

Putting children first: A rights respecting approach to youth justice in Australia

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Save the Children

54 reasons

dandolopartners

Introduction

This report explores why there is an urgent need to recast the foundations of the youth justice system to align with a child rights approach, and how this will improve outcomes for children, young people and the system as a whole.

Introduction to this report

At its best, the youth justice system has the potential to turn around lives, be responsive to the needs of children and young people, provide the supports they need to thrive, and thereby keep communities safer.

In recent years, numerous reports and inquiries across Australia and internationally have detailed the negative impacts that contact with the justice system can have on children and young people. This is particularly the case for Aboriginal and Torres Strait Islander children and young people, who are over-represented across all youth justice systems in Australia and are detained in youth detention facilities at unacceptably high rates.

Despite some recent gains and efforts in certain jurisdictions to better utilise prevention and early intervention across the system and support culturally safe practices, youth justice systems in Australia persistently violate child rights. Our youth justice systems are also often not fit-for-purpose to support the needs of children and young people and divert them out of the system for good.

Punitive and incarceration-focused policies and practices directly undermine the key outcomes that governments are seeking to achieve through these policies, including to reduce recidivism and improve community safety.

This report comes at a time when there has been significant youth justice reform across a number of states and territories in Australia, and a strengthened political imperative at the national level to raise the age of criminal responsibility and ameliorate the ongoing legacy of racial injustice. Right now, more than ever, there is also a heightened public consciousness that demands a new and better approach to youth justice.

The report aims to highlight why child rights are important, how these rights are relevant across youth justice systems, where child rights are being undermined in youth justice today and where the greatest opportunities are for reform.

We at Save the Children and 54 reasons hope this report will:

- Provide a roadmap for a paradigm shift in youth justice to a system that respects child rights and is more effective in achieving its goals, including reducing offending and re-offending
- Support productive conversations about what is possible and necessary to move towards a child rights approach, across states and territories and nationally, and why it's important
- Highlight specific opportunities and priorities for reform, across states and territories and nationally.

About the authors

Save the Children and 54 reasons have developed this report with the support of research and analysis done by dandolopartners (dandolo), a public policy consulting firm, and James McDougall, an expert in children's rights.



Save the Children is a leading global non-government organisation focused on children's rights, and active in Australia for over 100 years. 54 reasons delivers Save the Children's services in Australia, working alongside children, their families and communities in accordance with the 54 articles in the United Nations Convention on the Rights of the Child. We are Australia's leading child rights organisation.

dandolopartners

dandolo is a specialist public policy and strategy firm that works for clients in and around government. Since 2002 we have been delivering high quality policy, strategy and evaluation advice to clients in State and Federal Government, not for profits and the private sector. We work across a wide range of sectors including education, industry policy, health, justice, human services, research and innovation.

James McDougall

James McDougall is one of Australia's most experienced child rights experts having worked in youth justice, child protection, children's and youth services, family violence and child safety. His broad experience enables him to share knowledge and expertise in systems, services and programs mapping, planning and governance for children and young people.

The information included in this paper has been informed by desktop research only. Every effort has been made to ensure that the information included in this paper is as up to date and accurate as possible, however, we acknowledge that Australia's youth justice systems are subject to incremental and ongoing reforms, which sometimes are not publicly available or widely known outside of government. As such, we encourage this paper to be read as a point-in-time document aimed at highlighting specific opportunities and priorities for reform across states and territories, and nationally, to move towards a child rights approach.

For further information about this report, please contact Howard Choo, Australian Policy and Advocacy Lead, Save the Children, at howard.choo@savethechildren.org.au.

Acknowledgements



We respectfully acknowledge and celebrate the many Traditional Owners of the lands throughout Australia and pay our respects to ancestors of this country and Elders past and present.

We recognise that Aboriginal and Torres Strait Islander communities, culture and lore have existed within Australia continuously for 65,000 years.








The Uluru Statement from the Heart says:

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

We acknowledge the ongoing leadership of Aboriginal and Torres Strait Islander communities across Australia and those who have and continue to work tirelessly to address inequalities and improve Aboriginal and Torres Strait Islander justice outcomes for children and young people.

Structure of this report

This report examines why child rights are important, how they are relevant across the youth justice system, where changes need to be made to the system to better align with child rights and where the greatest opportunities for reform are.

Chapter	1	2	3	4	5	6	7
							
	Executive summary	What is a child rights approach to youth justice and why is it important	What causes children and young people to come into contact with the youth justice system	What is the current state of the youth justice systems across Australia and how has this changed in recent years	Why do we need to change the current approach to youth justice in Australia?	Opportunities to move towards a child rights approach	How to take this forward
Overview	This section provides an overview of the key messages and findings of this report, including what a child rights approach to youth justice is.	This section outlines what child rights are, how they are relevant to youth justice and why they are important.	This section provides an overview of the factors and service deficiencies that cause contact with the youth justice system.	This section provides an overview of the objectives and current policy and operating contexts of youth justice systems across Australia.	This section outlines where policy, legislative and operational practices across youth justice systems currently undermine child rights.	This section outlines where key changes can be made across youth justice systems in Australia to better align with a child rights approach.	This section outlines why youth justice systems across Australia are ready for change and the case for national reform in priority areas.
Pages	pp. 5-9	pp. 10-16	pp. 17-22	pp. 23-28	pp. 29-48	pp. 49-61	pp. 62-69

This report also includes five appendices, including definitions of key terms used in this report, a more detailed overview of child rights in domestic and international law, a summary of relevant youth justice data, a summary assessment of how youth justice systems across Australia currently align with a child rights approach, and an overview of key recommendations from recent reviews and inquiries into youth justice.

Executive summary

Why should we move towards a child rights approach to youth justice?

The current approach to youth justice isn't working. Current policy and practice is not always consistent with child rights. Moving towards a child rights approach will improve outcomes for children and young people, improve community safety and reduce cost pressures on the system as a whole.



The current approach to youth justice isn't working

Youth justice systems across Australia aim to:

- Reduce offending by children and young people
- Improve community safety
- Provide opportunities for children and young people to turn their lives around.

Youth justice systems should respond to children and young people differently to adults. This is because of evidence based differences in:

- The causes and trajectories of youth offending
- Adolescent brain development
- The fact that children and young people have great potential to rehabilitate and inherent strengths that can be built on to support them to live positive lives.

In recent years, youth justice systems across Australia went through a period of significant change. Despite some efforts to better use prevention and early intervention across the system and support culturally safe practices, these changes across most jurisdictions have favoured punitive, 'tough on crime' responses.

This has resulted in youth justice policies and practices that fail to adhere to child rights and directly undermine many of the key outcomes that governments are seeking to achieve through these policy changes.



Child rights are important across the entire youth justice system, however, access to rights is limited in practice

There are four key principles underpinning a child rights approach, which include:

- The best interests of the child
- Non-discrimination
- The right to life, survival and development
- The right to participate, be heard and taken seriously.

Child rights are relevant across all aspects of youth justice – from preventing contact with youth justice in the first place, to initial police contact, remand and bail, court processes and procedures, sentencing, detention and post-detention.

It is important to think about child rights in the context of youth justice not just from one part of the system, but across the system as a whole and through its intersections with other systems.

While all jurisdictions recognise that children and young people have rights, and to varying degrees have enshrined some of these principles in policy and legislation, in practice children and young people's access to their rights can be limited. This occurs for a range of reasons, including a lack of focus on rehabilitative practices, tough on crime agendas and institutional and systemic racism.



Moving towards a child rights approach will improve outcomes across the system

A child rights approach in youth justice:

- Recognises the vulnerabilities of children and young people that have contact with the youth justice system
- Fosters public confidence in the system
- Ensures better outcomes for children and young people and aligns with the evidence base for reducing offending behaviour.

A child rights approach is the most effective and fiscally responsible way of reducing crime.

It also supports government priorities and improves youth justice outcomes by:

- Preventing children and young people from coming into contact with youth justice
- Helping children and young people avoid further progression into the youth justice system
- Making sure children and young people do not remain in the youth justice system if they engage in offending behaviour
- Ensuring children and young people receive support to address the underlying causes of their offending behaviour.

A child rights approach can enable a paradigm shift in how youth justice systems operate and their ability to achieve their goals. Rather than punishing children and young people for the effects of underlying causes, it focuses system effort on providing effective support to change trajectories.

What does a child rights approach to youth justice look like?

There are a number of changes that should be made across the youth justice system to recast its foundations and move towards a child rights approach. These changes will ensure youth justice policies and practices align with our human rights obligations, improve outcomes and provide long-term policy solutions to the challenges associated with youth justice.

Why a child rights approach is important

All children and young people should have their rights respected and be supported to develop in a healthy way. Our current youth justice systems are punishing children and young people rather than supporting them when they face challenges. We need to shift to a rights-respecting approach that is grounded in therapeutic responses to children and young people's circumstances and behaviour, so that as a society we are giving children and young people the help they need to stay on the right path and to more effectively prevent offending and re-offending.

Where child rights come from

The United Nations Convention on the Rights of the Child (CRC) enshrines global minimum standards in relation to children's rights. Australia is legally obliged to meet and enforce these standards, including through its youth justice systems.

Greater respect for children and young people's right to be heard and taken seriously

The voices and insights of children and young people are heard and taken seriously in decisions that affect them.

Effective early intervention and prevention across the system

The right support is provided at the right time for children and young people to meet their needs and change trajectories, informed by accessible data, information and evidence.

Trauma-informed care

Instead of punitive responses, policies and programs and supports are trauma-informed and address the unmet needs of children and young people and families to achieve cultural, social and emotional wellbeing.

A skilled and adequately funded workforce

Staff across the justice system are equipped with skills, knowledge and systems to provide care that supports the needs of children and young people.

Children and young people are supported to transition back into the community

Wrap-around supports and planning are provided when children and young people leave custody to support their reintegration back into the community.

More effective and transparent oversight of youth justice

More effective accountability mechanisms uphold the rights of children and young people and proactively address discrimination.



Addressing over-representation of Aboriginal and Torres Strait Islander children and young people

Support for Aboriginal and Torres Strait Islander people is culturally safe and community controlled and provided, in line with the right to self-determination.



Diversion used at an early stage

Diversion for children and young people is used at the earliest stage possible to help identify and respond to the causal factors of offending and reduce recidivism.



Detention used as a last resort

Detention of children and young people is used as a measure of true last resort only where efforts to divert a child has failed. Children and young people are never detained in the same settings as adults.



Increasing the minimum age of criminal responsibility

The minimum age of criminal responsibility is raised to at least 14 in all Australian jurisdictions with no carve outs or exceptions.



Rehabilitative detention practices

Detention and community order practices are therapeutic, non-punitive and trauma-informed. Isolation is never used. Restraint and force are used only in strictly limited circumstances and not as a means of punishment.



What are the opportunities across jurisdictions to better align with child rights?

There are several reform areas that states and territories should prioritise to align with a child rights approach to youth justice. In some jurisdictions, there is already momentum building towards some of these reforms.



Raising the age of criminal responsibility with effective alternatives

Raising the age of criminal responsibility to at least 14 across all jurisdictions, with investment in effective alternatives to criminalisation.

See more at pp. 41, 42 and 54



Increasing access and availability of diversion programs

Providing access to early diversion programs that are well funded and supported by evidence.

See more at pp. 35, 36 and 53



Investing in and evaluating early intervention programs

Further investing in and evaluating early intervention programs that intersect and align with other government priorities.

See more at p. 52



Undertaking reviews of restrictive bail and remand laws and further investment in bail supports

Undertaking a review of bail laws and further investing in bail support programs to ensure more children and young people have access to bail and understand the impact of restrictive bail practices on child rights and outcomes.

See more at pp. 33 and 34



Improving detention practices

Improving detention practices to reflect international standards and the evidence base about effective, rights-respecting practices.

See more at pp. 43, 44 and 57



Implementing workforce reform

Youth justice workforce planning to ensure that all parts of the youth justice system are delivering therapeutic, culturally responsive programs that support children and young people to turn their lives around.

See more at pp. 45, 46 and 61

These opportunities can be pursued through national standards (See p. 9 for more information)

What opportunities are there for national reform?

In addition to reforms that jurisdictions can prioritise at the state and territory level, there are also opportunities for reform through a national approach or at the national level.

National reform opportunities



National youth justice standards

There is an opportunity to develop national standards to reflect research and international best practice through a community co-design process. The jurisdiction level priorities (p. 8) could be pursued through national standards.



National approach to minimum age of criminal responsibility

Increasing the age of criminal responsibility to at least 14 must be a key priority for Australian governments, given the significant impact it has on justice, social outcomes and children's rights.



Oversight of youth detention facilities

Given the egregious child rights breaches occurring in detention facilities, there is opportunity to implement the Optional Protocol to the Convention Against Torture (OPCAT) and improve oversight of youth detention facilities.



Legislated human rights protections

Legislated human rights protections would help Australia build a culture of respect for the human rights of people in all contexts and support key commitments and priorities including in relation to closing the gap and racial injustice.

See more at pp. 68 and 69

Australian Government reform opportunities



Ratify 3rd optional protocol to the CRC

The Australian Government should ratify the 3rd optional protocol to the CRC which allows children and young people to bring complaints directly to the United Nations Committee on the Rights of the Child. This would strengthen child rights in Australia.

See more at p. 69



Withdraw Australia's reservation to Article 37(c) of the CRC

Australia continues to have a reservation to article 37(c) of the CRC, which requires that children and young people not be detained with adults. The UN Committee on the Rights of the Child has noted that article 37(c) already allows for exceptions for when it is in the best interests of the child, and so a reservation is not necessary.

See more at p. 69

Chapter 1

What is a child rights approach to youth justice and why is this important?

Chapter at a glance

This chapter provides an overview of what child rights are, why they are important, how they are relevant to policy making and how they interact with youth justice.



Children and young people, like all people, have human rights that must be recognised and promoted. Children and young people also have specific rights that are enshrined in law at both the international and domestic level.



Child rights should always be respected and promoted, but this is particularly important in youth justice. This is because children and young people who come into contact with the youth justice system are a population with a range of intersecting and complex needs whose rights are particularly likely to be breached. Respecting child rights is also important to foster public confidence in the system, safeguard the improper use of the powers and resources the state has to investigate, prosecute and detain children and young people, reduce costs to society associated with contact with the youth justice system, ensure better outcomes for children and young people and align with the evidence base for reducing offending behaviour.



Child rights are relevant across all aspects of youth justice – from preventing any formal contact with youth justice to initial police contact, remand and bail, court processes and procedures, sentencing, detention and post-detention. It's therefore important to think about child rights in the context of youth justice not just from one part of the system, but across the system as a whole.



While all jurisdictions recognise that children and young people have rights, and to varying degrees have enshrined some of these principles in policy and legislation, in practice children and young people's access to their rights can be limited. This occurs for a range of reasons, including a lack of focus on rehabilitative practices, tough on crime agendas and institutional and systemic racism. A lack of focus on prevention is also an underlying factor.

Chapter structure

1

What are child rights and why do they matter in youth justice?

2

Where do child rights come from?

3

How child rights apply to policy making

4

How child rights interact with youth justice

5

Common reasons why child rights are limited across the youth justice system

What are child rights and why do they matter in youth justice?

Children and young people, like all people, have human rights that must be respected, protected and fulfilled. This includes rights that are specific to children and young people themselves. Respecting child rights is not just important to align with international human rights standards, but also produce better outcomes in the youth justice system, including reducing crime and costs.

Key child rights

There are four key principles underpinning a child rights approach as articulated in the United Nations Convention on the Rights of the Child.¹ These are centred around:

1

The best interests of the child

In all actions concerning children and young people, the best interests of the child should be a primary consideration.

2

Non-discrimination

Every child, without exception, should enjoy their rights without any distinction based on the child's parents or legal guardian, race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, poverty, disability, birth or other status.

3

The right to life, survival and development

A child not only has the right not to be killed, but also to have their economic and social rights, and overall wellbeing and development, guaranteed to the maximum extent possible.

4

The right to participate, be heard and taken seriously

Every child has the right to express their views on decisions affecting them, and those views and opinions should be respected, supported and taken seriously.

Further information about the sources of child rights and their application to the youth justice system is available on p. 13 and at Appendix 2.

Why is a child rights approach important in a youth justice context?



It recognises the specific needs of children and young people

Children and young people who have contact with youth justice are a vulnerable population, often with complex and intersecting needs. Special protections, over and above the rights of the general population, are important.



It is more effective in reducing crime

A child rights approach aligns with international best practice principles and what the evidence base says works for reducing crime and offending behaviour.



It provides a long term solution to offending behaviour

A child rights approach provides a long term solution to youth offending by addressing the root causes of crime, unlike building new prisons.



It is more cost effective than taking a punitive approach

There is substantial evidence that illustrates that investing in early intervention programs is much cheaper than spending money on custodial measures.



It is an effective way to increase public confidence in the system

When the state prosecutes, punishes and detains children and young people, it uses considerable powers and resources. Child rights are fundamental tenets of our democratic society and help to protect unjustified incursions, ensure that the law is applied to each child and young person equally and foster public trust and confidence.

Where do child rights come from?

There is explicit recognition internationally and in Commonwealth, state and territory legislation that children should be afforded protections and are the holders of their own human rights.

International law and treaties

Australia has ratified a number of multilateral treaties that deal with the rights of children.

Treaties

- The United Nations Convention on the Rights of the Child (CRC)
- The United Nations Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)
- The United Nations Convention on the Rights of Persons with Disabilities (CRPD)
- The United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

International Declarations, Guidelines, Principles and Rules

- The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)
- The Standard Minimum Rules for Administration of Juvenile Justice (Beijing Rules)
- The Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines)
- Rules for the Protection of Juveniles Deprived of Their Liberty (Havana Rules)
- Standard Minimum Rules for Non-Custodial Measures (Toyko Rules)

Commonwealth legislation and standards

Every treaty to which Australia is a party is binding upon it, and must be performed by it in good faith. Australia is bound to comply with their provisions and implement them domestically.

Ratification by the Executive Government does not mean that child rights are automatically enforceable. Treaty obligations must be incorporated by Parliament into legislation to operate as a direct source of domestic rights and obligations.

No federal legislation directly incorporates the youth justice obligations in the Convention on the Rights of the Child, although elements are included in:

- The Australasian Juvenile Justice Administrators Standards
- *Criminal Code Act 1995* (Cth)
- *Crimes Act 1914* (Cth)

State and Territory legislation, policies and practices

Youth justice has been treated as the responsibility of state and territory governments in Australia. Each has developed its own legislation, policies and practices.

State and territory governments are responsible for the administration and monitoring of their own youth justice systems.

In Victoria, Queensland and the Australian Capital Territory, there is also human rights legislation, which enshrines into law some key human rights established at an international level, including several rights specific to children and young people.¹

How child rights apply to policy making

Children and young people should be a focus in all government policies and actions that affect them. A child rights-based approach can guide governments' and policy-makers' efforts to ensure policy is child-centred and outcomes-focused, addresses root causes and structural and systemic issues, and is implemented successfully.

How children's rights apply to policy

Children's rights provide a framework for policy makers to ensure coordinated effort in addressing root causes and enabling system change.

They focus government and policy-makers' efforts to:



Ensure policy is child-centred and outcomes-focused

A child rights approach provides a comprehensive framework and guidance for supporting children and young people's development and access to opportunity and outcomes. It ensures that policy is genuinely child-centred and therefore truly holistic and focused in its response to children, as well as meaningful in its engagement with children and young people's voices, perspectives and experiences. Among other things, a child rights approach enables children's meaningful participation in decisions affecting them, leading to better policy, implementation, and systems.



Address root causes and structural and systemic issues

A child rights approach illuminates and addresses underlying causes, and structural and systemic issues, providing the impetus for a genuine shift to prevention and early intervention that is widely recognised as the best, and most cost-efficient, way to achieve better outcomes, but rarely realised.



Ensure successful implementation

A child right approach enables the adoption of a comprehensive and practical approach to implementation and action, recognising that too often there is a gap between the stated aspirations of government plans for children and young people and the reality of how they are implemented.

Child rights principles that should underpin policy decisions

All policy should be grounded in a small number of overarching principles to reflect a child rights framework.¹

These principles are grounded in the general principles of the Convention on the Rights of the Child, including freedom from discrimination, the best interests principle, the right to survival and development and the right to participate and be heard, along with other important principles of child rights and their application in Australia.² They are also shaped by other key human rights instruments, including the UN Declaration on the Rights of Indigenous Peoples.



Decisions and actions affecting children are truly child-centred and in the child's best interest



Governments uphold their responsibilities for ensuring children's rights



Children and young people are recognised as inherently equally worthy to adults and as agents in their own lives, including having a voice and being heard and taken seriously



A public health model guides the promotion of children's wellbeing and safety



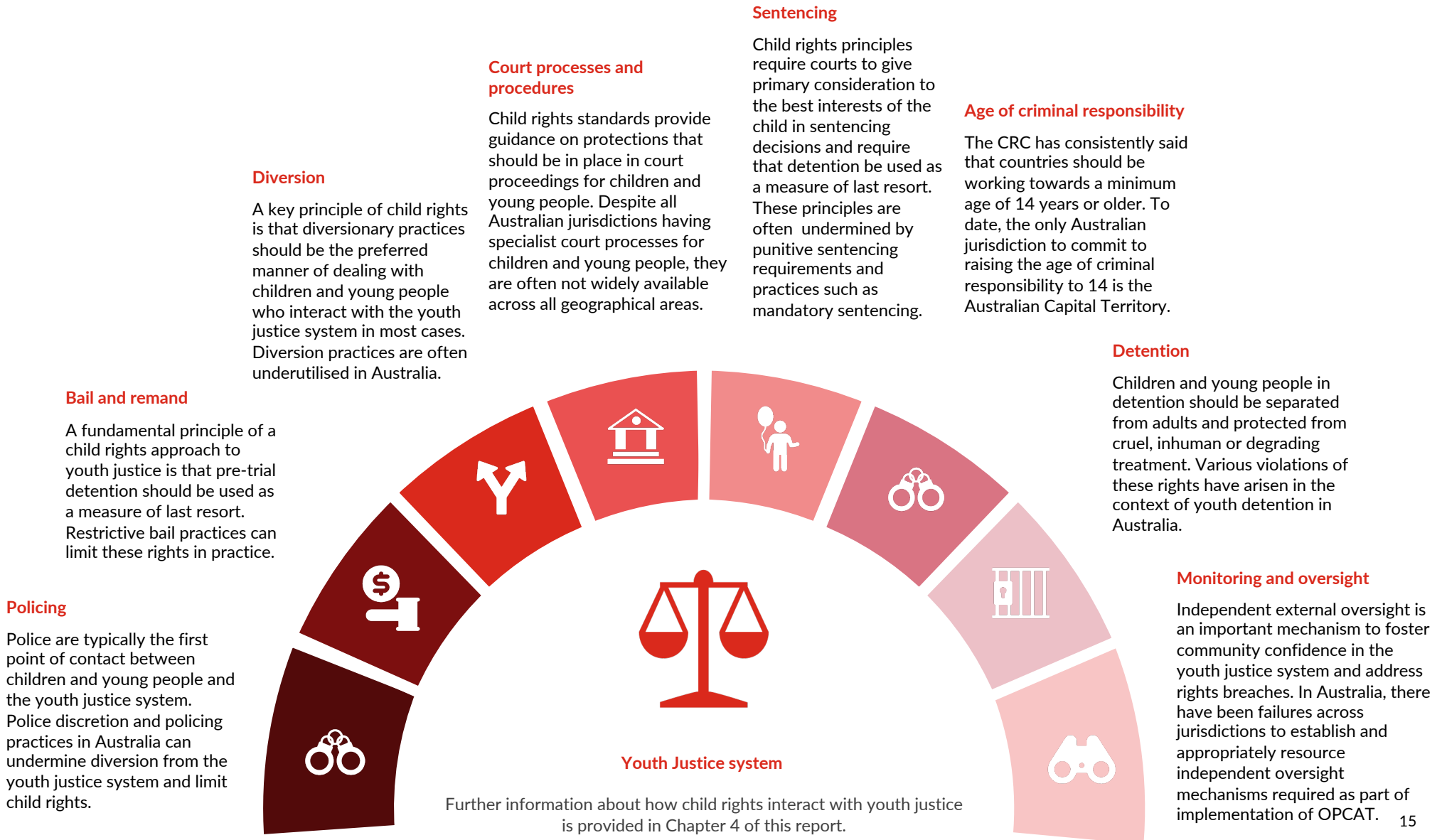
All children and young people are guaranteed access to the same rights without discrimination on any basis



The right to self-determination of Aboriginal and Torres Strait Islander peoples is fully supported

How child rights interact with youth justice

Child rights are relevant across all parts of the system – from initial police contact, to bail, court processes and procedures, sentencing and detention.



Common reasons why child rights are limited across the youth justice system

Across all Australian jurisdictions, a lack of focus on rehabilitation and therapeutic approaches, public sentiment and media reporting, and institutional racism are common contributing factors as to why child rights are often limited across the youth justice system.



Lack of focus on rehabilitation and therapeutic approaches in practice

While there have been some recent developments in youth justice that demonstrate a greater emphasis on evidence-based policies and age-appropriate responses, there are some parts of the youth justice system that currently fail to account for the behaviour of children and young people in the context of their past trauma and with a focus on rehabilitation. For example:

- Community diversion programs are not sufficiently embedded and utilised across the system
- Large parts of the workforce are not properly trained in rehabilitative practice
- Insufficient resources are provided to support communities to re-integrate young offenders
- Adult systems operate to dominate or distract from the programs required that recognise and address adolescent development issues and challenges.



