



Law Council
OF AUSTRALIA

Australia's progress in implementing the United Nations Convention on the Rights of the Child

National Children's Commissioner

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

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

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of the Law Society of New South Wales and the Law Institute of Victoria in the preparation of this submission. The Law Council also acknowledges its National Human Rights Committee for its input.

Introduction

1. The Law Council welcomes the opportunity to provide this submission to the National Children's Commissioner to assist in the upcoming report to Committee on the Rights of the Child (**Committee on the CRC**) in relation to Australia's implementation of the *Convention on the Rights of the Child (CRC)*.¹
2. On 20 November 2017, the Law Council provided a comprehensive submission to the Commonwealth Attorney-General's Department in relation to Australia's Draft Report to the Committee on the CRC (**2017 Submission**). Many of the issues raised in the 2017 Submission continue to be of concern to the Law Council and may be of use to the National Children's Commissioner when compiling her report. The Law Council's 2017 Submission is attached for your reference.

Submissions on specific cluster areas

3. The Law Council raises the following matters for the consideration of the National Children's Commissioner, many of which are based on instances where it is felt that the Australian Government may be able to respond more fully to the Concluding Observations of the Committee on the CRC in its 2012 report (**2012 Concluding Observations**).
4. In other instances, the Law Council has put forward specific concerns that have been brought to its attention through engagement with its Constituent Bodies, building on the material that has already been expressed in its 2017 Submission. As requested, this submission has been divided into identifiable cluster areas.

General measures of implementation

5. The Law Council reiterates its earlier points as set out in its 2017 Submission regarding the 'general measures of implementation' cluster of rights, in particular:
 - (a) the position that Australia should withdraw its reservation to article 37(c) of the CRC, which requires children to be separated from adults in prison, unless it is in the child's best interests not to do so;²
 - (b) a concern that the Australian Government's report to the Committee on the CRC has not adequately addressed the following issues identified in the 2012 Concluding Observations, including recommendations to:
 - (i) ensure effective remedies for violations of laws that implement CRC obligations or to introduce a comprehensive Children's Rights Act at a national level;³
 - (ii) consider establishing a technical body or mechanism with adequate resources to advise the Government in relation to coherence of policies and strategies to implement the CRC;⁴

¹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

² Law Council of Australia 'Australia's Draft report to the Committee on the Convention on the Rights of the Child', submission to Attorney-General's Department (20 November 2017), [1]-[3].

³ Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention – Concluding observations: Australia*, 60th sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012), [12].

⁴ *Ibid*, [14].

- (iii) accelerate Australia's foreign aid contribution to achieve Overseas Development Assistance as a percentage of Gross National Income of 0.7 percent;⁵ and
 - (iv) implement the United Nations' 'Protect, Respect and Remedy' framework which require that the rights of the child be considered when exploring the relationship between business and human rights.⁶
6. The Law Council considers these matters to be unresolved and refers the National Children's Commissioner to the Law Council's attached 2017 Submission for further details.

Definition of the child

7. The Law Council refers to its earlier statements contained in its 2017 Submission in relation to the 'definition of the child' cluster of rights, in particular:
- (a) a concern that Australia's position of maintaining the minimum age of criminal responsibility at 10 years old is incompatible with its obligations under the CRC, and should be increased accordingly;⁷ and
 - (b) the inappropriateness of several provisions of the *Criminal Code Act 1995* (Cth) (**Criminal Code**) which provide a defence to a number of child sex offences, including procuring or grooming a child for sexual activity, where at the time of the offence the child and the offender were in a valid marriage.⁸
8. The Law Council considers these matters to be unresolved and refers the National Children's Commissioner to the Law Council's attached 2017 Submission for further details.

General principles

9. The Law Council reiterates its earlier submissions contained within its 2017 Submission in relation to the 'general principles' cluster of rights, in particular:
- (a) the lack of identifiable progress in response to the 2012 Concluding Observations that urged Australia to strengthen its efforts to ensure that the best interests of the child is applied to all policies that affect children,⁹ with a specific focus on policies and procedures for children seeking asylum or in refugee and/or immigration detention;¹⁰ and
 - (b) the lack of adequate attention in the Government's report to the Committee on the CRC regarding the chronic underfunding of the legal assistance sector in Australia, and the impact this has on young people in legal and administrative proceedings.¹¹

⁵ Ibid, [26].

⁶ Ibid, [28].

⁷ Law Council of Australia 'Australia's Draft report to the Committee on the Convention on the Rights of the Child', submission to Attorney-General's Department (20 November 2017), [16]-[19].

⁸ Ibid, [20]-[22].

⁹ Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention – Concluding observations: Australia*, 60th sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012), [32].

¹⁰ Law Council of Australia 'Australia's Draft report to the Committee on the Convention on the Rights of the Child', submission to Attorney-General's Department (20 November 2017), [23]-[24].

¹¹ Ibid, [25]-[31].

10. The Law Council considers these matters to be unresolved and refers the National Children's Commissioner to the Law Council's attached 2017 Submission for further details.

Victorian bail reform and the best interests of the child

11. In addition to the above points within the 'general principles' cluster of rights, the Law Council has received additional input from the Law Institute of Victoria which points to recent changes to the *Bail Act 1977 (Vic)* (**Victorian Bail Act**) as having the potential to place the interests of community safety above the best interests of the child. This may be inferred from the addition of a set of guiding principles which place maximising the safety of the community and persons affected by crime 'to the greatest extent possible' above and before the presumption of innocence.¹² It is submitted that this prioritisation, if manifested in practice, may violate the obligation for the best interests of the child to be a primary consideration.
12. These reforms to the Victorian Bail Act, and concerns arising from them, are further discussed in this submission under the 'special protection measures' cluster of rights as it relates to the sentencing of children and detention as a measure of last resort.
13. The Law Institute of Victoria has further pointed out that recent changes to the laws governing direct representation of children in the Family Law Division of the Children's Court of Victoria have the potential to violate the obligation to provide a child the opportunity to be heard in any judicial and administrative proceedings affecting the child.¹³ Before these changes, an individualised assessment of a child's capacity to instruct a lawyer was undertaken, which was usually assessed at the age of 7. Now, children are only directly represented at the age of 10, which sets an arbitrary age before this right can be enlivened and has the potential to deny a whole category of children the right to be heard.¹⁴

Civil rights and freedoms

14. The Law Council reiterates its earlier points raised in its 2017 Submission in relation to the 'civil rights and freedoms' cluster of rights, in particular:
- (a) the absence of an adequate report by the Australian Government on the progress of the implementation of the recommendations of the *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*;¹⁵
 - (b) the need for the Government to provide an explanation as to why it has elected not to implement the recommendations of the Senate Standing Committee on Community Affairs in its 2013 report on the *Inquiry into the involuntary or coerced sterilisation of people with disability and intersex people* as they relate to the practice of sterilisation for both intersex and children with disability, except where required for legitimate health;¹⁶ and

¹² *Bail Act 1977 (Vic)*, subsection 1B(1).

