Australian Human Rights Commission

Inquiry into Australia's youth justice and incarceration system

Australian Human Rights Commission

Submission to the Senate Legal and Constitutional Affairs Committee

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1 Introduction

The Australian Human Rights Commission (Commission) makes this submission to the Senate Standing Committee on Legal and Constitutional Affairs (Committee) in relation to its inquiry into the Australia's youth justice and incarceration system.

This submission draws on the recently released Commission report, '*Help way earlier!': How Australia can transform child justice to improve safety and wellbeing* ('Help way earlier!').

'Help way earlier!' investigates opportunities for reform of child justice and related systems across Australia, based on evidence and the protection of human rights. It is the result of a project undertaken by the National Children's Commissioner (NCC) in 2023–24. The project included a submissions process, consultations with children and young people, families and community members, and interviews and roundtables with government and non-government stakeholders across Australia.

The Commission recommends that the Committee endorses the 24 recommendations made in the *'Help Way Earlier!'* report which provide an evidence base for how Australia can transform child justice to improve the safety and wellbeing of Australia's children.

For more detail than provided in this submission, please see the report and associated resources on the Commission website:

- Full report: *'Help way earlier!' How Australia can transform child justice to improve safety and wellbeing*
- Executive summary: *'Help way earlier!'*
- Easy read: *About the report by the National Children's Commissioner'*
- Easy read: *Recommendations to make the child justice system better*
- Submissions: *'Help way earlier!'*

2 Summary of the *'Help way earlier!'* report

Australia is not sufficiently protecting the rights of children. Children's rights are set out in the *United Nations Convention on the Rights of the Child* (CRC), and other international instruments that Australia has ratified. Australia's lawmakers and

decision-makers have obligations to take all appropriate measures to help all children in Australia realise their rights. However, reports and inquiries continue to highlight how our governments fail to protect their human rights.

Many children at risk of or in contact with the criminal justice system are dealing with multiple and complex issues in their lives which contribute significantly to their chances of offending and reoffending. Poverty, intergenerational trauma, violence and abuse, racism, homelessness, and inadequate healthcare are contributing factors in their contact with the justice system. These social determinants limit how children are able to enjoy their rights on a non-discriminatory basis, including the right to education, health, and an adequate standard of living, as well as the right to live in safety and to fully enjoy their culture.

When children enter the justice system, they may face additional breaches of their rights. For example, despite what we know about the harmful effects of detention on children, children as young as 10 can be detained in most parts of Australia. The overwhelming majority of these children are unsentenced, on remand, with some detained because there is no safe place for them to live while on bail. Many have disabilities and mental health issues which are exacerbated by detention and harmful conditions, including extended periods of time in isolation in their cells, as noted in numerous official reports. First Nations children and young people continue to be overrepresented in the criminal justice system, and particularly in detention.

Children and young people told the National Children's Commissioner about what they need in order to stay out of trouble, including that they want to be safe and to have a place to live. They want to participate in positive activities, and they want friends, connection to culture and supportive family relationships. They want to be able to go to a school where they feel they belong, and one day get a job. Children want to get extra help for themselves and their family members when it is needed. These things help children stay of trouble with the criminal justice system.

A national, child rights-based approach to reform is required. Recommendations from decades of inquiries, including Royal Commissions, have attempted to guide reform, in particular by focusing on prevention and early intervention in both child justice and child protection systems. However, responses have been piecemeal, uncoordinated and inadequate.

Despite evidence of the social determinants that are the root causes of offending behaviour, policy responses to these children are often only tinkering with the symptoms, with tougher policing, stricter bail laws, and more incarceration. This

is done under the guise of keeping the community safe but are often counterproductive. A human rights approach will not only support the wellbeing of children, but it will also make our communities safer. The solutions lie in transformational thinking and action to address systemic disadvantage.

Multiple barriers have stood in the way of child rights and evidence-based reform. Barriers include systemic racism; the fragmented way our governments operate; limited workforce capacity; lack of political commitment to evidence-based reform; pervasive 'tough on crime' rhetoric; and our persistent failure to make child wellbeing a national priority. These barriers to reform will not be addressed by a 'business as usual' approach. Transformational reform requires political will at all levels, including states and territories, and strong leadership, collaboration and coordination at the national level.

