



Save the Children

54 reasons

Youth justice and incarceration in Australia: A national responsibility

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

10 October 2024

We acknowledge the Traditional Custodians on whose land we live and work, honouring their continued connection to land, sea, skies and water.

We pay respects to Elders and Ancestors of Country and celebrate their role in passing down sacred cultural, spiritual and educational practices.

We also acknowledge the strength and commitment of First Nations practitioners who work alongside children and young people to support and guide leaders of the future.

Our perspective

Save the Children is a leading global non-government organisation that has been active in Australia for over 100 years. **54 reasons** is Save the Children's delivery identity in Australia. Our work is guided by the 54 articles in the UN Convention on the Rights of the Child. We are Australia's leading child rights organisation.

We provide **youth justice services** across Australia, as part of a broader suite of rights-respecting services that span early childhood development, family support, domestic and family violence, education engagement, humanitarian settlement, place-based initiatives and child rights programming.

Our perspective is strongly informed by our experience providing services across a continuum through prevention, early intervention, bail support, in detention settings, and post-detention programs, and **what we hear** from the children, young people and communities with whom we work on a daily basis.

Our recommendations are also grounded in our ongoing **policy, research and advocacy** activities, which reflect child rights principles and our commitment to operate as a rights-based organisation.

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Executive summary

This inquiry's terms of reference rightly focus attention on the importance of Australia's international child rights and human rights obligations. In our submission, we describe why this is important and what it means in practical terms for Australia's youth justice systems. In doing so, we draw on our recent policy report, *Putting children first: A rights respecting approach to youth justice in Australia*, which details the relevant child rights requirements, applies them to Australia's youth justice systems, policy and practice, and highlights priorities for reform.

Australia's youth justice systems are ineffective, discriminatory, and actively harm children, young people and their communities. They are oriented towards punishment and incarceration, and systemically violate rights. These failings are long-standing and acute at all points of the system, across all Australian jurisdictions, and are particularly pointed in a persistent over-reliance on detention. Ours is an unsuitable incarceration-based model that falls drastically short of global minimum standards. Fundamental reform is needed.

A rights-respecting approach can and should be the basis for such reform. It:

- Provides a different paradigm – one that is uniquely suited to enabling the systemic change that is required in youth justice
- Sets out a comprehensive blueprint for change, and clear standards to guide reform
- Focuses system effort on addressing root causes, preventing and reducing contact with youth justice, and providing effective support to change trajectories
- Centres children and young people, and sees them as children first and foremost
- Emphasises the importance of hearing, and acting on, what children and young people are telling us – about the failings of the current system, and the solutions that will make it better.

Importantly, a rights-respecting approach requires us to look well beyond the status quo of existing youth justice systems. Child rights and human rights standards are clear that the Australian Government is ultimately accountable for addressing the root causes and underlying drivers, and establishing the structural and system-spanning conditions, that determine whether rights are met and ultimately drive outcomes.

To achieve these aims, a long-term national youth justice strategy is required, along with enforceable national standards setting clear expectations across all Australian jurisdictions. These should be grounded in, and fully compliant with, human rights requirements. Extensive evidence and policy material has long been available to guide this work.

Reshaping Australia's youth justice systems to be rights-respecting will require a direct focus on supporting the self-determination of Aboriginal and Torres Strait Islander peoples, ensuring that children's right to be heard and taken seriously is upheld in youth justice, and establishing robust monitoring and oversight of youth detention. It will also require the Australian Government to fill the gaps in Australia's stated commitments to children's rights, by committing to all provisions of the United Nations Convention on the Rights of the Child and ratifying the Convention's Third Optional Protocol. These are fundamental requirements.

The failings of Australia's youth justice systems can be remedied by adopting a rights-respecting approach. To ensure lasting system change, a commitment to children's rights must be embedded into the institutions, policies and laws that govern Australia. In this submission, we explain how this can be done.

Recommendations

Save the Children and 54 reasons recommend that the Australian Government:

1. Provide national leadership by driving a rights-respecting approach to national youth justice reform, including as initial priorities:
 - a. Develop a 10-year strategy to guide national youth justice reform, with accompanying policy and investment commitments and action plans
 - b. Develop enforceable national youth justice standards that fully reflect child rights and human rights requirements

This could be implemented through a national taskforce or similar mechanism.
2. Ensure all policy reform is guided by child rights and human rights requirements in line with Australia's international obligations, including as overarching requirements:
 - a. Enable Aboriginal and Torres Strait Islander peoples' exercise of the collective right to self-determination, as recognised in the United Nations Declaration on the Rights of Indigenous Peoples
 - b. Take children's and young people's views seriously, and ensure children can participate in both government policy-making and individual decisions affecting them in youth justice systems, in line with children's participatory rights as enshrined in the United Nations Convention on the Rights of the Child (CRC)
 - c. Ensure appropriate oversight of all settings where children are imprisoned and detained, to meet Australia's obligations under the Optional Protocol to the Convention against Torture
3. Fill the gaps in Australia's commitments to international human rights standards and norms:
 - a. Remove Australia's reservation to Article 37(c) of the CRC, which prohibits the detention of children in the same facilities as adults or in adult facilities
 - b. Ratify the Third Optional Protocol to the CRC, which enables children to directly bring complaints about violations of their rights to the United Nations
4. Establish the measures that are needed to embed children's rights in the institutions of government:
 - a. Appoint a Cabinet-level Minister for Children
 - b. Create a Ministerial Council for children and young people
 - c. Develop a comprehensive National Children's Plan
 - d. Legislate to incorporate the CRC into Australian law

Why a rights-respecting approach to youth justice?

