



Law Council  
OF AUSTRALIA

# Youth Justice and Child Wellbeing Reform

**Australian Human Rights Commission**

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*Telephone* +61 2 6246 3788  
*Email* [mail@lawcouncil.au](mailto:mail@lawcouncil.au)  
PO Box 5350, Braddon ACT 2612  
Level 1, MODE3, 24 Lonsdale Street,  
Braddon ACT 2612  
Law Council of Australia Limited ABN 85 005 260 622  
[www.lawcouncil.au](http://www.lawcouncil.au)

# Table of Contents

<b>About the Law Council of Australia .....</b>	<b>3</b>
<b>Acknowledgements .....</b>	<b>4</b>
<b>Executive Summary.....</b>	<b>5</b>
<b>Factors contributing to the experience of young people in the justice system .....</b>	<b>6</b>
First Nations young people.....	6
Socioeconomic disadvantage.....	7
Stable housing.....	7
Family environment .....	8
Access to education, employment and social connections .....	8
Disability .....	8
Involvement in the child protection system.....	9
Prior contact with the justice system .....	9
<b>Areas requiring change and examples of positive reform .....</b>	<b>10</b>
International Human Rights Obligations.....	10
Prior inquiries .....	11
Federal and state/territory human rights legislation .....	12
Minimum age of criminal responsibility .....	13
Changes required at each stage of involvement.....	14
Changes required prior to engagement.....	14
Early intervention and justice reinvestment .....	14
Interagency collaboration, training and information sharing .....	16
Child protection .....	17
Changes required during engagement with the justice system .....	18
Bail reform.....	18
Diverse sentencing and diversion options .....	20
Treatment and conditions in youth detention centres .....	22
Police practices.....	24
Additional legislative reforms .....	26
Use of 'independent persons' in police interviews .....	26
Lack of credit for emergency management days .....	26
Changes required following engagement with the justice system .....	27
<b>Benefits to taking a national approach to youth justice .....</b>	<b>28</b>

## About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level, speaks on behalf of its Constituent Bodies on federal, national and international issues, and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2023 are:

- Mr Luke Murphy, President
- Mr Greg McIntyre SC, President-elect
- Ms Juliana Warner, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Ms Tania Wolff, Executive Member

The Chief Executive Officer of the Law Council is Dr James Pople. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is [www.lawcouncil.au](http://www.lawcouncil.au).

## Acknowledgements

The Law Council of Australia is grateful for the input, in the preparation of this submission, of its Indigenous Legal Issues Committee, National Human Rights Committee and National Criminal Law Committee, in addition to contributions from the Law Society of the ACT, the Law Society of NSW, the Law Institute of Victoria, the Law Society of South Australia, the Law Society of Western Australia (**LSWA**), and the Victorian Bar.

## Executive Summary

1. The Law Council of Australia appreciates the opportunity to make a submission to the National Children's Commissioner (the **Commissioner**) in response to her investigation into the opportunities for reform of youth justice and related systems across Australia.
2. The Law Council frames its submission against two overarching points:
  - communities will, generally, be safer and healthier if greater consideration and effort is given to diverting young people<sup>1</sup> from the justice system; and
  - responses to young people in the criminal justice system should reflect Australia's international obligations, particularly regarding the rights of the child<sup>2</sup> and ensuring the best interests of the child are a primary consideration in all actions concerning children.<sup>3</sup>
3. In this submission, the Law Council makes the following recommendations consistent with those two overarching points:
  - the minimum age of criminal responsibility should be increased to 14 years in all jurisdictions, without exception;
  - early intervention and rehabilitation solutions should be prioritised by governments to address underlying issues to help prevent young people from becoming involved in criminal activities;
  - inter-agency collaboration, training and information sharing within the youth justice system should be encouraged;
  - the treatment of young offenders in custody must meet Australia's international obligations in relation to the rights of children and young persons;
  - consideration should be given to diverse sentencing and diversion options, buttressed by integrated social support services, to promote rehabilitation and divert young people from re-offending; and
  - investment in measures to improve access to 'exit strategies' should be increased—including wraparound supports, transition services, throughcare and appropriate, safe and affordable accommodation—to prevent youth homelessness and avoid future contact with the criminal justice system.
4. The Law Council emphasises that, in light of the disproportionate number of First Nations young people involved in the youth justice system, it is critical that responses to addressing First Nations youth incarceration are culturally sensitive and led by First Nations communities.

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<sup>1</sup> Note, for the purpose of this submission, the term 'young person' is used to refer to all young persons under the age of 18 years. This reflects the definition of 'children and young people' under the *Commonwealth Commissioner for Children and Young People Act 2010* (Cth). The United Nations Convention on the Rights of the Child also refers to a child as 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier', see: *Convention on the Rights of the Child*, opened for signature 20 November 1989, GA res 44/25, UNTS 1577 3 (entered into force 2 September 1990) (CROC) art 1.

<sup>2</sup> CROC; see also, *United Nations Committee on the Rights of the Child, General Comment No 24 on young people's rights in the child justice system*, UN Doc CRC/C/GC/24 (18 September 2019).

<sup>3</sup> See, CROC, article 3.

## Factors contributing to the experience of young people in the justice system<sup>4</sup>

5. There are many diverse and intersecting factors that contribute to the experience of young people in the justice system. While not an exhaustive list, some key factors are set out below.

### First Nations young people

6. Young people who identify as First Nations people are disproportionately represented in the youth justice system.<sup>5</sup> The Productivity Commission reports that, in 2021–22, the rate of Aboriginal and Torres Strait Islander young people aged 10–17 years in detention was 28.3 per 10,000.<sup>6</sup> While this is an improvement on previous years, it nevertheless is a concerning rate compared to that of the non-Indigenous population.<sup>7</sup>
7. It is important to recognise that the disproportionate numbers of First Nations adults and young people being incarcerated are largely a product of Australia’s history of colonialism, dispossession of First Nations peoples from their land and entrenched, systemic discrimination.<sup>8</sup> That history has resulted in devastating and enduring socio-economic, physical, and psychological outcomes for First Nations people.<sup>9</sup>
8. The disproportionate representation of First Nations young people in detention also stems from unconscious bias and even institutional racism within the criminal justice system.<sup>10</sup> For example, there is evidence of First Nations young people potentially being subject to bias in the use of discretionary police powers, including in the use

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<sup>4</sup> For length reasons, the Law Council has not recorded the content of the questions asked by the AHRC in this consultation in the body of the submission. They are recorded in footnotes under each major heading. Here, this heading pertains to the following question: ‘What factors contribute to children’s and young people’s involvement in youth justice systems in Australia?’.

<sup>5</sup> Productivity Commission ‘Closing the Gap Annual Report (Report, July 2022)’, <<https://www.pc.gov.au/closing-the-gap-data/annual-data-report/report/closing-the-gap-annual-data-compilation-report-july2022.pdf>>, 33.

<sup>6</sup> Productivity Commission ‘Socioeconomic outcome area 11 Aboriginal and Torres Strait Islander young people are not overrepresented in the criminal justice system’ (Webpage, 21 June 2023), <<https://www.pc.gov.au/closing-the-gap-data/dashboard/socioeconomic/outcome-area11>>.

<sup>7</sup> Note, the rate of non-Indigenous young people in detention for 2021-2023 was 1.2 per 10,000, see Productivity Commission ‘Socioeconomic outcome area 11 Aboriginal and Torres Strait Islander young people are not overrepresented in the criminal justice system’ (Webpage, 21 June 2023), <<https://www.pc.gov.au/closing-the-gap-data/dashboard/socioeconomic/outcome-area11>>.

<sup>8</sup> Law Council of Australia, ‘Children and young people’ Justice Project Report (August 2018) <<https://lawcouncil.au/files/web-pdf/Justice%20Project/Final%20Report/Young%20people%20and%20Young%20People%20%28Part%201%29.pdf>>, citing Commissioners and Guardians, Statement on Conditions and Treatment in Youth Justice Detention (2017) 9.

<sup>9</sup> See, Law Council of Australia, ‘Aboriginal and Torres Strait Islander People’ Justice Project Report (August 2018) <<https://lawcouncil.au/files/web-pdf/Justice%20Project/Final%20Report/Aboriginal%20and%20Torres%20Strait%20Islander%20People%20%28Part%201%29.pdf>>, 7-8; see also, Productivity Commission, Closing the Gap Annual Data Compilation Report (July 2022) <<https://www.pc.gov.au/closing-the-gap-data/annual-data-report/report/closing-the-gap-annual-data-compilation-report-july2022.pdf>>, 29-35.

<sup>10</sup> See Law Council of Australia, ‘Submission to the Senate Legal and Constitutional Affairs Committee’, *Inquiry into missing and murdered First Nations women and children*, (11 January 2023), <<https://lawcouncil.au/publicassets/b3b314b3-e196-ed11-9479-005056be13b5/23%2001%2011%20-%20S%20-%20Missing%20and%20murdered%20First%20Nations%20women.pdf>> 15; Royal Commission and Board of Inquiry Into the Protection and Detention of Children in the Northern Territory, *Volume 1, Royal Commission into the Protection and Detention of Children in the Northern Territory* (Report, 2017), <<https://www.royalcommission.gov.au/system/files/2020-09/Volume%201.pdf>> 174-177

of cautions or diversions.<sup>11</sup> More generally, the Australian Law Reform Commission's Pathways to Justice report of 2018 highlighted that Aboriginal and Torres Strait Islander peoples fare worse at every stage of the criminal justice process, compared to non-Indigenous people. In 2016, they were seven times more likely to be charged with a criminal offence and appear before the courts, 11 times more likely to be held in prison on remand awaiting trial or sentence, and 12.5 times more likely to receive a sentence of imprisonment following conviction.<sup>12</sup>

### Socioeconomic disadvantage

9. Young people from disadvantaged backgrounds are more likely to be involved in the youth justice system due to limited access to resources, opportunities, and support systems.<sup>13</sup> The Law Council's Justice Project Report emphasises the link between disadvantage and vulnerability to legal problems, and notes this link is particularly apparent in disengaged or at-risk young people, who often experience intersectional and cumulative disadvantage.<sup>14</sup>

### Stable housing

10. Homelessness or the inability to access crisis housing has been found to dramatically affect a child's ability to sleep and participate in education, increasing the likelihood of reoffending or antisocial behaviour.<sup>15</sup> The current housing crisis in many rural and remote areas of Australia means that many young people reside in overcrowded houses, impacting their health and safety and leading to youth crime.<sup>16</sup> The Australian Institute of Health and Welfare (**AIHW**) records that, as at June 2021, 163,500 households were on the public housing waiting list, meaning many young people and their families have limited options available to them for stable housing.<sup>17</sup>

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<sup>11</sup> See for example, Victorian 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), <<https://ccyp.vic.gov.au/assets/Publications-inquiries/CCYP-OYOW-Final-090621.pdf>>, 419; see also, Productivity Commission, Report on Government Services 2021 (30 June 2021) Table 6A.20 <<https://www.pc.gov.au/ongoing/report-on-government-services/2021/justice/police-services>>.

