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# NATSILS

National Aboriginal and  
Torres Strait Islander Legal Services

**TRUE JUSTICE FOR OUR PEOPLE**

***Submission to the Senate Legal and  
Constitutional Affairs References Committee  
Inquiry into Australia's youth justice and  
incarceration system***



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## National Aboriginal and Torres Strait Islander Legal Services

National Aboriginal and Torres Strait Islander Legal Services (“**NATSILS**”) represents and is the national voice of community-controlled Aboriginal and Torres Strait Islander Legal Services (“**ATSILS**”). We advocate at the national level for the rights of Aboriginal and Torres Strait Islander peoples within the justice system and work to ensure that our peoples have equitable access to justice. NATSILS’ submission is endorsed by its members which include:

- Aboriginal Legal Service (NSW/ACT) Limited (ALS NSW/ACT)
- Aboriginal and Torres Strait Islander Legal Service Queensland (ATSILS QLD)
- Aboriginal Legal Rights Movement South Australia (ALRM SA)
- Aboriginal Legal Service Western Australia (ALSWA)
- North Australian Aboriginal Justice Agency (NAAJA)
- Tasmanian Aboriginal Legal Service (TALS)
- Victorian Aboriginal Legal Service (VALS)

### About this submission

NATSILS thanks the Senate Legal and Constitutional Affairs References Committee (“**Committee**”) for the opportunity to make a submission on this Inquiry into Australia’s youth justice and incarceration system.

NATSILS relies on our submission and recommendations to the previous Inquiry on Youth Justice (“**2024 Youth Justice Inquiry**”).<sup>1</sup>

NATSILS strongly supports the recommendations made by our members in separate submissions provided to the Committee. This submission is supplementary to those submissions and should be read in conjunction with those submissions.

In this submission, NATSILS points the Committee to research and issues, reports, reviews and trends that have arisen since the 2024 Youth Justice Inquiry, and that are resulting in increased harm to Aboriginal and Torres Strait Islander children.

NATSILS would be pleased to appear before the Committee to speak further on this submission.

Additionally, as we have indicated to the Committee Secretariat, NATSILS is happy to assist coordinating input from young Aboriginal people with lived experience of the criminal and care legal systems.

### Terminology: “youth justice” and “child protection”

In this submission NATSILS occasionally uses the terminology “youth justice” and “child protection” where these terms are used in primary sources and commentary. NATSILS prefers the terms “youth legal systems,” or “criminal legal systems” which do not legitimate or give moral cover to these often coercive and harmful systems, policies and practices. The word “justice” implies or suggests fairness, care, accountability and proportionality. However, many so-called “youth justice” systems prioritise and deliver punishment, surveillance, control and incarceration over fairness and care. Similarly, the use of the term “child protection systems” implies these systems afford protection and care and do not cause or lead to harm of children.

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<sup>1</sup> See NATSILS submission to the 2024 Youth Justice Inquiry at <https://www.natsils.org.au/wp-content/uploads/2025/01/Sub202.pdf>



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## RECOMMENDATIONS

### **RECOMMENDATION 1:**

NATSILS calls for the Prime Minister to exercise leadership and call an emergency summit on Australia's youth legal systems, so that key decision makers in government can listen to the voices of Aboriginal and Torres Strait Islander children, Aboriginal and Torres Strait Islander legal experts and leaders in a setting where community-controlled organisations lead the discussion.

### **RECOMMENDATION 2:**

The Commonwealth Government should use its constitutional powers to raise the age of criminal responsibility to at least 14 across all jurisdictions.

### **RECOMMENDATION 3:**

The Commonwealth Government should work with child rights experts, including NATSILS, to set minimum standards for the treatment of children in youth justice systems, consistent with international human rights norms and standards.

### **RECOMMENDATION 4:**

The Commonwealth Government should make a law that a child or young person can only be arrested or held as a last resort – when there is no other option – and for as short a period of time as possible.

### **RECOMMENDATION 5:**

The Commonwealth Government should make a law that forbids any child or young person being held in solitary confinement (and solitary confinement is defined, as in the Mandela Rules).



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## RECOMMENDATION 6:

The Australian Government should take immediate and proactive steps to protect and promote the rights of Aboriginal and Torres Strait Islander children and prevent further harm as set out in paragraph 11 of the Early Warning and Urgent Action complaint to the United Nations Committee on the Elimination of Racial Discrimination by Professor Megan Davis and Associate Professor Hannah McGlade.

These steps include:

- a) full and prompt response to the National Children's Commissioner's *Help Way Earlier!* report;
- b) ratification of the UN *Optional Protocol to the Convention on the Rights of the Child*;
- c) withdrawal of the reservation to article 37(c) of the UN *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.

## RECOMMENDATION 7:

Commonwealth, State and Territory governments should work in partnership with NATSILS, ATSILS and the First Peoples Disability Network to develop an Aboriginal and Torres Strait Islander Disability Framework and operational plan which would co-locate disability advocates within NATSILS, ATSILS and First People's Disability Network.

## RECOMMENDATION 8:

As a measure to prevent children's early interactions with the criminal legal systems, Governments should invest in ATSILS to enhance our intersectional practices and provide early intervention and wrap-around, prevention, diversion, rehabilitation, through-care and therapeutic support for Aboriginal and Torres Strait Islander people with disability, including specific resourcing for disability discrimination matters, as well as National Disability Insurance Scheme (NDIS) appeals.

## RECOMMENDATION 9:

The Commonwealth, States and Territories should fund the development and implementation of alternative responder models in the youth legal system that provide culturally safe therapeutic supports to Aboriginal children that will reduce contact with police and lower remand rates.



## **RECOMMENDATION 10:**

The criminalisation of children in out-of-home care must end. Commonwealth, State and Territory governments should introduce clearer accountability mechanisms for State and Territory justice and child protection agencies, related statutory services and funded services to ensure justice-impacted children in out-of-home care are not further criminalised by the State if in the out-of-home system, and are assisted to access the National Disability Insurance Scheme and culturally appropriate disability diagnosis, treatment and support before entry into custody, while in custody and upon release from custody.

## **RECOMMENDATION 11:**

A positive duty to not discriminate on the basis of disability should be extended to police through amendments to the *Disability Discrimination Act*. This protection against disability discrimination should additionally be extended to corrections, youth detention and child protection officeholders.

## **RECOMMENDATION 12:**

The Australian Government should implement the recommendations in the recently released *Barriers Experienced by Aboriginal and Torres Strait Islander Children and Families Accessing Legal Support Scoping Study* to reduce child removals and prevent the criminalisation of children in care.

## **RECOMMENDATION 13:**

Noting the link between school disciplinary actions, school exclusion and criminalisation of children, the *Disability Discrimination Act* should be amended to include provisions that protect the rights of children with disabilities to learn and participate in education.

## **RECOMMENDATION 14:**

Governments should implement the recommendations of the Standing Council of Attorneys-General Justice Policy Partnership Bail and Remand Reform Working Group Final Report.



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## **RECOMMENDATION 15:**

Australia must ensure its obligations under the United Nations *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* are fully implemented and resourced, including ensuring there are robust members of the National Preventative Mechanism (NPM) in place in every State and Territory.

## **RECOMMENDATION 16:**

The Commonwealth Government must implement the United Nations Working Group on Arbitrary Detention's calls for Australia to take urgent action to:

- address the remand crisis and end the gross overrepresentation of First Nations peoples in detention,
- raise the age of criminal responsibility to at least 14, and
- prohibit the solitary confinement of children.

## **RECOMMENDATION 17:**

The Commonwealth Government must implement the United Nations Working Group on Arbitrary Detention's recommendation to "ensure prisoners are not held in police watchhouses beyond short-term processing, that alternatives to pre-trial detention be prioritized, and that adequate correctional facility capacity be assured when detention is necessary as a last resort."

## **RECOMMENDATION 18:**

The Commonwealth Government should accept and implement the recommendations of the current United Nations' Universal Periodic Review, as well as the recommendations from earlier United Nations bodies as they relate to justice for Aboriginal and Torres Strait Islander people.



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## **RECOMMENDATIONS from the 2024 Youth Justice Inquiry**

### **Recommendation 1 (from the 2024 Youth Justice Inquiry)**

Provide needs-based and sustained funding increases for ATSILS to deliver culturally safe, holistic legal services and wraparound supports for Aboriginal and Torres Strait Islander children and young people, and to partner with governments to transform youth justice in line with the Closing the Gap priority reforms and to meet Socio-Economic Target 11.

### **Recommendation 2 (from the 2024 Youth Justice Inquiry)**

Establish a new independent statutory body or expand the functions of an existing independent, statutory entity with dedicated resources to monitor and report directly to Parliament on the youth justice system, focusing on the treatment and outcomes of Aboriginal and Torres Strait Islander children.

### **Recommendation 3 (from the 2024 Youth Justice Inquiry)**

Reform Bail and Remand Frameworks by reversing regressive changes and adopting evidence-based, youth-centred approaches that prioritise rehabilitation over detention.

### **Recommendation 4 (from the 2024 Youth Justice Inquiry)**

End harmful practices in youth detention by implementing enforceable national minimum standards and supporting trauma-informed, culturally safe, community-based alternatives to detention, with a focus on early intervention and diversion strategies, and justice reinvestment approaches that are self-determined and address the root causes of youth offending. Minimum standards must be developed in partnership with Aboriginal and Torres Strait Islander people.

### **Recommendation 5 (from the 2024 Youth Justice Inquiry)**

The Commonwealth ensure compliance with international human rights standards and obligations including by immediately raising the minimum age of criminal responsibility and eliminate detention of children. The Commonwealth should work with states and territories.



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## **Recommendation 6 (from the 2024 Youth Justice Inquiry)**

Implement Indigenous Data Sovereignty in youth justice by ensuring the Australian Government works in partnership with ACCOs, specifically ATSILS to lead national efforts in the collection, coordination, reporting and interpretation of youth justice data, consistent with Priority Reform 4 of Closing the Gap.

## **Recommendation 7 (from the 2024 Youth Justice Inquiry)**

Embed national anti-racism strategies across youth justice systems that includes agency self-assessment tools and independent accountability mechanisms to eliminate systemic racism and promote equality for Aboriginal and Torres Strait Islander children, in line with Priority Reform 3 of Closing the Gap.



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## Australia's youth legal systems: an escalating pattern of regressive and discriminatory reforms

Aboriginal and Torres Strait Islander peoples have been growing up their children strong in culture and community for millennia.<sup>2</sup> However, Aboriginal young people, their families and the communities ATSILS serve are experiencing a significant dangerous trajectory and persistent pattern of racial discrimination against Aboriginal and Torres Strait Islander children, evidenced by the proliferation of harsh and punitive laws implemented by States and Territories that is pipelining children into youth legal systems and prison. This is accompanied by persistent government inaction on recommendations made by independent entities and monitors for reforms to the youth and care legal systems and the policies and practices in those systems. Across Australia, Aboriginal and Torres Strait Islander children are policed earlier, charged more often, diverted less, refused bail more readily, and held on remand in conditions that do damage. The pipeline into the criminal legal system is not an accident: it is the predictable result of laws and decisions made by governments, parliaments, police and courts.

Our member ATSILS are witnessing the impacts of these reforms on a daily basis and the children from communities we serve are experiencing increasingly punitive harms. Calls to ATSILS' Custody Notification Services are increasing exponentially. Aboriginal and Torres Strait Islander children are spending more time in increasingly harmful conditions in police watch-houses, prison populations are exploding, lockdowns are more frequent with flow-on impacts on families who can't reach their loved ones. Disturbingly, politicians are boasting about increases in the number of criminalised children entering prison.<sup>3</sup>

**Appendix A** to this Submission sets out a table of State and Territory youth legal system-related legislative and policy amendments from our membership between May and December 2025. We note that this is a rapidly changing area, and given the current trajectory, it inevitable there will be further harmful reforms before this Committee completes its work and likely before oral hearings are convened. We refer the Committee to our member ATSILS' submissions which refer to these regressive legislative and policy regimes and set out the impact this is having on our clients and ATSILS' capacity to meet the increasing demand for our services.

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<sup>2</sup> See SNAICC and NATSILS, *Barriers Experienced by Aboriginal and Torres Strait Islander Children and Families Accessing Legal Supports – Scoping Study Report* at <https://www.natsils.org.au/wp-content/uploads/2026/01/Legal-Scoping-Study-Report-FINAL-2026.pdf>

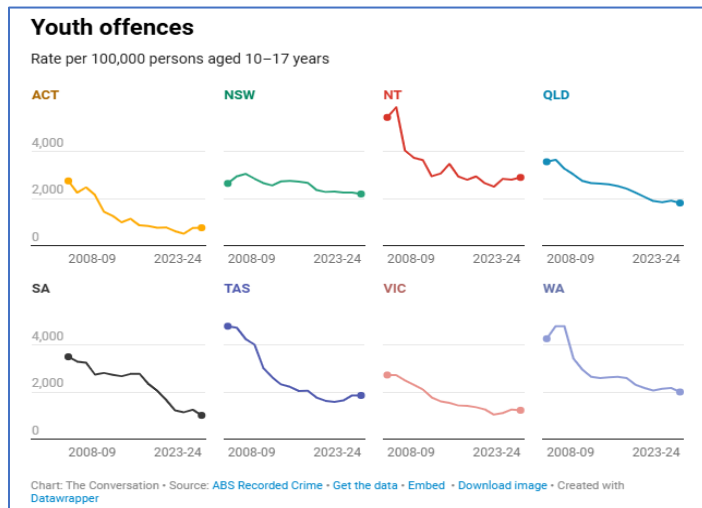
<sup>3</sup> See National Indigenous Times, *Minns defends increases in Aboriginal child prisoners in NSW*, published 6 February 2025, at <https://nit.com.au/26-02-2025/16504/minns-defends-increase-in-aboriginal-child-prisoners-in-nsw> ; and Victorian Premier heralding the introduction of “toughest bail laws in the country” at <https://www.premier.vic.gov.au/toughest-bail-laws-australia-pass-parliament>



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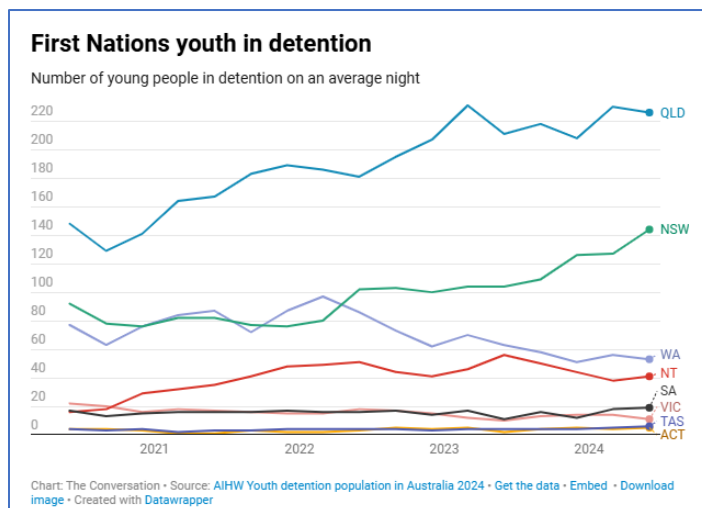
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The rapid-fire, knee-jerk reforms are purportedly responses to an alleged crisis in youth crime, the crisis being manufactured by scare-mongering media and fanned by political point-scoring that comes at the expense of our children’s wellbeing and liberty.

However, there is no evidence of a “youth justice crisis”: data from the Australian Bureau of Statistics (“ABS”) indicates youth crime is falling across all jurisdictions, albeit with some modest increases in some limited offences.



Australia is, however, experiencing a crisis in the increasing *incarceration of Aboriginal young people* in most jurisdictions. The biggest increase in the period from July 2020 to July 2024 was in Queensland.

In Victoria, as forecast by legal experts including the Victorian Aboriginal Legal Service (VALS), the recent changes to Victorian bail laws have led to increased time in police custody and on remand in prison, and delays in finalising matters - attributed to increased Court time dealing with a 10.5% increase in bail applications in 2024-2025. <sup>4</sup>

On the ABS statistics above, as well as the Closing the Gap data dashboards produced by the Productivity Commission,<sup>5</sup> and the Review of the National Agreement on Closing the Gap (“NACTG”), Australia is failing on its commitments to lower youth incarceration under the NACTG, and failing Aboriginal and Torres Strait Islander young people, their families and their communities.

In May 2025, NATSILS convened an online Emergency Town Hall meeting - [Emergency Town Hall – Reckoning on Youth Justice](#).<sup>6</sup> Organised in a short timeframe, over 1100 people registered for the Town Hall event: a clear indication of the concern in the broader community. At this Town Hall, audiences heard from legal experts, including Tony McAvoy SC on the drivers of over-incarceration of young Aboriginal people and the role of the

<sup>4</sup> See National Indigenous Times, 8 January 2026, *Long-held warnings from legal groups come to fruition as Victoria’s bail crackdown clogs courts* at <https://nit.com.au/08-01-2026/22020/long-held-warnings-from-legal-groups-come-to-fruition-as-victorias-bail-crackdown-clogs-courts>

<sup>5</sup> See dashboards at <https://www.pc.gov.au/closing-the-gap-data/dashboard/>

<sup>6</sup> See recording of the Emergency Town Hall – Reckoning on Youth Justice at [https://www.youtube.com/watch?v=j-T7-ThzP\\_Q](https://www.youtube.com/watch?v=j-T7-ThzP_Q)



Commonwealth to lead solutions, as well as from young Aboriginal people leading local solutions and change in their communities. We urge the Committee to view the recording of this Town Hall and in particular, to hear what the young Aboriginal people advocating for change had to say.

NATSILS and our members have consistently argued for greater investment in culturally safe and community-led approaches and called out the flawed “community safety” argument cited by governments when introducing punitive laws and policies. Evidence available to government shows that even short periods of incarceration on remand can cause harm and may contribute to future offending,<sup>7</sup> challenging the purported community safety goals of punitive reforms.

If left unchecked, serious harms to Aboriginal and Torres Strait Islander children caused by increasingly punitive laws, policies and practices will continue to escalate. NATSILS, our member ATSILS and other Aboriginal Community-Controlled Organisations (“ACCOS”) we work with know that listening to - and acting on - the strong voices of our children, families and communities, and genuine investment in ACCOs and self-determination are the means to secure sustained positive outcomes. The right to self-determination recognises that Aboriginal and Torres Strait Islander communities are best placed to make decisions about their needs and the needs of their children. This includes Aboriginal and Torres Strait Islander autonomy in the delivery of legal assistance services and statutory functions including, for example, statutory child protection functions

NATSILS agrees with the recently appointed National Children’s Commissioner that Governments need to listen to children and invest in things that work for children rather than locking them up.<sup>8</sup> It now costs approximately \$1.2 million a year to lock up a child in Australia.<sup>9</sup> This extraordinary investment in punitive practices and harm must be reviewed and reversed: governments should refrain from investing in carceral practices and institutions and instead invest in culturally safe support for children and families doing it tough – addressing unmet socio-economic needs in health, housing, education, training and family support – with poor outcomes in these areas a direct result and legacy of colonisation, systemic discrimination and racism.

The National Agreement on Closing the Gap is a commitment by Australian governments to set out a future where policy making impacting the lives of Aboriginal and Torres Strait Islander people is done in full and genuine partnership. All Governments have agreed to upholding self-determination as part of the National Agreement on Closing the Gap and the National Agreement itself recognises that Aboriginal and Torres Strait Islander community control is an act of self-determination (clause 44 of the National Agreement).<sup>10</sup> Aboriginal community-controlled organisations need sustained and appropriate levels of investment to support children – and governments need to lean in and step up. The Commonwealth, States and Territories need to do better.

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<sup>7</sup> See, for example, Sentencing Advisory Council Victoria, ‘Children who enter youth justice system early are more likely to reoffend’ (Media Release, 4 October 2023); 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.

<sup>8</sup> See comments by National Children’s Commissioner Deb Tsorbaris in *Youth crime is “not in a crisis”* in the Saturday Paper (December 2025) at <https://www.thesaturdaypaper.com.au/news/law-crime/2025/12/20/youth-crime-not-crisis>

<sup>9</sup> See Productivity Commission, [Report on Government Services 2024](#) (2024), ‘Youth Justice’, Table 17A.20.

<sup>10</sup> See, in particular clause 43 of the [National Agreement on Closing the Gap](#): “Aboriginal and Torres Strait Islander community-controlled services are better for Aboriginal and Torres Strait Islander people, achieve better results, employ more Aboriginal and Torres Strait Islander people and are often preferred over mainstream services”



In the current climate of State and Territory-sanctioned harm to Aboriginal and Torres Strait Islander children, and the powers and responsibility of the Commonwealth Government to protect children, decisive and urgent action is required.

## RECOMMENDATION 1:

NATSILS calls for the Prime Minister to exercise leadership and call an emergency summit on Australia's youth legal systems justice, so that key decision makers in government can listen to the voices of Aboriginal and Torres Strait Islander children, Aboriginal and Torres Strait Islander legal experts and leaders in a setting where community-controlled organisations lead the discussion.

## Commonwealth powers in youth legal systems

The AHRC AIFS Report referred to above refers to the *allocation* of responsibilities for child safety and wellbeing by Commonwealth, State and Territory governments and the limited opportunity for national policy coordination that creates barriers to reform. It concludes that their meta-analysis reveals the need to drive concerted action on numerous areas for reform and improvement to better fulfill Australia's obligations under the UN Convention on the Rights of the Child.

NATSILS agrees to an extent. To a degree, the *allocation* of responsibilities is a convention only. We say that there *is* opportunity for national policy coordination, and this could be through, amongst other things, governments transforming the way they work with and resource ACCOs which are the preferred providers of support services for Aboriginal and Torres Strait Islander people, and ensure allocation of resources appropriately prioritises ACCOs, consistent with their commitments under the National Agreement on Closing that Gap. We also say that the Commonwealth is uniquely placed *to act on youth justice reform and protect child wellbeing* through its constitutional powers. This is explored further below.

Contrary to populist belief, there is no youth crime crisis: youth crime is going down in all jurisdictions (see graphs above). Right now, we are in a current Aboriginal youth *incarceration* crisis under which States and Territories are rapidly passing increasingly punitive reforms in a crude and dangerous law and order race to the bottom that is patently causing disproportionate harm to Aboriginal children. The Commonwealth has the constitutional power and moral responsibility to lead change in the youth and care legal systems, and it must step up. We are not alone in calling this out.<sup>11</sup>

We also point the Committee to the Australian Human Rights Commission's *National Anti-Racism Framework*.<sup>12</sup> The Framework calls out the role of governments to strengthen regulation of media reporting related to

<sup>11</sup> See, for example, Change the Record at <https://www.changetherecord.org.au/change-the-record/posts/nt-government-laughs-as-aboriginal-children-vanish> ; Save the Children/54 Reasons National youth Justice Scorecard and reform priorities 2025 at [https://cdn.prod.website-files.com/63bc94aea859d812b4df39b4/692e5ea931e344195bdaffea\\_54R-SCA%202025%20Youth%20Justice%20Report%20and%20Scorecard.pdf](https://cdn.prod.website-files.com/63bc94aea859d812b4df39b4/692e5ea931e344195bdaffea_54R-SCA%202025%20Youth%20Justice%20Report%20and%20Scorecard.pdf)

<sup>12</sup> See, Australian Human Rights Commission, *The National Anti-Racism Framework: A roadmap to eliminating racism in Australia* (Report, November 2024) at [https://humanrights.gov.au/\\_data/assets/pdf\\_file/0019/25381/NARF\\_Full\\_Report\\_FINAL\\_DIGITAL\\_ACCESSIBLE.pdf](https://humanrights.gov.au/_data/assets/pdf_file/0019/25381/NARF_Full_Report_FINAL_DIGITAL_ACCESSIBLE.pdf)



Aboriginal and Torres Strait Islander and other negatively racialised communities and recommends media organisations adopt guidelines that are grounded in an anti-racist approach.<sup>13</sup>

## Expert Constitutional law advice

In September 2025, NATSILS worked with the Justice and Equity Centre (JEC) on the release of expert Constitutional Law advice from Senior Council on the Commonwealth’s powers to make laws relating to youth justice. We refer the Committee to the advice from legal experts: External Affairs Power as a Constitutional basis for Commonwealth intervention in national child rights reform (“**Expert Constitutional law advice**”)<sup>14</sup> at **Appendix B** and Constitutional Law Advice Explainer (“**Explainer**”)<sup>15</sup> at **Appendix C**.

The Expert Constitutional law advice demonstrates that using its external affairs powers under the Australian Constitution, the Commonwealth has powers to pass laws that give effect to Australia’s obligations under international law and international treaties, including the *Convention on the Rights of the Child*. These powers available, right now, to the Commonwealth includes powers to:

- make a law to raise the age of criminal responsibility to 14 years.<sup>16</sup>
- set minimum legislated standards for the treatment of children and young people in State and Territory youth legal systems.
- make a law that a child or young person can only be arrested or held as a last resort – when there is no other option – and for as short a period of time as possible.
- make a law that forbids any child or young person being held in solitary confinement.

The Expert Constitutional law advice confirms what NATSILS and our member ATSILS and legal experts have been saying for some time: that safety, protection and justice for children is not just a matter for States and Territories, and the Commonwealth Government has the power to protect our children and hold States and Territories accountable. The advice provides assurance and pathways for the Commonwealth Government to address the human rights violations that Aboriginal and Torres Strait Islander children are suffering because of State and Territory government laws and policies.

With the majority of States and Territories failing children, and failing on community safety, the Australian Government can and must take action to implement its international treaty obligations to protect all children in Australia. Relevant international instruments relevant to the rights of Aboriginal children in the youth system include:

- *Convention on the Rights of the Child*
- *International Covenant on Civil and Political Rights*
- *International Convent on Economic, Social and Cultural Rights*
- *Convention on the Rights of Persons with Disabilities*
- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*
- *United Nations Declaration on the Rights of Indigenous Peoples*

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<sup>13</sup> See Australian Human Rights Commission, *The National Anti-Racism Framework: A roadmap to eliminating racism in Australia* (Report, November 2024) recommendations 47 and 46 at

[https://humanrights.gov.au/\\_data/assets/pdf\\_file/0019/25381/NARF\\_Full\\_Report\\_FINAL\\_DIGITAL\\_ACCESSIBLE.pdf](https://humanrights.gov.au/_data/assets/pdf_file/0019/25381/NARF_Full_Report_FINAL_DIGITAL_ACCESSIBLE.pdf)

<sup>14</sup> The External Affairs Power as a Constitutional basis for Commonwealth intervention in national child rights reform – Advice at <https://www.natsils.org.au/wp-content/uploads/2026/01/Legal-Advice-on-National-Child-Rights-Reform-23-June-2025.pdf>

<sup>15</sup> See Explainer – Appendix C at <https://www.natsils.org.au/wp-content/uploads/2025/09/Explainer.pdf>

<sup>16</sup> Note: ATSILS oppose the use of confinement/administrative detention as part of any therapeutic alternative model to criminalisation.



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- *Convention on the Elimination of All Forms of Racial Discrimination*
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“the Beijing Rules”)
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty (“Havana Rules”)
- United Nations Standard Minimum Rules for the Treatment of Prisoners (“the Nelson Mandela Rules”)
- United Nations Standard Minimum Rules for Non-custodial Measures (“Tokyo Rules”).

We also note that the United Nations has commended States that have set a minimum age of criminal responsibility higher than 14 years.<sup>17</sup>

We also refer the Committee to the recent appearance of Australia before the United Nations Human Rights Council Working Group on the Universal Periodic Review, Fifty-first session in January 2026<sup>18</sup> which is discussed in further detail below.

## **RECOMMENDATION 2:**

The Commonwealth Government should use its constitutional powers to raise the age of criminal responsibility to at least 14 across all jurisdictions.

## **RECOMMENDATION 3:**

The Commonwealth Government should work with child rights experts, including NATSILS, to set minimum standards for the treatment of children in youth justice systems, consistent with international human rights norms and standards.

## **RECOMMENDATION 4:**

The Commonwealth Government should make a law that a child or young person can only be arrested or held as a last resort – when there is no other option – and for as short a period of time as possible.

## **RECOMMENDATION 5:**

The Commonwealth Government should make a law that forbids any child or young person being held in solitary confinement (and solitary confinement is defined, as in the Mandela Rules).

