Human Rights Law Centre

CHANGE THE RECORD
Smarter Justice. Safer Communities.

Ending Youth Incarceration

Submission to the Senate Legal and Constitutional Affairs Committee on Australia's youth justice and incarceration system

10 October 2024
Human Rights Law Centre and Change the Record

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Human Rights Law Centre

The Human Rights Law Centre is a founding member of the Change the Record coalition, and a leading Australian human rights advocacy organisation that uses a combination of strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia.

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Change the Record

Change the Record is Australia's only First Nations-led coalition of Aboriginal Community Controlled Organisations, legal, health, and family prevention experts. Change the Record has two key objectives: to end the mass incarceration of First Nations Peoples, and to end the disproportionate rates of family violence experienced by Aboriginal and Torres Strait Islander women and children.

Change the Record's work emphasises the importance of:

- Investing in Aboriginal and Torres Strait Islander communities and First Nations-led service providers, to ensure that our people have access to culturally safe and responsive support services, early intervention, prevention and healing programs;
- Shifting control and resources away from the criminal legal system and into First Nations-led community-based alternatives to policing and prisons;
- Ending the incarceration of children and young people, including by raising the minimum age of criminal responsibility to at least 14 years of age (without exception) and shutting down juvenile detention centres across Australia;
- Ensuring First Nations communities have control over the care and wellbeing of our children, with a particular emphasis on ending the forced removal of our children from their families, their communities and their culture;
- Ending the disproportionate poverty and housing precarity experienced by First Nations peoples; and
- Governments committing to Aboriginal and Torres Strait Islander self-determination and to addressing the ongoing effects of colonisation on First Nations peoples, including redress for the dispossession and systemic racism that our people experience to this day.

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Acknowledgement

Change the Record and the Human Rights Law Centre recognise and acknowledge Aboriginal and Torres Strait Islander People as the custodians and First Peoples of so-called Australia. With humility and gratitude, we acknowledge the Traditional Owners of the lands we work on and thank them for paving the way for us to continue the fight for justice in this country. Sovereignty in this country was never ceded, this always was and always will be Aboriginal land.

It would be remiss to not acknowledge the lives lost in the criminal legal system and because of the system's failure to keep children and young people away from harm. The Committee's inquiry has been brought about because of successive governments' failures to protect children from harm, and more recently continuous failures to address conditions in out-of-home care, watch houses, and prisons. We pay our utmost respect to the families and communities of young lives lost in the system and will continue to work in solidarity towards justice.

Contents

1. Executive Summary

This joint submission by the Human Rights Law Centre and Change the Record to the Legal and Constitutional Affairs References Committee (**Committee**) is made in response to the Committee's inquiry into Australia's youth justice and incarceration system.

Aboriginal and Torres Strait Islander people on this continent have upheld their own intricate and rich systems, laws and Lore for thousands of years. Since colonisation, these intricate systems, laws, decision-making processes and accountability to Lore have largely been disrupted, displaced and disregarded, making way for laws, policies and practices that have been racist, discriminatory and harmful to generations of First Nations children.

In 1991, the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**) found that Aboriginal people were grossly overrepresented in police custody and prisons and made 339 recommendations to reduce the high numbers of First Nations people in custody and end Aboriginal deaths in custody.[1] 33 years have passed since the RCIADIC and we have seen little change in the disproportionate numbers of First Nations people in custody. The prevention of First Nations deaths in custody is incompatible with the mass incarceration of First Nations people.

In 2019, all Australian Governments, and the Coalition of Peaks[2] signed the Partnership Agreement on Closing the Gap 2019-2029. This Agreement sets out key reform areas, as well as 17 targets that impact life outcomes for Aboriginal and Torres Strait Islander People, intended to be addressed by 2030. Target 11 specifically aims to reduce the incarceration of First Nations young people in the criminal legal system by at least 30% by 2031. Devastatingly, the Closing the Gap targets are not on track to be met by 2031, and in fact are frequently being contravened.[3]

No child belongs in prison. Children belong in playgrounds and schools, supported by friends and family in the community. Ending Australia's mass incarceration crisis starts with addressing the ongoing impacts of colonisation – including laws and policies infected by systemic racism and discriminatory policing – which are trapping Aboriginal and Torres Strait Islander children and young people in the quicksand of the criminal legal system.

Across much of so-called Australia, the minimum age of criminal responsibility is just 10 years old. While substantial campaigning has been undertaken by Aboriginal and Torres Strait Islander, human rights, social services, health, youth, religious and legal advocates to see the minimum age of criminal responsibility increased across the country, governments across Australia remain reluctant to implement this reform and invest in alternative, self-determined supports for children and young people.

To stop the pipeline of children into prisons, the minimum age of criminal responsibility must be raised to at least 14 years old, without exception, alongside legislating a minimum age of detention of at least 16 years old. Dangerous and discriminatory bail and mandatory sentencing laws must be repealed, and police must be subjected to independent oversight. Access to diversion must be maximised, and power and resources transferred to Aboriginal and Torres Strait Islander community-controlled organisations and other services to build alternative, culturally safe responses backed by the evidence.

While incarcerated, children are at risk of being subjected to harmful practices including solitary confinement, isolation, strip searching, spit hooding and other use of force and restraints, and detention in the same facilities as adults. We have seen crises unfold in Don Dale, Banksia Hill, Ashley

[1] Royal Commission into Aboriginal Deaths in Custody. (1991). *National report* (Vol. 1).
[2] A representative body of more than 80 Aboriginal and Torres Strait Islander community-controlled peak organisations and members.
[3] Productivity Commission, Closing the Gap review (Final report, February 2024).

and Cleveland youth prisons where children have been pushed to the brink, self-harmed and tragically taken their own lives.

The criminal legal system in this country is beyond its breaking point. Children – the vast majority of whom are First Nations children – and their families have been screaming for help and support for years. It is the sincere hope of the Human Rights Law Centre and Change the Record that this Committee finally listen and end the incarceration of children and young people.

2. Recommendations

1. The Committee recommend that the Australian government ensure that all Australian governments raise the minimum age of criminal responsibility to at least 14 years of age, without exception and without the introduction of new powers to police and detain children.

2. The Committee recommend that the Australian government ensure that all Australian governments transfer decision-making power, control and resources to Aboriginal and Torres Strait Islander community-controlled organisations and communities to build alternative, self-determined supports for children and young people.

3. The Committee recommend that the Australian government ensure that all Australian governments reform their bail laws to repeal reverse onus provisions and legislate a presumption in favour of bail for all offences, with the onus on the prosecution to demonstrate that bail should not be granted due to there being a specific and immediate risk to the physical safety of another person or the person posing a demonstrable flight risk.

4. The Committee recommend that the Australian government ensure that all Australian governments raise the minimum age of detention to at least 16 years old.

5. The Committee recommend that the Australian government ensure that all Australian governments repeal mandatory sentencing laws.

6. The Committee recommend that the Australian government ensure that all Australian governments introduce laws which enshrine presumptions in favour of alternative pre-charge measures and diversion at any stage of legal proceedings; remove exclusions in relation to diversion based on specified conduct; remove requirements for prosecutorial consent to diversion; and ensure access to diversion is not conditional on the admission or denial of guilt.

7. The Committee recommend that the Australian government ensure that all Australian governments end the incarceration of children and commit to a plan of action to do so. Money being funnelled into prisons should be reallocated to culturally safe services that meet the needs of children and young people at risk of criminalisation and divert people away from the criminal legal system.

8. The Committee recommend that the Australian government ensure that all Australian governments prohibit in law:
    a. the use of solitary confinement, by any name, on children and on people with disabilities in places of detention;
    b. the use of prolonged solitary confinement, by any name, on people in places of detention; and
    c. the use of confinement, by any name, as a means of control or punishment.