<sup>12</sup> Australian Law Reform Commission, Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Executive Summary, Overview of the Report (online, 9 January 2018) <<https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/executive-summary-15/overview-of-the-report-3/>>.

<sup>13</sup> See, Council of Attorneys-General Age of Criminal Responsibility Working Group, 'Draft Final Report (2020)', [7.2].

<sup>14</sup> Law Council of Australia, 'Children and young people' Justice Project Report (August 2018) <<https://lawcouncil.au/files/web-pdf/Justice%20Project/Final%20Report/Young%20and%20Young%20People%20%28Part%201%29.pdf>> 7, citing Christine Coumarelos et al, Law and Justice Foundation of New South Wales, Collaborative Planning Resource – Service Planning (2015), 29.

<sup>15</sup> Australian Institute of Family Studies, 'Child maltreatment, homelessness and youth offending' (October 2017), <<https://aifs.gov.au/resources/short-articles/child-maltreatment-homelessness-and-youth-offending>>.

<sup>16</sup> Australian Institute of Health and Welfare, 'Australia's youth: Homelessness and overcrowding', (webpage, 25 June 2021) <<https://www.aihw.gov.au/reports/young-people-youth/homelessness-and-overcrowding>>.

<sup>17</sup> Australian Institute of Health and Welfare, 'Housing assistance in Australia', (Online report, 29 June 2022) <<https://www.aihw.gov.au/reports/housing-assistance/housing-assistance-in-australia/contents/households-and-waiting-lists>>.

## Family environment

11. A young person's family environment is an important factor, as family violence and neglect are linked to young people's involvement in the youth justice system.<sup>18</sup> Additionally, young people with parents involved in the custodial and justice system are more likely to offend and participate in the youth justice system themselves.<sup>19</sup> This intergenerational cycle impacts stability, belonging, and community connection.

## Access to education, employment and social connections

12. A lack of educational opportunities and limited employment prospects can increase the likelihood of a young person becoming involved in the criminal justice system. Consultations conducted by the Law Council through its Justice Project identified 'disengagement from the education system as a pathway into crime and the juvenile justice system'.<sup>20</sup> Meanwhile a recent report by Save the Children notes that access to employment opportunities as well as recreational activities promotes pro-social interactions for young people, which can assist to divert them from criminal activity.<sup>21</sup>

## Disability

13. Young people with disability, including undiagnosed or untreated mental health disorders, are more likely to become involved with the criminal justice system.<sup>22</sup> The Justice Project emphasised that disability can increase a young person's vulnerability to legal problems.<sup>23</sup> The link between at-risk young people, disability, vulnerability to legal problems, and involvement with the juvenile justice system was highlighted in a prevalence study with respect to Foetal Alcohol Spectrum Disorder (FASD) among young detainees at Banksia Hill Detention Centre in Western Australia, conducted by the Telethon Kids Institute. The study revealed 'unprecedented levels of severe neurodevelopmental impairment amongst sentenced youth'.<sup>24</sup> Research indicates a high prevalence of oral language

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<sup>18</sup> Save the Children, 'Putting young people first: A rights respecting approach to youth justice in Australia' (Report, April 2023), <[https://www.savetheyoungpeople.org.au/getmedia/4befc9d7-c9de-4088-b591-547714fc8673/Putting-young-people-first-A-rights-respecting-approach-to-youth-justice-in-Australia\\_April-2023.pdf.aspx](https://www.savetheyoungpeople.org.au/getmedia/4befc9d7-c9de-4088-b591-547714fc8673/Putting-young-people-first-A-rights-respecting-approach-to-youth-justice-in-Australia_April-2023.pdf.aspx)>.

<sup>19</sup> Cunneen C, (2017) *Arguments for Raising the Minimum Age of Criminal Responsibility*, Research Report, Comparative Youth Penalty Project, University of New South Wales, <<http://cypp.unsw.edu.au/node/146>>; cited in Council of Attorneys-General Age of Criminal Responsibility Working Group, 'Draft Final Report (2020)', 63.

<sup>20</sup> Law Council of Australia, 'Children and young people' Justice Project Report (August 2018) <<https://lawcouncil.au/files/web-pdf/Justice%20Project/Final%20Report/Young-people%20and%20Young%20People%20%28Part%201%29.pdf>>, 8.

<sup>21</sup> Save the Children, 'Putting young people first: A rights respecting approach to youth justice in Australia' (Report, April 2023), <[https://www.savetheyoungpeople.org.au/getmedia/4befc9d7-c9de-4088-b591-547714fc8673/Putting-young-people-first-A-rights-respecting-approach-to-youth-justice-in-Australia\\_April-2023.pdf.aspx](https://www.savetheyoungpeople.org.au/getmedia/4befc9d7-c9de-4088-b591-547714fc8673/Putting-young-people-first-A-rights-respecting-approach-to-youth-justice-in-Australia_April-2023.pdf.aspx)>, 20.

<sup>22</sup> Save the Children, 'Putting young people first: A rights respecting approach to youth justice in Australia' (Report, April 2023), <[https://www.savetheyoungpeople.org.au/getmedia/4befc9d7-c9de-4088-b591-547714fc8673/Putting-young-people-first-A-rights-respecting-approach-to-youth-justice-in-Australia\\_April-2023.pdf.aspx](https://www.savetheyoungpeople.org.au/getmedia/4befc9d7-c9de-4088-b591-547714fc8673/Putting-young-people-first-A-rights-respecting-approach-to-youth-justice-in-Australia_April-2023.pdf.aspx)>, 20, citing Australian Government (2017) The Report of the Royal Commission and Board of Inquiry Into the Protection and Detention of Young people in the Northern Territory Volume 3B, *Royal Commission into the Protection and Detention of Young people in the Northern Territory*, 125, 128, 131, 133, 167, 174; and 198.

<sup>23</sup> Law Council of Australia, 'Children and young people' Justice Project Report, (August 2018) <<https://lawcouncil.au/files/web-pdf/Justice%20Project/Final%20Report/Young-people%20and%20Young%20People%20%28Part%201%29.pdf>>, 8.

<sup>24</sup> This study found: 89 per cent or nine out of ten incarcerated young people have at least one form of severe neurodevelopmental impairment; two thirds have at least three forms of severe neurodevelopmental impairment; 23 per cent have five or more forms of severe neurodevelopmental impairment; 36 per cent have FASD; and 25 per cent have an intellectual disability; See: Telethon Kids Institute, 'Nine out of ten young



disorders and communication problems, often undiagnosed, among young offenders, making it more difficult for them to understand and engage with the justice system.<sup>25</sup> Such communication disorders can, in turn, be linked to hearing loss—in particular, noting the high prevalence of middle ear infection in Aboriginal and Torres Strait Islander children, which compromises a child’s exposure to speech and song.<sup>26</sup>

### **Involvement in the child protection system**

14. A child’s involvement in the child protection system increases their likelihood of also being involved in youth crime.<sup>27</sup> Data collated by the AIHW found that young people who had received child protection services were nine times more likely than the general population to also be under youth justice supervision.<sup>28</sup> Furthermore, First Nations young people were more likely than non-Indigenous young people to have received both child protection services and youth justice supervision.<sup>29</sup>
15. The AIHW report emphasises the importance of understanding the characteristics and pathways of children and young people who are both in the child protection system and under youth justice supervision.<sup>30</sup>

### **Prior contact with the justice system**

16. A child’s prior contact with the justice system can also influence their future involvement with the system. According to Victorian data, being arrested, remanded, or sentenced to detention all increase the risk that a child will commit further offences and become involved with the criminal justice system.<sup>31</sup>
17. In this regard, prior contact with the justice system has been described by the Victorian Sentencing Advisory Council as ‘not only a predictor of ongoing contact with the system but also an indirect contributor to it’ meaning that ‘each contact ... exacerbates the risk of further contact.’<sup>32</sup> Further, there is evidence that the younger a child is when they first encounter the justice system, the more likely it is that they will re-offend and have further contact with the criminal justice system.<sup>33</sup>

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people in detention found to have severe neuro-disability’ (Media Release, 13 February 2018) <<https://www.telethonkids.org.au/news--events/news-and-eventsnav/2018/february/young-people-in-detention-neuro-disability/>>; Carol Bower et al, ‘Foetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia’ (2018) 8 *British Medical Journal Open* 1.

<sup>25</sup> Law Council of Australia, ‘Children and young people’ *Justice Project Report*, (August 2018) <<https://lawcouncil.au/files/web-pdf/Justice%20Project/Final%20Report/Young%20and%20Young%20People%20%28Part%201%29.pdf>>, 21, citing Pamela Snow and Martine Powell, ‘Youth (in)justice: Oral language competence in early life and risk for engagement in antisocial behaviour in adolescence’ (Trends & Issues in Crime and Criminal Justice No 435, Australian Institute of Criminology, April 2012) 1 (‘Youth (in)justice’); Speech Pathology Australia, Submission No 34.

<sup>26</sup> *Ibid.*

<sup>27</sup> Australian Institute of Health and Welfare, ‘Young people in child protection and under youth justice supervision 1 July 2014 to 30 June 2018’ (Report, 2019), <<https://www.aihw.gov.au/getmedia/ebf46682-66a3-4d5e-85ce-0b3919c70dfd/aihw-CSI-27.pdf.aspx?inline=true>>.

<sup>28</sup> *Ibid.*, 6. Note, the data in this report includes all jurisdictions, other than New South Wales.

<sup>29</sup> *Ibid.*, 7.

<sup>30</sup> *Ibid.*, 9.

<sup>31</sup> Sentencing Advisory Council, *Young people Held on Remand in Victoria: A Report on Sentencing Outcomes* (Report, September 2020) Executive Summary, ix.

<sup>32</sup> *Ibid.*

<sup>33</sup> See, Sentencing Advisory Council, *Crossover Kids: Vulnerable Young people in the Youth Justice System* (Report, June 2019), 1, which notes the younger young people were at their first sentence, the more likely they were to reoffend generally, reoffend violently and be sentenced to a term of adult imprisonment before their twenty-second birthday.

