



Law Council  
OF AUSTRALIA

# Alternative Report to the United Nations Committee on the Rights of the Child

United Nations Committee on the Rights of the Child

1 November 2018

*Telephone* +61 2 6246 3788 • *Fax* +61 2 6248 0639  
*Email* [mail@lawcouncil.asn.au](mailto:mail@lawcouncil.asn.au)  
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra  
19 Torrens St Braddon ACT 2612  
Law Council of Australia Limited ABN 85 005 260 622  
[www.lawcouncil.asn.au](http://www.lawcouncil.asn.au)

# Table of Contents

<b>About the Law Council of Australia</b> .....	<b>4</b>
<b>Acknowledgement</b> .....	<b>5</b>
<b>Executive Summary</b> .....	<b>6</b>
<b>General Measures of Implementation</b> .....	<b>7</b>
Withdrawing Australia’s reservation to art 37(c) of the CRC .....	7
<b>General Principles</b> .....	<b>7</b>
Non-Discrimination (art 2).....	7
Respect for the views of the child (art 12).....	8
Access to legal assistance .....	8
Access to specialist courts .....	11
Court delays .....	13
Access to justice for children in RRR areas .....	14
<b>Civil rights and freedoms</b> .....	<b>16</b>
Problematic police practices with respect to certain groups of young people (art 15, 16).....	16
<b>Family environment and alternative care</b> .....	<b>20</b>
Separation from parents (art 9) and children deprived of their family environment (art 20) .....	20
High contact with the criminal justice system .....	21
Lack of high quality, culturally safe or ‘child-focused’ care.....	22
Over-representation of Aboriginal and Torres Strait Islander children in care .....	23
Lack of independent scrutiny .....	26
Lack of support for transition from institutional care .....	27
Child sexual abuse .....	27
<b>Special protection measures</b> .....	<b>27</b>
Refugee and asylum seeker children (art 22) .....	27
Guardianship of unaccompanied migrant children .....	28
Children outside their country of origin seeking refugee protection .....	28
Children in conflict with the law (art 39, 40) .....	29
Minimum age of criminal responsibility.....	30
Administration of juvenile justice .....	31
Abusive practices in juvenile detention centres .....	31
Non-rehabilitative focus.....	33
Need for accountability mechanisms .....	35
Over-representation of Aboriginal and Torres Strait Islander children .....	35
Limited transitional support.....	38
Reliance on Police Watch Houses.....	39
The incarceration of young people without a meaningful prospect of release .....	39

Problematic laws and practices.....	40
Bail laws and practices.....	40
Mandatory sentencing laws .....	42
Other Victorian developments of concern.....	44

## 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 gratefully acknowledges the assistance of its National Human Rights Committee, the Law Society of New South Wales, the Law Institute of Victoria and the Law Society Northern Territory in the preparation of this submission.

## Executive Summary

1. The Law Council is grateful for the opportunity to submit an alternative report to the Committee on the Rights of the Child (**the Committee**) regarding Australia's implementation of the *Convention on the Rights of the Child (CRC)*.
2. The Law Council has chosen to comment on the following key areas of concern:
  - (a) Australia's 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. This reservation should be withdrawn;
  - (b) barriers to access to justice for children and young people, including underfunding of specialist legal assistance services, and specialist courts. This makes it difficult for children to participate meaningfully in the justice system;
  - (c) problematic police practices with respect to certain groups of young people, in particular homeless and Aboriginal and Torres Strait Islander young people;
  - (d) child protection practices, including high rates of child removal of Aboriginal and Torres Strait Islander children, minimal oversight and the criminalisation of children in out-of-home care;
  - (e) immigration policies that require the protracted detention of people seeking asylum who arrive by boat in offshore processing centres that are harmful for children;
  - (f) the age of criminal responsibility being 10 years,<sup>1</sup> despite repeated calls from civil society in Australia and UN bodies to raise it to at least 12 years;
  - (g) widespread concerns regarding the mistreatment and abuse in juvenile detention centres and the urgent need for juvenile detention reform across multiple Australian jurisdictions;
  - (h) the over-representation of Aboriginal and Torres Strait Islander children in the criminal justice and child protection systems;
  - (i) bail laws and practices, including conditions that result in a child's ongoing pre-trial detention if suitable accommodation cannot be found, or which penalise children with custodial sentences for breach of bail conditions; and
  - (j) mandatory sentencing laws which can result in unjust and harsh sentences for minor offences, failing to account for a child's particular circumstances.
3. These comments have been informed by the Law Council's previously held positions and the Justice Project – the Law Council's national review into the state of access to justice in Australia for people experiencing significant disadvantage, including children and young people. Its [final report](#) was released in August 2018.<sup>2</sup>

---

<sup>1</sup> There is a rebuttable presumption (known as *doli incapax*) that children aged between 10 and 14 years are incapable of committing a criminal act.

<sup>2</sup> Law Council of Australia, *Justice Project Final Report* (2018) <<https://www.lawcouncil.asn.au/justice-project/final-report>>.

# General Measures of Implementation

## Withdrawing Australia's reservation to art 37(c) of the CRC

1. 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.<sup>3</sup> Australia's reservation is in the following terms:

*... the obligation to separate children from adults in prison is accepted only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia.*<sup>4</sup>

2. The Law Council agrees with the Committee's appraisal in its 2012 Concluding Observations that this reservation is unnecessary.<sup>5</sup> The concerns raised by Australia are already addressed by article 37(c), which provides that every child deprived of liberty shall be separated from adults 'unless it is in the best interests of the child not to do so' and that the child 'shall have the right to maintain contact with his or her family'. This would provide latitude, for example, to allow infants to remain with their incarcerated mothers.
3. As noted by the Law Institute of Victoria (**LIV**), it would be necessary to ensure that valuable programs, such as the Mother & Baby program conducted at the Dame Phyllis Frost Centre in Victoria, are not affected by withdrawal of the reservation.<sup>6</sup>

## General Principles

### Non-Discrimination (art 2)

4. In its 2012 Concluding Observations, the Committee noted, amongst others, the following concerns with respect to Australia's compliance with article 2:

*The serious and widespread discrimination faced by Aboriginal and Torres Strait Islander children, including in terms of provision of and accessibility to basic services and significant overrepresentation in the criminal justice system and in out-of-home care...*

*Inadequate consultation and participation of Aboriginal and Torres Strait Islander persons in the policy formulation, decision-making and implementation processes of programmes affecting them...*<sup>7</sup>

---

<sup>3</sup> Attorney-General's Department, *Australia's draft report to the UN Committee on the Rights of the Child* (November 2017) 1 <<https://www.ag.gov.au/Consultations/Documents/Australias-draft-report-on-the-Convention-on-the-Rights-of-the-Child/Australias-draft-report-on-the-Convention-on-the-Rights-of-the-Child.pdf>>.

<sup>4</sup> United Nations Treaty Collection, *Convention on the Rights of the Child (Declarations and Reservations)* (Australia)

<[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV11&chapter=4&lang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV11&chapter=4&lang=en#EndDec)

<sup>5</sup> See 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) [10].

<sup>6</sup> *Ibid* [29].

5. These concerns have not been adequately addressed, and have arguably grown more acute since 2012. They are discussed in context and greater detail below, particularly under 'Special Protection Measures'.

## Respect for the views of the child (art 12)

### Access to legal assistance

6. The chronic underfunding of the legal assistance sector in Australia has a significant impact upon young people in legal and administrative proceedings. Access by children to legal assistance is relevant to Australia's obligations under article 12, which requires children to be 'provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body',<sup>8</sup> and article 40, where any child accused of violating the penal law has a right to 'legal or other appropriate assistance in the preparation and presentation of his or her defence'.<sup>9</sup> Providing legal assistance for children is also relevant to the Australia's obligation under article 19 to take measures to protect children from violence, abuse and neglect.<sup>10</sup>
7. The rights to be heard in judicial and administrative proceedings and be afforded legal assistance in the preparation of a criminal defence are mostly illusory without adequate funding for legal assistance services. Despite the fundamental role specialist, child-friendly legal assistance services play in ensuring access to justice for children and young people, there remains a gap in availability of such services, and a lack of lawyers with specialist skills to deal with children and young people.<sup>11</sup>
8. Children and young people experience a wide range of legal problems in Australia, including criminal problems (including as victims of crime), consumer, accidents, housing, rights (including discrimination), personal injury, fines, and child protection matters.<sup>12</sup> Young people 'at risk'- including young people who are homeless, people with disability, Aboriginal and Torres Strait Islander, live in out of out-home-care or juvenile detention, or are parents - are particularly at risk of substantial and multiple legal problems.<sup>13</sup> The experience of legal problems can further entrench disadvantage and social exclusion, due to their additive effect.<sup>14</sup> They are also a key predictor of mental health problems for young people.<sup>15</sup>

---

<sup>7</sup> Victorian Government, Corrections Prisons and Parole, *Mothers and Children Program Brochure* <<http://www.corrections.vic.gov.au/utility/publications+manuals+and+statistics/mothers+and+children+program+brochure>>.

<sup>8</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 12.

<sup>9</sup> *Ibid* art 40.

<sup>10</sup> *Ibid* art 19.

<sup>11</sup> See eg Pascoe Pleasence et al, Law and Justice Foundation of NSW, *Reshaping Legal Assistance Services: Building on the evidence base* (2014) 31.

<sup>12</sup> C Christine Coumarelos et al, Law and Justice Foundation of New South Wales, *Collaborative Planning Resource – Service Planning* (2015), 29; Law Council of Australia, *Justice Project Final Report: Children and Young People* (2018), 9-14.

<sup>13</sup> Christine Coumarelos et al, *Collaborative Planning Resource*, 30; Deborah Mancourt, 'Youth and the law: the impact of legal problems on young people' (2014) *Updating Justice* 1, 5, 7; Law Council of Australia, *Justice Project Final Report: Children and Young People* (2018), 13.

<sup>14</sup> Deborah Mancourt, 'Youth and the law: the impact of legal problems on young people' (2014) *Updating Justice* 1, 1, 7.

<sup>15</sup> Pascoe Pleasence, Nigel Balmer and Ann Hagell, Youth Access, *Health Inequality and Access to Justice: Young People, Mental Health and Legal Issues* (2015).

