Committee Secretary

Senate Legal and Constitutional Affairs Committee

PO Box 6100

Parliament House

Canberra ACT 2600

10 October 2024

Dear Officer,

RE: Australia's youth justice and incarceration system

The Australian National University Law Reform and Social Justice Research Hub ('ANU LRSJ Research Hub') welcomes the opportunity to provide this submission to the Legal and Constitutional Affairs Reference Committee, responding to terms of reference of the inquiry.

The ANU LRSJ Research Hub falls within the ANU College of Law's Law Reform and Social Justice program, which supports the integration of law reform and principles of social justice into teaching, research and study across the College. Members of the group are students of the ANU College of Law, who are engaged with a range of projects with the aim of exploring the law's complex role in society, and the part that lawyers play in using and improving law to promote social justice.

Summary of Recommendations:

1. That the Government commit to further long-term funding for Justice Reinvestment programs and provide grants to States, territories, and local councils to fund their own Justice Reinvestment programs.

2. That the Government work with Indigenous communities to develop a national standard for recording data on Indigenous and non-Indigenous children at every point in their contact with the youth justice system.

3. That Australia raise the age of criminal responsibility to 14 in all jurisdictions.

4. That the Commonwealth work with States and territories to remove mandatory sentencing provisions from all criminal legislation.

5. That Australia should establish a federal wide body to oversee the implementation of National Preventive Mechanisms ('NPM') in accordance with Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('OPCAT').

6. That Australia sign and ratify the Third Optional Protocol to the Convention on the Rights of the Child.

7. That Australia ensure their domestic avenues of complaints are child-friendly and child-accessible

8. That the Commonwealth adopt enforceable national standards for youth justice and detention administration consistent with best practice standards and international human rights obligations. These standards should set out binding, uniform minimum requirements regarding:

    a. Minimum ratios for staff-to-detainees at YDCs

    b. A baseline standard for training of staff in YDCs, especially in relation to detainee mental health and disability.

    c. A minimum standard for the treatment of detainees regarding isolation, food, and use of force.

    d. Record keeping regarding all behaviour management

    e. Prohibition of the use of solitary confinement in youth justice settings, clear parameters around isolation, and prohibition of the use of isolation as punishment or reprisal in any circumstances

    f. The design and implementation of mental health reporting and response policies

    g. Facilities, training, and supports required for children with disabilities

9. That the Federal Parliament work with the Tasmanian Government to implement, to the fullest extent possible, the recommendations of the 2023 Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings.

10. That the Commonwealth implement minimum enforceable national standards regarding the design and implementation of mental health reporting and response policies.

11. That the Australian Bureau of Statistics also designate a criterion indicating the number of children incarcerated for federal offences under the *Crimes Act 1914* (Cth).

12. That the Department of Home Affairs' reporting requirements of children in immigration detention be extended to include all children who are subject to any period of detention,

however temporary.

13. That the Committee recommend that the Parliament adopt nationally enforceable standards for courtroom procedure involving young people to reflect the distinct vulnerabilities they experience.

If further information is required, please contact us at anulrsjresearchhub@gmail.com.

On behalf of the ANU LRSJ Research Hub,

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Introduction

Young people do not belong in prisons. They deserve to be spending their childhood years in supportive environments where they can learn, grow and thrive. This submission is prepared during a time where, on average there are 812 young people in detention.[1] Countless reports demonstrate that imprisonment of young people does not protect the interests of the public. We know this to be wrong and yet it is still happening.

While the LRSJ welcomes the opportunity to submit to this inquiry, it expresses its frustration and disappointment towards the calls for further inquiry rather than meaningful adoption of solutions already available.

(a) and (b): the outcomes and impacts of youth incarceration in jurisdictions across Australia; the over-incarceration of First Nations children

One of the most concerning outcomes in the Australian youth justice system is the clear connection between incarceration and recidivism. Children aged 10–14 who have been incarcerated have an 80% chance of re-offending.[2] The younger a child is when they are first incarcerated, the higher their chance of re-offending.[3] One reason for recidivism is the criminogenic nature of detention centres. Detention centres are 'antisocial' environments where 'delinquent' peers educate and socialise other young people to re-offend after they leave detention.[4] Sentencing disrupts the natural 'ageing out' of anti-social behaviour, because incarcerated youth develop psychosocial maturity at far slower rates than comparable peers who remain in the community or are diverted.[5]

These statistics must be contextualised; the most urgent and significant concern that emerges from this inquiry is the overcriminalisation and over-incarceration of Indigenous children. As outlined in the introduction, there is now a wealth of data addressing the incarceration of Indigenous children. Nonetheless, we will briefly set out rates and trends of incarceration, primarily to show that Indigenous youth justice outcomes have deteriorated since the 1991 Royal Commission into Aboriginal Deaths in Custody ('RCIADIC').[6] We question the sincerity of calling for further inquiries when the majority of the recommendations made in RCIADIC have not been implemented.

[1] Australian Institute of Health and Welfare *Youth Detention in Australia 2023* (Report, 13 Dec 2023).
[2] Sentencing Advisory Council, *Reoffending by Children and Young People in Victoria* (Report, December 2016) 19.
[3] Ibid.
[4] Magda Stouthamer-Loeber et al, 'Desistance from Persistent Serious Delinquency in the Transition to Adulthood' (2004) 16(4) *Development and Psychopathology* 897.
[5] Ibid.
[6] *Royal Commision into Aboriginal Deaths in Custody* (Report, April 1991).

Adequate national data on the incarceration of Indigenous young people has been available since 1993, at which time, Indigenous children were incarcerated at a rate of 24.7 times their non-Indigenous counterparts.[7] Currently, Indigenous children aged 10–17 are incarcerated at a rate of 28 times that of their non-Indigenous peers.[8] On an average night in the third quarter of 2023, Indigenous children comprised 59% of young people in juvenile detention.[9] Indigenous children between the ages of 10–13 are 46 times more likely than non-Indigenous children to be placed in detention.[10]

It is practically outside the scope of this submission to thoroughly set out the connection between colonialism and the incarceration of Indigenous young people. We recognise that colonialism is an ongoing process, facilitated by violent and paternalistic Anglo-settler legal frameworks.[11]

We recognise that policing had a critical role in enforcing and entrenching discriminatory treatment of Indigenous peoples. Some of the earliest forms of policing in colonial Australia were used to dispossess Indigenous peoples of their land, undertaking 'expeditions' to expand colonial-controlled space.[12] In the present day, we recognise that many Indigenous communities are over-surveilled and overpoliced, facilitating ongoing hostile relationships between police and Indigenous communities.[13] Further, it has been recognised that the use of police discretion has had a discriminatory impact on Indigenous young people, particularly through the biassed application of diversions and cautions.[14]

It is well-documented that incarceration results in poor health outcomes for young people. Incarceration is correlated with increased rates of mental illness, substance abuse, and sexually transmitted infections,[15] which can have immense adverse impacts on the quality of life of a young person long after they have been released from incarceration.[16] The youth justice

[7] Chris Cuneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Taylor & Francis Group, 2001) 23.
[8] Steering Committee for the Review of Government Service Provision, *Report on Government Services: Community Services* (Report, January 2024) 182 ('Community Services Report 2024').
[9]Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2023* (Report, December 2023).
[10] Ibid.
[11] David McDonald and Chris Cuneen, 'Aboriginal Incarceration and Deaths in Custody: Looking Back and Looking Forward' (1997) 9(1) *Current Issues in Criminal Justice* 5; Irene Watson, 'Re-centring First Nations Knowledge and Places in a Terra Nullius Space' (2014) 10(5) *AlterNative* 508; Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native (2006) 8(4) *Journal of Genocide Research* 387; Tracey Banivanua-Mar, 'Consolidating Violence and Colonial Rule: Discipline and Protection in Colonial Queensland' (2006) 8(3) *Postcolonial Studies* 303.
[12] Henry Reynolds, *Frontier: Aborigines, Settlers and Land* (Allen & Unwin, 1987); Tony Roberts, *Frontier Justice: A History of the Gulf Country to 1900* (University of Queensland Press, 2005); Cuneen (n 7).
[13] Cuneen (n 7).
[14] Human Rights Law Centre and Change the Record Coalition, Over-Represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women's Growing Over-Imprisonment (2017) 22.
[15] The Royal Australasian College of Physicians, *The Health and Well-Being of Incarcerated Adolescents* (Report, 2011), 4.
[16] Ibid.

supervision system creates a 'cycle of trauma and re-traumatisation.'[17] Aboriginal and Torres Strait Islander children and young people are denied connection to their culture, and subjected to changes in familial structures, which adversely affects their development.[18]

Particular mental health concerns for Indigenous young people in the youth justice system can include cognitive illnesses such as anxiety, depression and post-traumatic stress disorder.[19] These can have disastrous impacts, as the 1991 RCIADIC found that the mental health of offenders and over-criminalisation of Indigenous peoples are keenly related to suicide and deaths in custody.[20]

We note that there are deficiencies across data collection practices within the youth justice system, raising issues of accountability and transparency.[21] Current data collection practices do not provide a comprehensive picture of interactions between Indigenous youth and the justice system, including their journey into the system, and the context in which diversions and sentences are made. The Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory has clearly articulated that without comprehensive data, the youth justice system lacks the transparency necessary for informed decision-making.[22] Effective data collection practices are also fundamental to ensuring transparency in the spending of public funds. In addressing these deficiencies, we recognise the importance of developing a framework that supports Indigenous data sovereignty.[23] This approach has potential to empower Indigenous communities and foster a more accurate and culturally relevant understanding of Indigenous experiences within the justice system. Most importantly, data must be contextualised to counteract deficit portrayals of Indigenous children as inherently criminal,[24] and redirect policy objectives towards diversion and community wellbeing.[25]

The economic costs of youth incarceration are substantial. The cost of incarcerating a single youth for one day is approximately $2,827, which is over $1.03 million a year; around seven

[17] Judy Atkinson et al, 'Addressing Individual and Community Transgenerational Trauma' in Pat Dudgeon et al (ed) *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice* (Commonwealth of Australia, 2014) 373.
[18] Ibid.
[19] Australian Indigenous Doctors' Association, *Incarceration: the disproportionate impacts facing Aboriginal and Torres Strait Islander people* (Report, 2023), 8.
[20] Ibid.
[21] Commission for Children and Young People, *Our Youth, Our Way: Inquiry into the Over-representation of Aboriginal Children and Young People in the Victorian Youth Justice System* (Report, June 2021) ('Our Youth, Our Way').
[22] Ibid 124.
[23] See, for example, Tahu Kukutai and John Taylor (eds), *Indigenous Data Sovereignty: Toward an Agenda* (ANU Press, Research Monograph, Australian National University, Centre for Aboriginal Economic Policy Research, no 38, 2016)
[24] Cressida Fforde et al, 'Discourse, Deficit and Identity: Aboriginality, the Race Paradigm and the Language of Representation in Contemporary Australia' (2013) 149(1) *Media International Australia* 162.
[25] 'Our Youth, Our Way' (n 21).

times the cost of incarcerating an adult.[26] Youth justice costs the taxpayer $1.3 billion a year nationally, with $855.3 million going towards youth detention centres ('YDC'), increasing from $482.1 million in 6 years.[27] Costs are rising, and as previously stated, more young people are reoffending. We must turn toward alternate solutions which are effective, economically viable, and beneficial to communities, and away from incarceration as a "one-stop-shop" solution to youth justice.