## Areas requiring change and examples of positive reform<sup>34</sup>

### International Human Rights Obligations

18. A rights-based approach to youth justice is required to ensure better outcomes for young people.<sup>35</sup> Australia is a party to the following human rights treaties that relate to young people:
- The *Convention on the Rights of the Child*<sup>36</sup> (**CROC**)—
    - addresses rights relating to children, and provides that the best interests of the child must be a primary consideration in all actions concerning children;<sup>37</sup> and
    - requires parties to ensure the detention of young people is used as a measure of last resort and for the shortest appropriate period of time.<sup>38</sup>
  - The *Convention Against Torture*<sup>39</sup> and the *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*<sup>40</sup> (**OPCAT**)—include protections against the use of torture or cruel, inhuman or degrading treatment and measures to protect against such treatment.<sup>41</sup>
  - The *International Covenant on Civil and Political Rights*<sup>42</sup> (**ICCPR**)—includes the rights of children to special protection, the right to life and protections in relation to the deprivation of liberty, such as the right for accused juveniles to be separated from adults and have their matter adjudicated as quickly as possible.<sup>43</sup>
  - The *International Covenant on Economic, Social and Cultural Rights*<sup>44</sup>—includes the right to education and enjoyment of the highest attainable standard of physical and mental health, and provides that special measures of protection and assistance should be taken on behalf of all children and young people without any discrimination.<sup>45</sup>

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<sup>34</sup> Questions 2 and 3 respectively ask: *What needs to be changed so that youth justice and related systems protect the rights and wellbeing of children and young people? What are the barriers to change, and how can these be overcome?* and *Can you identify reforms that show evidence of positive outcomes, including reductions in children's and young people's involvement in youth justice and child protection systems, either in Australia or internationally?*

<sup>35</sup> For further discussion of these rights as they pertain to youth justice see; Save the Children Foundation, 'Putting young people first: A rights respecting approach to youth justice in Australia' (Report, April 2023), <[https://www.savetheyoungpeople.org.au/getmedia/4befc9d7-c9de-4088-b591-547714fc8673/Putting-young-people-first-A-rights-respecting-approach-to-youth-justice-in-Australia\\_April-2023.pdf.aspx](https://www.savetheyoungpeople.org.au/getmedia/4befc9d7-c9de-4088-b591-547714fc8673/Putting-young-people-first-A-rights-respecting-approach-to-youth-justice-in-Australia_April-2023.pdf.aspx)>, Appendix 2.

<sup>36</sup> CROC, articles 2, 6, 12, 16, 19, 20(1), 37(a), 37(b), 37(c), 37(d), 39, 40(1), 40(2), 40(3)(a), 40(3)(b), 40(4).

<sup>37</sup> Ibid, article 3.

<sup>38</sup> Ibid, article 37(b).

<sup>39</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (**CAT**)

<sup>40</sup> *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 9 January 2003, A/RES/57/199 (entered into force 22 June 2006) (**OPCAT**)

<sup>41</sup> Ibid, articles 2-4, 10-16

<sup>42</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (**ICCPR**).

<sup>43</sup> Ibid, articles 6, 9, 10, 12 and 24

<sup>44</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (**ICESCR**).

<sup>45</sup> Articles 2, 6-8, 7, 10(1), 10(2)(b) and 10(3).

- The *Convention on the Rights of Persons with Disabilities*<sup>46</sup>—includes obligations to ensure that children and young people with disabilities enjoy their human rights on an equal basis with other children, and to take measures to combat harmful practices and prejudices about persons with disabilities.<sup>47</sup>

19. Notably, Australia has not ratified the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (**Third Optional Protocol**).<sup>48</sup> The Third Optional Protocol provides a redress mechanism for violations of rights under the CROC and its First and Second Protocols to the Committee on the Rights of the Child.<sup>49</sup> The Law Council has previously expressed support for Australia signing and ratifying the Third Optional Protocol.<sup>50</sup>

## Prior inquiries

20. Consideration must be given to implementing the outstanding recommendations from previous significant inquiries. This includes the findings of the Royal Commission into Aboriginal Deaths in Custody,<sup>51</sup> the Australian Law Reform Commission's (**ALRC**) Pathways to Justice Report<sup>52</sup> and the Royal Commission into the Protection and Detention of Children in the Northern Territory (**NT Royal Commission**).<sup>53</sup>
21. The Law Council considers that the recommendations from the NT Royal Commission may be used to inform 'a national, comprehensive, intergovernmental response' from the Australian Government.<sup>54</sup> The NT Government agreed to 'accept the intent and direction of all 227 Royal Commission recommendations. However,<sup>55</sup> it has been more than five years since the Royal Commission and the Law Council remains concerned about the lack of action to ensure all the recommendations are

<sup>46</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

<sup>47</sup> *Ibid*, articles 7 and 8.

<sup>48</sup> *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, 19 December 2011, A/RES/66/138, (entered into force 14 April 2014).

<sup>49</sup> Law Council of Australia, Submission to the Attorney General's Department, 'Third Optional Protocol to the Convention on the Rights of the Child' (10 April 2012), <https://cyberprecedent.com.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2613%20-%20Third%20Optional%20Protocol%20to%20Convention%20on%20the%20Rights%20of%20the%20Child.pdf> [3]-[4].

See also, Save the Children Foundation, 'Putting young people first: A rights respecting approach to youth justice in Australia' (Report, April 2023), <>,69.

<sup>50</sup> *Ibid* [2]. See also, Save the Children Foundation, 'Putting young people first: A rights respecting approach to youth justice in Australia' (Report, April 2023), <<https://www.savetheyoungpeople.org.au/getmedia/4bafc9d7-c9de-4088-b591-547714fc8673/Putting-young-people-first-A-rights-respecting-approach-to-youth-justice-in-Australia-April-2023.pdf.aspx>>,69.

<sup>51</sup> See recommendation 62, recommendation 239 and recommendation 240 in the Commonwealth Royal Commission into Aboriginal Deaths in Custody, National Report (1991) vol 5.

<sup>52</sup> Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, (28 March 2018) <<https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/4-justice-reinvestment/what-is-justice-reinvestment/>>.

<sup>53</sup> Royal Commission and Board of Inquiry Into the Protection and Detention of Children in the Northern Territory, *Findings and Recommendations, Royal Commission into the Protection and Detention of Children in the Northern Territory* (Report, 2017), <<https://www.royalcommission.gov.au/system/files/2020-09/findings-and-recommendations.pdf>>.

<sup>54</sup> Law Council of Australia, 'Justice targets back on the agenda' (Media release, 23 February 2018), <<https://lawcouncil.au/media/news/justice-targets-back-on-the-agenda>>; Law Council of Australia 'Call for justice targets on 10th anniversary of Apology to Australia's Indigenous peoples', (Media release, 13 February 2023), <<https://lawcouncil.au/media/media-releases/call-for-justice-targets-on-10th-anniversary-of-apology-to-australias-indigenous-peoples>>.

<sup>55</sup> Northern Territory Government, 'Safer Communities: Response to the 227 Recommendations of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory' (Media Release, 1 March 2018).

implemented.<sup>56</sup> There has even been regression in some areas of needed reform, for example an increase in the number of young people incarcerated at the Don Dale Youth Detention Centre.<sup>57</sup>

## Federal and state/territory human rights legislation

22. The Law Council supports the introduction of a Federal Human Rights Act<sup>58</sup> and some of its Constituent Bodies have expressed support for the establishment of human rights Acts in state jurisdictions currently without them.<sup>59</sup> In the context of youth justice, human rights legislation would facilitate change in the culture and norms underpinning the youth justice policy. Specifically, it would assist to ensure that the best interests of the child are a primary consideration in driving reform.<sup>60</sup>
23. Under the Law Council's preferred federal Human Rights Act model, explicit duties would be imposed on public authorities to act compatibly with human rights, and to give proper consideration to human rights in the development of policy and the making of decisions.<sup>61</sup>
24. This would encourage a shift in the focus of law and policy reform from the current retributive narratives to an approach centred on children's wellbeing. In addition to changing the normative focus, human rights legislation can be utilised to ensure children's rights are protected. For example, in 2017 the Victorian Supreme Court found that detaining children in an adult maximum security prison was contrary to Victorian law.<sup>62</sup>
25. The Law Council recognises that a Federal Human Rights Act would not, on its own, completely address issues facing young people in the justice system. The presence of human rights legislation should only form one part of a broader suite of legislative and policy measures designed to address youth justice issues.
26. For example, the *Strengthening Community Safety Act 2023* (Qld), expressly excludes protections under the *Human Rights Act 2019* (Qld) in order to allow offences for breach of bail to extend to children and to provide a new sentencing

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<sup>56</sup> Law Council of Australia, 'NT Government's 'unacceptable' Don Dale backflip fails young people and community' (Media release, 26 March 2019) <<https://lawcouncil.au/media/media-releases/nt-governments-unacceptable-don-dale-backflip-fails-young-people-and-community->>, See also: Jacqueline Breen, 'Five years since the NT royal commission into youth detention and child protection, there is hope, disappointment and fear', *Australian Broadcasting Corporation* (online, 17 November 2022) <<https://www.abc.net.au/news/2022-11-17/nt-don-dale-royal-commission-youth-detention-five-years/101655822>>;

<sup>57</sup> Ibid; Amanda Parkinson 'Don Dale: the children with profound disability held behind bars in the NT', *The Guardian* (online, 22 June 2023) <<https://www.theguardian.com/australia-news/2023/jun/22/don-dale-the-children-with-profound-disability-held-behind-bars-in-the-nt>>

<sup>58</sup> Law Council of Australia, 'Federal Human Rights Charter: Policy Position', (Policy Statement, November 2020), <<https://www.lawcouncil.asn.au/resources/policies-and-guidelines/federal-human-rights-charter>> > **(Law Council Federal Human Rights Charter Policy Position)**.

<sup>59</sup> Law Society of New South Wales, 'The Law Society of New South Wales Thought Leadership Series 2022 – Human Rights Legislation for New South Wales' [https://www.lawsociety.com.au/sites/default/files/2022-12/LS3805\\_PAP\\_TL\\_HumanRightsNSW\\_2022-12-6.pdf?\\_ga=2.183103718.1917967500.1689724196-1565039634.1687932070](https://www.lawsociety.com.au/sites/default/files/2022-12/LS3805_PAP_TL_HumanRightsNSW_2022-12-6.pdf?_ga=2.183103718.1917967500.1689724196-1565039634.1687932070) and Law Society of South Australia, 'A Human Rights Framework for all South Australians' <https://lssa.informz.net/lssa/data/images/Presentation%20version%20-%20Human%20Rights%20Framework%20FINAL.pdf>.

<sup>60</sup> In accordance with Australia's obligation under the *Convention on the Rights of the Child*, opened for signature 20 November 1989, GA res 44/25, UNTS 1577 3 (entered into force 2 September 1990), article 3.

<sup>61</sup> Law Council Federal Human Rights Charter Policy Position 4.