Australian Governments have devoted significant attention to youth justice. There is extensive evidence about what works, and what doesn't. The intersecting historical, environmental, institutional and system factors causing contact with youth justice and driving incarceration are well known. These include very high rates of severe maltreatment, neurodevelopmental and other disorders (often undiagnosed) and trauma, intersecting with institutional racism, the continuing legacy of colonisation and dispossession, and acute system failures.¹

Yet governments across Australia continue to rely on punitive and incarceration-focused responses, despite the clear evidence of their ineffectiveness. These are often misleadingly framed as reflecting concerns about community safety, despite in fact making the community less safe by causing increased offending and recidivism. A vicious cycle results, with extreme policy responses fuelling community concern rather than ameliorating it.

Combined with the ill-informed discussion about the issues in sections of the media, social media and elsewhere, and a lack of political will to implement coherent evidence-based reform, the result is a dynamic that has become stuck in ways that are deeply harmful for governments, communities and especially the children who are the victims of these failings.

Changing this dynamic requires a systems change lens and a guiding paradigm to achieve that change. Both are provided by a rights-respecting approach, grounded in a human rights framework and giving effect to child rights and human rights standards.

Children's rights and human rights

Children's rights are the human rights of children. Taken as a whole, children's rights provide a comprehensive framework for all matters relating to children, including achieving the policy objectives of youth justice – particularly preventing and reducing involvement with the criminal justice system, through childhood, adolescence and into adulthood.

Children's rights are the fundamental conditions, supports and protections that all children should have so they have the opportunity to reach their potential and thrive. They include the rights to health, education, an adequate standard of living, enjoyment of culture, being treated fairly, having adults act in their best interests, and being heard and taken seriously, among others. Children also have specific rights relating to the justice system and the use of detention. These basic rights cannot be forfeited or lost, and are held by everyone aged up to 18.

A child rights-based approach is informed by, and aligns with, contemporary child development science and evidence, including about:

- How a child-centred, holistic and ecological approach supports children's healthy cognitive, physical and other development, including when they experience adversity
- Children's progressive brain development, social, emotional and cognitive capacity, and developing ability to understand the consequences of their actions as they grow older
- Children's response to trauma and how this impairs healthy development
- The importance of empowering children to exercise agency in their lives

¹ For more detail, see Save the Children and 54 reasons, 2023, *Putting children first: A rights respecting approach to youth justice in Australia*, pp 19-21 ('**Putting children first**'). Available at <https://www.savethechildren.org.au/getmedia/4befc9d7-c9de-4088-b591-547714fc8673/Putting-children-first-A-rights-respecting-approach-to-youth-justice-in-Australia-April-2023.pdf.aspx>.

- The types of support and interventions that effectively prevent and reduce children's harmful behaviour.

Children's rights are enshrined in the United Nations Convention on the Rights of the Child (CRC) – the most widely ratified of all human rights treaties. The CRC represents a global consensus about what children are entitled to expect and the standards that governments are accountable for ensuring. Other important sources of children's rights and relevant human rights principles and requirements include the United Nations Declaration on the Rights of Indigenous Peoples, the Convention against Torture and its Optional Protocol, and the Convention on the Rights of Persons with Disabilities.²

A rights-respecting approach to youth justice

Youth justice is an area where children's rights are particularly important, and particularly challenged. Lack of respect for children and their rights is a fundamental impediment to more effective youth justice. The absence of a rights-respecting approach is an underlying reason why our youth justice systems continue to fail, and punitive and incarceration-based responses continue to feature so heavily despite their harmful and ineffective nature.

Systemically, Australia's youth justice systems do not respect children's basic human dignity. While this is particularly visible and, in many ways, acute when children are incarcerated, a lack of respect for children's human rights is apparent in every part of the system.

A rights-respecting approach to youth justice includes three types of requirement, all of which are interrelated and obligatory.

First, **foundational system conditions**. A child rights-based approach to system reform is comprehensive. More than just a different lens or a legal framework, it is a fundamental shift in paradigm and worldview. It requires systems to be reoriented and reorganised to centre the children and young people whose development, safety and wellbeing should be their focus. A child rights approach requires us to take children seriously and see the world from their perspective. It brings into focus the whole child, in the context of their ecology.

In the context of the over-representation and over-incarceration of Aboriginal and Torres Strait Islander children, genuine self-determination is another foundational requirement.

Second, **overarching principles**. Overarching child rights principles from the CRC that should guide youth justice reform are:

- Children should not be discriminated against for any reason and should always be treated fairly³
- Children's best interests should always be primary in decisions affecting them⁴
- Children have the right to life, survival and development, which includes the right to receive child-centred supports that respond to their individual needs and circumstances and address root causes of challenges to their healthy development⁵
- Children have the right to participate and be heard in decisions affecting them.⁶

² For a more comprehensive list of relevant human rights treaties, declarations, statements and rules, see *Putting children first*, pp 13 and 74-7.