9. The Committee recommend that the Australian government ensure that all Australian governments urgently enact law reform to cease and prohibit the practice of strip searching of people in all places of detention.

10. The Committee recommend that the Australian government ensure that all Australian governments urgently implement safer and less invasive alternatives such as body scanners,

which should only ever be used as a last resort when absolutely necessary, after less intrusive alternatives have been exhausted, an individual risk assessment has been completed and there remains objectively reasonable grounds to believe that the person is carrying dangerous contraband.

11. The Committee recommend that the reasons for any less invasive search – including the risk assessment, the basis of reasonable belief, the nature of any intelligence and relevant human rights considerations – be documented, together with any items identified by the search.

12. The Committee recommend that the Australian government ensure that all Australian governments ban the use of spit hoods (or similar devices) in law.

13. The Committee recommend that the Australian government ensure that all Australian governments ensure that the use of force and restraint in police custody and in prisons is documented and publicly reported on in a nationally consistent way.

14. The Committee recommend that the Australian Government withdraws its reservation to Article 37(c) of the *Convention on the Rights of the Child* and ensure that, in all jurisdictions, the detention of children in the same facilities as adults is prohibited by law unless it is considered in the child's best interests not to do so.

15. The Committee recommend that the federal government resolve the funding standoff with the states and all Australian governments establish and adequately resource independent National Preventive Mechanisms and facilitate SPT visits as part of implementing Australia's obligations pursuant to OPCAT.

16. The Committee recommend that all Australian governments establish and adequately resource an independent police oversight body with a mandate and adequate powers to investigate all allegations of police misconduct.

17. The Committee recommend that the Australian government legislate a national Human Rights Act consistent with the recommendations of the Parliamentary Joint Committee on Human Rights;

18. The Committee recommend that the Australian government ensure that every state and territory introduce or update human rights legislation to give full effect to Australia's international obligations, and that rights protected under such legislation are enforceable, with effective remedy accessible and available;

19. The Committee recommend that the Australian government ratify the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure.

3. Outcomes and impacts of youth incarceration across Australia

The worst response to a child in crisis is to punish and isolate them from their communities, families and friends. The medical evidence is clear that any engagement with the criminal legal system causes harm to a child - from police contact right through to the deprivation of liberty in child prisons.[4]

The criminal legal system fails to recognise that children who are in contact with the law are often already experiencing multiple forms of disadvantage, including intergenerational trauma, exposure to violence, poverty, family breakdown, and systemic racism. Imprisoning children does nothing to address the underlying causes of their behaviour. To the contrary, research shows that early contact

[4] Australian Medical Association, Submission to the Australian Human Rights Commission: National Children's Commissioner's youth justice and child wellbeing reform consultation (2023).

with the criminal legal system significantly increases the likelihood of ongoing involvement with the system throughout a child's life.[5]

The carceral approach not only fails to address the root causes of behaviour by children, it also entrenches cycles of disadvantage and harm, particularly for Aboriginal and Torres Strait Islander children, who are disproportionately more likely to be:[6]

- Stopped, questioned, and searched by police,
- Arrested, rather than receive a caution or formal warning,
- Taken into custody once arrested, instead of being summonsed to appear in court,
- Remanded in custody rather than granted bail.

The current approach also has a disproportionate impact on children with complex needs and disability. The Banksia Hill Project was the first study in Australia to assess and diagnose children in a custodial setting for Fetal Alcohol Spectrum Disorder (FASD), a neurodevelopmental disorder that occurs when an unborn child is exposed to alcohol in the womb. The study worked with children between the ages of 10–17 who were sentenced to a period of incarceration at Banksia Hill youth prison in Western Australia between 2015 and 2016. The study assessed children against the following domains: neurology, cognition, attention, executive function, motor, language, memory, adaptive skills, social, academic and communication skills. The results of the study showed that of the 99 children who completed assessments, 89% had at least one severe impairment against the domains assessed, and 65% had at least three domains severely impaired.[7]

While formal studies have not been undertaken in youth prison settings in other jurisdictions, the circumstances and unmet needs of children in detention are likely to be similar. For instance, in their submission to the Disability Royal Commission, the Northern Territory Children's Commissioner noted that more than a third of all youth detainees in the Northern Territory have FASD, noting that "it is impossible to talk about abuse and neglect of children with disability in child protection without discussing the interconnectedness with youth justice."[8] Australian Institute of Health and Welfare data also shows that, in the four-year period between July 2012 and June 2016, one in three children under youth justice supervision received an alcohol and other drug (AOD) treatment service.[9]

The prison-industrial complex is not capable of supporting children suffering from trauma and children who have unmet disability, health or social needs. When governments doggedly pursue carceral and punitive responses to children in need, it only deepens the trauma children experience. Incarcerated children face a significantly increased risk of depression, self-harm, suicidality, and impaired emotional and social development. Solitary confinement and isolation, often used in youth detention settings, can have devastating, long-term, and sometimes irreversible impacts on a child's mental health and overall well-being.[10] People with lived experience of incarceration speak frequently

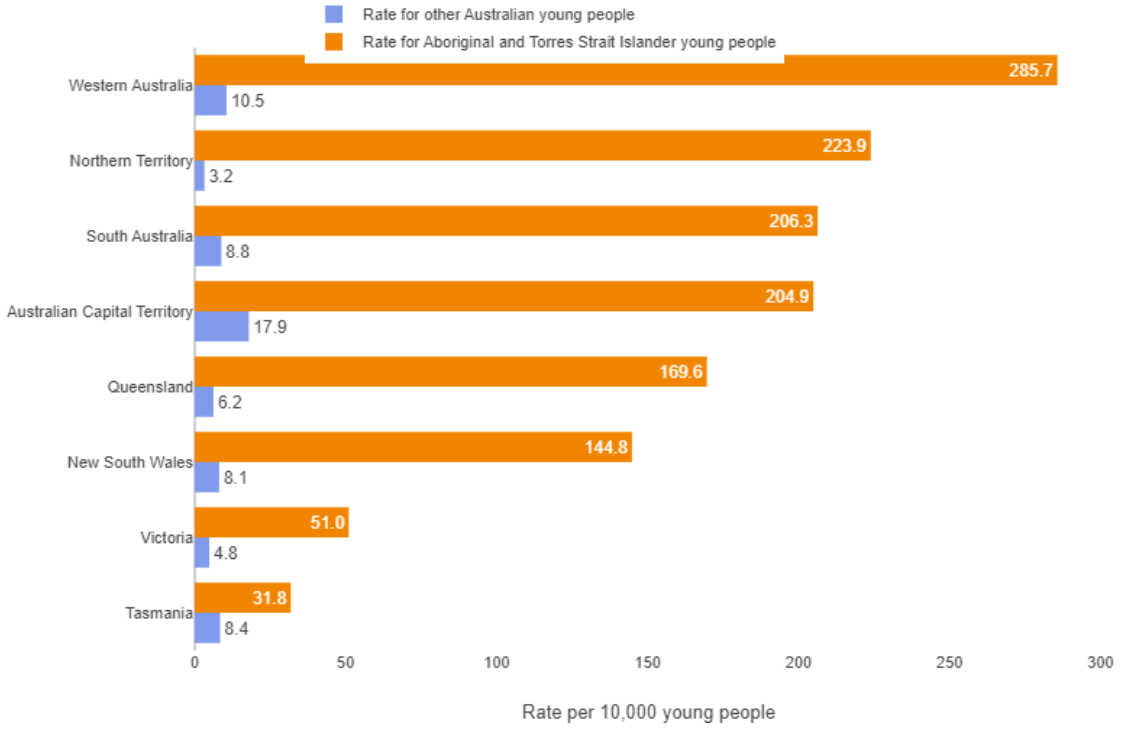
[5] Sentencing Advisory Council Victoria, *Children who enter youth justice system early are more likely to reoffend* (October 4 2023) <https://www.sentencingcouncil.vic.gov.au/news-media/media-releases/children-who-enter-youth-justice-system-early-are-more-likely-reoffend>
[6] Victorian Government, *Victorian Government Aboriginal Affairs Report* (2023) <https://www.firstpeoplesrelations.vic.gov.au/victorian-government-aboriginal-affairs-report-2023/justice-and-safety>
[7] Bower C, Watkins RE, Mutch RC, *et al.*, Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia (2018) 8(2) *BMJ*.
[8] Office of the Children's Commissioner, Northern Territory, Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (2021).
[9] Australian Institute of Health and Welfare, Overlap between youth justice supervision and alcohol and other drug treatment services: 1 July 2012 to 30 June 2016 (2018) <https://www.aihw.gov.au/reports/youth-justice/overlap-youth-justice-alcohol-drug-treatment>
[10] Singh Y, Old enough to offend but not to buy a hamster: the argument for raising the minimum age of criminal responsibility, (2023) 30(1) *Psychiatry, Psychology and Law*, 51-67.