Justice reinvestment ('JR') is an evidence-based approach to crime which seeks to divert money away from detention centres, and invest in community-led interventions aimed at rehabilitation and crime prevention. In particular, JR has been used in Indigenous communities across NSW to develop their own approach to addressing the over-incarceration of Indigenous peoples. This approach puts a level of power and agency back into the hands of the community. For this reason, no single JR model exists, rather, there is a diverse array of JR programs, tailored to address the specific needs of each community.

A 2018 report by KPMG evaluated a JR program in Bourke, NSW.[28] The results were striking: the program achieved a 38% reduction in juvenile charges in the top five offence categories and a 43% decrease in breaches of Apprehended Violence Orders among young people.[29] Re-offending decreased by 14%, whilst the completion rates of VET courses and Year 12 retention rose by 83% and 31% respectively.[30] KPMG estimates that in 2017 alone, the JR program had an approximate impact worth $3.1 million, with only an operational cost of $561,000.[31]

The Health Foundation is a JR-informed organisation with over 90 programs across Australia which focuses on Indigenous wellbeing through culturally-based healing practices.[32] Deloitte conducted a cost-benefit analysis of the centres, predicting a cost-benefit ratio of 1 to 4.4. The analysis predicted that each Healing Foundation centre would break even if each centre diverted approximately one person away from incarceration a year. Deloitte noted that their analysis did not capture the unquantifiable qualitative benefits of the centres, including community leadership, and social and cultural wellbeing.[33]

[26] Mia Schlict, *The Cost of Prisons in Australia: 2023* (Institute of Public Affairs, 2023).
[27] 'Community Services Report 2024' (n 8); Steering Committee for the Review of Government Service Provision, *Report on Government Services: Community Services* (Report, 2018).
[28] KPMG. Maranguka Justice Reinvestment Project, Impact Assessment. (Report, 2019) ('Maranguka Report').
[29] Ibid.
[30] Ibid.
[31] 'Maranguka Report' (n 28).
[32] Aboriginal and Torres Strait Healing Foundation, *A Resource for Collective Healing for Members of the Stolen Generations*, (Resource, 2014) 12, 15-16.
[33] Aboriginal and Torres Strait Islander Healing Foundation, *Prospective cost benefit analysis of healing centres*, (Report, July 2014).

We acknowledge and welcome the Government's decision to allocate $69 million over 4 years (from 2022-2023) into 26 Justice Reinvestment programs.[34] We recommend that the Government undertakes further long-term funding commitments to invest in these programs, and continues to expand funding into more programs over the coming years. We also recommend providing the States, territories, and local councils with grants to carry out JR initiatives, to address localised issues in a targeted, and effective manner.

Recommendation 1: That the Government commit to further long-term funding for Justice Reinvestment programs and provide grants to States, territories, and local councils to fund their own Justice Reinvestment programs.

Recommendation 2: That the Government work with Indigenous communities to develop a national standard for recording data on Indigenous and non-Indigenous children at every point in their contact with the youth justice system.

(d) and (f): The Commonwealth's International Obligations in Regards to Youth Justice

Australia is party to a number of conventions, resolutions and declarations on an international level pertaining to youth justice. Most notable and relevant of these include the United Nations *Convention on the Rights of the Child* ('CRC') and the *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* ('OPCAT'). In signing and ratifying such instruments, Australia has agreed to be bound by this international system.[35] It is the international obligation of Australia to ensure that domestic laws are enacted and applied in such a way that gives these treaties meaning and impact in law. The recommendations and discussion under these terms of reference will aim to therefore give the best effect to Australia's international obligations.

Preventing Youth Incarceration

Recommendation 3: That Australia raise the age of criminal responsibility to 14 in all jurisdictions.

[34] 'Justice Reinvestment' *Australian Government Attorney General's Department* (Web Page) <https://www.ag.gov.au/legal-system/justice-reinvestment#what-is-justice-reinvestment>.
[35] 'Australia's Human Rights Obligations', *Australian Human Rights Commission* (Web Page, 2004) <https://humanrights.gov.au/our-work/4-australias-human-rights-obligations>.

As a matter of Australia's international obligations as a signatory to the CRC, the 'primary consideration' in youth justice must be the 'best interests of the child'.[36] Following this, the CRC requires States to fix 'a minimum age at which children shall be presumed not to have the capacity to infringe penal law'.[37] While the CRC does not prescribe what this age should be, the Beijing Rules establish that it must 'not be fixed at too low a level, bearing in mind the facts of emotional, mental and intellectual maturity.'[38] To meet our obligations, Australia must set a minimum age of criminal responsibility that is in the best interests of the child.

The current state of Australia's juvenile justice system does not reflect compliance with these obligations, and Australia's criminalisation of young people has been criticised widely domestically and internationally.

The approach by State and Territory governments to the minimum age of criminal responsibility has been inconsistent. The Northern Territory government has indicated their intention to lower the minimum age of criminal responsibility from 12 to 10.[39] The Australian Capital Territory introduced legislation in November 2023 raising the criminal age of responsibility to 12, with intentions for the age to be raised to 14 in mid-2025.[40] Additionally, the Victorian Government committed to raise the age to 12 in 2024, but this promise has likely now been politically abandoned.[41] However, Tasmania has confirmed in their Youth Justice Blueprint that the State will raise the age of criminal responsibility to 14 years of age.[42] Children as young as 10 are still capable of being criminally responsible in Western Australia and Queensland.[43]

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[36] *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September, 1990) art 3(1) ('*CRC*').
[37] *CRC* (n 36) art 40(3)(a).
[38] *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ('*The Beijing Rules*'), GA Res 40/33, UN GAOR, 40th sess, Supp No 53, UN Doc A/40/53 (29 November 1985), 4.
[39] Steve Vivian, 'NT chief minister says government has 'mandate' to lower age of criminal responsibility, despite Productivity Commission warning', *ABC News* (online, 17 September 2024) <https://www.abc.net.au/news/2024-09-17/nt-government-defends-raise-age-policy-productivity-commission/104360600>.
[40] Australian Institute of Health and Welfare, *Youth detention population in Australia 2023* (2023) (Web Report), https://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2023/contents/understanding-youth-detention-in-australia/raising-the-age-of-criminal-responsibility; Australian Broadcasting Company, *Victorian Government Abandons Promise to Raise Criminal Age to 14 Amid Youth Justice Reforms* (2024) (Web Page), https://www.abc.net.au/news/2024-08-13/victoria-youth-justice-reform-criminal-age/104217160.
[41] Thomas Feng, 'Premier Allan to Continue Locking up Children After Breaking Promise to #RaiseTheAge', *Human Rights Law Centre* (2024) (Web Page), https://www.hrlc.org.au/news/2024/08/12/raise-age-vic.
[42] Department for Education, Children and Young People of the Tasmanian Government, *Youth Justice Blueprint 2024-2034* (2023) (Web Page), https://publicdocumentcentre.education.tas.gov.au/library/Shared%20Documents/Youth-Justice-Blueprint.pdf.
[43] Legal Aid Western Australia, *Age of Criminal Responsibility* (n.d.) (Web Page) <https://www.legalaid.wa.gov.au/find-legal-answers/young-people/police-and-courts/age-criminal-responsibility#:~:text=The%20age%20of%20criminal%20responsibility,were%20doing%20the%20wrong%20thing.>.

This current landscape amounts to a violation of Australia's international obligations. The established adverse effects of incarceration on young people (younger than 14) signify that the low minimum age of criminal responsibility of 10 years-old in Victoria, Western Australia, and Queensland is not consistent with the best interests of the child nor suitable in relation to youth justice. It is widely accepted that criminal justice systems and incarceration are cyclically criminogenic, with '[age of] contact being one of the key predictors of future offending'.[44] Children first detained between the ages of 10-14 are 'significantly more likely' to be similarly detained in the future, when compared to children first detained at the age of 15-17.[45]

The available evidence overwhelmingly indicates that, 'prior to 14 a neurotypical, able-bodied child simply cannot navigate the complexities of [...] judgement and decision-making, and consequences' relevant to the mental element required for criminality.[46] Therefore, these children are not at a stage of mental maturity where it is appropriate to consider them legally responsible for their actions. Taking steps to raise the age of criminal responsibility and provide alternative pathways is necessary to be consistent with our international obligations.

These measures would holistically address youth offenders at the individual level without relying on the punitive approach of criminalisation or detention. Additionally, it is notable that although children between the ages of 10-11 only constitute a small part of all children under custodial supervision (0.6%), Indigenous children made up 87% of that 10-11 year-old group in 2014.[47] The minimum age of criminal responsibility disproportionately negatively impacts Indigenous young people.

In recognition of this fact, the CRC has stated that a minimum age of criminal responsibility that falls below the age of 12 is unacceptable. In fact, 12 years-old is the 'absolute minimum'[48] and a higher minimum age of criminal responsibility of 14 or 16 years is ideal for developing a juvenile justice system that is in accordance with other sections of the CRC.[49] For example, Article 40(3)(b) provides that '[w]henever… desirable' – such as to relieve the aforementioned detrimental effects of incarcerating children – that children in conflict with the law are dealt with 'without resorting to judicial proceedings'.[50]

Significantly, due to the failure of the Commonwealth to ensure a nationwide compliance with its international obligations under the CRC, and OPCAT as will be later discussed, Australia faces

[44] Chris Cunneen, Barry Goldson, and Sophie Russell, 'Juvenile Justice, Young People and Human Rights in Australia', (2005) 23 *Current Issues in Criminal Justice*.
[45] Ibid.
[46] Simon Rice, 'Australia's Minimum Age of Criminal Responsibility: A Breach of Human Rights', (2022) 96(7) *The Australian Law Journal* 468.
[47] Australian Institute of Health and Welfare (2014) Youth Justice in Australia 2013–14, Characteristics of Young People Under Supervision, Supplementary Tables S74, S78.
[48] UN Committee on the Rights of the Child, *General Comment No 10: Children's Rights in Juvenile Justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007), [32] 10.
[49] Cunneen, Goldson, Russell (n 87).
[50] *CRC* (n 36) art 40(3)(b).

international scrutiny. For example, other nation States as well as the Committee have 'expressed… concern' repeatedly on the failure to meet international standards.[51]

In line with the 'internationally accepted level', compliance would require that the age of criminal responsibility be raised to 14 years-old at a minimum, as urged by the UN Committee on the Rights of the Child.[52] As the age of minimum criminal responsibility is set and regulated by State and territory governments, we recommend that the most politically favourable approach is to enable the States and territories to build consensus, such as through a soft law code, rather than for the Commonwealth Government to implement a strict and binding national minimum for all State and territory criminal law regimes. This will reflect a nationalised approach to the minimum age of criminal responsibility, minimising inconsistency between schemes while maintaining a dialogical process among the States and territories.