³ CRC Article 2.

⁴ CRC Article 3.

⁵ CRC Article 6.

⁶ CRC Article 12.

Third, **specific standards and requirements**. Collectively, the CRC and other relevant treaties, declarations, statements and rules⁷ provide clear and specific requirements that all youth justice systems must meet. These include, among others:

- *Arrest, detention and imprisonment must only be used as a last resort and for the shortest appropriate period of time.*⁸ Importantly, this standard requires governments to take all possible steps at a system-wide level to ensure that detention is only ever a true last resort. In other words, it is not satisfied by allowing other parts of the system to operate such that a child is put in a position where their detention is the only safe response at a point of crisis – rather, the obligation includes taking preventive action to prevent the point of crisis being reached in the first place.
- *Children must never be detained with adults, except in the very limited circumstances where this is in the child's best interests. Children must never be detained in adult facilities. This prohibition includes both pre-trial and sentenced detention, and includes youth detention centres, police cells and watch houses, and other settings.*⁹
- *Solitary confinement must never be used. Any separation of a child from others should be for the shortest possible time, used only as a measure of last resort for the protection of the child or others, and subject to stringent conditions and safeguards.*¹⁰
- *Restraint or force can be used only when a child poses an imminent threat of injury to themselves or others, and only when all other means of control have been exhausted. Restraint must not be used to secure compliance, involve deliberate infliction of pain or be used punitively. Any use of restraint or force must be directly supervised by a medical and/or psychological professional.*
- *The minimum age of criminal responsibility must be at least 14, with no exceptions. The UN Committee has highlighted that this standard reflects child developmental and neuroscientific evidence, and that systems that differentiate between different offences for this purpose are 'not based on a rational understanding of children's development'.*¹¹
- *Children's specific procedural rights in the criminal justice system and when detained must be upheld. These include, among others, the right to prompt legal and other assistance when detained, and guarantees of fair treatment and a fair trial.*¹²
- *All places where children are detained should be subject to rigorous oversight and preventive monitoring by a suitable resourced and empowered independent entity.*¹³

Child rights and imprisonment of children

International child rights standards give clear guidance on the global consensus about the minimum acceptable standards for the use of youth detention and detention conditions. Many of the standards summarised above relate specifically to children in detention.

⁷ See above n 2.

⁸ CRC Article 37(b).

⁹ CRC Article 37(c); UN Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system*, [85], [92]-[94] ('**General Comment No. 24**'). Australia has a reservation to Article 37(c) of the CRC, meaning that Australia refuses to be bound by the requirement.

¹⁰ CRC Article 37(c); *General Comment No. 24*, [95](g)-(h).

¹¹ CRC Article 40(3); *General Comment No. 24*, [20]-[28].

¹² CRC Articles 37(d) and 40.

¹³ Optional Protocol to the Convention against Torture.

Compliance with child rights standards for detention is important not only to ensure basic human dignity is respected, but also because when these standards are adhered to, outcomes are ultimately better. Children and young people have a better chance of rehabilitation and getting back on track when their rights are upheld, rather than becoming more deeply entrenched in the criminal justice system due to inappropriate use of, and treatment in, incarceration.

The violations of the rights of children in youth detention are among the most egregious human rights violations in Australia. Violations of child rights standards and requirements in legislation and practice across Australia have been widely reported over many years, and in most cases publicly acknowledged by the relevant State Government. Yet these practices and the laws, policies and system-wide cultures that enable them continue.

It is past time for a wholesale review of Australia's youth imprisonment model, facilities and practices, and their replacement by more contemporary, fit-for-purpose and effective therapeutic alternatives. Facilities of this type should only ever be used – if at all – for a very small number of children and young people, where there is no other alternative that would ensure their safety, and with the utmost focus on therapeutic support, rehabilitation, and upholding children's rights. Nonetheless, they are practicable and vastly preferable to the current youth imprisonment model operating in Australia.

Rights-based alternative models are operating successfully elsewhere. For example, in Ireland, the national facility – Oberstown Children Detention Campus – has undergone a significant transformation over the past decade and more, as part of a system-wide reform program. This transformation, and the facility's current operations, are explicitly grounded in a child rights-compliant framework and approach that is demonstrating clear success.¹⁴ Another recent example is in Scotland, where as at 28 August 2024, all remaining children under the age of 18 have been transferred from 'young offenders institutions' to more child-friendly settings.¹⁵

Significant work closer to home on what secure alternatives to incarceration could look like, in the limited cases where they may be required due to broader system failings, includes:

- In the ACT, in the context of raising the minimum age of criminal responsibility¹⁶
- In Western Australia, as part of a blueprint for a revisioned youth justice system¹⁷
- In New Zealand, to review international best practice for youth justice residential facilities.¹⁸

¹⁴ U Kilkelly and P Bergin, 2023, *Advancing children's rights in detention: A model for international reform*, Bristol University Press.

¹⁵ Scottish Government, <https://www.gov.scot/news/no-under-18s-in-young-offenders-institutions/>.

¹⁶ M McArthur, A Suomi and B Kendall, 2021, *Review of the service system and implementation requirements for raising the minimum age of criminal responsibility in the Australian Capital Territory*.