<sup>62</sup> This decision was made in consideration of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), in particular subsection 17(2), which stipulates that every child is entitled to protection based on their best interests. See *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children (No 2)* [2017] VSC 251

regime for children who are ‘serious repeat offenders’.<sup>63</sup> The Queensland Law Society has emphasised its concern that this legislation is incompatible with the *Human Rights Act 2019* (Qld) and represented a violation of the CROC.<sup>64</sup>

27. At the very least, the passage of the Queensland Act means that the legislative acknowledgement of such an override expressly alerts the community to the human rights issues at stake, and should prompt governments to justify their policy decisions more rigorously.
28. The Law Council supports a general limitations clause which provides that many of the rights protected in a Federal Human Rights Act may be subject to reasonable and proportionate restrictions if these are clearly demonstrated to be necessary for the achievement of a legitimate purpose such as protecting the rights of others.<sup>65</sup>

## Minimum age of criminal responsibility

29. The Law Council’s firm view is that the minimum age of criminal responsibility (**MACR**) should be raised nationally from 10 to 14 years.<sup>66</sup> The current MACR across Australia is incompatible with medical consensus regarding child brain development and with international human rights standards. The Law Council emphasises that communities are not safer or healthier where very young people are kept in detention.<sup>67</sup>
30. Raising the MACR to 14 years would protect young people aged 10–13 from being exposed to the youth justice system by requiring that authorities adopt alternative, more therapeutic approaches, focusing on providing these young people with critical supports, such as counselling, social support and education.<sup>68</sup>
31. While the ACT,<sup>69</sup> the Northern Territory,<sup>70</sup> and Victoria<sup>71</sup> have recently announced their intention to raise the MACR, it is critically important for the MACR to be raised

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<sup>63</sup> *Strengthening Community Safety Bill 2023*, Statement of Compatibility.

<sup>64</sup> Queensland Law Society, ‘Submission to the Economics and Governance Committee, Strengthening Community Safety Bill,’ (Submission 24 February 2023), <https://www.qls.com.au/Submissions/2023/Strengthening-Community-Safety-Bill-2023>, 4.

<sup>65</sup> Law Council Federal Human Rights Charter Policy Position 3.

<sup>66</sup> See, Law Council of Australia ‘Minimum Age of Criminal Responsibility’ (Policy Statement, December 2019), <<https://lawcouncil.au/publicassets/20fb2a76-c61f-ea11-9403-005056be13b5/AMA%20and%20LCA%20Policy%20Statement%20on%20Minimum%20Age%20of%20Criminal%20Responsibility.pdf>>.

<sup>67</sup> Ibid; see also Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention – Concluding Observations: Australia*, 40th sess, UN Doc CRC/C/15/Add.268 (20 October 2005); Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention – Concluding Observations: Australia*, 60th sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012); United Nations Committee on the Rights of the Child, *General Comment No 24 on young people’s rights in the child justice system*, UN Doc CRC/C/GC/24 (18 September 2019), [21]-[22].

<sup>68</sup> Law Council of Australia ‘Minimum Age of Criminal Responsibility’ (Policy Statement, December 2019), <<https://lawcouncil.au/publicassets/20fb2a76-c61f-ea11-9403-005056be13b5/AMA%20and%20LCA%20Policy%20Statement%20on%20Minimum%20Age%20of%20Criminal%20Responsibility.pdf>>, 4.

<sup>69</sup> Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023 (ACT).

<sup>70</sup> Northern Territory Government, ‘Raising the Age of Criminal Responsibility’ (Webpage) <<https://nt.gov.au/law/young-people/raising-minimum-age-of-criminal-responsibility>>.

<sup>71</sup> See, Department of Premier, Victoria, ‘Keeping Young People Out Of The Criminal Justice System | Premier of Victoria’ (Media Release, 26 April 2023) <<https://www.premier.vic.gov.au/keeping-young-people-out-criminal-justice-system>>.

in every jurisdiction to 14 years, with no exceptions or carve-outs.<sup>72</sup> The Law Society of the ACT notes that a bill to raise the MACR to 14 years in the ACT includes exceptions for several serious offences for young people aged 12 to 14.<sup>73</sup>

32. The Law Council recommends a tiered approach to developing policy responses to young offenders under the MACR based on the severity of the child's needs, with a primary focus on the provision of wraparound, multidisciplinary services aimed at attending to the core health and wellbeing needs of the child and their family.<sup>74</sup>

## Changes required at each stage of involvement

33. Given the varied and intersecting factors that contribute to a child's experience within the youth justice system, there are diverse areas requiring change prior to, during, and following a young person's engagement with the youth justice system.

### Changes required prior to engagement

#### Early intervention and justice reinvestment

34. Early intervention programs, access to support services, and initiatives that address underlying issues can help prevent young people from becoming involved in criminal activities.<sup>75</sup> In addition, the Australian Government should continue to provide funds towards justice reinvestment initiatives and family support to keep young people out of the child protection system, as this may assist in breaking the cycle of disadvantage. This should be partnered by state and territory government funding towards justice reinvestment/early intervention approaches, having regard to jurisdictional responsibilities.
35. There are several diversionary options already available for young people across Australia. The NSW Young Lawyers Committee noted such programs in NSW include:
  - the Aboriginal-led diversion and youth engagement programs run by Deadly Connections;<sup>76</sup>
  - the Clean Slate Without Prejudice program;<sup>77</sup>
  - the Youth on Track Program, run by Youth Justice NSW;<sup>78</sup>

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<sup>72</sup> Law Council of Australia 'Minimum Age of Criminal Responsibility' (Policy Statement, December 2019), <<https://lawcouncil.au/publicassets/20fb2a76-c61f-ea11-9403-005056be13b5/AMA%20and%20LCA%20Policy%20Statement%20on%20Minimum%20Age%20of%20Criminal%20Responsibility.pdf>>.

<sup>73</sup> Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023 (ACT) cl 92.

<sup>74</sup> Law Council of Australia, 'Responses to Children under the Minimum Age of Criminal Responsibility' (Position Paper, 25 June 2022), <https://lawcouncil.au/publicassets/6fdc725a-60f7-ec11-945c-005056be13b5/Position%20Paper%20-%20Responses%20to%20children%20under%20the%20MACR.pdf>.

<sup>75</sup> See: Save the children, 'Putting young people first: A rights respecting approach to youth justice in Australia' (Report, April 2023), <[https://www.savetheyoungpeople.org.au/getmedia/4befc9d7-c9de-4088-b591-547714fc8673/Putting-young-people-first-A-rights-respecting-approach-to-youth-justice-in-Australia\\_April-2023.pdf.aspx](https://www.savetheyoungpeople.org.au/getmedia/4befc9d7-c9de-4088-b591-547714fc8673/Putting-young-people-first-A-rights-respecting-approach-to-youth-justice-in-Australia_April-2023.pdf.aspx)>, 52.

<sup>76</sup> Deadly Connections, Impact Report, (Report, 2021), <<https://deadlyconnections.org.au/wp-content/uploads/2022/08/Deadly-Connections-Impact-Report-2019-2021.pdf>>, 30.

<sup>77</sup> Tribal Warrior, 'Clean Slate Without Prejudice' (Webpage), <<https://www.tribalwarrior.org/clean-slate-withoutprejudice#:~:text=Our%20Clean%20Slate%20Without%20Prejudice%20%28CSWP%29%20program%20is,respect%20through%20dedicated%20one-on-one%20mentoring%20and%20group%20activities.>>>

<sup>78</sup> NSW Government, 'About Youth on Track' (Webpage), <<https://www.nsw.gov.au/legal-and-justice/youth-justice/youth-on-track/about>>.

- New Street Services;<sup>79</sup> and
  - Functional Family Therapy, a family intervention program that supports adolescents with behavioural problems.<sup>80</sup>
36. There are also international examples of early intervention programs that focus on providing support and resources to at-risk young people and families, for example:
- in the United Kingdom, Young people and Parents Service Caps;<sup>81</sup> and
  - in the United States of America, the Nurse-Family Partnership Program.<sup>82</sup>
37. The LSWA suggests that early childhood and primary education are most in need of reform. Its view is that children who have been exposed to unstable family or living environments may still develop protective strategies, if they have strong learning platforms through specialist supports in place within those systems.<sup>83</sup> The LSWA supports expanding community infant and child nursing programs and assessments, and state-based family support programs, to provide a frontline monitoring program prior to formal compulsory education.
38. Additionally, First Nations-led justice reinvestment programs are a promising means of addressing preventative, early intervention and exit strategies. These initiatives are based on the premise that funds should be redirected from policing and prisons to fund and rebuild human resources and physical infrastructure to address incarceration rates in areas most affected.<sup>84</sup>
39. In July 2022 the Jumbunna Institute for Indigenous Education and Research at the University of Technology, Sydney and the Justice Reinvestment Network published a detailed report, 'Justice Reinvestment in Australia—A Review of Progress and Key Issues', which maps the progress of justice reinvestment projects in Australia and explores key issues related to their implementation.<sup>85</sup>

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<sup>79</sup> NSW Government, 'New Street Services' (Webpage),

<<https://www.health.nsw.gov.au/parvan/hsb/Pages/new-street-services.aspx>>

<sup>80</sup> See, Ozchild 'Functional Family Therapy' (Webpage) <<https://www.ozchild.org.au/service/functional-family-therapy-fft/>>

<sup>81</sup> Northern Ireland Association for the Care and Resettlement of Offenders 'Young people and Parents Support Caps' (Webpage), <<https://www.niacro.co.uk/child-and-parent-support-caps#:~:text=Caps%20is%20NIACRO%E2%80%99s%20early%20intervention%20programme%20for%20%E2%80%9313,programmes%20based%20on%20their%20individual%20and%20family%20needs>>.

<sup>82</sup> Nurse-Family Partnership 'Research Trials and Outcomes' (Factsheet, 2022) <<https://www.nursefamilypartnership.org/wp-content/uploads/2022/03/NFP-Research-Trials-and-Outcomes.pdf>>.

<sup>83</sup> Julia Carroll, et al, 'SEN support: A rapid evidence assessment' (Research report, July 2017) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/628630/DfE\\_SEN\\_Support\\_REA\\_Report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/628630/DfE_SEN_Support_REA_Report.pdf)>.

<sup>84</sup> Australian Law Reform Commission, *Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, (28 March 2018) <<https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/4-justice-reinvestment/what-is-justice-reinvestment/>>.

<sup>85</sup> Cunneen, C and Allison, F, 'Justice Reinvestment in Australia: A Review of Progress and Key Issues' (Report, 2022), <[https://jrna228913579.files.wordpress.com/2022/07/national-report\\_jr.pdf](https://jrna228913579.files.wordpress.com/2022/07/national-report_jr.pdf)>.