Recommendation 4: **That the Commonwealth work with States and territories to remove mandatory sentencing provisions from all criminal legislation.**

In terms of other manifestations of the 'best interests of the child' in the CRC, Article 37(b) provides that 'detention or imprisonment of a child… shall be used only as a measure of last resort'.[53] This international obligation is also reflected in the Beijing Rules where it states at Rule 19.1 that the 'placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period'.[54] Furthermore, mandatory sentencing causes human rights concerns such as violation of the prohibition against arbitrary detention in Article 9 of the *International Covenant on Civil and Political Rights* since the forced imposition of a sentence may be disproportionate or unreasonable.

The requirement that detention be a measure of last resort results from the recognition of the inherent harm caused to children by spending extended periods of time in detention. Similarly, it reflects the rehabilitative and therapeutic purpose of human rights law in this area where detention is damaging and criminogenic, further entrenching the disadvantage which exposed young people to initial criminalisation.

There are still many mandatory sentencing laws in place that are directed towards children. For example, Section 279(6A) of the *Criminal Law Amendment (Home Burglary and Other Offences) Act 2015* (WA) imposes a mandatory sentence of three years on a juvenile offender. The mandatory provisions in the *Juvenile Justice Act 2005* (NT) were recognised by Justice

[51] Wendy O'Brien and Kate Fitz-Gibbon, 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform', (2017) 17(2) *Youth Justice* 134, 137.
[52] UN Committee on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia*, General Distribution, UN Doc CRC/C/AUS/CO/5-6 (1 November 2019), 48.
[53] *CRC* (n 36) art 37(b).
[54] *The Beijing Rules* (n 38) 19.1.

Kearney of the Supreme Court of the Northern Territory as being 'directly contrary to Article 37(b)' of the CRC.[55]

It is our recommendation that the Commonwealth works broadly with the States and territories to abolish mandatory sentencing in all jurisdictions. This dialogical approach will have better political outcomes than the Commonwealth overriding States' authority.

Recommendation 5: That Australia should establish a federal wide body to oversee the implementation of National Preventive Mechanisms ('NPM') in accordance with Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('OPCAT')

The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('OPCAT') has the primary objective of preventing the mistreatment of individuals in detention. It was signed by the Australian Government in 2009 and ratified in 2017.[56] It operates via States' agreement to establish National Preventive Mechanisms ('NPM') which have the mandate to regularly visit places where 'persons are not permitted to leave at their own will'.[57] Additionally, NPMs can make recommendations to national authorities, and often work alongside them to reach the objectives of OPCAT.[58] Independence from State legislatures and governments is integral to the function of NPMs, as it allows for the independence of their personnel, capabilities, knowledge, and efficacy from political agendas that might impede aspects of OPCAT.

Post-ratification, the Commonwealth Government elected to adopt a multiple-body monitoring system between the Commonwealth, States and Territories as opposed to a federal-wide NPM as outlined by OPCAT[59]. This manoeuvre around OPCAT guidelines transferred the obligation of establishing adequate preventative institutions from the Commonwealth to the governments of each State and territory in Australia. Significantly, the Australian Government did not implement a body to oversee the implementation or actions of NPMs uniformly across the jurisdictions. Consequently New South Wales, Victoria and Queensland are still yet to implement their mechanisms.[60]

[55] *Ferguson v Setter and Gokel* (1997) 7 NTLR 118.
[56] 'OPCAT: Optional Protocol to the Convention against torture', *Australian Human Rights Commission* (Web Page, 2024) <https://humanrights.gov.au/our-work/rights-and-freedoms/projects/opcat-optional-protocol-convention-against-torture>.
[57] 'National Preventive Mechanisms Subcommittee on Prevention of Torture', *United Nations Human Rights Office of the High Commissioner* (Web Page) <https://www.ohchr.org/en/treaty-bodies/spt/national-preventive-mechanisms>.
[58] Ibid.
[59] 'Australia's Human Rights Obligations' (n 35).
[60] Ibid.

As a direct consequence of this decision, the conditions of youth incarceration have been left unmonitored in these jurisdictions. Ultimately, the influence of OPCAT and its aim are inhibited by this reckless choice. A submission from the Australian Human Rights Commission in 2011 has previously thoroughly explored the devastating impact this policy choice has had on youth detention facilities in the States and territories.[61] The jurisdiction in Queensland is the only jurisdiction in the nation that allows for 17 year olds to be treated as adults within their criminal justice system.[62] These children can be legally placed on remand or sentenced to a term of imprisonment in adult correctional facilities. Furthermore, the conditions within YDCs such as the now-closed Quamby Youth Detention Centre and Bimberi Youth Detention, were considered by the submission.[63] They found that routine strip searching, remission tactics and discrimination were common tactics employed by the respective governments.

Consequently, this submission finds that juvenile detention facilities across Australia must be monitored systematically. Although OPCAT has been ratified by the Australian Government, its subsequent implementation has discarded its primary aim; to systematically monitor detention facilities, in particular pertaining to youth detention, to prevent mistreatment. Thereby, this submission implores the Australian Government to reconsider the existence of a federal wide National Preventative Mechanism that oversees the conduct and implementation of the National Preventative Mechanisms across all jurisdictions.

Domestic and International Measures of Compliance

Recommendation 6: **That Australia sign and ratify the Third Optional Protocol to the Convention on the Rights of the Child.**

As already discussed, Australia has an obligation under CRC that laws are enacted and enforced in such a way that the best interests of the child are a primary consideration. One key contention is therefore how breaches of this international obligation may be investigated and resolved.

It has been recommended by a number of bodies that Australia sign and ratify the Third Optional protocol to CRC.[64] The Third Optional Protocol provides avenues of complaint for alleged violations of rights afforded under the CRC. Further, following these complaints, the Committee may communicate recommended urgent interim measures before it is heard. After the complaint is heard, the Committee offers its assistance to the parties in reaching a friendly

[61] Ibid.
[62] Ibid.
[63] Ibid.
[64] The Law Council of Australia, Submission to Attorney General's Department, *Inquiry Into Australia's Possible Ratification of the Third Optional Protocol to the Convention on the Rights of the Child* (5 April 2012) 3; Human Rights Law Resource Centre, Submission to Attorney General's Department, *Elaboration and Adoption of a Third Optional Protocol to the CRC* (11 November 2010) 3.

settlement.[65] Whilst the Optional Protocol is not without criticism, notably for its lack of a collective complaints mechanism, it represents an important step forward in ensuring that genuine efforts are made to protect the rights of children.[66]

It must further be noted that, as alluded to above, there have been numerous inquiries into this matter already by a range of government agencies and bodies. In responding to these inquiries, bodies such as the Law Council of Australia and the Human Rights Law Centre have repeatedly recommended that Australia sign and ratify the optional protocol.[67] These benefits were, in short, that signing the Optional Protocol would complement existing mechanisms and serve as an additional mechanism where domestic ones fail, and that Australia would be demonstrating international leadership in its stated commitment to the rights of children.[68]

The presence of an additional international redress mechanism may also spur governments and institutions to implement positive changes in this field. It would make Australia's international human rights obligations harder to ignore in favour of measures which garner immediate political support at the expense of these obligations. Examples of these measures that have been taken by both the Federal and State governments of Australia are numerous throughout this submission, and also submissions to previous inquiries.

Recommendation 7: **That Australia ensure their domestic avenues of complaints are child-friendly and child-accessible**

Understandably, children seeking to enforce their rights may face difficulties in attempting to understand or process their complaints.[69] The wording of the Third Optional Protocol requires a child to have exhausted all domestic avenues of redress before communication is submitted to the Committee. There are exceptions, such as cases in which children had been waiting for so long for their case to be heard domestically that international committees had instead heard their complaint.[70] However, in the best interests of supporting the function of the Third Optional Protocol, it is imperative that domestic avenues of complaint are streamlined and made accessible for children. In doing this, it will be more clear when redress can and cannot be made to the Committee.

[65] Third Optional Protocol to the Convention on the Rights of the Child Article 5. Full text availability: https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-child-communications
[66] Lina Johansson, 'The Third Optional Protocol to the International Convention on the Right of the Child: A Success or a Failure for the Enforcement of Children's Rights?' (2015) 2(1) *Queen Mary University Human Rights Law Review* 54, 73.
[67] See note 64.
[68] Ibid.
[69] Johansson (n 66) 58.
[70] Third Optional Protocol to the Convention on the Rights of the Child Article 7.

A great body of research from a range of different institutions already exists regarding the accessibility issues that Australia's justice system currently contains, particularly toward young people. A comprehensive report by Save the Children examines these policy ideas within the background of Australia's international obligations.[71] The Law Council has also made recommendations in this regard, highlighting the need for an expansion of free and specialised legal assistance and access to specialist children's courts.[72] Given the already expansive library of opinion relating to these proposals, and for the sake of brevity, they will not be once again thoroughly examined under this recommendation.

Further, improving youth access to justice in this way would improve Australia's standing toward other sections of the CRC, particularly Article 2 and Article 12. Article 2 stipulates non-discrimination, that the rights of the CRC are to be protected irrespective of race, sex, religion and other reasons.[73] Article 12 states that children's views should be heard, given weight and taken seriously within proceedings that affect them.[74] Introducing a more accessible and child focussed judicial process would therefore reduce discrimination, in particular to Aboriginal and Torres Strait Islander children as outlined under other terms of reference, and also ensure that children's voices are heard properly.