¹³ See, Erica Contini and Melissa Castan, 'Victorian Children Should be Seen and Not Heard' (11 February 2013) *Castan Centre for Human Rights Blog*, online at <<https://castancentre.com/2013/02/11/victorian-childrens-rights/>>.

¹⁴ *Children, Youth and Families Act 2005 (Vic)*, subsection 525(1).

¹⁵ Law Council of Australia 'Australia's Draft report to the Committee on the Convention on the Rights of the Child', submission to Attorney-General's Department (20 November 2017), [32]-[33].

¹⁶ *Ibid.*, [34]-[35].

- (c) the inadequacy of existing offences in the Criminal Code and of State and Territory criminal laws to effectively capture cyberbullying.¹⁷

15. The Law Council considers these matters to be unresolved and refers the National Children's Commissioner to the Law Council's attached 2017 Submission for further details.

Suspect targeting management plans

16. In addition to the above points made in its 2017 Submission regarding the 'civil rights and freedoms' cluster of rights, the Law Society of New South Wales has highlighted a 2017 report from the Public Interest Advocacy Centre and the Youth Justice Coalition titled '*Policing Young People in NSW: A study of the Suspect Targeting Management Plan*' (**STMP Report**).¹⁸ The STMP Report argues that the STMP policy is being improperly applied to young people in New South Wales (**NSW**) and is ineffective in reducing crime.

17. The Law Society of NSW has expressed concern with reports that young people subject to the STMP strategy have reported harassment and excessive contact by police, including the use of stop and search powers, presentations at the young person's home, and move on directions.¹⁹ The STMP Report also described instances where the courts had found the STMP to be an unlawful justification of the exercise of police power, and described young people's experiences of not knowing why they were targeted in circumstances where they had not committed an offence.²⁰

18. The Law Society of NSW has further noted its concern with the use of the STMP in relation to children not being in the best interests of the child and that it may infringe on the rights of the child under article 16(2) of the CRC which requires children to be protected from arbitrary interference with their privacy, family or home. In relation to this issue, the STMP Report noted that the research undertaken:

*... indicates specific instances where the STMP has contravened principles [under article 16 of the CRC], including unlawful stop and search. More broadly, NSW Police need to be confident that the STMP does not arbitrarily interfere with children and their families as a systematic effect of the policy.*²¹

19. The Law Society of NSW has endorsed the recommendation contained within the STMP Report that NSW Police should discontinue applying the STMP to children under 18,²² and the Law Council invites the National Children's Commissioner to consider this position when formulating its report.

Family environment and alternative care

20. The Law Council reiterates its earlier submissions contained within its 2017 Submission in relation to the 'family environment and alternative care' cluster of rights, in particular the:

¹⁷ Ibid, [36].

¹⁸ Youth Justice Coalition, *Policing Young People in NSW: A Study of Suspect Targeting Management Plan* (25 October 2017), online <www.piac.asn.au/wp-content/uploads/2017/10/17.10.25-YJC-STMP-Report.pdf>.

¹⁹ Ibid, 20.

²⁰ Ibid, 6.

²¹ Ibid, 46.

²² Ibid.

- (a) significant issues arising from high numbers of children entering out-of-home care;²³
- (b) rates and conditions of detention for juveniles, noting the serious and widespread discrimination faced by Aboriginal and Torres Strait Islander children in the criminal justice system;²⁴
- (c) impacts of mandatory sentencing laws on children and young people;²⁵ and
- (d) impacts of bail laws and practices on children, together with the lack of support programs for young people in the criminal justice system.²⁶

21. The Law Council considers these matters to be unresolved and refers the National Children's Commissioner to the Law Council's attached 2017 Submission for further details.

Care and protection

22. In addition to the above points contained in its 2017 submission, the Law Council provides the following additional submissions in relation to care and protection of young people.

23. Recent statistical research and anecdotal evidence supports the need for action to improve the approach to child protection in Australia. In 2009, the Council of Australian Governments endorsed the National Framework for Protecting Australia's Children 2009–2020 which provides a set of indicators relating to the safety and wellbeing of Australia's children, including the number of child protection substantiations, placement stability, kinship placement and family contact.²⁷ In June 2017, indicators from the National Framework show that over the last few years:

- (a) the rate of children who were the subject of child protection substantiations increased;
- (b) the rate of children in out of home care increased; and
- (c) the proportion of Aboriginal children in out of home care placed with extended family or other Aboriginal caregivers decreased.²⁸

24. It is further noted that Chapter 30 of the Final Report of the Royal Commission into the Protection and Detention of Children in the Northern Territory (**NT Royal Commission Report**) discussed in depth the child protection systems across Australia and concluded that, 'in all Australian jurisdictions, child protection systems are facing unprecedented demands and challenges, and are generally seen to be in crisis'.²⁹

²³ Law Council of Australia 'Australia's Draft report to the Committee on the Rights of the Child', submission to Attorney-General's Department (20 November 2017), [37]-[40].

²⁴ Ibid, [41]-[44].

²⁵ Ibid, [45]-[46].

²⁶ Ibid, [47]-[50].

²⁷ Department of Social Services, 'National Framework for Protecting Australia's Children 2009–2020', online at <www.dss.gov.au/our-responsibilities/families-and-children/publications-articles/protecting-children-is-everyones-business>.

²⁸ See, Australian Institute of Health and Welfare, *Indicator reporting for the National Framework for Protecting Australia's Children*, (29 June 2017), online: <www.aihw.gov.au/reports/child-protection/nfpac/contents/summary>.

²⁹ Royal Commission into Children and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Final Report* (17 November 2017) Volume 3A, Chapter 30, 199, online at: <<https://childdetentionnt.royalcommission.gov.au/Documents/Royal-Commission-NT-Final-Report-Volume-3A.pdf>>.