9. Access to specialised, free legal assistance<sup>16</sup> for children and young people is critical given their limited independence and life experience, limited knowledge of the law, difficulties identifying legal problems and the systemic barriers created by an adult legal system – as recognised by the Committee<sup>17</sup> and United Nations Office of the High Commissioner for Human Rights.<sup>18</sup> Specialist children’s legal assistance services play a fundamental role in ensuring diversionary and rehabilitative responses to youth offending.<sup>19</sup> More generally, they also enable young people to have a voice in fundamental decisions which will affect them, including family and child protection matters.<sup>20</sup>
10. However, there are significant gaps in specialist legal assistance for children, as highlighted in Justice Project research and stakeholder responses.<sup>21</sup> Coumarelos et al identified the lack of both specialist legal services for young people and lawyers with specialist skills to deal with children and young people, as key gaps in critical services which are necessary to deliver access to justice to children and young people.<sup>22</sup> For example, Tasmania and the Northern Territory both lack specialist, comprehensive legal services for children and young people.<sup>23</sup>
11. The gap in civil legal assistance is exemplified with respect to care and protection matters. The rate of children receiving child protection services, has risen by approximately 20 per cent from 2012 to 2016.<sup>24</sup> These rises correspond with sharp increases in demand for legal aid in relation to child protection issues.<sup>25</sup> However, nationally, less than three per cent of legal aid grants are for civil law matters,<sup>26</sup> and community legal centres turned away almost 170,000 people in 2015-16. There is a recognised risk that when civil matters are left unresolved they can escalate into more serious civil or even criminal matters. For example, legal aid commissions commonly witness ‘children who have been or are involved in child protection proceedings, also involved in juvenile justice proceedings, and ultimately, adult criminal law proceedings’.<sup>27</sup> Additionally, a 2015 UK study by Pleasence et al found

---

<sup>16</sup> Legal assistance services in Australia include: legal aid commissions, community legal centres, Aboriginal Legal Services, and Family Violence Prevention Legal Services.

<sup>17</sup> Committee on the Rights of the Child, *General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 34<sup>th</sup> sess, UN Doc CRC/GC/2003/5 (27 November 2003) [24].

<sup>18</sup> *Access to justice for children*, UN Doc A/HRC/25/35, 13.

<sup>19</sup> Western Australia Commissioner for Children and Young People, *Submission to the Law Council’s Justice Project*, 2017.

<sup>20</sup> Office of the Guardian for Children and Young People South Australia, *Submission to the Law Council’s Justice Project*.

<sup>21</sup> Including the Western Australia Commissioner for Children and Young People; Office of the Guardian for Children and Young People South Australia; LS NSW; Community Legal Centres NSW; and Hume Riverina Community Legal Service. See also Pascoe Pleasence et al, Law and Justice Foundation of NSW, *Reshaping Legal Assistance Services: Building on the evidence base* (2014), 31.

<sup>22</sup> Christine Coumarelos et al, ‘Legal Needs of younger people in Australia’ (2013) 27 *Updating Justice* 1.

<sup>23</sup> Although the Legal Aid Commission of Tasmania plays an important role in providing young people with advice and representation, including before the Magistrates Court Youth Justice Court: Consultation, 15/08/2017, Hobart (Legal Aid Commission of Tasmania); Consultation, 31/03/2017, Darwin (North Australian Aboriginal Justice Agency); Consultation, 30/03/2017, Darwin (Darwin Community Legal Service); Consultation, 15/08/2017, Hobart (Tasmanian Children’s Commissioner).

<sup>24</sup> Australian Institute of Health and Welfare, *Child Protection Australia 2015-2016* (2017) 17.

<sup>25</sup> See, eg, Mary Anne Noone, ‘Challenges Facing the Australian Legal Aid System’ in Asher Flynn and Jacqueline Hodgson (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Hart Publishing, 2017) 32; Department of Justice and Regulation (Victoria), *Access to Justice Review* (2016) 376.

<sup>26</sup> Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014), 678.

<sup>27</sup> *Ibid* 758.

that the experience of legal problems is a key predictor of mental health problems for young people.<sup>28</sup>

12. There are particularly critical gaps in legal assistance services for Aboriginal and Torres Strait Islander children and young people, who have urgent legal needs. For example, they are 24 times more likely to be in detention,<sup>29</sup> and 9.8 times more likely to be placed in out-of-home care,<sup>30</sup> than non-Indigenous children.
13. Notwithstanding this, Victoria's only Aboriginal legal service specifically for children and young people recently closed due to lack of government funding.<sup>31</sup> The service, known as *Balit Ngulu* provided services to Victorian Aboriginal and Torres Strait Islander children needing legal help and assistance with the intertwined issues of youth justice, child protection, family law, and civil law matters.<sup>32</sup> *Balit Ngulu* was established by the Victorian Aboriginal Legal Service (VALS) when it became clear that neither VALS nor the Community Controlled Organisation, Djirra were able to provide assistance to a large number of Aboriginal and Torres Strait Islander children as a result of professional conflict arising from the work undertaken by the agencies in the same or related matters. The inability of both VALS and Djirra to provide legal assistance to these children led to Aboriginal and Torres Strait Islander children either being left unrepresented or inappropriately represented. *Balit Ngulu* provided a valuable service in the provision of culturally appropriate legal services and facilitated access to justice for these children. LIV members have reported that, over the past year, the intervention of *Balit Ngulu* in cases involving Aboriginal and/or Torres Strait Islander children had resulted in:
  - (a) successful diversion programs being implemented as opposed to children entering the criminal justice system; and
  - (b) prioritisation and facilitation of placement for children within a kinship network as opposed to anonymous out of home care.
14. The Law Council further notes that general Aboriginal legal services which are capable of providing culturally safe support to children and families are also struggling to meet demand. For example, some Aboriginal Family Violence Prevention Legal Services are reporting having to turn away 30 to 40 per cent of women seeking assistance due to lack of resources.<sup>33</sup>
15. In certain jurisdictions there also is a lack of Independent Children's Lawyers (ICLs) for family law matters. In 2014 the Productivity Commission observed that the 'gap in independent lawyer services for children [was] especially worrying'.<sup>34</sup> This gap is made worse by the continuing withdrawal of the private profession from the legal assistance sector as a result of insufficient legal aid rates for private practitioners. The Productivity Commission received evidence of ICLs withdrawing from legal aid

---

<sup>28</sup> Pascoe Pleasence, Nigel Balmer and Ann Hagell, *Youth Access, Health Inequality and Access to Justice: Young People, Mental Health and Legal Issues* (2015).

<sup>29</sup> For young people aged 10-17: Australian Institute of Health and Welfare, *Youth Justice in Australia 2016-17* (2018) 8.

<sup>30</sup> National Aboriginal and Torres Strait Islander Legal Service, Submission to the Justice Project, September 2017; Victoria Tauli-Corpuz, Special Rapporteur, Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia, UN Doc A/HRC/36/46/Add.2 (8 August 2017).

<sup>31</sup> Connie Agius, 'Victorian Aboriginal Legal Service shuts down youth service', ABC The World Today, 28 September 2018.

<sup>32</sup> Section drawn from Letters from the LIV to the Victorian Attorney-General.

<sup>33</sup> Email from National Family Violence Prevention Legal Service to Law Council of Australia, 15 May 2018.

<sup>34</sup> *Ibid* 30.

briefs because the rates paid by legal aid commissions were unable to cover operating expenses or generate any profit margin.<sup>35</sup>

16. The Law Council has argued that it is in the best interests of the child to 'appropriately fund ICLs so that experienced practitioners in private practice are willing to do more of this work'. Increased funding will also allow ICLs to do more for children and to spend more time on each case and to meet with children more often in environments which are 'convenient to the child and not just the ICL'.<sup>36</sup>
17. The Law Council considers that additional investment in specialist legal assistance services for children and young people, including for Aboriginal and Torres Strait Islander children, civil matters and ICLs, is vital.

### Access to specialist courts

18. In addition to specialist legal services, specialist courts for children and young people, including children's courts, youth courts and Aboriginal and Torres Strait Islander sentencing courts are important in ensuring access to justice by addressing the specific legal and non-legal needs of participants. Children's Courts are 'presided over by judges with specialist training and experience in dealing with children, and who are well placed to consider alternatives to detention as a means of addressing the underlying issues that result in children coming before the courts'.<sup>37</sup>
19. The Law Council's Justice Project explored a range of successful examples of specialist courts in various jurisdictions, and emphasised the need to properly resource these courts, alongside necessary supports and services that underpin therapeutic justice and enable courts to exercise diversionary sentencing options.<sup>38</sup>
20. For example, the Specialist Youth Justice Court (**SYJC**) is a problem-solving court that deals with all youth matters for children under the age of 18<sup>39</sup> before the Magistrates' Court in Tasmania.<sup>40</sup> Its specialist list deals with more complex matters through a 'therapeutic, bail based approach' which addresses young offenders' underlying issues and helps the young person escape cycles of offending and disadvantage.<sup>41</sup> It has been evaluated as effective in offering 'a more therapeutic response to complex young offenders'.<sup>42</sup>

---

<sup>35</sup> See, eg, Terrill Associates, quoted in Productivity Commission, *Access to Justice Arrangements*, 727.

<sup>36</sup> Law Council of Australia, Submission to Australian Law Reform Commission, *Review of the Family Law System – Issues Paper 48*, 7 May 2018, 84-85.

<sup>37</sup> Office of the Children's Commissioner Northern Territory, *Annual Report 2016-17 (2017)* 116.

<sup>38</sup> See generally Law Council of Australia, *Justice Project Final Report: Courts and Tribunals* (2018).

<sup>39</sup> The Youth Justice Court hears and determines cases involving young people who are alleged to have committed offences while under the age of 18: Magistrates Court Tasmania, *Youth Justice Court* <[http://www.magistratescourt.tas.gov.au/about\\_us/youth\\_justice\\_division](http://www.magistratescourt.tas.gov.au/about_us/youth_justice_division)>.

<sup>40</sup> Magistrates Court Tasmania, *Youth Justice Court* <[http://www.magistratescourt.tas.gov.au/about\\_us/youth\\_justice\\_division](http://www.magistratescourt.tas.gov.au/about_us/youth_justice_division)>.

<sup>41</sup> Magistrates Court Tasmania, *Annual Report 2015-2016*, 13.

<sup>42</sup> Victor Stojcevski, Magistrates Court Tasmania, *Hobart Specialist Youth Justice Court Pilot: Evaluation Report* (2013), 8. The Pilot did not measure juvenile recidivism as this was not a specific goal of the Pilot. Rather, the Pilot aimed to improve youth justice arrangements within the context of the broader goals of the *Youth Justice Act 1997* (Tas). There was no definitive way of proving a causal link between the Pilot, the Special List and reduction in recidivism.

21. However, specialist courts for children and young people are often under-resourced, overburdened and unevenly available in Australia.<sup>43</sup> This is particularly the case in Regional, Rural and Remote (**RRR**) areas, as discussed further below.
22. For example:
- (a) the Youth Koori Court is a part of the NSW Children's Court which deals with Aboriginal and Torres Strait Islander young people charged with an offence. A 2018 evaluation found that participation in the Youth Koori Court reduced reoffending, as well as periods spent in custody. It also led to other positive outcomes such as safe living environments, progress in achieving education and employment goals and restoring contact with Clan and Country.<sup>44</sup> However, the Youth Koori Court has only been piloted in Sydney NSW to date,<sup>45</sup> and should be expanded to appropriate regional areas in NSW;
  - (b) the Law Council further notes that there are no specialist Aboriginal sentencing courts resembling the Youth Koori Court at all for children and young people in certain jurisdictions, such as the Northern Territory and Western Australia;<sup>46</sup> and
  - (c) additionally, the Youth Drug Court (**YDC**) in NSW was closed down in 2012. The YDC was generally considered a positive diversionary option to deal with the underlying cause of involvement in crime, and a means of keeping children from prolonged contact with the criminal justice system. The LS NSW supports its reinstatement.<sup>47</sup> The Law Council notes that generally, Drug Courts have been independently reviewed as more effective than conventional sanctions in reducing the risk of recidivism among offenders whose crime is drug-related'.<sup>48</sup>
23. Furthermore, some children are excluded from the operation of children's courts altogether. For example, the Law Society of New South Wales (**LS NSW**) draws specific attention to section 28(2) of the *Children's (Criminal Proceedings) Act (1987) (NSW) (CCPA Act)* which provides that the Children's Court of NSW does not have jurisdiction to deal with a traffic offence committed by a child of licensable age, unless the offence arose out of the same circumstances as another offence that is alleged to have been committed by the person, and for which the Children's Court of NSW has jurisdiction.<sup>49</sup> As a result, children aged 16 or 17 years who commit a traffic offence are dealt with in the adult NSW Local Court jurisdiction. The LS NSW considers that it is entirely appropriate, and in accordance with Australia's

<sup>43</sup> See generally Law Council of Australia, *Justice Project Final Report: Courts and Tribunals* (2018) and Law Council of Australia, *Justice Project Final Report: Children and Young People* (2018).