(c): the degree of compliance and non-compliance by State, territory and federal prisons and detention centres with the human rights of children and young people in detention

Recommendations:

The LRSJ Research Hub supports the creation of **enforceable national standards for youth justice and detention administration.** How the Commonwealth may seek to construct the enforceability mechanisms around such standards is beyond the scope of this submission at current. We do however acknowledge the need for greater consistency and accountability in the administration of youth detention centres around the country, and believe that such standards chart a promising way forwards in this area. In the following section, we canvass a number of justice issues in youth detention administration in each State and territory, and highlight areas in need of harmonisation through national standards. The LRSJ Research Hub acknowledges that the **AYJA National Standards for Youth Justice in Australia 2023** are the benchmark for best practice standards in this area, and are endorsed by youth detention administrators around the country. We endorse the AYJA National Standards as a framework for the development of enforceable minimum standards on the Commonwealth level.

[71] Save the Children, *Putting Children First: A Rights Respecting Approach to Youth Justice in Australia* (Report, April 2023).
[72] The Law Council of Australia, *Alternative Report to the United Nations Committee on the Rights of the Child* (1 November 2018).
[73] UN CRC Article 2.
[74] Ibid, Article 12.

Recommendation 8: That the Commonwealth adopt enforceable national standards for youth justice and detention administration consistent with best practice standards and international human rights obligations.

These standards should set out binding, uniform minimum requirements regarding:

A) Minimum ratios for staff-to-detainees at YDCs
B) A baseline standard for training of staff in YDCs, especially in relation to detainee mental health and disability.
C) A minimum standard for the treatment of detainees regarding isolation, food, and use of force.
D) Record keeping regarding all behaviour management
E) Prohibition of the use of solitary confinement in youth justice settings, clear parameters around isolation, and prohibition of the use of isolation as punishment or reprisal in any circumstances
F) The design and implementation of mental health reporting and response policies
G) Facilities, training, and supports required for children with disabilities

State and Territory prisons and detention centres

States and territories retain residual power for the detention of persons convicted of offences against the criminal law of that State or territory, as well as power over the detention of persons convicted of Commonwealth offences residing in that State or territory under section 120 of the Constitution. As a result, YDCs can and do vary greatly across the country in terms of human rights compliance (see *Term of Reference D* for the relevant law).

In this area, we again raise the concern that more than enough inquiries have been held, both at State and Commonwealth level, for the necessary human rights measures in YDCs to be clear. Using New South Wales as an example, this very concern was raised by Clancey and Metcalfe at the University of Sydney Law School, who pointed out that 'eight separate agencies in NSW and three separate Royal Commissions have furnished reports' on conditions in YDCs in only six years.[75]

This has resulted in a staggering approximate 1040 recommendations, with no doubt significant overlap between many.[76] Therefore, this inquiry runs the risk of further diluting the large, existing body of recommendations which could be implemented *now* to improve conditions in YDCs. Whilst we believe that now is the time for focussed improvement, not further inquiry, we will nonetheless make concise recommendations as to improving human rights compliance in State and territory YDCs.

[75] 'Inspections, reviews, inquiries and recommendations pertaining to youth justice centres in New South Wales between 2015 and 2021' (2022) 34(3) *Current Issues in Criminal Justice* 255.
[76] Ibid.

Australian Capital Territory

Note on Legislation

In addition to the relevant national laws detailed in section D above, the ACT has enacted various bills providing for the treatment of children detained in YDCs. For instance, the territory-wide *Human Rights Act 2004* (ACT) provides generally that 'a convicted child must be treated in a way that is appropriate for a person of the child's age who has been convicted.'[77] Further, the *Custodial Inspector Act 2017* (ACT) establishes the power for an Inspector of Correctional Services. An Inspector under the Act has various powers allowing them to investigate alleged human rights abuses, make scheduled inspections of facilities and interview detainees.[78]

The ACT is legislatively unique as it recently introduced the *Monitoring of Places of Detention Legislation Amendment Bill*.[79] This legislatively fulfils the territory's obligations under OPACT (as outlined above on page 12, Section D), providing for many issues including, significantly, legal protection for detainees against reprisals.[80] The bill also expands the investigatory powers of independent monitoring bodies, allowing them to act as the territory branch of a National Preventive Mechanism ('NPM'). However, as outlined in the above section, Australia has failed to establish a Commonwealth NPM, due in part to failure of some other States to make nominations.[81] The importance of an NPM and reprisal protection will be further discussed below in the *New South Wales* subsection (see pp. 19-20).

YDCs in Operation

The ACT only has one youth detention centre, the Bimberi Youth Justice Centre ('Bimberi'). Despite a generally positive trend towards human rights compliance, there have been some systemic problems which have undermined compliance, and allegations of human rights breaches have been raised by staff and detainees.

Staffing

Understaffing at Bimberi has systematically undermined the centre's compliance with human rights obligations. In the past, understaffing has led to a massive increase in *lockdowns:* a change to the operation of the prison which, when triggered, requires detainees to stay in a

[77] *Human Rights Act 2004* (ACT), s 20(4).
[78] *Custodial Inspector Act 2017* (ACT), ss 18–19.
[79] *2024* (ACT).
[80] Shane Rattenbury, 'New law to prevent torture and ill-treatment in detention' (Media release, ACT Government, 28 August 2024).
[81] 'Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)', *Australian Human Rights Commission* (Web Page, 29 June 2020) <https://humanrights.gov.au/our-work/rights-and-freedoms/projects/opcat-optional-protocol-convention-against-torture>.

certain spot for a period of time.[82] Throughout the second half of the 2010's, frequent, haphazard lockdowns were implemented due to staffing shortages, which meant the measure was required as a method of crowd control.[83]

In a 2019 report by the ACT Human Rights Commissioner, detainees expressed concerns with the negative impact of lockdowns. Many felt that lockdowns delayed or disrupted their education, and undermined a sense of routine to the detriment of mental health; this view was shared by teaching staff.[84] Therefore, it is hugely important that adequate staffing is maintained at Bimberi; otherwise, there is the risk that detainees' human right of access to education will be interfered with.

Furthermore, in a 2011 report to the ACT Legislative Assembly, the ACT Human Rights Commission raised that understaffing often leads to a higher incidence of force being used on detainees.[85] This could lead to non-compliance with the human right to have force only be wielded against a detainee as a last resort, which reinforces the need to prevent understaffing if Bimberi is to comply with its overarching obligations.[86]

Despite being a systemic problem reported as early as 2011, understaffing remains an issue as recently as 2021.[87] That said, a *Headline Indicators Report* from 2024 indicates that staffing problems have been tackled effectively, and operational lockdowns have reduced significantly. In fact, during the year of the report's release (2024), only 3 lockdowns had occurred —down from a high of 277 in the 2019–20 period.[88] This demonstrates a clear positive shift towards human rights compliance at Bimberi.

However, there is still 'no set staff to young person ratio at the Centre'.[89] This means that there are no legislative guardrails to prevent Bimberi from regressing into the chronic short staffing which has plagued it in the past. Also, it goes without saying that Bimberi is only a single youth detention centre, and, at any given point, YDCs in other States may suffer from similar staffing problems and therefore risk non-compliance with human rights. Therefore, this ACT example brings us to the following federal legislative recommendation:

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[82] 'Healthy Centre Review of Bimberi Youth Justice Centre 2020' (ACT Inspector of Correctional Services, June 2021), 89.
[83] ACT Human Rights Commission, *Commission Initiated Review of Allegations Regarding Bimberi Youth Justice Centre* (Report, March 2019) 63.
[84] Ibid, 64-66.
[85] 'The ACT Youth Justice System 2011: A Report to the ACT Legislative Assembly by the ACT Human Rights Commission' (ACT Human Rights Commission, July 2011), 55.
[86] Ibid.
[87] Ibid 265; Dominic Giannini, 'Staff shortages following 2019 Bimberi riot still affecting young detainees in the ACT', *Riotact* (online, 17 February 2021) <https://the-riotact.com/staff-shortages-following-2019-bimberi-riot-still-affecting-young-detainees-in-the-act/439565>.
[88] Rachel Stephen-Smith, 'Bimberi Headline Indicators Report – May 2024' (Report, Children, Youth and Family Services Ministry, May 2024), 8.
[89] 'commission Initiated Review Of Allegations Regarding Bimberi Youth Justice Centre' (ACT Human Rights Commission, March 2019), 67.

Recommendation 8 (a): That Australia federally legislates a minimum ratio of staff to detainees at YDCs.

New South Wales

YDCs in Operation

New South Wales has six YDCs in operation.[90] This number has reduced from nine over the past two decades as three centres have closed; at the same time, human rights compliance has generally improved.[91] Nevertheless, we identify areas for legislative intervention from the federal government to address ongoing instances of non-compliance which debase the carriage of youth justice in NSW YDCs.

Staff Training

It is well-evidenced that detainees in YDCs experience higher rates of psychological disorder and intellectual disability than unincarcerated children. A 2015 survey by NSW Health found that '83 per cent had at least one psychological disorder, 68 per cent had experienced abuse or neglect in childhood, and almost 17 per cent had […] potential intellectual disability'.[92] This vulnerability can amplify the risk of many human rights problems in YDCs. If a detainee's psychological conditions go unrecognised and/or staff are untrained with interpreting conditions, this can lead to detainees suffering inappropriate treatment (such as excess force or separation) due to mismanagement of their condition.

The likelihood of this mismanagement of detainee mental health can be reduced through the adequate training of staff. However, in NSW at least, 'there are no specific education, training or skill requirements to become a youth officer,' meaning that many YDC employees are unequipped to deal with young detainees, 'let alone a group with complex needs'.[93] Therefore, trends across NSW YDCs highlight the need for staff to be given strong detainee mental-health training. Improved and nationally consistent training for YDC staff is essential to ensure that all young detainees receive an equal standard of professionalism and care in regards to mental health, thereby minimising the potential for human rights non-compliance.

[90] Clancey et al, 'Some long-term positive trends in youth detention in New South Wales (Australia)' (2022) 22(1) *Safer Communities* 15, Table 2.
[91] Ibid.
[92] Justin Healey, *Youth Crime and Justice* (Spinney Press, 2022) 31.
[93] Ibid 35.

Recommendation 8 (b): That a national baseline standard is set for training YDCs' staff in relation to the mental health of detainees.

Importance of OPCAT Implementation and Protection Against Reprisals

As briefly mentioned on page 17, the ACT implemented the *Human Rights Act 2006* (ACT) to legislate the UN Optional Protocol to the Convention Against Torture (OPCAT - see page 12). This fulfils their territory contribution to a Nationwide Preventive Monitor ('NPM'), which is unfortunately held back by other States' and the Commonwealth's slow action.

Despite ratifying OPCAT, the Commonwealth Government is yet to establish a national NPM to enforce it, having postponed this several times.[94] There is obviously a general human rights need for a nationwide monitor to ensure human rights compliance. However it is especially necessary to prevent **reprisals** against detainees who raise concerns or speak out against abuse.