25. The NT Royal Commission Report made the following concerning observations with respect to the reforms in Australia over the past approximately 20 years:³⁰

- (a) there have been more than 21 inquiries into child protection services in Australia since 2006;
- (b) the inquiries have all recommended urgent systemic changes to the services system (including legislation, organisational structure, workforce training, recruitment and policies and procedures);
- (c) the inquiries have recommended adopting a public health approach to the care and protection of children; and
- (d) governments have not acted upon many of these proposals as it has been easier to maintain the status quo and 'tinker with' existing systems, and as a result, there has been:
 - (i) an exponential increase of reporting of children at risk;
 - (ii) unmanageable numbers of investigations;
 - (iii) an overburdened workforce;
 - (iv) a failure to address the needs of children who, along with their families, are often re-traumatised by the system; and
 - (v) families, communities and a system in a constant crisis.

26. Given the above findings, there is a concern that the Government's report to the Committee on the CRC does not adequately represent the extent of the issues regarding child protection in Australia, and therefore does not provide an accurate picture of Australia's compliance with children's rights under the CRC.

27. The Law Council is of the view that addressing issues around children, particularly Aboriginal and Torres Strait Islander children, in out-of-home care will also assist with the attainment of other rights, such as in respect of education. In this regard the Law Council refers to input received from the Law Society of NSW which highlights the NSW Ombudsman's August 2017 inquiry into behaviour management in schools, a report that cites alarming statistics in respect of school attendance for children in out-of-home care. The Ombudsman's inquiry found that for 295 school age children and young people who had been in out-of-home care for three or more months in 2016, 43 percent (128) missed 20 or more school days in 2016 for reasons other than illness. About one third (42) of these children were Aboriginal. These 128 children missed an average of 44 percent of the school year.³¹

28. It is noted that the Ombudsman formed the view that in relation to children in out-of-home care:

The department's lack of documented information about the OOHC [out-of-home care] status of the children we reviewed highlights the need for improved work between the department and FACS to ensure that children in

³⁰ Ibid, 210-211.

³¹ NSW Ombudsman, *Inquiry into behaviour management in schools* (August 2017), 46, online at <www.ombo.nsw.gov.au/_data/assets/pdf_file/0018/47241/NSW-Ombudsman-Inquiry-into-behaviour-management-in-schools.pdf>.

*OOHC are accurately identified at an early point to enable an appropriate and informed response to meeting their learning and support needs.*³²

29. The Law Society of NSW has reported that anecdotally, learning plans are often not made or maintained in respect of these children. The Law Society of NSW further submits that its members have observed that despite the obligatory nature of learning plans, out-of-home care caseworkers may not be in contact with schools to develop those learning plans in respect of children in out-of-home care.
30. The poor outcomes that result from non-attendance at school are myriad, not least of which is the fact that it is a risk factor for children in respect of entering the juvenile justice system. The Law Society of NSW has pointed out that the Children's Court of NSW believes that roughly 40 percent of children coming before the court in its criminal jurisdiction are not attending and are totally disengaged from school.³³
31. The Law Council supports efforts of the children's courts in Australia to adopt a similar model to the Victorian Education Justice Initiative.³⁴ Under this model, officers of the Victorian Department of Education are placed in the Children's Court to assist in identifying those children who are not attending school and to help them to re-engage in their education.

Care criminalisation

32. Further to the Law Council's 2017 Submission in which it raised concerns with the association between out-of-home care and subsequent involvement in the criminal justice system, the Law Council wishes to draw the National Children's Commissioner's attention to input provided by the Law Society of NSW which highlights the reported increase in the rates of children in out-of-home care, and the potential for this to lead to greater numbers of vulnerable children coming into the juvenile justice system. For example, in NSW, the 'drift' from care to crime is significant, with research from 2011 highlighting that 80 percent of NSW Legal Aid's criminal law high service users had some history of out-of-home care.³⁵
33. The Law Council specifically notes the link between Aboriginal and Torres Strait Islander children in out-of-home care and the criminal justice system. It is noted that of the 99 Aboriginal and Torres Strait Islander people who died in custody and were the subject of the Royal Commission into Aboriginal Deaths in Custody, 43 involved individuals who were separated from their families as children.³⁶
34. The Law Council supports an approach to this issue which targets early intervention to address risk issues arising for children well before they have contact with the criminal justice system.³⁷ In particular, the Law Council supports an emphasis on diversionary measures as a way of reducing and preventing police contact with children, noting that

³² Ibid 48.

³³ Children's Court of NSW, *Legislative Assembly Law and Safety Inquiry into the adequacy of youth diversionary programs in NSW* (8 February 2018), 16, online at: <www.parliament.nsw.gov.au/committees/DBAssets/InquirySubmission/Body/59799/Submission%2019.pdf>.

³⁴ For more information, see <http://parkvillecollege.vic.edu.au/?page_id=44>.

³⁵ Legal Aid NSW, *The Drift from Care to Crime: A Legal Aid NSW Issues Paper*, October 2011, available at: <www.legalaid.nsw.gov.au/__data/assets/pdf_file/0019/18118/The-Drift-from-Care-to-Crime-a-Legal-Aid-NSW-issues-paper.pdf>.

³⁶ National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, *Bringing them Home*, 1997, 15, online at: <<https://childdetentionnt.royalcommission.gov.au/NT-public-hearings/Documents/evidence-2016/evidence13october/Exh-024-008.pdf>>.

³⁷ Law Society of NSW, *Inquiry into the adequacy of youth diversionary programs in NSW* (20 February 2018) 14, online at: <www.lawsociety.com.au/sites/default/files/2018-03/1447687.pdf>.

the arrest, detention and imprisonment of a child should be used only as a measure of last resort.

35. In this regard, the Law Council submits that compliance with article 37 of the CRC will not be possible unless there is targeted action by Government to address ongoing issues with the crossover of the care and crime jurisdictions. We note that the issue of 'care criminalisation' was also identified in Chapter 35 of the NT Royal Commission Report, where that report identified the two primary factors contributing to care-criminalisation as being:³⁸
- (a) the use of police to manage behaviour; and
 - (b) the lack of care, staff training and support.
36. Recommendations 35.2 and 35.3 in the NT Royal Commission Report recommend protocols between the out-of-home care service sector and police to address the management and response to criminal behaviour, together with monitoring of the use of police callouts by out-of-home care providers. The Law Council endorses a whole-of-government solution to this problem, with a particular focus on interagency collaboration to prevent children in care being drawn into the criminal justice system, particularly where alternative approaches may better assist to resolve conflict and address the underlying causes of youth offending.
37. In relation to Aboriginal and Torres Strait Islander children, the Law Council notes that addressing the complex issue of overrepresentation in the juvenile justice system requires a holistic, multi-pronged approach. Resources must be directed towards early intervention, prevention and diversion along with strategies that strengthen communities. It is critical that diversionary programs for young Aboriginal and Torres Strait Islander offenders are community-led to promote self-determination in providing culturally responsive (and thereby effective) approaches.