Many stakeholders, in submissions, interviews and roundtables, argued that the scale of the child rights crisis in Australia requires a nationally coordinated approach to reform. This type of reform should be driven by a National Taskforce for Reform of Child Justice Systems, a Cabinet Minister for Children, a Ministerial Council for Child Wellbeing, and the incorporation of the CRC in a National Children's Act as well as a Human Rights Act.

Reform requires placing children and their wellbeing at the centre of policymaking and service delivery; empowering First Nations children, families and communities; optimising community-based action; building a capable and child specialised workforce; basing systems on data and evidence; and embedding accountability for the rights of children. See section 3 below for all 24 recommendations.

3 Recommendations

Recommendation: The Committee endorses the 24 recommendations made in the *'Help Way Earlier!'* report which provide an evidence base for how Australia can transform child justice to improve the safety and wellbeing of Australia's children.

The recommendations in 'Help way earlier!' are as follows:

Recommendation 1: Australian Governments establish a National Taskforce for Reform of Child Justice Systems. This Taskforce should report to Ministers responsible for child justice and child wellbeing across jurisdictions.

Recommendation 2: The Australian Government appoints a Cabinet Minister for Children, with responsibility for the human rights and wellbeing of children in Australia.

Recommendation 3: The Australian Government establishes a Ministerial Council for Child Wellbeing, chaired by the Minister for Children, and reporting to National Cabinet.

Recommendation 4: The Australian Government incorporates the *Convention on the Rights of the Child* into Australian law through a National Children's Act as well as a federal Human Rights Act.

Recommendation 5: Australian Governments provide integrated, place-based health, education and social services for both children and their families.

Recommendation 6: The Australian Government increases the level of income support payments for children, young people and families.

Recommendation 7: Australian Governments urgently prioritise access to safe and affordable housing for children and families, including those in the child protection and justice systems.

Recommendation 8: Australian Governments prioritise access to comprehensive and culturally safe healthcare, including for children with multiple and intersecting needs.

Recommendation 9: Australian Governments resource schools to be community hubs integrated with health services and providing flexible learning options.

Recommendation 10: Australian Governments prioritise investments in prevention and early intervention through Aboriginal Community-Controlled Organisations.

Recommendation 11: Australian Governments improve availability of free and accessible community sport, music, other social activities, and cultural programs, addressing barriers such as lack of public transport.

Recommendation 12: Australian Governments resource and expand the availability of evidence-based diversionary programs for children, including those by Aboriginal and Torres Strait Islander Community-Controlled Organisations, and other culturally safe programs.

Recommendation 13: Australian Governments invest in restorative justice conferencing to be available across Australia, ensuring culturally appropriate approaches for First Nations children and communities.

Recommendation 14: Australian Governments resource the redesign of services to be place-based and informed by evidence and local community priorities, in line with Priority Reform 1 of the *National Agreement on Closing the Gap*.

Recommendation 15: Australian Governments develop nationally consistent minimum training requirements for workforces in the child justice and related systems, including child protection and police. Training should include child rights, child development, mental health, neurodevelopmental disabilities, cultural competence, and trauma-informed practice.

Recommendation 16: Australian Governments ensure that all child justice matters are heard in specialised Children's Courts or by child-specialist magistrates.

Recommendation 17: Australian Governments collect key data on children in the child justice system, disaggregated by age, sex, disability, geographic location, ethnic origin, and socioeconomic background, including data disaggregated at the local level to support service design and delivery. This data should be publicly available and accessible.

Recommendation 18: The Australian Government withdraws its reservation to Article 37(c) of the *Convention on the Rights of the Child*.

Recommendation 19: Australian Governments legislate to prohibit solitary confinement practices in child detention facilities, and prohibit the use of isolation as punishment in any circumstance.

Recommendation 20: Australian Governments raise the age of criminal responsibility in all jurisdictions to 14 years and undertake a review of the application of the presumption of *doli incapax.*

Recommendation 21: Australian Governments agree to implement nationally consistent standards for monitoring detention facilities for children.

Recommendation 22: Australian Governments fully implement the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Publishment, including by designating National Preventive Mechanisms that have child rights expertise in all jurisdictions.

Recommendation 23: Australian Governments conduct Child Rights Impact Assessments on laws and policies that affect children.

Recommendation 24: The Australian Government ratify the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, that

will allow children to make complaints to the United Nations Committee on the Rights of the Child about breaches of their rights.