As things currently stand, many youth detainees are reluctant to report mistreatment for a fear of reprisals by YDC staff after monitors have left.[95] However, the OPCAT makes special provision for protection against reprisals, meaning that NPM monitors (who derive their authority from OPCAT) would take special measures to anonymise feedback and therefore encourage reporting.[96] Such measures include having conversations in a 'variety of locations' where detainees would otherwise be, assuring them of confidentiality and then monitoring the YDCs to ensure that no reprisals take place.[97]

Such measures will lead to far greater monitoring of human rights compliance. Therefore, worrying trends like the increase in 24hr+ segregations in NSW YDCs could be reversed.[98] This is a perfect example of the need for a nationwide monitor, as such long segregations are both

[94] 'Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)', Australian Human Rights Commission (Web page, 29 June 2020) <https://humanrights.gov.au/our-work/rights-and-freedoms/projects/opcat-optional-protocol-convention-against-torture>.
[95] Lisa Ewenson and Bronwyn Naylor, 'Protecting human rights in youth detention: listening to the voices of children and young people in detention' (2021) 27(1) *Australian Journal of Human Rights* 97, 101.
[96] *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res 57/199, UN Doc A/RES/57/199 (18 December 2002), Article 15, 21.
[97] Lisa Ewenson and Bronwyn Naylor, 'Protecting human rights in youth detention: listening to the voices of children and young people in detention' (2021) 27(1) *Australian Journal of Human Rights* 97, 103.
[98] Mary Louise-Vince and Cecilia Connell, 'Segregations Exceeding 24 Hours at Juvenile Justice Centres on the Rise', *ABC News* (online, 4 November 2022) <https://www.abc.net.au/news/2022-11-04/juvenile-justice-centre-solitary-confinments-rise-ombudsman/101610380>.

an example of non-compliance and also an example of a reprisal which detainees may fear, should they complain with inadequate protection.[99]

States including NSW are yet to make a nomination for an NPM, while the Commonwealth generally has been slow to act.[100] If this recommendation is implemented it will set the stage for greater human rights compliance in the future in all States, not just NSW.

Therefore, we reinforce the need for a National Preventive Monitor to be established by the Commonwealth, as per *Recommendation 7*.

Northern Territory

Legislation

The main legislative instrument for managing custodial corrections in the Northern Territory is the *Youth Justice Act 2005* (NT) (‘*Youth Justice Act*’), for which the *Youth Justice Regulations 2006* (NT) provides more specific regulations as to the standards to be upheld in State YDCs in the Territory.

YDCs in Operation

The NT has two YDCs: the Alice Springs Youth Detention Centre (‘Alice Springs YDC’) and the Don Dale Youth Detention Centre (‘Don Dale’).[101]

Compliance with Youth Rights

The Royal Commission into the Protection and Detention of Children in the Northern Territory (‘2017 Royal Commission’) was tabled in the Australian Parliament in 2017.[102] The NT Royal Commission investigated the conditions in both YDCs, and ultimately determined that the centres had breached Australia's international human rights obligations and contravened numerous domestic laws pertaining to youth incarceration.

The 2017 Royal Commission's report provides a comprehensive outline of how it arrived at the conclusion that the two YDCs were unfit for accommodating, let alone rehabilitating, children

[99] ‘Cruel’ punishment under article 37 of the UN CRC.
[100] ‘OPCAT: Optional Protocol to the Convention Against Torture, *Australian Human Rights Commission* (Web Page, 29 June 2020) <’https://humanrights.gov.au/our-work/rights-and-freedoms/projects/opcat-optional-protocol-convention-against-torture>.
[101] ‘Young People: Going to a Detention Centre’, *Northern Territory Government* (Web Page) <https://nt.gov.au/law/young-people/going-to-court-and-sentencing/young-people-going-to-a-detention-centre>.
[102] *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (Final Report, 17 November 2017).

and young people.[103] Among other findings, the report found that children were denied access to basic human needs (such as water, food, and toilet use); youth justice officers dangerously used physical force to exert power over the children; YDC employees verbally abused and bribed inmates to carry out humiliating acts or to commit acts of violence on each other; and isolation had been inappropriately used as punishment in violation of s 155A(2) of the *Youth Justice Act 2005* (NT).[104]

Although we acknowledge that there has been a move to modify the existing training centres by refurbishing the Alice Springs YDC, no closure of Don Dale has been announced, and at the time of writing, the youth detainees have not been relocated.[105] While we welcome the 'therapeutic, trauma informed, culturally secure service' that the updated centre purports to provide,[106] this redesign and concept was in response to the 2017 Royal Commission, so it is unclear whether it will be able to uphold these standards with the increasing rates of youth detention in the past few years.[107] Further, its construction has been undergoing delays since it was due to open mid-2022, leaving the young detainees suffering for years after their inhumane conditions had been exposed.[108]

Hence, in order to hold NT YDCs accountable and ensure that they consistently comply with the rights outlined in the Optional Protocol to the Convention Against Torture (OPCAT), a national human rights minimum standard should be implemented to prohibit the use of isolation and segregation, limit the excess use of force, require detainees' free access to food and toilets, and ensure access to specialist expertise to properly inspect and monitor youth detention facilities.[109]

Recommendation 8 (c): That the Commonwealth implement a national minimum standard which prohibits the use of isolation and segregation in YDCs, limits excess use of force against detainees, requires the security of detainees' free access to food

[103] Ibid.
[104] Ibid.
[105] Dechlan Brennan, 'NT Aboriginal Justice Agency Says Keeping Don Dale Open Means Continuing Harm to Young People', *National Indigenous Times* (online, 4 April 2024) <https://nit.com.au/04-04-2024/10649/nt-aboriginal-justice-agency-says-keeping-don-dale-open-will-continue-to-harm-young-people>.
[106] Office of the Children's Commissioner Northern Territory, 'Refurbishment of Alice Springs Youth Detention' (Media Release, 21 February 2024).
[107] 'Youth Detention Population in Australia 2023', *Australian Institute of Health and Welfare* (Web Page, 13 December 2023) <https://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2023/contents/state-and-territory-trends>.
[108] Save the Children, *Putting Children First: A Rights Respecting Approach to Youth Justice in Australia* (Report, April 2023).
[109] Lee Robinson, 'Redeveloped Youth Detention Centre to Open, Don Dale Detainees Return to Alice Springs', *ABC News* (Web Page, 21 February 2024) <https://www.abc.net.au/news/2024-02-21/redeveloped-alice-springs-youth-detention-centre-set-to-reopen/103495964>.

and toilets, and mandates inspections and monitoring of youth detention facilities.

Queensland

Legislative Framework

The general legislative instrument which oversees prisons and incarceration in Queensland is the *Corrective Services Act 2006* (Qld) ('**CSA (Qld)**'), which is executed by Queensland Corrective Services and the Minister for Corrective Services. Further, the *Youth Justice Act 1992* (Qld) ('**YJA (Qld)**') is executed by the Department of Youth Justice, overseen by the Minister for Education and Youth Justice, and regulated by the *Youth Justice Regulation 2016* (Qld) ('**YJR (Qld)**').

YDCs in Operation

In Queensland, there are three YDCs in operation: the Brisbane Youth Detention Centre ('**BYDC**'), with a bed capacity of 162 detainees; the Cleveland Youth Detention Centre ('**CYDC**'), with a bed capacity of 112 detainees and a notable Indigenous population; and the West Moreton Youth Detention Centre ('**WMYDC**'), the smallest of the three, with a bed capacity of only 32 detainees.[110] Each detainee receives an individually tailored service provision program, which is 'customised to the individual, taking into account their age, gender, experience, cognitive development, cultural background and educational needs.'

Obligation to Keep Records of All Behavioral Management

Recommendation 8 (d): That all youth detention centre employees are required to keep records of all behavioural management

Pursuant to Section 16(5)–(6) of the YJR, a YDC's chief executive must ensure a record is made of a YDC employee's use of reasonable force against a detainee carried out 'to protect a child, or other persons or property in the centre, from the consequences of a child's misbehaviour'.[111] We recommend that an additional subsection is appended to Section 16 which confers onto a YDC's chief executive a broader obligation to record any and all disciplinary and

[110] 'About youth detention in Queensland', *Queensland Department of Youth Justice* (Web Page, 15 July 2024) <https://desbt.qld.gov.au/youth-justice/parents-guardians/youth-detention/about>.
[111] *Youth Justice Regulation 2016 (Qld)* ss 16(5)-6.

behavioural management actions exercised by YDC employees under Divisions 3 and 4 (and not just 'reasonable force' under s 16(5)).

This would help ensure that YDC employees' exercise of all disciplinary force — both physical and non-physical — is recorded for five main reasons.

1. First, for detainees, keeping records of discipline and behavioural management can assist with a detainee's ability to report unfair, biased, or disproportionate treatment and provide an empirical basis upon which a detainee can advocate for better treatment when corresponding with legal representatives, mental health staff, or other support services.

2. Second, record-keeping can assist externally with the development, aggregation, and analysis of data for reports, inquiries, class action suits, and committees (such as this one), and bolster the credibility of qualitative data (in the form of detainee testimony and employee whistleblowing).

3. Third, if records are kept of all employee YDC employees, performance reviews can take into account an assessment of the exercise of behavioural management mechanisms and assist in internal reformation of YDCs'

4. Fourth, s 16(3)(b)(vi) requires a chief executive to ensure that discipline for misbehaviour is done with regard to 'any vulnerability of the child that the chief executive knows about.' Statutorily entrenching an obligation to keep records of all employees' behavioural management of detainees would inform the chief executive of a detainee's disciplinary and behavioural history, which is a pertinent vulnerability that, pursuant to s 16(3)(b)(vi), the chief executive must have regard to in their supervision of discipline.

5. Fifth, the increase in information brought about by a requirement to keep records of all behavioural management will assist with a chief executive's statutorily-established objectives to 'gain access to, or collect, information about a particular detention centre, detention centre employee or child' and 'analyse trends across all the information.'[112]

South Australia

Legislation

The main legislation concerning the protection of children and young people in South Australia is set out in the *Children and Young People (Safety) Act 2017* (SA) ('CAYPS Act'), which operates in conjunction with Chapter 8, Part 2 of the *Uniform Special Statutory Rules 2022* (SA) ('USS Rules'). The *CAYPS Act 2017* (SA) sets out the priorities in the operation of the Act. Section 7 of CAYPS Act establishes that the protection of children and young people from harm

[112] Ibid, ss 382(a)-(b).

is the 'paramount' consideration in the administration, operation and enforcement of the Act. Additionally, the *Youth Justice Administration Regulations 2016* (SA) provide more specific regulations as to the standards to be upheld in South Australia's YDCs.