Public sentiment and media reporting can influence policy making

Government action can often arise when there is disproportionate media treatment of particular, usually atypical, offending. This can result in governments acting in haste and producing policy that fails to consider issues from a long-term, evidence-based perspective. Media reporting often reinforces perceptions of increased volume and severity of youth offending and can be out of step with what data is telling us and what is actually happening in practice.

These reforms often have perverse impacts and the evidence rarely supports the efficacy of the measures introduced.

For example, restrictive bail reforms that have significantly limited the circumstances in which children and young people are able to access bail have led to increased remand populations and are not an effective mechanism in reducing offending in the long term.



Institutional racism

Institutional racism often arises due to an organisational failure to understand the impact of, or appropriately ensure compliance with, policies and procedures affecting particular people.

While there are some dedicated people in the youth justice system reckoning with government's colonial foundations and implementing an agenda of self-determination, there is still a long way to go. The history of trauma and over policing in Aboriginal and Torres Strait Islander communities in Australia has:

- Led to the increased likelihood of justice system contact for Aboriginal and Torres Strait Islander people
- Worsened relationships between police and communities
- Resulted in children and young people being more likely to come from families who have had contact with the justice and other statutory systems.

Chapter 2

What causes children and young people to come into contact with the youth justice system?

Chapter at a glance

This chapter provides an overview of what causes children and young people to come into contact with the youth justice system, the challenges they face, the service system deficiencies that contribute to their contact and the cohorts that are disproportionately represented across the system.



There are a range of intersecting historical, environmental, system and institutional factors that can result in a child or young person coming into contact with the youth justice system.



Children and young people who have come into contact with the youth justice system experience complex and intersecting challenges and barriers, including those related to their environment, health and development, employment and education. This complexity is increasing.



A significant proportion of children and young people who come into contact with the justice system also receive numerous other services and interventions, for example child protection, family, mental health, disability and homelessness services, before or during their involvement with youth justice. These children and young people typically also experienced challenges in education and health settings as well as in their families.



Historic, environmental, systemic and institutional factors lead to certain cohorts being disproportionately represented in the youth justice system, including Aboriginal and Torres Strait Islander and culturally and linguistically diverse children and young people, children and young people from regional, remote and low socioeconomic areas, and those who experience developmental challenges.

Chapter structure

1

What contributes to children and young people coming into contact with youth justice?

2

Challenges faced by children and young people who have contact with the youth justice system

3

Services system deficiencies that contribute to youth justice contact

4

Cohorts disproportionately represented in the youth justice system



What contributes to children and young people coming into contact with youth justice?

There are a range of intersecting historical, environmental, system and institutional factors that can contribute to a child coming into contact with the youth justice system, especially for those in ongoing contact.



Challenges faced by children and young people who have contact with the youth justice system

Children and young people who have contact with the youth justice system experience complex and intersecting challenges and barriers, including those related to their environment, health and development, employment and education.

Contact with youth justice

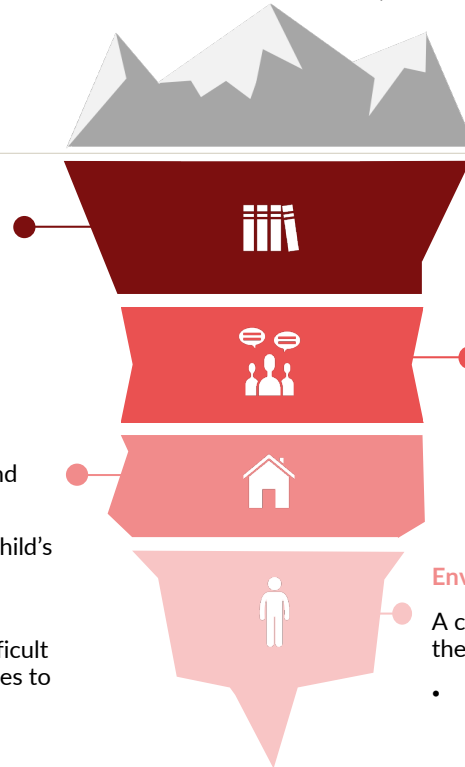
Education barriers¹

Children and young people's sense of belonging to school is an important protective factor for their mental health and wellbeing. It can provide them with a sense of stability and security through periods of stress and challenge. It can also provide a source of connection and positive relationships for children and young people with trusted adults.

Health and development complexities and barriers²

A range of developmental and health factors contribute to children and young people offending, including:

- **Neurocognitive disability** – Neurodisability is likely to increase a child's risk of offending, because of impulsivity, cognitive impairment, alienation and poor emotional regulation.
- **Mental health** – An unpredictable home environment makes it difficult for an infant or young child to learn to develop consistent responses to situation and people. This can lead to difficulties interacting with people and the world around them.
- **Foetal alcohol spectrum disorder (FASD)** – Children and young people with FASD present with a range of physical, developmental and/or neuro-behavioural symptoms. Children and young people are often unable to control aggression and are more likely to display reactive aggression.
- **Substance misuse** – Substance misuse is commonly associated with a range of risks and social issues including suicide, violence, crime, injury and death, and incarceration.



Employment and societal barriers³

Children and young people in dysfunctional living situations are more likely to spend less time in their home environment and more time in the community. Having constructive activities to engage in can divert them from criminal activity including:

- **Employment** – Employment promotes pro-social interactions and provides routine for children and young people.
- **Access to recreational activities** – Research suggests that sport and physical activity programs combined with other targeted interventions play a role in preventing or reducing crime among children and young people.

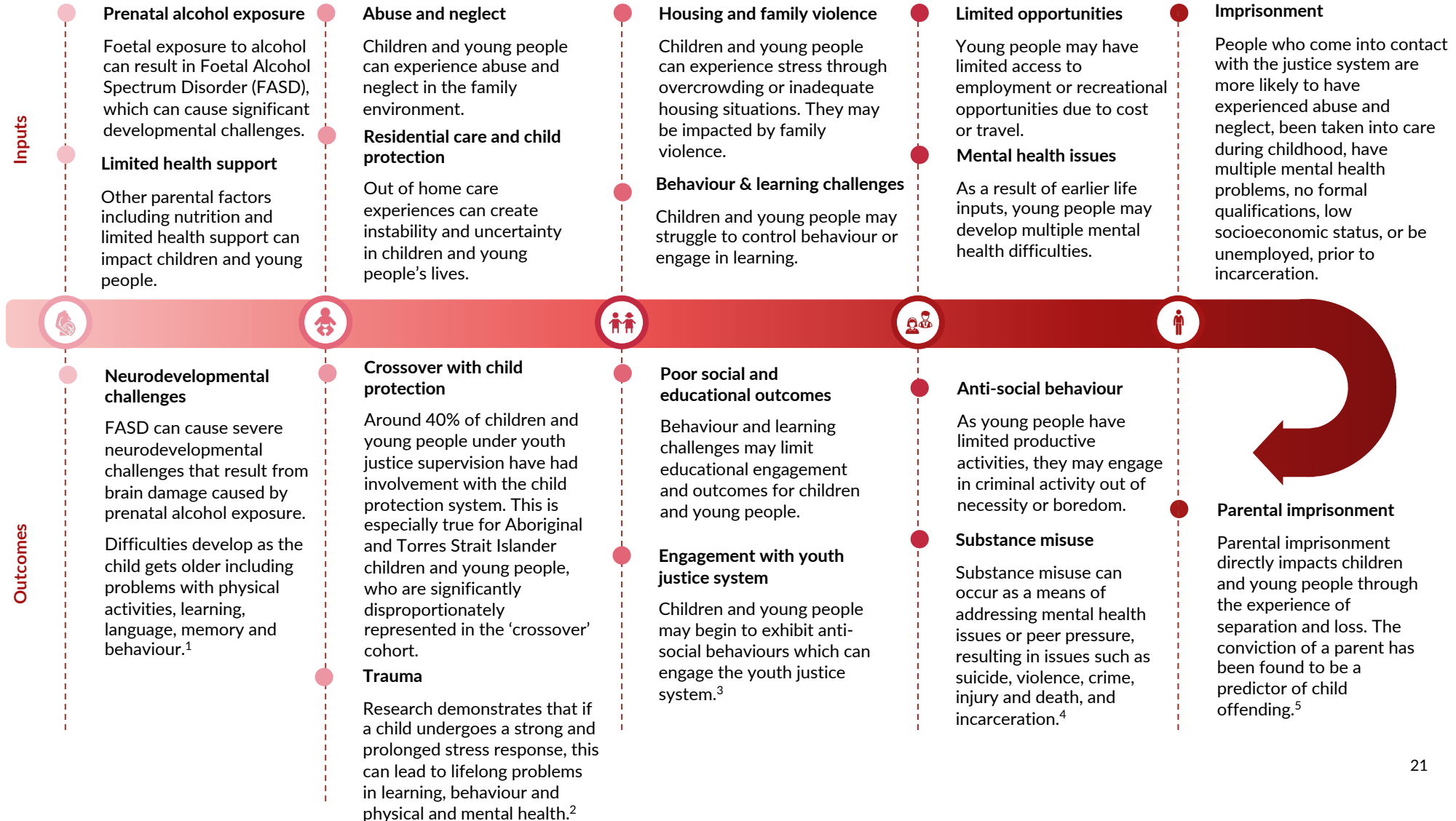
Environmental barriers⁴

A child's environment, such as housing and feeling safe at home, impacts how they interact with the community.

- **Housing** – For some children and young people, homelessness leads to contact with the youth justice system. Lack of accommodation can hasten a child or young person's path into detention - e.g. as grounds for the denial of bail.
- **Overcrowding** – Overcrowding places pressure on food and financial security and access to household facilities such as bathrooms and kitchens. This can contribute to children and young people spending more time out of home to access utilities or to avoid negative home experiences.
- **Domestic and family violence** – Many children and young people who come into contact with the youth justice and child protection systems have experienced domestic and family violence and abuse, including sexual abuse.
- **Social disconnection** – Many children and young people feel a lack of connection and may seek out connection with anti-social peers as a result. This can be connected to boredom, ineffective parenting and lack of pro-social activities.

Service system deficiencies that contribute to youth justice contact

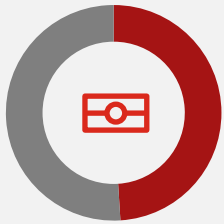
Children and young people often receive numerous other services and interventions before involvement with youth justice. Ultimately, contact with the youth justice system often occurs when community safeguards and other protective factors and service systems fail to ensure the safety and wellbeing of children and young people.



Cohorts disproportionately represented in the youth justice system

Historic, environmental, systemic and institutional factors lead to certain cohorts being disproportionately represented in the youth justice system, including Aboriginal and Torres Strait Islander and culturally and linguistically diverse children and young people, children and young people from regional, remote and low socioeconomic areas, and those who experience developmental challenges.

Aboriginal and Torres Strait Islander children and young people



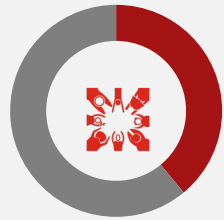
- Indigenous Australian
- Non-Indigenous Australia

49%

Of children and young people aged 10–17 under supervision on an average day in 2020–21 identified as Aboriginal or Torres Strait Islander.¹

This is despite only about 5.8% of children and young people aged 10–17 in Australia identifying as Aboriginal or Torres Strait Islander.

Culturally and linguistically diverse children and young people



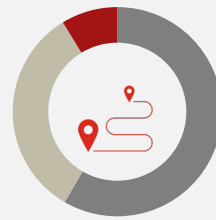
- Culturally and linguistically diverse
- Non-culturally and linguistically diverse Australians

39%

Of children and young people aged 10–17 in youth justice on an average day in 2020–21 identify as culturally and linguistically diverse in some Australian jurisdictions.²

Maori, Pacific Islander and South Sudanese children and young people are particularly disproportionately represented in certain jurisdictions.

Remoteness



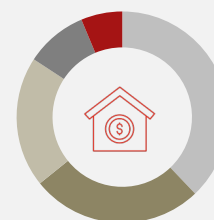
- Major cities
- Inner and Outer regional
- Remote and Very remote

40%

Of children and young people aged 10–17 under supervision on an average day in 2020–21 were from regional or remote areas.

This is despite the fact that only 30% of children and young people aged 10–17 in the general population live in remote or regional areas.³

Socioeconomic area



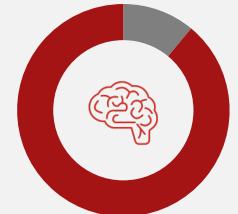
- Area 1
- Area 2
- Area 3
- Area 4
- Area 5

36%

Of children and young people aged 10–17 under supervision on an average day in 2020–21 were from the lowest socio-economic area.

Area 1 represents the lowest socioeconomic area with the greatest level of disadvantage. Area 5 represents the highest socioeconomic area with the lowest level of disadvantage.⁴

Developmental challenges and conditions



- No severe neurodevelopmental impairment
- At least one form of severe neurodevelopmental impairment

89%

Of children and young people have at least one form of severe neurodevelopmental impairment in some youth detention facilities in Australia.⁵

Chapter 3

What is the current state of youth justice systems across Australia and how has this changed in recent years?

Chapter at a glance

This chapter provides an overview of youth justice in Australia, what the objectives of youth justice are, the current policy context in the youth justice system and how public sentiment can shape youth justice policy.



States and territories in Australia administer their own youth justice systems and have their own youth justice legislation, policies and practices. However, the general processes by which a child or young person is charged or sentenced and the types of orders available to the court are similar.



Historically, Australia's youth justice systems have centred around two competing philosophies: practices targeted at addressing the criminogenic risks and needs of children and young people and welfare oriented and trauma-informed practices. In practice, these philosophies can often be in tension with one another. The youth justice system is often criticised for overemphasising the welfare and extrinsic needs of children and young people, which can inaccurately be perceived to be in direct opposition to focusing on the criminogenic needs of children and young people, reducing offending and improving community safety. A rights-respecting approach can reconcile this apparent tension.



Child rights in youth justice have received heightened political attention in recent years. While there has been some promising evidence of evidence-based policy responses that reflect child rights principles, financial investment in custodial supervision has continued to outweigh resources directed to early intervention and diversion across all jurisdictions.



Media coverage and public opinion has played a pivotal role in informing and shaping public policy in youth justice in Australia. One of the main consequences of sensational media coverage is that it has often led to short term problem solving and reactionary policy.

Chapter structure

1

Overview of youth justice in Australia

2

Competing youth justice objectives

3

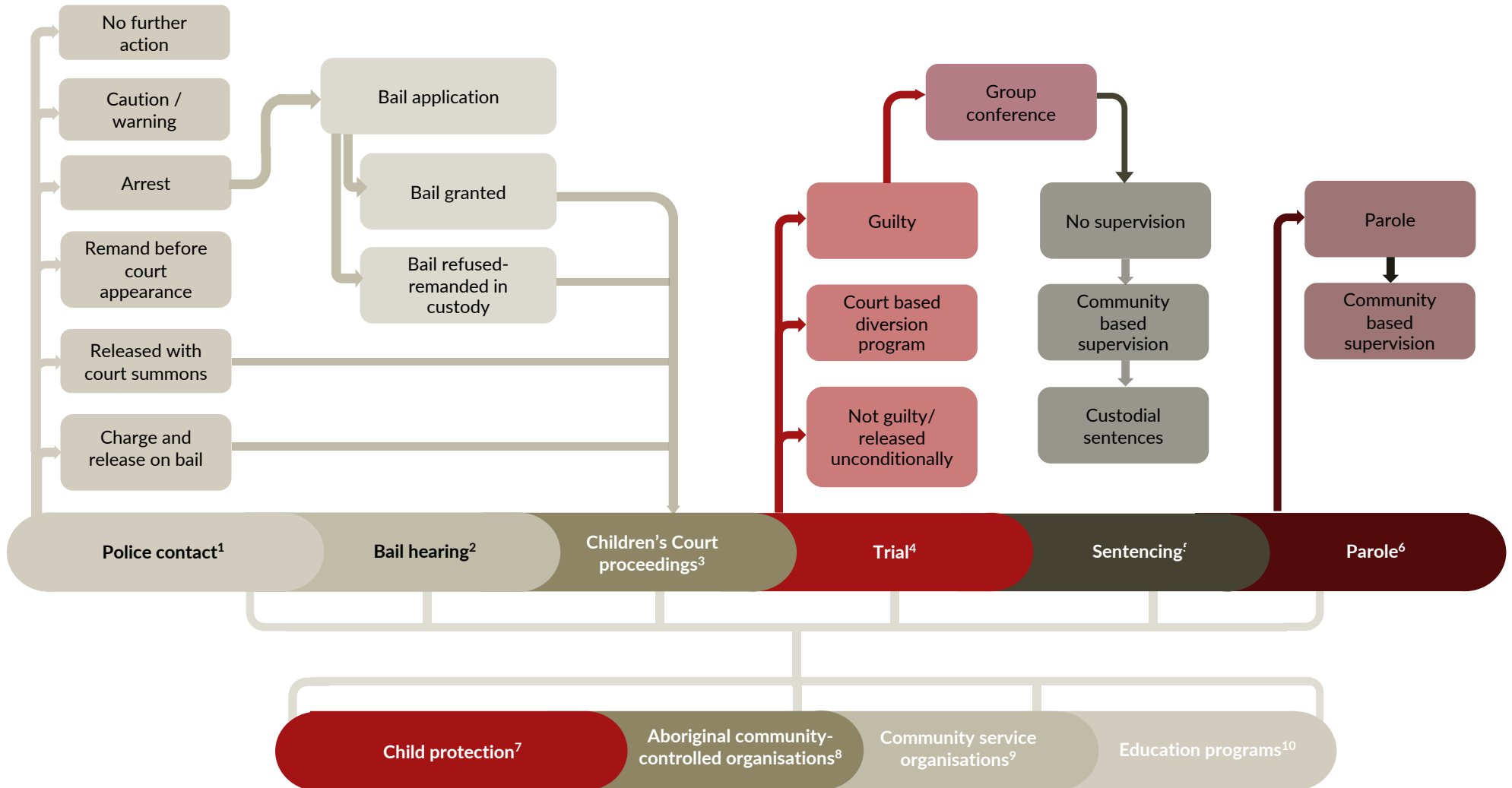
Shifting policy priorities in youth justice

4

Public sentiment around youth justice

Overview of youth justice in Australia

Each state and territory in Australia has its own youth justice legislation, policies and practices. However, the general processes by which a child or young person is charged or sentenced and the types of orders available to the court are similar.



Across each stage there are diversionary processes available that can prevent a child from progressing further into the youth justice system, for example police and court-based diversion.

Competing youth justice objectives

Historically, Australia's youth justice systems have centred around two competing philosophies: practices targeted at addressing the criminogenic risks and needs of children and young people and welfare-oriented and trauma-informed practices. These philosophies can often be in tension with one another.

There are two competing detention philosophies in youth justice¹



Address criminogenic risks and needs

Programs must address criminogenic risk factors for welfare programs to be effective.

The focal point of interventions should be addressing children and young people's criminogenic needs.

Welfare interventions cannot provide young people with tools to address their offending behaviour.

Overemphasis on trauma negates children and young people's ability to take responsibility for their own actions and perpetuating the narrative that all children and young people are victims.



Welfare oriented practice

Youth justice measures should account for disproportionate disadvantage by responding first to children and young people's complex, non-criminogenic needs.

All aspects of youth justice interventions should consider the impact of adversity experienced by the child or young person and attempt to ameliorate this harm.

Without appropriate and widely available community programs, children and young people with multiple disadvantages will continue to be 'excessively criminalised'.

Children and young people should be first seen as 'victims of circumstance' and disadvantage, rather than being viewed as offenders.



How this plays out in practice

Broadly, one philosophy favours a focus on addressing the criminogenic needs of children and young people, while the other is more welfare-oriented and is guided by trauma-informed practice.

In practice, the youth justice system is often criticised for overemphasising the welfare and extrinsic needs of children and young people.

This can inaccurately be perceived to be in direct opposition to focusing on the criminogenic needs of children and young people, reducing offending and improving community safety.

This perception is based in a misconception, as evidence indicates that a welfare-oriented approach is more likely to reduce offending and improve community safety in the long run.

A rights-respecting approach can resolve the apparent tension between the two competing philosophies and provide clear guidance about how to achieve the objectives of youth justice.

Shifting policy priorities in youth justice

Child rights in youth justice have received heightened political attention in recent years. While there have been some promising evidence-based policy responses that reflect child rights principles, financial investment in custodial supervision has continued to outweigh resources directed to early intervention and diversion across all jurisdictions.

Renewed focus on child rights

Child rights in the context of the youth justice system have received heightened public attention and scrutiny in recent years across Australia. For example:

- In 2016, the Royal Commission into the Detention and Protection of Children in the Northern Territory (Northern Territory Royal Commission) was established following media reports on inhumane treatment of children and young people detained in detention facilities there
- In 2017, the Australian Law Reform Commission published its report *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*
- In 2017 and 2021, Queensland and Victoria undertook end to end reviews of their youth justice systems following periods of significant attention
- In 2022, Western Australia announced a comprehensive review of its youth justice system following a period of significant media and public scrutiny.

In July 2020, the National Agreement on Closing the Gap was entered into between the Coalition of Aboriginal and Torres Strait Islander Peak Organisations and all Australian governments. For the first time, youth justice has been identified as a priority area and a target has been set to 'reduce the rate of Aboriginal and Torres Strait Islander young people (10–17 years) in detention by at least 30 per cent' by 2031.

Across Australia, the community sector is well connected to social and justice issues and increasingly using its platforms to amplify the voices of children and young people to drive change.

Alternative evidence-based initiatives such as justice reinvestment are also taking hold with promising results, for example through the Maranguka Project in Bourke, New South Wales and Halls Creek, Western Australia.

Shifting priorities in youth justice

Historically, Australia's youth justice system has comparatively low incarceration rates and effective diversion and rehabilitation programs in contrast to other comparable jurisdictions.

However, shifting public perceptions over many years has cumulated in a significant shift over the past 10 years towards policy and practices that promote security over diversion and rehabilitation. This has included:

- Using adult prisons in several jurisdictions to house children and young people
- Use of isolation, separation and lockdown in youth detention facilities and other punitive custodial operating practices
- A shift in focus from the best interests of the child to a focus on safe environments and security for staff and children and young people.

Across Australian jurisdictions, there has been promising evidence of and emphasis on evidence-based policies and age-appropriate responses in some jurisdictions that reflect modern youth justice standards and child rights. This includes new justice strategic frameworks and blueprints in certain jurisdictions, case management frameworks, practice guidelines, custodial operating philosophies and the development of new youth justice legislation.

However, financial investment in custodial supervision and strengthening security-based infrastructure has continued to outweigh resources directed towards diverting children and young people across all Australian jurisdictions.

This has also coincided with a gradual shift in bail policy across most Australian jurisdictions away from a traditional focus on securing attendance at court hearings towards an emphasis on providing community protection.

Public sentiment around youth justice

Media coverage and public opinion has played a pivotal role in informing and shaping public policy in youth justice in Australia. One of the main consequences of sensational media coverage is that it has often led to short term problem solving and reactionary policy.

Public sentiment plays a pivotal role in informing and shaping public policy in youth justice. Sensationalist and pejorative media representations of young offenders can also amplify social tensions and perpetuate detrimental social constructions of childhood, leading to poor policy outcomes and reactionary justice policies.¹

Youth offending often results in significant public and media interest

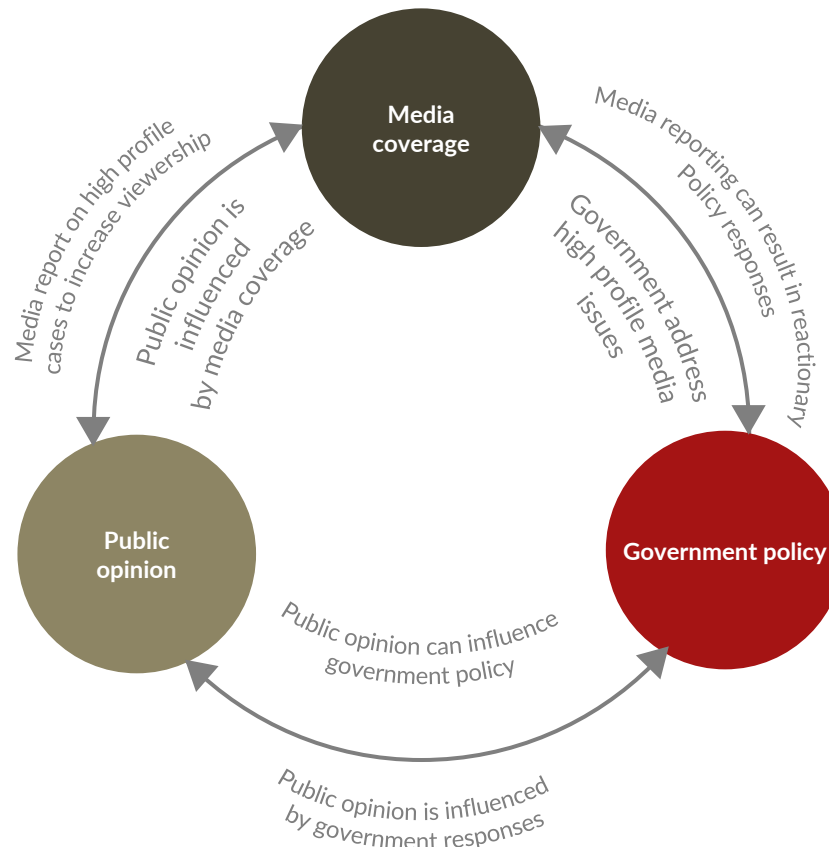
Media reporting frequently focuses on:

- High profile and serious offending committed by children and young people
- Perceptions that youth crime is increasing
- Commentary that courts are too lenient in the sentencing of young offenders.²

This has created the impression that youth crime is increasing, despite youth offending falling across most jurisdictions

Over a period of 10 years the rate of children and young people proceeded against by police declined by 36%.