<sup>17</sup> See United Nations, General Comment No.24 (201x), *Children’s rights in juvenile justice* at <https://www.ohchr.org/sites/default/files/Documents/HRBodies/CRC/GC24/GeneralComment24.pdf> at paras 32,33.

<sup>18</sup> <https://www.ohchr.org/en/hr-bodies/upr/au-index>



## Early Warning and Urgent Action submission to the United Nations Committee on the Elimination of Racial Discrimination

Legal scholars and human rights law experts Professor Megan Davis and Associate Professor Hannah McGlade 2025 submission to the United Nations Committee on the Elimination of Racial Discrimination *International Convention on the Elimination of All Forms of Racial Discrimination – Early Warning and Urgent Action submission (“**CERD complaint**”)* highlights the disproportionate impact of criminal legal system reforms on Aboriginal and Torres Strait Islander children.<sup>19</sup>

In the CERD complaint, endorsed by NATSILS, Professor Megan Davis and Associate Professor Hannah McGlade 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 ... as well as other UN treaties and instruments including United Nations standards and norms in juvenile justice*”.

Professor Megan Davis and Associate Professor Hannah McGlade pointed to:

- the criminal laws in Australia’s constitutional system increasingly and disproportionately impacts and harms Aboriginal and Torres Strait Islander children,
- recent state and territory laws and policies that violate Australia’s international human rights law obligations and are having a deleterious effect on Aboriginal and Torres Strait Islander children.
- The irreversible harm and even death caused by imprisoning children, and the instances of self-harm and attempted suicide by Aboriginal and Torres Strait Islander children in custody across Australia
- Aboriginal and Torres Strait Islander children 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.

The CERD complaint requested the Committee on the Elimination of Racial Discrimination issue a decision finding that the Commonwealth Government is in breach of the *Convention on the Elimination of All Forms of Racial Discrimination* 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 *Help Way Earlier!* report;
- b) ratification of the Optional Protocol to the *Convention on the Rights of the Child*;
- 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.

### Recommendation 6:

The Australian Government should take immediate and proactive steps to protect and promote the rights of Aboriginal and Torres Strait Islander children and prevent further harm as set out in

<sup>19</sup> See the CERD complaint at [https://www.hrlc.org.au/app/uploads/2025/04/United-Nations-CERD-complaint\\_youth-justice-in-Australia.pdf](https://www.hrlc.org.au/app/uploads/2025/04/United-Nations-CERD-complaint_youth-justice-in-Australia.pdf)



paragraph 11 of the Early Warning and Urgent Action complaint to the United Nations Committee on the Elimination of Racial Discrimination by Professor Megan Davis and Associate Professor Hannah McGlade.

These steps include:

- a) full and prompt response to the National Children’s Commissioner’s *Help Way Earlier!* report;
- b) ratification of the UN *Optional Protocol to the Convention on the Rights of the Child*;
- c) withdrawal of the reservation to article 37(c) of the UN *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.

## Lack of progress and government accountability on successive inquiries and reviews

NATSILS notes the numerous previous inquiries, reviews, reports and recommendations on youth legal systems covering Commonwealth, State and Territory jurisdictions.

We refer the Committee to the meta-analysis undertaken through the *Improving the safety and wellbeing of vulnerable children: A consolidation of systemic recommendations and evidence* undertaken by the Australian Institute of Family Studies (“**AHRC AIFS Report**”) in partnership with the Australian Human Rights Commission that analysed over 3,000 recommendations from 61 State, Territory and Commonwealth reports and inquiries into child protection and youth justice between 2010 and 2022.<sup>20</sup>

We also refer the Committee to the Australian Institute of Criminology’s findings from a meta-analysis of themes of 22 youth justice-related inquiries.<sup>21</sup>

These Inquiries, reviews and reports commonly point to similar findings and recommendations that include:

- The over-representation of criminalised Aboriginal and Torres Strait Islander children
- Limited First Nations partnership and self-determination across youth and care legal systems
- The vulnerabilities and complex needs of criminalised children
- The detrimental impacts of detaining children
- Detention as last resort – because detention is damaging and criminogenic
- Raising the age of criminal responsibility
- Need for greater use of diversions
- Reducing the remand population (to reduce disruption to education, families, rehabilitation)
- Improving detention conditions and rehabilitative/education programs in detention
- Lack of mechanisms for oversight, monitoring and transparency across youth and care legal systems
- Inadequate levels of investment across youth and care legal systems

<sup>20</sup> Australian Institute of Family Studies (2024) *Improving the safety and wellbeing of vulnerable children: A consolidation of systemic recommendations and evidence* at <https://aifs.gov.au/all-research/research-reports/improving-safety-and-wellbeing-vulnerable-children>

<sup>21</sup> Australian Institute of Criminology, *Youth justice in Australia: Themes from recent inquiries* (2020) at [https://humanrights.gov.au/\\_data/assets/file/0025/56770/Dr\\_garner\\_clancey\\_university\\_of\\_sydney\\_attachment2\\_redacted.pdf](https://humanrights.gov.au/_data/assets/file/0025/56770/Dr_garner_clancey_university_of_sydney_attachment2_redacted.pdf)



# NATSILS

National Aboriginal and  
Torres Strait Islander Legal Services

TRUE JUSTICE FOR OUR PEOPLE

- Limited opportunities for child voice and participation within youth and care legal systems
- Inadequate collaboration and coordination across youth and care legal systems
- Workforce challenges

A key message from the AHRC AIFS Report meta-analysis is the need for stronger governance and accountability in monitoring the implementation of previous recommendations and highlight the need for a strong focus on their implementation. One view on this might be to query the utility of successive inquiries.

The lack of progress from State, Territory and Commonwealth governments on making transformative changes under the National Agreement on Closing the Gap,<sup>22</sup> and lack of response to the Australian Human Rights Commission's *Help way earlier!': How Australia can transform child justice to improve safety and wellbeing Report* ("**Help Way Earlier Report**") and the 2024 Youth Justice Inquiry was recently called out through the CERD complaint discussed above,<sup>23</sup> where the authors stated their concerns "*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.*"

The AHRC AIFS Report analysis revealed high levels of unimplemented recommendations from reports on the over-representation of Aboriginal and Torres Strait Islander children in the criminal and care legal systems, and pointed to:

*"The critical and immediate need to listen to and work with Aboriginal and Torres Strait Islander communities to reduce the over-representation of children in child protection and youth justice systems, to develop culturally appropriate and trauma-informed supports for vulnerable children and families, and for First Nations-led and holistic approaches to supporting vulnerable children and families".<sup>24</sup>*

NATSILS agrees. There is already an abundance of data, expertise, knowledge and insights and solutions to reduce the contact of vulnerable Aboriginal and Torres Strait Islander children and young people within the criminal and care legal systems. NATSILS and our members have consistently and in good faith provided expert input into multiple inquiries consistent with the above findings and do so again at this Inquiry.

## Irreparable harm

There is an already significant existing evidence-base that prison is dangerous place for Aboriginal young people, including evidence that prison is in and of itself criminogenic.<sup>25</sup> Locking up children is associated with worsening mental health outcomes including self-harm and suicide risk, interferes with healthy development, interferes with educational progress and outcomes, increases the likelihood of future offending rather than reducing it, exposes children to abuse, isolation and other degrading treatment and conditions, and this

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<sup>22</sup> See Jumbunna Institute for Indigenous Education and Research (2025) *Closing the Gap Independent Aboriginal and Torres Strait Islander led Review* at <https://static1.squarespace.com/static/62ebb08a9ffa427423c18724/t/685b4f091f5af860bd9f1b48/1750814543128/Closing+The+Gap+Review.pdf> and Productivity Commission (2024) *Review of the National Agreement on Closing the Gap* at <https://www.pc.gov.au/inquiries-and-research/closing-the-gap-review/>.

<sup>23</sup> CERD complaint at [https://www.hrc.org.au/app/uploads/2025/04/United-Nations-CERD-complaint\\_youth-justice-in-Australia.pdf](https://www.hrc.org.au/app/uploads/2025/04/United-Nations-CERD-complaint_youth-justice-in-Australia.pdf)

<sup>24</sup> CERD complaint [https://www.hrc.org.au/app/uploads/2025/04/United-Nations-CERD-complaint\\_youth-justice-in-Australia.pdf](https://www.hrc.org.au/app/uploads/2025/04/United-Nations-CERD-complaint_youth-justice-in-Australia.pdf) at p 33.

<sup>25</sup> See, for example, Richards K 2011. "What makes juvenile offenders different from adult offenders?" *Trends & issues in crime and criminal justice* no. 409. Canberra: Australian Institute of Criminology at <https://www.aic.gov.au/publications/tandi/tandi409>.



disproportionately impacts on children with a history of trauma and those with disability, and disproportionately impacts on Aboriginal and Torres Strait Islander children.

The over-policing and incarceration of young people causes them irreparable harm and the consensus of research bodies is that punitive detention is harmful and not rehabilitative. There is also increasing evidence that identifying and supporting the needs of young people, including treating their mental health needs early, is far more beneficial than punitive measures which may in fact promote offending.<sup>26</sup> Australia's reliance on punitive approaches to offending by children is ineffective, not based on evidence and is not working to keep the community safe – and is doing harm to already traumatised children.<sup>27</sup>

Aboriginal children's experience of the criminal and care legal systems is unique and has a significant harmful impact on their connection to their family and kin, community, culture and country. Aboriginal children, their families and communities have solutions: they tell us that we have so much to learn from their experiences, strengths and resilience.

Many Aboriginal young people are shunted into the quicksand of the policing and carceral systems at a critical stage of life when care, support, and understanding are vital. The environments and practices in the carceral systems, and the policing and court processes that precede incarceration, overlook Aboriginal young people's mental, emotional health, family and cultural needs. These harmful systems also overlook the strengths and resilience of Aboriginal young people who have the solutions for themselves, their families and their communities - and who want to be listened to.

Criminalised Aboriginal and Torres Strait Islander children often enter the criminal legal systems presenting with complex needs shaped by histories of adverse childhood experiences influenced by poverty and the legacies of intergenerational trauma and cultural displacement as a result of the policies and practices of colonization and systemic discrimination and racism including over-policing. These histories and legacies directly impact on Aboriginal young people's social and emotional wellbeing, vulnerabilities and mental health.

Aboriginal young people's often negative interactions with police, and the environment of custodial settings including delays in police cells and watch houses, frequent prison lockdowns, prolonged periods in segregation and isolation, and limited access to appropriate therapeutic, educational, and cultural and family supports exacerbates the distress that may already be experienced by vulnerable children and young people.

With Aboriginal children significantly over-represented on remand and in detention centres, and under-represented in diversions and therapeutic pathways, it is critical that we hear their experiences and act on their proposed solutions.

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<sup>26</sup> See E Akpanekpo et al, "Association Between Mental Health Treatment and Reoffending Among Justice-Involved Youths" (2025) *Psychiatric Services*, Volume 76(8) at

<https://psychiatryonline.org/doi/10.1176/appi.ps.20240533>

<sup>27</sup> Australian Human Rights Commission, *Help Way Earlier! How Australia can transform child justice and improve community safety and wellbeing* (2024) at

[https://humanrights.gov.au/\\_data/assets/pdf\\_file/0025/25477/1807\\_help\\_way\\_earlier\\_-\\_accessible\\_0-1-2.pdf](https://humanrights.gov.au/_data/assets/pdf_file/0025/25477/1807_help_way_earlier_-_accessible_0-1-2.pdf)



We refer the Committee to the Report *Mounty Yarns: Lived Experiences of Aboriginal young people in Mt Druitt*, developed by justice-impacted Aboriginal young people from Mt Druitt in Sydney's west, who set out the harm the youth criminal and care legal systems cause, and the young peoples' solutions.<sup>28</sup> In the words of these young people from Mt Druitt, their lived experiences and call to action is as follows:

### ***Mounty Yarns Call to Action***

*"As a community and as young people, we know what works for us. Solutions need a strong focus on self-determination, investing in young people, and changing the way other people look at young people in Mount Druitt.*

*Solutions need to be centred around youth and community leadership, with the goal of intergenerational change.*

*As Aboriginal young people we can tell you that the "Justice System" is not working and is actually having a devastating effect. Our young people need to know that we as a community care for them. The way systems are set up at the moment, it is hard to tell. Nothing improves by locking up kids. When you do, you take us away from everything we value – our family, our culture, our country.*

*Governments need to stop investing so much in police and prisons and start investing in young people, with proper support to keep them away from the criminal justice system in the first place. We are strong advocates for raising the age of criminal responsibility. As you read through the experiences of young people in Mount Druitt and see how young we were when we were harassed, traumatised and brutalised by police, and harmed by systems that didn't support us, remember that no young person should be experiencing these things.*

*We want everyone to be able to learn from the experiences, strengths, challenges and resilience of us as young people. We speak for those young people who aren't usually given a voice or listened to, young people who are actively disbelieved.*

*We share these yarns with you and ask that you listen and hear our truths.*

*We hope that you hear our solutions and back us to make change."<sup>29</sup>*

With Australia failing on its commitments under the National Agreement on Closing the Gap, and lack of progress on Target 11, it is incumbent on all governments to transform how they work and partner with Aboriginal communities and ACCOs, who repeatedly point to solutions. Detained and incarcerated children rely upon the adults, and services around them. The criminal (and care) legal systems and their institutions are meant to provide the means for children to live safely while in custody and to set children up to thrive upon release. However, these institutions are failing Aboriginal children. Consensus from research and practice is

<sup>28</sup> See *Mounty Yarns: Lived Experiences of Aboriginal young people in Mt Druitt* at <https://static1.squarespace.com/static/644e27ff8602074e9b8ef945/t/64fe4341bf2ec6376e5d5db8/1694385003181/Mounty+Yarns.pdf>

<sup>29</sup> Ibid at p 7.



that evidence-based alternatives that include culturally safe, community-based support, diversionary programs are more effective to support criminalised Aboriginal children and have greater benefits for community safety generally than incarceration.<sup>30</sup> The failures of the systems to adequately protect young people (and support their families) are clearly made out in the Australian Human Rights Commission's *Help Way Earlier Report*.

We point the Committee to the recently released South Australian's Guardian for Children and Young People October 2025 Report: *From Those Who Know - Mental health and wellbeing in youth detention*.<sup>31</sup> This report documents the experiences of incarcerated young people who, rather than being protected when experiencing emotional or mental distress, are subject to treatment and practices including isolation and physical restraints that are experienced as punishment, or subject to coercive care plans that often involve loss of privileges, additional surveillance and deprivation. Young people also spoke of the trauma and shame that they carry with them upon release from detention, as well as the lack of continuity in supports and poorly adapted service systems that don't meet their needs.

These findings reflect similar findings in the *Help Way Earlier Report* and the experiences of young Aboriginal people in Western Sydney through the [Mounty Yarns](#) initiative and Report (discussed above).<sup>32</sup> Similarly, the recent CERD complaint sets out the discriminatory harms that young criminalised Aboriginal people face in the criminal legal system.

## Aboriginal young people's mental health

As noted above, locking up children is associated with worsening mental health outcomes including self-harm and suicide risk. A recent South Australian Report of the *Joint Inspection of the Mental Health and Wellbeing of children and young people detained at the Adelaide Youth Training Centre*<sup>33</sup> (the "**SA Joint Inspection Report**") co-authored by the Office of the Chief Psychiatrist noted that mental health is a foundational component of a child's overall well-being and development, influencing how children think, feel, respond to others and behave, shaping their ability to cope with stress, relate to others, and make healthy choices. The SA Joint Inspection Report found that Aboriginal children are disproportionately affected, both in the rate of detention and in the intensity of restrictions experienced, exacerbating the legacy of intergenerational trauma and systemic harm. It noted that the provision of high quality, evidence-based, trauma-informed, culturally appropriate, and age- and gender appropriate healthcare in all places of detention is critical to optimising health outcomes and to ensure children can reach their full potential and enjoy the highest attainable standard of health.

The SA Joint Inspection Report referred to the significant adverse childhood experiences many detained children experience before incarceration, such as abuse, neglect, or household poverty and challenges, have been linked to significant negative effects on child development and disruption to normal brain development, increase the risk of mental health disorders such as anxiety, depression, and post-traumatic stress disorder

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<sup>30</sup> Australian human Rights Commission (2025) *Evidence-based approaches to child justice* at <https://humanrights.gov.au/?a=71852>

<sup>31</sup> *Those Who Know - Mental health and wellbeing in youth detention*. October 2025 at [https://gcyp.sa.gov.au/wordpress/wp-content/uploads/2025/11/From-Those-Who-Know\\_Mental-Health-and-Wellbeing-in-Youth-Detention\\_FINAL.pdf](https://gcyp.sa.gov.au/wordpress/wp-content/uploads/2025/11/From-Those-Who-Know_Mental-Health-and-Wellbeing-in-Youth-Detention_FINAL.pdf)

<sup>32</sup> See *Mounty Yarns: Lived Experiences of Aboriginal Young People in Mt Druitt* at <https://static1.squarespace.com/static/644e27ff8602074e9b8ef945/t/64fe4341bf2ec6376e5d5db8/1694385003181/Mounty+Yarns.pdf>

<sup>33</sup> See *Joint Inspection of the Mental Health and Wellbeing of children and young people detained at the Adelaide Youth Training Centre* at [https://gcyp.sa.gov.au/wordpress/wp-content/uploads/2025/11/2025-10-27\\_Joint-Inspection-AYTC\\_Mental-Health-and-Wellbeing\\_TCV\\_OCP\\_FINAL.pdf](https://gcyp.sa.gov.au/wordpress/wp-content/uploads/2025/11/2025-10-27_Joint-Inspection-AYTC_Mental-Health-and-Wellbeing_TCV_OCP_FINAL.pdf)



which can impair a child's ability to regulate emotions and respond to challenges effectively. These symptoms are often heightened with a risk of ongoing deterioration of mental wellbeing upon detention.

The Report noted the importance of family connection for children in detention, and that for Aboriginal and Torres Strait Islander children, family connection is not only about emotional wellbeing but about survival, cultural identity, and healing. It also noted that detained Aboriginal and Torres Strait Islander children from remote communities had limited in-person visits.

The SA Joint Inspection Report referred to one study of 2849 children released from detention in Victoria between 1988 and 1999 which found that the rate of death for males was 9.4 times higher than among the age- and sex-matched general population, and 41.3 times higher for females. In this cohort, most deaths were due to drug overdose (46%) or suicide (24%).<sup>34</sup>

We also refer the Committee to the *Young People in Custody Health Survey* ("YPICHS") reports published by Youth Justice in NSW also point to the physical and psychosocial needs of young people entering youth custody in NSW.<sup>35</sup> Locking up these children exacerbates pre-existing vulnerabilities. It is clear children need help earlier, as clearly set out in the *Help Way Earlier Report*.

With the numbers and rates of Aboriginal children being imprisoned by States and Territories increasing, Australia must do better to protect our children from risk of harm and death resulting from detention.

## Aboriginal deaths in custody

The communities and families we work with continue to bury loved ones after deaths in custody that were preventable. The national [deaths in custody report](#) by the Australian Institute of Criminology (AIC) released in December 2025 showed 33 Aboriginal or Torres Strait Islander people died in custody in 2024-2025 – the highest yearly death toll since the AIC began keeping records.<sup>36</sup>

According to the AIC's real-time dashboard, there have been a total of 617 Aboriginal and Torres Strait Islander deaths in custody since the Royal Commission into Aboriginal Deaths in Custody.

This reinforces ATSILS' and the experience of the communities we serve that prisons are life-threatening places.

As State and Territory governments continue to pass laws which contradict their obligations to reduce Aboriginal over-representation in police cells, courts and prisons, we need governments to work in genuine partnership with Aboriginal communities to implement evidence-based, community-led solutions that prevent our people from entering the criminal legal system in the first place. Given the continuing failure of States and Territories to stop the flow into prisons, we need the Commonwealth Government to step up.

We refer the Committee to the Coroner's Court of Western Australia findings into the Inquest into the death of young Aboriginal man Cleveland Dodd which found lack of appropriate custodial and non-custodial staffing levels, infrastructure, means by which high-risk detainees can be continuously monitored, trauma-informed

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<sup>34</sup> Kinner S A, Calais-Ferreira L; Young JT, Borschmann RB; Clough A; Heffernan E. Rates (2025). Causes and risk factors for death among justice involved young people in Australia; a retrospective, population-based data linkage study. *Lancet – Public Health* Vol 10 Issue 4, E 274 – E 284 at [https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667\(25\)00042-8/fulltext](https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(25)00042-8/fulltext)

<sup>35</sup> See YPICH Reports at <https://dcj.nsw.gov.au/about-us/research-strategy/our-research-projects-and-partners/young-people-in-custody-health-survey.html>

<sup>36</sup> McAlister M, Miles H & Bricknell S 2025. *Deaths in custody in Australia 2024–25*. Statistical Report no. 57. Canberra: Australian Institute of Criminology. [https://www.aic.gov.au/sites/default/files/2025-12/sr57\\_deaths\\_in\\_custody\\_in\\_australia\\_2024-25.pdf](https://www.aic.gov.au/sites/default/files/2025-12/sr57_deaths_in_custody_in_australia_2024-25.pdf)



environment, and access for detainees to mental health care, education, support services and out of cell hours at Unit 18 during Cleveland's last period of detention.<sup>37</sup>

Coroner PJ Urquhart concluded that:

*"No child in detention deserves to be treated in the way Cleveland and the other young persons in Unit 18 were treated at the time he decided to end his life. Prolonged periods in solitary confinement, isolation, intense boredom, eating all their meals by themselves, and lack of access to mental health services, education and even running water had sadly become the norm for Cleveland and his fellow detainees" and*

*"It should never be forgotten that detainees are not only children but are some of the most vulnerable children in our State; many of whom have intellectual disabilities that can be directly linked to not only their offending in the community, but also to their behaviour when they are placed in detention"*

The Coroner agreed that:

*"Cleveland's mother is correct, the youth justice system failed Cleveland."*

## Young people with disability in the criminal legal system

The tragic death in custody of Cleveland Dodd is a heartbreaking example of how youth legal systems fail vulnerable children with unaddressed mental distress caused and exacerbated by conditions in detention.

We refer the Committee to NATSILS' submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (the "**Disability Royal Commission**").<sup>38</sup>

Some forms of disability are reported to be more prevalent in Aboriginal and Torres Strait Islander children than other children. For example, Aboriginal and Torres Strait Islander children and young people are 12 times more likely to have a hearing impairment than non-Indigenous children and young people.<sup>39</sup> The Australian Bureau of Statistics reports that 43% of Aboriginal and Torres Strait Islander people have hearing loss, this number is higher (59%) for people living in remote areas.<sup>40</sup> Aboriginal and Torres Strait Islander children are also more likely to be born with Foetal Alcohol Spectrum Disorder ("**FASD**").<sup>41</sup> Regrettably, children with FASD may be criminalised when their behaviours bring unwelcome and unwarranted police surveillance and later involvement in the youth legal system – and their families may be disproportionately subject to interventions from the care systems. Understanding the prevalence of FASD is critical so that appropriate and culturally safe early support and assistance can be provided to prevent entry into the criminal and care legal systems. We refer the Committee to the study from Western Australia that estimate the prevalence of FASD in imprisoned children and young people in Western Australia, and found that 89% of the study participants (76% of whom were Aboriginal) had at least one domain of severe neurodevelopmental impairment and 36% of participants were diagnosed with FASD.<sup>42</sup>

<sup>37</sup> See Coroner's Court of Western Australia, [Inquest into the death of young Aboriginal man Cleveland Dodd](#)

<sup>38</sup> See NATSILS Submission to the Disability Royal Commission at [7-May-020-NATSILS-Submission-to-the-DRC-Legal-System-Issues-Paper-a036.pdf](#).

<sup>39</sup> Australian Institute of Health and Welfare, Australia's Health 2018, Australia's health series no. 16. AUS 221. C (Report) <https://www.aihw.gov.au/getmedia/12c11184-0c0a-43ad-8386-975c42c38105/aihw-aus-221-chapter-6-4.pdf.aspx>

<sup>40</sup> Australian Bureau of Statistics, 4715.0 - National Aboriginal and Torres Strait Islander Health Survey, 2018-19, 2020

<sup>41</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, The Hidden Harm Inquiry into the prevention, diagnosis and management of Foetal Alcohol Spectrum Disorders (2012)

<sup>42</sup> Carol Bower et. al., *Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia*. BMJ Open, 2018.



The Disability Royal Commission found that proportion of Aboriginal and Torres Strait Islander people with cognitive disability in custody, particularly in youth detention, is a “*hidden national crisis*.”<sup>43</sup> NATSILS and ATSILSs are not surprised about this finding and agree that there is a need for care and support from ACCOs to prevent people with disability from entering the criminal legal system in the first place.

The Disability Royal Commission found that when a person is identified as an Aboriginal or Torres Strait Islander person in criminal legal settings, any support needs associated with disability tend to become less of a priority and that this may be exacerbated by limited access to advocacy and legal services with disability expertise. The Disability Royal Commission also recommended that ACCOs should be funded to provide culturally appropriate disability service to Aboriginal and Torres Strait Islander people.

System biases against Aboriginal and Torres Strait Islander people are present in the way they are treated at every point across the legal system, and in particular in interactions with police.<sup>44</sup> Aboriginal and Torres Strait Islander children are subject to disproportionate and harmful discrimination on the basis of race as well as disability in both the youth and care legal systems.

Recognising the significant number of Aboriginal and Torres Strait Islander people with disability in justice systems, in our recent submission to the *Review of the Disability Discrimination Act*,<sup>45</sup> (“**DDA Review**”) NATSILS recommended the Commonwealth, State and Territory governments work in partnership with NATSILS, ATSILSs and the First Peoples Disability Network to develop an Aboriginal and Torres Strait Islander Disability Framework and operational plan which would co-locate disability advocates within NATSILS, ATSILSs and First People’s Disability Network.<sup>46</sup>

## RECOMMENDATION 7:

Commonwealth, State and Territory governments work in partnership with NATSILS, ATSILSs and the First Peoples Disability Network to develop an Aboriginal and Torres Strait Islander Disability Framework and operational plan which would co-locate disability advocates within NATSILS, ATSILSs and First People’s Disability Network.

In a *Joint Statement* to the Review of the DDA Review, a coalition of justice and disability agencies, including NATSILS, collectively called for the Australian Government to partner with and fund ACCOs to ensure reforms to the *Disability Discrimination Act* centre culture, community control and on-Country accessibility, and commit funding for ACCOs to provide legal assistance for Aboriginal and Torres Strait Islander people with disability to access civil justice legal assistance including remedies for disability discrimination.<sup>47</sup>

Noting the prevalence of children with disability in the youth legal systems, early intervention support is critical. In our submission to the DDA Review, NATSILS recommended that any changes to the DDA be complemented by investment in ACCOs including ATSILS to enhance our intersectional practices and provide early intervention and wraparound prevention, diversion, rehabilitation throughcare and therapeutic support for Aboriginal and

<sup>43</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, Final Report: Volume 9, (2023), 139 at <https://disability.royalcommission.gov.au/>

<sup>44</sup> See, for example, Tamar Hopkins (2021) Litigating Racial Profiling: Examining the evidence for Institutional Racism by Victoria Police, *Australian Journal for Human Rights*.

<sup>45</sup> See <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/australias-anti-discrimination-law/review-disability-discrimination-act>

<sup>46</sup> See NATSILS submission to the DDA Review at <https://www.natsils.org.au/wp-content/uploads/2026/01/NATSILS-Submission-to-the-Review-of-the-Disability-Discrimination-Act-Final.pdf>

<sup>47</sup> See Joint Statement to the DDA Review at <https://nationallegalaid.org.au/news/dda-reforms>



Torres Strait Islander people with disability.<sup>48</sup>

## RECOMMENDATION 8:

As a measure to prevent children' early interactions with the criminal legal systems, Governments should invest in ATSILS to enhance our intersectional practices and provide early intervention and wrap-around, prevention, diversion, rehabilitation, through-care and therapeutic support for Aboriginal and Torres Strait Islander people with disability, including specific resourcing for disability discrimination matters, as well as National Disability Insurance Scheme (NDIS) appeals.