Judicial oversight

38. In relation to judicial oversight of child protection matters, the Law Institute of Victoria has highlighted its concern that in Victoria, the exercise of judicial discretion is being curbed in terms of the availability of outcomes and the ability to tailor orders particular to each family and their individual needs.
39. By way of example, the Law Institute of Victoria has pointed to amendments to the *Children, Youth and Families Act 2005* (Vic)³⁹ that have the potential to violate the obligation under article 9(1) of the CRC that separation of a child from parents by authorities should be subject to judicial review.
40. The Law Institute of Victoria has suggested that these amendments may fetter the discretion of the Children's Court of Victoria to exercise independent judgement and make decisions in the best interests of the child, noting that the Court no longer has the ability to:
- (a) make interim orders;⁴⁰

³⁸ Royal Commission into Children and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Final Report*, 17 November 2017, Volume 3B, Chapter 35, 20, online at: <<https://childdetentionnt.royalcommission.gov.au/Documents/Royal-Commission-NT-Final-Report-Volume-3B.pdf>>.

³⁹ *Children, Youth & Families (Permanent Care & Other Matters) Amendment Act 2014* (Vic).

⁴⁰ *Children, Youth and Families Act 2005* (Vic), subsection 262(5A).

- (b) make an interim protection order;⁴¹
- (c) decide the timeframe of reunification after the child has been in out of home care for 24 months;⁴²
- (d) determine contact arrangements;⁴³
- (e) specify who a child resides with, other than a parent on a final protection order;⁴⁴
- (f) direct the Department of Health and Human Services (**DHHS**) to bring an application for permanent care;⁴⁵
- (g) determine contact frequency for children and parents on permanent care orders;⁴⁶ and
- (h) review care arrangements at intervals determined by the court.⁴⁷

41. The Law Institute of Victoria has informed the Law Council that these amendments have had the effect of diminishing the ability of the Court to exercise its inherent jurisdiction and to review the decision-making of the DHHS, and that such limitations are counter-productive to the best interests of the child. In this regard, the National Children's Commissioner may be familiar with the recommendations of the Victorian Commission for Children and Young People to reinstate some of the Court's discretionary and review powers.⁴⁸

Disability, basic health and welfare

42. The Law Council reiterates its earlier submissions contained within its 2017 Submission in relation to the 'disability, basic health and welfare' cluster of rights, in particular the need for the Government to set out the specific initiatives it is undertaking to 'close the gap' on the health of Aboriginal and Torres Strait Islander children.⁴⁹

Special protection measures

43. The Law Council reiterates its earlier submissions contained within its 2017 Submission in relation to the 'special protection measures' cluster of rights, in particular in relation to the:

- (a) lack of sufficient regard to the recommendations of the Committee on the CRC in its 2012 Concluding Observations in relation to the establishment of an independent guardianship institution for unaccompanied immigrant children;⁵⁰

⁴¹ Ibid, repeal of section 291.

⁴² Ibid, sections 287, 287A and 296.

⁴³ Ibid, changes to section 287.

⁴⁴ Ibid, changes to sections 283 and 284.

⁴⁵ Ibid, repeal of section 297.

⁴⁶ Ibid, changes to paragraph 321(1)(d).

⁴⁷ Ibid, changes to sections 287 and 289.

⁴⁸ Victorian Commission for Children and Young People, *'Safe and wanted: Inquiry into the implementation of the Children, Youth & Families (Permanent Care & Other Matters) Amendment Act 2014'* (June 2017).

⁴⁹ Law Council of Australia 'Australia's Draft report to the Committee on the Convention on the Rights of the Child', submission to Attorney-General's Department (20 November 2017), [53].

⁵⁰ Ibid, [55]-[56].

- (b) inadequate referencing to children held in offshore detention facilities in the Government's report to the Committee on the CRC;⁵¹ and
- (c) lack of detail within the Government's report to the Committee on the CRC in relation to proposed action to address the increase in the number of homeless children in Australia.⁵²

Children outside their country of origin seeking refugee protection

44. Further to those points raised by the Law Council in its 2017 Submission in respect of child migrants, asylum seekers and refugees, there are ongoing concerns that offshore detention appears to be amounting to de facto indefinite detention. The Law Council notes that the Minister for Home Affairs has continued to rule out resettlement in New Zealand and has stated that the prospects for resettlement in another third country are 'bleak'.⁵³
45. The Law Council opposes the continued indefinite detention of refugee children,⁵⁴ and notes the recent Federal Court decisions in respect of *AYX18 v Minister for Home Affairs* [2018] FCA 283 and *FRX17 as litigation representative for FRM17 v Minister for Immigration and Border Protection* [2018] FCA 63 where His Honour Justice Murphy and His Honour Justice Perram respectively ordered the transfer of refugee children to Australia to allow specialist psychiatric assessment as soon as reasonably practical. The first matter concerns a 10-year-old boy at serious risk of self-harm and suicide. Similarly, the second matter concerns a young girl found to be suffering anxiety, depression, experiencing hallucinations and at extreme risk of suicide.
46. Justice Murphy set out information from clinical notes prepared by a child psychologist who saw the applicant, to illustrate the state of her mental health, stating as follows:
- The applicant stated that the voice tells her "dying is better than living, you'll be free". [The applicant] stated that she wants to die and she wants to kill herself and that if she was going to kill herself she would "make myself lost in the jungle and put a knife in my stomach". [The applicant] blames the Australian government for her state of mind and says that she is trapped in no land and that she thinks about dying like the Sri Lankan man (from Manus Island) who recently committed suicide.*⁵⁵
47. Justice Murphy also noted the view of Professor Newman, who gave evidence in *FRX17*, that 'suicidal acts in young children are rare and extremely serious events which require specialist psychiatric assessment and treatment. Given what appears to be persistent and significant suicidality in this child I do not see it as appropriate on clinical grounds to attempt to manage her in the Nauru community setting'.⁵⁶ The Law Council notes that there is no child psychiatrist resident on Nauru.
48. As noted in the Law Council's Asylum Seeker Policy, the detention of children for the purpose of determining their immigration status is unlikely to ever be in the child's

⁵¹ Ibid, [57]-[58].