As the number of children and young people coming to the attention of police in Australia has declined over the last decade or so, the numbers of children and young people entering youth justice systems has also fallen.³



Public sentiment and media reporting often leads to reactionary policy responses

One of the main consequences of sensationalist media narratives and public sentiment on youth offending is that they lead to short term problem solving and mitigates against good policy.

In recent years, this sentiment has successfully influenced governments of all persuasions across Australia, resulting in reactionary justice policies. These policy changes can often attract bipartisan support despite adding unnecessary complexity to judicial and administrative decision-making and directly undermining many of the other outcomes governments are seeking to achieve, including contributing to increased recidivism, disproportionate rates of imprisonment and perverse outcomes that erode rights and entrench disadvantage and inequality.⁴

Chapter 4

Why do we need to change the current approach to youth justice in Australia?



Save the Children

54 reasons

dandolopartners

Chapter at a glance

This chapter sets out where policy, legislative and operational practices across youth justice systems currently undermine child rights, what changes should be made as a result, and provides some examples of how they play out in practice. It is designed to be read in conjunction with Chapter 5, which sets out key opportunities across jurisdictions to move towards a child rights approach to youth justice.



Child rights are undermined across all aspects of youth justice systems in Australia, from policing, to bail and remand, diversion, court policies and practices, sentencing, the minimum age of criminal responsibility, detention, workforce and oversight of detention facilities.



Jurisdictions vary in how they comply with child rights. All Australian jurisdictions have examples of failing to comply with or respect child rights across various aspects of the youth justice system.



Egregious breaches of child rights occur across all jurisdictions in the context of youth detention policies and practices, and bail and sentencing. In addition, Australia recently failed to meet its extended compliance deadline for implementation of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (OPCAT), which requires all jurisdictions to improve the standards of oversight and monitoring of places of youth detention.



To move towards a child rights approach, Australian jurisdictions should implement specific changes across all aspects of the youth justice system, as summarised across Chapter 4. There are also opportunities to make changes and improvements to the system to better align with a child rights approach, which are outlined in Chapter 5.

Chapter structure

- 1 Policing
- 2 Bail and remand
- 3 Diversion
- 4 Court processes and procedures
- 5 Sentencing
- 6 Age of criminal responsibility
- 7 Detention
- 8 Youth justice workforce
- 9 Oversight of youth justice detention

Policing

Police can play an important role in diverting children and young people from the youth justice system. When policing practices undermine this, it can unnecessarily increase the pipeline of children and young people entering the system.

How are child rights relevant to policing?

Police are typically the first point of contact between children and young people and the youth justice system and are key actors in diverting them away from the system at the earliest possible stage. In their role as criminal investigators, police are also granted exceptional powers to deal with suspected offenders, including children and young people. These powers carry a responsibility to ensure that exercised power is lawful and fair, and consistent with international human rights standards.¹

What changes need to be made to move towards a child rights approach?

- Limit police veto discretion of children and young people's diversion
- Limit policing practices, e.g., strip-searching that violate child rights
- Reduce and introduce safeguards around the use of police custody for children and young people.

Key child rights challenges with the current approach



Police discretion can undermine children and young people's diversion from the youth justice system

Research indicates that the younger a child or young person is when they come into contact with the youth justice system, the more likely they are to return, and enter the adult system.² This highlights the importance of police in diverting children and young people from the youth justice system, and the overall impact this discretion has on the life trajectory of a young person. Many police diversionary policies are discretionary in nature, including access to diversionary options such as the use of cautions, and the decision to arrest a child or proceed with charges by way of summons.

When there is an absence of rights respecting leadership and clear cultural norms, police tend to default to their own norms of response and behaviour including around community safety and profiling. Data indicates that police often fail to use diversionary options available to them, and are less likely to use these diversionary options with Aboriginal and Torres Strait Islander children and young people, children and young people with a disability and children and young people from multicultural and multi-faith communities.



Public order policing negatively impacts on the rights of a child to freedom of assembly and peaceful association

The CRC has repeatedly raised concerns with the Australian Government about how public order policing can negatively impact on the rights of a child to freedom of assembly and peaceful association.³ For example, many Australian jurisdictions in recent years have introduced legislation restricting freedom of association through anti-consorting provisions. These laws can target children and young people with no link to organised criminal activity, disproportionately impact disadvantaged and vulnerable groups, criminalise normal social contact and undermine the right to freedom of association.⁴



Proactive policing practices undermine child rights and are not supported by adequate safeguards

Practices such as police search powers, including strip-searching of children and young people, are often justified on the grounds of supporting community safety. These practices, however, raise major issues of police accountability, with little public information available about how and when they are used, and why. These practices have been on the rise across certain Australian jurisdictions and significantly undermine child rights.⁵



Spending time in police custody can have a damaging and criminogenic impact on children and young people

The damaging effect of police custody on children and young people is well documented, particularly for Aboriginal and Torres Strait Islander people. Children and young people continue to be detained in police gaols at alarmingly high rates across Australia, with these numbers increasing in recent years due to changes in policy and legislative settings. Aboriginal and Torres Strait Islander children and young people continue to be over-represented in police arrests and are more likely than non-Aboriginal children and young people to be held in police custody.⁶



Systemic racism is deeply embedded in policing in Australia, which contributes to the overrepresentation of Aboriginal and Torres Strait Islander cohorts in the justice system

The CRC has noted that racial discrimination remains a problem in Australia, particularly for Aboriginal and Torres Strait Islander children and young people. Recent reviews and inquiries, including the Royal Commission into the Protection and Detention of Children in the Northern Territory and the Victorian Commissioner for Children and Young People's *Our Youth, Our Way* inquiry, have found that systemic racism can play a part in the treatment of children and young people by police, and can be experienced at critical junctures where sensitive, timely support was required to prevent re-engagement. This includes the use of practices such as strip-searching and others that are particularly likely to violate child rights, especially when applied in discriminatory ways.

Examples of police policies and practices that undermine child rights

Police cautioning practices in Victoria, paperless arrest laws in the Northern Territory and the NSW Police Suspect Target Management Plan are three examples of policies, practices and legislative settings that undermine child rights.

Victoria

Police caution practices

A 2017 study by the Crime Statistics Agency (CSA) into the effectiveness of police cautions found that children and young people who were cautioned had a significantly lower rate of reoffending (35.9%) compared to those who were charged (47.8%).¹

However, the CSA study found that police tended to use cautions less frequently for some cohorts:

- 48% of children and young people who lived in the 30 most disadvantaged postcodes were charged, compared to 14.4% of children and young people who lived in the 30 least disadvantaged postcodes.
- Aboriginal or Torres Strait Islander children and young people are approximately twice as likely to be charged.
- Children and young people born outside of Australia are 1.6 times more likely to be charged than those born in Australia.¹

One limitation to the current cautions approach in Victoria identified by the CSA is the absence of ongoing monitoring of charging decisions segmented by cohort. The Sentencing Advisory Council also found that the requirement under the Victoria Police Manual, that the offender admit their guilt, may be an obstacle as the making of admissions is influenced by various factors including access to legal advice, culture, previous contact with police, and the demeanour and training of officers.²

Northern Territory

Paperless arrest laws

In 2014, the Northern Territory Government passed legislation providing new powers to detain people arrested for a minor offence under the *Police Administration Act 1978* (NT).¹

The laws allow police to arrest and detain people for up to four hours for committing or being likely to commit minor offences. Many of these offences disproportionately impact children and young people, especially those from Aboriginal and Torres Strait Islander backgrounds and disadvantaged cohorts, due to the nature of offending and the use of public space.³

Detaining children and young people without charge undermines a number of fundamental rights in the criminal justice process and child rights, and puts children and young people at risk of arbitrary detention without monitoring and oversight mechanisms.⁴

In 2015, while dismissing a constitutional challenge to the laws, the High Court of Australia found that the powers covered a wide class of mostly minor offences and since their introduction had a disproportionate impact on Aboriginal and Torres Strait Islander children and young people.

The Northern Territory Coroner also has criticised the 'paperless arrest' system as 'manifestly unfair' in targeting Aboriginal and Torres Strait Islander people while calling for its repeal.⁵

NSW

Police Suspect Target Management Plan (STMP)

Since 2002, the NSW Police Force has used the Suspect Target Management Plan (STMP). The initiative was designed to reduce crime among high risk individuals through proactive policing and prevent future offending by targeting repeat offenders and people police believe are likely to commit future crime.⁶

Children and young people can be subjected to an STMP for a range of reasons, including prior criminal history, friendship or family associations and/or prior interactions with police. They act as a mechanism to enable any police officer to place people, including minors, who have never been convicted of an offence but who police suspect to be at risk of committing future crimes, on a list whereby they are targeted for 'intense policing'.⁴

An evaluation of the STMP found that STMPs are disproportionately used against children and young people, including some children and young people as young as 10 years old. The review also found that STMPs are disproportionately used on Aboriginal and Torres Strait Islander people.⁷

The review found that the STMP significantly undermines efforts to divert children and young people out of the youth justice system, and that children and young people experienced 'repeated contact with police in confrontational circumstances such as through stop and search powers, move on directions and regular home visits'.⁷

Bail and remand

Pre-trial detention should be used as a measure of last resort, and for the shortest amount of time possible. Recent bail legislative and practice changes have led to children and young people being remanded more frequently, and for longer periods of time, which has undermined child rights.

How are child rights relevant to bail?

A fundamental principle of child rights is that detention should be used as a measure of last resort, and for the shortest amount of time possible, including in relation to remand or pre-trial detention. This principle recognises the inherent harm that can be caused to children and young people spending time in detention.¹

What changes need to be made to move towards a child rights approach?

- Repeal recent legislative changes and restrictive bail practices to ensure pre-trial detention remains a last resort and children's specific needs are accounted for
- Increase investment in, and availability of, bail supports and accommodation to make it easier for decision makers to grant bail
- Limit the use of unreasonable bail conditions.

Key child rights challenges with the current approach



Recent legislative changes have increased the youth justice remand population especially for Aboriginal and Torres Strait Islander children and young people

Despite overall detention rates falling across Australian jurisdictions over the past decade, the proportion of children and young people remanded in custody has increased.² Researchers have attributed recent increases in the number of children and young people remanded in custody to, amongst other factors, restrictive bail practices introduced in recent years.³ These changes have had a range of unintended and punitive consequences, including Aboriginal and Torres Strait Islander children and young people being remanded at unacceptably high rates and contributing to their overrepresentation in the youth justice system.⁴ The high proportion of children and young people being held on remand indicates that Australia is falling short of its obligations to uphold the right to liberty and detention as a measure of last resort.⁵



Restrictive bail practices expose children and young people to damaging custodial remand environments, which can have lifelong consequences

Refusing bail to children and young people exposes them to a custodial environment, which places them at further risk of stigmatisation and increased likelihood of experiencing physical and psychological harm.⁶ They also can experience disruptions to their education, employment, family life, cultural connections and social and emotional development.⁶



Homelessness and housing instability are drivers of the increasing remand population, particularly for cohorts disproportionately represented in the youth justice system

Homelessness and housing instability are often cited as drivers of increasing remand populations, where a lack of alternative accommodation results in a young person being remanded in custody. This issue can particularly affect Aboriginal populations, those living in rural and remote areas and children and young people with mental illness, cognitive impairment or who are living in out-of-home care.⁸



Bail conditions for children and young people can be unreasonable, disproportionate and can be used for further criminalisation

Child rights require bail conditions to be reasonable and proportionate and only restrict children and young people to the extent necessary to keep them safe.⁹ Despite this, bail conditions set by courts can be disproportionate, unreasonable and set children and young people up to fail. Bail decision makers, particularly after-hours decision makers, often lack appropriate specialisation, expertise and timely advice to set bail conditions that support children and young people to address offending behaviour and avoid breaching bail.¹⁰ The use of unreasonable bail conditions can also further criminalise children and young people, who after breaching bail are charged with further offences and can be subject to more onerous and restrictive bail conditions.



A lack of bail supports and accommodation can make it difficult for decision-makers to grant bail

Availability of bail supports and accommodation are necessary features to enable bail decision-makers to grant children and young people bail and support children and young people to remain in the community and comply with bail conditions while they are awaiting court hearings. Supply of bail support and accommodation across jurisdictions has not kept up with demand, and there is a lack of culturally safe supports and accommodation available.¹¹ It is well recognised that the development and resourcing of additional programs, supports and accommodation are required for Australia to meet international child rights obligations, particularly for groups of children and young people overrepresented in the youth justice system.¹²

Examples of bail and remand practices that undermine child rights

Youth bail law reforms in the Northern Territory and Queensland are examples of recent changes to legislative settings that undermine child rights.



Northern Territory

Youth bail reforms

In May 2021, the Northern Territory Government passed amendments to the *Youth Justice Act 2005* (NT) and *Bail Act 1982* (NT) to make it harder for children and young people facing criminal charges to get bail and providing police with increased powers to tackle crime.¹

The legislation removed the presumption of bail for first time offenders, automatically revokes bail if conditions are breached, and makes it more difficult for courts to divert children and young people from the criminal justice system if they have previously failed a diversionary program.²

In response to the legislation, all fourteen Australian and New Zealand Children's Commissioners and Guardians wrote to the Northern Territory Chief Minister expressing concern about the legislation, noting that the changes are 'regressive' and 'signal a shift away from evidence-based policy approaches and directly unwind the implementation of key recommendations from the 2017 Royal Commission into the Protection and Detention of Children in the Northern Territory'.³



Queensland

Youth bail reforms

In February 2023, the Queensland Government introduced new legislation to make it harder for serious youth offenders to receive bail, strengthen sentencing for serious youth offenders and make breach of bail conditions a criminal offence. In introducing these reforms, the Queensland Government issued its first override of the *Human Rights Act 2019* (QLD) (the Act), which acknowledges that these reforms are incompatible with the Act and international child rights standards.⁵

The Act sets out that new legislation in Queensland must be accompanied by a statement of compatibility.⁶ It also gives parliament the ability to make an 'override declaration', which allows laws to take effect if they are incompatible with the Act, which should only be done in 'exceptional circumstances'.⁷

In introducing the legislation, the Minister for Police, the Hon Mark Ryan MP, said that 'the government accepts that these provisions are incompatible with human rights'. He also noted that the amendment was 'inconsistent with international standards about the best interests of the child'.⁸

Ryan confirmed three clauses from the government's new laws are incompatible with the Act: breach of bail as an offence for children and young people, a separate sentencing regime for serious repeat youth offenders and the requirement to serve suspended period of detention for conditional release orders.⁹

Diversion

Diversionary practices are the preferred way of dealing with children and young people who interact with the youth justice system. Diversionary practices are often underutilised in Australia despite significant evidence of their effectiveness.

How are child rights relevant to diversion?

A key principle of child rights is that diversion should be the preferred manner of dealing with children and young people charged with criminal offences in the majority of cases.¹ This principle recognises the widely held view that diversion is an effective mechanism to identify and respond to causal factors contributing to offending behaviour.

What changes need to be made to move towards a child rights approach?

- Broaden the scope and access to diversion, including removing police vetoing and embedding community involvement in diversionary practices at the earliest possible age
- Increase access to and availability of diversion programs, particularly for Aboriginal and Torres Strait Islander children and young people
- Monitor, evaluate and identify inconsistencies in diversionary practices across cohorts and introduce changes to better align with a child rights approach.

Key child rights challenges with the current approach



Despite a wealth of evidence that diversion should be prioritised, data shows that early diversionary mechanisms are often underutilised

A number of recent reports and inquiries have demonstrated the success of diversion in reducing the number of children and young people entering youth justice detention centres and moving away from traditional criminal justice interventions.² Diversion is more cost-effective than custodial sentences and can be specifically designed to reduce Aboriginal and Torres Strait Islander over-representation in the youth justice system. Despite this, early diversionary mechanisms, particularly related to police cautioning and community conferencing, are often underutilised or not used systematically.³ This is not consistent with international child rights standards and represents a missed opportunity to intervene and limit future contact with the youth justice system.⁴



There is a need to broaden scope and access to diversion, including removing police veto and embedding community involvement at the earliest possible stage

All Australian jurisdictions have legislated court-based diversion schemes that enable children and young people charged with an offence to participate in a diversion program and avoid findings of guilt. This gives them the opportunity to participate in rehabilitative programs, to make reparations to any victims and to contribute to the community in a manner that is designed to reduce the likelihood of offending. However, diversion programs are typically only accessible to a young person accused of relatively minor offending who has had little prior contact with the youth justice system. Police are also required to consent to the accused being diverted. This can result in a lack of equity in how the discretion is exercised, including lack of access by cohorts disproportionately represented in the youth justice system and inconsistencies in offences warranting diversion. These policies and practices directly contradict Australia's child rights obligations in making diversion the preferred manner of dealing with children and young people in the majority of cases.⁵



Diversion programs are not widely available at all stages of the youth justice system, especially for disproportionately represented cohorts

A fundamental principle of child rights is that diversionary programs should be made available at all stages of the criminal justice process, from apprehension to final disposition. Currently, across all Australian jurisdictions, there is limited supply of a range of programs, particularly Aboriginal and Torres Strait Islander programs, that meet the needs of children and young people across the country.⁶ Access to diversion can often also be restricted by prior offending or by particular categories of offences, or dependent on an admission of guilt, where the young person would otherwise be suitable for diversion.⁷



Diversionary practices differ across cohorts, which contributes to the overrepresentation of Aboriginal and Torres Strait Islander children and young people in the youth justice system

Research indicates that the availability of police diversion differs across cohorts, with Aboriginal and Torres Strait Islander people less likely to have diversion made available to them, indicating inconsistencies in practices and biases in decision-making. There is currently no oversight mechanism of early diversion practices, which limits the ability to monitor, evaluate and identify inconsistencies with respect to certain cohorts and is not consistent with child rights standards.⁸

Examples of diversionary practices that undermine child rights

In Tasmania and Victoria there are examples of effective early and court diversion programs, but there are still some barriers to access.



Tasmania

Diversion programs

The current Tasmanian system includes a combination of diversionary responses that can be offered either before or after a young person is charged with a criminal offence. However, the Tasmanian framework predominantly focuses on diversionary measures that can be offered once a decision has been made to formally charge a child with an offence.¹ This limits the availability of diversionary measures and their ability to prevent more serious contact with the youth justice system.

Recent data from Tasmania indicates that there has been a decrease in the use of diversion, in particular informal cautions and community conferences. Figures from Tasmania Police show the number of informal cautions has decreased over the past ten years: for example, whereas 1432 informal cautions were offered in 2010-2011, only 502 were offered in 2018-2019.²

Several possible reasons for this decline in the use of diversion were identified by the Tasmania Sentencing Advisory Council in a 2021 report, including different policing priorities. Stakeholders as part of their review also noted a 'class' factor with the response of children and young people to police and parental attitudes and support being factors in the use (or non-use) of diversion. Children and young people in Tasmania are generally dependent on parental support to be able to attend a formal caution or conference.²



Victoria

Children's Court diversion

The Children's Court Diversion Service is a legislated court-based diversion scheme that provides for the Children's Court to adjourn a criminal matter for up to four months to allow a child or young person to participate in a diversion program.³

The scheme has proven successful, with an evaluation of the program finding that 12-25% of diverted children and young people reoffend. The evaluation also found that it is a cost-effective way to deal with crime, as it offers a person who has committed minor offending, particularly a young person, a chance to avoid the long-lasting and compounding effect of having a criminal record.³

A critical barrier to the consistent availability of diversion for children and young people is the legislative requirement that Victoria Police prosecutors must consent to the accused person being diverted. There are few legislative limitations, and insufficient policy guidance, on the exercise of this discretion. Indicators that there is a lack of equity in how the discretion is being exercised include:

- Relative lack of access to diversion by disadvantaged cohorts, particularly Aboriginal people.
- Inconsistencies in offences warranting diversion of perpetrators.
- Lack of consistency in the weight given to police informants' views and the basis for their decisions (for example, the Law Institute of Victoria has said that some informants veto diversion when an accused exercises their right to silence in a police interview as it indicates lack of remorse).³

Court processes and procedures

Despite all Australian jurisdictions having specialist court processes for children and young people, they are often complex and not widely available, which can disproportionately impact overrepresented cohorts.

How are child rights relevant to court processes and procedures?

Child rights standards provide guidance on the minimum expectations for court proceedings in relation to children and young people, including that they should be in the best interests of the child, promote the participation of children, young people and families in court processes and be supported by a specialised and trained workforce.¹ These principles recognise the important role that courts play in safeguarding the rights of children and young people and improving engagement and outcomes in the criminal justice process.

What changes need to be made to move towards a child rights approach?

- Make legal assistance more widely available, including culturally appropriate services and supports, and providing system support for children, young people and families
- Expand specialist children's jurisdictions to regional and remote areas
- Adapt formal court processes to improve the experience of children and young people, and their families, across the system
- Ensure privacy and publication practices align with child rights.

Key child rights challenges with the current approach



Children, young people and their families are not always provided with legal assistance at critical times in the court process and there is often a lack of specialised assistance

Child rights principles provide that children and young people have the right to be given assistance by a lawyer at all stages of proceedings.⁹ Despite this, reviews and inquiries across Australian jurisdictions have found that children and young people have mixed experiences with legal assistance services and are often not able to access legal services at critical times, and there are significant challenges in providing continuity of service. There are also challenges in accessing culturally and age-appropriate services.



There's a need for greater systemic support of children, young people and their families

Across youth justice systems in Australia, there is currently a lack of systemic support, including a strong advocate, or option for family support, to protect the rights and interests of a child or young person in the system. If children and young people had a true advocate, more than just legal advice, they would be more likely to get positive outcomes and less likely to have their rights breached.



Specialist children's jurisdictions exist across Australian jurisdictions but these approaches haven't been expanded to rural and regional locations

All Australian jurisdictions have specialist children's courts, or a court division that hears children's matters.² However, there are challenges with expanding these approaches to rural and regional locations, which means that children and young people in these areas have their matters heard by decision makers who more commonly hear adult matters. This practice variation between geographical locations undermines child rights and particularly impacts cohorts disproportionately represented in the justice system, including Aboriginal and Torres Strait Islander people.³ Training for all magistrates and judges hearing matters in children's jurisdictions is important, including about diversionary options which research suggests are less used by magistrates who are not specialists in children's jurisdictions.⁵



Court processes are often complex and not communicated in a child-friendly manner

Child rights principles require that children and young people are given the opportunity to participate in decisions that affect them, and that they are provided with the opportunity to be heard.¹ While the right to a fair trial is the cornerstone of the criminal justice process, failure to adequately adapt formal court processes may undermine this fundamental principle.⁶ Reviews and inquiries across Australia in recent years have found that many children and young people and their families have negative experiences of court or struggled to understand the court process.⁶ This is particularly the case for certain cohorts, including those with limited English proficiency or with a disability.⁸



Australian jurisdictions have adopted varying approaches to privacy and publication for young people, many of which do not adhere to child rights

The right to privacy and protection in order to avoid harm being caused to children and young people through undue publicity or the process of labelling is a key child rights principle. Approaches to privacy and publication for children and young people in some Australian jurisdictions currently do not or previously have not adhered to these principles.⁹ For example, in the Northern Territory, there is no legislative presumption of non-publication of details related to court proceedings for children and young people, and in Queensland amendments were introduced in 2014 that allowed for the public identification of children and young people appearing before the courts for a second offence (though these reforms were reversed two years later).⁹ The notion of naming children and young people has been found to have no deterrent effect and can increase recidivism rates, and is a violation of child rights.

Court processes and procedures examples that undermine child rights

A South Australian Report and Tasmanian report found that legal assistance for children and young people must be specialised and easily accessible.



South
Australia

Specialised legal assistance for children and young people

A 2022 report into children and young people involved in both the child protection and youth justice systems identified barriers to justice in South Australia for children and young people. The report noted that the current youth justice system in South Australia is designed for adults and struggles to accommodate different communication needs.¹

People interviewed through the review commonly explained that when appearing before the Youth Court, a magistrate had not spoken directly to them, and they only had a limited ability or opportunity to instruct their solicitor.¹

The report noted that children and young people can be disadvantaged due to age-related communication barriers and poor social communication skills, particularly those who have low literacy levels, poor mental health, cognitive or intellectual impairment, and oral language disorders.¹

The report also noted that specialist child-friendly legal assistance and access to specialist children's courts services play a critical role in ensuring access to justice, but access to these services across Australia is highly limited, which is exacerbated by a lack of lawyers with necessary specialist skills.¹



Tasmania

Accessible and independent legal advice for children and young people

The 2013 report of the Advocacy for Children in Tasmania Committee noted that while there is evidence of some high-quality individual advocacy for children and young people in Tasmania, 'Advocacy services are seen to be patchy, subject to significant geographical variability and unintegrated and, at worst, confusing to young people and their families as well as many professionals'.

There is a need for independent advocacy services that can provide assistance free from any conflict of interest. Those who work for organisations that provide services to children and young people may not be able to be truly independent, particularly where a young person's concerns relate to that organisation. The Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse, for example, found that an organisation's concern for its reputation can be a cause in failing to respond appropriately to concerns of abuse. Other potential conflicts include concern about funding implications or employment if concerns are raised

Lawyers have strict professional obligations to ensure that they do not act with a conflict of interest, and can be subject to disciplinary proceedings for breaching these rules. While lawyers are not, and should not be, the only source of advocacy services, free and accessible legal services for children and young people are an important complement to other advocacy services.