4 Specific issues raised by this inquiry

4.1 Australia's international human rights obligations

Australia has made international commitments to uphold the human rights of children and has a moral and legal obligation to ensure these rights. The Australian Government, by agreeing to international human rights treaties, is both empowered and obliged to play a key role in ensuring child rights are protected.[1]

The *United Nations Convention on the Rights of the Child* (CRC) is the main human rights treaty for children, ratified by almost all nations of the world, and by Australia in 1990. It includes children's civil, political, economic, social and cultural rights, as well as additional rights for children, in recognition of their unique vulnerabilities and developing maturity and capabilities.

Four main principles guide the CRC.

- Every child has the right to non-discrimination (article 2)
- Every child has the right to have their best interests made a primary consideration in all decisions that affect them (article 3)
- Every child has the right to life, survival and development (article 6)
- Every child has the right to be heard and to have their views taken into account in decisions that affect them (article 12).

Some key rights set out in the CRC are especially relevant to children in contact with child justice systems:

- No torture or other cruel, inhuman or degrading treatment or punishment (article 37(a))
- Detention only as a measure of last resort and for the shortest appropriate time (article 37(b))
- When deprived of liberty, the right to have age taken into account, including being held separately from adults and being able to stay in contact with family (article 37(c))

- Age-appropriate measures that promote the physical and psychological recovery and social reintegration of a child victim (article 39)

- When accused or convicted of a crime, the right to be treated in a way that promotes a child's dignity and self-worth, with respect for human rights, and that takes into account their age and the need for their reintegration into society (article 40(1))

- Children accused of or recognised as having committed a crime should be dealt with without resorting to judicial proceedings wherever appropriate or desirable (article 40(3)(b)) and there should be a variety of appropriate and proportionate measures available including counselling, probation and training programs (art 40(4))

- A minimum age of criminal responsibility be established (article 40(3)(a)). The UN Committee on the Rights of the Child has encouraged states to adopt a minimum age of at least 14 years of age.[2]

Rights that are especially relevant to children involved in child justice can also be found in other important treaties and instruments, set out in Appendix 1 and Appendix 2 of the '*Help way earlier!*' report. These include the rights of indigenous peoples to self-determination (article 1, *International Covenant on Civil and Political Rights*; article 3, *United Nations Declaration on the Rights of Indigenous Peoples*) and the rights of children with disability to special care and assistance, including in legal matters (article 13, *Convention on the Rights of Persons with Disabilities*).

Despite Australia agreeing to these international human rights obligations, there is currently no federal legislation that directly and adequately incorporates the full spectrum of child rights, and that can effectively hold the Australian Government to account for protecting child rights across the nation. Policy affecting children is uncoordinated, widely spread across portfolios, and there is a lack of monitoring and accountability for reform.

Australia does not have a federal Human Rights Act and international law is not binding in domestic courts. Three jurisdictions in Australia (Australian Capital Territory, Victoria and Queensland) have passed human rights acts or charters over the past 20 years.[3] There is considerable evidence that this human rights legislation has impacted significantly on how decisions are made in those jurisdictions, with the result being the better protection and advancement of human rights.

The UN Committee on the Rights of the Child has recommended that the Australian Government enacts comprehensive national human rights legislation that fully incorporates the CRC and provides clear guidelines for its consistent and direct application throughout the states and territories. It has also called for the Australian Government to ensure that the government assesses the impacts of all legislation on child rights.[4]

In a report on Australia's Human Rights Framework, released on 30 May 2024, the Parliamentary Joint Committee on Human Rights recommended that a national Human Rights Act be introduced. The Committee endorsed the model Human Rights Act proposed by the Commission in 2023.[5]

The Commission's proposed model for a Human Rights Act includes all civil, political, economic, social and cultural rights; a 'participation duty' requiring that governments ensure the participation of children, First Nations peoples and persons with disability in decisions and policies that directly or disproportionately affect them; and an interpretative clause that requires courts to interpret legislation, where possible, in a way that is consistent with human rights, including the CRC.

The model Human Rights Act would enable people to complain to the Commission about rights breaches. If the Commission was unable to resolve the complaint, it would give people the power to action in the courts, with capacity for representative actions.[6] It also would provide comprehensive coverage of child rights and apply to all public authorities at the federal level. A public authority would include all departments and federal government agencies, as well as service providers that are contracted to provide services on behalf of the federal government.