about the impact of incarceration – from police contact to exposure to harmful practices in prison like solitary confinement – as worsening their condition.

4. Mass incarceration of First Nations children

Aboriginal and Torres Strait Islander children are drastically overrepresented in the criminal legal system. Examining the rates at which First Nations children were incarcerated across Australian jurisdictions in 2022-23 paints a grim picture. First Nations children between the ages of 10-17 were 29 times more likely than non-First Nations children to be in detention nationwide in 2023.[11] Western Australia had the highest number of First Nations children incarcerated: 285.7 per 10,000 people.[12] The Northern Territory had the largest gap between First Nations and non-First Nations children: incarceration rates for First Nations children were 70 times the rate for non-First Nations children.[13] In Victoria, this rate was 10.6 times higher for First Nations children than non-First Nations children.[14] In every jurisdiction except the Northern Territory and Victoria, incarceration rates for First Nations children increased between 2021-22 and 2022-23.[15]

Data from the Australian Institute of Health and Welfare[16] below shows the stark gap in incarceration rates between First Nations and non-First Nations children.



This is not to say that First Nations children 'are doing more crime' – a narrative often perpetuated in media and political circles, but rather that there are inherent injustices faced by First Nations children that increase the likelihood of their contact with the criminal legal system. Understanding the mass incarceration of First Nations children in the criminal legal system requires us to understand that "offending behaviours lie at the end of a continuum of risk. This continuum includes exposure to

[11] Australian Institute of Health and Welfare, Youth justice (2023) <https://www.aihw.gov.au/reports/australias-welfare/youth-justice>
[12] Ibid.
[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] Ibid.

intergenerational and current trauma within the historical context of genocide, and the ongoing issues of generational poverty, social disadvantage and discrimination."[17]

Nationally, more than one-third of First Nations children in incarceration in 2022-23 were aged between 10-13 years when they first entered the criminal legal system.[18] Substantial evidence shows that the younger a child is when they first encounter the criminal legal system, the more likely it is that they will become entrenched in the criminal legal system.

Children who are engaged in the criminal legal system at a young age often have backgrounds of trauma, unstable and unsafe housing, mental health issues, disability, and histories of drug and alcohol use. Children who have been removed from their families and placed in out-of-home care are pipelined to prison.

There is also a clear causative pathway between health-related factors and engagement with the criminal legal system for First Nations children. For instance, First Nations children are 14 times more likely than their non-First Nations counterparts to receive both alcohol and drug treatment and youth justice supervision.[19]

In this light, "young people ending up in the criminal justice system represent a failure of other systems to properly identify and provide support and effective interventions across development."[20] Instead of investing in appropriate supports and early intervention, governments across this continent have routinely opted to criminalise and imprison children who have experienced significant challenges, including disability, severe trauma, homelessness, family violence, and substance use.

Countless First Nations experts alongside medical, psychological and legal experts have long advocated for the need for early intervention for Aboriginal and Torres Strait Islander children and young people who are in contact with the criminal legal system. Intervention that takes the form of trauma informed, culturally safe and appropriate care and support for the child and their family is critical to ensuring effective intervention.

5. Justice consistent with Australia's international obligations

Ending the mass incarceration of children

Governments across the country have consistently invested in police and prisons over public housing, support services and community-based, self-determined alternatives to criminalisation and incarceration. Successive failures by governments to pursue evidence-based reform in favour of 'tough on crime' politics has caused immense harm to First Nations children and communities in particular.

Rather than punishing and caging children, Australia must comply with its international obligations by ensuring that all children and their families have the care and support needed to heal and eventually thrive.

[17] Milroy, H., Watson M., Kashyap, S., and Dudgeon P, First Nations peoples and the law (2021) 50 Aust Bar Rev, 510.
[18] Productivity Commission. Young people first coming into the youth justice system aged 10-13: Closing the Gap data dashboard <https://www.pc.gov.au/closing-the-gap-data/dashboard/se/outcome-area11/young-people-first-coming-into-youth-justice-system-aged-10-13>
[19] Ibid.
[20] Milroy, H., Watson M., Kashyap, S., and Dudgeon P, n 17.

Minimum age of criminal responsibility

In many jurisdictions across Australia, the minimum age of criminal responsibility in Australia is just 10 years old. This means that children as young as 10 can be arrested, charged with an offence, hauled before a court, locked away in detention and deprived of their liberty and ultimately their wellbeing.

Ending the mass imprisonment of children starts with raising the minimum age of criminal responsibility to at least 14 years old now, without exception.

For years, governments across Australia have sat on their hands and failed to act on advice from Aboriginal and Torres Strait Islander communities, medical and legal experts, independent parliamentary inquiries, United Nations bodies and their own justice departments that the minimum age of criminal responsibility should be raised to at least 14 years old.

The *United Nations Convention on the Rights of the Child* (**CRC**) requires governments to establish a minimum age of criminal responsibility,[21] and the UN Committee on the Rights of the Child has recommended that countries should set a minimum age no lower than 14 years, without exception.[22]

Medical experts, psychologists and criminologists agree that children under the age of 14 years have not developed the social, emotional and intellectual maturity necessary for criminal responsibility.[23]

The current low age of criminal responsibility inordinately impacts and harms Aboriginal and Torres Strait Islander children, given their disproportionate representation the criminal legal system and in child prisons. Given that children in the criminal legal system are more likely to have disability and neurodevelopment impairment, complex trauma, mental health disorders and drug and alcohol use disorders, the current approach also effectively amounts to the criminalisation of currently unmet health, disability and trauma needs.

Criminalising children does not result in safer communities but instead increases the likelihood of entrenchment in the criminal legal system. Australian Institute of Health and Welfare data confirms the increased likelihood of recriminalisation the younger a child is when they come into contact with the criminal legal system.[24]

Since 2023, there have been some movement in some Australian jurisdictions to increase the minimum age of criminal responsibility, with the ACT Government enshrining the transition from raising the age to 12 now to 14 in 2025 in law,[25] and the Tasmanian Government committing to raise the age from 10 to 14 with no exceptions by 2029.[26] The scale and pace of reform remains too slow.

