditation with the UN Economic and Social Council since 2011 and supported the NGO coalition submission to the Committee in respect of the last review of Australia during the Committee’s 94th session.

Index

Introduction	1
Overview of submission	3
Mass incarceration of Indigenous children and role of government	4
Mass incarceration	4
Government inaction	6
Discriminatory action	9
International human rights legal framework	12
The Convention on the Elimination of Racial Discrimination	12
Other treaties and instruments	12
Racial discrimination	15
Pattern of racial discrimination	18
Refusal to raise the minimum age of criminal responsibility	19
Mandatory detention laws.....	23
Broken and discriminatory bail laws.....	24
Use of isolation and solitary confinement.....	29
Use of strip searching.....	32
Use of spit hoods, other restraints and violence	34
Detention of children in adult facilities.....	37
Adult penalties.....	40
Removal of detention as a last resort	41
Inclusion of non-custodial events on criminal histories.....	42
Adoption of new discriminatory laws and policies	43
Segregation policies and exclusion from culture	44
Lack of adequate legislative frameworks and mechanisms addressing racial discrimination	46
Racial discrimination legislation	46
Failure to ratify, incorporate and fully adopt international law	48
Lack of adequate domestic human rights protections	48
Lack of independent oversight of police and prisons.....	49
Conclusion	50
Authors	52
Supporters	52