¹⁷ Social Reinvestment WA, 2022, *Blueprint for a better future: Paving the way for youth justice reform in Western Australia*.

¹⁸ I Matheson, 2023, *International best practice and models for youth justice residences: Evidence brief*, Oranga Tamariki Evidence Centre.

Current compliance with child rights requirements in Australia

The legal obligations that child rights and human rights impose under international law apply directly to the Australian Government.

It is not an exaggeration to say that every child rights requirement described above is being breached in Australia. At best, in some cases, there is partial compliance.

These breaches are systemic. They are created and sustained by governments' system-wide policies, laws and other decisions. The harm caused by these breaches of rights is similarly system-wide. Individual children's and young people's lives are often irreparably damaged by the operation of those systems. Less visible but equally damaging is the damage done to families and communities at the same time, and to broader society.

The Australian Government has a clear legal, moral and practical mandate to act on youth justice. This is grounded in its international obligations, in the national nature of the issue, and in the persistent failure of State and Territory Governments to uphold rights and meaningfully improve system performance and outcomes.

When systems run roughshod over rights, we are all worse off. Australia's youth justice systems require fundamental reform to be reoriented around the rights of children. Only then can they achieve their objective of delivering true justice.

National mechanisms to establish a rights-respecting approach to youth justice

Effective youth justice reform requires a focus on root causes. The primary aim should be preventing contact with youth justice in the first place. There is overwhelming evidence that preventive and early intervention approaches are the most effective and provide the highest return on investment, compared to late intervention once harm has already occurred.

The over-representation of Aboriginal and Torres Strait Islander children and young people in youth justice reflects the ongoing effects of violent colonisation and dispossession, institutional racism, and intergenerational trauma and poverty. Preventing a continuation of the intergenerational cycle – which sees each succeeding generation born into more deeply entrenched disadvantage and more likely to encounter the criminal justice system – requires a focus on those root causes, along with self-determination.

National mechanisms are needed to drive a rights-respecting approach across all Australian jurisdictions and give effect to child rights and human rights requirements in Australia's youth justice and incarceration system by addressing these root causes effectively.

A long-term national youth justice strategy

Addressing the root causes and underlying drivers of contact with youth justice systems requires a clear commitment and a long-term plan that unifies across portfolios, service systems and levels of government. For this reason, we recommend the development of a **10-year national youth justice strategy**, accompanied by appropriate policy commitments, investments, and national and jurisdictional action plans and oversight.

In developing a national youth justice strategy, it will be important to learn from the experience of existing and past national frameworks and plans.¹⁹ We have all seen government strategies with good intent that set the right policy directions but fail to achieve their goals, at both the state and national level. Invariably this is because the hardest aspects of addressing complex policy challenges are not, in practice, prioritised over the lifetime of the strategy. Persistent challenges that will also face any long-term youth justice strategy, and should be the subject of particular attention, include:

- Genuinely shifting focus from acute responses to prevention and early intervention. This in turn requires genuinely holistic and cross-portfolio strategies that focus on the real root causes of harm.
- Following through with sustained investment and resourcing for implementation across service, programs, workforces, evidence and data. This in turn requires clear national and jurisdictional action plans and reporting mechanisms.
- Ensuring direct involvement by, and meaningful accountability to, the people with lived experience who are most directly affected by the actions undertaken through the strategy. In this context, that means the children and young people who come into contact with youth justice systems.²⁰

¹⁹ These include the *National Framework for Protecting Australia's Children 2009-2020*, which was followed by the current *Safe and Supported: the National Framework for Protecting Australia's Children 2021-2031*, and the *National Plan to Reduce Violence against Women and their Children 2010-2022*, which was followed by the current *National Plan to End Violence against Women and Children 2022-2032*.

²⁰ Consideration could also be given to involvement of victims of crime, provided this is done in a way that is fully rights-compliant.

Enforceable national youth justice standards

Save the Children and 54 reasons has consistently recommended the development of **enforceable national youth justice standards** to clearly set out minimum requirements that all youth justice systems across Australia should meet, based on child rights and human rights requirements and international best practice,²¹ as has the Australian Child Rights Taskforce.²²

Child rights and human rights provide specific, practical requirements and standards for governments to meet. These should be clearly set out, and accompanied by arrangements for monitoring and enforcement of compliance with them.

Starting points for developing the standards could include:

- The child rights and human rights requirements that we have summarised in pages 6-8 of this submission
- The Australasian Youth Justice Administrators' *National standards for youth justice in Australia*²³ – noting that these standards do not fully meet child rights and human rights requirements and are described as 'aspirational' rather than mandatory
- The *Statement on conditions and treatment in youth justice detention* issued by Australian Children's Commissioners and Guardians in 2017²⁴ – noting that this statement is limited to detention only, rather than the broader youth justice system.

Consideration should be given to the most effective way to make these standards enforceable. These could include uniform national law or subordinate legislation and/or intergovernmental agreements between the Australian and State and Territory Governments, as well as strong and independent monitoring and oversight arrangements.