Our members report that it is difficult for Aboriginal and Torres Strait Islander children with disability to engage with the onerous NDIS application process, as well as the review/appeal processes. Funding for NDIS appeals is not available to ATSILS.<sup>49</sup> We note that a recent evaluation of Legal Aid Commissions' services under this funding pool flagged the low rate of Aboriginal and Torres Strait Islander NDIS participants (8%) given the rate of Aboriginal and Torres Strait Islander people with disability (25.3%) is higher than that of the non-Indigenous population (21.4%).<sup>50</sup> NATSILS submits that this underscores the need for culturally safe disability support services to be provided by ACCOs (including ATSILS), as recommended by the Disability Royal Commission.

Noting the harm caused to Aboriginal children in some circumstances where manifestations of disability are met with a risky, unqualified and potentially harmful policing response, NATSILS submits that there is a role for alternative first responder models that provide appropriately qualified therapeutic support and lower instances of harmful police interactions which may, in turn, lower incidents of incarceration on remand. We note that exploration of alternative responder models was the basis of Recommendation 2 of the Standing Council of Attorneys-General Bail and Remand Working Group Final Report set out above. We also refer the Committee to NATSILS' recommendation 10 to the DDA Review:

*"NATSILS submits that this Review [ie the DDA Review] provides an opportunity to reconsider the role of police as first responders in call outs where disability issues are in play, and that alternative responder models that provide therapeutic support and lower incarceration on remand be explored as an alternative. NATSILS notes that this was a recommendation to the recent Bail and Remand Reform Report to the Standing Council of Attorneys-General and would make an impact on socio-economic targets 10 and 11 and Government commitments under the National Agreement on Closing the Gap."<sup>51</sup>*

NATSILS understand that the Early Childhood Care and Development Policy Partnership ("ECCDPP") under the National Agreement on Closing the Gap is considering commissioning work to develop culturally safe disability

<sup>48</sup> See NATSILS submission to the DDA Review at <https://www.natsils.org.au/wp-content/uploads/2026/01/NATSILS-Submission-to-the-Review-of-the-Disability-Discrimination-Act-Final.pdf>

<sup>49</sup> See <https://www.health.gov.au/our-work/ndis-appeals-program?language=en>

<sup>50</sup> See Davies K, Ratcliffe S, Kothe E, Takchi S (2025) 'I would have given up without it': An evaluation of the NDIS Appeals Program Legal Services. Law and Justice Foundation of NSW at <https://nla-production-assets.s3.ap-southeast-2.amazonaws.com/public/Reports/2025/NDIS-Appeals-Program-Evaluation-/NDIS-Report.pdf> at p 11 - referring to Australian Bureau of Statistics. (2025) Aboriginal and Torres Strait Islander peoples with disability, 2022. <https://www.abs.gov.au/articles/aboriginal-and-torres-strait-islander-peoples-disability-2022>

<sup>51</sup> See NATSILS submission to the DDA Review at <https://www.natsils.org.au/wp-content/uploads/2026/01/NATSILS-Submission-to-the-Review-of-the-Disability-Discrimination-Act-Final.pdf>



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assessments for children in contact with child protection systems (ECCDPP Priority 4B<sup>52</sup>). NATSILS, through the Justice Policy Partnership has agreed to collaborate with the ECCDPP to consider building on this work to develop similar screening tools for youth justice settings. If implemented, this will improve culturally safe diagnostic tools and ongoing support services to reduce justice system contact and recidivism.

## RECOMMENDATION 9:

The Commonwealth, States and Territories should fund the development and implementation of alternative responder models in the youth legal system that provide culturally safe therapeutic supports to Aboriginal children that will reduce contact with police and lower remand rates.

## Care-criminalisation

Many studies and reports point to the link between out-of-home care, juvenile justice and adult incarceration.<sup>53</sup> The Australian Law Reform Commission's *Pathways to Justice Report*<sup>54</sup> documents the findings of earlier inquiries and reports, all saying much the same thing: children out-of-home care are over-represented in youth legal systems and we need to address the increasing incidents and rates of Aboriginal and Torres Strait Islander children from being removed from their families.

Our members continue to see children in out-of-home care/residential care settings who are criminalised for issues like property damage, where if they were at home, would not have been charged. We note that under *the Children, Youth and Families Act 2005* (Vic), when the State makes decisions for a child in out-of-home care, they must act in the best interests of the child, including, in the case of an Aboriginal child, must "protect and promote his or her Aboriginal cultural and spiritual identity and development by, wherever possible, maintaining and building their connections to their Aboriginal family and community" and "must make provision for the physical, intellectual, emotional and spiritual development of the child *in the same way a good parent would.*"<sup>55</sup>

Recognising the care-criminalisation pipeline, Aboriginal and Torres Strait Islander children with disability are over-represented in the out-of-home care system and the youth criminal legal systems,<sup>56</sup> with deep impacts on

<sup>52</sup> See ECCDPP Priorities at <https://www.snaicc.org.au/our-work/closing-the-gap/early-childhood-care-development-policy-partnership/>

<sup>53</sup> See, for example, Australian Institute of Health and Welfare, *Young People in Child Protection and under Youth Justice Supervision 2014–15* (2016) 7–17; Australian Institute of Health and Welfare, *Children and Young People at Risk of Social Exclusion: Links Between Homelessness, Child Protection and Juvenile Justice* (2012) 25–9; Pia Salmelainen, 'Child Neglect: Its Causes and Its Role in Delinquency' (Contemporary Issues in Crime and Justice No 33, NSW Bureau of Crime Statistics and Research, December 1996) 3–4; Don Weatherburn and Bronwyn Lind, *Social and Economic Stress, Child Neglect and Juvenile Delinquency* (1997).

<sup>54</sup> Australian Law Reform Commission (2017), *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* at [https://www.alrc.gov.au/wp-content/uploads/2019/08/final\\_report\\_133\\_amended1.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_133_amended1.pdf)

<sup>55</sup> See s10 and s174 *Children, Youth and Families Act 2005* (Vic) <https://content.legislation.vic.gov.au/sites/default/files/2025-12/05-96aa145-authorized.pdf>

<sup>56</sup> See, for example, Felicity Stewart, (2019) 'Crossover Kids: Vulnerable Children in the Youth Justice System Report 1' Sentencing Advisory Council (SAC); Susan Baidawi and Rubini Ball, 'Multi-system factors impacting youth justice involvement of children in residential out of home care,' (2022) 28(1) *Child and Family Social Work* 53



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families and communities. Our members regularly work with families and children with disability who are criminalised through the child protection systems. The specific needs of children in out-of-home care must therefore be considered in National Disability Insurance Scheme planning and review processes for justice-involved people. This should be accompanied by clear accountability mechanisms for State and Territory Child Protection agencies and statutory services in ensuring children in out-of-home care have access to culturally appropriate disability diagnosis, treatment and support before entry into custody. Access to diagnosis and support should not be reliant on a period of incarceration.

## RECOMMENDATION 10:

The criminalisation of children in out-of-home care must end. Commonwealth, State and Territory governments should introduce clearer accountability mechanisms for State and Territory justice and child protection agencies, related statutory services and funded services to ensure justice-impacted children in out-of-home care are not further criminalised by the State if in the out-of-home system, and are assisted to access the National Disability Insurance Scheme and culturally appropriate disability diagnosis, treatment and support before entry into custody, while in custody and upon release from custody.

Aboriginal and Torres Strait Islander children are over-surveilled by State and Territory care/child protection agencies and police. Acknowledging the over-representation and intersectionality of children with disability in out-of-home care, in our submission to the recent review of the *Disability Discrimination Act*, NATSILS recommended that the positive duty to not discriminate should also be extended to police as well as include powers and duties of child protection authorities and out-of-home care agencies. This is consistent with the recommendations of the *Yoorook for Justice Report* that recommended amendments to the *Victorian Equal Opportunity Act 2010* (Vic) “to prohibit race and other forms of discrimination in the administration of State laws and programs, including all functions performed by Victoria Police, Corrections Victoria and child” protection authorities”.<sup>57</sup>

## RECOMMENDATION 11:

A positive duty to not discriminate on the basis of disability should be extended to police through amendments to the *Disability Discrimination Act*. This protection against disability discrimination should additionally be extended to corrections, youth detention and child protection officeholders.

One of our members noted incidents of parents with undiagnosed disability who go under the radar until they become parents, and the risk that parents’ disability is used as evidence of parental incapacity in child protection agency scrutiny or intervention. This tips more Aboriginal and Torres Strait Islander children into the out-of-home care systems, who in turn are at higher risk of youth legal system interventions.

<sup>57</sup> See Yoorook for Justice Report, Recommendation 29 at <https://cdn.craft.cloud/06ad3276-b3d9-4912-bcbb-37795aade9a8/assets/documents/Yoorook-for-justice-report.pdf>



## Barriers experienced by Aboriginal and Torres Strait Islander Children and Families Accessing Legal Supports Scoping Study

We refer the Committee to the recently released study *Barriers Experienced by Aboriginal and Torres Strait Islander Children and Families Accessing Legal Supports* (“**Scoping Study**”) developed by NATSILS and SNAICC.<sup>58</sup> The Scoping Study examines how unmet legal need contributes to unnecessary child removals, family separation and intergenerational trauma, and identifies practical, evidence-based opportunities to reform systems in ways that strengthen legal supports, improve system responses and reduce the over-representation of Aboriginal and Torres Strait Islander children in out-of-home care.

The Scoping Study found that child protection and criminal legal systems continue to disproportionately surveil, intervene in and separate Aboriginal and Torres Strait Islander families. These harms are compounded by entrenched inequities in housing, health, education, employment and justice outcomes, which evidence shows significantly increase the likelihood of contact with statutory systems. Unmet legal need is a critical and preventable driver of this harm. When Aboriginal and Torres Strait Islander children and families cannot access culturally safe legal representation, they are more likely to experience child removal, unfair outcomes and permanent disconnection from family, culture, Country and kin.

*Safe & Supported: the National Framework for Protecting Australia's Children 2021–2031* (“**Safe and Supported Framework**”) is Australia's ten-year national framework for child and family wellbeing.<sup>59</sup> Together with *Safe and Supported: Aboriginal and Torres Strait Islander First Action Plan 2023-2026* (“**First Action Plan**”),<sup>60</sup> the Safe and Supported Framework recognises that culturally safe and appropriate legal representation is critical to supporting Aboriginal and Torres Strait Islander children, young people and families who are at risk of entering, or are already in contact with, child protection systems. Under Action 6 of the First Action Plan, governments have committed to improving the availability and quality of legal supports for Aboriginal and Torres Strait Islander children and families in contact with care/child protection legal systems. This Scoping Study delivers on Activity A of Action 6, examining the availability of legal support in the interface youth criminal legal and care systems.

The Scoping Study reaffirms what other reports and inquiries have found – that Australia's youth and care legal systems are failing Aboriginal and Torres Strait Islander children, young people and families. To support governments and the sector to deliver the systemic changes required to improve outcomes for Aboriginal and Torres Strait Islander children and families, the Scoping Study sets out recommendations that call for joined-up, cross-system responses led by Aboriginal and Torres Strait Islander communities and organisations. These recommendations include:

- Strengthening Aboriginal and Torres Strait Islander community-controlled legal supports to families and children
- Building cultural safety across systems
- Growing the Aboriginal and Torres Strait Islander legal workforce
- Ensuring children's rights and access to justice
- Reforming courts and decision-making processes

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<sup>58</sup> See *Barriers Experienced by Aboriginal and Torres Strait Islander Children and Families Accessing Legal Supports Scoping Study* at <https://www.natsils.org.au/wp-content/uploads/2026/01/Legal-Scoping-Study-Report-FINAL-2026.pdf>

<sup>59</sup> See [Safe & Supported: the National Framework for Protecting Australia's Children 2021–2031](#)

<sup>60</sup> See [Safe and Supported: Aboriginal and Torres Strait Islander First Action Plan 2023-2026](#)



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- Improving early intervention and system coordination
- Strengthening data, accountability and oversight

## RECOMMENDATION 12:

The Australian Government should implement the recommendations in the recently released *Barriers Experienced by Aboriginal and Torres Strait Islander Children and Families Accessing Legal Support Scoping Study* to reduce child removals and prevent the criminalisation of children in care.

## The “school-to-prison pipeline”

The SA Joint Inspection Report notes that mental health challenges and adverse social settings also impact on educational outcomes: many children in detention had fractured school enrolment, multiple education gaps and that impacts children’s social skills, and physical health, making early intervention critical to support positive outcomes. The correlation between school disengagement and youth incarceration is now so well-established to be now known as the “school-to-prison pipeline”.<sup>61</sup>

We also refer the Committee to research that demonstrates that students with disability are suspended and excluded at disproportionate rates and are more likely to be suspended if they are also in out-of-home care or from an Aboriginal and Torres Strait Islander background<sup>62</sup> and Queensland Advocacy for Inclusion’s submission to the 2024 Youth Justice Inquiry’s discussion of the school to prison pipeline.<sup>63</sup>

We again refer the Committee to the recent DDA Review<sup>64</sup> that referred to the link between disability, education exclusion and criminalisation. Noting the link between school disciplinary actions, school exclusion and criminalisation of children, NATSILS recommended that the *Disability Discrimination Act* should include provisions that protect the rights of children with disabilities to learn and participate in education. We reiterate that recommendation to this Inquiry.<sup>65</sup>

<sup>61</sup> See National Indigenous Youth Education Coalition (2025) *School Exclusion Report* at <https://www.niyec.com/knowledge-base/the-school-exclusion-project-span-classsqrte-text-color-blackresearch-reports>. The pipeline has also been identified or discussed in the Royal Commission into Aboriginal Deaths in Custody; Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, State youth justice inquiries (NSW, Victoria, NT, WA, Reports by the Australian Human Rights Commission, state Children’s Commissioners, and legal advocacy organisations.

<sup>62</sup> See, for example, Graham, Killingly, Alexander & Wiggans (2023). *Suspensions in QLD State Schools 2016 – 2020: overrepresentation, intersectionality and disproportionate risk* at <https://link.springer.com/article/10.1007/s13384-023-00652-6>.

<sup>63</sup> <https://qai.org.au/wp-content/uploads/2024/10/Australias-Youth-Justice-and-Incarceration-Inquiry-Oct-2024.pdf>

<sup>64</sup> See Review of the Disability Discrimination Act at <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/australias-anti-discrimination-law/review-disability-discrimination-act> Note: submissions to this Review have not yet been uploaded onto the AGD website.

<sup>65</sup> See NATSILS’ submission to the DDA Review at <https://www.natsils.org.au/wp-content/uploads/2026/01/NATSILS-Submission-to-the-Review-of-the-Disability-Discrimination-Act-Final.pdf>



## RECOMMENDATION 13:

Noting the link between school disciplinary actions, school exclusion and criminalisation of children, the *Disability Discrimination Act* should include provisions that protect the rights of children with disabilities to learn and participate in education.

## Bail

Bail has become the flashpoint for the harshest regressive and punitive criminal law reforms by States and Territories impacting Aboriginal and Torres Strait Islander children. As documented in the table of recent youth legal system reforms in each State and Territory at **Appendix A**, we are now seeing ‘copycat’ bail reforms in what appears to be a competition about which jurisdiction can be the harshest. In 2025, Victoria introduced their bail reforms under the name *Bail Amendment (Tough Bail) Bill 2025*, described by the government as “the toughest bail laws in the country.”<sup>66</sup>

Through 2025, NATSILS and ATSILS worked through the Justice Policy Partnership (“JPP”) established under architecture under the National Agreement on Closing the Gap, alongside representatives from all jurisdictions and all ATSILS to prepare a Report to the Standing Council of Attorneys-General (“SCAG”) on bail reform.<sup>67</sup> The need for bail reform recognises the clear and overwhelming evidence that changes to bail laws across jurisdictions are the key driver of the failing progress on Closing the Gap socio-economic outcomes 10 and 11 to lower over-representation of Aboriginal and Torres Strait Islander adults and children in prison.

The recommendations in the SCAG JPP Bail and Remand Reform Working Group Final Report (“**SCAG Bail and Remand Final Report**”) are set out in full in the box below. These recommendations represent the collective and considered deliberations of representatives from NATSILS, each ATSILS and representatives from all State and Territory justice agencies, that, if implemented, would have a significant and immediate impact on the rising prison population and stem the escalating criminalisation of Aboriginal and Torres Strait Islander children who are refused bail through increasingly punitive State and Territory bail laws.

These recommendations represent a unique opportunity for national policy coordination and leadership. In a missed opportunity, at its 14 November 2025 meeting, SCAG “discussed the Bail and Remand Reform Working Group Final Report *noting that the implementation of recommendations is a matter for each individual jurisdiction*” and agreed to release the SCAG Bail and Remand Final Report on the SCAG website “*without endorsement.*”<sup>68</sup> (emphasis added). NATSILS understands there will be no further work on bail reform, but we continue to seek leadership from the Commonwealth to explore the recommendations. The failure to act on the Report exemplifies the difficulty in getting progress on socio-economic outcome Targets 11 by governments due to the lack of political will and continued politicisation of Aboriginal and Torres Strait Islander children.

The United Nations Working Group on Arbitrary Detention (“UNWGAD”) noted the role of bail in the over-incarceration and arbitrary detention Aboriginal and Torres Strait Islander people including children, finding that “*bail reforms have often occurred as populist responses to high-profile incidents rather than being grounded in evidence; research suggests that even short periods of remand may contribute to future re-offending,*

<sup>66</sup> See Hansard, 15 March 2025, at [https://www.parliament.vic.gov.au/parliamentary-activity/hansard/hansard-details/HANSARD-2145855009-30053?utm\\_source=chatgpt.com](https://www.parliament.vic.gov.au/parliamentary-activity/hansard/hansard-details/HANSARD-2145855009-30053?utm_source=chatgpt.com)

<sup>67</sup> See SCAG Bail and Remand Reform Working Group Final Report at [https://www.ag.gov.au/sites/default/files/2025-11/scag\\_bail-and-remand-reform-working-group-final-report.PDF](https://www.ag.gov.au/sites/default/files/2025-11/scag_bail-and-remand-reform-working-group-final-report.PDF)

<sup>68</sup> See Standing Council of Attorneys-General Communique 14 November 2025 at [https://www.ag.gov.au/sites/default/files/2025-11/scag-communique\\_14-november-2025.pdf](https://www.ag.gov.au/sites/default/files/2025-11/scag-communique_14-november-2025.pdf)



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*undermining the community safety goals such reforms purport to serve.”*<sup>69</sup> In its Preliminary Findings, the UNWGAD recommended that Australia align bail laws with the recommendations in the SCAG Final Report.<sup>70</sup>

We refer the Committee to the High Court challenge filed by the North Australian Aboriginal Justice Agency (NAAJA) to the Northern Territory’s *Bail and Youth Justice Legislation Amendment Act 2025* (NT) (Act), which commenced in May 2025.<sup>71</sup> This Act added a requirement that a judge must now have a “high degree of confidence” that a person applying for bail will not commit a serious offence or endanger the safety of the community, imposing an impossibly high threshold. We note that 2024 amendments to the Bail Act 2013 (NSW) also imposed a “high degree of confidence” test that a young person will not commit a serious indictable offence while on bail.

Punitive bail laws disproportionately impact Aboriginal and Torres Strait Islander people, overwhelm Aboriginal community-controlled legal services including ATSIILS, and punish the most vulnerable – resulting in dramatic increases in the numbers of Aboriginal and Torres Strait Islander adults and children in prison who have not been sentenced. With the link between remand and deaths in custody clear, we need urgent action on bail reform to save lives.<sup>72</sup>

## **RECOMMENDATION 14:**

Governments should implement the recommendations of the Standing Council of Attorneys-General Justice Policy Partnership Bail and Remand Reform Working Group Final Report (*see recommendations below*)

### ***SCAG JPP Bail and Remand Reform Working Group Final Report - recommendations***

#### **RECOMMENDATION 1**

*Noting the success of ATSIILS-led bail support services, all Governments should provide increased and long-term funding to ACCOs, in particular ATSIILS, to establish, expand and provide long term funding of bail support services which enable access to holistic supports with a particular emphasis on:*

- a) Aboriginal and Torres Strait Islander children and young people, to immediately address Target 11.*
- b) Aboriginal and Torres Strait Islander women, as the fastest growing cohort of people being imprisoned.*
- c) Access to bail supports and programs, including social service and cultural supports such as housing, alcohol and other drug support services, and therapeutic social and emotional wellbeing for adults, children (and their families) seeking bail, including the provision of reports to assist bail decision-makers.*

<sup>69</sup> See UNWGAD’s Statement at <https://www.ohchr.org/sites/default/files/statements/20251212-eom-stm-australia-wg-arbitrary-detention-en.pdf> at p 3

<sup>70</sup> See United Nations Working Group on Arbitrary Detention: *Preliminary Findings from its visit to Australia (1 to 12 December 2025)* at <https://www.ohchr.org/sites/default/files/statements/20251212-eom-stm-australia-wg-arbitrary-detention-en.pdf> at p 3.

<sup>71</sup> See <https://www.naaja.org.au/naaja-to-challenge-nt-bail-laws-in-the-high-court-on-the-basis-that-they-are-unlawful-and-unconstitutional/>

<sup>72</sup> See, for example, the death in custody of Veronica Nelson – see <https://www.coronerscourt.vic.gov.au/finding-passing-veronica-nelson>



- d) *Accessibility across all locations including regional, rural and remote.*

## **RECOMMENDATION 2**

*A Working Group consisting of representatives of the JPP and officials from justice and policing (and other agencies as deemed relevant by the Working Group) be established to explore options and recommendations for alternative and co-responder models, including funding frameworks, to address factors such as domestic violence, children and young people, mental health, disability, alcohol and drug use and child protection in partnership with ACCOs including ATSILS and FVPLS.*

*A report on alternative and co-responder models should be prepared for SCAG by mid-2026*

## **RECOMMENDATION 3**

*A Working Group consisting of representatives of the JPP and officials from justice and policing (and other agencies as deemed relevant by the Working Group) develop a resource for bail decision-makers, being courts and police, that sets out guidance and 'best practice' approaches to bail that embed the foundational and common law principles of bail, with reference to relevant international human rights standards and conventions, and further considerations in relation to:*

- a) *Children and young people.*
- b) *Cultural and community norms and protocols, including to support individuals to remain within community and on country, which are specific to the local context.*
- c) *Diversions and early-intervention options, particularly for alleged low-level offences that are unlikely to attract a term of imprisonment.*
- d) *The use of irrelevant, unsuitable or onerous bail conditions that may result in breaches of bail and over-incarceration.*
- e) *Accessibility and appropriateness of bail conditions for people with disability.*
- f) *Suitable housing, noting cultural, social and family and domestic violence implications.*
- g) *The use of electronic monitoring, including where electronic monitoring is not practical or available.*

*A report on the development of a resource for bail decision-makers should be prepared for SCAG by mid-2026. Once the resource for bail decision-makers is developed, Attorney-General's Departments or Departments of Justice (or equivalent) in each jurisdiction should co-design and co-deliver training with local Aboriginal and Torres Strait Islander organisations to support bail decision-makers to implement the guidance materials, within their own jurisdictional context, by mid-2027.*

## **RECOMMENDATION 4**

*People on remand should have equitable access to support, education and rehabilitation programs.*

## **RECOMMENDATION 5**

*To have an immediate impact on remand rates and assist them in meeting Targets 10 and 11 under the National Agreement, jurisdictions should consider reform of bail laws for both adults and young people to:*

- a) *ensure bail laws explicitly provide that imprisonment be a last resort*
- b) *explicitly require that a person must not be remanded for an offence that is unlikely to result in a sentence of imprisonment*
- c) *remove bars on second (and subsequent) bail applications*
- d) *remove standalone bail offences*
- e) *remove presumptions against bail and provisions which reverse the onus of proof*
- f) *mandate bail authorities to consider any matters that arise in relation to a person's status as an Aboriginal or Torres Strait Islander person*
- g) *include a presumption in favour of bail for children and young people*



- h) *include a presumption in favour of bail for people with cognitive, psychosocial, mental health or other disability related issues*
- i) *remove bail tests that establish very high thresholds for bail being granted and curtail bail decision-makers' discretion*
- j) *ensure bail is not refused where electronic monitoring is not practical or available.*
- k) *ensure bail conditions are:*
  - i. *targeted at an identified risk*
  - ii. *able to be complied with by the individual (taking into account the individual's capacity to understand/comply), and*
  - iii. *not overly onerous*

*so as to prevent irrelevant, unsuitable or onerous bail conditions that may result in breaches of bail and overincarceration, such as conditions that require onerous daily reporting, impractical non-association conditions and inappropriate curfew conditions that are not relevant to bail concerns or risk.*

## **RECOMMENDATION 6**

- a) *Recognising that further work is required on uplifting data systems and identifying funding and resourcing requirements, in line with Priority Reform 4, all Governments should commit to improving data collection on bail and remand (through police, courts and ATSILS) on areas related to an individual, such as:*
  - i. *Aboriginal and Torres Strait Islander status*
  - ii. *Gender*
  - iii. *Age*
  - iv. *Disability status*
  - v. *Primary offence category*
  - vi. *Whether a child is under guardianship of the Minister or their delegate*
  - vii. *Whether previous domestic or family violence victimisation has occurred.*
- b) *The Working Group referenced in Recommendation 2 and 3 should work with the Data Policy Partnership and other relevant data bodies across governments to create an evidence base to better understand the following*
  - i. *Whether access to a bail support service was a factor in the decision whether or not to grant bail, including whether a lack of access to a bail support service (i.e. housing, alcohol and other drugs, reoffending, non-attendance) led to bail refusal and how this was assessed in each case.*
  - ii. *The incidence of bail being granted by a court after being refused by police.*
  - iii. *Reasons for imposing bail conditions, including how relevant legislative criteria were addressed.*
  - iv. *Police use of cautions, warnings and other 'diversionary' options as alternatives to arrest.*
  - v. *Trend data on:*
    - 1. *Bail decision comparability between metropolitan, rural, regional and remote areas and differences across police commands and court venues.*
    - 2. *Relative periods of remand over time to understand any trends related to changes in remand periods and therefore the efficiency of the justice system.*



- c) Governments should consider additional resourcing to ATSILS for the necessary capital upgrades and capabilities uplift to strengthen and support their ability to collect, aggregate, analyse, translate and report on their service delivery data. A report on progress should be prepared for SCAG by mid-2027.

## New material for the Committee's consideration

There are likely to be many hundreds more evidence-based recommendations from multiple reports, reviews and research since the 2024 Youth Justice Inquiry.

Along with the expert Constitutional law expert advice on Commonwealth powers and responsibilities in youth justice, and the SCAG Final Report referred to above, NATSILS refers the Committee to the new reports, submissions, evidence and research on youth and care legal systems that has emerged since the 2024 Youth Justice Inquiry. Some of these are listed below.

### Evidence-based approaches to child justice, self-determination and supporting ATSILS

There are multiple examples of alternative, evidence-based approaches to child justice that minimise harm.<sup>73</sup> We refer the Committee to the recently published Australian Human Rights Commission's paper *Evidence-based approaches to child justice: Supplementary paper to Help Way Earlier! How Australia can transform child justice to improve safety and wellbeing*.<sup>74</sup>

Rather than investing in carceral systems, funding must be redirected to community-based programs that bolster Aboriginal and Torres Strait Islander children's strengths, connects them to culture and country and supports them and their families to thrive.

We again refer the Committee to NATSILS' submission to the 2024 Youth Justice Inquiry.<sup>75</sup> To address the escalating over-representation of Aboriginal and Torres Strait Islander children in youth justice systems, and the rising demand for legal assistance in light of the worsening youth justice policies across all states and territories NATSILS recommends that immediate, needs-based and sustainable funding increases for ATSILS be prioritised. Without urgent and significant investment, ATSILS will be unable to meet demand, putting more children at risk of incarceration and long-term disadvantage.