<sup>44</sup> Melissa Williams et al, Western Sydney University Aboriginal and Torres Strait Islander Employment and Engagement Advisory Board, *Youth Koori Court Review of Parramatta Pilot Project* (2018) <[https://www.westernsydney.edu.au/\\_\\_data/assets/pdf\\_file/0008/1394918/YKC\\_review\\_Oct\\_24\\_v2.pdf](https://www.westernsydney.edu.au/__data/assets/pdf_file/0008/1394918/YKC_review_Oct_24_v2.pdf)>

<sup>45</sup> The Youth Koori Court commenced in Parramatta, Sydney, NSW and has recently been extended to Surry Hills, Sydney, NSW: Calla Wahlquist, 'Youth Koori court in NSW extended, with \$2.7m for three more years', *The Guardian* (online) 31 May 2018, <<https://www.theguardian.com/australia-news/2018/may/31/youth-koori-court-in-nsw-gets-27m-for-another-three-years>>.

<sup>46</sup> Australian Law Reform Commission, *Pathways to Justice: Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report No 133 (2018), 329.

<sup>47</sup> The LS NSW notes that if the YDC is reinstated, safeguards should be in place to ensure that children who appear before the YDC are not at risk of receiving a greater sentence if they fail to complete a YDC program, than if the matter had not proceeded through the YDC.

<sup>48</sup> Don Weatherburn et al, 'The NSW Drug Court: A re-evaluation of its effectiveness' (Contemporary Issues in Crime and Justice No 121, NSW Bureau of Crime Statistics and Research, September 2008), 12.

<sup>49</sup> *Children's (Criminal Proceedings) Act (1987) (NSW) s 28(2)*.

obligations under the CRC, that children and young people accused of a traffic offence appear before a specialist Children's Court in a closed court setting.

### Court delays

24. Both specialist and generalist courts in multiple Australian jurisdictions are dealing with long delays as a result of under-resourcing. For example, with respect to Children's Courts:

*At 30 June 2017, of the pending caseloads for criminal matters for Children's Courts matters in Queensland, the Australian Capital Territory and the Northern Territory, 24.1, 22.6 and 20.1 per cent (respectively) were pending for more than 6 months (against a benchmark of 10 per cent), with 9.5 per cent of the Queensland caseload and 8 per cent of the Northern Territory caseload pending for more than 12 months (against a set benchmark of zero per cent).<sup>50</sup>*

*At 30 June 2017, of the pending caseloads for civil matters for Children's Courts 48.5 per cent of matters in Western Australia, 40.4 per cent of matters in Queensland and 35.6 per cent of matters in NSW had been pending for over 6 months (against a benchmark of 10 per cent). 16.6 per cent of Western Australian matters, 14.8 per cent of Queensland matters and 14.6 per cent of NSW matters had been pending for more than 12 months (against a zero per cent benchmark).<sup>51</sup>*

25. Family Courts and Federal Circuit Courts make decisions that directly impact children, including with respect to family law and asylum seeker matters, and are also experiencing substantial delays. For example:

*At 30 June 2017, of the pending caseloads for Family Court (non-appeal) matters, 32.3 per cent had been pending for over a year (against a benchmark of 10 per cent), and 14.4 per cent for over two years (against a benchmark of zero per cent). For the Family Court of Western Australia, these figures were 32.5 per cent and 10.1 per cent respectively.<sup>52</sup>*

*At 30 June 2017, of the pending caseloads for the Federal Circuit Court, 39.4 per cent had been pending for more than 6 months (against a benchmark of 10 per cent), while 18.2 per cent had been pending for more than 12 months (against a benchmark of zero per cent).<sup>53</sup>*

26. The adverse impacts on the wellbeing of children and families of court delays can be significant and tangible.<sup>54</sup> For example, court delays can result in children waiting on remand for extended periods,<sup>55</sup> or place them at heightened risk of exposure to family violence.<sup>56</sup> Further, with respect to asylum seekers, the Centre for Advocacy, Support and Education for Refugees observed that 'extended delays can have life-altering consequences when they cause children to be separated from parents, or

---

<sup>50</sup> Productivity Commission, *Report on Government Services 2018*, Part C Chapter 7: Courts (2018) 7.14 Table 7A.17.

<sup>51</sup> Ibid 7.14 Table 7A.18.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> See eg Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014),127.

<sup>55</sup> Law Council of Australia, *Justice Project Final Report: Courts and Tribunals* (2018) 17 citing Consultation, 20/09/2017, Teleconference (Legal Aid NSW).

<sup>56</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017) 58-59.

significantly extend the period of time that a visa applicant resides in a situation of conflict or extreme poverty'.<sup>57</sup>

### Access to justice for children in RRR areas

27. Lack of specialist legal services and specialist children's courts is particularly acute in many RRR areas across Australia. Together with other factors such as a lack of critical support services (discussed below), this may be contributing to inequitable outcomes for children in these areas. These poorer outcomes can manifest in higher rates of supervision, including imprisonment in juvenile detention and policy custody, as well as intensive community-based supervision orders. For instance, the Australian Institute of Health and Welfare (AIHW) reported in 2017 that:

*Although most young people under supervision had come from cities and regional areas, those from geographically remote areas had the highest rates of supervision. On an average day in 2016–17, young people aged 10–17 who were from remote areas were 6 times as likely to be under supervision as those from major cities (86 per 10,000 compared with 14 per 10,000), while those from very remote areas were 10 times as likely (142 compared with 14 per 10,000).*

*This pattern occurred in both community-based supervision and detention. Young people aged 10–17 from remote areas were 6 times as likely as those from major cities to be under community-based supervision or in detention on an average day, while those from very remote areas were 10 times as likely to be under community-based supervision, and 9 times as likely to be in detention.*<sup>58</sup>

28. The AIHW further noted that Aboriginal and Torres Strait Islander children and young people living in RRR areas were even more likely to be under supervision.<sup>59</sup> These realities are borne out in the Northern Territory, which has a large population of young people and high rates of juvenile crime and detention, but no specialist legal service for children and young people<sup>60</sup> and no specialist Children's Court outside of Darwin.<sup>61</sup> However, the Northern Territory Government has recently indicated that it will establish a Children's Court in Alice Springs.<sup>62</sup>
29. In a study of the NSW Children's Court, Fernandez et al raised concerns about the disparity between outcomes for young people in RRR areas compared to young people in urban areas.<sup>63</sup> The study's participants identified 'that police practice varies between [rural and urban] areas with young persons in rural areas more likely

---

<sup>57</sup> Centre for Advocacy, Support and Education for Refugees, Submission No 241 to Productivity Commission, *Inquiry into Justice Arrangements – Response to Draft Report*, 21 May 2014, 3-4.

<sup>58</sup> Australian Institute of Health and Welfare, *Youth Justice in Australia 2016-17* (2018). See also Australian Institute of Health and Welfare, 'Youth justice in Australia 2015-16' (Bulletin No 139, March 2017) 10-11,

<sup>59</sup> Australian Institute of Health and Welfare, *Youth Justice in Australia 2016-17* (2018) 8, 10. See also Australian Institute of Health and Welfare, 'Youth justice in Australia 2015-16' (Bulletin No 139, March 2017) 10-11.

<sup>60</sup> Although the Northern Territory Legal Aid Commission and the North Australian Aboriginal Justice Agency provide some services for young people.

<sup>61</sup> See, eg, North Australian Aboriginal Justice Agency, *Criminal Law* <<http://www.naaja.org.au/our-services/criminal-law/>>.

<sup>62</sup> Northern Territory Government, 'Safer Communities: Response to the 227 Recommendations of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory' (Media Release, 1 March 2018) <<http://newsroom.nt.gov.au/mediaRelease/24289>>.

<sup>63</sup> Elizabeth Fernandez, University of New South Wales, *A Study of the Children's Court of New South Wales: Part of a National Assessment of Australia's Children's Courts* (2014) 21.

to be treated as adults by police and to receive harsher sentences from magistrates'.<sup>64</sup> This may be partly due to the fact that many Children's Courts matters are heard in the Local Court by non-specialist magistrates, with participants also noting differences regarding specialist courtrooms, availability of other specialised staff such as legal representatives and access to staff training. Justice Project contributors in RRR areas corroborated this concern, noting that non-specialist magistrates in RRR areas lack the necessary expertise to appropriately deal with children's matters and as a result, children, especially Aboriginal children, often receive harsher sentences to their urban counterparts.<sup>65</sup>

30. There are similar regional equities with respect to civil matters, including child protection. The Royal Commission into the Protection and Detention of Children in the Northern Territory (**NT Royal Commission**) reported that the cost of travel for RRR parents and families involved in child protection matters is often beyond their means.<sup>66</sup> As a result of these challenges, parents and family members often do not participate in proceedings, especially in Alice Springs, and final court orders are frequently made in their absence.<sup>67</sup> Further, children in NT care and protection matters are frequently unrepresented,<sup>68</sup> as the court is not obliged to appoint a legal representative for a child in care and protection proceedings.<sup>69</sup> Similarly, in all other jurisdictions except Victoria, South Australia and Tasmania, it is not mandatory for a child in care and protection proceedings to be independently represented.<sup>70</sup>
31. In Victoria, children in care and protection matters are required to be independently represented and the court must appoint representation if the child is unrepresented.<sup>71</sup> However, due to under-resourcing of legal assistance services, conflict of interest issues and a lack of specialisation in regional areas, many children are unable to find local representation and instead have to use lawyers in other regional towns which are often many miles away.<sup>72</sup>
32. In its 2017 review of its child protection services, Victoria Legal Aid found that

*There are an inadequate number of legal service providers in some regional areas. These areas deal with almost half of all applications to the Children's Court of Victoria. There is a need to ensure that lawyers have the necessary skills so that they are able to perform this difficult work to a*

---

<sup>64</sup> Ibid.

<sup>65</sup> Law Council of Australia, *Justice Project Final Report: Children and Young People* (2018) 30 citing Consultation, 20/09/2017, Teleconference (Legal Aid NSW); Consultation, 14/09/2017, Bourke (Aboriginal Legal Service (NSW/ACT)); Consultation, 13/09/2017, Bourke (Mission Australia).