Policy priorities

The development of the strategy and the standards should be directly informed by, and fully compliant with, all relevant child rights and human rights requirements. There is substantial existing and contemporary guidance and evidence to assist with this. For example:

- Save the Children and 54 reasons' *Putting children first* report (2023)²⁵ details how child rights and human rights requirements translate to specific youth justice policy and practice reform in Australia. The report describes priorities for reform at the State and Territory and national level, including enforceable national youth justice standards.
- The Australian Human Rights Commission's *Help way earlier* report (2024)²⁶ reviews existing reports and evidence and makes recommendations for systemic and structural reforms to uphold rights and shift system settings and operation, informed by the views and voices of children and young people themselves.

²¹ See, eg, *Putting children first*, p 68; Save the Children and 54 reasons, *Youth justice and child wellbeing reform*, Submission to Australian Human Rights Commission, 16 June 2023, p 8.

²² See, eg, Australian Child Rights Taskforce, *Statement: NGO coalition calls for governments to commit to meaningful national child rights standards in youth justice*, 1 September 2023.

²³ Available at <https://www.ayja.org.au/launch-of-the-revised-ayja-national-standards-for-youth-justice-in-australia-16-october-2023/>.

²⁴ Available at

https://humanrights.gov.au/sites/default/files/document/publication/ACCG_YouthJusticePositionStatement_24Nov2017.pdf.

²⁵ See above n 1.

²⁶ *'Help way earlier!' How Australia can transform child justice to improve safety and wellbeing*, 2024.

In summary, key elements of the strategy and the standards should include:

- *Addressing root causes of harm*, including the effects of colonisation and dispossession, intergenerational trauma and disadvantage, systemic racism, and poverty.
- *Shifting system focus and investment to preventing offending and re-offending, diversion, and early intervention*, including:
 - ending the intergenerational and present-day pipeline between statutory child protection, out-of-home care and youth justice involvement
 - prioritising family support and educational engagement as protective factors
 - investing in community-based and culturally appropriate diversionary and early intervention programs.
- *Embedding effective therapeutic and trauma-informed support for children and young people at every point of the system*, with priorities including:
 - effective support for adolescents using violence in the home
 - rights-compliant bail support, throughcare and post-detention services
 - an adequately resourced strategy to ensure rights-compliant youth justice workforces.
- *Raising the minimum age of criminal responsibility to 14 across Australia*, for all offences, accompanied by adequate investment in alternatives to criminalisation.
- *Bringing policy, law and practice governing imprisonment of children in Australia into line with child rights requirements*, including:
 - ensuring that bail laws and practices are fully compliant with child rights and human rights requirements
 - ensuring that policies, conditions and practices in detention settings are compliant with child rights and human rights requirements
 - committing to ending the current model of imprisonment of children
 - setting a timeframe to establish child-centred, therapeutic, non-punitive and trauma-informed alternatives to current youth detention facilities.

In addition, the strategy and the standards should have as their explicit foundations:

- Enabling *self-determination* of Aboriginal and Torres Strait Islander peoples
- Guaranteeing children and young people's *participatory rights*
- Ensuring effective *oversight* of youth justice systems, especially detention.

Pages 15-17 of this submission give more detail about these essential requirements.

A national taskforce

The Australian Government has a natural and established role in other domains in leading the development of cross-cutting national strategies, and in national standard-setting. The role that the Australian Government can and should play in youth justice would complement the responsibilities of State and Territory Governments as youth justice system managers.

The strategy and standards should be developed by a process of meaningful engagement – such as a national taskforce or similar mechanism – that includes:

- The Australian, State and Territory Governments
- Aboriginal and Torres Strait Islander representation and leadership, in a form that is as advised by peak bodies and leaders with the appropriate authority
- Children and young people with lived experience of the youth justice and incarceration system, who should be directly heard and part of decision-making
- Child rights and human rights organisations and experts
- Representatives of relevant peak bodies, service providers and others with an interest and expertise in rights-respecting youth justice systems.

RECOMMENDATION 1

The Australian Government should provide national leadership by driving a rights-respecting approach to national youth justice reform, including as initial priorities:

- a. Develop a 10-year strategy to guide national youth justice reform, with accompanying policy and investment commitments and action plans
- b. Develop enforceable national youth justice standards that fully reflect child rights and human rights requirements

This could be implemented through a national taskforce or similar mechanism.

Overarching requirements to meet child rights and human rights obligations

Successful reform of Australia's youth justice systems will require specific focus on three overarching requirements: self-determination, children and young people's participation, and robust oversight. These are at once essential levers for driving reform, and foundational requirements in their own right, for a rights-respecting approach to youth justice in Australia.

Self-determination

We cannot talk about youth justice and incarceration without confronting the extreme over-representation of Aboriginal and Torres Strait Islander children and young people.

- Aboriginal and Torres Strait Islander children aged 10-17 are detained at about 28 times the rate of non-Indigenous children. Almost 2 in 3 of all children in detention are Aboriginal and/or Torres Strait Islander children.²⁷
- Aboriginal and Torres Strait Islander children aged 10-13 are detained at even more disproportionate rates, at nearly 47 times the rate of non-Indigenous children.²⁸
- Aboriginal and Torres Strait Islander children and young people are also significantly more likely to be in contact with both child protection and youth justice.²⁹

These horrifying facts can only be understood as a consequence of the continuing legacy of violent colonisation, dispossession and marginalisation experienced by Aboriginal and Torres Strait Islander peoples. The Uluru Statement from the Heart calls this out in plain terms:

Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are alienated from their parents at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.