While a federal Human Rights Act would apply to federal laws and federal public authorities, it also provides a template for updating existing Human Rights Acts in Victoria, Queensland and the ACT, and for introducing Human Rights Acts in the other states and territories.[7]

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 ratifying the CRC, the federal government committed all Australian governments to comply with the human rights protected in the treaty.

There is value in considering a National Children's Act to complement a Human Rights Act. The National Children's Act could establish minimum standards of treatment for children that would apply across all levels of government, including at the state and territory level. This might include a legislative basis for national

out-of-home care standards and new child justice standards; and minimum standards on places of detention of children (consistent with Australia's obligations under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)). It could also provide a place for the legislative enshrinement of commitments in various national frameworks – such as the Closing the Gap framework – where stronger protection may be warranted.

A National Children's Act could also provide a framework for the engagement of children in policy making processes, and national monitoring processes associated with these – for example, by setting out minimum requirements for Child Rights Impact Assessments and when such assessments should be mandatory.

These more detailed and specific protections go beyond what would be covered in a national Human Rights Act, by providing an architecture for the implementation of child rights across different levels of government.

The National Children's Act would differ from a Human Rights Act, as the latter would provide the remedial framework for the protection of human rights consistently across all of Australia's rights obligations and place duties on public servants to fully consider and act in accordance with these rights. The National Children's Act would then provide the systems and infrastructure to fully embed these rights, so that the impact of decision making on children always matters.

4.2 Outcomes and impacts of youth incarceration in jurisdictions across Australia

UN studies have highlighted the potentially harmful effects of detention on children, especially their health, mental health and development.[8] Although there is a need for more research on the impacts of detention,[9] it is clear that many children enter detention with existing health conditions, and that these may be exacerbated by being in detention, with some health conditions developing as a result of deprivation of liberty.[10]

Many children are entering detention with pre-existing vulnerabilities, such as neurodevelopmental disabilities and mental ill-health. Current models of detention are likely to compound trauma for these children. The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability found that detention settings exacerbate the vulnerabilities of children with disability who often lack access to therapeutic support and trauma-informed care.[11]

Save the Children submitted to the National Children's Commissioner that the incarceration of children results in the criminal justice system itself retraumatising children while failing to respond to the impacts of trauma, medical and developmental challenges, and institutional racism.[12] These adverse childhood experiences and intergenerational trauma 'correlate with worse health and social outcomes across their life course'.[13]

Furthermore, stakeholders spoke of how incarceration of children carries additional historical weight for First Nations people — from colonial policies of control through to the Stolen Generations to the over-surveillance of children and young people[14] — which affects other areas of their lives, such as in the workplace.[15] This is regarded as 'further punishment of Aboriginal and Torres Strait Islander families and their experiences of disadvantage, vulnerability and trauma'.[16]

Recognising this potential for harm, the UN Committee on the Rights of the Child urges nations to immediately embark on a process to reduce reliance on detention to a minimum.[17] This requires the development of effective and responsive community-based alternatives to detention. Stakeholders submitted that the lack of access to diversionary alternatives to detention undermines the principle of detention of children as a last resort.[18]

A genuinely therapeutic and rehabilitative model should promote positive social connection with a child's family, community and culture, and be focused on building connections and relationships.[19] Many submissions suggested that detention centres should be small scale, locally sited and integrated within the surrounding community.[20] They should promote 'relational and differentiated security' with a focus on therapeutic and individually tailored responses.[21] These should include opportunities for education and life skills and address offending behaviour alongside mental health, substance misuse and other health and wellbeing needs. There should be a strong focus on resocialisation and reintegration.[22]

Some international examples of alternative detention models include:

- the Diagrama model used in Spain which takes a non-punitive approach to care for children in custody, and is staffed by educators who focus on social skills, education, and boundary setting, paired with care and encouragement.[23] The Northern Territory Legal Aid Commission noted the Diagrama model involves highly qualified staff, comprehensive case management, a full schedule of activities and an educational focus to create routine for children in 'normal and engaging environments'.[24]

- the Missouri Model and the Close to Home program in New York City, that stems from an acknowledgment that children were being re-traumatised in large youth detention facilities, and were separated from family and community who could be instrumental in their rehabilitation.[25] These approaches involve establishing small residential facilities, providing children and their families with targeted supports, reconnecting children with their families and community, and supporting educational attainment.[26]