<sup>66</sup> Northern Territory, Royal Commission into the Protection and Detention of Children in the Northern Territory, Final Report (2017) vol 3A, 500.

<sup>67</sup> Ibid.

<sup>68</sup> Law Council of Australia, *Justice Project Final Report: Children and Young People* (2018) 32 citing Consultation, 29/03/2017, Alice Springs (Central Australian Aboriginal Legal Aid Service and Central Australian Aboriginal Family Law Unit); Consultation, 29/09/2017, Teleconference (Office of the Children's Commissioner Northern Territory).

<sup>69</sup> The Court *may* order the appointment of a legal practitioner to represent a child to whom the proceedings relate if the Court considers doing so is in the best interests of the child: *Care and Protection of Children Act 2007* (NT) s 143A.

<sup>70</sup> However, in all jurisdictions, the court has the power to appoint the child a legal representative if it is deemed in the child's best interests: See *Children, Young Persons and Their Families Act 1997* (Tas) s 59; *Children and Young People Act 2008* (ACT); *Court Procedures Act 2004* (ACT) s 74E; *Children and Community Services Act 2004* (WA) s 148; *Child Protection Act 1999* (Qld) Part 3, Division 2; *Children's Protection Act 1993* (SA) s 48; *Children, Youth and Families Act 2005* (Vic) s 524.

<sup>71</sup> *Children, Youth and Families Act 2005* (Vic) s 524.

<sup>72</sup> Law Council of Australia, *Justice Project Final Report: Children and Young People* (2018) 33 citing Consultation, 26/09/2017, Mildura (Victoria Legal Aid); Victoria Legal Aid, *Child Protection Legal Aid Services Review* (2017) 44-45.

*high standard. This goes beyond an understanding of the law, and includes the ability to deal with young people, understand the impact of trauma and deliver services in a culturally safe way.*<sup>73</sup>

33. Such concerns can be extrapolated to RRR areas in other jurisdictions and a range of legal matters.<sup>74</sup> Several Justice Project stakeholders raised concerns about the gaps in specialist services and courts in RRR Australia for children and young people.<sup>75</sup>

## Civil rights and freedoms

### **Problematic police practices with respect to certain groups of young people (art 15, 16)**

34. The Law Council is concerned that practices by some police, including 'over-policing' and pre-emptive policing, may contravene 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 and the rights of freedom of association and peaceful assembly under article 15. As discussed further below, such practices are also potentially inconsistent with Australia's obligations under article 37 (ensuring that the arrest, detention or imprisonment of a child is only used as a measure of last resort and for the shortest appropriate period of time), as well as article 2 (ensuring that a child is protected against discrimination).
35. The Justice Project highlighted concerns that an over-emphasis by police on prosecuting low level 'street crime', leads to the criminalisation of young people who are experiencing poverty, homelessness or mental health conditions.<sup>76</sup> This includes the enforcement of public nuisance and 'street sweeping' laws, offensive behavior, obstructing police, shoplifting and fare evasion.<sup>77</sup> For example, Yfoundations<sup>78</sup> highlighted that because of their public visibility, non-conformist attitude and tendency to gather in groups, young people, especially those who are homeless or Aboriginal and Torres Strait Islander, are often targeted by police and

---

<sup>73</sup> Victoria Legal Aid, *Child Protection Legal Aid Services Review* (2017) 2.

<sup>74</sup> For further detail, see Law Council of Australia, *Justice Project Final Report: Children and Young People* (2018); Law Council of Australia, *Justice Project Final Report: Rural Regional and Remote Australians* (2018)

<sup>75</sup> Law Council of Australia, *Justice Project Final Report: Children and Young People* (2018) 29 citing submissions from the LS NSW, Hume Riverina Community Legal Service, and Uniting Tasmania; and consultations with the Office of the Children's Commissioner Northern Territory, Mildura (Victoria Legal Aid), Mildura (Private Practitioner), Legal Aid NSW, Bourke (Aboriginal Legal Service (NSW/ACT)), Bourke (Mission Australia), Hobart (Commissioner for Children and Young People Tasmania).

<sup>76</sup> Law Council of Australia, *Justice Project Final Report: Broader Justice Players* (2018) 24 citing eg, Vicki Sentas, 'The Poverty of Criminal Law: Criminalisation and the Limits of Access to Justice' in Andrea Durbach, Brendan Edgeworth and Vicki Sentas (eds), *Law and Poverty in Australia: 40 Years after the Poverty Commission* (The Federation Press, 2017) 249; Lucy Adams, 'In the Public Eye: Addressing the negative impact of laws regulating public space on people experiencing homelessness' (Churchill Fellowship Report, Justice Connect, April 2014) 11.

<sup>77</sup> Law Council of Australia, *Justice Project Final Report: Broader Justice Players* (2018) 24 citing eg submissions by Tamara Walsh; Vicki Sentas, 'The Poverty of Criminal Law: Criminalisation and the Limits of Access to Justice' in Andrea Durbach, Brendan Edgeworth and Vicki Sentas (eds), *Law and Poverty in Australia: 40 Years after the Poverty Commission* (The Federation Press, 2017).

<sup>78</sup> Yfoundations is the peak body organisation representing youth homelessness in Australia.

charged with public space offences.<sup>79</sup> Sentas has also pointed towards the effects of policing practices regarding NSW 'consorting' offences:

*These consorting offences act less as a criminal offence, than a police power: while 46 consorting charges were laid between 2012 and 2015, 9155 official consorting warnings were given by police. These warnings have disproportionately affected people who are homeless, people with mental health conditions or cognitive impairments, youth and Aboriginal and Torres Strait Islander peoples.*<sup>80</sup>

36. Such practices, in addition to other forms of over-policing<sup>81</sup> 'perceived to be discriminatory, unfair, or unduly oppressive',<sup>82</sup> may manifest in a greater likelihood of marginalised young people being stopped and searched by police, cautioned, charged and/or detained.<sup>83</sup> For example, the Australian Law Reform Commission, in its Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (**ALRC Report**) found that police sometimes engage in 'over-charging' by charging for multiple offences in relation to one incident, or charging with too high an offence for the alleged conduct.<sup>84</sup> The NT Royal Commission similarly found that 'Northern Territory police over-charge children and young people with offences,' and imposed inappropriate bail conditions.<sup>85</sup>
37. Aboriginal and Torres Strait Islander Legal Services have 'consistently pointed to a bias in the exercise of police discretion against diverting or cautioning Aboriginal and Torres Strait Islander people, particularly young people'.<sup>86</sup> The ALRC Report found that there is evidence that the law is applied unequally through such police practices— citing multiple research studies indicating that Aboriginal and Torres Strait Islander young people are more likely to be arrested than their non-Indigenous counterparts even after factors such as the offence, offence history and background factors were taken into account.<sup>87</sup> Examples of studies include:

*Crime Statistics Agency Victoria (CSAV) found that from July 2016 to June 2017, Aboriginal and Torres Strait Islander people were 10% more likely to be arrested following an alleged offender incident, were less likely to be*

---

<sup>79</sup> Law Council of Australia, *Justice Project Final Report: Children and Young People* (2018) 60 citing submission by Yfoundations. Other stakeholders raised similar concerns, including Aboriginal Legal Services in regional NSW and WA.

<sup>80</sup> Vicki Sentas, 'The Poverty of Criminal Law', 258, citing NSW Ombudsman, *The Consorting Law: Report on the Operation of Part 3A, Division 7 of the Crimes Act 1900* (April 2016) 68.

<sup>81</sup> Over-policing has been described internationally as generally resulting from the 'imposition of police control on individual or community activities at a level unlikely to occur in the dominant society'. Aboriginal Justice Implementation Commission, *Report of the Aboriginal Justice Inquiry of Manitoba* (November 1999), Chapter 16: Policing.

<sup>82</sup> Queensland Crime and Corruption Commission, *Restoring Order: Crime Prevention, Policing and Local Justice in Queensland's Indigenous Communities* (2009), 98.

<sup>83</sup> The Police Accountability Project, *What is Racial Profiling?* <<http://www.policeaccountability.org.au/issues-and-cases/racial-profiling/>>; LIV, Victoria Police Community Consultation (2013), citing Chris Cunneen 'Opinion on Racial Profiling on Federal Court of Australia Proceedings No VID 969 of 2010', Submission in *Daniel Haile-Michael & Ors v Nick Konstantinidis & Ors*, VID 969 of 2010, 15 October 2012; Queensland Crime and Corruption Commission, *Restoring Order: Crime Prevention, Policing and Local Justice in Queensland's Indigenous Communities* (2009), 98.

<sup>84</sup> Australian Law Reform Commission, *Pathways to Justice*, 457.

<sup>85</sup> Northern Territory, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report* (2017) Vol 2B, 249. Northern Territory, *Royal Commission: Findings and Recommendations*, 20.

<sup>86</sup> Human Rights Law Centre and Change the Record Coalition, *Over-looked and overrepresented: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment* (2017) 32.

<sup>87</sup> Australian Law Reform Commission, *Pathways to Justice*, 447.

*cautioned, and were also less likely to receive a summons or intent to summons than a non-Indigenous alleged offender.*<sup>88</sup>

*In 2008, the Australian Institute of Criminology (AIC) examined differences in juvenile diversionary rates for Aboriginal and Torres Strait Islander and non-Indigenous offenders in New South Wales (NSW), South Australia (SA) and Western Australia (WA). It found that Aboriginal and Torres Strait Islander offenders were more likely to be referred to a court than non-Indigenous offenders whereas non-Indigenous offenders in all three states were significantly more likely to receive a police caution.*<sup>89</sup>

38. Similar concerns regarding over-policing have been raised by the LIV. It points towards the Victorian Youth Parole Board's annual survey of young people involved with youth justice, which indicated that, of the young people detained on remand or under sentence in 2017:
- 15 percent were from an Aboriginal background;
  - 15 per cent were from Māori or Pacific Islander backgrounds; and
  - 19 per cent were from an African background (with the majority from South Sudan, followed by a small number from Ethiopia and Somalia respectively).<sup>90</sup>
39. The Law Council echoes the concerns of the Hon Judge Michael Bourke that this over-representation is coming from parts of the Victorian community which are 'disadvantaged, dislocated and often excluded', and risks entrenching this disadvantage and creating an 'underclass'.<sup>91</sup>
40. The Law Council is further concerned about pre-emptive police practices, such as the Suspect Targeted Management Program (STMP) in NSW, which have been identified as disproportionately affecting children and young people in Australia.<sup>92</sup> The STMP aims to 'prevent future offending by targeting repeat offenders and people police believe are likely to commit future crime'.<sup>93</sup>
41. While there is little publicly available NSW police material about the STMP, an analysis of the STMP by Sentas and Pandolfini found that it is disproportionately used against children (as young as 10 years) and young people, particularly Aboriginal young people. For instance, across 10 local area commands in NSW in

---

<sup>88</sup> Ibid citing Crime Statistics Agency Victoria, *Indigenous Alleged Offender Incidents—Year Ending June 2017* (2017) table 6.