Clause 44 of the National Agreement on Closing the Gap recognises that '*Aboriginal and Torres Strait Islander community control is an act of self-determination*'. As ACCOs, ATSILS are well placed to know what our children and young people need. ATSILS provide culturally safe legal services across Australia and have expertise in delivering wraparound support to our children through support programs including bail support, sentencing

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<sup>73</sup> See examples referred to in Sotiri, M; Schetzer, L; Kerr, A (2024) *Children, Youth Justice and Alternatives to Incarceration in Australia*, Justice Reform Initiative, Australia  
[https://assets.nationbuilder.com/justicereforminitiative/pages/441/attachments/original/1733879393/Dec\\_2024\\_YOUTH\\_JUSTICE.pdf?1733879393](https://assets.nationbuilder.com/justicereforminitiative/pages/441/attachments/original/1733879393/Dec_2024_YOUTH_JUSTICE.pdf?1733879393).

<sup>74</sup> Australian Human Rights Commission (2025). *Evidence-based approaches to child justice. Supplementary paper to 'Help way earlier!': How Australia can transform child justice to improve safety and wellbeing*. Sydney: Australian Human Rights Commission at <https://humanrights.gov.au/?a=71852>

<sup>75</sup> See NATSILS submission to the Senate Legal and Constitutional Affairs References Committee Inquiry in to Australia's Youth Justice and Incarceration System at <https://www.natsils.org.au/wp-content/uploads/2025/01/Sub202.pdf>



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Court support and throughcare – but our funding to deliver these wraparound support services is often short-term.

## Oversight and Accountability

In December 2025, the United Nations Working Group on Arbitrary Detention (“UNWGAD”) visited Australia. The UNWGAD was denied access to all adult and youth custodial facilities in the Northern Territory and some detention facilities in Western Australia. The disregard by States and Territories of the United Nations’ mandate and lack of any apparent consequences for State and Territory cavalier position is concerning.

Australia has not ensured that the National Preventive Mechanism (NPM) is operational across every State and Territory in implementing its international law obligations under the United Nations *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*. This must be rectified.

### RECOMMENDATION 15:

Australia must ensure its obligations under the United Nations *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* are fully implemented and resourced, including ensuring there are robust members of the National Preventative Mechanism (NPM) in place in every State and Territory.

## Arbitrary Detention

We draw the Committee’s attention to the recent *Preliminary Findings of the UNWGAD*, issued on 12 December 2025 at the conclusion of its visit to Australia.

In its Preliminary Findings, the UNWGAD:

- expressed “profound concern” at the grossly disproportionate representation of Aboriginal and Torres Strait Islander people in the criminal justice system.
- expressed “critical concern” about Aboriginal deaths in custody and pointed to the poor implementation of the recommendations of 1991 Royal Commission into Aboriginal Deaths in Custody and the worsening outcomes under the National Agreement on Closing the Gap.
- expressed “shock” about the extremely young ages from which children may be detained in Australia “in violation of fundamental human rights norms”
- called on Australia to take urgent action to, amongst other things:
  - address the remand crisis and end the gross overrepresentation of First Nations peoples in detention,
  - raise the age of criminal responsibility to at least 14, and
  - prohibit the solitary confinement of children.

We refer the Committee to the UNWGAD’s concern about the incidents of people held for lengthy periods in police watch houses and on pre-trial remand. NATSILS supports the UNWGAD’s recommendation “that Australia ensure prisoners are not held in police watchhouses beyond short-term processing, that alternatives to pre-trial detention be prioritized, and that adequate correctional facility capacity be assured when detention is necessary as a last resort.”



## RECOMMENDATION 16:

The Commonwealth Government must implement the United Nations Working Group on Arbitrary Detention's calls for Australia to take urgent action to:

- address the remand crisis and end the gross overrepresentation of First Nations peoples in detention,
- raise the age of criminal responsibility to at least 14, and
- prohibit the solitary confinement of children.

## RECOMMENDATION 17:

The Commonwealth Government must implement the United Nations Working Group on Arbitrary Detention's recommendation to "ensure prisoners are not held in police watchhouses beyond short-term processing, that alternatives to pre-trial detention be prioritized, and that adequate correctional facility capacity be assured when detention is necessary as a last resort."

### Australia at the United Nations Universal Periodic Review

On 26 January 2026, Australia was reviewed by the UN Human Rights Council in Geneva under the Universal Periodic Review ("UPR"), a five yearly peer review process where member countries assess each state's human rights performance and make recommendations for reform.

At the UPR, more than 120 countries made around 350 recommendations to improve Australia's record on protecting human rights. The most pressing concerns raised by these countries were related to the rights of Aboriginal and Torres Strait Islander peoples, particularly around inequality, racial discrimination and poor justice outcomes – with Australia's low age of criminal responsibility disproportionately impacting on Aboriginal and Torres Strait Islander children and families.

A full report on Australia's review will be published later this year.

In the interim, we refer the Committee to the Human Rights Council Working Group on the Universal Periodic Review Fifty-first Session *Compilation of information prepared by the Office of the United Nations High Commissioner for Human Rights ("HRC Compilation Report 2026")*<sup>76</sup> which represents a summary of earlier recommendations by various United Nations bodies, including the UN Committee Against Torture.

Recommendations in the HRC Compilation Report 2026 include, amongst other things, that Australia take all measures necessary to promptly establish its network of national preventive mechanisms across all States and Territories and ensure that each of its member bodies had the resources and functional and operational

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<sup>76</sup> See Human Rights Council Working Group on the Universal Periodic Review Fifty-first session, Australia, *Compilation of information prepared by the Office of the United Nations High Commissioner for Human Rights* at <https://docs.un.org/en/A/HRC/WG.6/51/AUS/2>



independence necessary to fulfil its preventive mandate in accordance with the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>77</sup>

The HRC Compilation Report noted that the UN Committee against Torture had:

*“expressed concern about the almost constant increase in the number of persons being held in pretrial detention, with a reported increase of 16 per cent from June 2020 to December 2021, which had been largely driven by increases in the rate of pretrial detention of Indigenous Peoples. It recommended that Australia ensure that the regulations governing pretrial detention were scrupulously respected and that such detention was resorted to only in exceptional circumstances and for limited periods, taking into account the principles of necessity and proportionality; and intensify efforts to significantly reduce the number of pretrial detainees by making more use of alternatives to detention, in particular with regard to Aboriginal and Torres Strait Islander adults and children in accordance with the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) and the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).”<sup>78</sup>*

The HRC Compilation Report 2026, further noted the UN Committee against Torture had:

*“expressed serious concerns about the very low age of criminal responsibility (10 years); the persistent overrepresentation of Indigenous children and children with disabilities in the juvenile justice system; reports that children in detention were frequently subjected to verbal abuse and racist remarks and restrained in ways that were potentially dangerous; the practice of keeping children in solitary confinement, in particular at the Banksia Hill youth detention centre in Western Australia, the Don Dale youth detention centre in the Northern Territory and the Ashley youth detention centre in Tasmania; the high number of children in detention, both on remand and after sentencing; children in detention not always being separated from adults; and children’s lack of awareness about their rights and how to report abuses.”<sup>79</sup>*

The UN Committee against Torture had further recommended:

*“that Australia increase its efforts to address the overrepresentation of Indigenous Peoples in prisons, including by identifying its underlying causes, by revising regulations and policies leading to their high rates of incarceration, such as the mandatory sentencing laws and imprisonment for fine defaults, and by enhancing the use of non-custodial measures and diverting programmes; take all measures necessary to give judges the discretion necessary to determine relevant individual circumstances; and ensure that adequate, culturally sensitive, qualified and accessible legal services were available to Aboriginals and Torres Strait Islanders.”*

The need for Australia to adopt a national Human Rights Act was also shared focus of many countries appearing at the UPR.

As has been clear to NATSILS and ATSILS for decades, it is also clear to the international community that Australia needs to improve its shameful human rights record and step up and show leadership to protect the rights and wellbeing of Aboriginal and Torres Strait Islander children, their families and their communities.

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<sup>77</sup> *ibid*

<sup>78</sup> *Ibid*, at paragraph 17

<sup>79</sup> *Ibid*, at paragraph 50.



# NATSILS

National Aboriginal and  
Torres Strait Islander Legal Services

TRUE JUSTICE FOR OUR PEOPLE

## **RECOMMENDATION 18:**

The Commonwealth Government should accept and implement the recommendations of the current United Nations' Universal Periodic Review, as well as the recommendations from earlier United Nations bodies as they relate to justice for Aboriginal and Torres Strait Islander people.



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National Aboriginal and  
Torres Strait Islander Legal Services

TRUE JUSTICE FOR OUR PEOPLE

## **APPENDICES**

**APPENDIX A - Youth legal system reforms by State and Territory May – December 2025**

**APPENDIX B - Expert Constitutional Law Advice**

**APPENDIX C - Constitutional Law Advice Explainer**

# APPENDIX A

## Youth justice reforms – ATSILS’ State and Territory ready-reckoner

This table sets out jurisdictional youth justice reforms from each ATSILS as at May 2025, August 2025 and December 2025.

These reforms point to increasingly punitive regimes in most jurisdictions over an 8-month period in 2025, with many “copy-cat” reforms as States and Territories copy jurisdictions in reforms to bail tests (eg “high degree of confidence” test), “boast and post” laws, “wandering” laws, “second strike” laws, declaration of “recidivist young offenders” and reforms removing detention as a last resort for children.

ATSILS	Updates as at May 2025	Updates as at August 2025	Updates as at December 2025
ALRM (SA)	<p><b>ALRM - May 2025</b></p> <ul style="list-style-type: none"> <li>➤ South Australia is on-track to achieve target 11, the rate of Aboriginal children and young people detained in South Australia was more than 34% less in 2023–24 than the 2019 baseline year. (However, rates of children in care are increasing – see below)</li> <li>➤ SA Govt recently announced plans to make bail and sentencing laws for children more punitive – by restricting access to bail and increasing penalties for children - <a href="https://www.agd.sa.gov.au/_data/assets/pdf_file/0007/1137445/Young-Offender-plan.pdf">https://www.agd.sa.gov.au/_data/assets/pdf_file/0007/1137445/Young-Offender-plan.pdf</a> <ul style="list-style-type: none"> <li>○ This is currently with the South Australia Law Reform Institute (SALRI) – to report in 2026, our main call for that is that they consult with ALRM, Aboriginal organisations and those impacted, especially those in remote and regional</li> </ul> </li> </ul>	<p><b>ALRM – August 2025</b></p> <ul style="list-style-type: none"> <li>➤ (update) This is correct – from a rate of 25.9/ 10,000 in 2018-19 to 17/ 10,000 in 2023-24.</li> <li>➤ We have grave concerns this will change with toughened bail laws and other laws.</li> <li>➤ (update) SA Govt has released draft <i>Recidivist Young Offenders Bill</i> which will toughen bail laws and change sentencing discretion, this has been sent to ALRM and other bodies for comment – not publicly. We and others will submit our comments on this but fear this will reverse the positive gains made in reducing child/ youth detention. (For your information – and discussion at meetings but not for public dissemination). SALRI/ ALRM have been in touch to commence consultation meetings and first meeting arranged</li> </ul>	<p><b>ALRM – December 2025</b></p> <p><b><i>NOTE from ALRM – notes below includes May and August updates, and is up to date as at December 2025</i></b></p> <ul style="list-style-type: none"> <li>➤ The SA Government announced in early 2025 that SA had the 2<sup>nd</sup> lowest youth crime (after ACT) and youth crime had been decreasing but that a small number of young people (20) were responsible for much of the crime. Nevertheless, it seems the main response is increasing sentencing and decreasing eligibility for bail: <a href="https://www.agd.sa.gov.au/_data/assets/pdf_file/0007/1137445/Young-Offender-plan.pdf">Young Offender Plan 2025</a></li> <li>➤ By the Closing the Gap figures of 2023/24 South Australia is <u>on-track to achieve target 11.</u> We are concerned that the SA Government has</li> </ul>

	<p>areas of SA.</p> <ul style="list-style-type: none"> <li>➤ Is working to give police dealing with children similar powers to powers they have with regard to outlaw bikie gangs as in the above plan - no Bill yet.</li> <li>➤ Is working to pass a Bill '<i>Summary Offences (Prohibition of Publication of Certain Material) Amendment Bill 2025</i>' – this would see those who share events on social media that turn out to be a crime, whenever and wherever committed, facing 2 years in prison. This is likely to impact mostly on children and young people as they communicate without thought by social media.</li> <li>➤ <i>Summary Offences (Knives and Other Weapons) Amendment Bill 2025</i> – passed and awaiting assent - expansion of police powers to conduct wandering searches of people (without any reasonable suspicion) at shopping centres, public transport hubs and on public transport – powers which are almost always used to target Aboriginal people and can result in their arrest for unrelated offences</li> <li>➤ Government has announced no intention to raise the age of criminal responsibility – currently the age is 10</li> <li>➤ Also of note – <i>Children and Young People (Safety and Support) Bill 2024</i> before the legislative council. This does not make the best interests of children the paramount consideration despite CROC and advice from the Childrens' Commissioners and Guardian</li> </ul>	<ul style="list-style-type: none"> <li>➤ (update) Draft Bill sent out for comment, to ALRM and others but not publicly released – <i>Street Gang Amendment Bill</i>, ALRM made a submission on this Bill very concerned as the group itself and participants don't have to have been charged or convicted of any offence for them to be taken to court for a barring order. (For your information – and discussion at meetings but not for public dissemination)</li> <li>➤ (update) Passed Legislative Council (first), introduced to Legislative assembly 1 May 2025, no further update.</li> <li>➤ (update) Commenced 1 July</li> <li>➤ (update) Correct, despite the evidence</li> <li>➤ (update) <i>Children and Young People (Safety and Support) Act 2025</i> now passed through Parliament with some pleasing amendments made to the Bill – with thanks to the lobbying of many stakeholders including ALRM who were</li> </ul>	<p>introduced legislation to provide increases in sentencing and removal of presumption of bail for young people who are by legislation classed recidivist offenders, introduced more offences to see young people further criminalised ('post and boast' laws and 'street gang orders'.) It has also introduced wide powers for wandering for knife detection – leading to increased charges for possession of drugs and with likely follow on offences related to police contact (hinder/ obstruct/ assault police).</p> <p><b>Bail:</b></p> <p>The SA Guardian for Children and Young people reports that the majority of children and young people in detention are on remand and are not able to access the same rehabilitation programs as sentenced children and young people, their time in custody is essentially spent in limbo. A joint Guardian for Children and Young People and Chief Psychiatrist Report of 2025 reports <b>95% of children in detention on 23 January 2025 were on remand.</b></p> <p>See: <a href="#">2025-10-27 Joint-Inspection-AYTC Mental-Health-and-Wellbeing TCV OCP FINAL.pdf</a> (at pg 9)</p> <p>Bail is more difficult to obtain if by legislation a young person aged 14 or over is categorised as a Recidivist Young Offender (<i>Statutes</i></p>
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for children in care. It includes ATSCIPP but not in full as required by SNAICC and with non-mandatory and non-enforceable language. The Bill also specifically prohibits the Youth Court from making orders for children to live with/ be placed with or spend time with/ have contact with their families. We are the only state to specifically prohibit this and it means the Department decisions go unchecked. Whereas our rates of youth detention are dropping, rates of children in care are increasing.

- By the *Bail Act 1985 (SA)*, there is no police duty to consider bail nor to seek a review of a decision to refuse bail – in SA children must apply for bail – in writing unless the police officer considers it can be done less formally. Likewise, the child would need to apply for a review ... this puts vulnerable children in a difficult position. (Bail Act s8)

listened to by the cross-bench in the Legislative Council – and in turn the Minister listened to them.

- The amendments include removing safety as paramount consideration and making it and best interests on equal grounds. But, in removing children, safety is the priority.
- The amendments made the ATSCIP principals slightly more workable and less escape clauses for not following them – but still not fully in accordance with SNAICC.
- The big issue remains that the Youth Court is specifically precluded from making placement or contact orders – meaning that South Australian children in care are the only children in the country with no court to go to for resolution of this – leaving this power in the hands of the Department and bodies they set up. Placement decisions can go to SACAT.

#### **NEW ISSUE – TRANSIT BARRING ORDERS**

*Passenger Transport (Transit Barring Orders) Amendment Regulations 2025* – this upscales transport barring orders from 1 July 2025 and will impact children as young as 10 who are suspected of or charged with an offence as minor as disorderly conduct – so fighting / being loud with a friend can mean barred from public transport indefinitely – no longer able to get to school/ football/ personal activities/ medical appointments – nor court!

**Transit Barring Orders be made:**

*Amendment (Recidivist Young Offenders) Act 2025*) by removing a presumption for bail.

South Australian Law Reform Institute instructed by Government to report on Bail in mid-2026. Our main call is that they consult with ALRM, Aboriginal organisations and those impacted, especially those in remote and regional areas of SA.

Holding of children in police lock ups continues to be an issue, as does the issue of the long distances to transport children from a local police station to the Adelaide based youth detention centre, 100s or more than 1000kms from various places.

By the *Bail Act 1985 (SA)*, there is no duty on police to consider bail nor to seek a review of a decision to refuse bail. In SA children who are arrested and detained must apply to police for bail in writing unless the police officer considers it can be done less formally. Likewise, the child would need to apply for a review ... this puts vulnerable children in a difficult position. (Bail Act s8)

#### **➤ Recidivist young offenders:**

The *Statutes Amendment (Recidivist Young Offenders) Act 2025* has now passed. Previously if criteria were met, a Court could declare a young person a recidivist young offender. This legislation has removed discretion and the young person is prescribed

		<ul style="list-style-type: none"> <li>- When a police or transport officer <b>suspects</b> a person has committed a disorderly conduct (but not offensive language) or more serious 'relevant' offence on or near public transport for a period written on the order for <b>up to an indefinite period</b>;</li> <li>- When a person behaves in 'an offensive or disorderly manner' on or near public transport for the period on the order, depending on who gives/ authorises it, this may be up to 6 months for a first barring order or 12 months for a 2<sup>nd</sup> or indefinite for 3<sup>rd</sup> or more (Reg 137B)</li> <li>- They <b>must</b> be made (<b>no discretion</b>) when a person has been charged with a '<i>relevant offence</i>' – that is charged with any of the following that allegedly occur on or near public transport: <ul style="list-style-type: none"> <li>o disorderly conduct (but not offensive language)</li> <li>o Possess or use offensive or prohibited weapon, article of disguise, dangerous article</li> <li>o Violent disorder</li> <li>o Affray</li> <li>o Gross indecency/ indecent assault/ unlawful sexual assault/ rape</li> <li>o Assault/ assault causing harm/ assault emergency workers/ offenses re human biological material (spitting etc)</li> <li>o Murder/ manslaughter/ causing death offences</li> </ul> </li> </ul>	<p>as a recidivist young offender simply upon the criteria in legislation being met.</p> <p>By this legislation if a young person of 14 or over is prescribed as a recidivist young offender, there is a presumption against bail. This will increase the number of young people on remand and lengthen the time in police custody.</p> <p>The legislation increases non parole periods and removes the necessity to make the sentence proportionate to the offence for all children and young people (10 and over) who are now prescribed 'recidivist young offenders'. However, a Court can declare this inapplicable to a young person if special circumstances are found to exist.</p> <p>➤ <b>Post and Boast Law</b> <i>'Summary Offences (Prohibition of Publication of Certain Material) Amendment Act 2025'</i> assented on 25/9/2025 – This criminalises those who share events on social media that turn out to be a crime, whenever and wherever committed, facing up to 2 years in prison. This is likely to impact mostly on children and young people as they communicate without thought by social media.</p> <p>➤ <b>Wanding Laws</b> <i>Summary Offences (Knives and Other Weapons) Amendment Act 2025</i> majority commenced July 2025 - expansion of police powers to conduct wanding searches of people (without any</p>
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		<ul style="list-style-type: none"> <li>▪ For these ones – barring order is for a time period in the order – which can be up to an <b>indefinite</b> period.</li> <li>▪ If the charge is dismissed/ withdrawn – then the Police must lift the barring order and notify the person of that, note, <i>it is not an automatic lifting</i>.</li> <li>▪ Note also – even if lifted, the police/ transit officer can still issue another barring order under Reg 137B above</li> </ul> <ul style="list-style-type: none"> <li>- The orders have to be ‘served’ – that is, either given to the person; or offered to the person and if they refuse to take it, informed of it and put down in the presence of them. (Regulation 137D)</li> <li>- How to lift a barring order? <ul style="list-style-type: none"> <li>○ After 3 months can go to court to ask for them to be lifted.</li> <li>○ The Court can only lift them if it finds ‘exceptional circumstances’ and that the person doesn’t pose a substantial risk to the public. (Regulation 137E)</li> </ul> </li> </ul>	<p>reasonable suspicion) at shopping centres, public transport hubs and on public transport – powers which are almost always used to target Aboriginal people and can result in their arrest for unrelated offences</p> <p>➤ <b>Street Gang legislation</b>  <i>Criminal Law Consolidation (Street Gangs) Amendment Act 2025</i> assented to 11.2025, was to enable young people in ‘gangs’ to be treated as bikie gangs. Enables court to declare people part of a street gang simply by association and without need for offending. Enables courts to make street gang control orders which prohibits members from attending certain places or associating with certain people, carrying certain amounts of cash etc. While in general the legislation includes children, a court cannot make a street gang control order for a child under 14 years and the court must be satisfied a young person understands any order (section 83GZA).</p> <p>➤ <b>Transit Barring Orders</b>  <i>Passenger Transport (Transit Barring Orders) Amendment Regulations 2025</i> – this upscales transport barring orders from 1 July 2025. Police and transit officers can make ‘transit barring orders’ preventing people from using any public transport for lengths of time up to <u>indefinite periods</u> if they are suspected of offences including disorderly conduct on or near to public transport.  These become mandatory if charged for certain offences including disorderly conduct.</p>
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			<p>No right of review by a court until 3 months after service of the order and only able to do so on exceptional circumstances.</p> <p>Impacting children and young people who lack other transport options and cannot get to school or attend reporting for bail, cannot get home at the required bail curfew time and cannot get to court.</p> <p>Fines of up to \$7000 for contravention of the order.</p> <p>➤ <b>MACR – 10</b> Government has announced no intention to raise the age of criminal responsibility – currently the age is 10</p> <p>➤ <b>Child Protection Legislation</b> Children in the state care / protection system remain overrepresented in the youth justice system.</p> <p><i>The Children and Young People (Safety and Support) Act 2025</i> was assented to in June 2025. Not likely to come into force until late 2026 at earliest.</p> <p>It isn't in our view compliant with CROC in that best interests of a child are not paramount –it places safety and best interest as equal principles – except in questions of removal, where safety is the priority.</p> <p>The amendments legislate for the ATSCIP principals to be considered – but still not fully in accordance with SNAICC.</p>
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			<p>Of concern is the Youth Court is specifically precluded from making placement or contact orders on an interim or final basis – meaning that South Australian children in care are the only children in the country with no court to go to for resolution of this. Whilst placement matters can go to the SA Civil and Administrative Tribunal, contact matters are through a body set up by the Department of Child Protection. We are the only state to specifically prohibit a <u>court</u> determining this and it means the Department decisions go unchecked. <u>Whereas our rates of youth detention in 2023/24 were dropping, rates of children in care are increasing.</u></p>
<p><b>ALS (NSW)</b></p>	<p><b>ALS NSW/ACT – May 2025</b></p> <ul style="list-style-type: none"> <li>➤ In 2024, the NSW Government introduced an unprecedented new bail test for children 14-17 charged with certain offences that imposes a higher threshold to access bail than applies to adults charged with the same offences.</li> <li>➤ In March 2025, the NSW Government extended this legislation for another 3 years without awaiting the outcome of the promised 12-month review. <ul style="list-style-type: none"> <li>○ <a href="#">Section 22C</a> Bail Act applies to children aged between 14 and 17 years old who are charged with certain break and enter and car theft offences whilst already on bail for the same types of offences. In these circumstances, the bail authority must not grant bail to the young person unless they have a “high degree of confidence” that the young person will</li> </ul> </li> </ul>	<p><b>ALS NSW/ACT – September 2025</b></p> <ul style="list-style-type: none"> <li>➤ <b>Bail Act NSW 22C update data</b> <ul style="list-style-type: none"> <li>➤ Between April 2024 to March 2025, a 12 month period, BOCSAR identified 267 first bail appearances where the matter was within the scope of the new bail test. Of these 267 appearances: <ul style="list-style-type: none"> <li>○ 217 (81%) involved defendants who were Aboriginal.</li> <li>○ 178 (67%) involved defendants from regional NSW.</li> <li>○ 188 (70%) resulted in court bail refusal and the young person being remanded to custody. Of these 188</li> </ul> </li> </ul> </li> </ul>	<p><b>ALS NSW/ACT – December 2025</b></p> <p><b>Children (Criminal Proceedings) and Young Offenders Legislation Amendment Bill 2025 (<a href="#">link</a>)</b></p> <ul style="list-style-type: none"> <li>• Earlier this year the NSW Government announced an independent review into <i>doli incapax</i>.</li> <li>• The review found that the principle of <i>doli incapax</i> is an appropriate safeguard and recommended that the common law principle be codified in legislation.</li> <li>• The ALS made a submission (<a href="#">ALS Doli Incapax Review Submission Redacted.pdf</a>) to the review and also participated in roundtables in Sydney, Tamworth and Moree, as well as multiple 1:1 engagements with the reviewers to share the expertise of our statewide</li> </ul>