The intergenerational trauma and harm caused by the structural discrimination and disempowerment experienced by Aboriginal and Torres Strait Islander peoples is apparent in the impaired physical, cognitive, emotional and other development of too many children, often before birth, and exacerbated by large barriers to connecting with family, community and culture. In turn these manifest in developmental challenges and disorders, behaviours and contact with the retraumatising effects of the criminal justice system.

To end over-representation, the collective right of Aboriginal and Torres Strait Islander peoples and communities to self-determination must be supported. When communities are empowered to make decisions about the matters that affect them, outcomes are always better. Government's responsibility is to invest in First Nations-led approaches for Aboriginal and Torres Strait Islander children, to enable these improved outcomes.

Again, the Uluru Statement speaks clear truth about what this will mean, for children and for everyone in Australia: *When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.*

²⁷ Australian Institute of Health and Welfare (AIHW), 2023, *Youth justice in Australia 2021-22*.

²⁸ AIHW, 2023, *Youth justice in Australia 2021-22*. The smaller numbers of children overall in detention aged 10-13 means these rates are more subject to change from year to year.

²⁹ 64 per cent of Aboriginal and Torres Strait Islander children under youth justice supervision had also received child protection services in the last five years (2016-2021), compared to 46 per cent of non-Indigenous children: AIHW, 2022, *Young people under youth justice supervision and their interaction with the child protection system 2020-21*.

Children and young people's participation in decision-making

Children and young people aged up to 18 have the right to participate in all decisions that affect them. This includes the right to be heard and have their views taken seriously, and to be supported appropriately to exercise this right and express their preferences, taking into account their age, capacity and circumstances.³⁰

The right to participate is a fundamental right in itself. It is also the basis for the realisation of all other rights. Everyone should be able to shape their own lives. Children are entitled to specific recognition and support because they depend on adults in order to exercise that right.

To realise the right to participate, it is important that there is meaningful and ongoing engagement with children and young people. This can be contrasted to one-off or tightly circumscribed consultation or questioning which can easily be tokenistic.

The right to participate is relevant to decisions of all types, from specific decisions within the youth justice system that directly affect a young person (such as court orders or goal setting in a diversionary program) to government policy decisions that shape the whole system.

At the *individual* level, supporting children's participation has significant benefits:

- Ensuring that supports provided reflect the actual priorities and needs of the young person, and their community and cultural context
- Identifying activities that are meaningful and enjoyable to the young person in settings that feel comfortable for them, so that therapeutic and restorative work can be undertaken and positive relationships with adults and mentors can be built
- Building greater ownership and accountability – or 'buy-in' – by the young person into the supports available to them, whether these supports are voluntary or mandated
- Strengthening social and emotional wellbeing by building a sense of agency and control over their own life and being proactive about making improvements.

At the *system and policy* level, incorporating lived experience into design, implementation and evaluation can enable better youth justice policy, more effective implementation, and strengthened engagement from those involved. A strengthened sense of civic engagement and responsibility has specific value in the context of youth justice, as people with lived experience who have achieved greater stability and positive engagement with society are particularly credible mentors for others who are still in contact with youth justice.

There is evidence of the specific benefits of children's participation in youth justice decision-making, at both the individual and system and policy level.³¹

Oversight

Robust oversight and monitoring of all places and settings where children are imprisoned and detained is essential to safeguarding children's rights and shining a light on where change is required, in individual cases and systemically.

Australia has ratified the Optional Protocol to the Convention against Torture (OPCAT), which is designed to help prevent torture and other cruel, inhuman or degrading treatment or

³⁰ United Nations Convention on the Rights of the Child, Article 12.

³¹ See, eg, J Fleming, J Hine and R Smith, 2014, *Use your situation to change your destination: Evaluation of The Howard League for Penal Reform's U R Boss*; Kilkelly and Bergin, above n 14, p 95; Children and Young People's Centre for Justice, *Participation and engagement*, <https://www.cycj.org.uk/what-we-do/participation-and-engagement/>.

punishment by providing for such oversight and monitoring, but has not implemented OPCAT's requirements. This has particular significance when it comes to children.

In particular, the Australian Government has not complied with OPCAT's key requirement – to establish and adequately resource a 'national preventive mechanism' (NPM) with the power to inspect all places where people are deprived of their liberty. The members of Australia's NPM themselves recently summarised the position in a submission to the United Nations:

Australian governments have largely made insufficient progress on OPCAT implementation since November 2022. Most notably, no members of the Australian NPM are nominated in Queensland, New South Wales and Victoria – Australia's three most populous states. Legislation for both NPMs and visits of the Subcommittee on Prevention of Torture (SPT) remains a patchwork, and adequate funding for all members is still a critical gap: subject to unresolved discussions between different levels of government. ... Current Australian NPM members continue to face immense challenges in our OPCAT implementation work.³²

RECOMMENDATION 2

The Australian Government should ensure all policy reform is guided by child rights and human rights requirements in line with Australia's international obligations, including as overarching requirements:

- a. Enable Aboriginal and Torres Strait Islander peoples' exercise of the collective right to self-determination, as recognised in the United Nations Declaration on the Rights of Indigenous Peoples
- b. Take children's and young people's views seriously, and ensure children can participate in both government policy-making and individual decisions affecting them in youth justice systems, in line with children's participatory rights as enshrined in the United Nations Convention on the Rights of the Child
- c. Ensure appropriate oversight of all settings where children are imprisoned and detained, to meet Australia's obligations under the Optional Protocol to the Convention against Torture

³² Australian National Preventive Mechanism, 2024, *Submission to the Committee against Torture Convention against Torture follow-up procedure: Sixth periodic review of Australia*, p 22.