40. The report concludes that most of the currently functioning justice reinvestment projects in Australia are community-driven and that the community must be central to all justice reinvestment processes, especially during preliminary discussions on feasibility.<sup>86</sup> It emphasises the importance of:

*... gathering of First Nations community data on readiness to implement [justice reinvestment], which has more emphasis on strengths and capabilities of the community compared to the criminal justice agency data on incarceration, recidivism.*<sup>87</sup>

41. The report also identifies First Nations self-determination and culture ‘as essential elements to achieving [justice reinvestment] objectives of reduced incarceration’.<sup>88</sup> It finds that self-determination can be realised through:
- data sovereignty—through which ‘First Nations people can take ownership of administrative and other data and re-interpret it for their own purposes through community-led processes and a community lens’;<sup>89</sup> and
  - governance structures that are ‘context specific, locally based and First Nations led’.<sup>90</sup>
42. Conversely, the report found the following barriers to successful justice reinvestment projects: the community lacking access to information or evidence on ‘what works’ or the resources or leadership to drive justice reinvestment; lack of access to meaningful data; absence of coordinated support; and lack of sustainable funding.<sup>91</sup>
43. The Law Council considers that it is important that justice reinvestment projects are closely, and independently evaluated, with regular assessment of how funds are being allocated and the effectiveness of the projects based on project outcomes.
44. To this end, the Law Council supports the commitment made in the October 2022 Federal Budget to spend \$12.5 million over four years from 2022–23 (and \$3.1 million per year ongoing) to support a national independent body to coordinate justice reinvestment.<sup>92</sup>

### **Interagency collaboration, training and information sharing**

45. The youth justice system involves multiple agencies and jurisdictions. Coordinated efforts and enhanced information sharing between agencies at all levels is required to achieve better outcomes for young people. Training social workers, police officers, child protection workers, duty lawyers and detention officers in effective information sharing and collaborative practices is crucial to improving the youth justice system. In addition, further training around domestic and family violence,

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<sup>86</sup> Ibid 9-14, 38, 49.

<sup>87</sup> Ibid 38.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid. See also, Allison, F (2022), Redefining Reinvestment. An opportunity for Aboriginal communities and government to co-design justice reinvestment in NSW. Final Report. Just Reinvest NSW 16-18.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid 39 and 49.

<sup>92</sup> Commonwealth of Australia, Budget October 2022-23, ‘Budget Paper No. 2’ (25 October 2022) 49; Law Council of Australia, ‘Welcome investment in First Nations justice’ (Media Release, 25 October 2022) <https://lawcouncil.au/media/media-releases/welcome-investment-in-first-nations-justice>.



youth crime and adopting trauma-informed and culturally safe practices can further assist in ensuring improved service delivery.<sup>93</sup>

## Child protection

46. Noting the correlation between young people involved in child protection and the youth justice system (identified above), it is important that there is collaboration between, and training of, youth protection services and youth justice services.<sup>94</sup>
47. A target of the Closing the Gap Report is to reduce the rate of overrepresentation of Aboriginal and Torres Strait Islander children in out-of-home care by 45 per cent by 2031.<sup>95</sup> At the time of the commencement of the report, 54.2 of every 1,000 Aboriginal and Torres Strait Islander children were in out-of-home care, compared to 5.1 of every 1,000 non-Indigenous children.<sup>96</sup> In 2022, the rate of Aboriginal and Torres Strait Islander children in out-of-home care had risen to 56.8 per 1,000 and the rate of non-Indigenous children in such care scenarios had dropped to 4.8 per 1,000.<sup>97</sup>
48. Given the disproportionately high rates of child removal of First Nations children from their families by child protection services, it is critical that responses to reform child protection services are culturally sensitive and led by First Nations communities.<sup>98</sup> In particular, the Law Council has previously reached the conclusion that the diminished quality of child protection may be partly a consequence of severe resourcing constraints and a lack of staff training, including cultural competency training, and mental health support for staff.<sup>99</sup> Notably, the NT Royal Commission found that welfare services were under-resourced and 'did not work together or talk to each other'<sup>100</sup> effectively in order to support young people and families appropriately.
49. It is critical that the cycle of young people moving between involvement in child protection and youth detention be broken.<sup>101</sup> This could be done through prioritising and investing in early intervention programs and services, adopting trauma-informed and culturally safe practices and developing uniform best practice guidelines and

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<sup>93</sup> Law Council of Australia, 'Children and young people' *Justice Project Report*, (August 2018) <<https://lawcouncil.au/files/web-pdf/Justice%20Project/Final%20Report/Young%20people%20and%20Young%20People%20%28Part%201%29.pdf>>, 53.

<sup>94</sup> See eg, Victorian State Government, 'Framework to reduce criminalisation of young people in residential care' (Report, 2020), <<https://providers.dffh.vic.gov.au/sites/default/files/2020-02/A%20Framework%20to%20reduce%20criminalisation%20of%20young%20people%20in%20residential%20care.PDF>>, 8.

<sup>95</sup> Productivity Commission, 'Aboriginal and Torres Strait Islander children are not overrepresented in the child protection system - Dashboard | Closing the Gap Information Repository' (webpage, accessed on 19 July 2023) <https://www.pc.gov.au/closing-the-gap-data/dashboard/socioeconomic/outcome-area12>.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> Law Council of Australia, 'Aboriginal and Torres Strait Islander People' *Justice Project Report* (August 2018) <<https://lawcouncil.au/files/web-pdf/Justice%20Project/Final%20Report/Aboriginal%20and%20Torres%20Strait%20Islander%20People%20%28Part%201%29.pdf>>, 79 and 98,

<sup>99</sup> Law Council of Australia, 'Children and young people' *Justice Project Report*, (August 2018) <<https://lawcouncil.au/files/web-pdf/Justice%20Project/Final%20Report/Young%20people%20and%20Young%20People%20%28Part%201%29.pdf>>, 5 and 49. While it is not an expert in child protection, the Law Council reached this conclusion based on analysis of submissions by many informed stakeholders and independent data analysis and research of relevant reports.

<sup>100</sup> Northern Territory, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Report Overview* (2017) 5.

<sup>101</sup> Australian Institute of Health and Welfare, 'Young people in child protection and under youth justice supervision 1 July 2014 to 30 June 2018' (Report, 2019), <<https://www.aihw.gov.au/getmedia/ebf46682-66a3-4d5e-85ce-0b3919c70dfd/aihw-CSI-27.pdf.aspx?inline=true>>.

joint protocols for responding to challenging behaviour in out-of-home care environments.<sup>102</sup>

50. The Australian Government has indicated that its primary mechanism to achieve this target is through 'Safe and Supported: the National Framework for Protecting Australia's Children 2021–2031' (**Safe and Supported**).<sup>103</sup> Earlier this year, the 'Aboriginal and Torres Strait Islander First Action Plan 2023–2026' was devised under Safe and Supported.<sup>104</sup> It identifies four areas of work directed to: improving access to services; 'reshaping legislation, policies, programs & practices in child and family welfare to be culturally safe and responsive'; 'supporting Aboriginal and Torres Strait Islander people and communities to participate in and have control over decisions that affect children and young people'; and making child protection systems and service providers accountable to Aboriginal and Torres Strait Islander people and communities.<sup>105</sup>

### Changes required during engagement with the justice system

#### **Bail reform**

51. The Law Council recognises that bail laws and policies can present barriers to justice for at-risk young people, and increase the number of young people on remand.<sup>106</sup> Stakeholders reported to the Justice Project that 'inflexible and onerous bail conditions, combined with a lack of available and appropriate bail accommodation for children and young people, results in their unnecessary incarceration in the youth justice system'.<sup>107</sup>
52. The Law Council notes the following concerns in relation to bail and young people raised in its Justice Project:
- the criminalisation of young people for breaching bail conditions;<sup>108</sup>
  - the need for resources to ensure the availability of bail support programs for children and young people, including supported accommodation;<sup>109</sup> and
  - the importance of considering cultural factors when granting bail and sentencing First Nations offenders.<sup>110</sup>

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<sup>102</sup> Law Council of Australia, 'Children and young people' *Justice Project Report*, (August 2018) <<https://lawcouncil.au/files/web-pdf/Justice%20Project/Final%20Report/Young%20people%20and%20Young%20People%20%28Part%201%29.pdf>> 58.

<sup>103</sup> Australian Government, 'Commonwealth Closing the Gap Annual Report 2022' 95 <https://www.niaa.gov.au/sites/default/files/publications/niaa-closing-the-gap-annual-report-2022.pdf>. Commonwealth of Australia, 'Safe and Supported: the National Framework for Protecting Australia's Children 2021-2031' (2021) [https://www.dss.gov.au/sites/default/files/documents/12\\_2021/dess5016-national-framework-protecting-childrenaccessible.pdf](https://www.dss.gov.au/sites/default/files/documents/12_2021/dess5016-national-framework-protecting-childrenaccessible.pdf).

<sup>104</sup> Commonwealth of Australia, 'Commonwealth Aboriginal and Torres Strait Islander First Action Plan 2023-2026 under Safe and Supported: the National Framework for Protecting Australia's Children 2021-2031' [https://www.dss.gov.au/sites/default/files/documents/01\\_2023/final\\_aboriginal\\_and\\_torres\\_strait\\_islander\\_first\\_action\\_plan.pdf](https://www.dss.gov.au/sites/default/files/documents/01_2023/final_aboriginal_and_torres_strait_islander_first_action_plan.pdf).

<sup>105</sup> Ibid 18.

<sup>106</sup> Ibid 40.

<sup>107</sup> Ibid 75.

<sup>108</sup> Ibid 41.

<sup>109</sup> Ibid 46 and 90.

<sup>110</sup> Law Council of Australia, 'Courts and Tribunals' *Justice Project Report*, (August 2018), <<https://lawcouncil.au/files/web-pdf/Justice%20Project/Final%20Report/Courts%20and%20Tribunals%20%28Part%202%29.pdf>>, 69.

53. Unfortunately, the Law Council has not been in the position to conduct a detailed review of measures adopted since it outlined these concerns in the Justice Project report. It encourages the Australian Human Rights Commission to enquire closely into these issues.
54. The NT Royal Commission made a number of recommendations about bail and bail support, which may have a general application. These include:
- the provision of appropriate facilities for girls and young women to access help when on remand;<sup>111</sup>
  - the ‘development of electronic means of explaining bail and reminding young people of their bail obligations’;<sup>112</sup>
  - electronic monitoring conditions—specifically, that they be considered only ‘when there is no other alternative to remanding the child or young person in detention’;<sup>113</sup>
  - reforms to bail legislation to: increase the threshold for denying bail; consider the circumstances of the person and their capacity to comply with conditions of bail; impose an obligation on a relevant official to explain bail conditions to a young person; and provide police with powers to issue warnings for bail breaches;<sup>114</sup>
  - the issuance of a police directive relating to reducing curfew checks and arrests for breaches of bail;<sup>115</sup> and
  - providing for bail services in areas of need, with features including: accommodation in small homelike residences; bail support plans; engagement of young persons and their families; and availability of services and practical life skills support.<sup>116</sup>
55. The Victorian Bar expressed concern that significant numbers of young people in Victoria continue to be remanded for matters that do not warrant a custodial sentence, or for a length of time that is greater than any custodial sentence that would ordinarily follow for the offence.<sup>117</sup> This leads to young people pleading guilty and being sentenced to time served while on remand, in circumstances where the sentence may otherwise have been a non-custodial sentence or a custodial sentence that is shorter than the period spent on remand. The Victorian Bar observed that lengthy periods spent on remand impede the delivery of rehabilitation programs to remanded young people.

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<sup>111</sup> Royal Commission and Board of Inquiry Into the Protection and Detention of Children in the Northern Territory, *Findings and Recommendations, Royal Commission into the Protection and Detention of Children in the Northern Territory* (Report, 2017), <https://www.royalcommission.gov.au/system/files/2020-09/findings-and-recommendations.pdf> Recommendation 25.15.