	<p>not commit a serious indictable offence while on bail. This test is previously unknown to the criminal law and has been the subject of damning judicial criticism, including questions about whether it is constitutionally valid.</p> <ul style="list-style-type: none"> <li>○ The Premier has boasted that the tougher laws are “working” because more children have ended up in prison on remand, however, there is no evidence of a reduction in crime. Recorded incidents of property crime, break and enter and vehicle theft have been stable between April 2023 and March 2025 (source: BOCSAR, Monthly Youth Snapshot NSW, March 2025 (Preliminary Data)).</li> <li>○ The experience of ALS NSW/ACT is that the laws have prevented some children from accessing therapeutic interventions that work – like community-based therapeutic support and treatment, residential alcohol and other drug programs and culturally appropriate options like the Youth Koori Court - because they are unable to get bail to access them (see <a href="#">ALS NSW Bail Laws Report Card</a>).</li> <li>○ Many children locked up under the laws do not go on to be found guilty of any offence and are not sentenced to jail time. Many children are refused bail on charges that are later withdrawn by police or dismissed (see <a href="#">ALS NSW Bail Laws Report Card</a>).</li> </ul>	<p>appearances where bail was refused:</p> <ul style="list-style-type: none"> <li>➤ 159 (85%) involved defendants who were Aboriginal.</li> <li>➤ 133 (71%) involved defendants from Regional NSW.</li> </ul> <p>➤ <b>‘Post and boast’ legislation -</b></p> <ul style="list-style-type: none"> <li>➤ There had been just over 30 charges for ALS clients in just under 12 months. Anecdotal evidence suggests many are withdrawn at court because of difficulty proving the offence – it can be challenging for the prosecution to prove the identity of the person who posted the video.</li> <li>➤ In our experience, police are also charging this offence in addition to a number of other sequences to increase the likelihood of the young person being remanded, even if the prospects of conviction are low.</li> <li>➤ In our practice, 90% of the people charged have been under 18.</li> <li>➤ <a href="#">Post and boast law a poor substitute for prevention measures: ALS lawyer - Law Society Journal</a></li> </ul> <p>➤ The ALS participated in the review’s consultation process via a written submission, regional consultation sessions in Moree and Tamworth, a roundtable session with the reviewers and other stakeholders (including Police, Health and Department of Communities and Justice) and a direct feedback session with ALS and the reviewers.</p>	<p>specialist children’s law practice and the experiences of our clients about the ineffectiveness of punishment and coercive supervision is for very young children in contact with the criminal legal system, the majority of whom are living with disability and/or complex trauma backgrounds.</p> <ul style="list-style-type: none"> <li>• We shared examples of ACCO-led community-based services and supports that actually work to address unmet need and prevent contact with the legal system.</li> <li>• The final review report was positive. It made 7 recommendations, 6 of which the ALS supports in full. ALS media release - <a href="#">link</a>.</li> <li>• The government moved quickly to pass a bill before the end of the parliamentary term.</li> <li>• Instead of directly implementing the recommendation, the government legislation weakens doli incapax by reducing the evidence that prosecutors need to successfully argue that child defendants under 14 have the capacity to be criminally responsible.</li> <li>• The ALS has particular concerns in relation to s 5(7), which appears to allow the presumption to be rebutted “without or despite other evidence of the child’s intellectual and moral development” on the basis of the facts of the alleged offence and the circumstances surrounding the alleged offence alone. Our view (media release <a href="#">link</a>) and the</li> </ul>
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	<p>➤ On 8 May, following media reporting on police “concerns” about the operation of the presumption of <i>doli incapax</i>, the NSW Government announced a review of how <i>doli incapax</i> is applied in criminal proceedings and what improvements could be made, and a framework for legislation.</p> <p><a href="https://www.nsw.gov.au/ministerial-releases/review-of-doli-incapax-for-young-offenders-under-14">https://www.nsw.gov.au/ministerial-releases/review-of-doli-incapax-for-young-offenders-under-14</a></p> <ul style="list-style-type: none"> <li>○ The announcement of the review follows a report by BOCSAR showing that the number of convictions for children aged 10-13 have declined since a High Court judgment in 2016 clarifying the standard of proof required to rebut the presumption by the prosecution. <a href="https://bocsar.nsw.gov.au/research-evaluations/2025/CJB268-Summary-court-outcomes-on-doli-incapax.html">https://bocsar.nsw.gov.au/research-evaluations/2025/CJB268-Summary-court-outcomes-on-doli-incapax.html</a></li> <li>○ We are alarmed that the NSW Government is considering options that may weaken legal safeguards for our society’s most vulnerable children that date back to the Middle Ages. It would be unprecedented in Australia and extremely disappointing if the government were to bow to media and political pressure to legislate to weaken <i>doli incapax</i>. This would take NSW out of step with every other state and fly in the face of the evidence. Weakening <i>doli incapax</i> would do nothing to reduce crime – it would make it worse by exposing more children to youth prisons and lifelong trauma.</li> </ul>	<p>➤ The reviewers indicated that the report would be finalised quickly but no definitive timeframes have been provided. It is not clear whether the report will be published. The consultation has been closed and confidential.</p> <ul style="list-style-type: none"> <li>○ The announcement of the review follows a report by BOCSAR showing that the number of convictions for children aged 10-13 have declined since a High Court judgment in 2016 clarifying the standard of proof required to rebut the presumption by the prosecution. <a href="https://bocsar.nsw.gov.au/research-evaluations/2025/CJB268-Summary-court-outcomes-on-doli-incapax.html">https://bocsar.nsw.gov.au/research-evaluations/2025/CJB268-Summary-court-outcomes-on-doli-incapax.html</a></li> </ul>	<p>view of other legal experts (eg NSW Bar Association - <a href="#">link</a>), is that this represents a significant departure from the position at common law.</p> <ul style="list-style-type: none"> <li>• One positive outcome is that the new legislation also incorporates improvements to youth diversion under the Young Offenders Act, to improve accessibility for more young people. This includes making more offences eligible for diversion, and making sure that statements made for the purposes of accessing diversion can’t be used as evidence against a child at court.</li> </ul> <p><b>Overall over-representation in custody</b></p> <ul style="list-style-type: none"> <li>• BOCSAR data (from the - <a href="#">Custody dashboard   BOCSAR</a>) shows that of young people in custody as at September 2025: <ul style="list-style-type: none"> <li>○ 153 (72.5%) were on remand</li> <li>○ 58 (27.5%) were sentenced</li> <li>○ 126 (59.7%) were Aboriginal</li> <li>○ 85 (40.3%) were non-Aboriginal</li> </ul> </li> </ul> <p><b>S 22C Bail Act (limitation on bail for certain young persons in relation to certain serious offences)</b></p> <ul style="list-style-type: none"> <li>• The Government has extended s22C to 1 October 2026. The extension included a requirement for a statutory review.</li> <li>• This legislation continues to drive high numbers of Aboriginal children on remand in youth detention. 80% of children captured by the laws in 15 months of operation were Aboriginal. Nearly 85% of children bail</li> </ul>
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	<ul style="list-style-type: none"> <li>○ The media release notes that Aboriginal-led organisations will be consulted as part of the review. The ALS is waiting for further information on how consultation will be undertaken and what the terms of reference are.</li> <li>➤ Recent data analysis on Firearms Prohibition Orders (FPOs), which allow searches without a warrant, show that in 2023-2024 there were 84 searches of children and of the 125 people under 18 subject to an FPO, 54% identified as Aboriginal. [source: The Guardian, <a href="#">NSW police’s ‘extraordinary’ search powers a ‘blank cheque’ to target Indigenous youth, lawyers say</a>, (19 May 2025)]. <ul style="list-style-type: none"> <li>○ ALS NSW/ACT says FPOs “<i>not only grant police sweeping powers, they give police a blank cheque to surveil, stop, search, arrest and charge Aboriginal children and adults</i>”.</li> <li>○ Legal Aid has said it is concerned FPOs seem to be increasingly used against young people.</li> <li>○ The Law Society has also argued that FPOs should not apply to people under 18 years old because the search powers extensively infringe children's civil liberties.</li> </ul> </li> </ul>		<p>refused and remanded under the laws have been Aboriginal.</p> <ul style="list-style-type: none"> <li>● The ALS has continued to raise concerns about the disproportionate impact of s 22C on Aboriginal children and the fact that many children bail refused under s 22C are found not guilty or sentenced to non-custodial sentences.</li> <li>● The ALS is concerned that in some cases, more serious offences are being charged by police in order to trigger the operation of s 22C and secure remand, despite low prospects of these offences being proven.</li> </ul> <p><u>December UN Working Group visit:</u></p> <ul style="list-style-type: none"> <li>● The ALS NSW ACT met with the United Nations Working Group on Arbitrary Detention in Sydney to inform them about unilateral government law and policy changes which are compromising our efforts to implement the CTG priority reforms in the justice sector and make progress towards targets 10 and 11.</li> <li>● We spoke to the Working Group about how NSW bail laws are driving the mass incarceration of Aboriginal people; the impact of the NSW Government’s changes to children’s bail laws and Doli Incapax which will increase the number of Aboriginal children in contact with the system; and the need to urgently improve conditions in NSW prisons and other places of detention. We also discussed the importance of NSW implementing the <i>UN Optional Protocol to the Convention against Torture</i>.</li> </ul>
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<p><b>ALS (ACT)</b></p>	<p><b>ALS NSW/ACT – May 2025</b></p> <ul style="list-style-type: none"> <li>➤ The Productivity Commission’s <i>2025 Report on Government Services</i> shows that, on average, 29% of people in prison in the ACT are Aboriginal or Torres Strait Islander, the highest rate of incarceration of Aboriginal and Torres Strait Islander people in the country. [sources: Productivity Commission, <i>Report on Government Services 2025</i> (30 January 2025), Part C, Section 8, Table 8A.4; ‘Inquiry Welcome but More is Needed’, <i>The Canberra Times</i>, (online, 11 May 2025) <a href="https://www.canberratimes.com.au/story/8963315/acts-board-of-inquiry-isnt-enough-to-tackle-injustice/">https://www.canberratimes.com.au/story/8963315/acts-board-of-inquiry-isnt-enough-to-tackle-injustice/</a></li> <li>➤ The ACT Government is currently seeking feedback on a Discussion Paper it has released on decision-making criteria in the <i>Bail Act 1992</i> (<a href="https://yoursayconversations.act.gov.au/bail-reform">https://yoursayconversations.act.gov.au/bail-reform</a>). The Discussion Paper does not propose or take a position on any reforms to bail in relation to children and young people but does ask for feedback on this topic. <ul style="list-style-type: none"> <li>○ The Discussion Paper asks for feedback on two broad questions in relation to bail and children and young people including, (1) whether any bail criteria and conditions should be specifically applied in matters involving children, and (2) whether there should be any reform to bail presumptions as they apply to children and young people.</li> </ul> </li> </ul>	<p><b>ALS NSW/ACT – August 2025</b></p> <ul style="list-style-type: none"> <li>➤ On 1 July 2025 the minimum age of criminal responsibility was increased from 12 to 14 years old with exceptions for certain offences (as a result of the <a href="#">Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023</a> which increased the MACR to 12 on 22 November 2023 and then further increased the MACR to 14 on 1 July 2025). <ul style="list-style-type: none"> <li>○ We oppose the remaining carve-outs for children aged 12 or 13 years old charged with certain serious offences if the child “knows that their conduct is wrong”</li> <li>○ <a href="#">ACT leads the nation by raising the age of legal responsibility - Aboriginal Legal Service (NSW/ACT) Limited</a></li> </ul> </li> </ul>	<p><b>ALS NSW/ACT – December 2025</b></p> <p>ALS released a media statement (<a href="#">ACT Policing treatment of Aboriginal boy is unacceptable and disturbing - Aboriginal Legal Service (NSW/ACT) Limited</a>) regarding an incident where ACT Policing officers pulled a 17-year-old Aboriginal boy from a bus at gunpoint, forced him to the ground, and handcuffed him before realising they had the wrong person. Family members say the boy was searched even after officers confirmed he was not the person they were pursuing.</p>
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	<ul style="list-style-type: none"><li>○ The Discussion Paper also asks for feedback on whether to enact a standalone provision, similar to section 3A in the Victorian <i>Bail Act 1977</i>, that requires bail decision-makers to consider any issues that arise due to a person’s Aboriginal and Torres Strait Islander status. This provision would also apply if the person applying for bail is a child or young person.</li><li>○ In the Discussion Paper, the ACT Government notes community concerns about a “small number of persistent repeat offenders” who are young people but also refers to Australia’s international obligation to use detention only as a last resort for young people.</li><li>○ The ALS will be making a submission that recommends the introduction of child-specific bail legislation or at least a child-specific test, the abolishment of presumptions against bail for children, and the introduction of a legislative presumption in favour of bail for children.</li><li>○ It remains to be seen what, if any, reforms the ACT Government will propose in relation to bail and children and young people after the Discussion Paper process has ended.</li></ul> <p>➤ The minimum age of criminal responsibility will increase from 12 to 14 years old on 1 July 2025 with exceptions for certain offences (as a result of the <a href="#"><i>Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023</i></a> which increased the MACR to 12 on 22</p>		
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	<p>November 2023 and will further increase the MACR to 14 on 1 July 2025).</p> <ul style="list-style-type: none"> <li>○ We note and are opposed to the fact that children aged 12 or 13 years old will still be held criminally responsible for certain offences (murder, intentionally inflicting GBH, sexual assault in the first degree and act of indecency in the first degree) if the child “knows that their conduct is wrong.”</li> </ul>		
<p><b>ALSWA (WA)</b></p>	<p><b>ALSWA – May 2025</b></p> <ul style="list-style-type: none"> <li>➤ 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 and impose criminal penalties on responsible adults in the event of a child breaching bail conditions.</li> <li>➤ Continues to lock up children in an adult men’s maximum-security prison, even after the tragic death of Cleveland Dodd in ‘Unit 18’</li> <li>➤ There have been deaths of two Aboriginal children in custody within a year.</li> </ul>	<p><b>ALSWA – August 2025</b></p> <ul style="list-style-type: none"> <li>➤ <i>New Criminal Code Amendment (Post and Boast) Bill 2025</i> introduced in Parliament on 26 June – reports from other jurisdictions with similar laws suggest children and young people most impacted.</li> <li>➤ Commitments to “fast track” all matters before the Children’s Court: “young repeat violent offender criminals have their trials held within 28 days”</li> <li>➤ Young people accused of violent offences will be subject to monitoring ‘using the latest technology’ - the 2025 Youth Crime Bail Reform Package includes \$1m towards ‘electronic curfew technology’.</li> <li>➤ <i>Bail Act 1982 (WA)</i> to be amended to allow same day reviews of Magistrates’ decisions to grant bail to young people accused of repeat violent offences. The same right will not be accorded to young people refused bail by a Magistrate. It appears that review will be by either the President or a Judge of the Children’s Court and includes a commitment to ‘a new satellite Children’s Court’ (30 km</li> </ul>	<p><b>ALSWA – December 2025</b></p> <ul style="list-style-type: none"> <li>➤ Findings of Inquest into the Death of Cleveland Keith Dodd delivered 28/11/2025 include findings that: <ul style="list-style-type: none"> <li>○ Cleveland spent 85% of his final period of detention in solitary confinement.</li> <li>○ The Department of Justice ‘inappropriately used confinement orders as a routine measure whenever a lockdown was required because of staff shortages’.</li> <li>○ Some cells, including Cleveland’s, did not have running water and were in a ‘disgusting’ state.</li> <li>○ Over the 66 available school days during his last period of detention, Cleveland had access to education for just 7 hours 4 minutes (1 hour 25 minutes of which was a teacher communicating with Cleveland through his cell door).</li> <li>○ Despite requests, Cleveland was only seen by mental health services on three occasions during 87 days of detention.</li> <li>○ Unit 18 was unfit to adequately care, treat, and supervise detainees at high risk of self-harm and suicide.</li> </ul> </li> </ul>

from Perth Children’s Court) to meet the 28-day timeframe commitment.

The Coroner made 19 recommendations including that Unit 18 be closed as a matter of urgency, that a special inquiry be established to investigate the manner in which Unit 18 came to be WA’s second youth detention centre, and that a forum be created to consider whether youth justice should remain entirely within the Department of Justice’s responsibility, noting that ‘There is a compelling argument that wholesale reform and a complete reset is necessary.’ Not even three hours after the publication of these findings and recommendations, [Ministers told the media they did not agree with these three recommendations](#), suggesting that a special inquiry would not uncover anything not already identified by the inquest, that moving youth justice out of adult corrections was not a priority, and that Unit 18 cannot be closed until a replacement facility is built ([at least 3 years away](#)).

- As at June 2025 the [rate ratio for Aboriginal young people aged 10-17 in detention in Western Australia was 25 times that of non-Indigenous young people](#).
- During the 2024-25 financial year, Aboriginal young people were arrested or apprehended by police and taken to a police station on 6,649 occasions – an increase compared to the 2023-24 financial year (6,448 occasions).
- Government [continues to employ ‘tough on crime’ rhetoric that undermines the ability of evidence-based, cultural safe, and trauma-informed diversionary programs to meet their objectives](#).

<p><b>ATSILS Q (QLD)</b></p>	<p><b>ATSILS Q – May 2025</b> <b>(2<sup>nd</sup> tranche are now law)</b></p> <ul style="list-style-type: none"> <li>• Queensland introduced new laws under the “<i>Making Queensland Safer (Adult Crime, Adult Time) Act</i>” that are incompatible with international human rights obligations, rights under the <i>Human Rights Act 2019 (Qld)</i> and the CTG by <ul style="list-style-type: none"> <li>○ 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,</li> <li>○ prohibiting courts from considering the principle when sentencing children</li> </ul> </li> <li>➤ QLD has overridden its own <i>Human Rights Act</i> in order to hold children in police watch-houses for extended periods</li> <li>➤ On 22 May 2025 introduced a second tranche that included 20 additional offences to the “Adult Crime Adult Time” laws – bringing tough consequences for a total of 33 offences. This second tranche now law and listed in the <i>Youth Justice Act 1992</i>. <a href="https://www.legislation.qld.gov.au/view/html/inforce/current/act-1992-044#sec.175A">https://www.legislation.qld.gov.au/view/html/inforce/current/act-1992-044#sec.175A</a> <ul style="list-style-type: none"> <li>○ On 19 May, UN Special Rapporteurs described the “Adult Crime Adult Time” laws as “<i>incompatible with basic child rights ...[and] ... have an especially negative impact on the lives of indigenous children, who are already disproportionately represented in the criminal legal system</i>” <a href="https://www.ohchr.org/en/media-">https://www.ohchr.org/en/media-</a></li> </ul> </li> </ul>	<p><b>ATSILS Q – August 2025</b></p> <p>No changes since last update</p> <ul style="list-style-type: none"> <li>➤ the tranche 2 reforms for the 33 listed offences to which adult penalties apply are now law</li> </ul>	<p><b>ATSILS Q – December 2025</b></p> <p>On 10 Dec 2025, the <b>Youth Justice (Electronic Monitoring) Amendment Bill 2025 (Bill)</b> was introduced into Parliament which proposes to make electronic monitoring (<b>EM</b>) for youth permanent and expand its use.</p> <p><u>Quick history of the EM Trial in Qld</u></p> <ul style="list-style-type: none"> <li>• Section 52AA was introduced into the <i>YJ Act in 2021</i> as an EM trial which had a sunset date of 2 years.</li> <li>• Section 52AA of the <i>YJ Act</i> allows a court, in certain circumstances, to impose on a grant of bail to a child who: <ul style="list-style-type: none"> <li>○ is at least 15 years old;</li> <li>○ is charged with a prescribed indictable offence; and</li> <li>○ has either been charged with an unrelated prescribed indictable offence in the preceding 12 months, or has been previously found guilty of at least one indictable offence,</li> </ul> </li> </ul> <p>a condition that the child must wear a monitoring device while released on bail.</p> <ul style="list-style-type: none"> <li>• 2022 - a review was undertaken and the review found that there was not enough data to make a conclusion regarding the overall effectiveness of EM.</li> <li>• 2023 - the <i>Strengthening Community Safety Act 2023</i> was made which extended the EM trial for a further 2 years (to expire 30 April 2025) and expanded it to include 15 year olds.</li> </ul>
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[advisories/2025/05/youth-justice-systems-across-australia-crisis-un-experts](#)

- 2023 - the Youth Justice (Monitoring Device Conditions) Amendment Regulation 2023 added 3 more trial sites.
- 2024 - the Youth Justice (Monitoring Device Conditions) Amendment Regulation 2024 added another 5 trial sites.
- 2024 - the *Queensland Community Safety Act 2024* was passed which expanded the list of prescribed indictable offence under s52AA to include specified offences involving violence or threats of violence, and expanded the criteria to include children who had been charged with a prescribed indictable offence in the preceding 12 months.
- Early 2025 - the *Youth Justice (Monitoring Devices) Amendment Act 2025* was passed which extended the EM trial period by one further year 'to allow time for a comprehensive review to be completed to inform government decisions about electronic monitoring for child offenders'.
- These provisions (representing the EM trial) are **due to expire on 30 April 2026**.
- We have opposed EM for children upon proposed introduction of the trial and each time that it has been proposed to be expanded/extended.
- Current trial sites include: Townsville, North Brisbane, Moreton, Logan, Gold Coast, Toowoomba, Mount Isa, Cairns, South Brisbane, Ipswich, Fraser Coast, Mackay, and Rockhampton.

What does the Bill propose to do?

The Bill proposes to:

			<ul style="list-style-type: none"><li>• make electronic monitoring ‘permanent’ by removing the expiry provision;</li><li>• make electronic monitoring statewide unless the court is advised the child does not live in a location with services to support the condition;</li><li>• <u>remove the current eligibility criteria that the child must be at least 15 years of age, charged with a prescribed indictable offence and previously charged with certain offences;</u> and <b>(This is concerning – we were expecting that if EM was to be made permanent, at least some of the parameters would still apply).</b></li><li>• There are some ‘safeguards’:<ul style="list-style-type: none"><li>○ the Bill proposes to introduce new ss52AA(1) which provides that a court may, under s52A(2), impose on a grant of bail to a child a condition that the child must wear a monitoring device while released on bail (a monitoring device condition) if the court is satisfied, in addition to being satisfied of the matters mentioned in that section, that imposing the monitoring device is appropriate having regard to a <u>‘suitability assessment report’ given to the court under subsection (4);</u> and ‘any other matter the court considers relevant’ (note that the Bill will replicate the existing legislative Note that exists in the YJ Act under the reference to ‘any other matter the court considers relevant’ in s52AA(1)(f)(iv) which states: <i>Note-</i></li></ul></li></ul>
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			<p><i>See the Human Rights Act 2019, sections 19, 22 and 25 to 28.</i></p> <ul style="list-style-type: none"><li>○ The court must still apply subsection 52A(2) of the YJ Act before imposing EM as a condition of bail (e.g., that the condition must be necessary to mitigate an unacceptable risk, that the conditions must not involve undue management and supervision of the child, etc.).</li><li>○ Proposed new section 52AA(1A) provides that a court may only impose on a grant of bail to a child a monitoring device condition if the chief executive advises the court that all of the following services are available in the area in which the child lives:<ul style="list-style-type: none"><li>▪ Services necessary to support the effective operation of a monitoring device;</li><li>▪ Services suitable to support the child’s compliance with the condition;</li><li>▪ Services suitable to support the monitoring of the child.</li></ul></li></ul> <p>The Explanatory Notes for the Bill state (at P1) that: <i>“An independent evaluation of the electronic monitoring trial has now been completed and has made findings in relation to the trial. It found that electronic monitoring conditions were associated with high bail completion (not having bail revoked), reduced reoffending, lower</i></p>
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			<p><i>victimisation (less offences involving victims whilst on bail) and reduced time in custody.</i></p> <p><i>These findings demonstrate the effectiveness of electronic monitoring as a condition of youth bail. Therefore, it is intended to make electronic monitoring as a condition of youth bail permanent and statewide, unless the Chief Executive advises that suitable and necessary services are not available. It is also intended to open up the application of electronic monitoring by removing the age limit, and the current eligibility requirements that the child must be charged with certain offences.</i></p>
<p><b>NAAJA (NT)</b></p>	<p><b>NAAJA – May 2025</b></p> <ul style="list-style-type: none"> <li>➤ The NT Government held an emergency parliamentary sitting in mid-May 2025 to: <ul style="list-style-type: none"> <li>○ Further expand the presumption against bail for young people</li> <li>○ Remove the legislated principle of 'detention as a last resort' from the Youth Justice Act 2005.</li> <li>○ This has resulted in a spike in youth detention numbers</li> </ul> </li> <li>➤ Substantial Territory funding directed to police and corrections, with little equivalent investment in prevention, diversion, or community-led services.</li> <li>➤ Declan's law also increased the use of electronic monitoring devices and gave police new wandering powers to scan people for knives in public, including schools.</li> </ul>	<p><b>NAAJA – August 2025</b></p> <p>The approach of the NT Government to Aboriginal affairs continues, characterised by 'tough of crime' legislation, directed largely at juveniles.</p> <p>Since October 2024, the NTG suite of punitive justice reforms now includes the following:</p> <ul style="list-style-type: none"> <li>➤ Sentencing Amendment Bill 2024</li> <li>➤ Criminal Code Amendment Bill 2024</li> <li>➤ Bail Legislation Amendment Bill 2024</li> <li>➤ Police Administration Amendment Bill 2024</li> <li>➤ Correctional Services Legislation Amendment Bill 2025</li> <li>➤ Police Administration Legislation Amendment Bill 2025</li> <li>➤ Attorney-General Legislation Amendment Bill 2025</li> <li>➤ Domestic and Family Violence and Victims Legislation Amendment Bill 2025</li> </ul>	<p><b>NAAJA - December 2025</b></p> <p>There have been no legislative reforms to youth justice since amendments to the <i>Youth Justice Act 2005</i> in July.</p> <p>However, we continue to see the impacts of the <i>Bail and Youth Justice Legislation Amendment Act 2025</i> and the <i>Youth Justice Act 2005</i>. The daily average youth detention numbers are now sitting around 60, which is double last year. Approx. 73% of those in youth detention are on remand and 98% are Aboriginal.</p> <p>Note: on 23 December 2025, NAAJA announced it had filed a challenge the NT bail laws in the High Court. <a href="https://www.naaaja.org.au/naaja-to-challenge-nt-bail-laws-in-the-high-court-on-the-basis-that-they-are-unlawful-and-unconstitutional/">https://www.naaaja.org.au/naaja-to-challenge-nt-bail-laws-in-the-high-court-on-the-basis-that-they-are-unlawful-and-unconstitutional/</a></p>

		<ul style="list-style-type: none"><li>➤ Bail and Youth Justice Legislation Amendment Bill 2025</li><li>➤ Currently (July 2025) rewriting the <i>Youth Justice Act 2005</i> including amending the <i>Youth Justice Regulations 2006</i></li></ul> <p>Chief among the effects of these legislative amendments are the lowering of the age of criminality from 12 to 10, introducing mandatory jail sentences for assaults upon first responders and some family violence assaults and made bail very difficult to secure, spiking remand numbers of both adults and juveniles.</p> <p>The NTG has most recently (late July) amended the <i>Youth Justice Act 2005</i>, reintroducing spit hoods for use upon juveniles, removing the principle of 'imprisonment as a last resort' and significantly expanding:</p> <ul style="list-style-type: none"><li>➤ The discretion of the Youth Detention CEO;</li><li>➤ Vesting the powers of a Youth Detention Superintendent upon NT Police and Corrections Officers (and providing police powers of arrest to Corrections Officers) who are deputised to assist where there is 'risk of emergency';</li><li>➤ Powers of dog handlers used inside or outside the wire.</li></ul> <p>Courts, prisons, watch houses and sector more broadly, cannot keep up with the upward trajectory of the Aboriginal jail rate.</p> <p>In June, three Aboriginal men died in custody</p>	
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<p><b>TALS (TAS)</b></p>	<p><b>TALS – May 2025</b></p> <ul style="list-style-type: none"> <li>➤ In 2022, the Tasmanian Government released the Youth Justice Blueprint 2022–2032, committing to raise the minimum age of criminal responsibility (MACR) from 10 to 14 years, and the minimum age of detention to 16 by 2029. However, no legislation has been introduced, and implementation timelines remain vague.</li> <li>➤ The Government also pledged to close Ashley Youth Detention Centre (AYDC) after widespread abuse was confirmed by the Commission of Inquiry. Despite this, closure has been delayed multiple times, now pushed back to 2028, with no public transition plan and continued operation of AYDC raising significant concern.</li> <li>➤ In April 2025, Premier Rockliff endorsed “adult time for adult crime” rhetoric, looking to QLD as the guiding state whilst undermining the diversionary intent of the Blueprint and coinciding with ongoing consultations on the Tasmanian Aboriginal Youth Justice Strategy.</li> <li>➤ As of January 2025, only 46 of 191 Commission of Inquiry recommendations have been completed; it is unclear how many relate directly to youth justice.</li> <li>➤ TALS does not support punitive approaches and warns these measures increase recidivism and contradict early intervention principles. There is still no legislative protection for the cultural rights of Aboriginal children, and no requirement for involvement of Aboriginal community-controlled organisations.</li> </ul>	<p><b>TALS – August 2025</b></p> <ul style="list-style-type: none"> <li>➤ Following The Government’s pledge to close Ashley Youth Detention Centre (AYDC), they released the <i>New Youth Justice Facility Masterplan</i> - <a href="https://www.decyp.tas.gov.au/safe-children/youth-justice-services/youth-justice-reform-in-tasmania/tasmanian-youth-justice-facility/">https://www.decyp.tas.gov.au/safe-children/youth-justice-services/youth-justice-reform-in-tasmania/tasmanian-youth-justice-facility/</a> and invited consultation and feedback, which is available here - <a href="https://www.decyp.tas.gov.au/2025/08/youth-justice-facility-masterplan-community-feedback-summary-available/">https://www.decyp.tas.gov.au/2025/08/youth-justice-facility-masterplan-community-feedback-summary-available/</a>. TALS is engaged in this process.</li> <li>➤ Closure of Ashley Youth Detention Centre (AYDC) continues to face delays, with the projected closure now extended to 2028. A major development in June 2025 saw the Legislative Council reject a Government Bill (8–6 vote) attempting to fast-track the Youth Justice Facility Development Bill and remove public appeal rights from the planning process. The Bill’s defeat means the proposal must now progress through standard planning pathways, likely causing further delays. The Legislative Council debate reflected community resistance to both the closure and redevelopment plans, alongside broader concerns around transparency and reduced public oversight.</li> <li>➤ The Committee on the Rights of the Child (United Nations) invited submissions on <i>the draft of general comment No. 27 on children’s right to access to justice and to an effective</i></li> </ul>	<p><b>TALS – December 2025</b></p> <p>No significant updates in this period – mainly consultations on existing issues/work.</p>
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	<ul style="list-style-type: none"> <li>➤ TALS continues to advocate for legislative reform to raise the MACR, immediate closure of AYDC, investment in culturally safe alternatives to detention, and full implementation of the Aboriginal Youth Justice Strategy.</li> <li>➤ The Bail Bill 2024, circulated for comment earlier this year, includes some protections for Aboriginal children, though the current status of these provisions is unclear and requires further attention.</li> <li>➤ • While legislation elsewhere (not in the Bail Bill) allows for Aboriginal elders to be involved in diversion processes, TALS highlights that there are still hardly any meaningful cultural protections legislated to ensure this involvement is effective and supported.</li> </ul>	<p><i>remedy</i> - <a href="https://www.ohchr.org/en/calls-for-input/2025/call-submissions-draft-general-comment-no-27-childrens-right-access-justice">https://www.ohchr.org/en/calls-for-input/2025/call-submissions-draft-general-comment-no-27-childrens-right-access-justice</a>.</p> <p>The Tasmanian Aboriginal Legal Service (TALS) provided a submission which was accepted and will be published by the Committee. The submission can be found here - <a href="https://tals.net.au/uploads/general/Committee-on-the-Rights-of-the-Child-General-Comment-no.27-TALS-RESPONSE.pdf">https://tals.net.au/uploads/general/Committee-on-the-Rights-of-the-Child-General-Comment-no.27-TALS-RESPONSE.pdf</a></p> <ul style="list-style-type: none"> <li>➤ Whilst campaigning prior to the recent (July 2025) Tasmanian State Election, incumbent Premier Jeremy Rockliff made a commitment to engage with <b>all</b> Aboriginal communities with regards to Aboriginal affairs and the government’s ongoing youth justice strategy.</li> <li>➤ The Tasmanian Government’s <i>Youth Justice Blueprint 2022–2032</i> maintains its commitment to raising the minimum age of criminal responsibility (MACR) from 10 to 14 years, and the minimum age of detention to 16 by 2029. However, no enabling legislation has been introduced to date, and timelines for implementation remain unclear.</li> <li>➤ In June 2025, the Tasmanian Custodial Inspector’s Office released a report highlighting serious systemic failures in youth justice, particularly the ongoing use of adult prisons and watch-houses to detain children. This practice exposes vulnerable young people, especially Aboriginal children, to high risks, including sexual abuse, violence, inappropriate gendered searches, and lack of cultural support. Despite previous reform commitments, these harmful practices persist. TALS continues to call for culturally</li> </ul>	
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		<p>safe, age-appropriate alternatives that uphold Child and Youth Safe Standards and protect children’s rights and wellbeing.</p> <ul style="list-style-type: none"> <li>➤ TALS is also monitoring the progression of <i>Reid’s Law</i>, introduced in March 2025, which expands police powers to conduct ‘wandering’ and weapon searches in public spaces such as transport hubs, shopping centres, and government facilities. While framed as a measure to reduce knife crime, TALS is concerned about the potential for disproportionate policing of young people, particularly Aboriginal youth, in and around schools and community spaces. These measures risk exacerbating criminalisation rather than supporting early intervention. TALS continues to advocate for evidence-based, community-led initiatives that focus on safety, education, and addressing root causes of youth violence.</li> </ul>	
<p><b>VALS (VIC)</b></p>	<p><b>VALS - May 2025</b></p> <ul style="list-style-type: none"> <li>➤ In March 2024, the Allan Labor government rushed through dangerous and discriminatory bail laws that will put more people – especially Aboriginal women and children – in prison on remand.</li> <li>➤ Instead of learning from past policy failures or listening to well informed evidence from ACCOs and the legal sector, the Allan government has introduced knee jerk legislation has done nothing but appease the tabloid media fear campaign – ignoring the need to prioritise real solutions that address underlying causes offending behaviour and</li> </ul>	<p><b>VALS - August 2025</b></p> <p><i>Bail Further Amendment Bill 2025</i> – introduces a “compelling reason test to a decision whether to grant bail to a person accused of committing an indictable offence while on bail for an indictable offence”</p> <p>Inserts a “high degree of probability” threshold as part of existing burden of satisfying the bail decision-maker that a risk is an unacceptable risk.</p> <p>EM states “the likelihood that the accused would not commit a further specified serious offence is</p>	<p><b>VALS - December 2025</b></p> <ul style="list-style-type: none"> <li>➤ The second tranche of bail amendments commenced in September 2025. This includes the “high degree of probability test” for six offences, which is almost impossible to satisfy and is tantamount to automatic detention. We are seeing significant impacts on numbers of Aboriginal people on remand, and with prisons over-crowded, people are being forced to spend weeks on remand at police stations. We are also seeing people complete their entire sentence in police stations.</li> </ul>