YDCs in Operation

The only Youth Training Centre in operation in South Australia is the Adelaide Youth Training Centre - Kurlana Tapa ('Kurlana Tapa').[113]

Compliance with Youth Rights

In 2020, the South Australian Ombudsman provided a comprehensive report ('Ombudsman's Report') outlining how the Department of Human Services had acted in a manner that was "unreasonable, wrong, oppressive, unjust and contrary to law".[114] These actions included, among others, segregation and isolation for a duration longer than reasonably necessary in the circumstances, a failure to provide sufficient cultural recognition and support, and restrictions on detainees' freedom of movement by means of mechanical restraints when the prescribed circumstances of the *Youth Justice Administration Regulations 2016* (SA) did not apply.[115]

Despite the Ombudsman's Report's exposure of harmful and, at times, unlawful conditions experienced by children in Kurlana Tapa, the Training Centre Visitor Report ('TCV Report') for the 2022–2023 fiscal year has not demonstrated promising progress.[116] According to Training Centre Visitor Shona Reid, Kurlana Tapa is severely understaffed, resulting in detainees being locked in their cells for far longer than reasonably necessary, including for periods of up to 22 hours a day.[117] As a result, Reid expresses concerns about the impact of detention and how a lack of time 'out of rooms' bears cumulative effects on the mental health of young people.[118]

Indeed, 36.9% of juvenile detainees are likely to experience self-harm behaviours, which demonstrates that the centre is not effectively pursuing section 7 of the *Children and Young People (Safety) Act 2017*.[119] The 2022-2023 TCV Report also notes that young people in Kurlana Tapa have experienced traumatic events in residential care environments, associated with peer behaviours, relationships and dynamics, as well as challenges in accessing mental health and other therapeutic support needs.[120]

Significantly, the TCV Report highlights that following their June 2020 Kurlana Tapa Pilot Inspection Report ('Pilot Inspection Report'), only two of the Recommendations to the

[113] 'Adelaide Youth Training Centre - Kurlana Tapa', *South Australian Government* (Web Page) <https://www.sa.gov.au/topics/rights-and-law/young-people-and-the-law/adelaide-youth-training-centre>.
[114] Ombudsman SA, *Investigation into the Treatment of Young People in the Adelaide Youth Training Centre* (Investigation, 10 February 2020).
[115] Ibid.
[116] Training Centre Visitor, *2022-2023 Annual Report* (Report, 30 September 2023).
[117] Ibid.
[118] Ibid.
[119] Ibid.
[120] Ibid.

Department of Human Services ('DHS') have been completed.[121] This highlights the DHS' lack of commitment to the recommendations and feedback provided by the TCV Report. Given the importance of independent oversight bodies in youth justice, outlined in the Royal Commission into Institutional Responses to Child Sexual Abuse, the DHS' unwillingness to proactively take on the recommendations from the Pilot Inspection Report demonstrates a general lack of commitment to improving the conditions of Youth Training Centres.[122]

Hence, to ensure Kurlana Tapa is committed to providing their detainees with the rights outlined in OPCAT, **a national human rights standard requiring adequate staffing levels and funding is necessary to ensure child rights are implemented in practice, as mentioned in recommendation 8(a).**

Tasmania

Legislative Overview

The general legislative instruments that set out the requirements for managing custodial corrections in Tasmania are the *Corrections Act 1997*, and *Correction Regulations 2018*,[123] both of which are executed by Correction Services Tasmania, under the Tasmanian government's Department of Justice.[124] Additionally, the *Youth Justice Act 1997* (**'YJA (Tas)'**), which aims to 'encourage young people who have committed offences to take personal responsibility for their actions',[125] provides for the administration of youth incarceration. The YJA (Tas) includes provisions on the rights of detainees, most specifically s 129, which outlines the needs which must be met:

> (1) A detainee is entitled –
>
> (a) to have his or her developmental needs catered for; and
>
> (b) subject to section 135 , to receive visits from guardians, relatives, legal practitioners and other persons, including, in the case of a detainee who is an Aboriginal person, persons acting on behalf of the entity known as the Aboriginal Legal Service; and

[121] Ibid.
[122] 'A Training Centre Visitor for Young People in Detention', *Office of the Guardian for Children and Young People* (Web Page, 5 April 2018) <https://gcyp.sa.gov.au/2018/04/05/a-training-centre-visitor-for-young-people-in-detention/>.
[123] Department of Justice (Tas), 'Rules and Regulations', *Tasmania Prison Service* (Web Page, 20 September 2021) <https://www.justice.tas.gov.au/prisonservice/life-in-prison/rules-and-regulations>.
[124] Department of Justice (Tas), 'Adult Offenders', *Corrective Services* (Web Page) <https://www.justice.tas.gov.au/correctiveservices>.
[125] 'The Youth Justice Act', *Magistrates Court of Tasmania* (Web Page) <https://www.magistratescourt.tas.gov.au/going_to_court/young_offender/about_the_youth_justice_act>.

(c) to have reasonable efforts made to meet his or her medical, religious and cultural needs including, in the case of a detainee who is an Aboriginal person, his or her needs as a member of the Aboriginal community; and

(d) to complain to the Secretary or the Ombudsman about the standard of care, accommodation or treatment he or she is receiving in the detention centre.

(2) The Secretary must ensure that the rights of a detainee under sections 127 and 128 and this section are not infringed.[126]

Ashley Youth Detention Centre

Tasmania currently has one youth detention centre in operation, the Ashley Youth Detention Centre ('**AYDC'**), located in North Tasmania, near Deloraine.[127] It is operated by Tasmania's Children and Youth Services, and houses children who have been remanded or sentenced to detention under the YJA (Tas) for committing criminal offences.[128] Under the YJA (Tas), 'the Secretary of Tasmania's Children and Youth Services is responsible for the security and management of detention and for the safe custody and wellbeing of detainees'.[129]

Non-Compliance with Youth Rights

Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings (2023)

In 2023, a Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Instituional Settings (**'the 2023 Commission'**) was published, with Volume 5 specifically 'examin[ing] the Tasmanian Government's responses to allegations of child sexual abuse at AYDC since 2000'.[130] The 2023 Commission found that there are 'high rates of sexual abuse for children in detention', particularly due to their heighted vulnerability in our community, which is frequently compounded by experiences of 'trauma, maltreatment and significant development disorders'.[131] According to Chapter 10 in Volume 5 of the 2023 Commission, 'specific risk factors for child sexual abuse in detention include:

- the deprivation of children's liberty and a lack of privacy
- isolation and disconnection from friends, family and community

[126] *Youth Justice Act 1997* (Tas) s 129.
[127] Department for Education, Children and Young People, 'About Youth Justice Services in Tasmania', *Youth Justice Services* (Web Page) <https://www.decyp.tas.gov.au/safe-children/youth-justice-services/about-services-for-youth-justice-in-tasmania/>.
[128] Fernanda Dahlstrom, 'Youth Detention (Tas)', *Criminal Law* (Web Page) <https://www.gotocourt.com.au/criminal-law/tas/youth-detention/>.
[129] *Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings* (Report, September 2023) vol 5, ('*Tasmanian Commission of Inquiry*').
[130] *Tasmanian Commission of Inquiry* (n 101).
[131] Ibid.

- lack of access to trusted adults
- the power imbalance between adult staff and detained children
- the use of rigid rules, discipline and punishment
- the lack of voice afforded to children
- cultures of disrespect for, and humiliating and degrading treatment of, children
- strong group allegiance among management.'[132]

AYDC's geographically remote location further amplifies its inhabitants' isolation.[133] In addition to allegations of child sexual abuse, Volume 5 of the 2023 Commission reveals 'a culture of unauthorised use of force, restaurants and isolation and of belittling and humiliating behaviours allegedly used to dehumanise children and young people in detention' at AYDC. Chapter 11 of the 2023 Commission further details specific accounts of abuse in AYDC, as well as Ashley Home for Boys (AHFB), its predecessor.[134] A common theme that emerged from the various case studies documented was 'the devastating ongoing trauma that the abuse at AYDC has had on victim-survivors' mental and physical health'.[135] The 2023 Commission highlights the necessary reforms that their findings have indicated, which include:

- 'an acknowledgment from the Government about what has happened to them
- a prohibition on staff who have abused children in detention from ever working with children again
- comprehensive background checks on anyone seeking employment at a youth justice facility
- a rehabilitative facility for young people that is more centrally located and ensures detainees have access to a full education
- closed-circuit television throughout a new facility
- female and male young people to be housed separately in detention facilities, with girls to be supervised only by female staff
- a safe and effective process for children to make complaints about their treatment when detained
- more cultural support for Aboriginal young people in detention.'[136]

[132] Ibid.
[133] Ibid.
[134] Ibid.
[135] Ibid 149.
[136] Ibid 150.

The need for these reforms, as well as AYDC's 'culture of humiliation, denigration, control, violence and abuse',[137] indicates a great degree of non-compliance with the human rights of children and young people in detention in Tasmania.

Recommendation 9: That the Federal Parliament work with the Tasmanian Government to implement, to the fullest extent possible, the recommendations of the 2023 Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings.

Victoria

Legislative Overview

The general legislative instrument that manages the requirements for managing custodial corrections in Victoria is the *Corrections Act 1986.*[138] The principal legislation for youth justice services in Victoria is the *Children, Youth and Families Act 2005* (**'CYFA'**),[139] which is 'a framework for youth justice, child protection, out of home care and family services'.[140]

Victoria did not have a standalone Youth Justice Act until 10 September 2024, when the *Youth Justice Act 2024* (**'YJA (Vic)'**) was assented to.[141] One purpose of the YJA (Vic) is 'to repeal certain provisions from the *Children, Youth and Families Act 2005*', and Part 10.2 specifically outlines the rights and responsibilities of children and young people in youth justice custodial centres.[142]

Additionally, there is a *Charter of Human Rights and Responsibilities Act 2006*;[143] this protects human rights in Victoria's prisons and detention centres, including entitlement to 'opportunities for education and rehabilitation' for children in detention.[144]

[137] Ibid 149.
[138] *Corrections Act 1986* (Vic).
[139] *Children, Youth and Families Act 2005* (Vic).
[140] 'Legislation relating to the youth justice service', *Department of Justice and Community Safety Victoria* (Web Page) <https://www.justice.vic.gov.au/justice-system/youth-justice/legislation-relating-to-the-youth-justice-service>.
[141] *Youth Justice Act 2024* (Vic).
[142] Ibid s 1(2)(a).
[143] 'About the Charter', *Victorian Equal Opportunity & Human Rights Commission* (Web Page) <https://www.humanrights.vic.gov.au/legal-and-policy/victorias-human-rights-laws/the-charter/>.
[144] 'Prison and youth detention', *Victorian Equal Opportunity & Human Rights Commission* (Web Page) <https://www.humanrights.vic.gov.au/for-individuals/places-prisons/>.