<sup>89</sup> The effect was reduced but still statistically significant after controlling for variables. Australian Law Reform Commission, *Pathways to Justice*, 447 citing Lucy Snowball and Australian Institute of Criminology, 'Diversion of Indigenous Juvenile Offenders' (Trends & Issues in Crime and Criminal Justice No 355, Australian Institute of Criminology, 2008).

<sup>90</sup> Youth Parole Board (Vic), (2018) *Annual Report 2017-18* (Victorian Government Printer, Melbourne) 19-21.

<sup>91</sup> His Honour Judge Michael Bourke, Youth Parole Board (Vic), (2018) *Annual Report 2017-18* (Victorian Government Printer, Melbourne) x.

<sup>92</sup> Vicki Sentas and Camilla Pandolfini, *Policing Young People in NSW: A study of the Suspect Targeting Management Plan* (2017); Australian Lawyers for Human Rights, 'Human Rights Lawyers Slam Suspect Target Management Scheme: NSW Pre-Emptive Policing Program' (Media Release, 6 November 2017) <<https://alhr.org.au/human-rights-lawyers-slam-nsw-pre-emptive-policing-program/>> ('Human Rights Lawyers Slam Suspect Target Management Scheme'); Letter from the LS NSW to Jonathan Elliot (Committee Director, Legislative Assembly), 20 February 2018 <<https://www.lawsociety.com.au/sites/default/files/2018-03/1447687.pdf>>.

<sup>93</sup> Vicki Sentas and Camilla Pandolfini, *Policing Young People in NSW: A study of the Suspect Targeting Management Plan* (2017) 1.

the 2015 financial year, there were 213 people on STMP. 48.82 per cent were young people – the youngest being 11 years old, and 44.1 per cent identified as Aboriginal.<sup>94</sup> Young people may be placed on the STMP because of prior criminal history, friendship or family associations and/or prior interactions with police.<sup>95</sup> In practice, Legal Aid NSW has suggested that the STMP often targets vulnerable children, such as those who are in out-of-home care or those experiencing homelessness.<sup>96</sup> Australian Lawyers for Human Rights has stated that the STMP effectively ‘enables any NSW 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 as well as recidivist offenders, on a list whereby they are targeted for intensive policing’.<sup>97</sup>

42. Sentas and Pandolfini found that young people targeted on the STMP experienced ‘oppressive policing’ which involved ‘repeated contact with police in confrontational circumstances such as through stop and search, move on directions and regular home visits’.<sup>98</sup> Despite varying backgrounds, the authors observed ‘no appreciable distinction in the nature of STMP targeting and the use of police powers in relation to a young person who has committed minor offences or no offences as compared to more serious offences’.<sup>99</sup> Sentas and Pandolfini further found that the heightened interaction with police for young people on the STMP resulted in increased contact with the criminal justice system.<sup>100</sup> They argued that this result undermines ‘...diversion, rehabilitation and therapeutic justice’.<sup>101</sup>
43. Overall, the available information on the program indicates specific instances where the STMP has contravened principles under article 16 of the CRC, including unlawful stop and search.<sup>102</sup> It may also contravene best interests of the child principles ‘as the focus is solely on a narrow approach to crime prevention largely based on deterrence without consideration of the best interests of the young person’.<sup>103</sup> The LS NSW argues that the ‘NSW police should discontinue applying the STMP to children under 18’.<sup>104</sup> It further suggests that ‘young people considered to be at medium or high risk of re-offending should be directed to evidence-based prevention programs that address the cause of re-offending, rather than placement on an STMP’.<sup>105</sup>
44. The Law Council’s Justice Project made proposals for addressing certain problematic police practices with respect to marginalised people including children and young people at risk. This included: calling for police forces to review, and where necessary develop, protocols/guidelines promoting diversion from the criminal justice system where appropriate, including training on best practice

---

<sup>94</sup> Ibid 11.

<sup>95</sup> Ibid 20.

<sup>96</sup> Law Council of Australia, *Justice Project Final Report: Children and Young People* (2018) citing Consultation, 20/09/2017, Teleconference (Legal Aid NSW).

<sup>97</sup> Australian Lawyers for Human Rights, ‘Human Rights Lawyers Slam Suspect Target Management Scheme: NSW Pre-Emptive Policing Program’ (Media Release, 6 November 2017) <<https://alhr.org.au/human-rights-lawyers-slam-nsw-pre-emptive-policing-program/>>

<sup>98</sup> Vicki Sentas and Camilla Pandolfini, *Policing Young People in NSW: A study of the Suspect Targeting Management Plan* (2017) 1.

<sup>99</sup> Ibid 20.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid 50.

<sup>103</sup> Ibid 50.

<sup>104</sup> Letter from the LS NSW to Jonathan Elliot (Committee Director, Legislative Assembly), 20 February 2018 <<https://www.lawsociety.com.au/sites/default/files/2018-03/1447687.pdf>>.

<sup>105</sup> Ibid.

approaches to exercising discretionary police powers; and addressing concerns regarding over-policing and under-policing with respect to particular groups.<sup>106</sup> Additionally, the Justice Project recommended that police accountability and complaints mechanisms be reviewed in line with ALRC Report recommendations.<sup>107</sup>

## Family environment and alternative care

### Separation from parents (art 9) and children deprived of their family environment (art 20)

45. The Law Council is concerned that in many cases, existing child protection practices and policies may undermine Australia's performance of its obligations under article 9 and article 20 of the CRC. There is a clear need for state and territory governments, supported by the Commonwealth Government, to improve the quality of the child protection systems. In particular, commitments are needed to reducing the flow of children in care into the juvenile justice systems and the over-representation of Aboriginal and Torres Strait Islander children in the child protection systems
- (a) The NT Royal Commission Report made the following concerning observations with respect to child protection reforms in Australia over the past approximately 20 years:
  - (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. 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.<sup>108</sup>
46. The above findings prompt concerns that the Commonwealth Government's report to the Committee 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 its obligations under the CRC.

---

<sup>106</sup> Law Council of Australia, *Justice Project: Broader Justice System Players* (2018) 67.

<sup>107</sup> Law Council of Australia, *Justice Project: Broader Justice System Players* (2018) 67; Australian Law Reform Commission, *Pathways to Justice*, 372.

<sup>108</sup> 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, 210-211.

## High contact with the criminal justice system

47. Children in out-of-home care have high levels of contact with the criminal justice system, leading to 'the almost inevitable progression to the adult corrections system'.<sup>109</sup> The ALRC Report acknowledged that 'the links between these systems is so strong that child removal into out-of-home care and juvenile detention could be considered as key drivers of adult incarceration'.<sup>110</sup> The NT Royal Commission similarly highlighted the intersection between the child protection and juvenile justice systems, finding that 'Territory Families, and its predecessors, failed to provide the support needed to some children in care to assist them to avoid pathways likely to lead into the youth justice system'.<sup>111</sup> Research by the AIHW has indicated that 'young people placed in out-of-home care are 16 times more likely than the equivalent general population to be under youth justice supervision in the same year'.<sup>112</sup>
48. This 'care to crime' drift has been attributed in part to systemic issues regarding the child protection system in Australia, including 'badly trained and poorly supported staff, inadequate matching of children of different ages, experiences and background (offenders and victims of abuse are often placed together), and a readiness to call police to manage children's behaviour'.<sup>113</sup> For example, there remains a frequent practice in residential care facilities of 'relying on police and the justice system in lieu of adequate behavioural management' and a tendency for young people to be charged for relatively minor property damage offences that occur in residential care.<sup>114</sup>
49. This use of law enforcement as a behaviour management strategy increases the interaction children have with the criminal justice system, leading to potentially severe consequences, including incarceration.<sup>115</sup> McFarlane has argued that 'despite abundant research showing children become involved in crime through the processes of the care environment itself', 'policymakers are reluctant to acknowledge the care system is producing criminals'.<sup>116</sup> The Western Australia Commissioner for Children and Young People has corroborated this:

*There is anecdotal evidence to suggest that there is a "criminalising" of behaviour for children and young people in out-of-home care, where challenging behaviours which would normally be managed within the home (for example, smashing a plate or damaging furniture in anger) are reported to police and young people are charged with offences such as property damage. There is a clear need for the effective implementation of trauma-*

---

<sup>109</sup> Dr Katherine McFarlane, 'From Care to Custody: Young women in out-of-home care in the criminal justice system' (2010) 22(2) *Current Issues in Criminal Justice* 348.

<sup>110</sup> Australian Law Reform Commission, *Pathways to Justice*, 485.

<sup>111</sup> Northern Territory, *Royal Commission: Findings and Recommendations* (2017) 23.

<sup>112</sup> Australian Institute of Health and Welfare, cited in Australian Law Reform Commission, *Pathways to Justice*, 487.

<sup>113</sup> Dr Katherine McFarlane, 'The faulty child welfare system is the real issue behind our youth justice crisis', *The Conversation* (online), 13 February 2017 <<https://theconversation.com/the-faulty-child-welfare-system-is-the-real-issue-behind-our-youth-justice-crisis-72217>>.

<sup>114</sup> Katherine McFarlane, 'From Care to Custody: Young women in out-of-home care in the criminal justice system' (2010) 22(2) *Current Issues in Criminal Justice* 345, 348.

<sup>115</sup> *Ibid.* See also Legal Aid NSW, *The Drift from Care to Crime* (2011) 57.

<sup>116</sup> Dr Katherine McFarlane, 'The faulty child welfare system is the real issue behind our youth justice crisis', *The Conversation* (online), 13 February 2017 <<https://theconversation.com/the-faulty-child-welfare-system-is-the-real-issue-behind-our-youth-justice-crisis-72217>>.

*informed approaches in out-of-home care in responses to such scenarios.*<sup>117</sup>

50. In this regard, the Law Council considers that compliance with article 37 of the CRC will not be possible unless there is targeted action by Commonwealth, state and territory governments to address ongoing issues with the crossover of the care and protection and juvenile crime jurisdictions. 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. In particular, the Law Council supports the development of uniform best practice guidelines and joint protocols for responding to challenging behaviour in out-of-home care environments.<sup>118</sup> A positive example in this regard is the recent NSW Joint Protocol to reduce the contact of young people in residential out-of-home-care with the criminal justice system between the NSW Police Force, Family and Community Services, Association of Children's Welfare Agencies and Aboriginal Child, Family and Community Care State Secretariat.<sup>119</sup>

### **Lack of high quality, culturally safe or 'child-focused' care**

51. The Justice Project pointed to strong stakeholder concerns that out-of-home care often fails to provide high quality, culturally safe or 'child-focused' care and is staffed with inexperienced workers.<sup>120</sup> Stakeholders suggested that the diminished quality of child protection is partly a consequence of severe resourcing constraints and a lack of staff training, including cultural competency training, and mental health support for staff.<sup>121</sup> The NT Royal Commission reported that:

*The welfare system did not have enough staff or resources to deal with the problems. The services did not work together or talk to each other to give children and families the support they needed to stay together and grow healthy and strong.*<sup>122</sup>

52. Since the Royal Commission, there have been numerous reports in the NT as well as in other states and territories of child protection workers being subjected to unmanageable workloads and experiencing regular incidents of harassment, assault and abuse, resulting in high levels of stress and poor mental health amongst workers.<sup>123</sup> In turn, this has detrimental consequences for vulnerable children and

---

<sup>117</sup> Law Council of Australia, *Justice Project Final Report: Children and Young People* (2018) 57 citing submission by the Western Australia Commissioner for Children and Young People.