	<p>investing in self-determined community based supports including dedicated youth programs, intensive bail supports, housing, family violence, AOD, mental health, etc.</p> <ul style="list-style-type: none"> <li>➤ They have brought back bail laws which were called a “complete and unmitigated disaster” after they led to the tragic death of Veronica Nelson, a proud Gunditjmara, Dja Dja Wurrung, Wiradjuri and Yorta Yorta woman who passed away in custody after being refused bail.</li> <li>➤ The bail law amendments included: <ul style="list-style-type: none"> <li>○ Raising community safety to an overarching principle</li> <li>○ Removing the principle of remand as a last resort for children</li> <li>○ Reintroduction of bail offences including (note – do not apply to young people) <ul style="list-style-type: none"> <li>➤ Commit indictable offence while on bail</li> <li>➤ Breach of bail conditions offence</li> <li>➤ Breach of bail conditions offence exception to prohibition on refusing bail</li> <li>➤ NOTE: These breach of bail offences <u>DO NOT APPLY</u> to young people</li> </ul> </li> <li>○ Expansion of Schedule 1 and 2 offences</li> </ul> </li> <li>➤ VALS launched the <a href="#">Bail Saves Lives</a> open letter which now has over 100 signatories from across the ACCO, AJC, Community organisations and legal sector representatives.</li> <li>➤ We are expecting the second tranche of these reforms to be debated in Parliament mid-year, VALS have prepared a Statement of Advice containing 20 legislative and programmatic recommendations.</li> </ul>	<p>less than high, the accused person will pose an unacceptable risk and must be refused bail”</p> <p>The high degree of probability test is targeted at individuals accused of “repeat high-harm offending on bail” by reference to itemised offences including armed robbery, aggravated burglary, home invasion, aggravated home invasion, carjacking and aggravated carjacking.</p> <p>Providers for a review of certain Bail Act amendments – including to examine the impact on Aboriginal and Torres Strait Islander people of previous and current proposed amendments</p>	<ul style="list-style-type: none"> <li>➤ Various Parts of the <i>Youth Justice Act 2024</i> commenced in November 2025, including a raised minimum age of criminal responsibility to 12. While VALS welcomes the increase to MACR, it does not go far enough. At the time of the development of the Act and in the parliamentary process VALS staunchly advocated for a legislated staged commitment to raise the age 14 by a certain date. The govt rather established an Expert Reference Group to scope an Alternative Response Model to support yp aged 12 – 14 before they would commit to raising the age to 14. Earlier this year the govt formally disbanded this commitment and will not be RTA further.</li> <li>➤ Government is reopening the Malmsbury Youth Justice Centre two years after shutting the facility down, as more prison beds are needed for children remanded due to regressive reforms. There was no prior warning or consultation with the legal or community sector about this decision. This is a deeply disappointing decision – pouring money into a facility that has been found dangerous and not fit for purpose for children and young people isn’t going to heal them. VALS has been calling for Malmsbury to be decolonised and instead be a place of healing on Country for young people to have their needs met in a holistic and trauma-informed model.</li> </ul> <p><b>Recently passed legislation</b></p>
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	<p>There has been a \$727 million dollar funding boost into Corrections, as part of a \$1.6 billion dollars of funding to support the new bail laws.</p>		<p>In the last few sitting weeks of Parliament, the government introduced and passed the Justice Legislation Amendment (Community Safety) Act 2025, the Justice Legislation Amendment (Police and Other Matters) Act 2025, and the Crimes Amendment (Retail, Fast Food, Hospitality and Transport Worker Harm) Act 2025.</p> <p>➤ <i>Justice Legislation Amendment (Community Safety) Act 2025</i>: The ‘adult time for violent crime’ laws were rushed through as an ‘emergency bill’ with some clauses commencing immediately and some will commence in February 2026. The Act, which is incompatible with Victoria’s Human Rights Charter, will see children face adult life sentences of imprisonment in adult courts. Six offences are elevated from the Children’s Court to the County Court, including home invasion and carjacking, and two further offences (aggravated burglary and armed robbery) are elevated if the conduct is ‘serious and repeated’. The reforms also increase the maximum sentences for aggravated home invasion and aggravated carjacking from 25 years to life imprisonment. VALS condemns these reforms and has released a <a href="#">Statement of Advice</a>. VALS alongside dozens of community and legal organisations signed an <a href="#">open letter to the Premier</a>. In partnership with the Federation of CLCs, Human Rights Law Centre, and YouthLaw, we undertook inside-track advocacy with govt. We also met with the crossbench to advocate for the amendments needed. X-bench was helpful in getting things</p>
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			<p>on record and also posing questions to Ministers.</p> <ul style="list-style-type: none"><li>○ Clauses in effect immediately:<ul style="list-style-type: none"><li>▪ New knife offence</li><li>▪ Amendments to penalties for each offence</li><li>▪ Carjacking charge amendment that means where a child is in the car when it is carjacked there are harsher penalties</li></ul></li><li>○ Clauses that take effect on 27 Feb 2026:<ul style="list-style-type: none"><li>▪ Removing sentencing principals of imprisonment as a last resort and for the least time necessary, and that positive engagement and rehabilitation are the most effective ways to reduce reoffending</li><li>▪ Changes to matters that are taken into account when sentencing a young person</li><li>▪ Matters that are uplifted to the County Court from the Children's Court (CSI intentionally in circs of gross violence, RCSI in circs of gross violence, home invasion, agg home invasion, agg carjacking)</li></ul></li><li>○ Govt has said these laws will be backed by 'early intervention programs' and has announced (without any consultation) the est of</li></ul>
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a Violence Reduction Unit (VRU) based on the Scottish model. The VRU undertakes 'early intervention' and provides young people with lived experience mentors. Whilst this approach worked well in Scotland, there has been zero consultation about whether this is appropriate in the Victorian context.

Some other legislative reforms to note are the *Justice Legislation Amendment (Police and Other Matters) Act 2025* and *Crimes Amendment (Retail, Fast Food, Hospitality and Transport Worker Harm) Act 2025*.

- We are particularly concerned with how the convergence of these reforms alongside the media rhetoric, will compound criminalisation of particular cohorts of young people.
- Particularly so the expansion of search powers, expansion of PSO jurisdiction and powers, and the long-term designation of areas.

➤ *Justice Legislation Amendment (Police and Other Matters) Act 2025*: The Act expands police search powers, and PSO powers to the level of a police constable, in the name of community safety.

- The expansion of PSO powers was done with no consultation and is certainly not the answer to creating a safer environment. PSOs have been criticised for years for being

			<p>undertrained and repeatedly overstepping their powers. PSOs undertake only 12 weeks of training, this is a tenth of what police officers receive. This is going to make our communities more dangerous, with a higher risk of over-reactions and unnecessary escalations leading to serious injury and deaths.</p> <p>Government has announced the PSOs will be present at shopping centres over the summer period in an attempt to address retail crime and violence.</p> <ul style="list-style-type: none"><li>○ The Act also expands police powers in relation to protests, where they can compel removal of face coverings, and introduces a new offence for use of lock on devices at protests; and police powers in relation to searches, where they can now search a child or person with cognitive impairment in a designated area without requiring the presence of an independent person.</li><li>○ Accompanying the expansion of powers, Victoria Police have declared the Melbourne CBD a 'designated area' for the next 6 months. This allows police and PSOs to stop and search anyone for no reason, or be ordered to leave the area if they refuse to remove a face covering. This coincides with <u>new data from the Centre Against Racial Profiling</u> which</li></ul>
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			<p>shows that Victoria Police disproportionately search and use force against Aboriginal, African, Middle Eastern and Pacific Islander communities.</p> <p><i>Crimes Amendment (Retail, Fast Food, Hospitality and Transport Worker Harm) Act 2025</i>: introduces new offences for assault, threats or offensive language towards retail workers, and a 'ram raid' offence captured under aggravated burglary. These new offences are unnecessary as the conduct is already adequately captured under existing offences; new offences will only perpetuate and entrench cycles of criminalisation. Worker harm incidents are related to the cost-of-living crisis, mental health, disability and homelessness, which the Act does not address, and offences likely to impact Aboriginal people due to racism and racial profiling.</p>
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## APPENDIX B

### THE EXTERNAL AFFAIRS POWER AS A CONSTITUTIONAL BASIS FOR COMMONWEALTH INTERVENTION IN NATIONAL CHILD RIGHTS REFORM

#### ADVICE

##### INTRODUCTION

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1. We have been asked to advise on the following questions:
  - (a) whether s 51(xxix) of the Constitution (also known as the **external affairs power**), in conjunction with art 40(3)(a) of the *Convention on the Rights of the Child (CRC)*<sup>1</sup> is likely to provide the Commonwealth Government with legislative power to prescribe a minimum age of criminal responsibility for offences against state and territory criminal laws (**Question 1(a)**);
  - (b) whether s 51(xxix) of the Constitution, in conjunction with various articles of the CRC, is likely to provide the Commonwealth Government with legislative power to set minimum standards for the treatment of children and young people in state and territory criminal legal systems, including for example:
    - i. that arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time (in reliance on art 37(b));
    - ii. that no child shall be held in a correctional facility designed for or used by adults, for any period of time (in reliance on art 37(c));
    - iii. that any detention amounting to solitary confinement be absolutely prohibited for children, for any period of time (in reliance on art 37(a), along with other international law materials); and
    - iv. that every child accused of a criminal offence and/or deprived of their liberty have prompt access to legal assistance and representation (in reliance on art 37(d) and art 40(2)(b)(ii)) (**Question 1(b)(i)-(iv)**).
2. Our advice is sought in the context of international and domestic pressure to strengthen child rights in Australia, specifically in relation to the operation and application of different State and Territory laws. The Committee on the Rights of the Child (**Committee**) has recommended Australia:

“[e]nact comprehensive national child rights legislation fully incorporating the Convention and providing clear guidelines for its consistent and direct application throughout the states and territories of the State party”.<sup>2</sup>

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<sup>1</sup> 1577 UNTS 3 (adopted 20 Nov 1989, entered into force 2 Sept 1990).

<sup>2</sup> Committee on the Rights of the Child, “Concluding observations on the combined fifth and sixth periodic reports of Australia”, CRC/C/AUS/CO/5-6 (1 November 2019), [7(a)] (**2019 Concluding Observations**).

3. In 2024, the Australian Human Rights Commission (**AHRC**) recommended that the Australian Government incorporate the CRC into Australian law through a National Children’s Act as well as a federal Human Rights Act.<sup>3</sup> The question of whether s 51(xxix) of the Constitution would support legislation incorporating international obligations with respect to child rights was raised in the interim report of the Senate Legal and Constitutional Affairs References Committee on Australia’s youth justice and incarceration system in February 2025 (**Interim Report**).<sup>4</sup> We also note the Parliamentary Joint Committee on Human Rights has also recently considered s 51(xxix) in its Inquiry into Australia’s Human Rights Framework (in the context of economic, social and cultural rights).<sup>5</sup>
4. In summary, our advice on the questions is as follows:
  - (a) **Question 1(a):** Section 51(xxix) of the Constitution provides the Commonwealth Government with legislative power to prescribe a minimum age of criminal responsibility for offences against state and territory law to the extent such a law is appropriate and adapted to give effect to Australia’s obligations described in art 40(3)(a) of the CRC and the Committee’s recommendations. Prescription of a minimum age of 14 years would, in our view, be appropriate and adapted to art 40(3)(a) of the CRC, read with the Committee’s recommendations.
  - (b) **Question 1(b)(i), (iii), and (iv):** Section 51(xxix) of the Constitution provides the Commonwealth Government with legislative power to set minimum standards for the treatment of children and young people in state and territory criminal legal systems:
    - i. that arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time;
    - ii. that any detention amounting to solitary confinement be absolutely prohibited for children, for any period of time;
    - iii. that every child accused of a criminal offence and/or deprived of their liberty have prompt access to legal assistance and representation.
  - (c) **Question 1(b)(ii):** Were Australia to withdraw its reservation to art 37(c) of the CRC, then art 37(c) of the CRC could be relied on to enact federal legislation providing that “no child shall be held in a correctional facility designed for or used by adults, for any period of time, unless holding the child in such a facility is considered to be in the best interests of the child”. Consideration should be given to reliance on art 10 and art 24 of the *International Covenant on Civil and*

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<sup>3</sup> Australian Human Rights Commission, “‘Help way earlier!’ How Australia can transform child justice to improve safety and wellbeing” (2024), pp 29-31 and Recommendation 4.

<sup>4</sup> Interim Report at [4.98]; [5.25]-[5.27]; [5.54]; and Additional Comments by Senator Lidia Thorpe at [1.29].

<sup>5</sup> The Parliamentary Joint Committee on Human Rights, *Inquiry into Australia’s Human Rights Framework* (May 2024), [6.46]-[6.59]. See also discussion of the Law Council of Australia’s submissions at [6.115].

*Political Rights (ICCPR)*<sup>6</sup> as a basis for federal legislation supported by s 51(xxix) if the Commonwealth Government declines to withdraw its reservation to art 37(c) of the CRC.

## **RELEVANT INTERNATIONAL LAW AND ITS STATUS UNDER AUSTRALIAN LAW**

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### **International Conventions**

5. Under art 26 of the *Vienna Convention on the Law of Treaties (VCLT)*,<sup>7</sup> a treaty in force is binding upon parties (for the purpose of international law) to it and must be performed by them in good faith.

### **Convention on the Rights of the Child**

6. The CRC entered into force on 2 September 1990 and has 196 States Parties.<sup>8</sup>
7. Article 3(1) of the CRC provides:

“[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.
8. Article 4 requires all States Parties to:

“undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention”. A more flexible standard adopted with respect to economic, social and cultural rights, which States Parties are to undertake “to the maximum extent of their available resources”.
9. Article 37 addresses the deprivation of liberty, and is set out in full below:

“States Parties shall ensure that:

  - (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
  - (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
  - (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner

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<sup>6</sup> 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976). See “[International Covenant on Civil and Political Rights](#)” (accessed 4 June 2025).

<sup>7</sup> (1969) 1155 UNTS 331 (concluded 23 May 1969, entered into force 27 January 1980).

<sup>8</sup> UNTC, “[Convention on the Rights of the Child](#)”.

which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

- (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.”

10. Article 40 addresses the rights of a child accused of a crime. Article 40(1) provides:

“States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.”

11. Article 40(2) then sets out a series of rights which States Parties are bound to ensure “to this end”. These relevantly include that “every child alleged as or accused of having infringed the penal law” is guaranteed, amongst other rights:

- (a) “To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence” (art 40(2)(b)(ii)); and
- (b) “To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance ...” (art 40(2)(b)(iii)).

12. Article 40(3)(a) expressly addresses the minimum age of criminal capacity. It states:

“States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

- (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law”.

13. Article 41 provides that “[n]othing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child” contained in either the law of a State Party or international law in force for that State. This provision confirms that CRC rights are complemented by those available under

other international instruments to which a State is party.<sup>9</sup>

14. When Australia ratified the CRC it made one reservation, with respect to art 37:<sup>10</sup>

“Australia accepts the general principles of article 37. In relation to the second sentence of paragraph (c), the obligation to separate children from adults in prison is accepted only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia. Australia, therefore, ratifies the Convention to the extent that it is unable to comply with the obligation imposed by article 37 (c).”

15. In addition, we note the following provisions of international conventions to which Australia is a party:

- (a) Article 9(1) of the ICCPR provides for the right to liberty and security of person and prohibits arbitrary arrest or detention. Article 24(1) of the ICCPR provides that “[e]very child shall have ... the right to such measures of protection as are required by his status as a minor...”.
- (b) Article 10(1) of the *International Covenant on Economic, Social and Cultural Rights*<sup>11</sup> states that States Parties recognise the “widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children”. Article 10(3) provides that “[s]pecial measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions”.
- (c) Article 11 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture)*<sup>12</sup> provides that “[e]ach State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture”.
- (d) Article 7(1) of the *Convention on the Rights of Persons with Disabilities*<sup>13</sup> provides that “States Parties shall take all necessary measures to ensure the full

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<sup>9</sup> See CRC, art 41; see also, with respect to art 40 CRC, John Tobin with Cate Read, ‘Article 40. The Rights of the Child in the Juvenile Justice System’ in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (OUP 2019) at 1617.

<sup>10</sup> UNTC, “[Convention on the Rights of the Child](#)”.

<sup>11</sup> 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976).

<sup>12</sup> 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987).

<sup>13</sup> 2515 UNTS 3 (opened for signature 13 December 2006, entered into force 3 May 2008).

enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children. In addition:

- i. Article 7(2) provides that “[i]n all actions concerning children with disabilities, the best interests of the child shall be a primary consideration”;
  - ii. Article 14(1) provides that “States Parties shall ensure that persons with disabilities, on an equal basis with others, (a) [e]njoy the right to liberty and security of person; (b) [a]re not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty”;
  - iii. Article 14(2) provides that “States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation”;
  - iv. Article 23(4) provides that “States Parties shall ensure that a child is not separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child”, and that “[i]n no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents”.
- (e) Article 5(b) of the *International Convention on the Elimination of All Forms of Racial Discrimination*<sup>14</sup> guarantees the right to “security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution”.
16. Non-binding international standards also address the incarceration of children. In particular, we note the following:
- (a) The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”)<sup>15</sup> provide in rule 4.1 that “[i]n those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.” The commentary to rule 4.1 notes: “The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal

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<sup>14</sup> 660 UNTS 195 (opened for signature 21 December 1965, entered into force 4 January 1969).

<sup>15</sup> Adopted by General Assembly resolution 40/33 of 29 November 1985.

responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behaviour. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority, etc.). Efforts should therefore be made to agree on a reasonable lowest age limit that is applicable internationally.” In addition, rule 13.1 provides that “[d]etention pending trial shall be used only as a measure of last resort and for the shortest possible period of time”. Rule 27.1 provides that the Standard Minimum Rules for the Treatment of Prisoners and related recommendations shall be applicable as far as relevant to the treatment of juvenile offender in institutions, including those in detention pending adjudication.

- (b) The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (**United Nations Rules**)<sup>16</sup> provide in rule 2 that “[d]eprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases”. In addition, rule 28 provides that “[t]he detention of juveniles should only take place under conditions that take full account of their particular needs, status and special requirements according to their age, personality, sex and type of offence, as well as mental and physical health, and which ensure their protection from harmful influences and risk situations.” Rule 11(a) provides that “[t]he age limit below which it should not be permitted to deprive a child of his or her liberty should be determined by law”. Limitations on physical restraint and the use of force are set out in rules 63-65. Rule 67 provides that “[a]ll disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned”.
- (c) The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)<sup>17</sup> provide in preliminary observation 4(2) that “[t]he category of young prisoners should include at least all young persons who come within the jurisdiction of juvenile courts. As a rule, such young persons should not be sentenced to imprisonment”. Rule 43 prohibits, amongst other practices, indefinite or prolonged solitary confinement. Solitary confinement is defined in rule 44 as confinement of prisoners for 22 hours or more a day without meaningful human contact, while prolonged solitary confinement is such confinement for more than 15 days.

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<sup>16</sup> Adopted by General Assembly resolution 45/113 of 14 December 1990.

<sup>17</sup> Adopted by General Assembly resolution 70/175 of 17 December 2015, [5].

17. Australia’s 2021 Universal Periodic Review included recommendations from 29 countries to raise the age of criminal responsibility (see **Annexure A**).<sup>18</sup>

### **Status of international conventions and standards in Australian law**

18. International law does not have any legal effect in Australian law unless and until it is enacted in legislation.<sup>19</sup>
19. Australian Courts have consistently said a court is bound to apply Australian statute law “even if that law should violate a rule of international law”.<sup>20</sup>

### **How international law may be incorporated into Australian law to operate nationally**

20. Section 51 of the Constitution does not confer an express power to make laws for the protection and promotion of human rights laws. In the absence of clear power, the external affairs power has been used to enact wide-ranging human rights laws in furtherance of Australia’s international obligations.
21. Section 51(xxix) of the Constitution provides:
- “The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: [...]
- (xxix) external affairs”.
22. The Commonwealth Government is empowered under s 51(xxix) to enact a national law in order to implement a treaty obligation binding upon Australia, even if it may have the effect of rendering a State law invalid.<sup>21</sup> The position with the Northern Territory and the Australian Capital Territory are slightly different given the effect of s 122 of the Constitution.<sup>22</sup>

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<sup>18</sup> UN General Assembly, Human Rights Council, 47<sup>th</sup> Sess., Universal Periodic Review, “Report of the Working Group on the Universal Periodic Review: Australia”, A/HRC/47/8, 24 March 2021, [146].

<sup>19</sup> *Dietrich v The Queen* (1992) 177 CLR 292 at 305 (Mason CJ and McHugh J), 359–360 (Toohey J); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286–287 (Mason CJ and Deane J), and *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 480–481 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

<sup>20</sup> *Polites v The Commonwealth* (1945) 70 CLR 60 at 69 (Latham CJ), 74 (Rich J), 75 (Starke J), 78 (Dixon J), 79 (McTiernan J), 81 (Williams J); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 204 (Gibbs J) and *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 384 (Gummow and Hayne JJ).

<sup>21</sup> *Commonwealth v Australia* (1983) 158 CLR 1 at 122, 125–126 (Mason J); 171–172 (Murphy J); 218–219 (Brennan J); and 258–259 (Deane J) (*Tasmanian Dams Case*). Such a treaty obligation must be entered into bona fide: *Tasmanian Dams Case* at 219 (Brennan J); 259 (Deane J). See further paragraphs 35 – 38 below.

<sup>22</sup> Section 122 of the Constitution provides that “[t]he Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.”

23. However, the Commonwealth's power to enact laws that have such an effect must be carefully considered. To be characterised as a law with respect to "external affairs", a law must be "reasonably capable of being considered appropriate and adapted to implementing the treaty".<sup>23</sup>
24. The external affairs power therefore has a purposive aspect, in that the purpose of the law (in the sense of the "object for the advancement or attainment of which a law was enacted") is a "test" for determining whether the law is reasonably capable of being considered as giving effect to the relevant treaty.<sup>24</sup>
25. There must be a reasonable proportionality between the purpose or object of a law and the means by which the law achieves that purpose – the law "must be seen, with 'reasonable clearness', upon consideration of its operation, to be 'really, and not fancifully, colourably, or ostensibly, referable' to and explicable by the purpose or object which is said to provide its character".<sup>25</sup>
26. It is permissible to implement treaty obligations in part, so long as the deficiency "is not so substantial as to deny the law the character of a measure implementing the Convention", or renders the law, read as a whole, substantially inconsistent with the treaty.<sup>26</sup>
27. The High Court has recognised that some treaties may not enliven the legislative power in s 51(xxix): *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 486 (***Industrial Relations Act Case***). There, the majority stated (footnotes omitted):

"For example, Professor Zines has suggested that a treaty expressed in terms of aspiration (for example, 'to promote full employment') cannot support a law which adopts one of a variety of possibly contradictory ways that might be selected to fulfil the aspiration. He writes:

'Accepting ... that the agreement by nations to take common action in pursuit of a common objective amounts to a matter of external affairs, the objective must, nonetheless, be one in relation to which common action can be taken. Admittedly, this raises questions of degree; but a broad objective with little precise content and permitting widely divergent policies by parties does not meet the description.'

When a treaty is relied on under s 51(xxix) to support a law, it is not sufficient that the law prescribes one of a variety of means that might be thought appropriate and adapted to the achievement of an ideal. The law must prescribe a regime that the treaty has itself defined with sufficient specificity to direct the general course to be taken by the signatory states."

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<sup>23</sup> *Industrial Relations Act Case* at 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

<sup>24</sup> *Industrial Relations Act Case*, 487.

<sup>25</sup> *Tasmanian Dams Case* at 260 (Deane J).