Alarmingly, there has also been regression in some Australian jurisdictions. In August 2024, the recently elected Northern Territory Country Liberal Party promised to lower the minimum age of criminal responsibility back down to 10 years of age, barely one year after raising it to 12,[27] and the Victorian Government abandoned its commitment to raise the minimum age of criminal responsibility to 14 years old.[28]

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[21] Convention on the Rights of the Child (**CRC**), opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) [40(3)(a)].
[22] Committee on the Rights of the Child, General comment No. 24 on children's rights in the child justice system, CRC/C/GC/24 (18 September 2019).
[23] Jesuit Social Services, Too much too young: Raise the age of criminal responsibility to 12 (October 2015) 4.
[24] Australian Institute of Health and Welfare, Young people returning to sentenced youth justice supervision 2017-18 (2019), Juvenile justice series no. 23. Cat. no. JUV 130.
[25] *Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023* (ACT).
[26] Tasmanian Government, Department for Education, Children and Young People, Youth Justice Blueprint 2024-2034 (December 2023).
[27] The Guardian, Country Liberals to lower criminal age to 10 years old in NT as Finocchiaro talks tough on law and order (26 August 2024) <https://www.theguardian.com/australia-news/article/2024/aug/26/country-liberals-to-lower-criminal-age-to-10-years-old-in-nt-as-finocchiaro-talks-tough-on-law-and-order>.
[28] Premier of Victoria, Cracking Down on Repeat Serious Offenders (Media Release, 13 August 2024) <https://www.premier.vic.gov.au/cracking-down-repeat-serious-offenders>

There is also a need to ensure that 'raise the age' reforms do not introduce exceptions for specified conduct or new powers to police children under the minimum age of criminal responsibility. In this regard, the Victorian Government recently legislated to raise the age from 10 to 12 years of age but simultaneously handed the police new powers over children aged 10 and 11, including powers to transport them in a police vehicle; detain them, including at police stations, without any express time limits; use force on them; and subject them to searches.[29] These powers are on top of existing common law and statutory powers available to police. Granting police additional powers over children under the minimum age of criminal responsibility undermines the entire purpose of raising the age and risks causing further harm to children and entrenchment in the criminal legal system.

In South Australia, a discussion paper released earlier this year similarly proposed new powers to police and detain children, as well as broad exceptions to raising the minimum age of criminal responsibility, including carve outs for so-called 'serious offences'. This is contrary to the recommendation of the UN Committee on the Rights of the Child, which noted that "[s]uch practices are usually created to respond to public pressure and are not based on a rational understanding of children's development."[30]

Rather than replicate criminal legal responses, governments across Australia must resource Aboriginal and Torres Strait Islander community-controlled organisations and other services to build alternative, self-determined and culturally safe responses backed by the evidence.

Recommendations

1. The Committee recommend that the Australian government ensure that all Australian governments raise the minimum age of criminal responsibility to at least 14 years of age, without exception and without the introduction of new powers to police and detain children.

2. The Committee recommend that the Australian government ensure that all Australian governments transfer decision-making power, control and resources to Aboriginal and Torres Strait Islander community-controlled organisations and communities to build alternative, self-determined supports for children and young people.

Broken and discriminatory bail laws

In December 2023, the United Nations Subcommittee on the Prevention of Torture (**SPT**) urged Australia to reduce the "extraordinary number of people deprived of their liberty on remand" in Australia.[31] In line with the presumption of innocence and the *United Nations Standard Minimum Rules for Non-custodial Measures* (The Tokyo Rules), the detention of people awaiting trial must be the last resort.[32]

With specific regard to children, under Article 37(b) of the CRC, Australia is obliged to ensure that the "arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time".

The detention of children as a measure of last resort is undermined by the mass incarceration of children on remand across Australia: as noted by the National Children's Commissioner this year, the overwhelming majority of incarcerated children in Australia are unsentenced, on remand, with some detained because there is no safe place for them to live while on bail.[33] Concerningly, the proportion of

[29] *Youth Justice Act 2024* (Vic), ss 66-79.
[30] Committee on the Rights of the Child, n 22 [25].
[31] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**SPT**), Visit to Australia undertaken from 16 to 23 October 2022: recommendations and observations addressed to the State party (Report, 20 December 2023) [33].
[32] *United Nations Standard Minimum Rules for Non-custodial Measures,* A/RES/45/110 (entered into force 2 April 1991) [6.1-6.3].
[33] Australian Human Rights Commission (**AHRC**), 'Help way earlier!': How Australia can transform child justice to improve safety and wellbeing (2024) 8.

people in unsentenced detention has increased nationally, with most young people in unsentenced detention being on remand.[34]

The crisis of children behind bars has been fuelled by dangerous and discriminatory bail laws across the country. Such laws include reverse onus bail provisions, which flip the usual process of bail on its head and make time behind bars the default for too many children. Strict bail conditions and the criminalisation of breaches of bail conditions also pipeline children into detention. As reported by the SPT in December 2023, the cost and conditions of bail disproportionately affect Aboriginal and Torres Strait Islander peoples.[35]

In Victoria, changes to the bail laws in 2017 and 2018 that were intended to target adult men triggered an increase in the number of children on remand. As a result, in August 2023, the Victorian Government announced it was repealing bail offences under these laws, as they had a disproportionate impact on women, children and First Nations peoples.[36] However, the Victorian Government re-introduced specified bail offences for children this year, together with stricter bail tests.[37] Additionally, instead of repealing almost all reverse onus bail provisions for children, as previously promised, the Victorian government introduced a trial of electronic monitoring in the *Youth Justice Act 2024* (Vic) (**Youth Justice Act**).[38] Far from an alternative to incarceration, electronic monitoring is another way of punishing children – indeed, the Youth Justice Act includes further provision to remand children while the suitability of electronic monitoring is explored.[39]

In Queensland, the government passed laws[40] in March 2023 to criminalise children who breach bail conditions, overriding its own *Human Rights Act 2019* (Qld) for the first time to do so. Subsequently, in August 2024, the Queensland Government passed changes to its Charter of Youth Justice Principles that would scrap the principle of detention as a last resort.[41]

In March 2024, the New South Wales Government passed legislation[42] to tighten the test for the grant of bail for children who commit specified motor vehicle-related offences.

There is no evidence that stricter bail laws improve community safety, and they fail to serve any rehabilitative purpose. As reported by the National Children's Commissioner, access to therapeutic programs can be limited or non-existent whilst on remand, which means that some children are not able to engage in any such programs because the length of their remand may be longer than their final sentence.[43]

Consistent with the call of the family of Veronica Nelson - a Gunditjmara, Dja Dja Wurrung, Wiradjuri and Yorta Yorta woman who died in custody while on remand due to Victoria's bail laws - for the Victorian government to adopt Poccum's Law,[44] there should be no presumptions against bail. In particular, children should never be subject to reverse-onus bail provisions, which only serve to entrench them in the criminal legal system.

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[34] Australian Institute of Health and Welfare, Youth Detention Population in Australia 2023 (Web Report, 13 December 2023) <https://www.aihw. gov.au/reports/youth-justice/youth-detention-population-in-australia-2023/contents/trends-in-sentenced-and-unsentenced-detention>.
[35] SPT, n 31 [33].
[36] Premier of Victoria, New Reforms To Make Victoria's Bail Laws Fairer (Media Release, 14 August 2023) <https://www.premier.vic.gov.au/new-reforms-make-victorias-bail-laws-fairer>.
[37] Premier of Victoria, n 28.
[38] *Youth Justice Act 2024* (Vic) Part 22.
[39] Ibid, Part 22.1, s 903, inserting new Part 2A, s 17G, into the *Bail Act 1977* (Vic).
[40] *Strengthening Community Safety Bill 2023* (Qld).
[41] *Queensland Community Safety Act 2024* (Qld), s 132.
[42] NSW Attorney-General, New bail and performance crime laws passed to prevent youth crime (Media Release, 22 March 2024) <https://www.nsw.gov.au/media-releases/new-bail-and-performance-crime-laws-passed-to-prevent-youth-crime>.
[43] AHRC, n 13 52.
[44] Victorian Aboriginal Legal Service, Poccum's Law: the blueprint to fix the Andrews Government's discriminatory bail laws (Media Release, 22 March 2023) <https://www.vals.org.au/poccums-law-the-blueprint-to-fix-the-andrews-governments-discriminatory-bail-laws/>.