<sup>118</sup> Law Council of Australia, *Justice Project Final Report: Children and Young People* (2018) 57.

<sup>119</sup> NSW Ombudsman, *Joint Protocol to reduce the contact of young people in residential out-of-home-care with the criminal justice system* (2016). See also Law Council of Australia, *Justice Project Final Report: Broader Justice System Players* (2018) 20-1.

<sup>120</sup> Law Council of Australia, *Justice Project Final Report: Children and Young People* (2018) 48 citing Western Australia Commissioner for Children and Young People, *Submission No 37*; Consultation, 25/08/2017, Canberra (National Children's Commissioner); Consultation, 12/09/2017, Sydney (The Shopfront Youth Legal Centre); Consultation, 26/09/2017, Mildura (Private practitioner).

<sup>121</sup> Law Council of Australia, *Justice Project Final Report: Children and Young People* (2018) 48 citing Consultation, 26/09/2017, Mildura (Victoria Legal Aid).

<sup>122</sup> Northern Territory, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Report Overview* (2017) 5.

<sup>123</sup> See, eg, Miki Perkins and Noel Towell, 'Child protection worker sues state government for overwork and stress', *The Age* (online), 10 May 2018 <<https://www.theage.com.au/national/victoria/child-protection-worker-sues-state-government-for-overwork-and-stress-20180510-p4zegn.html>>; Noel Towell, 'Spat on, sworn at, threatened – child protection staff doing it tough', *The Age* (online), 10 May 2018 <<https://www.theage.com.au/national/victoria/spat-on-sworn-at-threatened-child-protection-staff-doing-it->

families. The Justice Project therefore emphasised the need to provide adequate training to child protection staff so that they are equipped to address the complex needs of children in care.<sup>124</sup>

### **Over-representation of Aboriginal and Torres Strait Islander children in care**

53. Aboriginal and Torres Strait Islander children are 9.8 times more likely to be placed in out-of-home care than non-Indigenous children and represent 36.3 per cent of all children in out-of-home care.<sup>125</sup> In 2017, the Productivity Commission reported that of the 54,666 children on care and protection orders nationally, 19,662 were Aboriginal and Torres Strait Islander children, and of the 47,915 children in out-of-home care nationally, 17,664 were Aboriginal and Torres Strait Islander children.<sup>126</sup> The 2017 *Family Matters Report*<sup>127</sup> found that 'from 2010 to 2018, the over-representation of Aboriginal and Torres Strait Islanders in child death statistics has grown from a rate ratio of 1.84 to 2.23'.<sup>128</sup> It highlighted that 'the rate at which Aboriginal and Torres Strait Islander children are removed from their families continues to be an escalating national crisis'.<sup>129</sup>
54. The 1997 *Bringing Them Home* report underlined the need for departmental officers, workers in non-government adoption agencies, judges and magistrates to be trained in the principles underlying the legislation and departmental policy relating to the placement of Aboriginal and Torres Strait Islander children.<sup>130</sup> The *Aboriginal and Torres Strait Islander Child Placement Principle* was developed by grassroots organisations and adopted nationally as part of the *National Framework for Protecting Australia's Children*. Its key purposes include preserving Aboriginal children's connection to family and community and sense of identity and culture and enabling participation of Aboriginal and Torres Strait Islander families in child protection decision making.<sup>131</sup>
55. However, only 67 per cent of Aboriginal and Torres Strait Islander children in child protection are placed with their family, kin and community, indicating 'a failure to comply with these elements'.<sup>132</sup> Figures compiled by the Productivity Commission in

---

tough-20180510-p4zefx.html>; Jane Bardon, 'NT child protection workers allege large, unmanageable workloads put vulnerable children at risk', *ABC News* (online), 4 April 2018 <<http://www.abc.net.au/news/2018-04-04/nt-child-protection-workers-allege-caseloads-risk/9615396>>.

<sup>124</sup> Law Council of Australia, *Justice Project Final Report: Children and Young People* (2018) 58 citing submissions by the Western Australia Commissioner for Children and Young People; Office of the Guardian for Children and Young People South Australia; Consultation, 06/09/2017, Kalgoorlie (Aboriginal Legal Service of Western Australia); Consultation, 25/08/2017, Canberra (National Children's Commissioner); Consultation, 03/08/2017, Darwin (Top End Women's Legal Service); Consultation, 26/09/2017, Mildura (Private practitioner).

<sup>125</sup> Law Council of Australia, *Justice Project Final Report: Children and Young People* (2018) 50 citing submission by the National Aboriginal and Torres Strait Islander Legal Services.

<sup>126</sup> Productivity Commission, *Report on Government Services 2018* (2018) part F, chapter 16.

<sup>127</sup> A collaborative effort of the University of Melbourne, the Secretariat of National Aboriginal and Islander Child Care, the Centre for Evidence and Implementation, and Save the Children Australia.

<sup>128</sup> Family Matters, 'Family Matters: the state of 2017' (Media Release, 29 November 2017) <<http://www.familymatters.org.au/family-matters-state-2017/>>.

<sup>129</sup> *Ibid.*

<sup>130</sup> See Australian Human Rights Commission, *Bringing them home: the 'stolen children' report* (1997) <<https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/bringing-them-home-stolen>>.

<sup>131</sup> Fiona Arney, *Enhancing the implementation of the Aboriginal and Torres Strait Islander Child Placement Principle* (CFCA Paper No 34, Australian Institute of Family Studies, August 2015).

<sup>132</sup> Secretariat of National Aboriginal and Islander Child Care, University of Melbourne, Griffith University and Save the Children Australia, *Family Matters Report 2016* (2016) 42 <[http://www.familymatters.org.au/wp-content/uploads/2016/12/Family\\_Matters\\_Report\\_2016.pdf](http://www.familymatters.org.au/wp-content/uploads/2016/12/Family_Matters_Report_2016.pdf)>; Productivity Commission, *Report on Government Services 2018*, Part F Chapter 16.

2018 show that placements in line with the principle have gone backwards, declining from 74 per cent of placements in 2007-08 to 67.6 per cent in 2016-17.<sup>133</sup> At the state and territory level, most jurisdictions (with the notable exception of Victoria) reflect the national trend of decline, with particularly steep drops over 10 years in Western Australia and the Northern Territory.<sup>134</sup>

56. The Sex Discrimination Commissioner has recently reported that the intergenerational impact of child protection practices in Aboriginal and Torres Strait Islander communities has been 'to break down the sense of identity and family structures rather than strengthening family and community'.<sup>135</sup> Aboriginal and Torres Strait Islander Justice Project stakeholders drew historical parallels with the stolen generation.<sup>136</sup> In addition to raising concerns about Australia's compliance with articles 2, 9 and 20, the over-representation of Aboriginal and Torres Strait Islander children in care, and the failure to effectively implement the *Child Placement Principle* is arguably in contravention of article 30,<sup>137</sup> as Indigenous children may be separated from their families, communities and associated cultures and languages, without effective plans to maintain connection with culture in place.
57. Decisions to remove children from their families too frequently follow reports of family violence being made to authorities, particularly by Aboriginal and Torres Strait Islander women. National Family Violence Prevention Legal Services has emphasised that inappropriate practices towards Aboriginal and Torres Strait Islander victims of family violence by child protection authorities have profound, broad-ranging consequences.<sup>138</sup> The Law Council has voiced concerns regarding discriminatory practices within child protection services, noting the likelihood that Aboriginal women may refrain from reporting family violence due to fears that their children will be removed.<sup>139</sup>
58. The NT Royal Commission reported that 'training in understanding Aboriginal kinship systems and culturally appropriate kinship care is not adequate for the purpose of kinship care placements and must be significantly improved'.<sup>140</sup> Justice Project stakeholders also reported that concerns that some child protection officials had little cultural competence or knowledge of Aboriginal and Torres Strait Islander family relationships or kinship systems within communities, nor did they have community links required to work effectively within Aboriginal communities.<sup>141</sup>

---

<sup>133</sup> Productivity Commission, *Report on Government Services 2018*, Part F Chapter 16.

<sup>134</sup> *Ibid.*

<sup>135</sup> Australian Human Rights Commission, *A Conversation in Gender Equality* (2017) 14 <[https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC\\_conversation\\_gender\\_equality\\_2017\\_2.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_conversation_gender_equality_2017_2.pdf)>.

<sup>136</sup> Chris Cunneen, Fiona Allison and Melanie Schwartz, 'Access to Justice for Aboriginal People in the Northern Territory' (2014) 49 *Australian Journal of Social Issues* 2, 219-240, 229.

<sup>137</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 30: *In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.*

<sup>138</sup> Law Council of Australia, *Justice Project Final Report: Children and Young People* (2018) 53 citing submission by the National Family Violence Prevention Legal Services.

<sup>139</sup> Law Council of Australia, Submission to Department of Prime Minister and Cabinet, *Closing the Gap*, 4 May 2018, 12; Law Council of Australia, Submission to the Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples: Discussion Paper 84*, 6 October 2017; Law Council of Australia, *Justice Project Final Report: Aboriginal and Torres Strait Islander peoples* (2018).

<sup>140</sup> Northern Territory, *Royal Commission: Findings and Recommendations* (2017) 22.

<sup>141</sup> Law Council of Australia, *Justice Project: Broader Justice System Players* (2018) 47 and Law Council of Australia, *Justice Project Final Report: Children and Young People* (2018) 53 citing Consultation, 06/09/2017,

59. The Northern Territory Government<sup>142</sup> and Victorian Government<sup>143</sup> have recognised the need to invest in measures to specifically address this issue. It is noteworthy that Victoria is the 'first state to hand the guardianship of Aboriginal children in care from the state to the chief executive of an Aboriginal community-controlled organisation'.<sup>144</sup>
60. The LIV has noted specific concerns regarding permanency amendments contained in the *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* (Vic) which came into effect on 1 March 2016. The LIV considers the preference of adoption over other forms of permanency, as a general rule contained in the permanency hierarchy, is contrary to the child's right to preserve their identity, including their nationality, name and family identity, and their right to maintain a relationship and contact with their parents.<sup>145</sup> The LIV is concerned the restriction on pursuing family reunification as a permanency objective in case plans when the child has been in out-of-home care for a cumulative period of 12 months or more, and is unlikely to be reunified with their family in the next 12 months, is contrary to a child's right, as far as possible, to know and be cared for by their parents.<sup>146</sup> The LIV endorses the findings and recommendations of the Commission for Children and Young People's inquiry into the implementation of the *Children, Youth & Families (Permanent Care & Other Matters) Amendment Act 2014*,<sup>147</sup> and notes that enacting these recommendations would advance Australia's progress in implementing the CRC. The LIV considers the minimal involvement of the child and the family in the case-planning process is contrary to a child's right to express their views about matters affecting them and for those views to be taken into account.<sup>148</sup>
61. The ALRC Report noted that there has not been a national review of the laws and processes operating between the care and protection systems of the states and territories and recommended that the Commonwealth Government establish a national inquiry into child protection laws and processes affecting Aboriginal and Torres Strait Islander children.<sup>149</sup> The Law Council supports this measure, and has also advocated for the introduction of national justice targets to reduce the over-

---

Kalgoorlie (Aboriginal Legal Service of Western Australia and Kalgoorlie Community Elders); Consultation, 02/08/2017, Maningrida (Burnawarra Elders).