Sentencing practices

The best interests of the child as a primary consideration in sentencing decisions, and that detention be used only as a measure of last resort, are key child rights principles. These principles are undermined by practices such as mandatory sentencing and uplift requirements for serious offending.

How are child rights relevant to sentencing?

When sentencing children and young people, the best interests of the child must be a primary consideration in decision making and, where appropriate, children and young people must be diverted from judicial proceedings. Sentencing must also be proportionate, with rehabilitation a principle of particular emphasis, and detention must be used only as a sanction of last resort and for the minimum amount of time possible. These principles recognise that children and young people have the right to be treated differently from adults in the criminal justice process and their rehabilitation and reintegration into the community should be the primary guiding principle in decisions made by the courts.

What changes need to be made to move towards a child rights approach?

- Repeal mandatory sentencing laws in Western Australia
- Ensure sentencing principles are informed by culturally safe practices
- Repeal serious youth offending sentencing changes that limit the court's discretion to take into account the specific circumstances of a child's offending
- Increase resourcing for community and diversion programs to ensure they are available to the court as a sentencing option.

Key child rights challenges with the current approach



Child rights are ignored when mandatory sentencing children and young people

The use of mandatory sentences in detention undermines the principle of detention as a last resort. Currently, Western Australia is the only Australian jurisdiction where mandatory sentencing applies to children and young people (although the Northern Territory previously had similar provisions, these were subsequently repealed) and has had this in place for several decades.¹ The CRC and the Committee Against Torture have recommended the abolition of WA 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.²



Sentencing principles are not always culturally considerate and do not always draw on expertise of Aboriginal and Torres Strait Islander communities and practitioners

All Australian states and territories include cultural considerations as a factor that a decision maker must consider when imposing a sentence on a young person.⁴ These principles, however, do not place participation of the family and community of the child, and Elders, in the sentencing process, or draw on advice from Aboriginal and Torres Strait Islander practitioners. Placing these principles at the centre of sentencing decisions would ensure that child rights and cultural factors are taken into account and ensure that sentencing practices do not compound historical and continuing disadvantage faced by Aboriginal and Torres Strait Islander people when they are sentenced.



Serious youth offender sentencing requirements changes represents an explicit abandonment of key child rights principles

In recent years, many Australian jurisdictions have made changes to serious youth offender offence classifications that has seen courts being required to impose more significant sentences on children and young people found guilty of a more expansive definition of serious offence. In certain jurisdictions, such as Victoria, these changes have also required charges to be heard in higher courts (limiting the jurisdiction of the Children's Court) to ensure that the full range of sentencing options was available for consideration.⁵ These reforms have been introduced to promote community safety overall, but have had the effect of undermining child rights, in particular the need for sentencing to be proportionate and prioritise diversion of children and young people.⁶ These reforms have had a disproportionate impact on groups overrepresented in the youth justice system, including Aboriginal and Torres Strait Islander children and young people and those from culturally diverse backgrounds.⁶



Courts are required to consider community and diversionary programs for youth offenders, however, these are often unavailable

In addition to sentencing practices that undermine child rights, other aspects of the youth justice system also inhibit the extent to which key child rights principles can be applied by limiting the court's ability to use community and diversionary programs. Sufficient resources for these programs are frequently unavailable, particularly in rural and remote areas, leaving detention as one of the few sentencing options available to the courts. This is in direct contradiction of the notion of detention being a sanction of last resort.¹

Examples of sentencing practices that undermine child rights

Mandatory sentencing in Western Australia and changes to uplift requirements for serious youth offending in Victoria are two examples of sentencing practices that significantly undermine child rights.



Mandatory sentencing

Western Australia currently has mandatory sentencing laws directed towards children and young people. The Northern Territory previously had similar provisions, but these were repealed in 2001.¹

In 2014, earlier legislation was expanded with the passage of the *Criminal Law Amendment (Home Burglary and Other Offences) Act 2014 (WA)*, which requires courts to impose custodial sentences on children and young people who have committed three or more home burglary offences.²

The expansion of these laws incorporates multiple offences committed within the same incident, meaning children and young people can receive a mandatory 12-month sentence during their first court experience.²

The UN Committee on the Rights of the Child and the Committee against Torture have recommended the abolition of WA mandatory sentencing provisions.³

In particular, it has been argued that the laws do not give primacy 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.³



Changes to uplift requirements for serious youth offending

In 2017, the Victorian Government amended the *Children, Youth and Families Act 2005 (Vic)* to limit the summary jurisdiction of the Children's Court of Victoria with respect to serious youth offences. These amendments are commonly referred to as 'uplift' requirements and were made to ensure that serious offences are heard in higher courts with the full range of sentencing options available and to limit the circumstances in which the Children's Court of Victoria hears serious youth offences.⁴

A statutory review of the provisions undertaken by the Department of Justice and Community Safety in 2022 found that as a consequence of the changes:

- Children and young people subject to uplift are often experiencing long periods on remand and have been unsettled for an extended period with fewer opportunities to access therapeutic programs.⁵
- Any young people sentenced with significant time served (whilst on remand) may be released straight into the community rather than having a supported period of supervision in the community on parole. These consequences are deleterious to the young person's rehabilitation and what evidence tells us works to reduce reoffending.⁵
- The uplift changes limit child rights, including those set out in the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* and international human rights such as principles related to children and young people being treated differently to adults, responses to child offenders should be proportionate and that the time between commission of the offence and final response should be as short as possible.⁵

Age of criminal responsibility

The minimum age of criminal responsibility is the primary legal barrier to criminalisation and therefore entry into the criminal justice system. The United Nations has consistently said that countries should be working towards a minimum age of 14 years or older.

What is the minimum age of criminal responsibility (MACR)?

The conclusive presumption that a child under minimum age cannot commit an offence on the basis that they are not criminally responsible for that offence.¹ It relies on the legal principle *doli incapax*, which assumes that children and young people aged 10 to 14 are criminally incapable unless proven otherwise.²

The Commonwealth MACR is 10 years of age.

What is the minimum age of detention?

The minimum age a child or young person can be detained in the youth justice system.³

This is often distinct and higher than the MACR as children and young people older than the MACR may be found guilty but not detained because of the minimum age of detention.

What changes need to be made to move towards a child rights approach?

- All jurisdictions should commit to raising the age of criminal responsibility to 14 years, with no exceptions or 'carve outs'.
- All jurisdictions should develop and adequately resource a service system response to ensure that children and young people who engage in offending behaviour get the familial, therapeutic, restorative and rehabilitative assistance they need.

How are child rights relevant to MACR?

The minimum age of criminal responsibility is the primary legal barrier to criminalisation and therefore entry into the criminal justice system. The CRC and other United Nations entities have consistently said that countries should be working towards a minimum age of 14 years or older, and Australia has been repeatedly criticised by the CRC for failing to raise the age.*

Key child right challenges with current approach



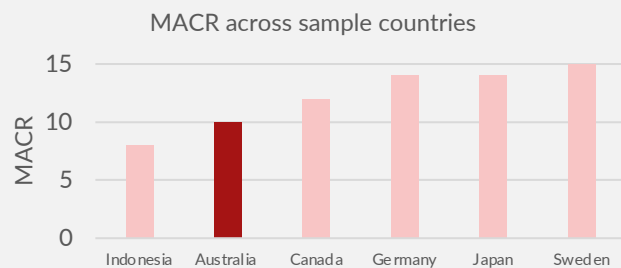
Misalignment with international standards

Australia's minimum age of criminal responsibility has been repeatedly criticised for being too low by the CRC. It is also one of the lowest ages in the OECD.⁵



Disadvantaged cohorts disproportionately represented

Children and young people who engage with the criminal justice system have comparatively higher rates of childhood neglect and trauma (including physical, psychological and sexual abuse), familial instability and substance abuse, and experience in the child protection and out of home care systems, as well as lower levels of education.⁸ This shows that disadvantage can contribute to entering the youth justice system.



Disproportionate Aboriginal and Torres Strait Islander impact

Aboriginal and Torres Strait Islander children and young people additionally experience intergenerational trauma and institutional racism. They are vastly overrepresented in the youth justice system.⁹



Misalignment with child cognitive development

Psychological, cognitive and neurological development evidence indicates that a child under the age of 14 years is unlikely to understand the impact of their actions or to have the required maturity for criminal responsibility.⁶



Doli incapax applied inconsistently

Doli incapax does not consistently operate as intended and may not always protect children and young people aged 10 to 14 years who did not know that their behaviour was 'seriously wrong.' Even in cases where *doli incapax* operates to prove that a child was incapable of criminal responsibility, the late stage at which the presumption is triggered still results in a child being subjected to the criminal justice system, including a criminal trial.¹⁰



Misalignment with youth justice objectives

A main youth justice objective is to deter children and young people from reoffending. However, early contact with the justice system instead encourages recidivism with 85% of children and young people who were supervised between the ages of 10 and 14 years returned to, or continued under, supervision when they were aged 15 to 17 years.⁷

Examples of effective alternatives to criminalising children and young people aged 10 to 13

There are many effective alternatives to respond to offending behaviour for 10-13 year olds. These include the use of multi-disciplinary panels, alternative police responses, safe accommodation options and therapeutic jurisprudence.

Therapeutic jurisprudence and solution-focused courts²

This approach can direct court decisions beyond narrowly resolving the specific dispute before the court and towards addressing the needs and circumstances of children and young people involved in the dispute.

Multidisciplinary panel models¹

Multidisciplinary panels can be effective structures that monitor, problem solve and authorise a system of care for children and young people with complex needs, including emotional and behavioural challenges – especially if they are adequately resourced.



Integrated and coordinated service models that respond to complex needs⁵

Children and young people presenting to the youth justice system have complex needs.

Cross-portfolio/departmental integration is required to provide a strongly coordinated service response across different service sectors.

Examples could include evidence-based models such as therapeutic foster care.

Safe and secure accommodation options³

Providing safe and secure accommodation options when returning home is not an option is an important part of the service response.

Examples include secure therapeutic, trauma-informed facilities with a strong emphasis on connection for children and young people who are at immediate and substantial risk of harm.

Alternative supportive police response⁴

Enabling an alternative course of action for police when criminal justice is not relevant is an effective alternative.

Examples include a safe and child-friendly place where police can take children and young people at any time of the day, and clear guidelines for police.

Detention practices

Child rights principles require children and young people to be separated from adults in detention and to be protected from cruel, inhuman or degrading treatment. Violations of these rights have arisen in the context of youth detention.

How are child rights relevant to detention?

Various violations of child rights have arisen in the context of youth detention in Australia. This has included the failure to ensure that detention is used as a sanction of last resort, the failure to separate children and young people from adults, the failure to protect them from torture and cruel, inhuman and degrading treatment, as well as other significant administrative failings that have negatively impacted on child rights and wellbeing.

What changes need to be made to move towards a child rights approach?

- Ensure that adult facilities are not used to detain children and young people in any circumstance
- Prohibit the use of isolation and segregation
- Limit the use of excess force and restraints in detention facilities
- End the use of degrading, humiliating or harmful acts or physical violence.

Key child rights challenges with the current approach



Child rights are undermined by use of adult facilities to detain children and young people in Australia

The separation of children and adults in detention is mandated in several articles of the CRC and the Beijing Rules.¹ However, Australia maintains a reservation to article 37(c) of the CRC, technically allowing it to keep children and young people in adult prisons where necessitated for geographic or practical reasons.² In practice, police watch houses used to hold adults are frequently used as informal remand centres across several Australian states, including Queensland, the Northern Territory, New South Wales and Tasmania.³ Despite profound human rights issues, the Australian Government is not considering withdrawing its reservation to article 37(c) at this time.³



Child rights abuses have been exacerbated where adult prisons are used to detain children and young people

This has often occurred in the context of imprisoning children and young people after riots and damage to youth detention facilities and has occurred in the Northern Territory, Victoria and Western Australia.⁶ In 2022, Western Australia came under public scrutiny for housing a group of teenagers under the age of 18 in Casuarina adult prison.⁷ Using sections of adult prisons as youth detention facilities enables governments to circumvent restrictions on transferring children and young people to adult prisons. In 2017, in Victoria, the Supreme Court determined that the transfer of youth offenders under 18 to a maximum security prison was a violation of child rights.⁸



Isolation and segregation is widely used across youth detention facilities, in direct breach of child rights

Australia's Children's Commissioners and Guardians have stated that 'solitary confinement constitutes cruel, inhuman and degrading treatment and is a violation of human rights standards'.⁹ In Victoria and New South Wales, there have been reports of isolation being used on children and young people for up to 45 and 100 days, respectively.¹⁰ The Northern Territory Royal Commission found that isolation of children and young people was used on some detainees excessively, punitively and in breach of the legislative requirements, and often accompanied by long periods of 'lockdown' in cells for 23 hours per day with one hour of exercise handcuffed.¹¹ In 2022, evidence emerged of treatment of a young person in Western Australia who was locked alone in a glass-walled cell at Banksia Hill for 79 days.¹² These practices amount to solitary confinement, which can have severe, long-term and irreversible effects on a young person's wellbeing.¹³



The use of excess force and restraints in youth detention facilities are a direct breach of child rights

The Northern Territory Royal Commission found that children and young people were restrained using force to their head and neck areas, including putting them in chokeholds, and that 'ground stabilising' was used throwing children and young people forcibly on the ground.¹⁴ Similarly, the use of excess force by staff, intimidation and assaults has been identified across other jurisdictions including Queensland, Victoria, Western Australia and Tasmania.¹⁵ Only two Australian states and territories have restricted the use of spit hoods, devices placed over the head of a detainee that have been labelled as 'inhumane' by the Northern Territory Royal Commission.¹⁶



Degrading, humiliating or harmful acts or physical violence carried out by youth detention workers breaches child rights

The Northern Territory Royal Commission found that detention workers dared or offered bribes to children and young people to carry out degrading, humiliating and/or harmful acts or to carry out acts of violence against each other. Similarly, in Victoria, an inquiry found that staff had incited fights between detainees and supplied contraband. In the Northern Territory, some female children and young people detained were found to have been inappropriately handled, restrained and stripped of their clothing by male workers, and subject to inappropriate sexualised attention. Problems related to strip-searching of young people have also been identified in detention facilities in Western Australia and Queensland.¹⁸

Examples of detention practices that undermine child rights

The use of force at Banksia Hill Detention Centre in Western Australia and the use of police cells to detain children and young people in South Australia are two examples of detention practices that undermine child rights.



South
Australia

Use of adult police cells to detain children and young people

A 2022 report from the South Australian Commissioner for Children and Young People found that the South Australian Government breached child rights by locking them up in adult facilities.¹

The report found that children and young people were detained in adult police cells at least 2,030 times by South Australia Police in the 2020-21 financial year.¹

In some regional and remote locations, all, or almost all, children and young people arrested and detained were Aboriginal.¹

The report found that this practice was in direct contravention of the rights of children.¹

In response to the report, the South Australian Government admitted more needed to be done but defended police using adult facilities in some circumstances.²



Western
Australia

Use of force at Banksia Hill Detention Centre

In 2022, media reports were released highlighting the mistreatment of children and young people in Western Australia's youth detention system.³

Footage from an ABC's Four Corners Investigation showed custodial officers at Banksia Hill Detention Centre using excessive and dangerous force to restrain a child, with a boy being handcuffed, forcibly held down and sat on by guards in a dangerous restraint technique known as 'folding up'. The practice has been outlawed in Queensland and other jurisdictions due to its risk of serious injury, suffocation, and death. There were reports several other boys have been subjected to similar practices.³

This news followed nearly 12 months of revelations of human rights abuses at Banksia Hill and the July 2022 decision to send children to maximum security adult Casuarina prison.³

The treatment of children and young people at Banksia Hill was met with widespread condemnation from the community, including former and current Inspectors of Custodial Services, the former WA Police Commissioner and the current President of the Children's Court.³

In late 2022, a class action representing nearly 600 current and former children and young people detained at Banksia Hill was launched in the Federal Court seeking damages against the WA Government for psychological harm for the conditions they were subject to at Banksia Hill.

Youth justice workforce

Youth justice workforces often do not receive adequate training, funding and staffing to comply with child rights obligations. This includes ongoing supervision, coaching, support and structures to ensure effective implementation.

How are child rights relevant to the youth justice workforce?

Child rights principles require all staff involved in the administration of the youth justice system to be appropriately trained to provide support to children and young people who come into contact with the youth justice system. In order to implement a child rights approach to youth justice, it is important that youth justice systems are appropriately funded, trained and staffed. It is also important that youth justice workforces are understood broadly – for example, as including social workers and educators as relevant.

What changes need to be made to move towards a child rights approach?

- Ensure there are qualified, trusted, reliable workers across youth justice services
- Provide specialist training and ongoing supervision, support and structures for all workforces that interact with youth justice to provide safety, support, discipline, guidance and care
- Provide adequate staffing levels and funding to ensure child rights are implemented in practice
- Ensure there is specialist expertise to properly inspect and monitor youth justice service and detention facilities.

Key child rights challenges with the current approach



Child rights are undermined when children and young people are not supported and connected with services that provide trusted, reliable workers able to recognise and address their needs

It is well established that trusting and consistent relationships with workers are a key factor in engaging and supporting children and young people.¹ Research indicates that youth justice workers who have good relationship skills and form a ‘therapeutic alliance’ with the young people with whom they work can have a positive effect on the recidivism rates of those children and young people.¹ This approach is consistent with child rights principles, including the right to participation and the best interests of the child.² While there are many youth justice workers across the system who develop trusting relationships and provide trauma-informed supports to children and young people, there can be a lack of understanding of the complex drivers of behaviour, lack of recognition of socio-economic, historic and cultural factors that influence a child or young person’s behaviour, and a failure to adopt a consistent ‘strengths-based approach’.



There are gaps in specialised training and ongoing investment in supervision, coaching, support and structures for workforces that interact with children and young people

Child rights principles require appropriate training of all those involved in the administration of youth justice, as well as the establishment and observance of rules, regulations and protocols that enhance consistent treatment of children and young people.³ While there is good practice that is occurring in settings across jurisdictions, there is a lack of consistent and up-to-date understanding of the circumstances, experiences and vulnerabilities of children and young people in youth justice across all workforces and the necessary skills and experience to address these circumstances in youth justice settings and systems as a whole. This needs to include investment in ongoing supervision, coaching, support and structures to ensure effective implementation and embedding of cultural change across workforces and work environments. An embedded trauma-informed, culturally safe and child rights-based approach is required in the important work of youth justice workforces in ensuring effective rehabilitation and reintegration.



Insufficient staffing levels, inadequate training and funding can lead to child rights principles not being followed or implemented in practice

Often where youth justice legislation and policies align with child rights in theory, they can be compromised because of ineffective implementation in practice.

This can include insufficient staffing levels and inadequate training and funding.⁵ For example, the Havana Rules permits the use of restraint in ‘exceptional cases’ only, as ‘explicitly authorised and specified by law and regulation, once ‘all other control methods have been exhausted and failed’.⁵ Reports and inquiries have found that it is not always clear to staff how to understand and apply the phrase ‘last resort’. Adequate training, staffing and funding are important supplements to legislation and policy to ensure child rights are supported across all aspects of the youth justice system.⁶



There’s a need for specialist expertise to properly inspect and monitor places where children and young people are deprived of their liberty

It is essential that personnel responsible for inspecting and monitoring places where children and young people are deprived of their liberty have the expertise and skills necessary to understand the developmental needs of children, their rights at international law, applicable domestic law, and how to meaningfully and safely communicate with children and young people. Currently, oversight bodies do not always have expertise, which can further undermine child rights implementation.⁷

Examples of how the youth justice workforce undermine child rights

The interpretation of the use of force in youth detention facilities in Queensland and staffing in youth detention facilities in the Northern Territory are two examples of workforce challenges that undermine child rights.



Queensland

Interpretation of the use of force in youth detention facilities by staff

The use of force in Queensland youth detention facilities shows how implementation of legislation and policies can be problematic in its practical implementation.¹

In Queensland, detention centre staff may only use force if they reasonably believe there are no other options for protection of others at the centre. If they opt to do so, they 'must not use more force than is reasonably necessary.'¹ The unnecessary use of force may constitute assault.

In 2012, an investigation into use of force in Queensland youth detention identified proportionality of force as a systemic issue. It recommended that reviews of staff training programs consider guidance on the behaviour and physical characteristics of young people prior to use of force, justifications for use of force, the technique and amount of force to be used when determining the level of force to apply in a given situation, and debriefing a young person after force has been used on them.¹



Northern Territory

Staffing in youth detention facilities

The Royal Commission into the Protection and Detention of Children in the Northern Territory found a number of inadequate management practices in youth justice staffing, training and funding.²

Specifically, this included:

- The recruitment of youth justice officers was ad hoc and crisis-driven, with insufficient emphasis on the skills and training required to perform the role, with the consequence that staff members employed as youth justice officers were not competent to undertake the work.
- Training of youth justice officers was poor in a number of respects
- Youth detention facilities were frequently understaffed, which inhibited the operations of facilities
- Senior management in the youth justice system lacked experience and/or training in youth detention.²

The Northern Territory committed to introducing measures to respond to these findings, including increased funding, staff and training for youth justice employees.³

Oversight of youth justice detention

Australia recently failed to meet its extended compliance deadline for implementing OPCAT due to failures across jurisdictions to establish and appropriately resource independent oversight mechanisms required as part of the protocol.

How are child rights relevant to oversight of the youth justice system?

Youth justice can involve the deprivation of liberty at the hands of the state of children and young people under the age of 18. Accordingly, it's important that Australia's youth justice systems meet appropriate standards of oversight and monitoring of places, including youth detention. In 2017, Australia ratified the Optional Protocol to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (OPCAT) which required it to improve the standards of oversight and monitoring of places of detention.

What changes need to be made to move towards a child rights approach?

- Create enforceable and binding national standards to ensure children and young people are safe in youth detention
- Introduce federal legislation to ensure full implementation of OPCAT across all Australian jurisdictions
- Establish mechanisms for children and young people to participate in the development and implementation of oversight arrangements.

Key child rights challenges with the current approach



There is an absence of clear national standards to ensure children and young people are safe in youth detention

Recent inquiries and reports have revealed that youth justice detention systems across Australia are failing to protect the rights of children, with serious consequences. Concerning practices and conditions have seemingly occurred despite numerous non-binding standards and guidance materials, including, for example, the Juvenile Justice Standards (2009) and Principles of Youth Justice in Australia (2014). The reported practices in youth detention centres in Australia suggest that unenforceable guidance has been insufficient to ensure appropriate practices and protections for children and young people. There's also currently insufficient systems to ensure data collection, public reporting, accessible complaints mechanisms and consequences for improper conduct.¹



Australia missed its extended compliance deadline for OPCAT in January 2023

Australia ratified OPCAT in 2017, which, if implemented effectively, has the potential to bring about improved child rights protections. Effective implementation of OPCAT requires states and territories to play an important role in complying with OPCAT obligations. While the Australian Government has made some progress in the implementation of OPCAT, for example through establishing the Commonwealth Ombudsman's Office as both the Commonwealth National Preventive Mechanism (NPM) and the coordinator of the Australian NPM network, and some states and territories designating NPMs and passing dedicated OPCAT legislation, jurisdictions still have a long way to go to meet basic OPCAT commitments.² The decision by the UN Subcommittee on the Prevention of Torture (UN SPT) in October 2022 to suspend its visit to Australia, and in February 2023 to terminate its visit, is a stark example of its failure to meet OPCAT commitments.² The UN SPT cited a lack of cooperation by some states as one of the reasons for their decision to suspend the visit and highlighted that this was 'a clear breach by Australia of its obligations under OPCAT'. Australia is one of only four countries to have ever had the UN SPT suspend or terminate a visit.²



Australia has not created new legislation to implement OPCAT

The UN SPT has stated: 'the mandate and powers of the NPM should be clearly and specifically established in national legislation as constitutional or legislative text. The broad definition of places of deprivation of liberty as per OPCAT shall be reflected in that text.'³ The Federal Parliament has power under the Constitution to legislate with regard to treaty obligations using the external affairs power. To date, the Australian Government has not chosen to introduce federal legislation and instead left it for states and territories to implement OPCAT. This has meant that OPCAT to date has not been fully implemented, and the current approach does not align with good practice as outlined by the UN SPT.⁴

In the absence of fully implementing OPCAT, there's currently significant variability across jurisdictions in oversight of youth detention facilities



This includes:

- The lack of a statutory office with functional independence in each state and territory
- Gaps in places of detention inspected
- Lack of specialist expertise to properly inspect places where children and young people are deprived of their liberty, including expertise about child development, trauma and the specific nature and effects of children's experiences of detention and how these differ from adults
- The need for complementary access to child sensitive complaints mechanisms.³

Examples of oversight practices that undermine child rights

There are no designated NPMs in New South Wales, Victoria and Queensland. The WA Office of the Inspector of Custodial Services has also highlighted challenges it has experienced in implementing OPCAT in the absence of a national approach.

Implementation of OPCAT in New South Wales, Victoria and Queensland

Despite Australia agreeing to ratify OPCAT in 2017, New South Wales, Victoria and Queensland have not yet designated NPMs. They also have failed to ensure appropriate funding and resources for NPMs remains a significant issue.¹

The UN Committee Against Torture also observed late last year that Australia's adoption of a 'primary versus secondary' approach to places where people are deprived of their liberty inappropriately limits the mandate of NPMs and is contrary to the requirements of OPCAT.