<sup>112</sup> Ibid Recommendation 25.16.

<sup>113</sup> Ibid Recommendation 25.17.

<sup>114</sup> Ibid Recommendation 25.19.

<sup>115</sup> Ibid Recommendation 25.20.

<sup>116</sup> Ibid Recommendation 25.21.

<sup>117</sup> Sentencing Advisory Committee, ‘Young people Held on Remand Victoria’ (Report, 29 September 2020), <<https://www.sentencingcouncil.vic.gov.au/publications/young-people-held-on-remand-in-victoria>>

56. The Victorian Bar recommended the following amendments to the *Bail Act 1977* (Vic):
- to section 3A, which requires a bail decisionmaker to take into account issues which arise due to the person's Aboriginality, to include a positive assertion that connection to culture can play a constructive role in rehabilitation and specify that this can constitute compelling or exceptional circumstances to justify the grant of bail;<sup>118</sup> and
  - to sections 3B and 5AA, which relate to the procedures for granting bail to a child, so that remanding young people is a last resort and incarceration for breach of a bail condition is an exceptional occurrence.

### **Diverse sentencing and diversion options**

57. The Law Council has consistently opposed the use of sentencing regimes that prescribe mandatory minimum sentences.<sup>119</sup> As noted by Save the Children:

*The [Convention on the Rights of the Child] and the Committee Against Torture have recommended the abolition of [Western Australian] mandatory sentencing laws, noting that they are not consistent with child rights related to the best interests of the child, offend principles of proportionality and are a direct violation of Australia's international rights obligations, in particular removing the principle of detention as a sanction of last resort.*<sup>120</sup>

58. Diversion programs, such as cautioning, family/community conferencing and community-based orders, offer alternatives to formal court proceedings and aim to divert young people from the criminal justice system.<sup>121</sup> These programs provide opportunities for young people to take responsibility for their actions while addressing the underlying causes of their behaviour. Article 4 of the CROC requires parties to take all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the Convention. Accordingly, Australia has an obligation to establish measures to ensure juvenile detention is used as a last resort and for the shortest appropriate period of time.<sup>122</sup> Such measures may include diversion practices that allow young people to be diverted away from detention.

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<sup>118</sup> See: *Re KF* [2022] VSC 349; *Re Firebrace* [2023] VSC 137.

<sup>119</sup> Law Council of Australia, 'Mandatory Sentencing Policy' (Policy Statement, May 2014) <<https://lawcouncil.au/publicassets/2c6c7bd7-e1d6-e611-80d2-005056be66b1/1405-Policy-Statement-Mandatory-Sentencing-Policy-Position.pdf>>.

<sup>120</sup> Save the Children Foundation, 'Putting young people first: A rights respecting approach to youth justice in Australia' (Report, April 2023), <<https://www.savetheyoungpeople.org.au/getmedia/4befc9d7-c9de-4088-b591-547714fc8673/Putting-young-people-first-A-rights-respecting-approach-to-youth-justice-in-Australia-April-2023.pdf.aspx>>; see; Committee on the Rights of the Child, *Concluding Observations: Australia*, 60th sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012), [84]; Committee against Torture, *Concluding observations on the fourth and fifth periodic reports of Australia*, 53rd sess, UN Doc CAT/C/AUS/CO/4-5 (23 December 2014), [12]; Committee against Torture, *Concluding observations on the fourth and fifth periodic reports of Australia*, 75th sess, UN Doc CAT/C/AUS/CO/6 (5 December 2022), [34].

<sup>121</sup> See, Australian Human Rights Commission 'Human Rights Brief No.5 - Best practice principles for the diversion of juvenile offenders' (webpage, 2001) <<https://humanrights.gov.au/our-work/publications/human-rights-brief-no5-best-practice-principles-diversion-juvenile-offenders>>.

<sup>122</sup> CROC, article 37.

59. The Law Council notes that some states in the USA have, according to data reported in 2019, effectively shifted their approach to youth justice to embrace community-based strategies to prevent, intervene, and respond to youth crime. These US states have been able to reduce juvenile crime rates, reduce youth incarceration rates, and ultimately close juvenile detention facilities.<sup>123</sup>
60. The Law Council also emphasises that specialist courts for children, including Children's courts, youth courts and First Nations sentencing courts, are important in ensuring access to justice by addressing the specific legal and non-legal needs of participants.<sup>124</sup> The Courts and Tribunals chapter in the report of the Justice Project outlined a range of therapeutic justice approaches occurring in Australian courts and tribunals.<sup>125</sup> However, it also made the point that these were not consistently available, particularly on a geographical basis, and that rural, regional and remote Australians often missed out.<sup>126</sup>
61. The Law Council supports courts having access to alternative sentencing options, culturally responsive diversion programs, and integrated support services for young offenders. In particular, community-based orders that involved intense supervision by Community Corrections were reported to the Justice Project as useful in diverting young offenders away from re-offending.<sup>127</sup>

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<sup>123</sup> Urban Initiative, 'Promoting a New Direction for Youth Justice Strategies to Fund a Community-Based Continuum of Care and Opportunity' (Research Report, March 2019), [https://www.urban.org/sites/default/files/publication/100013/innovative\\_strategies\\_for\\_investing\\_in\\_youth\\_justice\\_1.pdf](https://www.urban.org/sites/default/files/publication/100013/innovative_strategies_for_investing_in_youth_justice_1.pdf). The Sentencing Project reported in 2016 that between 2011-2016 at least 22 states in the US had closed or announced closures for 94 state prisons and juvenile facilities, resulting in the elimination of over 48,000 state prison beds and an estimated cost savings of over \$345 million: see The Sentencing Project, 'Repurposing: New Beginnings for Closed Prisons', (Policy Brief) <<https://www.sentencingproject.org/app/uploads/2022/08/Repurposing-New-Beginnings-for-Closed-Prisons.pdf>>

<sup>124</sup> Law Council of Australia, 'Children and young people' *Justice Project Report*, (August 2018) <<https://lawcouncil.au/files/web-pdf/Justice%20Project/Final%20Report/Young%20people%20and%20Young%20People%20%28Part%201%29.pdf>> 27.

<sup>125</sup> Law Council of Australia, 'Courts and Tribunals' *Justice Project Report*, (August 2018), <<https://lawcouncil.au/files/web-pdf/Justice%20Project/Final%20Report/Courts%20and%20Tribunals%20%28Part%202%29.pdf>> 83-117.

<sup>126</sup> Ibid 113-115.

<sup>127</sup> Law Council of Australia, 'Courts and Tribunals' *Justice Project Report*, (August 2018), <<https://lawcouncil.au/files/web-pdf/Justice%20Project/Final%20Report/Courts%20and%20Tribunals%20%28Part%202%29.pdf>>, 112.

## Treatment and conditions in youth detention centres

62. The Law Council is concerned by the harmful conditions and treatment of young people in some Australian youth detention centres<sup>128</sup> and emphasises the extreme importance of ensuring that the rights of young people in custody are protected.
63. The Save the Children Report into Australia's youth justice system<sup>129</sup> identifies the following examples of children's and young people's rights being undermined within Australian detention centres:
- adult facilities used to detain children and young people including the use of adult police watch houses;<sup>130</sup>
  - use of isolation and segregation, particularly for long periods of time;<sup>131</sup>
  - use of excess force and restraints in youth detention facilities;<sup>132</sup> and
  - degrading, humiliating or harmful acts or physical violence carried out by youth detention workers.<sup>133</sup>
64. Importantly, the ICCPR, to which Australia is a signatory, provides that:

*The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.*<sup>134</sup>

While the Law Council does not have a complete picture of the current situation across juvenile detention in Australia. It notes that reviews of youth detention have been completed or are on foot, and believes that their recommendations should be

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<sup>128</sup> See, *Locking up Kids: Australia's failure to protect young people in detention* (Produced by Four Corners, ABC, 14 November 2022); *Australia's Shame* (Produced by Four Corners, ABC, 25 July 2016); Australian Government, *The Report of the Royal Commission and Board of Inquiry Into the Protection and Detention of Young people in the Northern Territory: Findings and Recommendations*, (Report 2017) <https://www.royalcommission.gov.au/child-detention/final-report>.

<sup>129</sup> Save the Children, 'Putting young people first: A rights respecting approach to youth justice in Australia' (Report, April 2023), <[https://www.savetheyoungpeople.org.au/getmedia/4befc9d7-c9de-4088-b591-547714fc8673/Putting-young-people-first-A-rights-respecting-approach-to-youth-justice-in-Australia\\_April-2023.pdf.aspx](https://www.savetheyoungpeople.org.au/getmedia/4befc9d7-c9de-4088-b591-547714fc8673/Putting-young-people-first-A-rights-respecting-approach-to-youth-justice-in-Australia_April-2023.pdf.aspx)>, 43.

<sup>130</sup> Ibid 43. See also, Rachel Rida and Kate McKenna, 'Advocates say young people are being held in adult watch houses in Queensland for weeks at a time', Australian Broadcasting Corporation, (online) 7 February 2023, <https://www.abc.net.au/news/2023-02-07/young-people-held-in-adult-watch-houses-youth-justice-system-crisis/101936438>

<sup>131</sup> Ibid. See Rebecca Turner, 'WA government breaks laws with 'solitary confinement' of youth detainee, court rules' *Australian Broadcasting Corporation* (online) 25 August 2022 <<https://www.abc.net.au/news/2022-08-25/banksia-hill-supreme-court-ruling/101370542>>; see also, Victorian Ombudsman, *OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people*, (Report, September 2019), <[https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/1-PDF-Report-Files/OPCAT-in-Victoria-A-thematic-investigation-of-practices-related-to-solitary-\\_-September-2019.pdf](https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/1-PDF-Report-Files/OPCAT-in-Victoria-A-thematic-investigation-of-practices-related-to-solitary-_-September-2019.pdf)>.

<sup>132</sup> Ibid. See Australian Commissioners and Guardians, *Human rights standards in youth detention facilities in Australia: the use of restraint, disciplinary regimes and other specified practices* (Report, April 2016).

<sup>133</sup> Ibid. Australian Government, *The Report of the Royal Commission and Board of Inquiry Into the Protection and Detention of Young people in the Northern Territory: Findings and Recommendations*, (Report, 2017), 3-18, cited in Save the Children, 'Putting young people first: A rights respecting approach to youth justice in Australia' (Report, April 2023), <[https://www.savetheyoungpeople.org.au/getmedia/4befc9d7-c9de-4088-b591-547714fc8673/Putting-young-people-first-A-rights-respecting-approach-to-youth-justice-in-Australia\\_April-2023.pdf.aspx](https://www.savetheyoungpeople.org.au/getmedia/4befc9d7-c9de-4088-b591-547714fc8673/Putting-young-people-first-A-rights-respecting-approach-to-youth-justice-in-Australia_April-2023.pdf.aspx)> at footnote 18 on page 43.