Recommendation

3. The Committee recommend that the Australian government ensure that all Australian governments reform their bail laws to repeal reverse onus provisions and legislate a presumption in favour of bail for all offences, with the onus on the prosecution to demonstrate that bail should not be granted due to there being a specific and immediate risk to the physical safety of another person or the person posing a demonstrable flight risk.

Decarceration

In recognition of the harms caused by incarceration, which are disproportionately felt by Aboriginal and Torres Strait Islander peoples, decarceration – ending the imprisonment of children and young people – is urgently needed.

Alongside raising the minimum age of criminal responsibility to at least 14 years old and repealing dangerous bail laws that pipeline too many children and young people into prisons, all Australian jurisdictions must legislate a minimum age of detention of at least 16 years of age. This conforms with the principle of detention as a last resort and has been recommended by the UN Committee on the Rights of the Child.[45] In Victoria, the Yoorrook Justice Commission has similarly recommended that the Victorian Government urgently legislate to prohibit the detention of children under 16 years.[46] Notably, following the recommendation of the Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings,[47] the Tasmanian Government committed to raising the minimum age of detention to 16 by 2029.[48]

Additionally, mandatory minimum sentencing laws, which are contrary to the principles of proportionality[49] and detention as a last resort, and which disproportionately impact Aboriginal and Torres Strait Islander peoples,[50] must be abolished. In Western Australia, children remain subject to minimum mandatory sentences for specified offences.[51]

Access to diversion must be broadened and enshrined in law. This starts with legislative presumptions in favour of alternative pre-charge measures and diversion at any stage of legal proceedings; removing exclusions in relation to diversion based on specified conduct; removing requirements for prosecutorial consent to diversion; and ensuring access to diversion is not conditional on the admission or denial of guilt.

Concerningly, the National Children's Commissioner has identified that first responders such as police officers are failing to use options which limit or prevent incarceration.[52] This is especially troubling given that diversion is often available at the discretion of police, underscoring the need to resource and expand the availability of alternative first responder models led by Aboriginal Community-Controlled Organisations and youth worker and health practitioner-led approaches.

Governments must work to address the underlying factors that result in criminalisation in the first place, and provide culturally safe, community-based supports to enable children to thrive. Successive inquiries have found that the current, punitive approach to child justice, which centres carceral solutions, does not reduce recriminalisation nor improve community safety. The 2022 Inquiry into Victoria's Criminal Justice System recommended an overhaul of the state's criminal legal system in recognition of the fact that the current, punitive approach is "not reducing crime or improving

[45] Committee on the Rights of the Child, n 22.
[46] Yoorrook Justice Commission, Yoorrook for Justice Report (September 2023).
[47] Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse, Report (August 2023) 120.
[48] Tasmanian Government, n 26.
[49] Article 40 of the CRC confirms that criminal justice responses for children must be age-appropriate, proportionate, and rehabilitative: CRC, n 21.
[50] NT Royal Commission into the Protection and Detention of Children in the Northern Territory (2017) Volume 4, 172.
[51] *Criminal Code 1913* (WA) ss 297, 318, 401(4).
[52] AHRC, n 33, 104.

community safety".[53] Similarly, the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory found that "locking kids up does not stop them breaking the law and does not make the community safer."[54]

Money being funnelled by governments into opening new or expanding existing prisons should be reallocated to culturally safe services that meet the needs of children at risk of criminalisation and help divert them away from the criminal legal system.

In other jurisdictions, decarceration has delivered positive outcomes for children and communities. By way of example, we note the movement to replace incarceration with trauma-informed care in Hawai'i has eliminated the incarceration of girls there. Reforms included the federally funded Project Kealahou, based on principles of self-determination and connection to culture, which offered young girls at risk of incarceration "gender-positive, trauma-informed, culturally responsive, community-based services",[55] including mental health and substance use supports.

In Scotland, after two children took their lives at the same youth prison in 2018 and 2024, legislation – which came into force in August 2024 – was passed to ban children under 18 from being sent to prison.[56] This prohibition is intended to ensure that children are placed in safe, suitable accommodation and that their wellbeing and rehabilitation is at the heart of their care.[57]

Recommendations

4. The Committee recommend that the Australian government ensure that all Australian governments raise the minimum age of detention to at least 16 years old.

5. The Committee recommend that the Australian government ensure that all Australian governments repeal mandatory sentencing laws.

6. The Committee recommend that the Australian government ensure that all Australian governments introduce laws which enshrine presumptions in favour of alternative pre-charge measures and diversion at any stage of legal proceedings; remove exclusions in relation to diversion based on specified conduct; remove requirements for prosecutorial consent to diversion; and ensure access to diversion is not conditional on the admission or denial of guilt.

7. The Committee recommend that the Australian government ensure that all Australian governments end the incarceration of children and commit to a plan of action to do so. Money being funnelled into prisons should be reallocated to culturally safe services that meet the needs of children and young people at risk of criminalisation and divert people away from the criminal legal system.

Ending torture and cruel, inhuman or degrading treatment

Mistreatment of children and young people in prisons and police cells across the country is all too common.

Subjecting children and young people in incarceration to mistreatment and punishment can cause lifelong trauma and undermines any rehabilitative purpose that prison might serve. Such

[53] Victorian Parliament Legal and Social Issues Committee, Inquiry into Victoria's Criminal Justice System (Final Report, 24 March 2022).
[54] Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, Report Overview (17 November 2017).
[55] Suarez E, Jackson DS, Slavin LA, Michels MS, McGeehan KM. Project Kealahou: improving Hawai'i's system of care for at-risk girls and young women through gender-responsive, trauma-informed care. *Hawaii J Med Public Health*. 2014;73(12):387-392.
[56] *Children (Care and Justice) (Scotland) Act 2024*.
[57] Scottish Government, No under 18s in Young Offenders Institutions (Media Release, 2 September 2024) <https://www.gov.scot/news/no-under-18s-in-young-offenders-institutions/>.

mistreatment can also amount to cruel, inhuman and degrading treatment – contrary to state-based human rights protections and Australia's obligations under international law.

The CRC makes clear that children should not be subjected to torture or other cruel, inhuman or degrading treatment or punishment.[58] Children deprived of liberty must be treated with humanity and respect for the inherent dignity of the human person, and in a way that takes into account the needs of a person their age.[59]

Human rights laws in the ACT, Victoria and Queensland similarly enshrine the right to protection from torture and cruel, inhuman or degrading treatment.[60]

At the outset, it is worth noting that such treatment cannot be stamped out by changes to legislation alone, given the persistence of degrading practices which are not authorised by law and the accountability gap for police and prison misconduct. Ending the incarceration of children is the most effective way to ensure that they are not subjected to cruel, inhuman or degrading treatment, punishment and torture at the hands of police and prisons.