- the justice approach in Hawaii, which involves investment in mental health and substance addiction treatments, showed a significant reduction in youth detention which reportedly allowed the detention facility to be repurposed in 2018 to a healing youth and family wellness centre.[27] The Hawaii example was also referred to by many stakeholders as a positive example of system change.[28]

A key aspect of keeping communities safe is creating opportunities for genuine rehabilitation and reintegration of children into community after any offending behaviour. Children leaving detention can face significant structural barriers, including lack of housing, poor educational and employment opportunities, and lack of access to help for mental health and substance addiction issues. These can be compounded by experiences of discrimination, social exclusion and family problems. To address these issues, children may benefit from longer term case management support, with staff working alongside the child and their family post release with support being reduced over an extended period of time.[29]

4.3 The over-incarceration of First Nations children

National data consistently shows the overrepresentation of First Nations children in both the child justice and child protection systems.[30]

There are multiple and complex reasons for the continuing overrepresentation of First Nations children in these systems. Many stakeholders in submissions attributed this to Australia's history of colonialism, cultural dispossession, and discriminatory laws and policies, which have affected, intergenerationally, the social, economic and mental wellbeing of First Nations peoples.[31]

On an average day in 2022–23, First Nations children were 23 times more likely than non-Indigenous children to be under youth justice supervision. They were 28 times more likely to be in detention.[32] First Nations children make up 5.7% of the Australian population aged 10–17.[33]

First Nations children are particularly overrepresented in the child justice system at younger ages, making up 6.1% of children aged 10–13 years in all types of youth justice supervision compared to 2.3% of their non-Indigenous counterparts.[34]

Also, children aged 10–17 from very remote areas were 11 times more likely to be under supervision compared to those from major cities.[35] The Australian Institute of Health and Welfare (AIHW) suggests that this largely reflects the higher proportions of First Nations children living in these areas.[36]

National data also shows that First Nations children (aged 10–16) are more likely to return to youth justice supervision. Of the 1,151 First Nations children released from community-based supervision in 2020–21, nearly 2 in 3 (64%) returned within 12 months.[37] A lower proportion of non-Indigenous children released from community-based supervision returned within 12 months (50%).[38] These differences were also apparent for children released from detention with 88% First Nations children and 79% non-Indigenous children returning within 12 months.[39]

While First Nations children are overrepresented in the child justice system, they are underrepresented in terms of access to basic services.[40] For example, school attendance rates for First Nations students continue to be lower than for non-Indigenous students.[41] Despite some notable improvements reported for the 2024 Closing the Gap targets on education for First Nations children,[42] only the early childhood Target 3 is 'on track' to be met by 2030.[43] Target 4, on increasing the proportion of First Nations children assessed as developmentally on track, is worsening.[44]

4.4 The human rights of children in detention

The CRC requires Australia 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' (Article 37(b)).

However, restrictive bail laws directed at children who offend undermine both the principle of detention as a last resort, and ongoing efforts to reduce the numbers of children in detention. Most children currently in detention are unsentenced, on remand. In other words, they have been arrested and are detained waiting for their trial or sentence. Some will be later released on bail before their trial or sentence.

Across Australia, the proportion of children in unsentenced detention has increased nationally,[45] with most young people in unsentenced detention being

on remand.[46] Of all children in detention on an average day in 2023, almost 4 in 5 were unsentenced (80%), with only 1 in 4 (25%) serving their sentence in detention.[47]

Some examples of making bail laws harsher include:

- In Queensland, the government passed laws in 2023 to make breach of bail a criminal offence and other changes aimed at reducing serious offending.[48] This move was criticised by youth advocates, the Queensland Human Rights Commissioner and others for posing a risk of greater numbers of young people in detention, with little improvement of community safety.[49] Further, on 1 May 2024, the Queensland Government introduced amendments to its Charter of Youth Justice Principles that would replace the words 'detention as a last resort' with alternative wording.[50] These proposed amendments have been criticised.[51]

- In March 2024, the New South Wales Government passed legislation[52] to tighten bail laws for children in that state, which some stakeholders consider is 'going to make it more difficult for children to get bail than for adults' and will lead to more children in custody.[53]

Mandatory minimum sentencing laws can also undermine the principle of detention as a last resort.[54] The UN Committee on the Rights of the Child has repeatedly raised concerns about their application to children in the Northern Territory and Western Australia.[55] The Northern Territory has since repealed many of its provisions, but in Western Australia, minimum mandatory sentences for certain offences still apply to children.[56] Article 40 of the CRC confirms that criminal justice responses for children must be age-appropriate, proportionate, and rehabilitative. The principle of proportionality means that mandatory sentences of any kind, and particularly of detention, contravene the CRC.[57] They also have a disproportionate impact on First Nations peoples.[58]

Under the CRC, 'every child deprived of liberty must be separated from adults unless it is considered in the child's best interests not to do so' (article 37 (c)).