<sup>26</sup> *Industrial Relations Act Case* at 488-489 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

28. The majority recognised that in answering this question of degree, it was appropriate to take into account the nature of international law. At 486, their Honours cited Deane J's statement in *Commonwealth v Australia* (1983) 158 CLR 1 at 261-262 (*Tasmanian Dam Case*) that:
- “absence of precision does not ... mean any absence of international obligation ... it would be contrary to both the theory and practice of international law to ... deny the existence of international obligations unless they be defined with the degree of precision necessary to establish a legally enforceable agreement under the common law.”
29. Recommendations by international agencies will not enliven the legislative power conferred by s 51(xxix), unless “the terms of [the recommendations] themselves can reasonably be regarded as appropriate and adapted to giving effect to the terms of the Conventions to which they relate”.<sup>27</sup>
30. In the *Industrial Relations Act Case*, the instruments in question were two Recommendations adopted by the General Conference of the International Labour Organisation, being a body comprised of four delegates from each of the members of the ILO, representing the government, employers and “workpeople”: at 489, 504. Recommendation No 90 sets out recommended procedures for the progressive application of the principles in the Equal Remuneration Convention of 1951,<sup>28</sup> while Recommendation No 111 supplements the Discrimination (Employment and Occupation) Convention of 1958.<sup>29</sup> The majority considered that these two Recommendations could reasonably be regarded as appropriate and adapted to giving effect to the terms of the Conventions to which each related, such that legislative power was enlivened.
31. In *XYZ v Commonwealth of Australia*, the High Court held that s 51(xxix) supported a law with respect to places, matters or things (including conduct) outside the geographical limits of Australia.<sup>30</sup> The legislation at issue criminalised the engagement of certain forms of sexual activity involving children by Australian citizens or residents while outside Australia.<sup>31</sup>
32. In *Pape v Commissioner of Taxation of the Commonwealth of Australia*, Heydon J considered the reasoning in the *Industrial Relations Act Case*, arguing that the Court had “specifically declined to decide whether legislation enacted to carry out the recommendations of international agencies made otherwise than in order to give effect

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<sup>27</sup> *Industrial Relations Act Case* at 509 (Brennan CJ, Toohey, Gaudron, McHugh, Gummow JJ).

<sup>28</sup> *Industrial Relations Act Case* at 507.

<sup>29</sup> See ILO, “[R111 - Discrimination \(Employment and Occupation\) Recommendation, 1958 \(No. 111\)](#)” (accessed 4 June 2025).

<sup>30</sup> (2006) 227 CLR 532, 542-543 (Gleeson CJ); 546-548, 552 (Gummow, Hayne and Crennan JJ). Kirby J found the legislation at issue valid the alternate basis that it was “with respect to the international relationships of Australia with other nation states and international organisations” (at 575-576, 582).

<sup>31</sup> See *ibid*, 545-546 (Gummow, Hayne and Crennan JJ).

- to the terms of a treaty to which they relate could be supported by s 51(xxix)”, and that “[t]he better view is that it cannot”.<sup>32</sup>
33. Finally, it is well-established that the external affairs power is capable of expanding the legislative competence of the Commonwealth Government. In the *Industrial Relations Act Case* at 484-485, Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ stated:
- “According to basic constitutional principle, and with qualifications not presently relevant, the intrusion of Commonwealth law into a field that has hitherto been the preserve of State law is not a reason to deny validity to the Commonwealth law provided it is, in truth, a law with respect to external affairs.”
34. **Annexure B** to this Advice sets out limited application provisions, objects clauses, and other provisions in Commonwealth legislation incorporating international treaties, together with clauses that indicate the legislature’s intention to “cover the field” or not to do so.

**The effect of a Commonwealth law that gives effect to a human rights obligation on an inconsistent state or territory law**

35. Section 109 of the *Constitution* provides that “[w]hen a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid”.
36. There are three principal tests for inconsistency: the “cover the field” test, the “simultaneous obedience” test, and the “conferral of rights” test. The first test involves ‘indirect’ inconsistency, while the second and third tests are considered ‘direct’ forms of inconsistency.<sup>33</sup>
37. The High Court has held that the word “invalid” should be regarded as meaning “inoperative”.<sup>34</sup> Accordingly, the words “to the extent of the inconsistency” have been described as having a temporal as well as a substantive connotation.<sup>35</sup> The operation of the invalidated state law is suspended so long as the inconsistency continues. If the Commonwealth law, with which the state law was inconsistent, is repealed, then the state law revives.<sup>36</sup>

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<sup>32</sup> *Pape v Commissioner of Taxation of the Commonwealth of Australia* (2009) 238 CLR 1 at 164-165 (citation from 165).

<sup>33</sup> Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Lawbook Co, 2024), 305.

<sup>34</sup> *Butler v A-G (Vic)* (1961) 106 CLR 268 at 274 (Fullagar J); 278 (Kitto J); 283 (Taylor J); 286 (Menzies J); 288 (Windeyer J).

<sup>35</sup> *Butler v A-G (Vic)* (1961) 106 CLR 268 at 283 (Taylor J); *Commonwealth v Western Australia* (1999) 196 CLR 392 at 440 (Gummow J);

<sup>36</sup> *Butler v A-G (Vic)* (1961) 106 CLR 268.

38. If Parliament chooses to implement a treaty by statute, and adopts the same words used in that treaty, it is assumed that the language of the statute should carry the same meaning as in the treaty.<sup>37</sup> The text of an international treaty is, in turn, to be interpreted in accordance with the general principles of treaty interpretation in the VCLT.<sup>38</sup>

## ANALYSIS

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**Question 1(a): Power to prescribe a minimum age of criminal responsibility for offences against state and territory criminal laws (s 51(xxix) of the Constitution and art 40(3)(a) of the CRC)**

39. Section 51(xxix) of the Constitution provides the Commonwealth Government with the source of power to make laws to prescribe a minimum age of criminal responsibility for offences against state and territory criminal laws, if the law is appropriate and adapted to give effect to art 40(3)(a) of the CRC.
40. We first set out general principles on the scope of the external affairs power, before considering the Constitutional validity of a law enacted on the basis of art 40(3)(a) of the CRC.

***Power to prescribe a minimum age of criminal responsibility for offences against state and territory criminal laws***

41. The first issue raised by Question 1(a) is whether art 40(3)(a) imposes an obligation upon Australia, and if so, its terms. Article 40(3)(a) provides that States Parties (emphasis added):

“shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

- (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law”.

42. Three points deserve comment. First, the provision is expressed in mandatory terms (“States Parties shall”). Secondly, the actual obligation imposed is of a flexible nature (“seek to promote”). Thirdly, while art 40(3)(a) singles out “the establishment of a

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<sup>37</sup> *Addy v Federal Commissioner of Taxation* (2021) 273 CLR 613 at 623 (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ); *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 230-231; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 265 (Brennan J). See also s 15AB(2)(d) of the *Acts Interpretation Act 1901* (Cth), which provides that “any treaty or other international agreement that is referred to in the Act” is material that may be considered in accordance with s 15AB(1) in the interpretation of a provision of that Act.

<sup>38</sup> See *Kingdom of Spain v Infrastructure Services Luxembourg sàrl* (2023) 275 CLR 292 at 316 (Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

minimum age”, it does not specify precisely which legislated minimum age States Parties are obliged to seek to promote.

43. Read alone, art 40(3)(a) therefore supports a variety of potential legislative outcomes (or, indeed, non-legislative outcomes, given the broad ambit of an obligation to “seek to promote” a particular result).
44. The obligation in art 40(3)(a) has however been given greater specificity by the Committee in its General Comment No 24 (2019) on children’s rights in the child justice system (**General Comment No 24**).<sup>39</sup> It states at [21]-[22]:

“Under article 40 (3) of the Convention, States parties are required to establish a minimum age of criminal responsibility, but the article does not specify the age. Over 50 States parties have raised the minimum age following ratification of the Convention, and the most common minimum age of criminal responsibility internationally is 14. Nevertheless, reports submitted by States parties indicate that some States retain an unacceptably low minimum age of criminal responsibility.

[...] States parties are encouraged to take note of recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age.”

45. The Committee has also provided specific recommendations to Australia in its periodic reporting. In the concluding observations on the combined fifth and sixth periodic reports of Australia (**2019 Concluding Observations**), the Committee stated:<sup>40</sup>

“With reference to its general comment No. 24 (2019) on children’s rights in the child justice system, the Committee urges the State party to bring its child justice system fully into line with the Convention and:

- (a) To raise the minimum age of criminal responsibility to an internationally accepted level and make it conform with the upper age of 14 years, at which *doli incapax* applies”.

46. In the *Industrial Relations Act Case*, the High Court accepted that legislation with respect to a recommendation made by an international agency could be supported by s 51(xxix) of the Constitution if its terms were regarded as appropriate and adapted to giving effect to the terms of their related Convention. The Committee is not an international agency, but rather a body of experts. However, it is established under the CRC and is empowered to “make suggestions and general recommendations” based on information received.<sup>41</sup> In our view, the reasoning of the High Court in the *Industrial Relations Act Case* is apt to be extended to encompass recommendations of the Committee which meet the necessary threshold.

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<sup>39</sup> CRC/C/GC/24 (18 September 2019).

<sup>40</sup> 2019 Concluding Observations, [48(a)].

<sup>41</sup> CRC, art 45(d) (“The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention”).

47. The Committee's recommendations elaborate upon art 40(3)(a) of the Convention and direct States Parties as to how it may be implemented. In our view, the Committee's recommendations are appropriate and adapted to give effect to art 40(3)(a) of the CRC. Accordingly, art 40(3)(a) of the Convention and the Committee's concomitant recommendations are likely to provide the Commonwealth Government with legislative power to prescribe a minimum age of criminal responsibility for offences against state and territory laws. Prescription of a minimum age of 14 would, in our view, be appropriate and adapted to art 40(3)(a) of the CRC, read in conjunction with the Committee's recommendations set out above.

**Question 1(b)(i): Power to legislate that arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time (in reliance on art 37(b))**

48. We have been asked to advise whether art 37(b) of the CRC could be relied upon by the Commonwealth Government to enact legislation providing that "arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time".
49. Article 37(b) of the CRC provides:
- "States Parties shall ensure that [...]
- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."
50. Article 37(b) is framed in obligatory terms ("States Parties shall ensure that ..."). In our view, it prescribes how that obligation is to be fulfilled with the precision to be expected of an international convention.
51. The proposed form of the legislation mirrors the obligation binding on States Parties in art 37(b) of the CRC and can plainly be considered appropriate and adapted to implementing the obligation.
52. The Commonwealth Government is empowered under s 51(xxix) of the Constitution to legislate in order to implement a treaty obligation binding upon Australia. We consider that a law in the form proposed would be supported by s 51(xxix) of the Constitution.
53. As noted above, art 9(1) of the ICCPR provides for the right to liberty and security of person and prohibits arbitrary arrest or detention. The Human Rights Committee states in its General Comment No 35 on Article 9 (Liberty and security of person):<sup>42</sup>

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<sup>42</sup> Human Rights Committee, "General comment No. 35 Article 9 (Liberty and security of person)", CCPR/C/GC/35 (16 December 2014), [18] (citations omitted).

“Children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors.”

54. Australia has been found to have violated art 9(1) in its treatment of child applicants in a series of Communications.<sup>43</sup> Breaches of art 24 of the ICCPR have also been found in several cases.<sup>44</sup>
55. Consideration could therefore also be given to Australia’s obligations to children under the ICCPR as support for legislative action under s 51(xxix) of the Constitution. The enactment of the *Human Rights (Sexual Conduct) Act 1994* (Cth) in the wake of the *Toonen* decision reflects the potential for Human Rights Committee decisions to stimulate legislative reform.<sup>45</sup>

**Question 1(b)(ii): Power to legislate that no child shall be held in a correctional facility designed for or used by adults, for any period of time (in reliance on art 37(c))**

56. We have been asked to advise whether art 37(c) could be relied upon by the Commonwealth Government to enact legislation providing that in state and territory criminal legal systems “no child shall be held in a correctional facility designed for or used by adults, for any period of time”.
57. Article 37(c) of the CRC provides:

“Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact

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<sup>43</sup> See Human Rights Committee, *M.I. et al v Australia*, Comm No 2749/2016, CCPR/C/142/D/2749/2016 (23 January 2025), [10.4]; *A.K. et al v Australia*, Comm No 2365/2014, CCPR/C/132/D/2365/2014 (14 January 2022), [8.5]; *F.K.A.G. et al v Australia*, Comm No 2094/2011, CCPR/C/108/D/2094/2011 (28 October 2013), [2.1] and [9.4]; *M.M.M. et al v Australia*, Comm No 2136/2012, CCPR/C/108/D/2136/2012 (28 October 2013), [10.3]-[10.4]; *D and E v Australia*, Comm No 1050/2002, CCPR/C/87/D/1050/2002 (9 August 2006), [7.2]; *Bakhtiyari v Australia*, Comm No 1069/2002, CCPR/C/79/D/1069/2002 (6 November 2003), [9.3]; *Baban v Australia*, Comm No 1014/2001, CCPR/C/78/D/1014/2001 (18 September 2003), [7.2].

<sup>44</sup> Human Rights Committee, *Brough v Australia*, Comm No 1184/2203, CCPR/C/86/D/1184/2003 (27 April 2006), [10] (finding violations of articles 10 and 24(1) ICCPR); *A.K. et al v Australia*, Comm No 2365/2014, CCPR/C/132/D/2365/2014 (14 January 2022), [8.5]; *Bakhtiyari v Australia*, Comm No 1069/2002, CCPR/C/79/D/1069/2002 (6 November 2003), [9.7].

<sup>45</sup> See *Toonen v Australia*, Comm No 488/1992 (31 March 1994); Second Reading Speech on the Human Rights (Sexual Conduct) Bill 1994 by the Hon. Michael Lavarch (12 October 1994), referring to the Human Rights’ Committee’s findings in *Toonen* that Australia was in breach of art 17 of the ICCPR before stating that “[t]he Human Rights (Sexual Conduct) Bill translates one important element of our obligations under an international agreement into binding domestic Australian law... This bill is not a servile capitulation to the views of some international body. It is a statement of this government's belief in and support for the standards enshrined in the international covenant”.

with his or her family through correspondence and visits, save in exceptional circumstances”.

58. As noted above, Australia has made a reservation to the CRC with respect to art 37(c), and expressly “ratifies the Convention to the extent that it is unable to comply with the obligation imposed by article 37 (c).”<sup>46</sup> This reservation constitutes a unilateral statement by Australia that purports to limit the obligations imposed upon Australia under the CRC.<sup>47</sup>
59. Reservations that are not incompatible with the object and purpose of the CRC are permissible: CRC, art 51(2). We do not consider that Australia’s reservation is incompatible with the CRC. Nor, it would appear, does the Committee. While the Committee recommends that Australia consider removing its reservation to art 37(c) CRC,<sup>48</sup> its reasoning is that the reservation is “unnecessary”, as “there appears to be no contradiction between the logic behind it and the provisions of article 37 (c) of the Convention.”<sup>49</sup>
60. Because of its permissible reservation, Australia is not bound by art 37(c) of the CRC.<sup>50</sup> It follows that art 37(c) is not presently a treaty obligation binding upon Australia that provides a basis for a valid law pursuant to the external affairs power.
61. Were Australia to withdraw its reservation to art 37(c), we consider that the sub-provision could be relied upon to pass federal legislation providing that “no child shall be held in a correctional facility designed for or used by adults, for any period of time, *unless holding the child in such a facility is considered to be in the best interests of the child*”.
62. However, it is unlikely to support a law framed in the terms set out in Question 1(b)(ii) of the Brief, for the following reasons.
63. Article 37(c) of the CRC is framed in obligatory terms (“States Parties shall ensure that ...”) and prescribes how that obligation is to be fulfilled with some precision (“[i]n particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so...”).

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<sup>46</sup> UNTC, “[Convention on the Rights of the Child](#)” (accessed 4 June 2025).

<sup>47</sup> See “Guide to Practice on Reservations to Treaties”, adopted by the International Law Commission (ILC) at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/66/10, para. 75), [1.1.1]. The UN General Assembly has taken note of the “Guide to Practice on Reservations to Treaties”, and encouraged its widest possible dissemination: UN General Assembly, “Resolution adopted by the General Assembly on 16 December 2013”, A/RES/68/111 (19 December 2013), [3].

<sup>48</sup> 2019 Concluding Observations, [6], citing also Committee on the Rights of the Child, “Consideration of reports submitted by States parties under article 44 of the Convention”, CRC/C/AUS/CO/4 (28 August 2012), [10] and Committee on the Rights of the Child, “Consideration of reports submitted by States parties under article 44 of the Convention”, CRC/C/15/Add.268 (20 October 2005), [8].

<sup>49</sup> Committee on the Rights of the Child, “Consideration of reports submitted by States parties under article 44 of the Convention”, CRC/C/AUS/CO/4 (28 August 2012), [9].

<sup>50</sup> “Guide to Practice on Reservations to Treaties”, [4.2.4].

64. It is a precise obligation capable of supporting legislation enacted under s 51(xxix) of the Constitution.
65. In General Comment No 24, the Committee states:<sup>51</sup>
- “Every child deprived of liberty is to be separated from adults, including in police cells. A child deprived of liberty is not to be placed in a centre or prison for adults, as there is abundant evidence that this compromises their health and basic safety and their future ability to remain free of crime and to reintegrate. The permitted exception to the separation of children from adults stated in article 37 (c) of the Convention – “unless it is considered in the child’s best interests not to do so” – should be interpreted narrowly and the convenience of the States parties should not override best interests. States parties should establish separate facilities for children deprived of their liberty that are staffed by appropriately trained personnel and that operate according to child-friendly policies and practices.”
66. In its 2019 Concluding Observations, the Committee stated (emphasis added):<sup>52</sup>
- “With reference to its general comment No. 24 (2019) on children’s rights in the child justice system, the Committee urges the State party to bring its child justice system fully into line with the Convention and [...]
- (e) In cases where detention is unavoidable, to ensure that children are detained in separate facilities...”
67. The proposed formulation of the law in Question 1(b)(ii) is that “no child shall be held in a correctional facility designed for or used by adults, for any period of time”. This unequivocal framing is inconsistent with the “child’s best interest” exception in art 37(c) of the CRC.
68. The best interests of the child is a core principle of the CRC that is to be a primary consideration in all actions concerning children (art 3). The Committee states that this exception in art 37(c) “should be interpreted narrowly and the convenience of the States parties should not override best interests”.<sup>53</sup> However, within these confines, it is a core aspect of art 37(c) which reflects the overriding principle of CRC art 3.
69. As noted above, it is permissible to implement treaty obligations in part, so long as the deficiency “is not so substantial as to deny the law the character of a measure implementing the Convention”.<sup>54</sup> A law framed in the terms proposed in Question 1(b)(ii) would be open to constitutional challenge on the basis that it lacked the character of a measure implementing the CRC due to its failure to make allowance for the “best interests” principle.

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<sup>51</sup> General Comment No 24, [92].

<sup>52</sup> 2019 Concluding Observations, [48(e)].

<sup>53</sup> General Comment No 24, [92].

<sup>54</sup> *Industrial Relations Act Case* at 488-489 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

70. We consider that, were Australia to withdraw its reservation to art 37(c), the CRC could be relied upon to pass federal legislation providing that that “no child shall be held in a correctional facility designed for or used by adults, for any period of time, *unless holding the child in such a facility is considered to be in the best interests of the child*”.
71. There are some differences between the formulation of the treaty obligation in art 37(c) and the proposed law, as amended above. However, on balance, we consider the proposed law as amended to be tailored to, and consistent with, the obligation in art 37(c).
72. The treaty obligation calls for “every child deprived of liberty” to be “separated from adults unless it is considered in the child’s interest not to do so”, and to be treated in a manner “which takes into account the needs of persons of his or her age”.
73. The proposed law (as amended) prohibits holding a child “in a correctional facility designed for or used by adults, for any period of time”, unless the best interests exception applies. To the extent that this proposed law prohibits holding children in a facility “used by adults”, we consider it to be sufficiently tailored to the treaty obligation to separate children from adults. This conclusion is reinforced by the statement in General Comment No 24 that a child deprived of liberty is “not to be placed in a centre or prison for adults”.<sup>55</sup> We consider this statement to be a recommendation of the Committee that can itself “reasonably be regarded as appropriate and adapted to giving effect to the terms” of the Convention to which it relates.<sup>56</sup>
74. The words “designed for” could encompass a prohibition on holding a child in a correctional facility designed for adults but housing only children. We consider, however, that this aspect of the proposed law would give effect to the obligation in art 37(c) to treat every child deprived of their liberty “in a manner which takes into account the needs of persons of his or her age”. While a matter of degree, we consider the obligation in art 37(c) to define the course to be taken by government with sufficient specificity to support the proposed law.<sup>57</sup> Article 37(c) is not apt to be described as a “broad objective with little precise content ... permitting widely divergent policies”.<sup>58</sup>
75. For these reasons, we consider that s 51(xxix) of the Constitution would support federal legislation providing that “no child shall be held in a correctional facility designed for or used by adults, for any period of time, unless holding the child in such a facility is considered to be in the best interests of the child”.

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<sup>55</sup> General Comment No 24, [92].

<sup>56</sup> *Industrial Relations Act Case* at 509 (Brennan CJ, Toohey, Gaudron, McHugh, Gummow JJ).

<sup>57</sup> See *Industrial Relations Act Case* at 486 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

<sup>58</sup> James Stellios, “Zines’ The High Court and the Constitution” (6<sup>th</sup> edn, The Federation Press 2015), p 435.

***Support for this approach from other relevant international treaty obligations***

76. We have not been asked to advise on the scope of any relevant rights in the ICCPR. However, we note that art 10(2)(b) of the ICCPR provides that “[a]ccused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication”, and that art 24(1) provides that “[e]very child shall have ... the right to such measures of protection as are required by his status as a minor...”.
77. In *Brough v Australia*, the Human Rights Committee found Australia had violated arts 10 and 24 of the ICCPR in its treatment of the applicant, a 16 year-old Aboriginal boy who was initially detained in Kariong Juvenile Detention Centre, but transferred to Parklea Correctional Centre (an adult prison) where he was “segregated” from other prisoners.<sup>59</sup> The Human Rights Committee stated at [9.4]:

“Even assuming that the author’s confinement to a safe or dry cell was intended to maintain prison order or to protect him from further self-harm, as well as other prisoners, the Committee considers that the measure incompatible with the requirements of article 10. The State party was required by article 10, paragraph 3, read together with article 24, paragraph 1, of the Covenant to accord the author treatment appropriate to his age and legal status. In the circumstances, the author’s extended confinement to an isolated cell without any possibility of communication, combined with his exposure to artificial light for prolonged periods and the removal of his clothes and blanket, was not commensurate with his status as a juvenile person in a particularly vulnerable position because of his disability and his status as an Aboriginal. As a consequence, the hardship of the imprisonment was manifestly incompatible with his condition, as demonstrated by his inclination to inflict self-harm and his suicide attempt.”

78. We consider that consideration should be given to reliance on arts 10 and 24 of the ICCPR as a basis for federal legislation supported by s 51(xxix) if the Commonwealth Government declines to withdraw its reservation to art 37(c) of the CRC. Any such legislation would need to be carefully tailored to ensure that it was appropriate and adapted to the precise obligations that bind Australia as a State Party under arts 10 and 24 of the ICCPR.

**Question 1(b)(iii): Power to legislate that any detention amounting to solitary confinement be absolutely prohibited for children, for any period of time (in reliance on art 37(a), along with other international law materials)**

79. We have been asked to advise whether art 37(a), along with other international law materials, could be relied upon by the Commonwealth Government to enact legislation

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<sup>59</sup> Human Rights Committee, *Brough v Australia*, Comm No 1184/2203, CCPR/C/86/D/1184/2003 (27 April 2006), [2.1]-[2.14].

- providing that any detention amounting to solitary confinement be absolutely prohibited for children, for any period of time.
80. Article 37(a) of the CRC does not expressly refer to solitary confinement. It provides:
- “States Parties shall ensure that ... [n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age”.
81. However, in its General Comment No 24, the Committee stated that solitary confinement is contrary to art 37 CRC (emphasis added):<sup>60</sup>
- “...Disciplinary measures in violation of article 37 of the Convention must be strictly forbidden, including corporal punishment, placement in a dark cell, solitary confinement or any other punishment that may compromise the physical or mental health or well-being of the child concerned ...
- Solitary confinement should not be used for a child. Any separation of the child from others should be for the shortest possible time and used only as a measure of last resort for the protection of the child or others. Where it is deemed necessary to hold a child separately, this should be done in the presence or under the close supervision of a suitably trained staff member, and the reasons and duration should be recorded”.
82. In its 2019 Concluding Observations, the Committee stated (emphasis added):<sup>61</sup>
- “With reference to its general comment No. 24 (2019) on children’s rights in the child justice system, the Committee urges the State party to bring its child justice system fully into line with the Convention and [...]
- (c) To explicitly prohibit the use of isolation and force, including physical restraints, as a means of coercion or to discipline children under supervision, promptly investigate all cases of abuse and maltreatment of children in detention and adequately sanction the perpetrators”.
83. The Committee’s statement that solitary confinement violates art 37 is a recommendation that can “reasonably be regarded as appropriate and adapted to giving effect to the terms” of the Convention to which it relates.<sup>62</sup>
84. The 2019 Concluding Observations cited above provide a further recommendation that is expressly addressed to Australia.
85. In light of the Committee’s recommendations, we consider it likely that a law framed in the terms proposed would be supported by s 51(xxix) of the Constitution as a law with respect to external affairs. Such a law would be reasonably considered to be

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<sup>60</sup> General Comment No 24, [95(g)-(h)].

<sup>61</sup> 2019 Concluding Observations, [48(c)].

<sup>62</sup> *Industrial Relations Act Case* at 509 (Brennan CJ, Toohey, Gaudron, McHugh, Gummow JJ).

appropriate and adapted to implementing art 37(a) of the CRC, as it has been articulated by the Committee.

86. While the analysis above is sufficient to answer the question posed, we have also considered other international material in relation to solitary confinement. Specifically:

- (a) Rule 67 of the United Nations Rules<sup>63</sup> provides that “[a]ll disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned”. The UN General Assembly adopted these rules in 1990 and invited Member States to “adapt, wherever necessary, their national legislation ... to the spirit of the Rules”.<sup>64</sup> We do not consider this instrument – which does not itself impose obligations on Australia – to provide a solid basis upon which to support legislation under s 51(xxix) of the Constitution.
- (b) Rule 45(2) of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) provides that “[t]he prohibition of the use of solitary confinement and similar measures in cases involving women and children ... continues to apply”.<sup>65</sup> Solitary confinement is defined, “for the purpose of these rules”, as confinement of prisoners for 22 hours or more a day without meaningful human contact.<sup>66</sup> The Nelson Mandela Rules are not expressed as binding obligations – their preliminary observations state that they seek to “set out what is generally accepted as being good principles and practice in the treatment of prisoners”, and that “not all of the rules are capable of application in all places at all times”.<sup>67</sup> In adopting the Nelson Mandela Rules, the UN General Assembly reaffirmed the preliminary observations and “underscore[d] the non-binding nature of the Rules”.<sup>68</sup> We therefore do not consider that the Nelson Mandela Rules provide a solid basis for engaging s 51(xxix) of the Constitution.
- (a) The United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment recommends, “[w]ith reference to rule 45 of the Nelson Mandela Rules and rule 67 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty”, that Australia ensure “that persons under the age of 18 years are never subject to solitary confinement,

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<sup>63</sup> Annexed to UN General Assembly Resolution 45/113, “United Nations Rules for the Protection of Juveniles Deprived of their Liberty” (68<sup>th</sup> Plenary Meeting, 14 December 1990).

<sup>64</sup> UN General Assembly Resolution 45/113 (14 December 1990), [4], [6].

<sup>65</sup> UNODC, “The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (undated). See also rule 43(a)-(b).

<sup>66</sup> Nelson Mandela Rules, rule 44.

<sup>67</sup> Nelson Mandela Rules, Preliminary observations 1-2.

<sup>68</sup> UN General Assembly Resolution 70/175, “United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)”, A/RES/70/175 (8 January 2016), [8].

as this constitutes a form of ill-treatment and in some cases may amount to torture.”<sup>69</sup> Australia is a Party to the Convention against Torture<sup>70</sup> and its Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>71</sup> This recommendation provides a basis, albeit a weak one, for supporting the proposed legislation under s 51(xxix). The Sub-Committee appears to focus not on the obligation in art 2 of the Convention Against Torture, but rather on the Nelson Mandela Rules and the United Nations Rules.