Isolation and solitary confinement

Under the United Nations Standard Minimum Rules for the Treatment of Prisoners (**the Nelson Mandela Rules**), solitary confinement – defined as the confinement of prisoners for 22 hours or more a day without meaningful human contact – is only to be used in exceptional cases when authorised as a last resort, for as short a time as possible and subject to independent review.[61]

The Nelson Mandela Rules and *The United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (**Havana Rules**) strictly prohibit the use of solitary confinement on children[62] and all disciplinary measures constituting cruel, inhuman or degrading treatment.[63] The practice is capable of causing immeasurable and lasting trauma to children, especially those with experiences of significant disadvantage and marginalisation.[64] Indeed, there have been reports of children self-harming to escape prolonged confinement in their cells in South Australia's youth prison, Kurlana Tapa.[65]

Given the mass incarceration of children and young people with disabilities in the criminal legal system,[66] it is notable that solitary confinement is prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures.[67] Indefinite solitary confinement and prolonged solitary confinement – the latter consisting of solitary confinement in excess of 15 consecutive days – is also prohibited.[68]

Despite the prohibitions on the use of solitary confinement imposed by international law, no jurisdiction in Australia prohibits solitary confinement.[47] Concerningly, while Australian jurisdictions tend not to use the term solitary confinement, practices akin to solitary confinement are effectively permitted by law and policy in various guises: 'separation', 'segregation', 'seclusion' or 'isolation'.

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[58] CRC, n 21 [37(a)].
[59] Ibid, [37(c))]
[60] *Human Rights Act 2004* (ACT), s 10; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 10; *Human Rights Act 2019* (Qld), s 17.
[61] *United Nations Standard Minimum Rules for the Treatment of* Prisoners (**Nelson Mandela Rules**) UN Doc E/CN.15/2015/L.6/Rev [44-45]
[62] Ibid [45(2)]; and *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (**Havana Rules**) Un Doc A/RES/45/113 [67].
[63] Ibid [67].
[64] See, for instance, Queensland Child Death Review Board, *Child Death Review Board Annual Report 2022–23* (2023) 38.
[65] The Guardian, Children self-harming to escape prolonged confinement in cells, South Australian watchdog says (30 June 2023) <https://www.theguardian.com/society/2023/jun/29/children-locked-in-cells-for-up-to-23-hours-at-south-australias-youth-detention-centre>.
[66] SPT, n 31 [37(b)]
[67] NT Royal Commission into the Protection and Detention of Children in the Northern Territory (2017) Volume 4, 172.
[68] Nelson Mandela Rules, n 61 [44-45]

During the Royal Commission into the Protection and Detention of Children in the Northern Territory in 2017, the Commission heard disturbing findings about the use of 'isolation' as a tool for behaviour management and punishment for children in Don Dale and Alice Springs youth prisons. Throughout the hearings that took place, many young people who served sentences at Don Dale or Alice Springs advocated for the abolition of isolation entirely,[69] but their calls remain unheeded.

While the laws and policies governing the use of confinement on children and young people in prison vary across states and territories, they have proved insufficient to prevent children and young people from being subjected to solitary confinement or otherwise isolated in circumstances which may amount to cruel, degrading and inhuman treatment. A ban in law on the use of solitary confinement is the bare minimum safeguard necessary to prevent children from being subjected to this treatment.

Following the SPT's terminated visit to Australia in October 2022, the SPT reported "especially poor" conditions in youth prisons, including children being left alone in their cells for up to 23 hours per day in Banksia Hill youth prison in Western Australia.[70]

Prior to that, in December 2022, the United Nations Committee against Torture similarly expressed serious concern about the solitary confinement of children, in particular at Banksia Hill, the Don Dale youth prison in the Northern Territory and the Ashley youth prison in Tasmania.[71]

The documented use of confinement on children due to staffing shortages and as a means of discipline or control,[72] as well as 'lockdowns' pursuant to restrictions introduced during the Covid-19 pandemic[73] may similarly constitute cruel, inhuman or degrading treatment in breach of children's rights under the CRC, Nelson Mandela Rules and Havana Rules. In recognition of this, the national children's commissioner has called on all Australian governments to prohibit solitary confinement, as well as the use of isolation as punishment in any circumstance.[74]

Recommendations

8. The Committee recommend that the Australian government ensure that all Australian governments prohibit in law:
    a. the use of solitary confinement, by any name, on children and on people with disabilities in places of detention;
    b. the use of prolonged solitary confinement, by any name, on people in places of detention; and
    c. the use of confinement, by any name, as a means of control or punishment.

Strip searching

Like other forms of sexual violence, strip searching may amount to inhumane and degrading treatment.[75] Strip searching may also constitute a serious and unjustified limitation on the rights of

[69] Royal Commission into the Protection and Detention of Children in the Northern Territory. (2017). *Final report* (Vol. 2A).
[70] SPT, n 31 [72].
[71] Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**), Concluding observations on the sixth periodic report of Australia (5 December 2022) [37(d)].
[72] See, for instance, the case of an Aboriginal child with an intellectual disability at Cleveland youth prison in Queensland who was reported to have likely spent 500 days confined to his cell for more than 20 hours a day in the two-year period from approximately June 2021: The Guardian, Five hundred days in solitary: Queensland teenager's case 'a major failure of our system' (26 June 2023) <https://www.theguardian.com/australia-news/2023/jun/26/500-days-of-solitary-aboriginal-teen-spent-extraordinary-period-in-isolation>.
[73] SPT, n 31 [60].
[74] AHRC, n 33 91.
[75] See, for instance, the European Court of Human Rights' decision in *Van der Ven v. the Netherlands* (50901/99), 61 – 63. The Queensland Human Rights Commission similarly recognised that strip searches may violate the prohibition on inhuman and degrading treatment in section 17 of the *Human Rights Act 2019* (Qld): Queensland Human Rights Commission, Stripped of our dignity: a human rights review of policies, procedures, and practices in relation to strip searches of women in Queensland prisons (September 2023) 65.

people in prison, which are protected under international law and domestic human rights laws. Relevant rights include the right to:

- humane treatment in detention;
- freedom from cruel, inhumane and degrading treatment or punishment;
- non-interference with privacy, including bodily integrity;
- protection of families and children; and
- equality.

These rights are protected in international human rights treaties to which Australia is a party, including the International Covenant on Civil and Political Rights[76] and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[77] They are also enshrined in domestic human rights legislation in the ACT, Victoria and Queensland.[78]

The Nelson Mandela Rules further provide that intrusive searches such as strip searches should be undertaken only if absolutely necessary.[79] Searches should not be used to harass, intimidate or unnecessarily intrude on privacy, and records should be kept of the searches, the reason for the searches, who conducted them, and the results of the search.[80]

The laws and policies governing the strip searching of children and young people vary across Australian jurisdictions. In many states and territories, overly broad laws permit strip searching, including as a matter of prison routine. For instance, data obtained by the Human Rights Law Centre revealed that in April 2022, out of 127 strip searches conducted at Frank Baxter and Cobham youth prisons in NSW,[81] the reason recorded for 119 (93.7%) of the strip searches was "new admission". This appears to be a routine, rather than intelligence-led, reason for search.

Despite governments' refrain that strip searching is needed to maintain the 'security or good order' of prisons, strip searching is not a conductive means of achieving this aim. In a 2019 review, the Western Australian Office of the Inspector of Custodial Services found no evidence that strip searching deters people trying to bring contraband into prisons, and indeed no evidence of any relationship between strip search frequency and rates of drug detection.[82]

Strip searching, and the abuses of power connected to it, cause trauma to incarcerated children and compound previous trauma arising out of child abuse or neglect, institutional abuse, family violence and sexual violence.