Stakeholders in submissions to the Commission provided examples where children had been held in adult facilities, and where they have not been kept safe from harm in those facilities.[59]

In Western Australia, a separate wing of the adult Casuarina Prison, called Unit 18, has been used to detain children from mid-2022, following a series of incidents at Banksia Hill Detention Centre.[60] Initially seen as a circuit-breaker for

the frequency of critical incidents, Unit 18 continues to be used to detain children.

In Queensland, children are being detained in adult watch houses, some for extended periods of time.[61] This has resulted in 'undesirable breaches of human rights for children and young people who are in custody at watchhouses throughout Queensland as the detention centres have not capacity to accommodate them'.[62] Watch houses are usually attached to a police station, designed to hold people (with or without being charged) for a short period of time. Police watch houses were designed for adults to be held for a short period, not for children who are being held for many weeks at a time. While children may be held in a separate cell, the facilities can include adult detainees who can be seen and heard by the children. In these circumstances, children may have restricted access to sunlight, fresh air, visits and regular exercise.

In a review of the increasing use of watch houses, the Queensland Family and Child Commission showed that the length of detention of children in watch houses was increasing significantly.[63] Data also showed that children as young as 10 were being detained in watchhouses.[64]

The Australian Government has a reservation to article 37 (c)), stating previously that its geography and demography make it difficult to always detain children in juvenile facilities, while also allowing children to maintain contact with their families.[65] However, the UN Committee has pointed out that the Australian Government's concerns are already taken into account by the article, which states that incarceration with adults is prohibited unless it is considered in the child's best interests not to do so and also that a child shall have the right to maintain contact with his or her family.[66]

By removing the reservation to Article 37(c), the Australian Government would signal to the states and territories that it is serious about meeting its obligations under the CRC, and that detaining children in facilities designed for adults is unacceptable.

The CRC also makes clear that children should not be subjected to torture or other cruel, inhuman or degrading treatment or punishment (article 37(a)) while in detention. This extends 'not only to acts that cause physical pain but also to acts that cause mental suffering to the individual'.[67] 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 (Article 37(c)).

To prevent such treatment, restraint should never be used as a means of punishment, but only when the child poses an imminent threat of injury to themselves or others, and solitary confinement should never be used for a child.[68] The UN Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) define solitary confinement as the physical isolation of individuals 'for 22 or more hours a day without meaningful human contact'.[69] Although in Australia the power to isolate a child in a detention facility is subject to statutory limitations, these protections vary by jurisdiction, and no jurisdiction prohibits solitary confinement.[70]

Official inquiries continue to find that children have been impacted by mistreatment in detention, including being subjected to prolonged isolation, across the nation.[71] For example, in June 2022, the Western Australian Inspector of Custodial Services found that children detained in the Intensive Support Unit of Banksia Hill Detention Centre were often being held in conditions akin to solitary confinement and in breach of international human rights agreements.[72] Due to staffing shortages, children were often locked into their cells for most of the day, preventing meaningful social interaction with peers and staff. They faced long periods of alone time in cells that are often in a poor state and are small. This typically led some children to act out and increasingly there were more incidents of children self-harming.[73]

On 11 July 2023, the Supreme Court of Western Australia ruled that three young people were unlawfully locked in their cells at Banksia Hill Detention Centre and Unit 18 at Casuarina Prison for prolonged periods, amounting to solitary confinement.[74] The three children were held in these conditions for a combined total of 167 days in 2022.[75] Justice Tottle found that subjecting children to solitary confinement frequently was not only inconsistent with the Western Australian child justice law, but also with basic notions of the humane treatment of young people, with the capacity to cause immeasurable and lasting damage to an already psychologically vulnerable group. It amounted to a systemic failure caused by a shortage of qualified staff, inadequate infrastructure and a consequent inability to manage detainees with difficult behavioural problems.[76]