Gaps to be filled in Australia's stated commitment to children's rights

Australia has agreed to be bound by many of the human rights treaties, instruments and provisions that collectively set out the international consensus on global minimum standards for human rights. There can be no doubt that a strong commitment to international human rights norms and laws is in line with community expectations in Australia.

However, there remain concerning gaps where Australia has, to date, refused to accept international norms relating to children's rights. These are squarely matters for the Australian Government to address, and are actions that the Government could readily take.

Article 37(c) of the CRC

Article 37(c) of the CRC requires that children never be detained with adults, except in exceptional situations where it is in the child's best interests to do so. Australia has refused to be bound by this obligation since it first ratified the CRC in 1990.

Of the 196 United Nations member states and countries that have ratified the CRC, Australia is one of only seven to maintain a specific reservation to Article 37(c). Two others have broader reservations that include Article 37 as a whole.³³

As has been widely reported, Australian governments continue to detain children in adult facilities, and with adults, in violation of Article 37(c). The harmful – and even fatal – consequences of these practices are, sadly, well evidenced.

In defending its reservation to Article 37(c), Australia has asserted to the United Nations that the country's geography and demography make it difficult to always detain children in juvenile facilities while also allowing them to maintain contact with their families.³⁴ The UN Committee on the Rights of the Child has highlighted that Australia's reservation is "unnecessary" because the supposed basis for the reservation is "well taken care of" by Article 37(c) itself, which specifically provides that the prohibition only applies where it is in the child's best interests and that children have the right to maintain contact with their family.³⁵ The UN and Australia's global peers have repeatedly criticised Australia for its reservation.³⁶

Experts in Australia have also repeatedly urged the Australian Government to agree to be bound by Article 37(c). In 1998, the Joint Standing Committee on Treaties recommended withdrawing the reservation.³⁷ In 2010, the Australian Law Reform Commission recommended its withdrawal.³⁸ Civil society has consistently made the same recommendation.³⁹

We repeat this recommendation that Australia should remove its reservation to Article 37(c).

³³ This does not include other member states and countries that have entered generally worded reservations, such as reservations that purport to apply to the extent that the CRC is inconsistent with national law or Shari'a law. As at September 2024.

³⁴ United Nations, *Second and third periodic reports of States parties due in 1998 and 2003: Australia*, 29 December 2004, CRC/C/129/Add.4, [466]-[467].

³⁵ Committee on the Rights of the Child, *Concluding observations: Australia*, 20 October 2005, CRC/C/15/Add.268, [7]-[8].

³⁶ Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, 1 November 2019, [6]; Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, 24 March 2021, [146.39], [146.142].

³⁷ *United Nations Convention on the Rights of the Child*, 17th Report, August 1998.

³⁸ ALRC, *Seen And Heard: Priority For Children In The Legal Process*, ALRC Report 84, Chapter 20.

³⁹ See, eg, Australian Child Rights Taskforce, 2018, *The Children's Report*, p 10; Australia's 3rd Universal Periodic Review: *Joint NGO Submission on behalf of the Australian NGO Coalition*, p 3.

Third Optional Protocol to the CRC

The Third Optional Protocol to the CRC – also known as the Optional Protocol on an individual ‘communications’ or ‘complaints’ procedure – is an additional treaty that enables individual children to raise concerns about their rights directly with the United Nations Committee on the Rights of the Child. It entered into force in 2014.

Unlike 52 other UN member states and countries,⁴⁰ Australia has not ratified this Protocol, despite being repeatedly urged to do so by the United Nations,⁴¹ by Australia's global peers⁴² and by Australian civil society.⁴³ This is a significant gap in Australia's commitment to children's rights and to international human rights norms and UN engagement. It denies children in Australia access to this ultimate forum for upholding their rights.⁴⁴

There is no good reason for refusing to ratify the Third Optional Protocol. Australia's stated commitment to upholding children's rights is apparent from its ratification of the CRC. It should follow as a matter of course that this would extend to enabling children to hold the Australian Government to account before the UN where this is required.

We repeat this recommendation that Australia should ratify the Third Optional Protocol.

RECOMMENDATION 3

The Australian Government should fill the gaps in Australia's commitments to international human rights standards and norms:

- a. Remove Australia's reservation to Article 37(c) of the CRC, which prohibits the detention of children in the same facilities as adults or in adult facilities
- b. Ratify the Third Optional Protocol to the CRC, which enables children to directly bring complaints about violations of their rights to the United Nations

⁴⁰ As at September 2024.

⁴¹ Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, 1 November 2019, [52];

⁴² Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, 24 March 2021, [146.8], [146.9], [146.26], [146.28]-[146.30], [146.40].