<sup>134</sup> ICCPR art. 10(3).

implemented.<sup>135</sup> Given the serious and ongoing concerns being raised in relation to youth detention centres,<sup>136</sup> the Law Council reiterates previous recommendations for comprehensive and urgent implementation of the OPCAT.<sup>137</sup> This will provide for nationwide, independent oversight and scrutiny of the conditions of detention in youth detention centres through a National Preventative Mechanism (NPM). The OPCAT is specifically designed to address serious detention-related concerns such as those raised above. Despite the evident and urgent need for proper implementation of the OPCAT, the Australian Government (and state/territory governments cooperating in the NPM) have much work to do in this regard, several years after ratification in December 2017.<sup>138</sup>

65. Furthermore, it is imperative that detention centres are suitably resourced. For example, the Victorian Bar has emphasised that staffing levels of Victorian youth justice facilities are inadequate.<sup>139</sup> The Victoria Bar points out that the consequences of an inability to adequately staff and resource those facilities include:
- increased use of lockdowns and, in practical effect, solitary confinement for young people within centres—the statutory prohibition on the use of isolation as a punishment, can be bypassed when isolation is imposed for administrative rather than punitive reasons;<sup>140</sup>
  - restricted movement of young people within a centre impacts their access to outdoor recreation, program facilities and education facilities (program delivery within the centres is also currently severely restricted due to inadequate staffing); and
  - reduced staff with proper training to deal with the most traumatised and troubled young people who end up in youth justice detention.
66. Adequate staffing of youth justice facilities, with the dedication of whatever resources are necessary to achieve adequate numbers of appropriately trained staff, must be an absolute priority to assist in addressing issues within detention centres. At the same time, the potential for cost savings in youth justice should be explored, by reference to other recommendations made in this submission. This includes careful regard being given to the disproportionate numbers of children and young

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<sup>135</sup> Katherine McMillan QC and Professor Megan Davis, 'Independent Review of Youth Detention' (December 2016) <http://www.youthdetentionreview.qld.gov.au/>; Jessica Hayes, Ted O'Connor, Cameron Carr, and Hinako Shiraishi, 'Government pledges full review of Western Australia's struggling juvenile justice system, (ABC News Online, 5 October 2022) <https://www.abc.net.au/news/2022-10-05/wa-government-to-review-juvenile-justice-system/101500118>.

<sup>136</sup> Law Council of Australia and Law Society of Western Australia, Excessive use of force on children unconscionable' (Joint Media Release, 15 November 2022) <https://lawcouncil.au/media/media-releases/excessive-use-of-force-on-children-unconscionable>; Keane Bourke, 'As unlawful confinement of detainees at Banksia Hill is highlighted once again, it's time to end the vicious cycle' (ABC News online, 13 July 2023) <https://www.abc.net.au/news/2023-07-13/vicious-cycle-continues-at-banksia-hill-time-for-action-analysis/102591254>; Laura Beavis, 'Tasmania's Ashley youth prison closure must be brought forward, children's commissioner, advocates say' (ABC News Online, 24 August 2022) <https://www.abc.net.au/news/2022-08-24/call-to-close-ashley-prison-now-in-wake-of-coi-revelations/101362550>.

<sup>137</sup> Opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006).

<sup>138</sup> See, Loraine Finlay, 'Australia needs to deliver on our treaty promises' (online, 20 January 2023) <<https://humanrights.gov.au/about/news/opinions/australia-needs-deliver-our-treaty-promises>>

<sup>139</sup> See, Legal and Social Issues Committee, Parliament of Victoria, 'Inquiry into youth justice centres in Victoria Final Report' (Report, March 2018), <https://apo.org.au/sites/default/files/resource-files/2018-03/apo-nid135561.pdf>, 13.

<sup>140</sup> *Young people, Youth and Families Act 2005* (Vic), ss 487-488.

people in remand, and the potential for bail support and accommodation programs to reduce these numbers.

## Police practices

67. Police are a critical point of contact between young people and the youth justice system. Policing practices can impact a young person's experience with the youth justice system, including through the discretion to apply diversion strategies (such as the use of cautions), the application of public order policing to young people (such as anti-consorting provisions), and the over-policing of young people—in particular, First Nations young people.<sup>141</sup>
68. In this context, and as a snapshot example of the issues that arise, a member of the Law Council's Indigenous Legal Issues Committee has drawn attention to findings of a May 2022 Corruption and Crime Commission report of a review of the use of force involving police dogs by Western Australia Police. That Commission found that Aboriginal and Torres Strait Islander persons were the subject of 61 per cent of all police dog deployments by Western Australia Police in the 2020–2021 financial year.<sup>142</sup> It found that, while there was no evidence 'of canine handlers culturally targeting Aboriginal persons in the deployment of police dogs',<sup>143</sup> the high representation 'was concerning'.<sup>144</sup>
69. The Western Australia Police responded by indicating that it would review the high representation of Aboriginal and Torres Strait Islander persons involved in police dog deployments, noting:

*'it is likely tis [sic: this] may correlate with:*

- *The over representation of Aboriginal and Torres Strait Islander people in the criminal justice system; and*
- *The higher proportion of Aboriginal and Torres Strait Islanders in regional WA, where over fifty per cent of reviewed incidents occurred'.<sup>145</sup>*

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<sup>141</sup> Over-policing has been described internationally as generally resulting from the 'imposition of police control on individual or community activities at a level unlikely to occur in the dominant society': see Aboriginal Justice Implementation Commission, Report of the Aboriginal Justice Inquiry of Manitoba (November 1999), Chapter 16: Policing <http://www.ajic.mb.ca/volume1/chapter16.html>. A further discussion of the over-policing of Aboriginal and Torres Strait Islander people, particularly young people, can be found in Law Council of Australia, 'Aboriginal and Torres Strait Islander People' *Justice Project Report* (August 2018) <<https://lawcouncil.au/files/web-pdf/Justice%20Project/Final%20Report/Aboriginal%20and%20Torres%20Strait%20Islander%20People%20%28Part%201%29.pdf>> 65-70. See also, Save the children, 'Putting young people first: A rights respecting approach to youth justice in Australia' (Report, April 2023), <[https://www.savetheyoungpeople.org.au/getmedia/4befc9d7-c9de-4088-b591-547714fc8673/Putting-young-people-first-A-rights-respecting-approach-to-youth-justice-in-Australia\\_April-2023.pdf.aspx](https://www.savetheyoungpeople.org.au/getmedia/4befc9d7-c9de-4088-b591-547714fc8673/Putting-young-people-first-A-rights-respecting-approach-to-youth-justice-in-Australia_April-2023.pdf.aspx)>31; Grace O'Brien, Racial Profiling, Surveillance and Over-Policing: The Over-Incarceration of Young First Nations Males in Australia, 10 *Social Sciences*, 68; Commission for Children and young people Victoria, *Our youth, our way: Inquiry into the overrepresentation of Aboriginal young people in the youth justice system*, (Report, 2021).

<sup>142</sup> Western Australian Corruption and Crime Commission, 'A report on the deployment of police dogs' (11 May 2022) [205] <https://www.ccc.wa.gov.au/sites/default/files/2022-05/A%20report%20on%20the%20deployment%20of%20police%20dogs.pdf>.

<sup>143</sup> Ibid [197].

<sup>144</sup> Ibid [198].

<sup>145</sup> Ibid [213].



70. In March this year, the Commissioner indicated that '[m]any dog deployments are against young and/or Indigenous persons' and that the policies that underpin the deployment of dogs are 'not racist in intent but are racist in effect'.<sup>146</sup> He said that the Commission was looking forward to 'working with the Commissioner of Police to find a way of limiting the use of dogs while maintaining, of course, the protection of the community'.<sup>147</sup>
71. The Law Council is aware that high proportions of children and young people coming into contact with the justice system have experienced trauma. Reports regarding the disproportionate use of dogs by police forces with respect to Aboriginal children and young people are concerning, and the Law Council encourages continuing collaboration to minimise their use. More broadly, the Law Council refers to the ALRC recommendations to achieve improved police accountability across Australian jurisdictions as worthy of continuing consideration.<sup>148</sup>
72. Separately, in 2019, a UNSW report found disproportionate numbers of young people in NSW were being subjected to strip searching, with 45 per cent of strip searches being conducted on young people under 25 during 2017–2018.<sup>149</sup> Further data obtained under Freedom of Information in 2022 found that young people in NSW continue to be disproportionately subject to strip searching, with First Nations young people being further disproportionately impacted.<sup>150</sup> The NT Royal Commission made recommendations to amend the relevant legislation<sup>151</sup> to regulate the use of strip searches in the NT.<sup>152</sup> These recommendations have now been implemented.<sup>153</sup>
73. The Victorian Bar points out that strip searching should only ever be a last resort, after all less invasive methods have been exhausted and have provided a reason for a strip search to be necessary. The Victorian Bar suggests that the statutory discretion for an officer in prison to order a strip search (or 'unclothed search') in Victoria is too broad.<sup>154</sup> The circumstances where an unclothed search may be ordered should be better and more narrowly defined. The Victorian Bar suggests

<sup>146</sup> Keane Bourke, 'Corruption and Crime Commission slams WA Police use of dogs against young Aboriginal people (ABC News online, 15 March 2023) <https://www.abc.net.au/news/2023-03-15/ccc-condemns-wa-police-use-of-dogs-on-young-and-indigenous/102097636>.

<sup>147</sup> Mr John McKechnie, Corruption and Crime Commissioner, evidence to Parliament of Western Australia, Joint Standing Committee on the Corruption and Crime Commission, Transcript of Evidence, 15 March 2023 – Session One 2

[https://www.parliament.wa.gov.au/Parliament/commit.nsf/\(Evidence+Lookup+by+Com+ID\)/169BEF7B52AA201248258975002AC574/\\$file/ccc230315.1.f.pdf](https://www.parliament.wa.gov.au/Parliament/commit.nsf/(Evidence+Lookup+by+Com+ID)/169BEF7B52AA201248258975002AC574/$file/ccc230315.1.f.pdf).

<sup>148</sup> Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, (28 March 2018) <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/4-justice-reinvestment/what-is-justice-reinvestment/> Recommendations 14-1 to 14-4.

<sup>149</sup> Dr Michael Grewcock and Dr Vicki Sentas, 'Rethinking Strip Searches by NSW Police', UNSW (Report, August 2019), <<https://rlc.org.au/sites/default/files/attachments/Rethinking-strip-searches-by-NSW-Police-web.pdf>> 27.

<sup>150</sup> Nakari Thorpe, 'More than 4,500 strip searches were carried out in NSW during the pandemic' *Australian Broadcasting Corporation*, (online) 23 August 2022, <<https://www.abc.net.au/news/2022-08-23/4500-strip-searches-pandemic-nsw/101359456>>

<sup>151</sup> *Youth Justice Act 2005* (NT); *Youth Justice Regulations 2006* (NT).