For children in prisons, strip searching is a particularly stark "manifestation of power relations"[83], involving adult staff forcing children to undress in front of them. Despite the breadth of powers granted to prison staff to strip children, a culture of impunity in youth prisons has enabled practices in excess of these powers to proliferate. For instance, the Northern Territory Royal Commission into the abuses at the Don Dale youth prison found that girls had been inappropriately physically handled,

[76] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force on 23 March 1976).
[77] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
[78] *Human Rights Act 2004* (ACT), *Charter of Human Rights and Responsibilities Act 2006* (Vic), *Human Rights Act 2019* (Qld).
[79] Nelson Mandela Rules, n 62, rule 52.
[80] Ibid, rule 51.
[81] The Human Rights Law Centre was unable to access data for the other youth prisons in NSW, i.e. Acmena, Orana, Reiby and Riverina youth justice centres.
[82] Office of the Inspector of Custodial Services (WA) (OICS), Strip searching practices in Western Australian prisons (2019) 8–9
[83] Lord Carlile of Berriew QC, An independent inquiry into the use of physical restraint, solitary confinement and forcible strip searching of children in prisons, secure training centres and local authority secure children's homes, The Howard League for Penal Reform (2006) 58, <howardleague.org/wp-content/uploads/2016/03/Carlile-Report-pdf.pdf>.

restrained and stripped of their clothing by male prison staff,[84] and that children were being subjected to random strip-searching following family visits without any justification.[85]

Perpetrators of child sexual abuse have also exploited the operationalisation of strip searching as an opportunity to groom and sexually abuse children in youth prisons, with the Royal Commission into Institutional Responses to Child Sexual Abuse documenting victim survivors' accounts of prison staff exploiting strip searches to digitally penetrate, touch and sexualise them.[86]

To ensure the safety and wellbeing of children, their strip searching must be banned in law. Less intrusive alternatives to strip searching exist, including wands and body scanners. In recognition of the harmful impact of strip searches on children in youth prisons, the ACT has recently updated its youth prison standards to provide that strip searching should not be used, and that body scanners or direct observations should be used as alternatives.[87]

Alternative search methods may not even be necessary at all given other measures of control already imposed on people in prisons, like direct observations and saliva swab testing. Alternative search methods should therefore remain a last resort and should not be used as punishment or for any other improper purpose.

Recommendations

9. The Committee recommend that the Australian government ensure that all Australian governments urgently enact law reform to cease and prohibit the practice of strip searching of people in all places of detention.
10. The Committee recommend that the Australian government ensure that all Australian governments urgently implement safer and less invasive alternatives such as body scanners, which should only ever be used as a last resort when absolutely necessary, after less intrusive alternatives have been exhausted, an individual risk assessment has been completed and there remains objectively reasonable grounds to believe that the person is carrying dangerous contraband.
11. The Committee recommend that the reasons for any less invasive search – including the risk assessment, the basis of reasonable belief, the nature of any intelligence and relevant human rights considerations – be documented, together with any items identified by the search.

Spit hoods and other restraints

The Nelson Mandela Rules prohibit the use of restraints which are inherently degrading or painful and provide that any other instruments of restraint should only be used as authorised by law and in extremely narrow and limited circumstances.[88]

The use of spit hoods and other degrading restraints across Australia contravenes these rules and is often characterised by a failure to comply with the patchwork of laws and policies which attempt to regulate their use.

There is no safe way to use spit hoods. Spit hoods have been implicated in the deaths of people in custody, including Aboriginal and Torres Strait Islander peoples. In 2019 Wiradjuri, Kookatha and Wirangu man Wayne "Fella" Morrison tragically died after being restrained by this dangerous and degrading device. According to the Guardian Australia's Deaths Inside database,[89] from 2008-2019 at

[84] Royal Commission into the Protection and Detention of Children in the Northern Territory (Final Report, 2018) 447.
[85] Ibid, 257.
[86] Royal Commission into Institutional Responses to Child Sexual Abuse (Final Report, 2017) 93.
[87] ACT Inspector of Correctional Services, ACT Standards for Youth Detention Places (2024) 37.
[88] Nelson Mandela Rules, n 62 [47].
[89] The Guardian, Deaths inside: Indigenous Australian deaths in custody (August 2018) < https://www.theguardian.com/australia-news/ng-interactive/2018/aug/28/deaths-inside-indigenous-australian-deaths-in-custody>.

least 14 First Nations people died in custody as a direct result of a medical episode following use of physical, mechanical and/or chemical restraint.

Ongoing and powerful advocacy led by the family of Wayne "Fella" Morrison has resulted in legislative bans on spit hoods in South Australia[90] and New South Wales.[91] The recently passed Youth Justice Act in Victoria bans the use of spit hoods in youth prisons and police custody.[92]

The remaining Australian jurisdictions have yet to introduce any ban on the use of spit hoods in law. Alarmingly, the recently elected Country Liberal Party government in the Northern Territory has promised to reintroduce the use of spit hoods on children.[93]

Nationally, there is a lack of basic data collection and public reporting on the use of force and restraint in custody. At minimum, all places of detention should be subject to reporting requirements around the use of restraint and spit hoods.

Recommendations

12. The Committee recommend that the Australian government ensure that all Australian governments ban the use of spit hoods (or similar devices) in law.

13. The Committee recommend that the Australian government ensure that all Australian governments ensure that the use of force and restraint in police custody and in prisons is documented and publicly reported on in a nationally consistent way.

Detention of children separately from adults

Australia has ratified the CRC but made a reservation to Article 37(c), which provides that "every child deprived of liberty must be separated from adults unless it is considered in the child's best interests not to do so". The Australian government has previously sought to justify this reservation on the basis that Australia's geography makes it difficult to comply with this right while also ensuring that children are able to maintain contact with their families.[94]

However, as noted by the National Children's Commissioner, "[c]hildren have been detained alongside adults predominately in major metropolitan centres and towns, and where considerations of geography are not the relevant barrier."[95]

The safety of children is at risk when they are imprisoned in the same facilities as adults. Unit 18, in Western Australia's Casuarina Prison, has been used to detain children from mid-2022. Just recently, on 30 August 2024, Western Australia recorded its second child death in youth detention.[96] This followed the death in custody of another child, Cleveland Dodd, ten months earlier in October 2023. Both children were Aboriginal boys who had been detained in Unit 18, a wing inside maximum-security adult prison, Casuarina Prison. The coronial inquest into Cleveland Dodd's death heard that conditions in Unit 18 were "cruel, degrading and inhuman".[97]

In Queensland, children as young as 10 years old[98] are being detained in deplorable conditions in adult watch-houses – designed to imprison people for short periods of time – for extended and

[90] *Statutes Amendment (Spit Hood Prohibition) Act 2021* (South Australia).
[91] *Detention Legislation Amendment (Prohibition on Spit Hoods) Act 2024* (NSW).
[92] *Youth Justice Act 2024* (Vic), ss 477(3)-(4) & 580(3)-(4).
[93] ABC News, Youth justice advocates condemn NT government proposal to reverse ban on using spit hoods on children (7 September 2024) <https://www.abc.net.au/news/2024-09-07/nt-spit-hoods-clp-policy-youth-justice-advocates-warning/104308508>
[94] Australian Government, Australia's Combined Second and Third Reports under the Convention on the Rights of the Child (Report, 2003) 467.
[95] AHRC, n 33 90.
[96] A 17-year-old boy whose family has requested he not be named.
[97] National Indigenous Times, 'Cruel and inhumane': teen's solitary cell before death (29 July 2024) <https://nit.com.au/29-07-2024/12776/top-official-hires-lawyer-following-inquest-revelations>.
[98] Queensland Family and Child Commission, Queensland Child Rights Report 2023 (2023) 31–32.

increasing[99] periods of time. Children in watchhouses can see and hear adults that are detained there, and children have been reported to witness people who are "drunk, abusive, psychotic or suicidal".[100] In 2023, a Queensland watch-house officer reported that there were incidents of adult prisoners exposing their genitals and imitating sexual acts to children of the opposite sex, and an incident where a girl was placed in a cell with two adult male prisoners.[101]

Under the *Human Rights Act 2019* (Qld), "an accused child who is detained must be segregated from all detained adults" and a convicted child "must be treated in a way that is appropriate for the child's age".[102] In 2023, following a Queensland Supreme Court decision which ordered the urgent transfer of three children from watch-houses where they had been detained for extended periods,[103] the Queensland Parliament voted to override these human rights protections in order to enable children to continue to be detained police watch houses.[104]

In Victoria, the recently passed Youth Justice Act allows for the transfer of children aged 16 and over to adult prisons.