⁵² Ibid, [59]-[60].

⁵³ Henry Belot, *Peter Dutton says third country resettlement for Manus Island refugees 'a myth'*, 7 May 2018, ABC News, available at: <www.abc.net.au/news/2018-05-07/peter-dutton-says-third-country-resettlement-option-a-myth/9734744>.

⁵⁴ Law Council of Australia 'Asylum Seeker Policy' (September 2014), 7 at <www.lawcouncil.asn.au/resources/policies-and-guidelines>.

⁵⁵ *FRX17 as litigation representative for FRM17 v Minister for Immigration and Border Protection* [2018] FCA 63, [18].

⁵⁶ Ibid, [27].

interest.⁵⁷ This is particularly the case in relation to detention of children on Nauru, noting the following:

- (a) children on Nauru are not being detained as a measure of last resort and for the shortest possible time;
- (b) the right to development is likely being compromised for children on Nauru;
- (c) the school has closed in the Nauruan detention facility, undermining asylum seeker children's right to education. Further, while refugee and asylum seeker children have access to the local school, many have reported bullying and even sexual harassment;⁵⁸
- (d) the physical and psychological recovery for refugee and asylum seeker children, including those who have been exposed to armed conflict is likely to be impossible if living in offshore detention;
- (e) the right to a nationality could be undermined by expanding powers of visa cancellations and citizenship cancellations;
- (f) the Commonwealth Redress Scheme for Institutional Responses to Child Sexual Abuse will potentially be discriminatory on the basis of citizenship and visa status;⁵⁹ and
- (g) children on Nauru and child asylum seekers have been separated from parents because they have been removed from Nauru and have been transferred to Australia. The Law Society of NSW has informed the Law Council that it is aware of cases where families are at risk of permanent separation because family members in Australia will not be considered for the Australia-US refugee deal unless they return to Nauru, in conflict with medical advice, which says that it is not safe for them to return to Nauru. This has the effect of undermining the rights of the child under articles 9 and 10 of the CRC.

Bail and youth justice reform in Victoria

49. The Law Council also seeks to highlight the views of the Law Institute of Victoria as they relate to recent reforms to bail and youth justice that have taken place in Victoria. It is understood that these reforms occurred within the context of calls for the need for the Government to 'act tough' on issues of youth crime.⁶⁰

50. The Law Institute of Victoria has raised a particular concern with the transfer of responsibility for youth justice in Victoria from the DHHS to the Department of Justice and Regulation. This concern is grounded in the potential for young people to be treated as if they were adults in the criminal justice system and may undermine the previous recognition of the differences between young offenders and adult offenders,

⁵⁷ Law Council of Australia 'Asylum Seeker Policy' (September 2014), 7 at <www.lawcouncil.asn.au/resources/policies-and-guidelines>.

⁵⁸ See incidents 1, 2 and 10, extracted from the Nauru Files by the Australian Lawyers Alliance, set out in the Appendix to its supplementary submission to the Senate Standing Committee on Legal and Constitutional Affairs on the inquiry on *Serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre*, 16 March 2017, available at <www.lawyersalliance.com.au/documents/item/814>.

⁵⁹ See Law Society of NSW submission to the Senate Community Affairs Legislation Committee on the inquiry into the Commonwealth Redress Scheme for Institutional Responses to Child Sexual Abuse Bill 2017 (13 March 2018), submission 90.

⁶⁰ Wendy O'Brien and Kate Fitz-Gibbon, 'Can Human Rights Standards Counter Australia's Punitive Youth Justice Practices?' (2018) 26 *International Journal of Children's Rights* 197, 198.

including in relation to developmental immaturity, impulsivity, inexperience, dependence, vulnerability, and a unique susceptibility to rehabilitation.⁶¹

51. It is submitted that a lack of adequate recognition of the differences between adult and child offenders, and the need to treat them differently through a separate system that centres their welfare and minimises harmful contact with the justice system, has the potential to violate the underlying principles embedded in articles 37 and 40 of the CRC.
52. Finally, the Law Council echoes the concerns detailed by the Committee on the CRC about the over-representation of Aboriginal and Torres Strait Islander young people in the juvenile justice process and in detention.⁶² In Victoria alone, young Aboriginal and Torres Strait Islander people are detained at 13 times the non-indigenous rate, and between 2016-17, 18 percent of young people in unsentenced detention in Victoria on an average day were Aboriginal or Torres Strait Islander.⁶³

Young people in adult prisons

53. As noted above, the Law Council considers that Australia should withdraw its reservation to article 37(c) of the CRC, which requires children to be separated from adults in prison, unless it is in the child's best interests not to do so.
54. Additional input regarding children in adult prisons has been received from the Law Institute of Victoria, who have raised a particular concern with the response by the Victorian Government to the protests of some young people who caused damage to the Parkville Youth Residential Centre in November 2016. The response from Government included:
- (a) transferring the young people to the Grevillea Unit of Barwon Prison, a maximum-security adult prison;
 - (b) the Premier of Victoria publicly stating: '[T]hat's where they belong'; and
 - (c) efforts to defy a Supreme Court judgment declaring that the transfer of the young people was unlawful, until the Government was explicitly prohibited from continuing to detain children at Barwon Prison and required to immediately transfer the children to youth justice facilities.⁶⁴
55. The Law Institute of Victoria has suggested that these Barwon Prison transfers are demonstrative of the risk that, without adequate oversight, the intrinsic differences between adult offenders and young offenders may be eroded or wholly removed.

⁶¹ Law Institute Victoria, *Submission to the Legal and Social Issues Committee Inquiry into youth justice centres in Victoria*, 2017, 3-4, 8; see also Kelly Richards, 'What makes juvenile offenders different from adult offenders?' (Trends and Issues in Crime and Criminal Justice no. 409, Australian Institute of Criminology, 2011); Michael Tonry and Colleen Chambers, 'Juvenile justice cross-nationally considered' in Barry Feld and Donna Bishop (eds), *Oxford Handbook of Juvenile Crime and Juvenile Justice* (Oxford University Press, 2012) 892.