<sup>152</sup> Royal Commission and Board of Inquiry Into the Protection and Detention of Children in the Northern Territory, *Findings and Recommendations, Royal Commission into the Protection and Detention of Children in the Northern Territory* (Report, 2017), <https://www.royalcommission.gov.au/system/files/2020-09/findings-and-recommendations.pdf>, recommendation 13.7.

<sup>153</sup> See, *Youth Justice Legislation Amendment Act 2018* (NT).

<sup>154</sup> *Young people, Youth and Families Act 2005* (Vic), s 488AC.

that, for situations where a strip search is absolutely necessary, stronger oversight provisions should be put in place.<sup>155</sup>

### **Additional legislative reforms**

74. The Victorian Bar has additionally raised concerns about the need for legislative reform in other areas of the Victorian youth justice system. While these are specific to Victoria, the Law Council suggests that they may be of value in considering broader youth justice systems across Australia:

#### Use of 'independent persons' in police interviews

75. The Victorian Bar expresses concerns about section 464E of the *Crimes Act 1958* (Vic), which requires that police must not conduct questioning or an investigation of a person in custody under 18 (with certain exceptions), unless the person's parent or guardian is present or, if the parent or guardian is not available, 'an independent person is present'.
76. The Victorian Bar expresses concerns over the use of independent persons in circumstances where a parent, guardian, legal practitioner, or advocate is not available—namely:
- an independent person is not an advocate for the child's interests, rather, their presence is intended to prevent mistreatment or undue pressure in a police interview;
  - young people do not necessarily appreciate the role of an independent person and may wrongly believe that the person is an advocate for their interests. That may contribute to the child engaging with police in a way that is detrimental to them and undermines the presumption of innocence and the procedural protections that a child would be encouraged to invoke with legal representation or the presence of a parent or guardian; and
  - provision for independent persons as an alternative too readily relieves police of the statutory obligation<sup>156</sup> to ensure that a person tasked with defending the child's interests—their parent, guardian or lawyer—is present before a child is interviewed.<sup>157</sup>
77. The Victorian Bar considers that efforts to secure the attendance of a child's parent, guardian or legal practitioner must be prioritised and mandated by legislation. The role of an independent person to monitor the police interview should be treated as additional to, and not a substitute for, the presence of a person who is an advocate for the child's interests.

#### Lack of credit for emergency management days

78. The Victorian Bar also points out that, in Victoria, there is no recognition of 'emergency management' days for detained young people under the *Children, Youth and Families Act 2005* (Vic). This contrasts with the situation of adults, who may be granted 'emergency management' days under the *Corrections Act 1986* (Vic). 'Emergency management days' is the term given to the reduction in the length of an

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<sup>155</sup> For example the relevant provisions in the *Children and Young People Act 2008* (ACT), ss 254-255.

<sup>156</sup> *Crimes Act 1958* (Vic), s 464E.

<sup>157</sup> See for example, a broader discussion of the importance of access to a lawyer for persons deprived of their liberty under international law here: Association for the Prevention of Torture, 'Legal Safeguards to Prevent Torture The Right of Access to Lawyers for Persons Deprived of Liberty' (Legal Briefing Series, March 2010) <[https://www.ap.t.ch/sites/default/files/publications/LegalBriefing2\\_Lawyers.pdf](https://www.ap.t.ch/sites/default/files/publications/LegalBriefing2_Lawyers.pdf)>.

adult prisoner's sentence or non-parole period for good behaviour while suffering a disruption or deprivation during an industrial dispute or emergency at the prison or in other circumstances of an unforeseen and special nature.<sup>158</sup>

79. The Victorian Bar considers that, while the priority should be on ending administrative lockdowns altogether, provision should be made for emergency management days for detained young people in circumstances where lockdowns or other disruptions occur within a youth justice centre.

### **Changes required following engagement with the justice system**

80. Developing comprehensive exit strategies and providing critical support for young people leaving juvenile detention can reduce the risk of homelessness, recidivism, and further involvement with the justice system.<sup>159</sup>
81. The Justice Project report identified that a key priority should be investment in better exit strategies, including wraparound supports, transition services, throughcare and appropriate, safe and affordable accommodation, to prevent youth homelessness and avoid contact with the criminal justice system for young people exiting government institutions, including the child protection systems and youth detention.<sup>160</sup>
82. In its Justice Project, the Law Council observed that tailored alternative dispute resolution programs that incorporate the cultural concerns and conceptions of family of Aboriginal and Torres Strait Islander people, can be an effective means of enhancing access to justice.<sup>161</sup> Implementing restorative justice practices such as conferencing, forum and circle sentencing, and mediation may positively reduce reoffending rates and promote victim satisfaction, subject to their engagement with Aboriginal and Torres Strait Islander communities and promotion of self-determination.<sup>162</sup>
83. In NSW, a report by the NSW Bureau of Crime Statistics and Research, which examined the relationship between circle sentencing and the likelihood of incarceration and recidivism, found that when compared to offenders subject to traditional sentencing, after controlling for defendant-case characteristics and time-fixed effects, offenders participating in circle sentencing:
- experienced a relative decrease of 51.7 per cent in incarceration rates;
  - experienced a relative decrease of 9.6 per cent in reoffending rates; and
  - if they reoffended, took an additional 55 days to reoffend.<sup>163</sup>

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<sup>158</sup> See, *Corrections Act 1986* (Vic), s 58E.

<sup>159</sup> See, Australian Government (2017) *Royal Commission into the Protection and Detention of Young people in the Northern Territory: Final Report: Volume 2B*, (Report), 194

<sup>160</sup> Law Council of Australia, 'Children and young people' Justice Project Report (August 2018) <<https://lawcouncil.au/files/web-pdf/Justice%20Project/Final%20Report/Young%20people%20and%20Young%20People%20%28Part%201%29.pdf>> 89.

<sup>161</sup> Law Council of Australia, 'Dispute Resolution Mechanisms' Justice Project Report (August 2018) <https://lawcouncil.au/files/web-pdf/Justice%20Project/Final%20Report/Dispute%20Resolution%20Mechanisms%20%28Part%202%29.pdf> 20.

<sup>162</sup> *Ibid* 26-27.

<sup>163</sup> Yeong, S. and Moore, E., (2020). Circle Sentencing, incarceration and recidivism (Crime and Justice Bulletin No. 226). Sydney: NSW Bureau of Crime Statistics and Research <https://www.bocsar.nsw.gov.au/Publications/CJB/2020-Report-Circle-Sentencing-incarceration-and-recidivism-CJB226.pdf> 1. The report notes at page 1 that: 'We are, unfortunately, unable to address the possibility that selection bias is driving our (associative, non-causal) estimates. As such, our estimates must be interpreted with caution'. See also, the caveats noted at page 14 of that report.

84. More generally, such practices include:
- Youth Justice Group Conferencing programs, which exist in various Australian jurisdictions, promoting restorative justice practices; and<sup>164</sup>
  - Multisystemic therapy—an intensive, home-based, family intervention for addressing significant emotional and behavioural problems in older young people and young adolescents.<sup>165</sup>

## Benefits to taking a national approach to youth justice<sup>166</sup>

85. As demonstrated throughout this submission, the Commonwealth and states and territories each have responsibilities relevant to the engagement of young people with the youth justice system and their experience within it. These extend from implementing international obligations to realise the rights of children into domestic law and policy, to legislative responsibilities for the operation of aspects of the criminal justice system, or services that underpin successful justice outcomes for children and young people, including health services, housing and homelessness, and education.
86. A consolidated national approach to the youth justice system would better ensure cross-jurisdictional collaboration across all aspects of that system. This includes addressing the underlying causes of youth offending, early intervention programs, the experience of young people within the criminal justice system, alternatives to detention, conditions in detention and post-detention support.
87. State and territory laws and processes are variable and cyclical, and it is hard to identify any consistent approach across Australian jurisdictions. This reinforces the need for national leadership. A national approach will better ensure the development of consistent standards, policies, and practices across jurisdictions, reducing disparities and promoting equitable treatment of young people in the justice system, and coherence and consistency in the development of laws and policies
88. The Law Council's Young Lawyers Committee suggests that adopting an overarching principles-based approach to national reform allows for consistent standards while recognising each jurisdiction's unique needs and contexts. Careful consideration should be given to whether existing national frameworks and agreements—including under the Closing the Gap targets, and *Safe and Supported National Framework for Protecting Australia's Children 2021–2031*—are sufficient in this regard. In the Law Council's view, more needs to be done: setting out commitments and corresponding jurisdictional actions that are multi-portfolio, specific, cohesive and achievable, along with rigorous independent evaluation.

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<sup>164</sup> Australian Association for Restorative Justice, 'Youth Justice' (Webpage), <<https://www.aarj.org.au/restorative-justice/youth-justice/>>.

<sup>165</sup> Mark Porter and Leartluk Nuntavisit, 'An Evaluation of Multisystemic Therapy with Australian Families' (2016) 37(4) Australian and New Zealand Journal of Family Therapy, 443-462. <https://onlinelibrary.wiley.com/doi/10.1002/anzf.1182>

<sup>166</sup> Question 4 asks: *From your perspective, are there benefits in taking a national approach to youth justice and child wellbeing reform in Australia? If so, what are the next steps?*.

89. While some relevant data is currently collated by the Australian Institute of Criminology,<sup>167</sup> the Australian Institute of Health and Welfare,<sup>168</sup> and the Productivity Commission (as part of the Closing the Gap Agreement),<sup>169</sup> the Law Council emphasises the value of having a cross-jurisdictional approach to measuring the outcomes of different approaches based on data collated.<sup>170</sup> It is also essential, in the Law Council's view, to have access to a more visible, national and up-to-date clearinghouse of rigorous and independent information (research and evaluation) about 'what works' in this area. Corresponding funding should be provided to ensure that projects are independently and rigorously evaluated. Too often, such evaluation has been left to the not-for-profit sector to manage, along with the project itself, on a shoestring.

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<sup>167</sup> Australian Institute of Criminology, 'Juvenile offenders' (Webpage), <<https://www.aic.gov.au/subject/juvenile-offenders>>.

<sup>168</sup> Australian Institute of Health and Welfare, 'Youth Justice' (Webpage), <<https://www.aihw.gov.au/reports-data/health-welfare-services/youth-justice/overview>>.

<sup>169</sup> Productivity Commission, 'Annual Data Compilation Report' (Report, July 2023), <<https://www.pc.gov.au/closing-the-gap-data/annual-data-report>>.

<sup>170</sup> The Law Council discussed the limitations in the available data about missing First Nations women and children and in relation to First Nations people more broadly in Submission to the Senate Legal and Constitutional Affairs Committee, *Inquiry into missing and murdered First Nations women and children*, (11 January 2023), <https://lawcouncil.au/publicassets/b3b314b3-e196-ed11-9479-005056be13b5/23%2001%2011%20-%20S%20-%20Missing%20and%20murdered%20First%20Nations%20women.pdf> [15]-[23].