**Question 1(b)(iv): Power to legislate that every child accused of a criminal offence and/or deprived of their liberty have prompt access to legal assistance and representation (in reliance on art 37(d) and art 40(2)(b)(ii))**

87. We have been asked to advise whether art 37(d) and art 40(2)(b)(ii) could be relied upon to enact Commonwealth legislation providing that “every child accused of a criminal offence and/or deprived of their liberty have prompt access to legal assistance and representation”.

88. Article 37(d) of the CRC provides:

“States Parties shall ensure that: [...]

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.”

89. Article 40(2)(b)(ii) of the CRC provides:

“...having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that: [...]

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees: [...]

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence”.

90. Both arts 37(d) and 40(2)(b)(ii) are framed in obligatory terms (“States Parties shall ...”). In our view, each sub-provision prescribes how the obligation is to be fulfilled

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<sup>69</sup> Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, “Visit to Australia undertaken from 16 to 23 October 2022: recommendations and observations addressed to the State party”, CAT/OP/AUS/ROSP/1 (20 December 2023), [74].

<sup>70</sup> 1465 UNTS 85 (concluded 10 December 1984; entered into force 26 June 1987).

<sup>71</sup> 2375 UNTS 237 (18 December 2002, entered into force 22 June 2006).

- with sufficient precision to empower the Commonwealth Government to enact appropriate and adapted legislation under s 51(xxix) of the Constitution.
91. In assessing whether the proposed law is appropriate and adapted to the terms of the CRC, we note that the formulation of the proposed legislation differs from the terms of the international obligations in arts 37(d) and 40(2)(b)(ii) of the CRC.
92. The proposed legislation conflates the obligations that bind the State in relation to a child who has been accused of a criminal offence and/or deprived of their liberty. These two circumstances are dealt with separately under the CRC and the State is bound by discrete obligations in each case:
- (a) Under art 37(d) of the CRC, a child deprived of liberty is entitled to “prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority...”.
  - (b) In contrast, under art 40(2)(b)(ii) of the CRC, a child alleged to have or accused of having infringed the penal law is entitled “*if appropriate ... to have legal or other appropriate assistance in the preparation and presentation of his or her defence*” (emphasis added).
93. However, in General Comment No 24, the Committee recalls that art 14(3)(d) of the ICCPR enshrines the right of legal representation in the criminal justice system for all persons. Article 14(3)(d) of the ICCPR (which binds Australia)<sup>72</sup> provides:
- “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality [...]
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it”.
94. The Committee accordingly recommends that States:
- (a) “ensure that the child is guaranteed legal or other appropriate assistance from the outset of the proceedings, in the preparation and presentation of the defence, and until all appeals and/or reviews are exhausted;<sup>73</sup> and
  - (b) “provide effective legal representation, free of charge, for all children who are facing criminal charges before judicial, administrative or other public authorities”.<sup>74</sup>

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<sup>72</sup> See “[International Covenant on Civil and Political Rights](#)” accessed 4 June 2025. Australia’s reservation with respect to article 14 does not affect this obligation.

<sup>73</sup> General Comment No 24, [49].

<sup>74</sup> General Comment No 24, [51].

95. We consider that the Committee’s recommendations can be “reasonably be regarded as appropriate and adapted to giving effect to the terms” of the CRC.<sup>75</sup>
96. In reaching this conclusion, we note that the chapeau to art 40(2)(b)(ii) expressly refers to “relevant provisions of international instruments”.
97. The proposed law is therefore reasonably capable of being considered appropriate and adapted to the terms of the CRC.
98. Accordingly, we consider it likely that a law framed in the terms proposed would be supported by s 51(xxix) of the Constitution as a law with respect to external affairs.



**Kate Eastman AM SC**  
**New Chambers**



**Emma Dunlop**  
**Omnia Chambers**

23 June 2025

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<sup>75</sup> *Industrial Relations Act Case* at 509 (Brennan CJ, Toohey, Gaudron, McHugh, Gummow JJ).

## ANNEXURE A

Australia's 2021 Universal Periodic Review<sup>76</sup> included recommendations from 29 countries to raise the age of criminal responsibility, set out below.

- 1) 146.140 Raise the minimum age of criminal responsibility to 18 years, and prohibit isolation and the use of force as forms of punishment in juvenile justice centres (Bolivarian Republic of Venezuela);
- 2) 146.141 Consider raising the minimum age of criminal responsibility to at least 14 years (Slovakia);
- 3) 146.142 Amend Australia's legislation in order to increase the minimum age of criminal responsibility to at least 14 years and withdraw the reservations to article 37 (c) of the Convention on the Rights of the Child regarding the separation of children, which requires detained children to be separated from adults (Spain);
- 4) 146.143 Raise the minimum age of criminal responsibility to an internationally accepted level (Sri Lanka);
- 5) 146.144 Raise the age of criminal responsibility to at least 14 years, in line with the international standard and as recommended by the Committee on the Rights of the Child (Sweden);
- 6) 146.145 Raise the minimum age of detention for minors to 14 years or above in conformity with the recommendation of the Committee on the Rights of the Child (Switzerland);
- 7) 146.146 Consider revising the minimum age of criminal responsibility in accordance with the recommendations of the Committee on the Rights of the Child (Uruguay);
- 8) 146.147 Increase the minimum age of criminal responsibility and adopt measures to ensure children receive appropriate community support directed at addressing risk factors (Canada);
- 9) 146.148 Raise the current minimum age of criminal responsibility from 10 to 14 years, in line with international standards on the matter, and promote non-custodial measures (Chile);
- 10) 146.149 Increase the minimum age of criminal responsibility across all states and territories (Croatia);
- 11) 146.150 Raise the minimum age of criminal responsibility to at least 14 years (Cyprus);
- 12) 146.151 Raise the minimum age of criminal responsibility to at least 14 years and prohibit the use of isolation and force as punishment in juvenile justice facilities (Zambia);
- 13) 146.152 Promote non-judicial measures for children accused of criminal offences and raise the minimum age of criminal responsibility (Czechia);
- 14) 146.153 Significantly raise the minimum age of criminal responsibility (Denmark);
- 15) 146.154 Raise the age of criminal responsibility (Estonia);
- 16) 146.155 Bring the child justice system fully into line with international standards, including by raising the minimum age of criminal liability to 14 years (Finland);

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<sup>76</sup> UN General Assembly, Human Rights Council, 47<sup>th</sup> Sess., Universal Periodic Review, "Report of the Working Group on the Universal Periodic Review: Australia", A/HRC/47/8, 24 March 2021, [146].

- 17) 146.156 Raise the minimum age of criminal responsibility to 13 years and improve the conditions of detention of minors under the age of 15 (France);
- 18) 146.157 Raise the minimum age of criminal responsibility to at least 14 years (Germany);
- 19) 146.158 Consider raising the age of criminal responsibility to 14 years of age (Greece);
- 20) 146.159 Raise the minimum age of criminal responsibility nationwide and fund and support community-led prevention and diversion programmes that keep children and youth out of prison (Iceland);
- 21) 146.160 Enact laws that raise the minimum age of criminal responsibility to 14 years (Lithuania) and 146.161 Bring elements of the child justice system specified by the Committee on the Rights of the Child into line with the Convention on the Rights of the Child (Lithuania);
- 22) 146.162 Raise the minimum age of criminal responsibility (Luxembourg);
- 23) 146.163 Raise the minimum age of criminal responsibility nationwide to at least 14 years (Malta);
- 24) 146.164 Raise the age of criminal responsibility, and harmonize the juvenile justice system with the Convention on the Rights of the Child (Mexico);
- 25) 146.165 Raise the minimum age of criminal responsibility of children to 14 years, in accordance with international standards (North Macedonia);
- 26) 146.166 Adopt recommendations by the Committee on the Rights of the Child to raise the minimum age of criminal responsibility to at least 14 years of age (Norway);
- 27) 146.167 Raise the minimum age of criminal responsibility to 14 years of age (Poland);
- 28) 146.168 Raise the minimum age of criminal responsibility to at least 14 years old (Portugal);
- 29) 146.169 Adjust the national child justice system in line with the Convention on the Rights of the Child, in particular raise the minimum age of criminal responsibility from 10 to 14 years of age (Republic of Moldova).

## ANNEXURE B – PROVISIONS IN COMMONWEALTH LEGISLATION INCORPORATING INTERNATIONAL TREATIES

### A. Limited application provisions incorporating international treaties

<p><i>Age Discrimination Act 2004 (Cth)</i></p>
<p><b>10 Application of Act – constitutional powers</b></p> <p>(7) The limited application provisions have effect in relation to discrimination against a person on the ground of age to the extent that the provisions:</p> <ul style="list-style-type: none"><li>(a) give effect to the Discrimination (Employment and Occupation) Convention, 1958 adopted by the General Conference of the International Labour Organization on 25 June 1958 (a copy of the English text of which is set out in Schedule 1 to the <i>Australian Human Rights Commission Act 1986</i>); or</li><li>(b) give effect to the International Covenant on Civil and Political Rights (a copy of the English text of which is set out in Schedule 2 to the <i>Australian Human Rights Commission Act 1986</i>); or</li><li>(c) give effect to the International Covenant on Economic, Social and Cultural Rights; or</li><li>(d) give effect to the Convention on the Rights of the Child; or</li><li>(e) relate to matters external to Australia; or</li><li>(f) relate to matters of international concern.</li></ul>
<p><i>Racial Discrimination Act 1975 (Cth)</i></p>
<p><b>3 Interpretation</b></p> <p><i>Convention</i> means the International Convention on the Elimination of All Forms of Racial Discrimination that was opened for signature on 21 December 1965 and entered into force on 2 January 1969, being the Convention a copy of the English text of which is set out in the Schedule.</p> <p><b>9 Discrimination</b></p> <p>(1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life. [...]</p> <p>(2) A reference in this section to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes any right of a kind referred to in Article 5 of the Convention.</p>
<p><i>Sex Discrimination Act 1984 (Cth)</i></p>
<p><b>9 Application of Act</b></p>

(10) The prescribed provisions of Part II, and the prescribed provisions of Division 3 of Part II, have effect to the extent that the provisions give effect to a relevant international instrument.

#### **4 Interpretation**

*relevant international instrument* means:

- (a) the Convention on the Elimination of All Forms of Discrimination Against Women done at New York on 18 December 1979 ([1983] ATS 9) (a copy of the English text of which is set out in the Schedule); or
- (b) the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23); or
- (c) the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5); or
- (d) the Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4); or
- (e) ILO Convention (No. 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value done at Geneva on 29 June 1951 ([1975] ATS 45); or
- (f) ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation done at Geneva on 25 June 1958 ([1974] ATS 12); or
- (g) ILO Convention (No. 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities done at Geneva on 23 June 1981 ([1991] ATS 7); or
- (h) ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer done at Geneva on 22 June 1982 ([1994] ATS 4).

### ***Disability Discrimination Act 1992 (Cth)***

#### **12 Application of Act**

- (8) The limited application provisions have effect in relation to discrimination against a person with a disability to the extent that the provisions:
- (a) give effect to the Convention; or
  - (b) give effect to the Covenant on Civil and Political Rights; or
  - (ba) give effect to the Disabilities Convention; or
  - (c) give effect to the International Covenant on Economic, Social and Cultural Rights; or
  - (d) relate to matters external to Australia; or
  - (e) relate to matters of international concern.

#### **4 Interpretation**

*Convention* means the Discrimination (Employment and Occupation) Convention, 1958 adopted by the General Conference of the International Labour Organization on 25 June 1958, a copy of the English text of which is set out in Schedule 1 of the *Australian Human Rights Commission Act 1986*.

***Privacy Act 1988 (Cth)***

**12B Severability—additional effect of this Act**

(2) This Act also has the effect it would have if its operation in relation to regulated entities were expressly confined to an operation to give effect to the following:

- (a) the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23), and in particular Articles 17 and 24(1) of the Covenant;
- (b) Article 16 of the Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4).

**26XE Constitutional basis of this Division [Division 5 – Dealing with personal information involved in eligible data breaches]**

This Division relies on the Commonwealth’s legislative powers under paragraph 51(xxix) (external affairs) of the Constitution as it relates to giving effect to Australia’s obligations under relevant international agreements, in particular Article 17 of the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23).

**B. Objects provisions incorporating international treaties**

***National Disability Insurance Scheme Act 2013 (Cth)***

**3 Objects of Act**

(1) The objects of this Act are to:

- (a) in conjunction with other laws, give effect to Australia’s obligations under the Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006 ([2008] ATS 12); and  
....
- (i) in conjunction with other laws, give effect to certain obligations that Australia has as a party to:
  - (i) the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23); and
  - (ii) the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5); and
  - (iii) the Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4); and
  - (iv) the Convention on the Elimination of All Forms of Discrimination Against Women done at New York on 18 December 1979 ([1983] ATS 9); and
  - (v) the International Convention on the Elimination of All Forms of Racial Discrimination done at New York on 21 December 1965 ([1975] ATS 40).

**C. Other types of provisions incorporating international treaties**

<i>Australian Human Rights Commission Act 1986 (Cth)</i>
<p><b>3 Interpretation</b></p> <p><i>Convention</i> means the Discrimination (Employment and Occupation) Convention, 1958 adopted by the General Conference of the International Labour Organization on 25 June 1958, a copy of the English text of which is set out in Schedule 1, as that Convention applies in relation to Australia.</p> <p><i>Covenant</i> means the International Covenant on Civil and Political Rights, a copy of the English text of which is set out in Schedule 2, as that International Covenant applies in relation to Australia.</p> <p><i>human rights</i> means the rights and freedoms recognised in the Covenant, declared by the Declarations or recognised or declared by any relevant international instrument.</p> <p><b>31 Functions of Commission relating to equal opportunity</b></p> <p>The following functions are hereby conferred on the Commission: [...]</p> <p>(f) when requested by the Minister, to report to the Minister as to the action (if any) that, in the opinion of the Commission, needs to be taken by Australia in order to comply with the provisions of the Convention;</p> <p>(g) on its own initiative or when requested by the Minister, to examine any relevant international instrument for the purpose of ascertaining whether there are any inconsistencies between that instrument and the Convention, and to report to the Minister the results of any such examination;</p> <p><b>Part IIA—Aboriginal and Torres Strait Islander Social Justice Commissioner</b></p> <p><b>46C Functions of the Commission that are to be performed by the Commissioner etc.</b></p> <p>(4) In the performance of functions, or the exercise of powers, under this section, the Commissioner must, as appropriate, have regard to:</p> <p>(a) the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child; and</p> <p>(b) such other instruments relating to human rights as the Commissioner considers relevant.</p> <p><b>Part IIAA—National Children’s Commissioner</b></p> <p><b>46MB Functions of Commission that are to be performed by the National Children’s Commissioner etc.</b></p> <p>(6) In performing functions, or exercising powers, under this section, the National Children’s Commissioner must, as appropriate, have regard to:</p> <p>(a) the Universal Declaration of Human Rights (United Nations General Assembly Resolution A/RES/217(III) A (1948); and</p> <p>(b) the following, as amended and in force for Australia from time to time:</p>

<p>(i) the International Convention on the Elimination of all Forms of Racial Discrimination done at New York on 21 December 1965 ([1975] ATS 40);</p> <p>(ii) the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5);</p> <p>(iii) the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23);</p> <p>(iv) the Convention on the Elimination of All Forms of Discrimination Against Women done at New York on 18 December 1979 ([1983] ATS 9);</p> <p>(v) the Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4);</p> <p>(vi) the Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006 ([2008] ATS 12); and</p> <p>(c) such other instruments relating to human rights as the Commissioner considers relevant.</p>
<p><b><i>Human Rights (Sexual Conduct) Act 1994 (Cth)</i></b></p>
<p><b>4 Arbitrary interferences with privacy</b></p> <p>(1) Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.</p>

**D. Provisions which relate to s 109 of the *Constitution***

**D.1 Provisions reflecting an intention to cover the field**

<p><b><i>Human Rights (Sexual Conduct) Act 1994 (Cth)</i></b></p>
<p><b>4 Arbitrary interferences with privacy</b></p> <p>(1) Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.</p>
<p><b><i>Native Title Act 1993 (Cth)</i></b></p>
<p><b>11 Extinguishment of native title</b></p> <p>(1) Native title is not able to be extinguished contrary to this Act.</p>
<p><b><i>Airports Act 1996 (Cth)</i></b></p>
<p><b>112 Exclusion of State laws</b></p> <p>(1) It is the intention of the Parliament that this Part is to apply to the exclusion of a law of a State.</p>

(2) In particular, it is the intention of the Parliament that this Part is to apply to the exclusion of a law of a State relating to:

- (a) land use planning; or
- (b) the regulation of building activities.

***Biosecurity Act 2015 (Cth)***

**172 Exclusion of State and Territory laws**

This Part applies to the exclusion of a law, or a provision of a law, of a State or Territory to the extent that the law or provision purports to prohibit or restrict the bringing or importation of particular goods into Australian territory, or into a part of Australian territory, from outside Australian territory for the purpose of managing biosecurity risks associated with the goods.

**D.2 Provisions reflecting an intention not to cover the field**

***Age Discrimination Act 2004 (Cth)***

**12 Operation of State and Territory laws**

- (1) A reference in this section to this Act is a reference to this Act as it has effect because of a provision of sections 9 and 10.
- (2) A reference in this section to a law of a State or Territory is a reference to a law of a State or Territory that deals with discrimination on the ground of age.
- (3) This Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act.
- (4) If:
  - (a) a law of a State or Territory relating to discrimination deals with a matter dealt with by this Act; and
  - (b) a person has made a complaint or initiated a proceeding under that law in respect of an act in respect of which the person would, apart from this subsection, have been entitled to make a complaint under the *Australian Human Rights Commission Act 1986* alleging that the act is unlawful under a provision of Part 4 of this Act;the person is not entitled to make a complaint or institute a proceeding under the *Australian Human Rights Commission Act 1986* alleging that the act is unlawful under a provision of Part 4 of this Act.
- (5) If:
  - (a) a law of a State or Territory relating to discrimination deals with a matter dealt with by this Act; and
  - (b) an act by a person that constitutes an offence against that law also constitutes an offence against this Act;the person may be prosecuted and convicted either under that law of the State or Territory or under this Act

(6) Nothing in subsection (5) makes a person liable to be punished more than once in respect of the same act.

***Racial Discrimination Act 1975 (Cth)***

**6A Operation of State and Territory laws**

(1) This Act is not intended, and shall be deemed never to have been intended, to exclude or limit the operation of a law of a State or Territory that furthers the objects of the Convention and is capable of operating concurrently with this Act.

(2) Where:

(a) a law of a State or Territory that furthers the objects of the Convention deals with a matter dealt with by this Act; and

(b) a person has, whether before or after the commencement of this section, made a complaint, instituted a proceeding or taken any other action under that law in respect of an act or omission in respect of which the person would, but for this subsection, have been entitled to make a complaint under the *Australian Human Rights Commission Act 1986* alleging that the act or omission is unlawful under a provision of Part II or IIA of this Act;

the person shall be deemed never to have been, and is not, entitled to make a complaint or institute a proceeding under the *Australian Human Rights Commission Act 1986* alleging that the act or omission is unlawful under a provision of Part II or IIA of this Act and any proceedings pending under this Act at the commencement of this section in respect of such a complaint made before that commencement are, by force of this subsection, terminated.

(3) Where:

(a) a law of a State or Territory that furthers the objects of the Convention deals with a matter dealt with by this Act; and

(b) an act or omission by a person that constitutes an offence against that law also constitutes an offence against this Act;

the person may be prosecuted and convicted either under that law of the State or Territory or under this Act, but nothing in this subsection renders a person liable to be punished more than once in respect of the same act or omission.

***Sex Discrimination Act 1984 (Cth)***

**10 Operation of State and Territory laws**

(1) A reference in this section to this Act is a reference to this Act as it has effect by virtue of any of the provisions of section 9 other than subsection 9(10).

(2) A reference in this section to a law of a State or Territory is a reference to a law of a State or Territory that deals with work health and safety, discrimination on the ground of sex, discrimination on the ground of sexual orientation, discrimination on the ground of gender identity, discrimination on the ground of intersex status, discrimination on the ground of marital or relationship status, discrimination on the ground of pregnancy or potential pregnancy, discrimination on the ground of breastfeeding or discrimination on the ground of family responsibilities.

(3) This Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act.

(4) Where:

(a) a law of a State or Territory deals with a matter dealt with by this Act; and

(b) a person has made a complaint, instituted a proceeding or taken any other action under that law, other than a claim for workers compensation, in respect of an act or omission in respect of which the person would, but for this subsection, have been entitled to make a complaint under the *Australian Human Rights Commission Act 1986* alleging that the act or omission is unlawful under a provision of Part II of this Act;

the person is not entitled to make a complaint or institute a proceeding under the *Australian Human Rights Commission Act 1986* alleging that the act or omission is unlawful under a provision of Part II of this Act.

(5) Where:

(a) a law of a State or Territory deals with a matter dealt with by this Act; and

(b) an act or omission by a person that constitutes an offence against that law also constitutes an offence against this Act;

the person may be prosecuted and convicted either under that law of the State or Territory or under this Act, but nothing in this subsection renders a person liable to be punished more than once in respect of the same act or omission.

#### **11 Operation of State and Territory laws that further objects of relevant international instruments**

(1) A reference in this section to this Act is a reference to this Act as it has effect by virtue of subsection 9(10).

(2) A reference in this section to a law of a State or Territory is a reference to a law of a State or Territory that deals with work health and safety, discrimination on the ground of sex, discrimination on the ground of sexual orientation, discrimination on the ground of gender identity, discrimination on the ground of intersex status, discrimination on the ground of marital or relationship status, discrimination on the ground of pregnancy or potential pregnancy, discrimination on the ground of breastfeeding or discrimination on the ground of family responsibilities.

(3) This Act is not intended to exclude or limit the operation of a law of a State or Territory that furthers the objects of a relevant international instrument and is capable of operating concurrently with this Act.

(4) Where:

(a) a law of a State or Territory that furthers the objects of a relevant international instrument deals with a matter dealt with by this Act; and

(b) a person has made a complaint, instituted a proceeding or taken any other action under that law, other than a claim for workers compensation, in respect of an act or omission in respect of which the person would, but for this subsection, have been entitled to make a complaint under the *Australian Human Rights Commission Act 1986* alleging that the act or omission is unlawful under a provision of Part II of this Act;

the person is not entitled to make a complaint or institute a proceeding under the *Australian Human Rights Commission Act 1986* alleging that the act or omission is unlawful under a provision of Part II of this Act.

(5) Where:

- (a) a law of a State or Territory that furthers the objects of a relevant international instrument deals with a matter dealt with by this Act; and
- (b) an act or omission by a person that constitutes an offence against that law also constitutes an offence against this Act;

the person may be prosecuted and convicted either under that law of the State or Territory or under this Act, but nothing in this subsection renders a person liable to be punished more than once in respect of the same act or omission.

### ***Disability Discrimination Act 1992 (Cth)***

#### **13 Operation of State and Territory laws**

(1) A reference in this section to this Act is a reference to this Act as it has effect because of a provision of section 12.

(2) A reference in this section to a law of a State or Territory is a reference to a law of a State or Territory that deals with discrimination on the grounds of disability.

(3) This Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act.

(3A) Subsection (3) does not apply in relation to Division 2A of Part 2 (Disability standards).

(4) If:

- (a) a law of a State or Territory relating to discrimination deals with a matter dealt with by this Act (including a matter dealt with by a disability standard); and
- (b) a person has made a complaint or initiated a proceeding under that law in respect of an act or omission in respect of which the person would, apart from this subsection, have been entitled to make a complaint under the *Australian Human Rights Commission Act 1986* alleging that the act or omission is unlawful under a provision of Part 2 of this Act;

the person is not entitled to make a complaint or institute a proceeding under the *Australian Human Rights Commission Act 1986* alleging that the act or omission is unlawful under a provision of Part 2 of this Act.

(5) If:

- (a) a law of a State or Territory deals with a matter dealt with by this Act (including a matter dealt with by a disability standard); and
- (b) an act or omission by a person that constitutes an offence against that law also constitutes an offence against this Act;

the person may be prosecuted and convicted either under that law of the State or Territory or under this Act, but nothing in this subsection renders a person liable to be punished more than once in respect of the same act or omission.

<b><i>Australian Human Rights Commission Act 1986 (Cth)</i></b>
<b>4 Operation of State and Territory laws</b> <p>(1) This Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act.</p> <p>(2) If:</p> <ul style="list-style-type: none"><li>(a) a law of a State or Territory deals with a matter dealt with by this Act; and</li><li>(b) an act or omission by a person that constitutes an offence against that law also constitutes an offence against this Act;</li></ul> <p>the person may be prosecuted and convicted either under that law of the State or Territory or under this Act, but nothing in this subsection renders a person liable to be punished more than once in respect of the same act or omission.</p>
<b><i>National Disability Insurance Scheme Act 2013 (Cth)</i></b>
<b>207 Concurrent operation of State laws</b> <p>(1) It is the intention of the Parliament that this Act is not to apply to the exclusion of a law of a State or Territory to the extent that that law is capable of operating concurrently with this Act.</p> <p>(2) The regulations may prescribe kinds of laws of States and Territories as examples of laws to which subsection (1) applies.</p>
<b><i>Privacy Act 1988 (Cth)</i></b>
<b>3 Saving of certain State and Territory laws</b> <p>It is the intention of the Parliament that this Act is not to affect the operation of a law of a State or of a Territory that makes provision with respect to the collection, holding, use, correction or disclosure of personal information (including such a law relating to credit reporting or the use of information held in connection with credit reporting) and is capable of operating concurrently with this Act.</p>



**NATSILS**  
National Aboriginal and  
Torres Strait Islander Legal Services  
*TRUE JUSTICE FOR OUR PEOPLE*



**Justice and  
Equity Centre**

### **Calling for Australian Government action to protect children**

The National Aboriginal and Torres Strait Islander Legal Services ('NATSILS') and the Justice and Equity Centre ('the JEC') have received expert legal advice that the Australian Government has the constitutional power to:

- raise the minimum age of criminal responsibility to 14 years old across Australia; and
- set minimum legislated standards for the treatment of children and young people in state and territory criminal legal systems.

#### **The Constitution and the states**

The Australian Constitution divides-up power between the national (Australian) and state governments, giving the Australian Government the ability to make laws on certain issues. All other law-making powers remain with the states.

If there is an overlap between powers, and an inconsistency between laws, the laws of the Australian Government apply and the law of the state has no effect – to the extent of the inconsistency.

Power to make laws relating to policing, prisons and youth detention centres mostly belong to states, not the Australian Government.

#### **The 'external affairs' power**

However, the Commonwealth has the power to make laws about 'external affairs'.

The High Court of Australia has said that this power includes giving effect to treaties that Australia has signed with other countries. If a treaty requires Australia to do something, the Australian Government can pass laws to make it happen.

#### **The Convention on the Rights of the Child**

Treaties cover lots of different topics – trade, air travel, border disputes.

Some treaties are commitments to respect the rights of certain people within the borders of the country that signs. For example, Australia has signed treaties to protect the rights of people with disability, women and workers. This has enabled the Australian Government to pass laws about disability discrimination, sexual harassment and the minimum wage.

Australia has also signed the Convention on the Rights of the Child. This is a treaty which sets out what countries must do to protect children within their borders.

#### **Protecting children**

NATSILS and the JEC are concerned that the states and territories are not doing enough to protect children who have involvement with police and courts.

We asked two expert lawyers for their advice about the Australian Government's power to make laws that give effect to the Convention on the Rights of the Child, that would override state or territory laws that are inconsistent.

We asked the experts if the Australian Government can pass a law to raise the age of criminal responsibility to 14 years, so that children younger than 14 cannot be sent to prison.

They say yes, the Australian Government can.

We asked the experts if the Australian Government can make a law that a child or young person can only be arrested or held as a last resort – when there is no other option – and for as short a period of time as possible.

They say yes, the Australian Government can.

We asked the experts if the Australian Government can make a law that forbids any child or young person being held in solitary confinement.

They say yes, the Australian Government can.

The experts have told us clearly that the Commonwealth government *can* take action. Now, NATSILS and the JEC say, with a majority of states and territories failing children and failing on community safety, the Australian Government *must* take action to implement its international treaty obligations and protect all children in Australia.