⁶² Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention – Concluding observations: Australia*, 60th sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012), [29].

⁶³ Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2017*, online at <www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2017/contents/table-of-contents>; Australian Institute of Health and Welfare, 'Young people in unsentenced detention: 2015-16' factsheet (2017), 2 <www.aihw.gov.au/getmedia/bb4a9b5c-bbe3-4b5d-87b2-cef4dd658fd5/juv108-YJFS-86-Unsentenced.pdf.aspx>.

⁶⁴ Wendy O'Brien and Kate Fitz-Gibbon, 'Can Human Rights Standards Counter Australia's Punitive Youth Justice Practices?' (2018) 26 *International Journal of Children's Rights* 197, 213; *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* (2016) VSC 796, upheld on appeal *Minister for Families and Children v Certain Children by their Litigation Guardian Sister Marie Brigid Arthur* (2016) VSC 343; *Certain Children v Minister for Families and Children & Ors* (No 2) (2017) vsc 251, [588(a)i-ii], [588(b)i-ii].

Bail reform in Victoria and detention as a measure of last resort

56. The Law Council also notes concerns raised by the Law Institute of Victoria in relation to recent amendments to the Victorian Bail Act. Further to the above submissions on these reforms, the Law Institute of Victoria has advised that these measures have the potential to violate international minimum standards that imprisonment of children should be a measure of last resort and for as short a period as possible, and counter-productively, increase the number of young people detained on remand in Victoria.
57. The Law Institute of Victoria has advised that the number of young people on remand in Victoria has already increased at an alarming rate, with youth remand orders swelling from 538 in 2007-2008 to 1,069 in 2016-2017.⁶⁵ At one point in 2017 the number of young people detained on remand accounted for 80 percent of all detained young people in Parkville (with the sentenced population only comprising 20 percent).⁶⁶
58. Furthermore, the time each young person spends on remand has also increased, with young people in Victoria spending an average of over 50 days in unsentenced detention during 2015-16.⁶⁷ This figure is particularly troubling because 40 percent of young people on remand in Victoria will be found not guilty or sentenced to a period equal to or less than the period of their remand.⁶⁸
59. The Law Institute of Victoria has noted its concern that the *Bail Amendment (Stage One) Act 2017 (VIC) (Stage One)*, which commenced 21 May 2018, will result in a further increase in the number of young people being detained on remand in Victoria. The Victorian Government has publicly acknowledged that Victoria's bail system is 'arguably the most onerous in Australia' and contends that these reforms will make it 'even stronger'.⁶⁹
60. The Law Institute of Victoria has pointed to amendments limiting the presumption of bail within these reforms as being particularly troubling. The Stage One amendments create a Schedule 1 and 2 to the Victorian Bail Act, setting out a list of offences in relation to which the presumption in favour of bail is reversed.⁷⁰
61. The new offences that have been introduced to both Schedules expand the categories of offences where there is no presumption in favour of bail. Schedule 1 offences, and attempts to commit Schedule 1 offences, are to be subjected to the 'exceptional circumstances' test, while Schedule 2 offences will be subject to the 'compelling reasons' test, which replaces the previously less stringent 'show cause test'.⁷¹

⁶⁵ Youth Parole Board (Vic), *Annual Report 2016-2017*, 31; Legal and Social Issues Committee, *Final Report: Inquiry into youth justice centres in Victoria*, Victorian Government, Melbourne, 2018, 65.

⁶⁶ Legal and Social Issues Committee, *Final Report: Inquiry into youth justice centres in Victoria*, Victorian Government, Melbourne, 2018, 67; Victorian Ombudsman, *Report on youth justice facilities at the Grevillea unit of Barwon Prison, Malmsbury and Parkville* (February 2017), 9 <www.ombudsman.vic.gov.au/getattachment/c6880f35-3cf3-4237-b463-9be28db448c8>.

⁶⁷ Australian Institute of Health and Welfare, 'Young people in unsentenced detention: 2015-16' (2017), 3 <www.aihw.gov.au/getmedia/bb4a9b5c-bbe3-4b5d-87b2-cef4dd658fd5/juv108-YJFS-86-Unsentenced.pdf.aspx>; Penny Armytage and Professor James Oglloff AM, *Youth Justice Review and Strategy: Meeting needs and reducing offending - Part 2*, Victorian Government, Melbourne, 2017, 65-60.

⁶⁸ Lorana Bartels et al 'Bail, Risk and Law Reform: A Review of Bail legislation across Australia' (2018) 42 *Criminal Law Journal* 91, 93; Law Institute Victoria, *Submission to the Review of Victoria's Bail System*, 2017, 13.

⁶⁹ Victoria, *Parliamentary Debates*, Legislative Assembly, 8 May 2017, 1494.

⁷⁰ Victoria, *Parliamentary Debates*, Legislative Council, 8 June 2017, 3337.

⁷¹ *Bail Act 1977* (Vic), subsection 4(4).

62. The inclusions refer to offences that have been popularly associated with youth 'gangs', with the addition to Schedule 1 of aggravated home invasion and aggravated burglary, and Schedule 2 incorporating armed robbery and carjacking.⁷²
63. The Stage One amendments also introduce a presumption against bail when an accused commits a serious indictable offence while under supervision, either through bail, summons, parole, or under sentence.⁷³ The Law Institute of Victoria has contended that the trend of increasing numbers of young people held on remand for contravening bail conditions will be increased by this amendment.⁷⁴
64. The *Bail Amendment (Stage Two) Act 2018* (Vic) is scheduled to come into operation on 1 July 2018, and will create a more onerous threshold for the unacceptable risk test by emphasising the importance of the consideration of an accused's potential risk to community safety, and requiring a relevant reverse onus test to be applied first, if both are applicable.⁷⁵ The Victorian Government acknowledges that this represents a 'more rigorous approach' to bail in Victoria.⁷⁶
65. The Law Institute of Victoria has noted that at all stages of the bail process, the bail decision-maker has the capacity to treat children, among other vulnerable categories of applicants, differently. This can occur through the additional considerations a decision-maker is required to take into account in making a determination in relation to a child, which enshrines the principle of last resort by making it mandatory that the decision-maker considers 'all other options before remanding the child to custody'.⁷⁷
66. Furthermore, the Law Institute of Victoria notes that the presumption of bail remains in subsection 4(1) of the Victorian Bail Act, and that when assessing the surrounding circumstances, the decision-maker must take the vulnerabilities of the accused, including the simple fact that the accused is a child, into consideration.⁷⁸
67. Although it is hoped that in practice these provisions will cushion the rigour of the new amendments when they are applied to young people, the concern remains that these amendments will instead result in an increased number of young people being held on remand.
68. The Victorian Government has asserted that the amendments will not result in young people being unnecessarily remanded.⁷⁹ However, the Law Institute of Victoria has pointed out that the 2013 reforms to the Victorian Bail Act, which created new bail offences that applied to children, resulted in an increase in the number of young people on remand.⁸⁰
69. The Law Institute of Victoria submits that expanding the offences covered by the reverse onus and creating a more onerous unacceptable risk test will result in more young people being refused bail, and remanded in custody where they will be exposed to a high risk, unstable and volatile population of detained young people, which increases the risk of recidivism.⁸¹ The Courts have acknowledged the significant harm