Recommendation

14. The Committee recommend that the Australian Government withdraws its reservation to Article 37(c) of the *Convention on the Rights of the Child* and ensure that, in all jurisdictions, the detention of children in the same facilities as adults is prohibited by law unless it is considered in the child's best interests not to do so.

Independent oversight of police and prisons

Ratified by the Australian Government back in 2017, United Nations' anti-torture protocol, the Optional Protocol to the Convention Against Torture (**OPCAT**), provides a framework for stamping out cruel and degrading treatment by requiring governments to facilitate visits by the SPT and designate independent bodies to undertake inspections of places of detention.[105]

Australia's compliance with OPCAT is dismal. The SPT had to terminate its last visit to Australia in October 2022 after being blocked from carrying out its mandate to visit places of detention in New South Wales and Queensland.

Additionally, to date, only 6 of the 9 jurisdictions have formally nominated their independent detention oversight bodies – known as National Preventive Mechanisms – with the Victorian, NSW and Queensland Governments having failed to implement this bare minimum safeguard to protect against mistreatment in prisons.[106] We understand it is the position of these governments that the federal government should provide funding for independent detention oversight. So long as this funding standoff persists, people in all places of detention – including children and young people in prison and police watch-houses – will remain at risk of mistreatment.

In relation to mistreatment of children and young people by police, there is an urgent need for greater police accountability across Australia - police officers will continue to act with impunity so long as the status quo of police investigating police persists. To ensure accountability for mistreatment in police

[99] Queensland Family and Child Commission, Accountability and transparency key to watch house solution (Web Page, 12 December 2023) <https://www.qfcc.qld.gov.au/news-and-media/ accountability-and-transparency-key-watch-house-solution>.
[100] *Re Richard Jones (a pseudonym)* [2023] QChCM 1, 11.
[101] The Guardian, 'Illegal' strip searches of children among claims made by Queensland watch-house whistleblower (27 February 2023) <https://www.theguardian.com/australia-news/2023/feb/27/strip-searches-of-children-among-claims-made-by-queensland-watch-house-whistleblower>.
[102] *Human Rights Act 2019* (Qld), ss 33(1) and 33(3).
[103] *Youth Empowered Towards Independence Inc v Commissioner of Queensland Police Service* [2023] QSC 174.
[104] *Child Protection (Offender Reporting and Offender Prohibition Order) and Other Legislation Amendment Bill 2022* (Qld).
[105] *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**), GA Res 57/199, UN Doc A/RES/57/199 (9 January 2003) arts 3–4.
[106] Association for the Prevention of Torture, *Australia* (Webpage) <https://www.apt.ch/knowledge-hub/ opcat/australia>.

custody, as well as for any police misconduct in the investigation of cruel, inhuman and degrading treatment inflicted on children and young people at the hands of the state, each state and territory in Australia must establish an independent body for investigating complaints against police. Any such body must comply with international law requirements for allegations of cruel, inhuman and degrading treatment or torture to be met by prompt, impartial, thorough, effective and independent investigation.[107]

Recommendations

15. The Committee recommend that the federal government resolve the funding standoff with the states and all Australian governments establish and adequately resource independent National Preventive Mechanisms and facilitate SPT visits as part of implementing Australia's obligations pursuant to OPCAT.
16. The Committee recommend that all Australian governments establish and adequately resource an independent police oversight body with a mandate and adequate powers to investigate all allegations of police misconduct.

Effective remedy for violations of children's rights

While Australia has committed to uphold the CRC and other international human rights instruments, it has failed to directly and adequately incorporate these commitments into domestic law.

As recommended by the Parliamentary Joint Committee on Human Rights in May 2024,[108] the Australian Government must enshrine its obligations in a national Human Rights Act. In accordance with the recommendation of the National Children's Commissioner, a national Human Rights Act should incorporate the CRC.[109]

Creating a Human Rights Act for Australia will benefit the whole community. It will ensure that the rights of children, including the right to be treated fairly, be involved in decisions that affect them, have quality education, be treated with respect and dignity, and to grow up in a safe and healthy environment, are enshrined in law. It will also provide avenues for children to seek redress or remedy when their rights are violated.

It is important to note that human rights acts or charters exist already in Queensland, the ACT and Victoria, and have had success in protecting and promoting the rights of children. For example, in Victoria, children detained in the Barwon maximum security adult prison were able to challenge their transfer to that prison based on breaches of the Victorian *Charter of Human Rights and Responsibilities Act 2006.*[110]

A national Human Rights Act would apply to federal laws and federal public authorities, but it would not negate the validity of legislation in states and territories. As Commissioner Hollonds notes in her report, "state and territory governments are not exempt from international agreements and are obliged to play an active role to incorporate conventions into domestic legislation. By the federal government ratifying the Convention on the Rights of the Child, it is committing *all* Australian Governments to comply with the human rights protected therein."[111]

Recognising that police and prisons are primarily the domain of states and territories, Australia is in need of robust human rights protections in every state and territory. In jurisdictions without human rights legislation, people are deprived of effective mechanisms to enforce their rights, including the right to protection from cruel, inhuman and degrading treatment and torture.

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[107] OPCAT, n 105 [12]; Nelson Mandela Rules, n 62 [57(3) and 71(1)-(2)].
[108] Parliamentary Joint Committee on Human Rights, Parliament of Australia, Inquiry into Australia's Human Rights Framework (Final Report, May 2024), 9.11 and 9.42.
[109] AHRC, n 33, 4.
[110] *Human Rights Law Centre and Certain Children v Minister for Families and Children* [2017] VSC 251.
[111] AHRC, n 33, 31.

Even in the few domestic jurisdictions with human rights legislation, there remain significant barriers to people enforcing their rights. In Victoria and Queensland, claims under their human rights laws must 'piggyback' another primary claim, preventing standalone human rights challenges.[112] The remedies available for breaches of human rights are also limited in the ACT, Victoria and Queensland, which do not permit the recovery of damages.[113]

Australia must also ratify the Optional Protocol to the CRC on a Communications Procedure, to enable children to bring complaints of breaches of the CRC directly to the UN Committee on the rights of the child. This is substantially pressing given the current absence of adequate domestic remedies.

Recommendations

17. The Committee recommend that the Australian government legislate a national Human Rights Act consistent with the recommendations of the Parliamentary Joint Committee on Human Rights;
18. The Committee recommend that the Australian government ensure that every state and territory introduce or update human rights legislation to give full effect to Australia's international obligations, and that rights protected under such legislation are enforceable, with remedy accessible and available;
19. The Committee recommend that the Australian government ratify the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure.

[112] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 39; *Human Rights Act 2019* (Qld) s 59(1).
[113] *Human Rights Act 2004* (ACT), s 40C(4); *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 39(3); *Human Rights Act 2019* (Qld), s 59(3).