<sup>142</sup> As part of its commitment to implementing the recommendations of the Royal Commission, the Northern Territory Government has announced that it will invest \$5.39 million to support for Aboriginal foster and kinship carers and increase the involvement of families in decisions relating to children in care. Northern Territory Government, *Budget Overview* (2018) <[https://budget.nt.gov.au/\\_\\_data/assets/pdf\\_file/0003/500583/Budget-Overview-book.pdf](https://budget.nt.gov.au/__data/assets/pdf_file/0003/500583/Budget-Overview-book.pdf)> 9.

<sup>143</sup> The Victorian Government will allocate \$33.6 million to trial a new model of kinship care which identifies kinship networks early, strengthen reunification where appropriate, and ensures children and young people get the care and support they need. The Victorian government also announced that it signed a funding agreement with Aboriginal community-controlled organisations relating to the management of Aboriginal children in the child protection system. Calla Wahlquist, 'Victoria pledges record funds to keep Indigenous children in community care', *The Guardian* (online), 26 April 2018 <<https://www.theguardian.com/australia-news/2018/apr/26/victoria-pledges-record-funds-to-keep-indigenous-children-in-community-care>>.

<sup>144</sup> *Ibid.*

<sup>145</sup> *Children Youth and Families Act 2005* section 167(1); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) articles 8, 9(3).

<sup>146</sup> *Children Youth and Families Act 2005* section 67(4); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) article 7(1).

<sup>147</sup> Commissioner for Children and Young People (Vic) *Inquiry into the implementation of the children, youth and families amendment (permanent care and other matters) act 2014 (permanency amendments inquiry)* (2016) <<http://apo.org.au/node/56714>>.

<sup>148</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) article 12; 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*, Victorian Government, Melbourne 2017, 78.

<sup>149</sup> Australian Law Reform Commission, *Pathways to Justice*, 485.

representation of Aboriginal and Torres Strait Islander children, as part of the *Closing the Gap* framework.<sup>150</sup> These steps should occur in conjunction with investment in proactive rather than reactive initiatives – such as resourcing holistic family support services.<sup>151</sup>

### Lack of independent scrutiny

62. The Justice Project also disclosed concerns that there is frequently little independent scrutiny of child protection removal decisions, and families often have little effective means of challenging removal decisions.<sup>152</sup> An associated concern is that children do not always have an independent or external body to whom they can make complaints about their care arrangements.<sup>153</sup>

63. Relevantly, the Royal Commission into Institutional Responses to Child Sexual Abuse made a case for strong oversight mechanisms in its final report. It identified key national ‘child safe’ standards and recommended the following in connection to out-of-home care and institutions:

*An independent oversight body in each state and territory should be responsible for monitoring and enforcing the Child Safe Standards. Governments could enhance the roles of existing children’s commissioners or guardians for this purpose.*<sup>154</sup>

64. The NT Royal Commission found that the NT Children’s Commissioner was ‘under-resourced to perform its full range of statutory functions’.<sup>155</sup> The Tasmanian Commissioner for Children and Young People submitted that an external, independent oversight system of the child protection system, including an independent body that can hear complaints and reviews, was ‘fundamental to ensuring that the system is accountable to the taxpayer, the Parliament, and most importantly, to the children and young people within it’.<sup>156</sup> National and state/territory Children’s Commissioners, Guardians or Advocates play an important role in promoting the best interests and upholding the rights of children and young people in the care systems, and must be sufficiently resourced to perform these duties.

65. The Office of the Guardian for Children and Young People (South Australia) has specifically encouraged greater oversight for Aboriginal and Torres Strait Islander children in care.<sup>157</sup> Relevantly, the 2017 *Family Matters* report noted that two newly established representative system oversight bodies were operating or in development: the Victorian Aboriginal Children’s Forum and the Queensland First

---

<sup>150</sup> See Law Council of Australia, *Justice Project Final Report: Recommendations and Priorities* (2018)/

<sup>151</sup> See Law Council of Australia, *Justice Project Final Report: Critical Support Services* (2018) 24.

<sup>152</sup> Law Council of Australia, *Justice Project Final Report: Children and Young People* (2018) 47 citing Consultations, 06/09/2017, Kalgoorlie (Aboriginal Legal Service of Western Australia and Kalgoorlie Community Elders); Consultation, 15/08/2017, Hobart (Commissioner for Children and Young People Tasmania); Consultation, 29/08/2017, Brisbane (Caxton Legal Centre); Consultation, 26/09/2017, Mildura (Private practitioner); Consultation, 03/05/2017, Canberra (Legal Aid ACT).

<sup>153</sup> Law Council of Australia, *Justice Project Final Report: Children and Young People* (2018) 48 citing submission by the Western Australia Commissioner for Children and Young People, also Consultation, 15/08/2017, Hobart (Commissioner for Children and Young People Tasmania).

<sup>154</sup> Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, 26 [Recommendations 6.10 and 6.11].

<sup>155</sup> Northern Territory Royal Commission Report, *Findings and Recommendations* (2017) 23.

<sup>156</sup> *Ibid.*

<sup>157</sup> Law Council of Australia, *Justice Project Final Report: Broader Justice Players* (2018) 64 citing submission by the Office of the Guardian of Children and Young People South Australia.

Children and Families Board.<sup>158</sup> The establishment of similar bodies in other states and territories could potentially improve oversight and inform culturally competent child protection responses.

### **Lack of support for transition from institutional care**

66. Inadequate exit strategies and lack of transition support for children and young people leaving government institutions, such as out-of-home care, juvenile detention and mental health facilities, increases the risk of homelessness, entrenched disadvantage and contact with the juvenile justice system.<sup>159</sup> Given the vulnerability of children at the point of transition from the child protection and juvenile justice systems, there is a need for governments to invest in developing better exit strategies and transitional support services and to consider extending these support structures for children and young people transitioning out of state care beyond the age of 18 years.<sup>160</sup> Both the Tasmanian and South Australian Governments have recently committed to extend the age that children leave care from 18 to 21 years of age, and consideration could be given to expanding this measure to all jurisdictions.

### **Child sexual abuse**

67. The Law Council also notes that children in out-of-home care are often victims of child sex abuse. The Royal Commission into Institutional Responses to Child Sexual Abuse reported that, as of March 2016, the Commission ‘held over 4,700 private sessions, in which [out-of-home] care was the largest category of institutions identified, constituting over 40 percent of all reports of child sexual abuse’.<sup>161</sup> This is particularly concerning given the abovementioned large numbers of children in out-of-home care in Australia. Addressing child sex abuse in out-of-home care is also relevant to Australia’s obligations under article 39, which provide that States Parties shall take all appropriate measures to promote recovery of a child victim of exploitation or abuse, in an environment which fosters the health, self-respect and dignity of the child. The high prevalence of sexual abuse in out-of-home care heightens the need for additional oversight and transparency mechanisms as indicated above.

## Special protection measures

### **Refugee and asylum seeker children (art 22)**

68. Australia’s asylum seeker and refugee laws, policies and practices with respect to children have been subject to consistent international criticism.<sup>162</sup> The Committee raised concerns in its 2012 Concluding Observations regarding ‘the inadequate

---

<sup>158</sup> Secretariat of National Aboriginal and Islander Child Care, University of Melbourne, Griffith University and Save the Children Australia, *Family Matters Report 2017* (2017) 12.

<sup>159</sup> For detailed discussion of these issues and effective exit strategies, see Law Council of Australia, *Justice Project Final Report: Critical Support Services* (2018) 67-79.

<sup>160</sup> *Ibid.*

<sup>161</sup> Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Institutional Responses to Child Sexual Abuse in Out-of-Home Care* (2016) 4.

<sup>162</sup> See, eg, Committee on the Rights of the Child, *Consideration of reports submitted by State parties under article 44 of the Convention. Concluding observations: Australia*, 40<sup>th</sup> sess, 1080<sup>th</sup> mtg, UN Doc CRC/C/15/Add.268 (20 October 2005); Committee on the Rights of the Child, *General Comment No. 6 (2005): Treatment of unaccompanied and separated children outside their country of origin*, 39<sup>th</sup> sess, UN Doc CRC/GC/2005/6 (1 September 2005).

understanding and application of the principle of the best interests of the child in asylum-seeking, refugee and/or immigration detention situations'.<sup>163</sup>

### Guardianship of unaccompanied migrant children

69. The Committee recommended in its 2012 Concluding Observations that Australia should create an independent guardianship institution for unaccompanied immigrant children.<sup>164</sup> Under current arrangements, the Minister for Home Affairs is the legal guardian for unaccompanied minors who arrive in Australia. The Law Council has called for an independent guardian to be appointed given that the Minister's role is necessarily political and interferes with decisions that are in the best interests of the child.<sup>165</sup> The Special Rapporteur on Children has echoed these calls.<sup>166</sup>

### Children outside their country of origin seeking refugee protection

70. The Law Council holds strong concerns regarding the health and wellbeing of children residing in Nauru under regional processing arrangements, including with respect to incidents of physical and sexual assault, serious shortcomings in living conditions and lack of services, and high levels of trauma amongst children.<sup>167</sup> It notes that the Commonwealth of Australia has responsibility for the health and safety of asylum seekers, including children, who are transferred under offshore processing arrangements under both international and Australian law.<sup>168</sup>
71. The Law Council notes the Federal Court decisions in respect of *AYX18 v Minister for Home Affairs* [2018] FCA 283 and *FRM17 v Minister for Immigration and Border Protection* [2018] FCA 63 which respectively ordered the transfer of refugee children to Australia to allow specialist psychiatric assessment as soon as reasonably practical. These decisions highlighted child health experts' severe concerns regarding the poor mental health of young children subject to regional processing on Nauru, including their serious risk of self-harm and suicide.
72. The Law Council further notes concerns from a group of pediatricians who visited Nauru in 2015 and concluded that 'Nauru is an inappropriate place for asylum seeking children to live, either in the detention centre or the community' and that under no circumstances should children be detained there.<sup>169</sup> Similar concerns have been raised by the UN Special Rapporteur on Children<sup>170</sup> and the Special Rapporteur on the Human Rights of Migrants has also observed that:

---

<sup>163</sup> 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)* [31].

<sup>164</sup> Ibid [81].

<sup>165</sup> See, eg, Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Migration Guardian for Unaccompanied Children Bill 2014*, 5 November 2014, 2.

<sup>166</sup> François Crépeau, Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru, UN Doc A/HRC/35/25/Add.3 (24 April 2017) 10.

<sup>167</sup> Australian Human Rights Commission, *Asylum seekers, refugees and human rights: Snapshot Report* (2nd edition, 2017) 35-38.

<sup>168</sup> As outlined in Law Council of Australia, *Policy Statement: Proposal For Australia's role in a regional cooperative approach to the flow of asylum seekers into and within the Asia-Pacific region* (October 2017) (Regional Processing Policy Statement).