⁷² Victoria, *Parliamentary Debates*, Legislative Council, 8 June 2017, 3337.

⁷³ *Ibid*, 3337-8.

⁷⁴ Legal and Social Issues Committee, *Final Report: Inquiry into youth justice centres in Victoria*, Victorian Government, Melbourne, 2018, 65.

⁷⁵ Victoria, *Parliamentary Debates*, Legislative Council, 8 February 2018, 200.

⁷⁶ *Ibid*, 201.

⁷⁷ *Bail Act 1977 (VIC)* section 3B(1); Law Institute Victoria, *Submission to the Review of Victoria's Bail System*, 2017, 12, 26.

⁷⁸ *Bail Act 1977 (VIC)* sections 4(1), 3AAA(h).

⁷⁹ Victoria, *Parliamentary Debates*, Legislative Council, 8 June 2017, 3336 (Ms Pulford, Minister for Agriculture).

⁸⁰ Legal and Social Issues Committee, *Final Report: Inquiry into youth justice centres in Victoria*, Victorian Government, Melbourne, 2018, 74; Law Institute Victoria, *Submission to the Review of Victoria's Bail System*, 2017, 12, 26.

⁸¹ Law Institute Victoria, *Submission to the Review of Victoria's Bail System*, 2017, 13.

caused by detaining young people on remand, because they are ‘especially vulnerable to long-term physical, and emotional harm and negative formative influence’.⁸²

Detention under youth justice reforms in Victoria

70. The Law Institute of Victoria has also raised a concern with the *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Vic) (**Youth Justice Reform Act**) as it applies in Victoria, noting that this has increased the maximum detention period that can be imposed from three to four years, and also increases the maximum period of youth detention that can be imposed on a single offence from two years to three years.⁸³
71. The Law Institute of Victoria has advised the Law Council that further amendments imposed by the Youth Justice Reform Act impose harsher penalties for young people who commit crimes while in custody. If convicted, the young person will be subject to a presumption of cumulative sentencing for any period of detention imposed for escaping from, or damaging property of, a youth justice facility.⁸⁴
72. The amendment also introduces cumulative sentencing for attacks on youth justice centre workers committed by a young person under 18 years and imposes a statutory minimum sentence where the offender is aged 18 years or over.⁸⁵
73. The reforms double the current detention periods for such offences, and increase the penalty for ancillary offences such as harbouring or concealing a person and counselling or inducing a person to escape, where the penalties are increased from 15 to 120 penalty units, and from 3 to 12 months detention.⁸⁶
74. Furthermore, the Law Council has been advised that the Youth Justice Reform Act abrogates Victoria’s dual track sentencing, a system which underpinned the relative success of Victoria’s youth justice system.⁸⁷ The Victorian ‘dual track system’ allowed young people between the ages of 18 and 21 to remain in, or be sentenced to, youth detention, rather than adult jail, based on their prospects of rehabilitation or their vulnerability, impressionability and immaturity.⁸⁸
75. Contrary to this approach, the Youth Justice Reform Act restricts courts from sending young people between 18 and 21 who have been convicted of a category A offence or a category B offence (where there is a previous conviction for a category A or B offence) to a youth justice centre or a youth residential centre, unless there are exceptional circumstances, such as intellectual disability.⁸⁹

⁸² *DPP v SE* [2017] VSC 12, [29].

⁸³ *Children, Youth and Families Act* (Vic), sections 413(3)(b) and 413(2).

⁸⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 25 May 2018, 1504; A joint open letter from stakeholders including the Law Institute Victoria to the Attorney-General and Ministers Mikakos and Neville, 7 June 2017, <www.fclc.org.au/youth_justice_reforms_pso_bill_a_joint_open_letter_to_the_attorney_general_and_ministers_mikakos_and_neville>.

⁸⁵ *Sentencing Act 1991* (Vic) sections 32(3)(b) and 33(1A) as inserted by the *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Vic); Victoria, *Parliamentary Debates*, Legislative Assembly, 25 May 2018, 1502 (Martin Pakula, Attorney General).

⁸⁶ *Children, Youth and Family Act* (Vic) sections 498(1) (escape or attempted escape), 499 (harbor or conceal a person), 500 (counselling or inducing a person to escape).

⁸⁷ A joint open letter from stakeholders including the Law Institute Victoria to the Attorney-General and Ministers Mikakos and Neville, 7 June 2017,

<www.fclc.org.au/youth_justice_reforms_pso_bill_a_joint_open_letter_to_the_attorney_general_and_ministers_mikakos_and_neville>.

⁸⁸ *Sentencing Act 1991* (Vic) section 32.

⁸⁹ *Sentencing Act 1991* (Vic) sections 32(2C), 32(2D), 3(1); Victoria, *Parliamentary Debates*, Legislative Assembly, 25 May 2018, 1497; Jesuit Social Services ‘Unwinding of dual track erodes foundations of Victoria’s youth justice system’ (September 2017), <<https://jss.org.au/unwinding-of-dual-track-erodes-foundations-of-victorias-youth-justice-system/>>.