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability also heard evidence of the concerning treatment of children with disability within the Banksia Hill Detention Centre, including examples where children with disability were provided with very limited education and therapeutic support, and instances of solitary confinement.[77] It concluded that isolation amounting to solitary confinement is overused in child detention facilities across Australia. It recommended that states and territories should

prohibit solitary confinement in child justice settings and prohibit the use of isolation as punishment in any circumstance.[78]

In Queensland, the Child Death Review Board's 2022–23 Annual Report highlighted how two First Nations boys, both of whom had disabilities and cognitive impairments, were subjected to extended periods of separation during their time in detention.[79] It described how such practices can impact on children, especially those with experiences of significant disadvantage and marginalisation, creating an environment of re-traumatisation.[80]

Australian and New Zealand Children's Commissioners, Guardians and Advocates have long called for an end to the harmful practice of isolating children and young people in detention.[81]

Australian Governments should undertake comprehensive reviews of their child justice legislation and associated policies to ensure consistency with child rights. In particular, reviews should consider provisions relating to the best interests of the child, isolation and separation in detention, bail restrictions and mandatory minimum sentencing. A review of all child justice related laws and policies could be undertaken as an action of the National Taskforce for reform of child justice systems (Recommendation 1 of *'Help way earlier!'*).

4.5 National minimum standards for youth justice

Having consistent standards for monitoring the provision of child justice services across the country is central to ensuring children's rights are being protected. Currently, there are no legally binding national standards for child justice systems.

The Australasian Youth Justice Administrators,[82] have developed both Principles and Standards for Youth Justice. The ten Principles of Youth Justice in Australia were endorsed by all states and territories in October 2014.[83] The National Standards for Youth Justice in Australia were revised in 2023.[84] These include a reviewer's checklist, under 12 domains, to be used by youth justice administrators from interstate jurisdictions as part of a newly established peer review process. While an additional process of review is welcome, participation by jurisdictions remains voluntary, and implementation of recommendations coming out of the review will be at the discretion of the host agency. Although these Standards have been agreed to by all jurisdictions, they remain only 'aspirational standards of practice'.[85]

Given the concerns raised about the rights and wellbeing of children in detention in a large number of reports and inquiries, it is evident that these non-binding

Standards have been insufficient to ensure the protection of children.[86] Further, there is no mechanism for public accountability on how these Standards are being implemented. One of the areas of action for the National Taskforce for reform of child justice systems (Recommendation 1 of *'Help way earlier!'*) should be to strengthen these agreed national standards, to ensure they have greater force and public accountability, and to enable the protection of children and their human rights.

Some states and territories focus accountability efforts specifically on the treatment of children in detention facilities, with oversight and monitoring by statutory inspectors and ombudsmen. They have developed their own standards to guide the inspection and monitoring of youth justice centres in their jurisdictions.[87] However, these standards are not consistent between jurisdictions, with variability in data collection, public reporting, accessible complaints mechanisms and consequences for improper conduct.[88]

The development of an integrated network of National Preventive Mechanisms (NPM), as required by the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), presents an opportunity to coordinate these efforts, and develop nationally consistent standards for child justice facilities, based on international human rights obligations and standards. It also presents an opportunity to improve the collection of national data on conditions in detention. However, progress on implementation has been slow. Australia failed to meet the earlier deadline for establishing the NPMs, then extended to 20 January 2023. To date, only 6 of the 9 Australian jurisdictions have formally nominated their NPMs.[89] By ratifying OPCAT, Australia is also required to accept visits from the UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT).[90] However, the SPT decided to suspend its visit to Australia in October 2022, due to obstacles in carrying out its mandate to visit places of detention in New South Wales and Queensland. The SPT formally terminated this visit in February 2023, with Australia being only the second country to have had an SPT country visit terminated.

Australia needs to urgently set standards of care for children held in detention and to have comprehensive independent monitoring with transparency and accountability.

[1] The Australian Greens, Submission No 119 to the Australian Human Rights Commission, *Youth Justice and Child Wellbeing Reform Project* (3 July 2023) 3.
[2] United Nations Committee on the Rights of the Child, *General Comment 24 on children's rights in the child justice system*, UN Doc CRC/C/GC/24 (18 September 2019).
[3] *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (VIC); *Queensland Human Rights Act 2019* (QLD).
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