The decision by the UN Subcommittee on the Prevention of Torture in October 2022 to suspend its visit to Australia, and in February 2023 to terminate its visit, is a stark example of its failure to meet OPCAT commitments.

The Subcommittee cited a lack of cooperation by New South Wales and Queensland as one of the reasons for its decision to suspend the visit and highlighted that this was 'a clear breach by Australia of its obligations under OPCAT'.

Australia is one of only four countries to have ever had the Subcommittee suspend or terminate a visit.¹

Western Australia

Western Australia Office of the Inspector of Custodial Services

The WA Office of the Inspector of Custodial Services (WA OICS) has been an effective custodial oversight mechanisms in an Australian jurisdiction. Its effectiveness, however, has been limited because there is no mandatory requirement for the WA government to respond to the recommendations in the WA OICS reports or oversight of police cells.²

In July 2019, the WA OICS was nominated as one of two National Preventive Mechanism (NPM) bodies for Western Australia as part of the preparation for implementation of OPCAT. By the end of June 2022, only a few Australian states had nominated NPM bodies and national consensus and agreement between the states and Commonwealth had not yet been reached.³

The WA OICS has outlined in several annual reports that, without national agreement around implementation, it has not been possible for the organisation to commit significant resources to developing important processes and structures around how we will undertake this new work. This includes:

- Contributing to the development of legislation to expand its jurisdiction to cover inspection of police lockups
- The development of appropriate inspection standards and protocols; preparing reporting frameworks and templates
- The identification of resource needs.³

The OICS has highlighted that the absence of a national agreement and coordination around the implementation of OPCAT has meant that they have not been able to make much progress in implementation.³

Chapter 5

Opportunities to move towards a child rights approach

Chapter at a glance

This chapter sets out what key changes should be made to move towards a rights respecting approach to youth justice. It is designed to be read in conjunction with Chapter 4, which sets out where the key challenges across the system are.



There are a number of opportunities for changes that should be made across youth justice systems to recast its foundations and move towards a child rights approach. These changes will ensure compliance with international human rights standards, improve outcomes for children and young people, and reduce recidivism and costs in youth justice. They also provide long-term policy solutions to the challenges associated with youth justice.



These opportunities include greater respect for the voice of children and young people, more effective early intervention and prevention, better use of diversion at an early stage, increasing the age of criminal responsibility, providing trauma-informed support, using detention as a measure of last resort only, using rehabilitative detention practices, supporting children and young people to transition back into the community, more transparent oversight of the youth justice system, addressing the overrepresentation of Aboriginal and Torres Strait Islander children and young people and supporting a skilled workforce.



These opportunities can focus governments' efforts to move towards a child rights approach to youth justice. An overview of how to take this work forward, including through national reform, is explored in Chapter 6.

Chapter structure

1

Greater respect for children's right to be heard across the youth justice system

2

Effective early intervention and prevention

3

Better use of diversion at an early stage

4

Increasing the minimum age of criminal responsibility to at least 14

5

Trauma-informed support

6

Detention as a last resort only

7

Rehabilitative detention practices

8

Children and young people are supported to transition back into the community

9

More effective and transparent oversight of the youth justice system

10

Addressing the over-representation of Aboriginal and Torres Strait Islander children and young people

11

A skilled and adequately funded workforce

Greater respect for children's right to be heard across the youth justice system

Children and young people are often not heard or taken seriously in the youth justice system. Creating systems that embed and promote the participation and voices of young people in the youth justice system improves outcomes at the individual and systems level and is a fundamental principle underpinning child rights.

Description



Children and young people have the right to express their views on decisions that affect them. Those views should be taken seriously and placed at the centre of decision-making.¹ Genuine participation by children and young people in the youth justice system is key to developing child-centred, culturally appropriate solutions. Such participation needs to occur on two levels – (1) at the individual level, where a young person who interacts with the youth justice system has input into planning and decision-making that affects them, and (2) at the systems-level, where the young person has input into the development of policy and decisions about investment related to youth justice issues.

Why it's important



A large body of research has explored the benefits of involving children and young people in decision-making affecting them across a variety of systems. Encouraging children and young people to be involved in goal-setting and decision-making fosters ownership and accountability. Engaging children and young people in this way has been shown to be beneficial, not only for individual children and young people, but for the effectiveness of services and communities.²



At the individual level, ensuring robust frameworks are in place that create an environment where children and young people's voices are heard and acted upon is essential to achieving positive outcomes.³ This means providing opportunities to meaningfully engage with children and young people on the ways in which youth justice orders are managed, goals are developed and support is provided.³ It is important to acknowledge that the notion of individual participation in the youth justice system is complex, as choice is generally considered to be one of the pre-conditions for genuine and effective youth participation, whereas a young person's involvement in the youth justice system is usually involuntary.⁴



At the systems-level, actively listening and including the voices of children and young people supports their rights to participate in civic life and in matters that affect them.⁵ Children and young people's participation in decisions about youth justice policies and procedures helps to solve systemic problems and provides relevant and effective solutions that change their lives for the better.⁵

What it looks like

1

Youth justice systems should be accountable for creating an environment where:

- Children and young people feel secure and able to express their views
- Children and young people feel that their views are taken seriously
- Workers value the views of young people, and where appropriate, act on their views.

2

Children and young people, and their families, should be informed and educated about their rights, and listened to and respected in their interactions with services across the justice system continuum, including:

- Before any contact with police
- Their first contact with police
- Being informed and represented through the court process and any periods of custody
- Being supported during their transition back into the community.

3

Youth justice systems should create mechanisms for young people to meaningfully have input into, and influence over, the decisions that affect them in the youth justice system. This should include providing insights and advice on the development of youth justice programs, policies and services, and could include:

- Reviewing systems data, trends and outcomes
- Identifying areas of reform and system improvement
- Testing policy and legislative reform direction
- Advising on funding and budget prioritisation.

Effective early intervention and prevention

The youth justice system is disproportionately focused on crisis-driven, punitive responses to offending behaviour, at the expense of effective early interventions and supports. There's a need for a shift towards service provision beyond the justice system such as health and education to address the root causes of offending.

Description



There is a wealth of evidence demonstrating both the ineffectiveness of the youth justice system in addressing the complex needs of most youth offenders, as well as the criminogenic impact of involvement with the youth justice system.¹ Reforms and investment should be prioritised across the youth justice system that have at their core the key objective of reducing youth involvement in the youth justice system and should be directed towards early intervention with children, young people and their families to address the underlying factors that often lead to youth offending – including homelessness, poverty, education, substance abuse, mental health issues and the effects of trauma, including intergenerational trauma.

Why it's important



Children and young people have specific developmental needs. Acknowledging these needs before considering a justice approach, and addressing educational and health issues through effective interventions, can divert children and young people from cycles of offending.



The youth justice system is disproportionately focused on late, punitive responses to offending behaviour. There is a lack of availability and funding towards effective prevention, early intervention and individualised support to meet the needs and experiences of children and young people who interact with the system.²



There is a lack of effective, early services and supports to support children and young people, particularly for Aboriginal and Torres Strait Islander children and young people. This can be due to culturally appropriate and effective early supports not being available, services being at capacity or inaccessible due to geographical distance.³



There are clear links between the youth justice system's failure to support children and young people in areas such as housing, family violence, health and trauma, and their continued involvement with the justice system. In many cases, these early systemic failures can be contributing factors that lead to increased and escalating offending behaviour.¹



There is significant crossover of children and young people in child protection and children that enter the youth justice system. Addressing the elements of child protection that cause children and young people to enter the youth justice system can divert a significant number of children and young people away from the system.

What it looks like

1

A significant shift in focus and investment is required across youth justice, together with interrelated systems that provide support to and have a direct impact on the lives of children and young people and families. This requires a paradigm shift away from punitive responses towards considering the needs and development of children and young people first and utilising early intervention to address the root causes of offending before it begins. It also requires explicit and shared outcomes and targets across departments and service systems relating to preventing youth justice involvement and supporting early intervention.

2

Programs and services should be invested in that aim to respond to the needs of children and young people who are at risk of becoming involved in the youth justice system. These programs can be applied in a wide range of contexts delivered at various points in a young person's life that are aimed at reducing risk factors and increasing protective factors to prevent a young person's entry into, or long term involvement in, the youth justice system. This should include a specific focus on education as a powerful protective factor.

3

Governments should work with communities to develop and extend existing early intervention programs that are currently working, particularly programs developed by and for Aboriginal and Torres Strait Islander people. This can include justice reinvestment approaches, which are centred around early intervention and therapeutic support to improve social outcomes in areas broader than justice, such as education and employment, to generate net benefits across the system as a whole.³ It can also include incentivising prevention and early intervention through results-based contracting and commissioning.

4

Working with child protection departments to incorporate intervention and prevention initiatives diverting children and young people from the youth justice system. In particular, providing supportive environments that are culturally relevant to children and young people.

Better use of diversion at an early stage

Diversion programs at early stages of the justice process are often underutilised. Better use of diversion for children and young people at earlier stages will help identify and respond to the causal factors of offending and reduce recidivism.

Description



Diversion practices are an effective mechanism to identify and respond to causal factors contributing to offending. The earlier diversion is utilised across the youth justice system, the more effective it will be for the child or young person. There is a need to better leverage options for diversion at the earliest possible stage and redesign legislative responses to shift the focus from punitive sentencing and detention measures to diversion to reduce recidivism and divert children and young people away from the system for good.

Why it's important



A key principle of child rights is that diversion should be the preferred manner of dealing with children and young people charged with criminal offences in the majority of cases.¹ This principle recognises the widely held view that diversion is an effective mechanism to identify and respond to causal factors contributing to offending behaviour.



Wherever possible, children and young people should be diverted from the youth justice system to reduce recidivism and ongoing contact.² Options for diversion should be taken at the earliest possible opportunity and focus on connection with community-based supports to address unmet needs.



There is strong evidence that punitive sentencing and detention of children and young people, and the low age of criminal responsibility, does little to increase community safety or the root causes of offending. Indeed they have the opposite effect. High rates of recidivism show our current approaches do not create the outcomes we need and cause irrevocable harm to children and young people.²

What it looks like

1

Better use of police diversion, including:

- Strengthening requirements in favour of early diversion practices
- Creating appropriate incentives for police use of diversion
- Limiting the vetoing powers of police to refuse cautions and diversion
- Better funding diversion programs and making them more accessible across metropolitan, rural and remote locations to make sure they are available to all children and young people.

2

Redesigning legislative responses to shift the focus from punitive sentencing and detention measures to address the causes of offending, reduce recidivism and support more children and young people to be diverted from the justice system for good.

3

Better implementation of restorative justice programs throughout the court process, including the use of Family Group Conferencing.

4

Better use of solution-focused courts and therapeutic jurisprudence, as well as embedding cultural decision-making in court interventions through the use of Aboriginal and Torres Strait Islander courts.

Increasing the minimum age of criminal responsibility to at least 14

The current age of criminal responsibility in Australia is inconsistent with contemporary understanding of child development and undermines child rights. Increasing the minimum age to at least 14 years old and moving towards community-based responses for children aged 10 to 13 will address the root causes of anti-social behaviour and divert children away from the justice system.

Description



In Australia, children as young as 10 are exposed to the harmful and stigmatising aspects of the criminal justice process, including being arrested, questioned, charged, remanded, prosecuted, convicted, sentenced and incarcerated. This is unacceptably low by international standards, inconsistent with contemporary understandings of child development, and harmful to children and young people.¹ Raising the minimum age of criminal responsibility would facilitate a vital systemic shift from criminalisation to social service responses for children and young people under the age of 14, which would have a profound and enduring impact on individuals, families and communities.

Why it's important



Research demonstrates that early contact with the youth legal system increases the likelihood of:

- **Poor future justice outcomes:** Research indicates that the younger a child is at their first point of contact with the youth justice system, the longer their involvement in the system is likely to be.²
- **Interruption to education:** Children and young people who interact with the youth justice system are less likely to complete their education, and therefore less likely to thrive into the future.³
- **Trauma and mental illness:** Incarceration and criminalisation causes documented long-term impacts on mental health and often compounding pre-existing trauma.⁴



The medical evidence is clear that children have not experienced sufficient neurological development by 12 or 13 to have the capacity to form the type of criminal intention needed to be found criminally responsible, or to predict the reaction or consequence of an action before it occurs. Children under 14 years old do not have the cognitive capacity to form criminal intent.⁵



Significant evidence and expert commentary is available supporting raising the age of criminal responsibility to at least 14, with no exceptions or 'carve outs'. A large number of submissions to the review by the Council of Attorneys-General are compiled on the Raise the Age campaign website.⁶

What it looks like⁷

- 1 All jurisdictions should introduce reforms to increase the minimum age of criminal responsibility to 14 years old. This should not be subject to any exceptions.
- 2 Community-based intervention must be the key feature of an alternative response to children and young people aged 10-13 who are engaging in anti-social behaviour. Dedicated services for this age group must be developed in consultation with the community to support their wellbeing and address issues, with particular attention to the role of families – broadly understood – wherever possible. This could include:
 - **Safe and secure accommodation options:** Providing suitable crisis accommodation for children who can't return home and secure welfare models in facilities to prevent further offending that are trauma-informed, therapeutic, multidisciplinary, culturally appropriate and focused on supporting child wellbeing and development.
 - **Alternative police response:** Providing alternative processes to police for responding to children aged 10-13 when a criminal justice approach is not appropriate.
 - **Multidisciplinary panel models:** Multidisciplinary panels monitor, problem solve and authorise a system of care for children with complex need, authorising wraparound approach.
- 3 A very small proportion of those involved in the youth justice system at the ages of 10-13 exhibit serious or violent anti-social behaviour. In most cases, this type of behaviour is the result of very serious abuse and neglect. For this group of children and young people, relevant programs should be developed and made available without removing them from their home environment. In very serious cases, or where services in the community are exhausted, spending time in a therapeutic facility may be appropriate in some instances to provide the necessary array of professional services. In all cases these must be focused on children's and young people's best interests as the highest priority and objective. These should be used as a last resort only and for the shortest appropriate time.⁸

Trauma-informed support

Children and young people in youth justice settings have often experienced complex developmental trauma. Despite this, support provided across the youth justice system is often not trauma-informed. Understanding the underlying causes of a young person's behaviour and embedding this across all aspects of the system is critical to promote healing and reduce offending behaviour.

Description



Studies have found that a high proportion of young people who come into contact with the youth justice system have experienced trauma in their lives, and that 80-89% of children and young people in detention have experienced multiple traumatic events.¹ To promote healing and drive better outcomes across the youth justice system, trauma-informed approaches should be developed and embedded across all aspects of the system from the first point of contact through to detention and reintegration back into the community. Such approaches are essential to protecting the best interests of children and young people and supporting their development, in line with rehabilitative and restorative justice principles.

Why it's important



A high proportion of children and young people in contact with the youth justice system have unique needs related to experiences of trauma. This requires tailored care responses that are currently not addressed consistently across the youth justice system.¹



Trauma can impact a person's mental health, alcohol and substance use, and experience of homelessness. Complex trauma can change the ways in which a person copes with difficult events, their ability to engage with supports, and navigate relationships in a healthy way.²



One way to ensure better outcomes for children and young people who interact with the youth justice system is through the provision of trauma-informed care. These approaches recognise the relationship between trauma and trauma symptoms, and that there is a need for a collaborative approach between workers, trauma survivors and family.²



While some sectors across the youth justice system are already integrating trauma-informed approaches, it's important that all children and young people who interact with the youth justice system experience trauma-informed care from the first point of contact, and safe and secure environments that foster their continued engagement.²

What it looks like

1

Trauma-informed care underpins all aspects of services, supports and engagement for children and young people who engage with the youth justice system, grounded in an understanding of their circumstances and needs. Comprehensive assessment, triaging and referral are embedded across the system.

2

Greater workforce training is provided in trauma-informed care to empower the workforce to employ healing approaches that seek to understand and respond to trauma and its impacts on individuals, families and communities.

3

Children and young people experience trauma-informed care and support from the first point of contact with the youth justice system. In detention, trauma is assessed on entry and considered as part of care and release planning to ensure that supports provided to young people are appropriate to their needs.

4

Trauma informed, system-level support should be provided to children and young people and their families to support the interests of children and young people in the youth justice system, improve outcomes and reduce the likelihood of children and young people having their rights breached.

Detention as a last resort only

Both domestic and international human rights laws make it clear that detention of children and young people must be a measure of last resort. Despite this, jurisdictions across Australia have introduced a range of punitive reforms that have established a lower threshold for children and young people being held in custody. To reduce recidivism and ensure that detention is used a last resort only, diversion and alternatives to being remanded in custody should be used more frequently.



Description

Custodial environments cause significant harm to children and young people and put them at risk of harm and entrenchment in the youth justice system. To prevent this, detention should be used as a measure of last resort only, and diversion and alternatives to being remanded in custody should be used more frequently.

Why it's important



Child rights require that detention and imprisonment of children and young people should only be used as a last resort and in exceptional circumstances, for example, when the safety of a person cannot be guaranteed in the community.¹



Legislation introduced across Australian jurisdictions related to more punitive presumptions against bail and overuse of remand is inconsistent with the principle of detention as a measure of last resort.¹



Evidence shows that prevention and pre-court diversion measures are more effective measures to reduce recidivism than incarceration of children and young people.²



For children and young people who are charged with an offence and refused bail, spending even a little bit of time remanded in custody has negative impacts on their prospects of rehabilitation. Their connection with protective factors such as family, community groups and positive peer groups is removed at a critical time for therapeutic interventions in their life. Although their protective connections are interrupted, they do not remain in detention long enough to permit their education, health or social difficulties to be addressed in a meaningful way.³

What it looks like

1

More community-based and culturally-safe alternative sentencing options are developed and funded to ensure alternatives to detention that focus on the therapeutic needs and rehabilitation of the young person.

2

Investment in diversion programs to ensure there are a diverse range of alternatives to detention available for use and referral.

3

Punitive bail and remand laws are reversed to ensure that children and young people are not detained unnecessarily and that child rights principles, including the best interests of the child and the use of detention as a last resort, are embedded across the youth justice system. Bail support programs are appropriately funded to ensure they are available and used by bail decision-makers.

Rehabilitative detention practices

Current approaches to youth justice in Australia currently use traumatising and harmful practices that cause harm to children and young people and are not consistent with child rights standards. Detention practices – if required as a measure of last resort – should be therapeutic, non-punitive and trauma-informed.

Description



It is acknowledged that, given current system arrangements, there are certain circumstances where detention will be required to ensure the safety of a young person. Where this is the case, detention practices should align with best practice measures and child rights standards, and should be centred around therapeutic, non-punitive and trauma-informed principles.

Why it's important



Evidence has repeatedly shown that environments of prison and detention are not fit for children and young people and can cause lifelong harm.¹ Reviews and inquiries across Australia have consistently identified the need to replace the current model of detention with a rehabilitative and trauma-informed model of care.²



Restrictive practices such as the use of force, restraint, solitary confinement and strip-searching are traumatising and harmful for children and young people and do not meet international human rights standards and expectations.²



Children and young people in youth detention have a diverse range of needs and often have experienced trauma in their lives. The current model of detention does not address these needs and can often compound the trauma they are experiencing.³



Despite some efforts to improve cultural safety, youth justice detention is currently not culturally safe or appropriate for Aboriginal and Torres Strait Islander young people. There is a need to work with communities to design and implement culturally safe services and programs to be established in youth detention facilities.³

What it looks like

- 1 Youth detention centres are designed around therapeutic, non-punitive and trauma informed principles.
- 2 Children and young people are never detained in adult facilities or with adults.
- 3 Restrictive practices and others such as the use of force, restraint, solitary confinement and strip-searching are stopped, including completely prohibiting solitary confinement.
- 4 The workforce is adequately supported and funded to provide responsive, trauma-informed care.

Children and young people are supported to transition back into the community

The transition from custody back into the community is a critical point in time. Often, young people do not have consistent access to services and supports when they leave custody, which can prevent their reintegration back into the community. Without adequate support and planning for release from custody, children and young people are set up to fail.

Description



The point at which a child or young person leaves custody, from remand or after completing a custodial sentence, is a critical juncture for their reintegration into the community and capacity to exit the youth justice system over the long term. Without adequate planning for release from custody, children and young people are set up to fail, and without post-release support, 'the likelihood of failure inevitably increases'.¹

Why it's important



The literature regarding best practice in supporting children and young people to leave custody recommends individualised case management that addresses the specific needs of the child or young person and their risk factors for reoffending. Children and young people who are at greatest risk of reoffending should be provided with the most intensive support.² This should include a specific focus on building, or rebuilding, connection to family and community, and recognition of the value of connection to education. It may also include improved family finding.



Child rights provide a number of standards in relation to the supports that young people are entitled to when they leave custody. This includes that children and young people should be provided with necessary assistance, including accommodation, education or training, employment and any other assistance that facilitates the rehabilitation process. Child rights principles also require that steps should be taken prior to the completion of a sentence to support a person to gradually return to society and provide that a person leaving custody is entitled to efficient aftercare directed towards the lessening of prejudice and social rehabilitation. Other child rights rules provide further focus on addressing the needs of a person being released from custody, including employment, clothing, transport and financial support.³

What it looks like

- 1 Children and young people should be provided with accessible and tailored services that support them to leave youth justice custody and achieve their personal goals and aspirations. This should include long-term support for custody.
- 2 Government should invest in throughcare programs that are culturally safe, responsive and sustainable. These need to be delivered state-wide, and tailored to the needs of young people who use them, including groups disproportionately represented in the youth justice system including Aboriginal and Torres Strait Islander children and young people. This may include intensive case management, housing, employment and training, mental health, drug and alcohol, and cultural support services.
- 3 Throughcare programs should build on successes of existing programs and services in responding to the needs and goals of children and young people leaving custody through culturally safe and family centred programs.

More effective and transparent oversight of the youth justice system

Robust oversight of youth detention is an important safeguard to protect child rights. Effective implementation of oversight measures, including OPCAT, is important to ensure that children and young people are safe in youth detention.



Description

When involvement with youth justice involves the deprivation of liberty at the hands of the state, it's important that there is appropriate oversight and monitoring to ensure power isn't abused. In order to do this effectively, Australia must act on its commitment to ratify OPCAT and ensure that it is appropriately implemented and resourced across all Australian jurisdictions.

Why it's important



Numerous recent inquiries and reports have revealed that youth justice detention systems across Australia are failing to protect the rights of children, with serious consequences. Concerning practices and conditions have seemingly occurred despite numerous non-binding standards and guidance materials, including, for example, the Juvenile Justice Standards (2009) and Principles of Youth Justice in Australia (2014), both published by the Australasian Youth Justice Administrators, and *Human rights standards in youth detention facilities in Australia: the use of restraint, disciplinary regimes and other specified practices* (2016) published by the Australian Children's Commissioners and Guardians. The continued reported practices in youth detention centres in Australia strongly suggest that unenforceable guidance has been insufficient to ensure appropriate practices and protections for children and young people.



To date, the Australian Government has not implemented new legislation to embed OPCAT into federal law. States and territories have taken a piecemeal approach to implementation of OPCAT, and some jurisdictions have failed to introduce measures that are required as part of core elements of the scheme (i.e., New South Wales, Victoria and Queensland have not appointed NPMs). This resulted in the UN Subcommittee on the Prevention of Torture suspending its visit to Australia in late 2022 due to failure to meet OPCAT commitments and subsequently terminating its visit in early 2023.

What it looks like

- 1 Co-design enforceable and binding national standards to ensure appropriate practices and protections are in place for children and young people in youth detention, including independent monitoring and oversight supported by strong powers and regular contact and check-ins with children and young people in detention.
- 2 Adopt a national approach to implementation of OPCAT to ensure that states and territories meet their OPCAT obligations, and that appropriate resourcing and funding is provided to ensure effective implementation.
- 3 Develop complementary access to child sensitive complaint mechanisms, including through ratification of the 3rd Optional Protocol to the Convention on the Rights of the Child on a communications procedure to improve children and young people's access to complaints mechanisms.

Addressing over-representation of Aboriginal and Torres Strait Islander children and young people

Aboriginal and Torres Strait Islander people are significantly over-represented in youth justice systems across Australia, which is the result of structural racism. Recognising the operation of structural racism and introducing specific measures to reduce contact and promote self-determination will help produce better outcomes and reduce over-representation.



Description

Aboriginal and Torres Strait Islander children and young people are disproportionately targeted by the police, sentenced by the courts, and removed from their families and communities. Change is required to address over-representation and achieve self-determination in the youth justice system.

Why it's important



In recent years, governments have increased investment in initiatives to reduce over-representation of Aboriginal and Torres Strait Islander people in the youth justice system.¹ Nevertheless, overall inequality in youth justice outcomes remains and it continues to be an everyday reality that Aboriginal and Torres Strait Islander children and young people are disproportionately targeted by police, sentenced in the courts, and removed from their families and communities.¹ A very high proportion of Aboriginal and Torres Strait Islander young people involved in the youth justice system also have child protection involvement.²



Aboriginal and Torres Strait Islander children and young people in the youth justice system are highly likely to have experienced greater cumulative adversity compared to their non-Aboriginal and Torres Strait counterparts. For many, these state-inflicted interventions have directly caused generations of trauma and broken connection to Country and community. The devastating consequences of this have led to inequalities in life experiences, including a higher prevalence of low educational attainment and earning, housing insecurity, unequal health outcomes, and early mortality. Many Aboriginal and Torres Strait children and young people in the youth justice system have also experienced exposure to family violence and substance misuse, as well as the impact of being forcibly removed from their families.³



The harmful impacts of these interventions are well-recognised in the literature and acknowledged in government policy frameworks and initiatives. However, despite this, a culture of over-policing and surveillance, forced removal of children and young people from their families, disproportionate youth justice system outcomes and adverse experiences persists.⁴

What it looks like

- 1 Services should be designed, controlled and delivered by the Aboriginal and Torres Strait Islander community for their children and young people and should be adequately resourced and made available.
- 2 Governments should ensure that relevant data on Aboriginal and Torres Strait Islander and non-Aboriginal and Torres Strait Islander children and young people at each point in the youth justice system is collected and reported on to ensure a single, authoritative source of information about Aboriginal children and young people in the youth justice system and their outcomes. This data should be collected and shared in line with Aboriginal and Torres Strait Islander data sovereignty principles.
- 3 Decision-makers at all points in the youth justice system recognise the need to connect with culture, family and community and have regard to the need to strengthen community connection.
- 4 Aboriginal and Torres Strait Islander children and young people, and their caregivers and supportive family members, are provided with specialist legal assistance to navigate the youth justice system.
- 5 Detention facilities are culturally safe and culturally supportive therapeutic spaces as an alternative to separation, isolation and seclusion are provided.