YDCs in Operation

There are currently two Youth Justice Custodial Services in operation in Victoria, and administered by the Department of Justice and Community Safety: Parkville Youth Justice Precinct (PYJP), and Cherry Creek Youth Justice Precinct (CCYJP).[145] The aims of these Youth Justice Custodial Services include providing 'safe and secure youth justice custodial facilities for young people and staff'.[146]

Non-Compliance with Youth Rights

Human Rights Law Centre

According to the Human Rights Law Centre, the Victorian Government has 'continue[d] to dodge scrutiny of youth prisons', having 'missed the deadline' in January 2023 to meet Australia's obligations to the OPCAT.[147] Despite this, 'reports of human rights abuses [...] emerged from youth prisons' throughout 2023, including 'the rampant use of solitary confinement on children, and the use of spit-hooding, a dangerous practice which has caused deaths in custody, on a 17-year-old Aboriginal child detained in an adult prison'.[148]

Inquiry into Youth Justice Centres in Victoria (2018)

The Inquiry into Youth Justice Centres in Victoria was reported in 2018, and provides 33 findings and 39 recommendations.[149]

Findings and recommendations on the structure and oversight of youth justice centres in Victoria are outlined in Chapter 7. Findings in this section are summarised below:

- **'FINDING 17:** There was a breakdown in the relationship between staff and management in Victoria's youth justice centres.'[150]
- **'FINDING 18:** The Department of Health and Human Services and the Department of Justice must work closely together to ensure continuity of care for young people who experience both the child protection and youth justice systems.'[151]
- **'FINDING 19:** Independent oversight agencies provide important feedback on how well youth justice systems function, including giving a voice to detained young offenders.'[152]

[145] 'Custody in the youth justice system', *Department of Justice and Community Safety Victoria* (Web Page) <https://www.justice.vic.gov.au/justice-system/youth-justice/custody-in-the-youth-justice-system>.
[146] Ibid.
[147] 'Victorian Government continues to dodge scrutiny of youth prisons', *Human Rights Law Centre* (Web Page) <https://www.hrlc.org.au/news/2024/1/19/opcat-youth-prisons>.
[148] Ibid.
[149] Legal and Social Issues, *Inquiry into youth justice centres in Victoria* (Legislative Council Paper No 372, Session 2014-18).
[150] Ibid 121.
[151] Ibid 124.
[152] Ibid 129.

Section 7.4.1 discusses the OPCAT, and Amnesty International suggests that 'Victoria's current oversight and inspection regime for youth justice facilities would not fully meet OPCAT requirements'.[153] **Hence, the OPCAT should be given greater effect at a federal level, in correspondence with recommendation 8(b), (c) and (d).**

Independent Broad-based Anti-corruption Commission (IBAC) Findings

Since its establishment in 2012, the IBAC, an independent statutory authority of Victoria, has conducted 'many investigations into the corrections and youth justice sector'.[154] IBAC investigations has provided insights into various wrongdoings of custodial staff in prisons, whose actions include:

- 'smuggling contraband to prisoners
- having inappropriate relationships with prisoners
- using excessive force
- misusing information
- inappropriately managing conflicts of interest, including in relation to prisoners but also when making decisions regarding procurement and recruitment
- not reporting or investigating incidents within the prison correctly, particularly assaults or use of force against prisoners.'[155]

Such corruption and misconduct in the Victorian corrections and youth justice sector indicates a great degree of non-compliance with the human rights of children and young people in detention in Victoria. **Hence, we reiterate our recommendations at 8(b), (c) and (d), which would ameliorate these issues.**

Western Australia

Legislative Overview

In Western Australia, the *Young Offenders Act 1994* (WA) ('YOA') is the foremost piece of legislation providing for the administration of youth justice in the State. A review of the YOA was announced in 2022, but had not begun consultation as of 2024. The Commissioner for Children and Young People has also urged the government, as part of the YOA review, to consider review of other legislation which impacts children and young people inside the justice system, including the *Criminal Code Act 1913* (WA), the *Bail Act 1982* (WA), and the *Sentencing Act*

[153] Ibid 128.
[154] 'Corruption and misconduct risks in corrections and youth justice', *Independent Broad-based Anti-corruption Commission* (Web Page) <https://www.ibac.vic.gov.au/corruption-and-misconduct-risks-in-corrections-and-youth-justice>.
[155] Ibid.

1995 (WA).[156] Other advocates have further urged this review, on the basis that several aspects of the State's approach to youth justice are incompatible with a rehabilitative and justice reinvestment framework, requiring urgent and serious reform. Some of those aspects include:

- The minimum age of criminal responsibility;
- The continued existence of mandatory sentencing provisions which apply to young people;
- The detention of young people in adult prison facilities, including the transfer of young people aged 18 to adult prisons; and
- The use of solitary confinement in youth detention.

Banksia Hill Detention Centre (BHDC)

The Banksia Hill Detention Centre (BHDC), in Canning Vale, is the State's sole youth detention centre after the closure of the Rangeview Juvenile Remand Centre in 2012.[157]

The Western Australian government has, in the past month, announced that they will allocate $100 million for the construction of an additional 30-bed juvenile detention centre adjacent to Banksia Hill. The facility is intended to replace Unit 18, a wing of the maximum-security adult facility Casuarina Prison which was hurriedly converted into a youth detention facility in 2022. The decision to open Unit 18 has come under sharp criticism following the deaths by suicide of a number of Indigenous children in the Unit, and allegations of serious misconduct and neglect by staff in relation to their deaths.[158] There is no current timeline on the construction of the proposed new facility, and as such Unit 18 will remain functional as a youth detention facility for the foreseeable future.[159]

Compliance with Youth Rights

Solitary confinement

Western Australian youth detention facilities have been found to have repeatedly detained children in conditions amounting to solitary confinement. In July 2023, the Supreme Court of

[156] Commissioner for Children and Young People Western Australia, *Discussion Paper: Youth Justice in Western Australia* (Discussion Paper, January 2024) <https://www.ccyp.wa.gov.au/media/5170/youth-justice-discussion-paper-final-pdf.pdf>.
[157] Find and Connect, *Longmore Remand and Assessment Centre* (Web Page, 2021) <https://www.findandconnect.gov.au/entity/longmore-remand-and-assessment-centre/>.
[158] Corruption and Crime Commission Western Australia, *An investigation into allegations of serious misconduct following the death of a young detainee in Unit 18 Casuarina Prison* (Report, 11 June 2024) <https://www.ccc.wa.gov.au/sites/default/files/2024-06/An%20investigation%20into%20allegations%20of%20serious%20misconduct%20following%20the%20death%20of%20a%20young%20detainee%20in%20Unit%2018%20Casuarina%20Prison_2.pdf>.
[159] 9 News, 'New youth detention centre planned to replace WA's controversial Unit 18' (26 September 2024) <https://www.9news.com.au/national/new-youth-detention-centre-planned-to-replace-was-controversial-unit-18/0773e66e-9ad1-4502-a430-9e89088de7ed>

Western Australia found that three children had been locked unlawfully in their cells for a total of 167 days in 2022, for prolonged periods which amounted to solitary confinement, at both Banksia Hill Detention Centre and Unit 18. The holding of the children under such conditions was not only inconsistent with the administration of the YOA, but 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'. Earlier, in June 2022, the Western Australian Inspector of Custodial Services determined that children in Banksia Hill were often being held in conditions equating to solitary confinement, and in breach of international human rights agreements. In a 2023 class action commenced by previous child detainees of Banksia Hill, the first complainant, Alexandra Walters, shared her experience of being 'locked confined alone in a cell for approximately 23 hours a day with short periods of recreation of approximately 1 hour each day outside the cell… either in an enclosed room of approximately 4 metres by 5 metres or in an enclosed outside structure approximately 3 metres by 3 metres with concrete and brick walls and a cyclone wire cage above'.[160] The class action will allege that this confinement amounts to false imprisonment, but also unlawful disability discrimination and a breach of an established duty of care to take reasonable steps to prevent psychiatric injury to young detainees.

The Australian Human Rights Commission characterised the use of solitary confinement as ' a systemic failure caused by a shortage of qualified staff, inadequate infrastructure and a consequent inability to manage detainees with difficult behavioural problems'.[161]

Consistent with the recommendation of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, we recommend that:

Recommendation 8(f): any enforceable national standards prohibit the use of solitary confinement in youth justice settings, set clear parameters around isolation, and outright prohibit the use of isolation as punishment or reprisal in any circumstances.[162]

Disability discrimination

In *Alexandra Walters & Ors v State of Western Australia*, the applicant submitted a claim of unlawful disability discrimination at Banksia Hill. She recounted a failure to assess or obtain diagnoses for young people for mental health conditions upon admission to custody, subsequent failures to provide suitable treatment, programs or services for young people with disability, or adapt education programs and services for children with disability in custody. The case further alleges that Banksia Hill staff failed to make reasonable adjustments for children with disabilities, with the effect that they were less favourably treated, including being subjected to

[160] Affidavit of Stewart Levitt, *Alexandra Walters & Ors v State of Western Australia*, Federal Court of Australia (28 November 2022).
[161] Ibid.
[162] Ibid.

prejudicial conditions and treatment. For instance, the Applicants claim that they were subject to regular strip searching which, for reasons associated with their disabilities, they would refuse to comply with, being met with frequent punitive responses such as use of force or restraints, or prolonged solitary confinement.

The treatment of children with disabilities in detention highlights the need for adequate strategic planning, training and support for staff in relation to accommodating children with disability. At Banksia Hill in 2018, almost 90% of children in detention had at least one type of severe neurodevelopmental impairment.[163] Despite this, a 2022 inspection by the Office of the Inspector of Custodial Sentences found that youth prison facilities in Western Australia were inadequately prepared to accommodate children with disabilities:

> *'Most facilities will have one or two cells designed to accommodate people with a physical disability requiring mobility aids, but not much beyond that. For individuals with cognitive and intellectual disability, there are limited specialist accommodation options. Many end up placed in general population units. Some are placed in prison protection units with the intention to safeguard their particular vulnerabilities. However, these are often not operated with specific policies or procedures in place to manage people with disability. Experience has shown that many are not always safe or appropriate places for particularly vulnerable prisoners or detainees.*'[164]

There appears to be no current explicit policy framework for the support and treatment of young people with disability in prisons. The most comprehensive reference to disability within the justice administration policy framework in Western Australia is in the Detainee Behaviour Management Operating Policy and Procedure, where one item (F) in a list of behaviour management principles is 'consideration of a disability, including cognitive needs.'[165] The Inspector of Custodial Sentences determined that the most pressing factor in the poor treatment of disabled children at Banksia Hill is the lack of appropriate facilities and physical infrastructure - including forensic mental health beds, accessible shower and toilet facilities, and non-confinement facilities for behavioural management.[166] The Inspector noted that the 'most important reform underway' at Banksia Hill is the development of a trauma-informed model of care. This is an incomplete project, requiring greater practical implementation - ensuring staff understand and follow the model, providing adequate training to such effect, and increasing the number of non-custodial, welfare-focused staff at the centre.[167]

Recommendation 8(g): Implementation of enforceable national minimum standards regarding the facilities, training, and supports required for children with disabilities kept in detention centres.