⁴³ See, eg, *Australia's 3rd Universal Periodic Review: Joint NGO Submission on behalf of the Australian NGO Coalition*, p 3.

⁴⁴ The Protocol's value, and its pragmatic nature, are both illustrated by a high profile example of its use in another context. In 2019, sixteen children from around the world, including Greta Thunberg, used the Protocol to submit a complaint that their countries were breaching their rights to life, health, prioritisation of their best interests, and culture by causing and perpetuating climate change. The Committee ultimately dismissed the complaint for the technical reason that the complainants had not, as required by the Protocol, exhausted all domestic remedies before bringing the complaint to the UN.

Institutional measures to entrench children's rights in Australia

A fundamental difficulty with youth justice reform is that the starting point itself is wrong. Policy, services and systems should not be primarily focused on the interaction between children and the criminal justice system, but instead should aim to support children's development, wellbeing and safety (including in the face of the significant challenges and trauma faced by most who currently come into contact with your justice).

For this reason, to secure lasting youth justice system change, a commitment to children's rights more broadly must be embedded into the institutions, policies and laws that govern Australia. Only when the institutions of government are structurally required to respect and value children, treat them with dignity, and take their views seriously, will all children in Australia truly be able to access their rights, so that youth justice systems can achieve their aims.

There are practical steps that the Australian Government can and should take to ensure that children's rights are at the heart of our national governance and institutions. All can be pursued in parallel with the development of the 10-year national youth justice strategy and enforceable national youth justice standards that we have recommended.

A Minister for Children

There are over 5.7 million children in Australia – nearly one-quarter of the total population.⁴⁵ So it is a remarkable omission that no one in Federal Cabinet is responsible for children, even in the outer Ministry. While some ministerial portfolios relate to areas that directly affect children (for example, Education and Early Childhood Education), and the Youth portfolio includes adolescents along with young people aged over 18,⁴⁶ no member of Cabinet is responsible for the rights, interests or wellbeing of children as a whole, from birth to age 18.

Australia's children and young people deserve someone to represent them and advocate for them at the highest levels of government. It would be a simple step for the Australian Government to appoint a Cabinet-level Minister for Children, and the right thing to do.

A Ministerial council for children and young people

The Australian Government is ultimately responsible and accountable for children's rights and outcomes in Australia. However, to enable the Australian Government to collaborate effectively with State and Territory Governments and ensure meaningful national leadership and direction in relation to children, a Ministerial council should be established that reports to National Cabinet, consistently with other issues of national significance requiring this degree of coordination.

A National Children's Plan

A National Children's Plan would establish a clear vision for children and young people in Australia, and a practical roadmap to achieve it. The Plan would establish a long-term and comprehensive framework for how policies, services, investments and decisions that affect children are organised, connecting currently siloed portfolios, services and systems.

It would provide a coordinated plan for addressing the underlying forces and structures – such as intergenerational poverty and disadvantage – that drive children into contact with child

⁴⁵ Australian Bureau of Statistics, estimated resident population at 30 June 2023. Ages 0-17.

⁴⁶ Early Childhood Education and Youth are both outer Ministry portfolios.

safety, youth justice and other 'acute' systems and are the root causes of the problems and harm that these systems deal with. It would unify across existing arrangements – including the new 10-year youth justice strategy that we have recommended – with a child-centred focus.

The development of a National Children's Plan should be strongly informed by the views of children and young people themselves, including those with direct experience of the youth justice, child safety and other tertiary systems.

The Australian Child Rights Taskforce, Save the Children and 54 reasons, and UNICEF Australia have jointly developed a *Blueprint for a National Children's Plan* that outlines in more detail what such a Plan could look like.⁴⁷ We would be happy to provide more detail about this.

An Act for Children

Australia lacks a legislative framework to uphold children's rights as a whole. This absence manifests in the ongoing significant violations of children's rights seen across Australia, and in the lack of direction and accountability by governments to address these violations.

To remedy this, the Australian Government should commit to fully incorporating the CRC into Australian law. This should be informed by successful experiences of other countries.

Legislative incorporation of the CRC provides unique opportunities given:

- The nature of children's rights and their innate and close connection to the overall purposes and goals of society and government action relating to supporting children's development, wellbeing and flourishing, and promoting social opportunity and equity
- The particular value of establishing a comprehensive legislative foundation for government action relating to children as a cohort within society, given the particular importance of holistic and integrated approaches to meeting their needs as well as the high social and economic returns on investment arising from doing so.

Work to incorporate the CRC into Australian law could occur in parallel with the development of a federal Human Rights Act, which we also strongly support. It does not depend on any particular approach or timing of a Human Rights Act, and could proceed before or in parallel with it.

RECOMMENDATION 4

The Australian Government should establish the measures that are needed to embed children's rights in the institutions of government:

- a. Appoint a Cabinet-level Minister for Children
- b. Create a Ministerial Council for children and young people
- c. Develop a comprehensive National Children's Plan
- d. Legislate to incorporate the CRC into Australian law

⁴⁷ Australian Child Rights Taskforce, Save the Children & 54 reasons and UNICEF Australia, *Blueprint for a National Children's Plan* (forthcoming).