A skilled and adequately funded workforce

Embedding a child rights approach across the justice system requires adequate training and support for the workforce to ensure that legislation and policies are implemented effectively in practice. Staff across the justice system must be equipped with skills and knowledge to provide care that supports the needs of children and young people.



Description

Child rights principles require all staff involved in the administration of the youth justice system to be appropriately trained and support the implementation of equal treatment of children and young people who come into contact with youth justice. In order to implement a child rights approach to youth justice, it is important that youth justice systems are appropriately funded, trained and staffed. This includes all workforces interacting with children across youth justice systems.

Why it's important



It is well established that trusting and consistent relationships with workers are a key factor in engaging and supporting children and young people.¹ Research indicates that youth justice workers who have good relationship skills and form a 'therapeutic alliance' with the young people with whom they work can have a positive effect on the recidivism rates of those children and young people.¹ This approach is consistent with child rights principles, including the right to participation and the best interests of the child.²



While there is some good practice that is occurring in pockets across certain jurisdictions, there's currently a lack of understanding of the unique circumstances, experiences and vulnerabilities of children and young people in youth justice across all workforces who interact with these cohorts and youth justice systems as a whole. Specialist training accompanied by supportive structures and systems can ensure that workforces are equipped to respond to the unique circumstances of children and young people and embed a trauma-informed, culturally safe and child rights approach in their practice.



Child rights can be undermined in practice due to insufficient staffing, employee training and funding.³ Inconsistent staffing, shift changes, poor structure and lack of support all contribute to these challenges and need to be addressed. The challenges of the youth justice workforce are complex and require a systematic response that encompasses ongoing coaching, support and professional development, with the right systems in place, to complement specialist training on trauma-informed care.

What it looks like

1

Specialist training on children and young people and providing trauma-informed care is provided to all workforces who interact with the youth justice system. Specialist training on cultural safety, including for Aboriginal and Torres Strait Islander people and culturally and linguistically diverse communities, should also be provided.

2

Workforces are adequately staffed, trained and funded to ensure policy and legislation that supports a child rights approach can be implemented in practice. This includes structures and systems to enable ongoing coaching and supervision, support and professional development for workforces.

3

Ensure a strengths-focused model of care across youth justice that enables good relationships and therapeutic alliances between children and young people and youth justice workers.

Chapter 6

How to take this forward

Chapter at a glance

This chapter provides an overview of the landscape of the youth justice system in Australia today and why it is ready for reform, noting the momentum building across jurisdictions and the case for national reform in priority areas to more effectively align systems and practice with a child rights approach.



Overall, youth justice systems across Australia have increasingly focused on addressing perceptions of what is required for community safety through punitive responses over the past 10 years. At the expense of evidence and policy principles, this focus has led to restrictions on child rights and had a range of other perverse impacts. While there's been a shift in some jurisdictions towards more evidence-based and age-appropriate responses in recent times, there's much more that can be done to build better and stronger child rights compliant systems.



There's currently momentum and a convergence of significant youth justice strategic reform approaches across states and territories in Australia, and a strengthened political and social imperative to improve outcomes across the system. This offers a platform to drive transformational improvements across the system and bring together all parts of the system to address issues of concern for wellbeing and justice.



There is opportunity and the need for Australian Government involvement and a coordinated national approach to youth justice reform. This is because Australia's international human rights obligations call for a national approach, there are significant opportunities for jurisdictions to collaborate or learn from each other to improve justice outcomes and rights compliance, and the Australian Government is responsible for many of the policy, services and investment levers required for true system reform.



While there are many areas across youth justice that are ready for reform, youth justice standards, increasing the age of criminal responsibility and oversight of youth detention facilities should be key priorities. These are, on our assessment, where the most egregious child rights breaches are, align with the evidence for building better practice and can be aligned with key government priorities.

Chapter structure

- 1 The Australian youth justice landscape today
- 2 Momentum towards a rights respecting approach
- 3 Priority reforms for jurisdictions to move towards a child rights approach
- 4 Rationale for national reform
- 5 Priority national reforms to align with a child rights approach

The Australian youth justice landscape today

While there's been a shift in some jurisdictions towards more evidence-based and age-appropriate responses in recent times, there's more that can be done to build better and stronger child rights compliant systems.

Youth justice systems across Australia have increasingly focused on pursuing community safety through punitive responses in recent years

As explored in earlier chapters of this report, there's been a trend over the past 10 years in Australia towards youth justice policies and practices that favour punitive responses and security over diversion and rehabilitation.

Each jurisdiction has pursued this agenda differently, however, trends have included:

- Introducing increased powers for police
- Restricting the use of diversionary practices
- Introducing punitive bail and sentencing reforms that restrict judicial decision-making power to consider the best interests of the child
- Using adult prisons, adult custodial staff and police watch houses to house and manage children and young people
- Increased use of isolation, separation and lockdown in youth detention facilities and other punitive custodial operating practices
- A shift in focus from the best interests of the child to a focus on safe environments and security for staff.

These approaches have not led to better outcomes for children and young people, and across the system

While these measures have been introduced with the intention of improving community safety and reducing offending, in practice they appear to be contributing to increased recidivism.¹

They have also had a range of other perverse impacts, for example:

- Contributing to disproportionate rates of imprisonment relative to the population and crime rates
- Significantly increasing fiscal pressures across the systems and resulting in redirection of spending away from diversion and early intervention to infrastructure and security
- Eroding child rights, which entrenches disadvantage and inequality.

There's been a shift across some jurisdictions towards evidence-based practice, but more needs to be done

There's been a renewed focus across some Australian jurisdictions towards evidence-based and age-appropriate responses to youth offending and heightened public awareness of the importance of child rights.

Community safety and child rights are not binary concepts. In fact, evidence and research tells us that measures supporting child rights are the most effective way to improve community safety, community safety is improved, and recidivism is reduced in the long-term when rights respecting approaches are supported.

There is a false dichotomy between the two, and there's a need for Governments to acknowledge and adopt this in policy and practice.

Momentum towards a rights respecting approach

There's currently a convergence of youth justice strategic reform across states and territories, and a strengthened political and social imperative to improve outcomes across the system. This offers a platform to drive transformational improvements across the system and bring together all parts to address issues of concern for wellbeing and justice.



Revisiting youth justice strategies

Several jurisdictions are redesigning their youth justice strategies, with promising signs of emphasis on evidence-based policy and standards that reflect modern principles and human rights in some jurisdictions. This includes New South Wales, Victoria and Tasmania.



Revisiting the age of criminal responsibility

A national working group made up of representatives and delegates of all Attorney Generals has been considering raising the age of criminal responsibility since 2019. The NT has increased the minimum age of criminal responsibility to 12, the ACT has committed to raising the age to 14 by 2026, Tasmania has committed to raising the minimum age of detention to 14 and in early 2023 the Victorian Premier publicly indicated that Victoria 'would go at it alone' if national consensus wasn't reached over the coming months.



Increased public interest and awareness

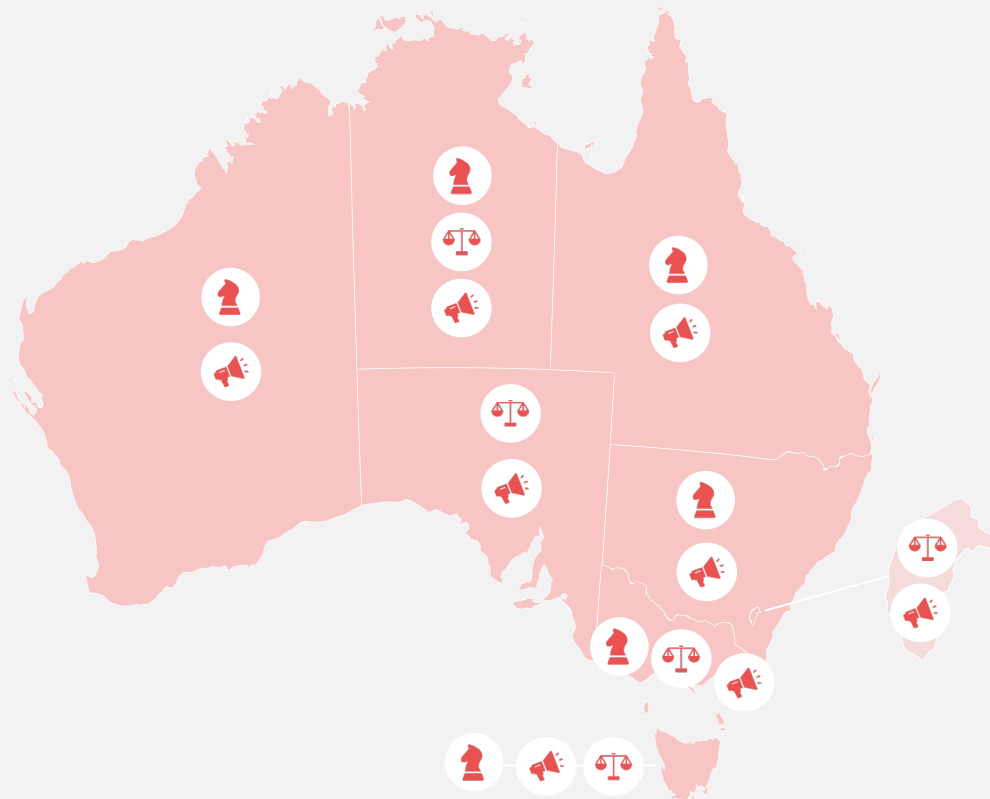
There's been heightened public awareness of issues around child rights in youth justice, including raising the age of criminal responsibility, in recent years. There's been increasing momentum from high-profile figures (including politicians and members of the judiciary), and increased connection and advocacy from the community sector in using its platforms to amplify the voices of children and young people to drive change. Aboriginal and Torres Strait Islander voices have continued to lead, as they have for many years.



Areas of national interest

There's been increased national momentum to improve justice policy outcomes and Aboriginal and Torres Strait Islander overrepresentation across the system. This has included national funding for justice reinvestment initiatives and a commitment for a referendum on a Voice to Parliament at the federal level.

Youth justice activity across Australia



Priority reforms for jurisdictions to move towards a child rights approach

There are six priority reforms that should be pursued across all Australian jurisdictions. In some jurisdictions, there is already momentum building towards some of these reforms, but more needs to be done.



Raising the age of criminal responsibility with effective alternatives

Raising the minimum age of criminal responsibility to at least 14 would bring jurisdictions in Australia in line with international standards and current medical and other evidence.

In raising the age, there is the opportunity to divert children and young people aged 10-14 from the justice system and provide support services in the community.

In order to provide effective alternatives to entering the criminal justice system, systematic and evidence based investment is required by jurisdictions alongside any reforms to raise the age of criminal responsibility.



Increasing access and availability of diversion programs

Diversion programs, particularly those targeted at children and young people before they are charged with offences, are significantly underfunded by states and territories in comparison to investment in custodial facilities.

Increasing access to and availability of these programs should be considered alongside any reforms to raise the minimum age of criminal responsibility. They should focus on developing tailored programs for, and ensuring widely available access to, programs for over-represented cohorts including Aboriginal and Torres Strait Islanders, CALD communities and 'crossover' cohorts such as with child protection.



Investing in and evaluating early intervention programs

Investment across jurisdictions in early intervention programs is critical to address the root causes of offending. This includes justice reinvestment programs that can intersect with other government priorities (e.g. mental health, drug and alcohol), working in coordination with families and communities to support children and young people. Education can also act as a protective factor for children and young people.

There is evidence that these programs work, but they are rarely evaluated. Jurisdictions should invest in evaluations of programs to support business case development or expansion of programs.



Reviewing restrictive bail laws and funding additional bail support programs

Restrictive bail laws have significantly increased youth justice remand populations across Australia. Often these practices are introduced without consideration of child rights impacts (or while acknowledging they are inconsistent with child rights).

All jurisdictions should undertake a review of their bail practices to consider their impacts on child rights, Aboriginal and Torres Strait Islander outcomes, community safety and flow on costs across the system.

Additional investment should also be made in intensive bail and support programs to ensure children and young people are able to access bail when the legislation allows for it.



Improving detention practices

There has been significant media attention and public scrutiny of conditions in youth detention across all Australian jurisdictions in recent years.

There is a need for all jurisdictions to move towards a child rights approach to detention practices given these are where many of the most egregious breaches are.

These include limiting the use of adult custodial facilities, the use of police watch houses to detain children and young people and the use of isolation and force.

Detention practices could be included in national standards, as outlined on p. 69, and should be monitored through implementation of OPCAT.



Implementing workforce reform

Youth justice has been negatively impacted by the lack of enthusiasm amongst youth workers for professionalisation and systematic underinvestment in workforces.

As a result, there is currently a gap in specialist expertise across youth justice systems in Australia and providing therapeutic care to children and young people.

Workforce planning and specialist training should be prioritised across jurisdictions, and should be considered as part of upcoming EBA negotiations as a mechanism to catalyse reform.

Rationale for national reform

There is opportunity and necessity for a national approach to youth justice reform. There are opportunities for the Australian Government to take a leadership and stewardship role to support collaboration and improved outcomes across jurisdictions while moving towards meeting Australia's human rights obligations.



Australia consistently fails to meet its human rights obligations

As highlighted in this report, youth justice policy and practices across Australian jurisdictions frequently do not fully comply with Australia's human rights obligations.

For example, the CRC has noted that Australia's youth justice systems 'still require substantial reforms to conform to international standards'.¹ Australia's youth justice systems were a major focus of recommendations for reform made by other UN member states in Australia's Universal Periodic Review in 2021, including raising the minimum age of criminal responsibility. In October 2022, the United Nations Subcommittee on the Prevention of Torture suspended its visit to Australia due to obstructions it encountered in carrying out its OPCAT mandate, and in February 2023 terminated its visit.²

In practice, states and territories have significant discretion in whether to incorporate human rights obligations into youth justice legislation, policies and practice. There is an opportunity for the Commonwealth to take a more proactive stewardship role in how human rights and treaty obligations can be implemented in practice.



True system reform requires Australian Government involvement

To fundamentally shift youth justice systems' orientation towards prevention and early intervention, a coordinated service response and focus on underlying causes of involvement with youth justice is required.

The Australian Government is directly responsible - either wholly, or jointly with states and territories - for a number of key policy levers that are required to enable such a shift. This includes services and systems across income support and social services, social and affordable housing, mental health, domestic and family violence, education, Aboriginal and Torres Strait Islander communities and outcomes, and others.

As such, the Australian Government has a unique role and responsibility to work closely with states and territories to prevent youth justice involvement along with other 'downstream' harms that arise when root causes at the individual, family and community level are not addressed.



There are opportunities to learn and collaborate

Most jurisdictions have an in-principle commitment to supporting child rights, at least in part. The ACT, Victoria and Queensland have also introduced their own human rights charters and frameworks.

Youth justice policies are implemented in a complex operating environment, which is often where jurisdictions fall down in complying with child rights.

There's a need to share best practice and ways of ensuring child rights are prioritised and respected within the complex operating environment of youth justice.

The Australian Government can support youth justice improvement by facilitating discussion between States and Territories. These facilitations can help individual jurisdictions improve their youth justice outcomes, and create a national approach.

In some cases there are opportunities for co-investment between the Australian and State and Territory Governments to improve outcomes in specific geographic areas and communities.

Priority national reforms to align with a child rights approach part 1

While there are many areas across youth justice that are ripe for reform, youth justice standards, increasing the age of criminal responsibility and oversight of youth detention facilities should be a priority for national reform. We have identified these priorities given they are, on our assessment, where the most egregious child rights breaches are and align with government priorities.

Criteria

Egregiousness of breach

Seriousness of the breach and how widespread it is across jurisdictions.

Opportunity for reform

Alignment with government priorities and directions.

Level of availability and consensus in non-government expertise on the issue.

Amenability to change

Practicability for government to make the change.

These priorities could be taken forward by a national youth justice taskforce, with representation from all jurisdictions. This would promote national leadership and ensure collaboration across jurisdictions.



National youth justice standards

There are currently national standards developed by the Australian Youth Justice Administrators, as well as a statement on treatment and conditions in youth justice detention developed by Australian Children's Commissioners and Guardians.¹

While these documents provide a good starting point, they are currently non-enforceable and non-binding standards and guidance material. It is unclear to what extent they are currently implemented in practice by states and territories and the reported practices in youth detention centres suggest that they have been insufficient to ensure appropriate practices.

There's an opportunity to build on these to develop revised national standards that draw on international best practice and are more comprehensive and have greater force, potentially through uniform law and intergovernmental agreement and/or other mechanisms. These could be co-designed with jurisdictions, community organisations, Aboriginal communities and those with lived experience of places of detention.



National approach to minimum age of criminal responsibility

Increasing the age of criminal responsibility to at least 14 must be a key priority for Australian governments, given the significant impact it has on justice, social outcomes and children's rights.

A national approach makes sense, given:

- It is an issue all jurisdictions are grappling with
- There is an opportunity for the Australian Government to play a coordinating role
- There are opportunities for coordinated system design and investment in effective alternatives to criminalisation for children aged 10 to 13 involving the Australian Government.

Importantly, a national approach should not preclude individual states and territories moving more rapidly to raise the age to at least 14, with no exceptions, and supported by appropriate service system reforms.



Oversight of youth detention facilities

Some of the most egregious breaches of child rights happen in youth detention. Oversight of youth detention is an important safeguard in ensuring that child rights standards are complied with. Australia has attempted to improve this in theory by ratifying OPCAT, but has not done this in practice by missing its extended compliance deadline in January 2023.

To date, the Australian Government has not taken an active role in implementation of OPCAT. There are opportunities going forward for more active national leadership given the Australian Government's overall responsibility for compliance with child rights obligations and ensuring positive child outcomes, the complexity of the reforms, their relevance across multiple portfolios beyond youth justice, the potential to leverage shared learnings and the imminent risk to Australia of embarrassment on the global stage before the UN if it continues to fail to adhere to its OPCAT obligations.

Children and young people's participation should be embedded in oversight arrangements.

Priority national reforms to align with a child rights approach part 2

While there are many areas across youth justice that are ripe for reform, youth justice standards, increasing the age of criminal responsibility and oversight of youth detention facilities should be a priority for national reform. We have identified these priorities given they are, on our assessment, where the most egregious child rights breaches are and align with government priorities.

Criteria

Egregiousness of breach

Seriousness of the breach and how widespread it is across jurisdictions.

Opportunity for reform

Alignment with government priorities and directions.

Level of availability and consensus in non-government expertise on the issue.

Amenability to change

Practicability for government to make the change.

These priorities could be taken forward by a national youth justice taskforce, with representation from all jurisdictions. This would promote national leadership and ensure collaboration across jurisdictions.



Legislated human rights protections

There is currently no federal human rights act and corresponding human rights protections in every state and territory. Legislated human rights protections would help Australia build a culture of respect for the human rights of people in all contexts and support key commitments and priorities including in relation to closing the gap and racial injustice.

Legislative requirements also have the positive effect of requiring capacity and competence-building across levels of government.

For example, in the ACT, Queensland and Victoria, where human rights acts do exist, these laws have been observed to provide numerous benefits, including improved policy making, improving service delivery and addressing disadvantage.



Ratifying the 3rd optional protocol to the CRC²

The 3rd optional protocol to the CRC allows children to bring complaints directly to the UN Committee on the Rights of the Child. Currently, Australia has signed, but not ratified the 3rd optional protocol, which means that it is not operative in Australia.

Australia should ratify the optional protocol to provide an additional avenue of appeal for children and young people, in line with human rights expectations.

States and territories are required to address rights violations in their national justice systems. However, these systems do not always provide adequate solutions. When rights are not sufficiently protected at the national level, it is critical that there be a system to turn to at the international level in order to address violations.



Withdrawing Australia's reservation to Article 37(c) of the CRC³

Australia continues to have a reservation to article 37(c) of the CRC, which requires that children and young people not be detained with adults.

Australia has previously defended the reservation to article 37(c), claiming that Australia's geography and demography make it difficult to always detain children in juvenile facilities and simultaneously allow children and young people to maintain contact with their families.

However, the UN Committee on the Rights of the Child in its 2005 Concluding Observations, pointed out that the Australian Government's concerns are taken into account by article 37(c), which states that incarceration with adults is prohibited unless it is considered in the child's best interests not to do so and also that a child shall have the right to maintain contact with his or her family. The Committee reiterated this point in its subsequent Concluding Observations in 2012 and 2019.

Appendix 1

Key terms used in this report

Key terms used in this report

Term	Definition
Aboriginal and Torres Strait Islander	54 reasons recognises the diversity of Aboriginal and Torres Strait Islander people living across Australia. The term 'Aboriginal and Torres Strait Islander' in this report refers to Aboriginal and Torres Strait Islander peoples from across Australia. 'Indigenous' is retained when it is part of the title of a program, report or quotation.
Age of criminal responsibility	The age at which a child is legally deemed to be capable of committing a criminal offence and may be subjected to criminal legal processes such as being charged (see also ' <i>doli incapax</i> ').
Arrest	The act of apprehending and taking into custody a person suspected of committing an offence.
Bail	A decision to allow a person charged with an offence to remain at liberty pending the finalisation of criminal proceedings, on the condition that the person return to court at a specified time.
Caution	A formal warning given by police to a child as an alternative to prosecution.
Charge/charged	A person is charged with a criminal offence when a police officer provides them with a document (also known as a 'charge') that details an alleged offence by that person.
Child	A person under the age of 18 years. In this report we also refer to 'children and young people' under the age of 18 years.
Contact with the justice system	A person who has had contact with the justice system, including with police, courts, youth justice detention and parole.
Crossover child	In this report, a child with involvement in both the youth justice system and the child protection system.
Cultural safety	A principle to ensure that an environment is welcoming, safe and respectful of a person's culture and identity.
<i>Doli incapax</i>	A legal presumption that children aged 10 to 13 years lack sufficient intellectual and moral development to be held criminally responsible. In order to rebut the presumption, the prosecution must prove that at the time of the alleged offence, the child knew that their actions were 'seriously wrong'.

Key terms used in this report

Term	Definition
Out-of-home care	Out-of-home care is a temporary, medium- or long-term living arrangement for children and young people who cannot live in their family home. This most commonly refers to statutory out-of-home care, where a child or young person cannot live with their family at home and a legal order is in place to support the arrangement. Statutory out-of-home care consists of kinship care, foster care, residential care and lead tenant arrangements.
Parole	A process allowing a child or young person sentenced to youth justice custody to serve part of their sentence in the community under supervision.
Proceeded against by police	Police proceed with formal charges against a child or young person by providing them with a document (also known in some jurisdictions as a charge) that details an alleged offence by a young person.
Remand	A decision to hold a person in custody pending the finalisation of criminal proceedings against them, rather than releasing them on bail. This term also refers to a category of custody (sometimes described as 'unsentenced detention'), and is used in contrast to sentenced detention.
Summons	A notice indicating when a person must go to court in relation to alleged criminal conduct by the person.
Youth justice supervision	A child or young person is subject to youth justice supervision when they have received a supervised community-based order or detention sentence from a court.

Appendix 2

Child rights in international and domestic law



Save the Children

54 reasons

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International treaties


















Australia has ratified seven major human rights treaties that include child rights. The leading child rights treaty is the Convention on the Rights of the Child, which requires government to ensure the best interests of the child in all actions, including youth justice.

Australia has ratified **7 major human rights treaties** relating to child rights. These treaties cover the following areas:

-  Civil and political rights
-  Economic, social and cultural rights
-  The rights of the child
-  Racial discrimination
-  Discrimination against women
-  Rights of persons with disabilities
-  Torture, cruel, inhuman or degrading treatment

Of these treaties, the *Convention on the Rights of the Child* provides specific guidance on child rights.