[163] Officer of the Inspector of Custodial Services, Statement of Information to the Royal Commission into Violence, Abuse, Neglect, and Exploitation of People with Disability, August 2022 [65].
[164] Ibid [66].
[165] Ibid [76].
[166] Ibid [74].
[167] Ibid [100].

At 1:35AM on 12 October 2023, Cleveland Dodd, a young Aboriginal man detained at Unit 18, called a Youth Custodial Officer at the facility to warn of his intention to hang himself. Shortly after, Cleveland fatally self-harmed by hanging himself from a broken vent in his cell ceiling. Cleveland's call and warning was one of at least 17 threats of self-harm or suicide made by young detainees in the preceding 24 hours.[168] Despite mandatory incident reporting by centre employees through the Total Offender Management System (TOMS) for every incident of threatened self-harm, only one of these at least 17 incidents resulted in the generation of an incident report.[169] In the six hours prior to his self-harm, Cleveland threatened to slice his throat, cut himself, or hang himself on eight separate occasions. None of these incidents were reported through TOMS or referred onwards for mental health intervention.[170] An investigation by the Western Australian Corruption and Crime Commission was satisfied that 'those requirements were not always followed' by staff at Unit 18, and 'were certainly not followed' by the staff working on the night of Cleveland's self-harm.[171]

The report indicates that this appears to be due to a significant volume of threats of self-harm. The Commission was told that there are full time employees 'barely, to cover Banksia Hill', let alone the facilities at Unit 18, despite 'giving Unit 18 prioritisation in regard to daily staffing'.[172] Beyond adequate staffing, already outlined in this submission as a matter for which national minimum standard-setting is urgently required, this Research Hub recommends that national enforceable standards regarding policies and enforcement relating to mandatory incident reporting would provide an additional impetus to strengthen reporting and response processes which are designed to protect children like Cleveland. Cleveland's death was the result of a failure of systems and policy enforcement. Adequate staffing and meaningful implementation of policies designed to respond to mental health crises will be necessary to avoid the preventable deaths of young people in custody.

Recommendation 10: That the Commonwealth implement minimum enforceable national standards regarding the design and implementation of mental health reporting and response policies.

[168] Corruption and Crime Commission, *An investigation into allegations of serious misconduct following the death of a young detainee in Unit 18 Casuarina Prison* (Report, 11 June 2024) [3].
[169] Ibid [90].
[170] Ibid [91]
[171] Ibid [92].
[172] Ibid [29].

Federal prisons and detention centres

A federal view: Non-compliance by 'federal prisons and detention centres'

Children convicted of Federal Offences

Australia does not have any federal prisons as per s 120 of the *Constitution*. That said, the Commonwealth does have 'direct responsibility for young federal offenders' who are in breach of the *Crimes Act 1914* (Cth).[173] Thus, all young offenders in breach of federal law do not attend 'federal prisons,' but are detained in State or territory prisons depending on their registered place of residence.

There is no publicly available data regarding federal offender characteristics by minor status. The Australian Bureau of Statistics publishes data on sex, mean/median age, and Indigenous status for the number of total prisoners and parolees subject to federal offences and currently incarcerated. Thus, we recommend:

Recommendation 11: That the Australian Bureau of Statistics also designate a criterion indicating the number of children incarcerated for federal offences under the Crimes Act 1914 (Cth).

These offences can include 'damaging federal Government property (such as telephone boxes), stealing federal Government property, hacking into a federal Government computer' or trespassing on federal land. Young people may also be charged with crimes, such as social security fraud, under other federal legislation.[174] It is important that this data be made publicly available, and the Australian Law Reform Commission has in the past noted that 'statistics on the number of federal offenders are largely unavailable as most State and territory police services do not record federal offences separately.'[175]

The detention centres operated federally include the Defence Force Correctional Establishment at the Holsworthy Barracks (capacity for 22 detainees, and does not hold minors), as well as holding cells controlled by the Australian Federal Police, and immigration detention facilities.

Pursuant to section 7.1 of the *AFP National Guideline on persons in custody and police custodial facilities*, federal police are required to lodge children separately from other persons in custody. These holding procedures are in alignment of Articles 37 and 40 of the CRC which requires parties to maintain separate juvenile justice systems.

[173] Australian Law Reform Commission (2010). *Federal responsibilities*. [online] Available at: https://www.alrc.gov.au/publication/seen-and-heard-priority-for-children-in-the-legal-process-alrc-report-84/18-childrens-involvement-in-criminal-justice-processes/federal-responsibilities/.
[174] Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process* (ALRC Report 84, 19 November 1997) 225–227.
[175] Ibid 486.

The immigration context

Section 196 of the *Migration Act 1958* (Cth) mandates detention for all persons — child or adult — arriving in Australia without a valid visa. Prior to 2015, Australia held children in Immigration Detention Centres ('IDCs') for medium-to-long periods of time. Two such instances occurred in April 2013, when 31 children were placed in Northern IDC in Darwin, and in July 2014, when 157 Sri Lankan people seeking asylum by boat were detained on an Australian customs vessel for four weeks.[176]

Whilst the Department of Home Affairs (as of 31 July 2024) suggests there are no children in closed detention, this is likely due to an accounting choice rather than being an accurate reflection of the state of affairs. The Refugee Council suggests that 'most children detained since 2020 are detained for short periods so are unlikely to be captured in the monthly reporting.'[177]

Recommendation 12: That the Department of Home Affairs' reporting requirements of children in immigration detention be extended to include all children who are subject to any period of detention, however temporary.

(g): Facilitating young people's safe involvement in court processes

Young people in Australia's justice system are often vulnerable and experience intersectional disadvantage. Many are victims of child abuse or neglect, have a cognitive impairment or mental illness, and engage in substance abuse.[178] Aboriginal and Torres Strait Islander young people are disproportionately represented within the justice system.[179]

It is also widely accepted that there are fundamental developmental differences between young people and adults. The justice system should treat young offenders differently due to the social, biological, and psychological factors that differentiate them from adults.[180] As we have addressed on page 4, most young people will grow out of offending behaviour as they mature and enter adulthood,[181] and offences committed by young people are generally minor.[182] Most

[176] 'Statistics on people in detention in Australia', *Refugee Council of Australia* (Web Page, 11 September 2024) <https://www.refugeecouncil.org.au/detention-australia-statistics/4/>.
[177] Ibid.
[178] Justice Health & Forensic Mental Health Network and Juvenile Justice NSW, *2015 Young People in Custody Health Survey* (Full Report, November 2017) xx, 16, 94-96.
[179] Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2023* (Australian Government, 13 December 2023) 1, 3.
[180] Judge Peter Johnstone, 'Early Intervention, Diversion and Rehabilitation from the Perspective of the Children's Court of NSW' (Speech, 6th Annual Juvenile Justice Summit, 5 May 2017) [70] ('*Early Intervention, Diversion and Rehabilitation*').
[181] Kelly Richards, *What Makes Juvenille Offenders Different from Adult Offenders*? (Trends & Issues in Crime and Criminal Justice No 409, Februrary 2011) 2 ('*What Makes Juvenille Offenders Different*').
[182] Ibid 3–4.

pressingly, research also suggests that once children are incarcerated, the likelihood of future recidivism and reincarceration is increased.[183]

Holding these ideas in mind, courtroom process and procedure must accommodate the following:

(a) The vulnerability of the young people who come before court.

(b) The developmental differences between children and adults.

(c) The role of incarceration plays in recidivism and the further entrenchment of disadvantage.

Young people often find court overwhelming, intimidating, and challenging to comprehend, which negatively impacts their engagement as they become stressed and distressed. These emotional responses hinder their ability to think clearly and comprehend the proceedings, and ultimately render them less likely to comply with court directives.[184] Consultations conducted with young people who have lived experience of the justice system have suggested that court cell waiting times be used more productively to help alleviate stress and anxiety. Young people should be given more information about court process and procedure before entering court, and be provided with activities to help pass the time and focus their minds.[185]

Court decisions are often complex and communicated in a manner that is not appropriate for children.[186] Recommendations made by other bodies and inquiries have suggested that bail is of specific concern. Bail conditions can be complicated, and breaches of bail can often lead to unnecessary, and avoidable, incarceration.[187] The 2016 *Royal Commission into the Protection and Detention of Children* indicated that a court's approach to bail for children and young people is often not appropriately adapted to the needs of young people.[188]

There must be greater attention paid to ensuring that young people comprehend their conditions, which is especially important for children who have a cognitive impairment, reduced literacy levels, or limited comprehension of English.[189] This could take the form of better practice

[183] Edward Mulvey, *Highlights from Pathways to Desistence: A Longitudinal Study of Serious Adolescent Offenders* (Office of Justice Programs Juvenile Justice Fact Sheet, March 2011) cited in *Early Intervention, Diversion and Rehabilitation* (n 187) [95].
[184] Helen Connolly, *Making Change in Youth Justice* (Commissioner for Children and Young People, March 2020) 24 ('*Making Change in Youth Justice*').
[185] Ibid 23.
[186] Save the Children et al, *Putting Children First: A Rights Respecting Approach to Youth Justice in Australia* (April 2023) 37 ('*Putting Children First*').
[187] Law Council of Australia, *Youth Justice and Child Wellbeing Reform* (Report, 24 July 2023) 18.
[188] *Royal Commission into the Detention and Protection of Children in the Northern Territory* (Final Report, November 2017) vol 2b, 286–291 ('*Northern Territory Royal Commission*').
[189] Ibid 290.

by judicial officers: communicating directly to the young person and responsible adult, providing clear explanations as to the reasons for the orders, and using age-appropriate language.[190]

Recommendation 13: **That the Committee recommend that the Parliament adopt nationally enforceable standards for courtroom procedure involving young people to reflect the distinct vulnerabilities they experience.**

These standards should be produced in consultation with young people with lived experience of the justice system, and must prioritise the wellbeing of young people at court and their comprehension and understanding of outcomes.

[190] Ibid 291.