76. The category of offences again targets those offences now associated with youth 'gangs' such as carjacking and home invasion. To remove the dual track sentencing option from the discretion of magistrates and judges moves vulnerable young people into the adult prison system where they are likely to be traumatised and hardened, lessening their prospects of rehabilitation.⁹⁰
77. The Law Institute of Victoria has further advised that the amendments introduce a presumption of uplift to a higher court when a young person is charged with a Category A serious youth offence, allegedly committed when the child was aged 16 or over, if the offending allegedly occurred on or after 5 April 2018.⁹¹ If the young person is charged with a Category B offence, the court is required to consider uplift to a higher court.⁹² This presumption not only fails to treat children as children, but also undermines the rehabilitative focus of the Children's Court of Victoria, and is likely to result in a substantial increase in charges against accused young people proceeding via committal and subsequent trial in the County or Supreme Court.⁹³
78. The Youth Justice Reform Act creates Youth Control Orders, an 'intensive supervision regime' to 'penalise the child by imposing restrictions on his or her liberty'.⁹⁴ Such an order can mandate a young person engage in onerous reporting schedules, as well as education, training or work (including unpaid work), community service, treatment, counselling, curfews, social media bans or geographic exclusion, with failure to meet these requirements resulting in a sentence of detention.⁹⁵
79. The Law Council welcomes an alternative to detention for young people, however remains concerned about the risk of young people being placed on remand if they fail to meet unrealistic conditions that may not be responsive to the needs and circumstances of the young person.⁹⁶
80. While the Victorian Government asserts the numbers of detained young people will not increase 'disproportionately' as a result of the abovementioned amendments, the Law Institute of Victoria has advised that the Victorian Government is simultaneously planning for a significant increase in the amount of young people detained in Victoria through the proposed Cherry Creek Youth Justice Facility. The facility will more than double the capacity of Victoria's youth justice system, accommodating 224 detained young people.⁹⁷ The Victorian Government has also flagged that the facility has 'scope for further expansion'.⁹⁸ The inclusion of a 'supermax facility' in Victoria's youth justice

⁹⁰ A joint open letter from stakeholders including the Law Institute Victoria to the Attorney-General and Ministers Mikakos and Neville, 7 June 2017, <www.fclc.org.au/youth_justice_reforms_pso_bill_a_joint_open_letter_to_the_attorney_general_and_ministers_mikakos_and_neville>.

⁹¹ *Children, Youth and Families Act* (Vic) subsection 356(6); Children's Court Research Materials, Reserve Magistrate Peter Power for the Children's Court of Victoria, 'Criminal Divison: Procedure' (05 April 2018) [10.1] <www.childrenscourt.vic.gov.au/sites/default/files/Research%20Materials%20-%2010%20-%20Criminal%20Division%20-%20Procedure_3.pdf>.

⁹² *Ibid*, subsection 356(8).

⁹³ Children's Court Research Materials, Reserve Magistrate Peter Power for the Children's Court of Victoria, 'Criminal Division: Procedure' (05 April 2018) [10.1] <www.childrenscourt.vic.gov.au/sites/default/files/Research%20Materials%20-%2010%20-%20Criminal%20Division%20-%20Procedure_3.pdf>; A joint open letter from stakeholders including the Law Institute Victoria to the Attorney-General and Ministers Mikakos and Neville, 7 June 2017, <www.fclc.org.au/youth_justice_reforms_pso_bill_a_joint_open_letter_to_the_attorney_general_and_ministers_mikakos_and_neville>; Victoria, *Parliamentary Debates*, Legislative Assembly, 25 May 2018, 1502.

⁹⁴ *Children, Youth and Families Act* (Vic) section 409A.

⁹⁵ *Ibid*, section 409E.

⁹⁶ A joint open letter from stakeholders including the Law Institute Victoria to the Attorney-General and Ministers Mikakos and Neville, 7 June 2017, <www.fclc.org.au/youth_justice_reforms_pso_bill_a_joint_open_letter_to_the_attorney_general_and_ministers_mikakos_and_neville>.

⁹⁷ Victoria, *Parliamentary Debates*, Legislative Council, 8 June 2017, 3336 (Ms Pulford, Minister for Agriculture).

⁹⁸ Daniel Andrews, 'Building a Stronger and More Secure Youth Justice System', Victorian Government Media Release (Premier) 6 February 2017 (2017b): <www.premier.vic.gov.au/building-a-stronger-and-more-secure-youth-justice-system>.

system may contravene the fundamental tenets of the CRC that detention of young people should be an option of last resort and ignore evidence of best practice models that favour small, community based centres.⁹⁹

81. In Victoria bail must not be refused for a young person solely because of a lack of adequate accommodation.¹⁰⁰ However, the Law Institute of Victoria has advised that it is aware of reports of disadvantaged young people being placed on remand due to a lack of suitable alternatives, which is caused by 'an extreme shortage' of housing for young people on bail or exiting remand.¹⁰¹
82. Finally, the Law Institute of Victoria has noted that there are concerns with the ability for DHHS to access the secure welfare service administratively. Under policy, a child protection operations manager can place a young person, between the ages of 10-17 who is subject to a family reunification order, in protective custody.¹⁰² The process lacks judicial oversight and denies the child the right to be heard, by allowing the DHHS to hold the dual role of both the decision-maker and the assessor. This process also arguably violates the young person's right to not be arbitrarily detained, for detention to be a measure of last resort and the right to challenge the legality of the deprivation of their liberty before a competent, independent and impartial authority.¹⁰³
83. The National Children's Commissioner is invited to consider these points when preparing her report to the Committee on the CRC.

⁹⁹ Jesuit Social Services, *Justice Solutions Tour Report: Expanding the Conversation* 2017, <https://jss.org.au/wp-content/uploads/2017/08/SUB-170623-Solutions-Tour-Long-Report-v.15.pdf>; Wendy O'Brien and Kate Fitz-Gibbon, 'Can Human Rights Standards Counter Australia's Punitive Youth Justice Practices?' (2018) 26 *International Journal of Children's Rights* 197, 216.

¹⁰⁰ *Bail Act 1977* (Vic) subsection 3B(3).

¹⁰¹ Legal and Social Issues Committee, *Final Report: Inquiry into youth justice centres in Victoria*, Victorian Government, Melbourne, 2018, 70, 79; Law Institute Victoria, *Submission to the Legal and Social Issues Committee Inquiry into youth justice centres in Victoria*, 2017, 19; Law Institute Victoria, *Submission to the Review of Victoria's Bail System*, 2017, 30.

¹⁰² See <www.cpmanual.vic.gov.au/policies-and-procedures/out-home-care/secure-welfare/secure-welfare-service-placement>.

¹⁰³ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) article 37(b), (d).