The *Convention on the Rights of the Child (CRC)* provides that the **best interests of the child must be a primary consideration** in all actions concerning children (Art 3), including children in the youth justice system. The CRC requires governments to ensure, among other things, the following:

-  Every child enjoys their rights in the CRC without discrimination of any kind (Art 2).
-  Every child has the right to life, survival and development (Art 6).
-  Every child has the right to be heard and to participate in decisions that affect them (Art 12).
-  No child is subjected to arbitrary or unlawful interference with their privacy (Art 16).
-  Children and young people are protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation (Art 19).
-  A child deprived of their family environment is entitled to special protection and assistance provided by the government (Art 20(1)).
-  No child is subjected to torture or other cruel, inhuman or degrading treatment or punishment (Art 37(a)).
-  No child is deprived of their liberty unlawfully or arbitrarily, and detention of a child is only used as a measure of last resort and for the shortest appropriate period of time (Art 37(b)).
-  Every child deprived of their liberty is treated with humanity and respect for their inherent dignity, and in a manner that takes into account the needs of people their age (Art 37(c)).
-  Every child deprived of their liberty is separated from adults unless it is in the child's best interests not to do so, and has the right to maintain contact with their family through correspondence and visits, save in exceptional circumstances (Art 37(c)).
-  Every child deprived of their liberty has the right to prompt access to legal and other appropriate assistance, and the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision (Art 37(d)).
-  All appropriate measures are taken to promote the physical and psychological recovery and social reintegration of a child victim of neglect, exploitation, abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment (Art 39).
-  Every child accused or convicted of a crime is treated in a manner consistent with the child's sense of dignity and self-worth, which reinforces the child's respect for human rights and takes into account their age and the desirability of promoting their reintegration into society (Art 40(1)).
-  Every child is guaranteed fair treatment and trial, including a number of minimum standards to guarantee this (Art 40(2)).
-  A minimum age of criminal responsibility is established (Art 40(3)(a)).
-  Whenever appropriate and desirable, measures for dealing with children and young people without resorting to judicial proceedings are promoted (Art 40(3)(b)).
-  A variety of dispositions and alternatives to institutional care are available to ensure that children and young people are dealt with in a manner appropriate to their wellbeing and proportionate to their circumstances and the offence (Art 40(4)).



Rights that **complement** these provisions are also found in the following treaties:

- *Convention on the Elimination of All Forms of Racial Discrimination*
- *Convention on the Elimination of All Forms of Discrimination Against Women*
- *International Covenant on Economic, Social and Cultural Rights*

International treaties




The ICCPR, CAT and CRPD support child rights by preventing poor treatment or requiring equal treatment for different cohorts of children.

The **International Covenant on Civil and Political Rights (ICCPR)** provides for the following child rights:¹

-  the right to non-discrimination
-  the right to life and to physical and moral integrity
-  no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment
-  all persons deprived of their liberty shall be treated with humanity and respect for their dignity
-  accused juveniles must be separated from adults and have their matter adjudicated as quickly as possible
-  juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status

Relevant Articles include 2, 6-8, 7, 10(1), 10(2)(b), 10(3).

The **Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)** provides the following child rights:²

-  prohibit acts of torture, cruel, inhuman or degrading treatment or punishment carried out by public officials on behalf of a state or territory
-  requires that all public officials, including those in detention settings, be provided with education and training about this prohibition and systematic review of arrangements to prevent torture in detention
-  requires prompt investigation of allegations of torture, access to a complaint mechanism and investigation of complaints, and access to remedies for breaches

The **Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (OPCAT)** aims to prevent torture and other treatment or punishment by assisting implementation.

Relevant Articles in CAT include 2-4, 10-16

The **Convention on the Rights of Persons with Disabilities (CRPD)** is relevant, given the large proportion of children and young people in youth justice detention have a physical or intellectual disability or mental health problems. The CRPD requires governments to:³

-  ensure children and young people with disabilities enjoy their human rights on an equal basis with other children
-  take measures to combat harmful practices and prejudices about children and young people with disabilities
-  put in place child-focused measures to identify, investigate and prosecute the exploitation of children and young people with disabilities
-  ensure that the best interests of children with disabilities are paramount in all cases
-  ensure children and young people with disabilities are not excluded from the education system

International treaties

A number of other international treaties are also relevant to child rights in a youth justice context.

The **Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)** provides for the following child rights:



Men and women have a common responsibility in the development of their children and young people and the interest of the child is the primordial consideration in all cases.

The **Committee on the Elimination of Racial Discrimination (CERD)** provides the following child rights:



States undertake to engage in no act or practice of racial discrimination against persons, groups of persons or institutions to ensure that all public authorities and public institutions, national and local, act in conformity.



Effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.



Equal treatment before the tribunals and all other organs administering justice. Right to security of person and protection by the State against the violence or bodily harm

The **International Covenant on Economic, Social and Cultural Rights (ICESCR)** provides the following child rights:



Widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and the education of dependent children. Marriage must be entered into with the free consent of the intending spouses.



Special measures of protection and assistance should be taken on behalf of all children and young people without any discrimination for reasons of parentage or other conditions.










Right to education and enjoyment of the highest attainable standard of physical and mental health

International guidelines, principles or rules

In addition to international treaties, there are international guidelines, principles and rules that set out minimum standards for the treatment of children and young people involved in the criminal justice system.

There are several international guidelines, principles, declarations or rules that set out minimum standards for the treatment of children and young people involved in the criminal justice system and affirm their human rights in such situations.

The most important among these are the following:

-  *Standard Minimum Rules for the Administration of Juvenile Justice 1986 (Beijing Rules)*
-  *Rules for the Protection of Juveniles Deprived of their Liberty 1990 (Havana Rules)*
-  *Guidelines for the Prevention of Juvenile Delinquency 1990 (Riyadh Guidelines)*
-  *Guidelines for Action on Children in the Criminal Justice System (1997) (Vienna Guidelines)*
-  *Standard Minimum Rules for the Treatment of Prisoners 1955 (as revised and adopted in 2015 as the Mandela Rules)*
-  *Body of Principles for the Protection of all Persons under Any Form of Detention (1988)*
-  *United Nations Declaration on the Rights of Indigenous Peoples*

There are also interpretive documents provided by UN human rights treaty committees that provide clarification on the scope and meaning of the standards in these treaties.

Relevant General Comments of these committees include (among others):

-  **UN Committee on the Rights of the Child:** General Comment 24 – Children's Rights in the Child Justice System
-  **UN Committee Against Torture:** General Comment 2 – Implementation of Article 2
-  **UN Human Rights Committee:** General Comment 21 – Humane treatment of people deprived of their liberty
-  **UN Human Rights Committee:** General Comment 20 – Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment, Article 7

These instruments apply to *all* children and young people, including those who have not been convicted or sentenced. Children and young people who have not been convicted should generally be detained separately from children and young people who have been convicted and sentenced.

Australian instruments

There are Australian minimum standards for youth justice set by the Australasian Juvenile Justice Administrators Standards.

In Australia, minimum standards for youth justice facilities are set by the **Australasian Juvenile Justice Administrators Standards (AJJA Standards)**.

These standards, which are based on the international instruments listed before, set out the minimum requirements for youth justice facilities. The AJJA Standards were extended with the development of the Principles of Youth Justice in Australia (AJJA Principles) endorsed in October 2014.

The collective body that developed the Standards and Principles is now known as the Australian Youth Justice Administrators.

The Principles are that:



offending behaviour is prevented and children and young people are diverted from the justice system



the youth justice system holds children and young people accountable for their behaviour



there is effective support to victims of youth offending



there are effective policy and service responses to address the overrepresentation of Aboriginal and Torres Strait Islander children and young people in the justice system



there is authentic collaboration across the service systems



service responses are evidence-based



the developmental needs of children and young people are addressed



interventions are informed by drivers of offending and the assessed risk of future offending



support to children and young people is individualised and reflects the diversity of culture and communities in which they live



the health and mental health needs of children and young people are addressed.

Appendix 3

Youth justice data

Appendix at a glance

This chapter provides key statistics about youth crime and contact with the youth justice system across Australia.



Youth crime rates in Australia have been steadily decreasing. In 2020-21, the youth crime rate dropped to the lowest rate since the time series began in 2008-09, though this rate has been influenced by COVID-19. The number of children and young people who come into contact with the youth justice system make up a very small proportion of the overall population. In recent years, there has been a reduction in the number of children and young people who have come into contact with youth justice and who are in youth detention across Australian jurisdictions.



While the overall rate of children and young people who are in youth detention has decreased, the rate of children and young people who have not been sentenced continues to increase. The majority of children and young people in youth detention in Australia have not been sentenced. And although detention rates are declining overall, for certain cohorts such as Aboriginal and Torres Strait Islander people and girls, the decline is moving at a much slower rate or the rate is increasing.



The types of youth principal offences have changed over the time period. While the total number of offences have gone down, this is mainly driven by reductions in less serious offences such as theft. Supervision rates vary significantly between jurisdictions. The Northern Territory, Queensland, Western Australia and Tasmania have the highest rates of children and young people who are subject to a detention or community based youth justice order.



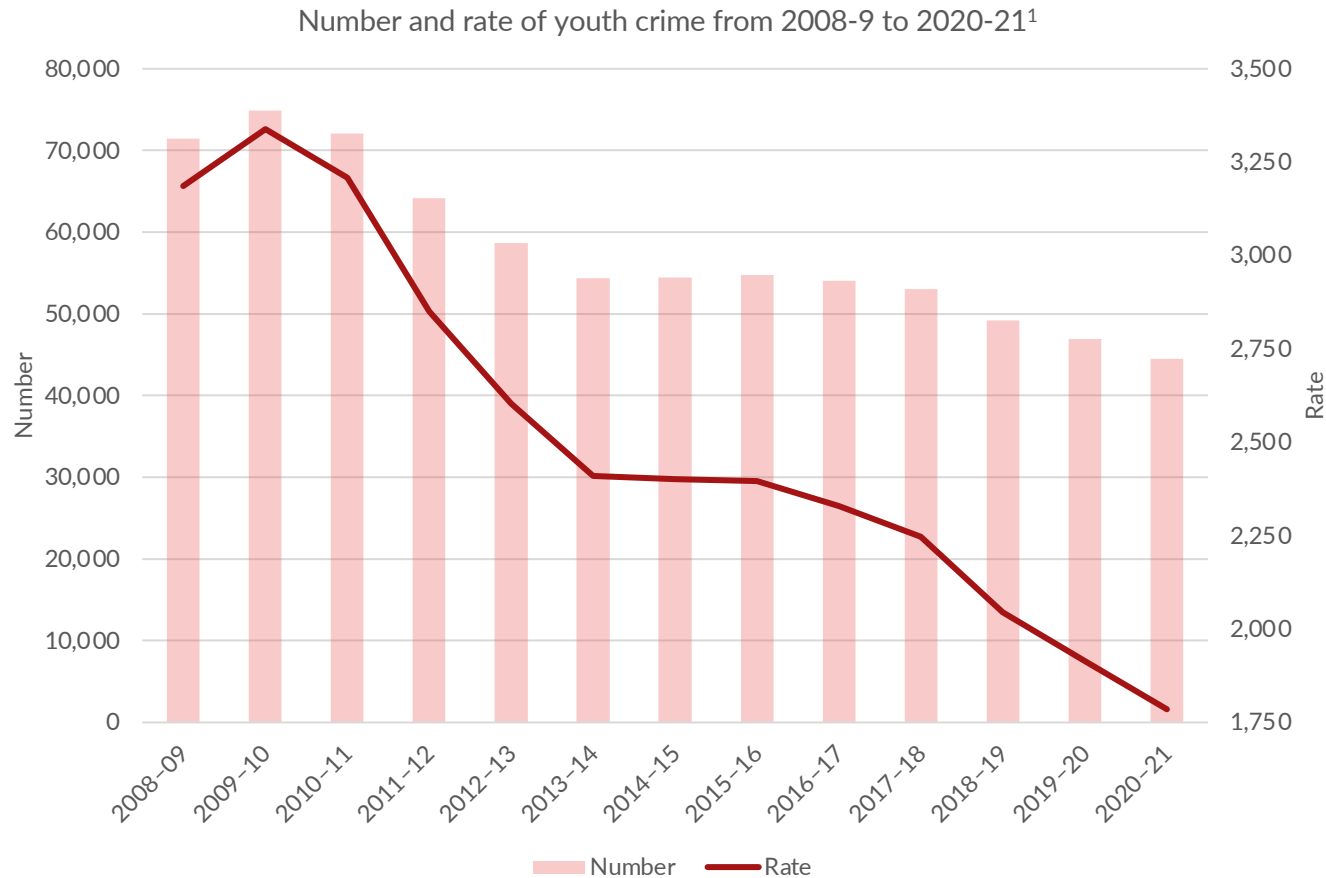
Despite decreasing supervision and crime rates, expenditure on youth justice has significantly increased in recent years.

Appendix structure

- 1 Youth crime rates
- 2 Children and young people who come into contact with youth justice in Australia
- 3 Children and young people in unsentenced detention
- 4 Detention rates by cohort
- 5 Types of offences
- 6 Supervision rates by jurisdiction
- 7 Expenditure on youth justice

Youth crime rates

Youth crime rates in Australia have been steadily decreasing. In 2020-21, the youth crime rate dropped to the lowest rate since the time series began in 2008-09, though this rate has been influenced by COVID-19.



Key insights



Total number of offenders

There were 44,496 offenders aged between 10 and 17 years proceeded against by police in 2020-21.



Rate of offending

There is a rate of 1,785 offenders per 100,000 persons aged between 10 and 17 years.



Total number of offenders

Both the number of offenders and the offender rate dropped to the lowest recorded in the time series.

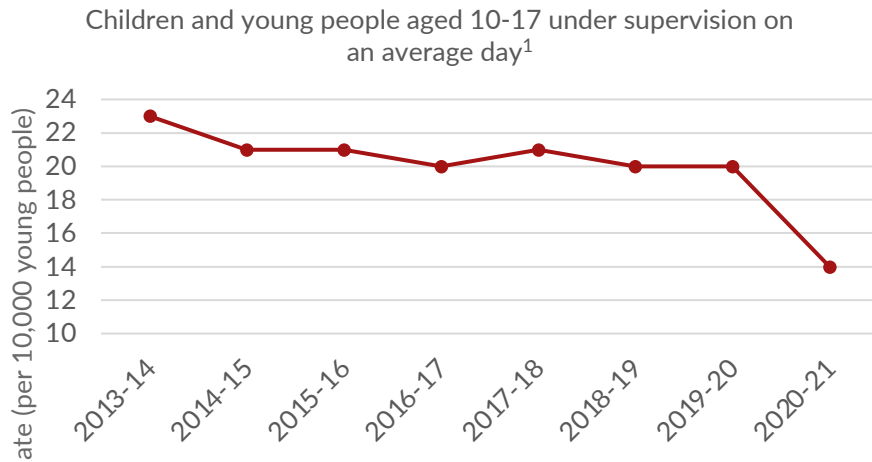
In response to the COVID-19 pandemic, state and territory governments introduced a suite of measures to minimise the risk of transmission. This ultimately led to an overall decline in the number of police proceedings during the period, as well as a decline in the remand and custodial sentences.

Children and young people who come into contact with youth justice in Australia

The number of children and young people who come into contact with the youth justice system make up a very small proportion of the overall population. In recent years, there has been a reduction in the number of children and young people who have come into contact with youth justice and who are in youth detention across Australian jurisdictions.

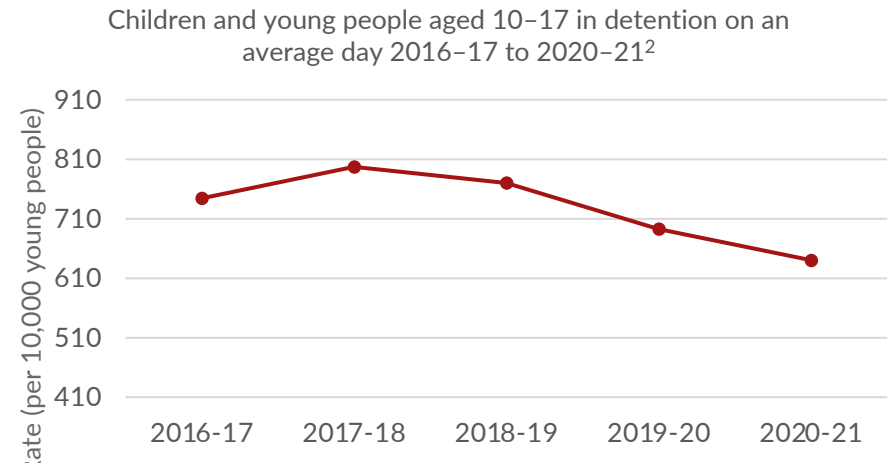
Key insights

Children in the youth justice system in Australia make up a very small portion of the overall population of children. In 2020-21, only 1.4% of the population were in contact with the youth justice system. In recent years, that number has steadily fallen.



Key insights

Smaller still is the population of children and young people in the youth justice system who are in detention, and that number has also fallen. In 2020-21, on an average day there were 640 children and young people in detention. This is down from the 743 children and young people who were in detention five years ago (2016-17).

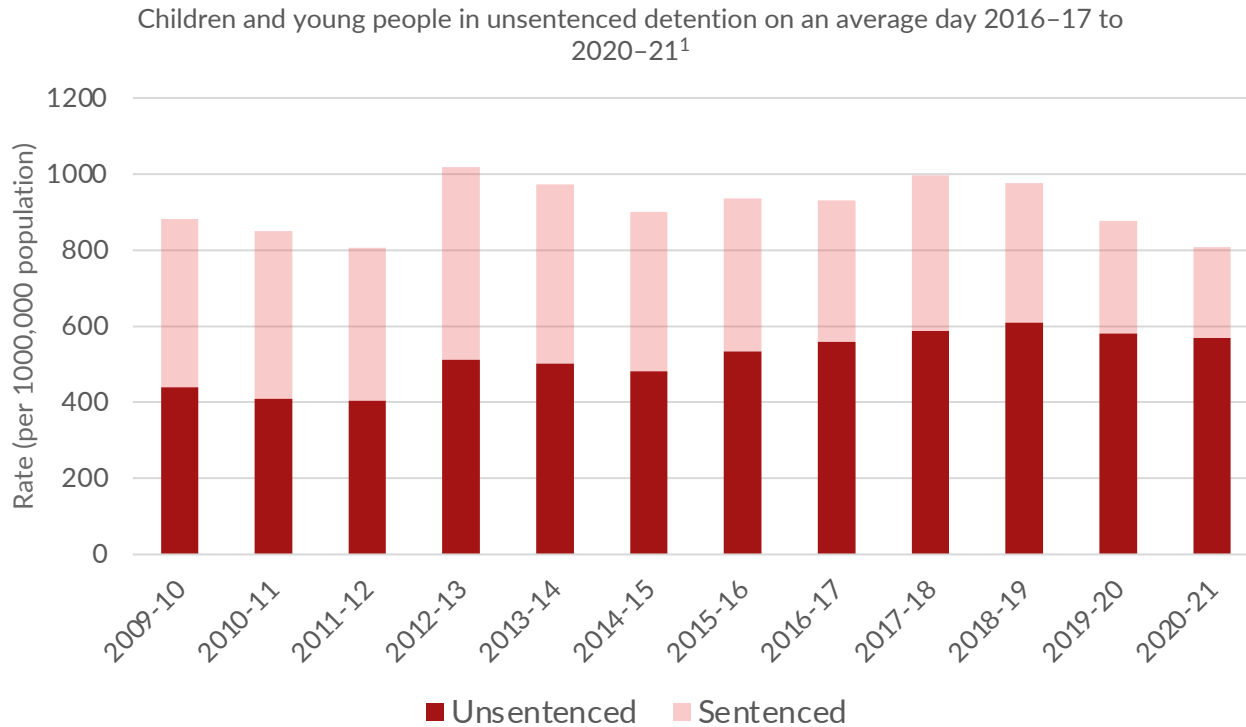


The direct impact of COVID-19 and related social restrictions on the number of young people in youth justice supervision is difficult to determine due to a range of factors including, variability of the data, variations in state-based legislation, policy and practice, small numbers of young people under supervision.



Children and young people in unsentenced detention

While the overall rate of children and young people who are in youth detention has decreased, the rate of children and young people who have not been sentenced continues to increase. The majority of children and young people in youth detention in Australia have not been sentenced.



Key insights




The majority of children and young people in youth detention have not been sentenced.



Australia-wide, on an average day in 2020-21, of all children and young people in detention, almost 3 in 4 were unsentenced (72 per cent).



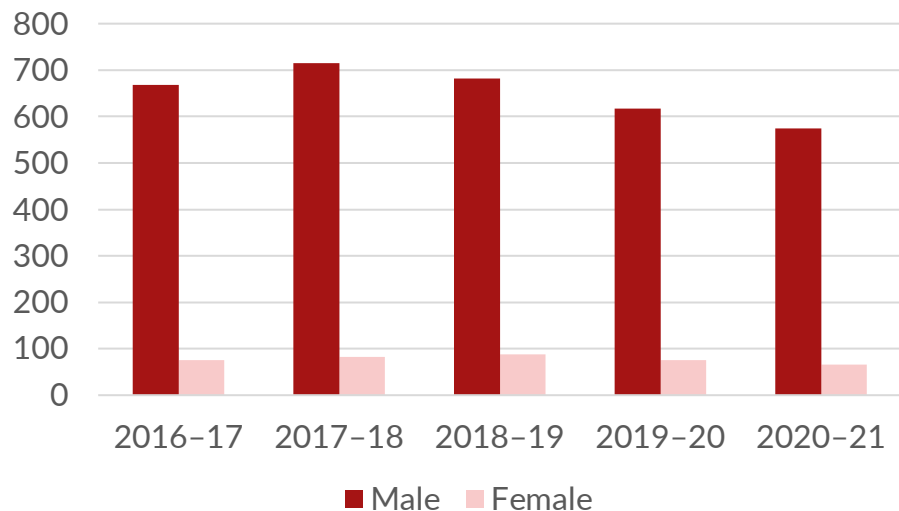
This has increased from 57 per cent in 2015-16.

 The direct impact of COVID-19 and related social restrictions on the number of children and young people in youth justice supervision is difficult to determine due to a range of factors including, variability of the data, variations in state-based legislation, policy and practice, small numbers of children and young people under supervision.

Detention rates by cohort

Detention rates are declining overall, but for certain cohorts such as Aboriginal and Torres Strait Islander people and girls, is moving at a much slower rate or is increasing.

Detention rates by gender on an average day 2016-17 to 2020-21¹



Key insights

The proportion of male children and young people is significantly higher than female children and young people.

This is consistent across the time periods and although detention rates are declining overall for this cohort, it is at a much slower rate for female children and young people than males.

Children and young people in detention by Aboriginal status on an average day 2016-17 to 2020-21²



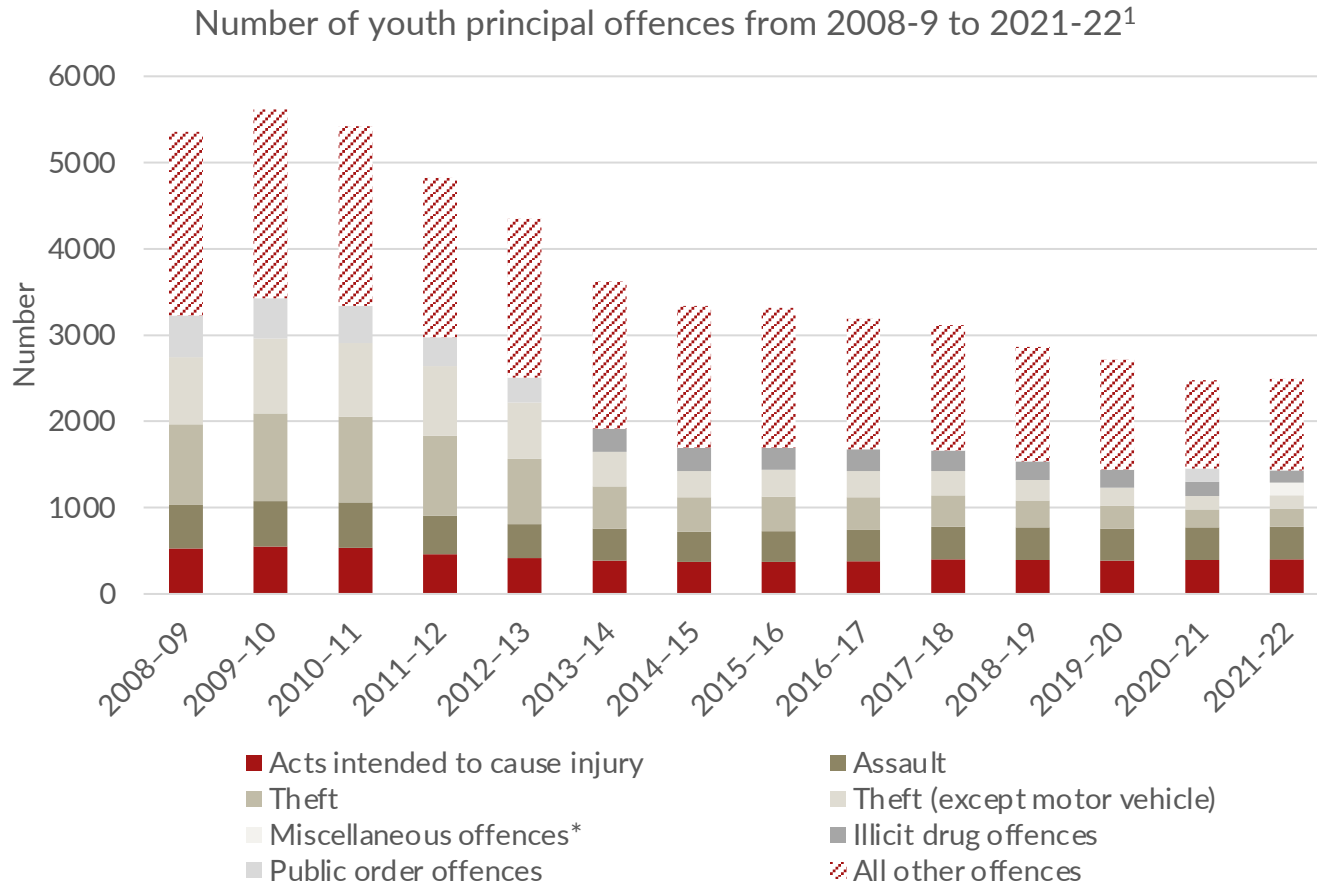
Key insights

Aboriginal and Torres Strait Islander children and young people are significantly overrepresented in youth justice detention compared to the general population.

The rate at which Aboriginal and Torres Strait Islander children and young people were incarcerated outnumbered non-Aboriginal and Torres Strait Islander children in detention and has continued to grow over the past 10 years.

Types of offences

The types of youth principal offences have changed over the time period. While the total number of offences have gone down, this is mainly driven by reductions in less serious offences such as theft.



Key insights



The most common offence across all time periods was Acts intended to cause injury.



There has been a decrease in Theft and Theft (except motor vehicle) principal offences from the beginning of the time period to present day.



There has been a reduction of illicit drug offences from 2013-14 onwards.



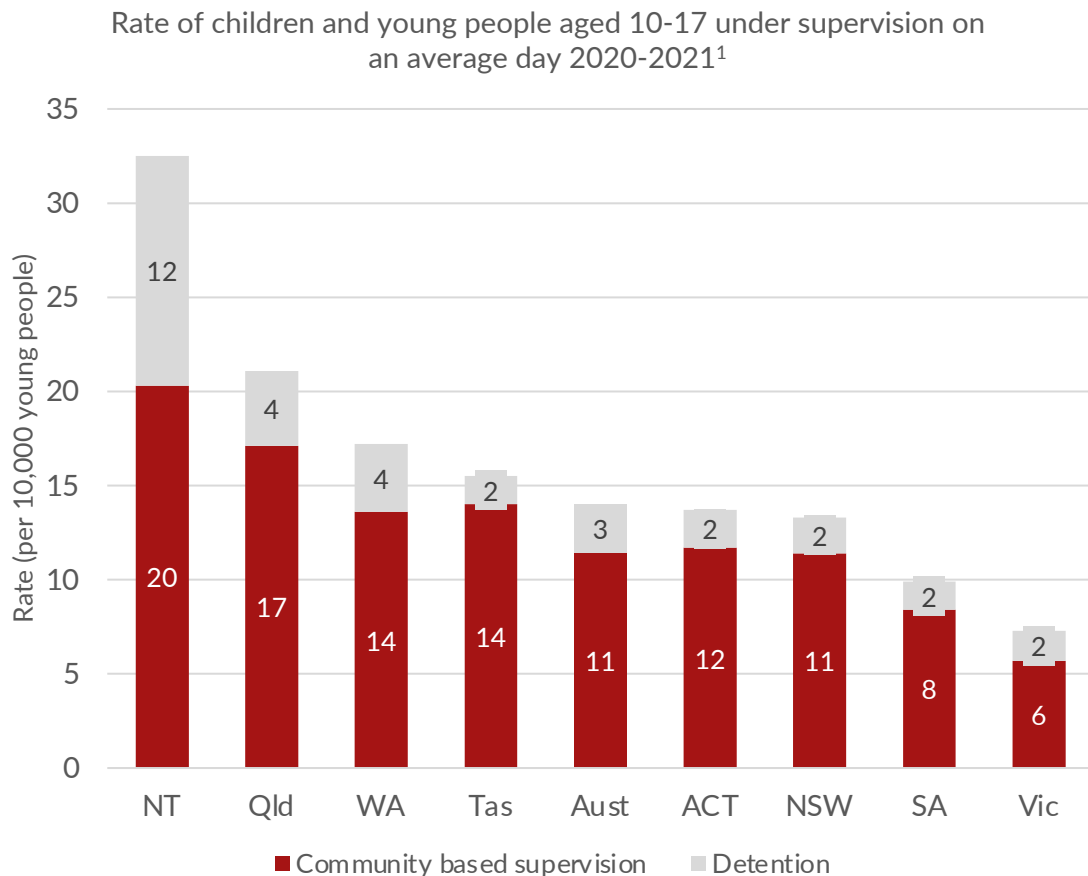
There has been a reduction in public order offences since 2013-14.

The graph shows the five most common principal offences for each year. All other principal offences are captured in 'all other offences'

*Miscellaneous offences in 2021-2022 were largely COVID-19 offences

Supervision rates by jurisdiction

Supervision rates vary significantly between jurisdictions. The Northern Territory, Queensland, Western Australia and Tasmania have the highest rates of children and young people who are subject to a detention or community based youth justice order.



Key insights

Overall supervision rates

- Northern Territory, Queensland and Western Australia and Tasmania have the highest rates of youth justice supervision in Australia.
- The majority of children and young people in youth justice are under community based supervision orders.



Community based supervision

- Northern Territory, Queensland and Tasmania have highest rates of community-based supervision.
- New South Wales, South Australia and Victoria have the lowest community-based supervision rates.



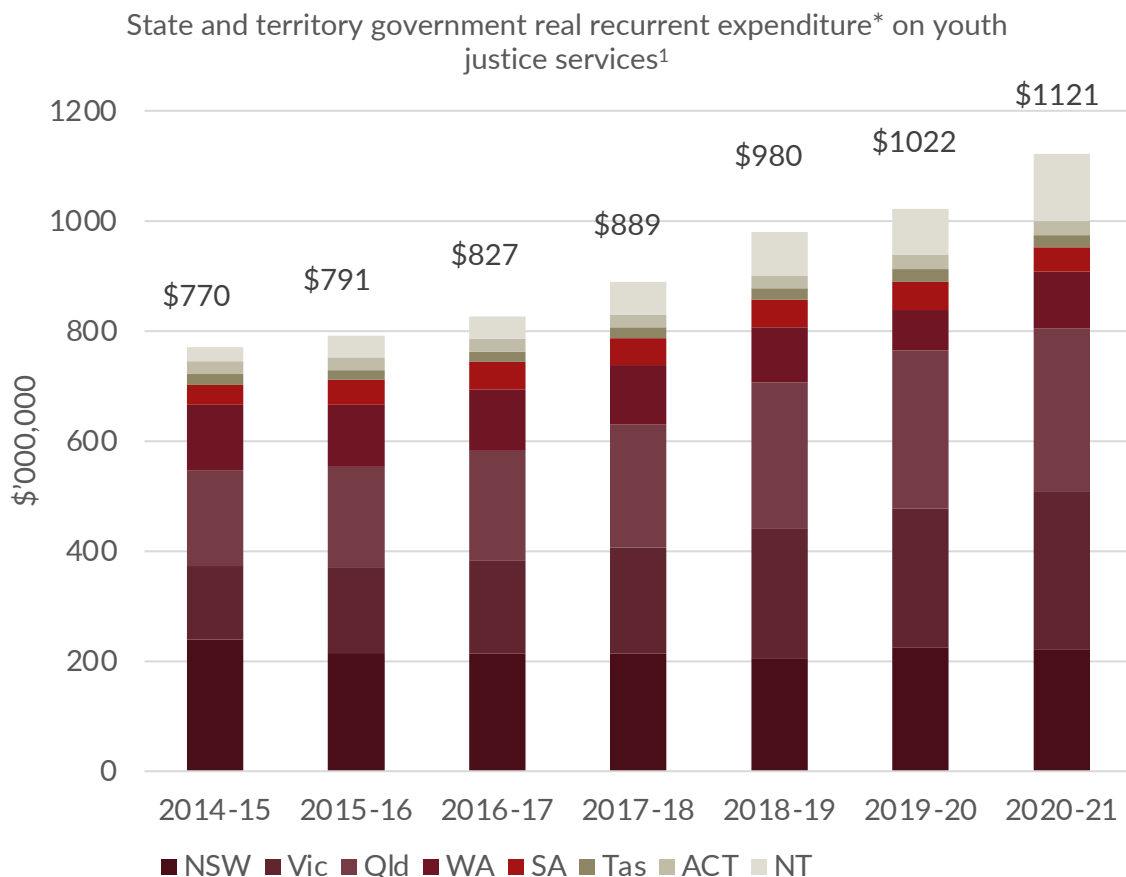
Detention

- Tasmania, South Australia and Victoria have the lowest detention rates in Australia.
- Northern Territory, Western Australia and Queensland have highest rates of detention.



Expenditure on youth justice

Despite decreasing supervision and crime rates, expenditure on youth justice has significantly increased in recent years.



Key insights



Expenditure has increased each year since 2014-15

- Real recurrent expenditure has increased by 46% since 2014-15.



NSW, Queensland and Victoria have the highest spending

- In 2020-2021, 72% of total expenditure comprised of:
 - 20% by New South Wales,
 - 26% by Queensland, and
 - 26% by Victoria.



Trends by jurisdiction

- Victoria and Queensland have increased expenditure every year since 2014-15.
- NT had significant increases each year:
 - 2015-16: increased by 55%
 - 2020-21: increased by 46%
- WA had decreased expenditure from 2015-2019, though increased by 40% in 2020-21.

Youth justice systems are administered by state governments which means there are some challenges in making direct comparisons across different states and territories



Save the Children

54 reasons

dandolopartners

*Real recurrent expenditure includes: detention-based services, community-based services and group conferencing.

Appendix 4

Jurisdictional comparison

How well do Australian jurisdictions align with child rights?


About the jurisdictional comparison


We have completed a high-level assessment of the extent to which each jurisdiction's approach is aligned with a child rights respecting approach across various aspects of the system (e.g. policing or bail) based on our understanding of current practice. This is designed to give an overview of the child rights environment across Australia, but there are some key limitations to our analysis.


This page explains how we have assessed each jurisdiction, and each aspect of the system, as either having high, medium or low alignment with a child rights respecting approach. It also sets out the major limitations to the analysis.

The jurisdictional comparison is available on p. 90.

Jurisdictional table coding explanation

 **Green** **High alignment:** Appears to comply with a good practice approach to child rights, however the approach may not be implemented comprehensively in all areas (for example, availability of programs may be limited in rural and remote areas).

 **Amber** **Medium alignment:** In theory complies with child rights respecting approach, at least in part. However, there is some evidence that in practice, child rights are being limited or undermined.

 **Red** **Low alignment:** An authoritative source, such as the UNCRC, the state or territory Commission for Children and Young People, the Australian Law Reform Commission or an expert in the field, has identified that child rights have been breached or undermined.



Limitations



Our assessments are based on publicly available information we were able to source through desktop research only.



Our assessments are made based on current practice only. There are some jurisdictions who have indicated they are considering, or outlined their intention to, introduce reforms in the future. These planned changes have not been taken into consideration for the purpose of this assessment.



Youth justice systems are subject to incremental and ongoing reform and therefore some of the information may now be out of date.



Some jurisdictions tend to have less publicly available information about their youth justice systems. This means that our analysis of these jurisdictions may be less accurate.



The content and our assessments have not been verified by external sources or stakeholder consultation.

How well do Australian jurisdictions align with child rights?

Rights respecting approach	ACT	NSW	NT	Qld	SA	Tas	Vic	WA
Policing								
Bail and remand								
Diversion								
Court processes								
Sentencing practices								
Minimum age of criminal responsibility								
Detention								
Youth justice workforce*	-	-	-	-	-	-	-	-
Oversight of youth detention facilities								

Key High alignment Medium alignment Low alignment

* We have not assessed youth justice workforce given the lack of publicly available information

Appendix 5

Relevant recommendations from reviews and inquiries

Reviews and inquiries- Commonwealth

	The sky is the limit: Keeping young children out of prison by raising the age of criminal responsibility by Amnesty International Australia	The children's report: Australia's NGO coalition report to the United Nations Committee on the Rights of the Child by the Australian Child Rights Taskforce	Free to be kids: National plan of action by the Change the Record Coalition	Pathways to justice: An inquiry into the incarceration rates of Aboriginal and Torres Strait Islander Peoples by the Australian Law Reform Commission	A statement on conditions and treatment in youth justice detention by the Australian Children's Commissioners and Guardians	Australian child rights progress report: A report on the 25 years of the UN Convention on the Rights of the Child in Australia by the Australian Child Rights Taskforce
Vulnerabilities and complex needs	✓	✓	✓	✓		✓
Detrimental impacts of detention	✓		✓	✓		
Culturally appropriate supports	✓	✓	✓	✓	✓	✓
Detention as a last resort	✓					
Raising the minimum age of criminal responsibility	✓		✓			
Greater use of diversion	✓	✓	✓	✓		
Reducing the remand of population			✓	✓		
Improved detention facilities	✓	✓	✓	✓	✓	
Provide appropriate programs and adequately resourced services to all detainees	✓	✓	✓	✓	✓	

Reviews and inquiries- Commonwealth

	The sky is the limit: Keeping young children out of prison by raising the age of criminal responsibility by Amnesty International Australia	The children's report: Australia's NGO coalition report to the United Nations Committee on the Rights of the Child by the Australian Child Rights Taskforce	Free to be kids: National plan of action by the Change the Record Coalition	Pathways to justice: An inquiry into the incarceration rates of Aboriginal and Torres Strait Islander Peoples by the Australian Law Reform Commission	A statement on conditions and treatment in youth justice detention by the Australian Children's Commissioners and Guardians	Australian child rights progress report: A report on the 25 years of the UN Convention on the Rights of the Child in Australia by the Australian Child Rights Taskforce
Provide appropriate programs and adequately resourced services to all detainees	✓	✓	✓	✓	✓	
Make education programs available to as many detainees as possible for as long as possible		✓	✓	✓	✓	
Properly train and supervise staff		✓	✓	✓	✓	
Cautions						
Police culture				✓		
Changes to bail		✓		✓		
Additional post-release supports			✓			
Increased monitoring and oversight powers		✓	✓	✓	✓	

Reviews and inquiries- New South Wales

	Ministerial Review into the riot at Frank Baxter Detention Centre 21 and 22 July 2019 by former NSW Police Force Assistant Commissioner Lee Shearer APM (2019)	Inquiry into the adequacy of youth diversionary programs in New South Wales by Parliament of New South Wales, Legislative Assembly Committee on Law and Safety (2018)	Use of force, separation, segregation and confinement in New South Wales youth justice centres by the New South Wales Inspector of Custodial Services (2020)	Re-integrating young offenders into the community after detention by the New South Wales Auditor-General (2016)	What children and young people in juvenile justice centres have to say by the NSW Advocate for Children and Young People (2019)
Vulnerabilities and complex needs		✓	✓	✓	
Detrimental impacts of detention			✓		
Culturally appropriate supports		✓	✓	✓	✓
Detention as a last resort		✓	✓		
Raising the minimum age of criminal responsibility		✓			✓
Greater use of diversion		✓			✓
Reducing the remand of population			✓	✓	
Improved detention facilities		✓	✓	✓	
Provide appropriate programs and adequately resourced services to all detainees		✓	✓	✓	✓
Make education programs available to as many detainees as possible for as long as possible		✓	✓	✓	✓
Properly train and supervise staff		✓	✓	✓	✓
Cautions		✓	✓		
Police culture		✓	✓		
Changes to bail		✓		✓	
Additional post-release supports		✓			✓
Increased monitoring and oversight powers		✓	✓		

Reviews and inquiries- Northern Territory

Royal Commission into the Protection and Detention of Children in the Northern Territory

Vulnerabilities and complex needs	✓
Detrimental impacts of detention	✓
Culturally appropriate supports	✓
Detention as a last resort	✓
Raising the minimum age of criminal responsibility	✓
Greater use of diversion	✓
Reducing the remand of population	✓
Improved detention facilities	✓
Provide appropriate programs and adequately resourced services to all detainees	✓
Make education programs available to as many detainees as possible for as long as possible	✓
Properly train and supervise staff	✓
Cautions	✓
Police culture	✓
Changes to bail	✓
Additional post-release supports	✓
Increased monitoring and oversight powers	✓

Reviews and inquiries- Queensland

Report on youth justice by former Queensland Police Service Commissioner Bob Atkinson AO, APM

Vulnerabilities and complex needs	✓
Detrimental impacts of detention	✓
Culturally appropriate supports	✓
Detention as a last resort	✓
Raising the minimum age of criminal responsibility	✓
Greater use of diversion	✓
Reducing the remand of population	✓
Improved detention facilities	✓
Provide appropriate programs and adequately resourced services to all detainees	✓
Make education programs available to as many detainees as possible for as long as possible	✓
Properly train and supervise staff	✓
Cautions	✓
Police culture	✓
Changes to bail	✓
Additional post-release supports	✓
Increased monitoring and oversight powers	✓

Reviews and inquiries- Tasmania

	Youth at risk strategy paper by the Tasmanian Government	Custodial youth justice options paper by Noetic Solutions
Vulnerabilities and complex needs	✓	✓
Detrimental impacts of detention		✓
Culturally appropriate supports		
Detention as a last resort		✓
Raising the minimum age of criminal responsibility		
Greater use of diversion		✓
Reducing the remand of population		
Improved detention facilities	✓	✓
Provide appropriate programs and adequately resourced services to all detainees	✓	✓
Make education programs available to as many detainees as possible for as long as possible		✓
Properly train and supervise staff		✓
Cautions		✓
Police culture		
Changes to bail	✓	✓
Additional post-release supports	✓	✓
Increased monitoring and oversight powers	✓	✓

Reviews and inquiries- Victoria

	Managing rehabilitation services in youth detention by the Victorian Auditor-General's Office (2018)	Inquiry into Youth Justice Centres in Victoria by Parliament of Victoria, Legislative Council Legal and Social Issues Committee (2018)	Victoria youth justice review and strategy: Meeting needs and reducing offending. Report by former Secretary of the Department of Justice and Regulation Penny Armytage and Professor James Ogloff AM (2022)	Review of the Parkville Youth Justice Precinct: An independent review by former Victoria Police Chief Commissioner Neil Comrie AO, APM (2022)
Vulnerabilities and complex needs		✓	✓	
Detrimental impacts of detention		✓	✓	
Culturally appropriate supports		✓	✓	
Detention as a last resort		✓	✓	
Raising the minimum age of criminal responsibility		✓		
Greater use of diversion		✓	✓	
Reducing the remand of population		✓	✓	
Improved detention facilities		✓	✓	✓
Provide appropriate programs and adequately resourced services to all detainees	✓	✓	✓	
Make education programs available to as many detainees as possible for as long as possible	✓	✓	✓	
Properly train and supervise staff		✓	✓	✓
Cautions				
Police culture		✓		
Changes to bail		✓	✓	
Additional post-release supports		✓	✓	
Increased monitoring and oversight powers		✓	✓	

Reviews and inquiries- Western Australia

Inspection of Banksia Hill Detention
Centre by the Western Australia Office of
the Inspector of Custodial Services

Diverting children and young people away from court by
the Office of the Auditor-General Western Australia

Vulnerabilities and complex needs		
Detrimental impacts of detention		
Culturally appropriate supports		
Detention as a last resort		
Raising the minimum age of criminal responsibility		
Greater use of diversion		✓
Reducing the remand of population		
Improved detention facilities	✓	
Provide appropriate programs and adequately resourced services to all detainees	✓	✓
Make education programs available to as many detainees as possible for as long as possible	✓	
Properly train and supervise staff	✓	
Cautions		✓
Police culture		✓
Changes to bail		
Additional post-release supports		
Increased monitoring and oversight powers		

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Page 13	¹ <i>Human Rights Act 2004 (ACT)</i> Legislation Register, s 11, <i>Charter of Human Rights and Responsibilities Act 2006 (Vic)</i> , Victorian Legislation, s 17 and s 22; <i>Human Rights Act 2019 (Qld)</i> , Queensland Legislation, s 26 and s 33.
Page 14	¹ Australian Child Rights Taskforce, Save the Children & 54 reasons and UNICEF Australia (2023) <i>A Blueprint for a National Children's Plan</i> (forthcoming). ² UN (United Nations) (1989) <i>Convention on the Rights of the Child: Article 2, 3, 6 and 12</i> , UN.
Page 19	¹ AIHW (Australian Institute of Health and Welfare) (2019) <i>Young people in child protection and under youth justice supervision: 1 July 2014 to 30 June 2018</i> , AIHW; Sentencing Advisory Council (2019) <i>'Crossover Kids': Vulnerable Children in the Youth Justice System – Report 1: Children Who Are Known to Child Protection among Sentenced and Diverted Children in the Victorian Children's Court</i> , State Government of Victoria. ² Australian Government (2017) <i>The Report of the Royal Commission and Board of Inquiry Into the Protection and Detention of Children in the Northern Territory Volume 3B</i> , Royal Commission into the Protection and Detention of Children in the Northern Territory, p. 125, 128, 131, 133, 167, 174; and 198.
Page 20	¹ Australian Government (2017) <i>The Report of the Royal Commission and Board of Inquiry Into the Protection and Detention of Children in the Northern Territory Volume 3B</i> , Royal Commission into the Protection and Detention of Children in the Northern Territory, 125, 128, 131, 133, 167, 174; and 198. ² Australian Government (2017) <i>The Report of the Royal Commission and Board of Inquiry Into the Protection and Detention of Children in the Northern Territory Volume 3B</i> , Royal Commission into the Protection and Detention of Children in the Northern Territory, 125, 128, 131, 133, 167, 174; and 198. ³ Australian Government (2017) <i>The Report of the Royal Commission and Board of Inquiry Into the Protection and Detention of Children in the Northern Territory Volume 3B</i> , Royal Commission into the Protection and Detention of Children in the Northern Territory, 125, 128, 131, 133, 167, 174; and 198. ⁴ Australian Government (2017) <i>The Report of the Royal Commission and Board of Inquiry Into the Protection and Detention of Children in the Northern Territory Volume 3B</i> , Royal Commission into the Protection and Detention of Children in the Northern Territory, 125, 128, 131, 133, 167, 174; and 198.
Page 21	¹ Telethon Kids Institute (n.d.) <i>Fetal Alcohol Spectrum Disorder (FASD)</i> , Telethon Kids Institute ² Dean A (2018) <i>The intersection between the child protection and youth justice systems</i> , AIFS (Australian Institute of Family Studies) ³ Centre for Policy Development (2020) <i>Partners in Crime: the relationship between disadvantage and Australia's criminal justice systems</i> , Centre for Policy Development ⁴ Centre for Policy Development (2020) <i>Partners in Crime: the relationship between disadvantage and Australia's criminal justice systems</i> , Centre for Policy Development ⁵ Centre for Policy Development (2020) <i>Partners in Crime: the relationship between disadvantage and Australia's criminal justice systems</i> , Centre for Policy Development
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Page 25	<p>1 Police are the first point of contact between children and the youth justice system. Police have a range of options available to them when responding to incidents. This includes arrest and release pending a summons to appear at court, charging and releasing on bail or remanding in custody until they can be brought before court.</p> <p>2 Children and young people may be placed on bail while awaiting a hearing or sentencing. This may include a condition to participate in a bail support program. Bail hearing can result in bail being provided or the young person may be remanded in custody if not granted.</p> <p>3 Most jurisdictions have specialist Children's Court's divisions that hear and determine charges against children and young people. Generally, if a child or young person is alleged to have committed an offence under the age of 18 years their case will be heard in the Children's Court division.</p> <p>4 All jurisdictions offer pre-sentence court-based youth diversion programs. Youth justice conferencing is available to children and young people following a finding of guilt and pre-sentence.</p> <p>5 Courts have a hierarchy of sentencing options available if it finds a child or young person guilty of an offence. This comprises sentences involving no supervision, sentences involving community-based supervision by youth justice, and custodial sentences involving detention in a youth justice centre.</p> <p>6 Youth parole decision makers decide whether a child or young person may be released on parole and subject to supervision by youth justice in the community.</p> <p>7 Statutory child protection services are responsible for investigating and responding to concerns that a child or young person may be at risk of harm and for providing a range of services to children and young people where harm has been substantiated. These include providing care placements.</p> <p>8 Aboriginal Community Controlled Organisations generally adopt a holistic approach and assist with a wide variety of services, including child, youth and family services and care services such as residential care</p> <p>9 Community services organisations deliver child, youth and family services, and out-of-home care services such as residential care. They provide health services, including mental health, drug and alcohol, and medical services. They also provide disability services and support through the National Disability Insurance Scheme.</p> <p>10 State and territory Education Departments, schools and alternative education programs are responsible for the educational and learning needs of Aboriginal children and young people.</p>
Page 26	<p>1 Clancey G, Lin B and Wang S (2020) 'Youth justice in Australia: Themes from recent inquiries', <i>Trends & issues in crime and criminal justice</i>, Australian Institute of Criminology</p>
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Page 31	<p>1 UN (United Nations) (2019) <i>General comments: Committee on the Rights of the Child</i>, UN, General Comment No.10; UN (United Nations) (1985) <i>United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")</i>, UN, Rule 10.3, 12.1 and 7.</p> <p>2 Sentencing Advisory Council (2016) <i>Reoffending by children and young people in Victoria</i>, State Government of Victoria, p. 30.</p> <p>3 UN (United Nations) (2012) <i>Convention on the Rights of the Child: Concluding Observations: Australia</i>, UN, p. 39-40.</p> <p>4 Cunneen C, Goldson B and Russell S (2016), 'Juvenile Justice, Young People and Human Rights in Australia', <i>Current Issues in Criminal Justice</i>, p.177- 178.</p> <p>5 NSW Government (2023) <i>Ombudsman Annual Report 2012-2013</i>, NSW Government; Cunneen C, Richards K and White R (2015) <i>Juvenile Justice Youth and Crime on Australia</i>, Oxford University Press.</p> <p>6 Grewcock M and Sentas V (2019) <i>Rethinking Strip Searches by NSW Police</i>, University of New South Wales Law.</p> <p>7 CCYP (Commission for Children and Young People Victoria) (2021), <i>Our youth, our way: Inquiry into the overrepresentation of Aboriginal young people in the youth justice system</i>, CCYP.</p>

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