<sup>169</sup> Australian Human Rights Commission, *Asylum seekers, refugees and human rights: Snapshot Report* (2nd edition, 2017) 38.

<sup>170</sup> François Crépeau, Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru, UN Doc A/HRC/35/25/Add.3 (24 April 2017) 13-15. 78 Homelessness Australia, *Homelessness Statistics* (2012)

<<http://www.homelessnessaustralia.org.au/index.php/about-homelessness/homeless-statistics>>.

*Children held in Nauru show signs of post-traumatic stress disorder, anxiety and depression, and exhibit symptoms such as insomnia, nightmares and bed-wetting. Feelings of hopelessness and frustration can lead to acts of violence against themselves or others. The Special Rapporteur heard of suicide attempts and self-harm, mental disorders and development problems, including severe attachment disorder.*<sup>171</sup>

73. Further, the Law Council draws attention to the following specific concerns:
- (a) children on Nauru are not being detained as a measure of last resort and for the shortest possible time – undermining the rights of the child under article 37(b);
  - (b) the right to development is likely being compromised for children on Nauru (relevant to article 27(1));
  - (c) 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; and
  - (d) 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. This has the effect of undermining the rights of the child under articles 9 and 10 of the CRC.
74. The Law Council has recently joined the Australian Medical Association in calling for the immediate removal of asylum seeker children in Nauru as a matter of urgency.<sup>172</sup> Removing these asylum seeker children is not only medically necessary, it is also consistent with Australia's obligations under domestic and international law, including article 3 of the CRC. Going forward, the Law Council supports a strong commitment by Australia to achieving a cooperative, regional response to asylum seekers that meets Australia's international and domestic law obligations.<sup>173</sup>

### **Children in conflict with the law (art 39, 40)**

75. The Committee's observed in its 2012 Concluding Observations that 'despite ... earlier recommendations, [Australia's] juvenile justice system ... still requires substantial reforms for it to conform to international standards'<sup>174</sup> The Committee raised concerns about children being held within adult correctional centres, mandatory minimum sentences and instances of abuse in juvenile detention centres.<sup>175</sup> Unfortunately, these issues have not been satisfactorily addressed in the intervening years.

---

<sup>171</sup> Report of the Special Rapporteur on the human rights of migrants, UN Doc A/HRC/35/25/Add.3, 14.

<sup>172</sup> See Law Council of Australia, 'Legal profession calls for immediate removal of asylum seeker children from Nauru' (Media Release, 18 October 2018) < <https://www.lawcouncil.asn.au/media/media-releases/legal-profession-calls-for-immediate-removal-of-asylum-seeker-children-from-nauru>>.

<sup>173</sup> As outlined in the Law Council's Regional Processing Policy Statement, and its *Asylum Seeker Policy* (2014).

<sup>174</sup> 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, CRC/C/AUS/CO/ (28 August 2012) 20 [82].

<sup>175</sup> Ibid [83], [84].

## Minimum age of criminal responsibility

76. The report submitted by the Australian Government to the Committee in January 2018 did not express an intention to raise the minimum age of criminal responsibility (**MACR**). This is despite the recommendation made by the UN Committee in 2005<sup>176</sup> and again in 2012<sup>177</sup> that Australia should raise the MACR 'to an internationally acceptable level'.
77. The MACR across Australian jurisdictions is currently 10 years, and there is also a rebuttable presumption (known as *doli incapax*) that children aged between 10 and 14 years are incapable of committing a criminal act. However, the Northern Territory government has recently committed to raising the MACR to 12 years.<sup>178</sup>
78. The Law Council considers that raising the age of criminal responsibility to a minimum of 12 years would further Australia's commitments to fostering the best interests of the child as a party to CRC, provided that
- (a) the doctrine of *doli incapax* remains in place for children under 14 years; and
  - (b) no child under 14 years should be sentenced to detention, except in the most serious cases, in line with the NT Royal Commission's recommendations.<sup>179</sup>
79. Other organisations such as Amnesty International, the Federation of Community Legal Centres, Victoria Legal Aid and Change the Record Coalition, have recently called for the MACR to be raised to 14 years of age.<sup>180</sup> Change the Record Coalition's *Free to be Kids: National Plan of Action*, argued that the MACR should be raised to at least 14 years of age because:
- Children under the age of 14 are undergoing significant growth and development such that they may not have the required capacity to be criminally responsible. Children should not be in prison, as the institutions, conditions and separation from family can be extremely harmful to their health and development.*<sup>181</sup>
80. The Law Council further supports ongoing consideration of whether the MACR should be raised beyond 12 to 14 years of age, based on thorough research and analysis of children's development and international best practice.

---

<sup>176</sup> Committee on the Rights of the Child, *Consideration of reports submitted by States Parties Under article 44 of the Convention: Concluding Observations - Australia* (20 October 2005), CRC/C/15/Add.268.

<sup>177</sup> Committee on the Rights of the Child, *Consideration of reports submitted by States parties under Article 44 of the Convention – Concluding observations: Australia* (28 August 2012), CRC/C/AUS/CO/4.

<sup>178</sup> Northern Territory Government, 'Safer Communities: Response to the 227 Recommendations of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory' (Media Release, 1 March 2018) <<http://newsroom.nt.gov.au/mediaRelease/24289>> See also Human Rights Law Centre, 'Northern Territory set to be the first government in Australia to raise the age of criminal responsibility' (Media Release, 1 March 2018) <<https://www.hrlc.org.au/news/2018/3/1/nt-to-be-the-first-government-to-raise-age-of-criminal-responsibility>>.

<sup>179</sup> Northern Territory, *Royal Commission: Findings and Recommendations*, 46 (Recommendation 27.1).

<sup>180</sup> Victoria Legal Aid, 'Victoria Legal Aid supports raising the age of criminal responsibility' (Media Release, 30 November 2017) <<https://www.legalaid.vic.gov.au/about-us/news/victoria-legal-aid-supports-raising-age-of-criminal-responsibility>>; Amnesty International, 'NT leads the way but it's not enough: Australia must now raise criminal age to 14' (Media Release, 1 March 2018) <<https://www.amnesty.org.au/nt-leads-way-not-enough-australia-must-now-raise-criminal-age-14/>>.

<sup>181</sup> Change the Record Coalition, *Free to be Kids: National Plan of Action* (2017) 1 <<https://changetherecord.org.au/blog/news/a-plan-to-transform-the-justice-system-for-aboriginal-and-torres-strait-islander-children>>.

## Administration of juvenile justice

### *Abusive practices in juvenile detention centres*

81. Reports of abuse and mistreatment against children in juvenile detention have arisen across multiple Australian jurisdictions.<sup>182</sup> In response to these allegations, several Australian governments have commissioned independent reviews into the policies and practices of state and territory juvenile detention centres, including the NT Royal Commission, the Victorian ‘Same Four Walls’ Inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system, and the Queensland Independent Review of Youth Detention.<sup>183</sup> In 2016, the Law Council has emphasised ‘the pressing need for all jurisdictions to conduct independent, arms-length reviews of their juvenile detention systems’.<sup>184</sup>
82. Together, these inquiries have revealed evidence of ‘inappropriate’ and ‘unlawful’ practices occurring in juvenile detention, such as instances of abuse and mistreatment, extended periods of solitary confinement and isolation, and unacceptable use of restraints and force, such as the use of mechanical and other types of restraints, such as hog-ties.<sup>185</sup> Other common concerns include the growing numbers of children on remand, the over-representation of Aboriginal and Torres Strait Islander children in juvenile detention, inadequate staff training, and poor and inadequate facilities.<sup>186</sup> As an illustrative example, the NT Royal Commission, reporting comprehensively in late 2017, reported ‘shocking and systemic failures occurred over many years [which] were known and ignored at the highest levels’.<sup>187</sup> It found that:

*Children in detention were denied basic human needs, and the system failed to comply with basic human rights standards and safeguards, including the Convention on the Rights of the Child.*<sup>188</sup>

83. Other relevant findings of the NT Royal Commission included:
- youth detention centres were not fit for accommodating, let alone rehabilitating, children and young people;

---

<sup>182</sup> Including at Reiby Juvenile Justice Centre in NSW, Bimberi Youth Detention Centre in the ACT, Cleveland Youth Detention Centre in Queensland, and Barwon Prison in Victoria: see Amnesty International, ‘Not Just Don Dale: New Canberra child abuse allegations confirm need for national overhaul of “injustice” system’ (Media Release, 4 July 2017) <<https://www.amnesty.org.au/not-justdon-dale-new-canberra-child-abuse-allegations/>>.

<sup>183</sup> For a complete list of inquiries as of November 2017 see Australian Commissioners and Guardians, *Statement on Conditions and Treatment in Youth Justice Detention* (2017), 24 (Appendix 1).

<sup>184</sup> Law Council of Australia, ‘Disturbing images from Qld underscore the need to review youth detention Australia-wide’ (Media Release, 19 August 2016) <<https://www.lawcouncil.asn.au/media/media-releases/disturbing-images-from-qld-underscore-the-need-to-review-youth-detention-australia-wide>>.

<sup>185</sup> See, eg, Northern Territory, Royal Commission into the Protection and Detention of Children in the Northern Territory, Interim Report (2017), 37; Commission for Children and Young People Victoria, *The same four walls: Inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system* (2017) 39; Queensland Government, *Reasons for inclusion or redaction of categories of information in the report* (2017) 2 <<http://www.youthdetentionreview.qld.gov.au/review-of-youth-detention-centres-report-updated-28-June-2017.pdf>>.

<sup>186</sup> Australian Commissioners and Guardians, *Statement on Conditions and Treatment in Youth Justice Detention* (2017) 7.

<sup>187</sup> Royal Commission into the Protection and Detention of Children in the Northern Territory, *Royal Commission and Board of Inquiry into protection and detention systems of the Northern Territory has revealed systemic and shocking failures* (17 November 2017) <<https://childdetentionnt.royalcommission.gov.au/media-centre/Documents/Royal-Commission-Board-Enquiry-Media-release.pdf>>.

<sup>188</sup> Northern Territory, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Findings and Recommendations* (2017) 4.

- youth detention centres are failing to reduce the rate of youth crime or rehabilitate detainees;
- the inadequate youth detention facilities placed the detainees' health, safety and wellbeing at serious risk and created difficult and unsafe working environments for staff;
- detainees were subjected to regular, repeated and distressing mistreatment, including verbal abuse, racist remarks, physical abuse, and humiliation, and at times, youth justice officers dared detainees or offered bribes to detainees, to carry out degrading, humiliating, harmful and/or physically violent acts;
- inappropriate, punitive and inconsistent use of force, restraint and isolation;
- children in isolation and at risk placements were arbitrarily excluded from education;
- female detainees experienced particularly harsh conditions of unjustified isolation and segregation and received lower priority and unequal treatment in terms of access to recreational facilities, education and personal hygiene facilities;
- upon entry into detention, children did not have an adequate health assessment, including screening of FASD;
- there was a lack of culturally competent and age appropriate health services available for detainees; and
- failure to follow procedures and requirements under youth justice legislation.<sup>189</sup>

84. The Northern Territory Government announced that it would invest \$229.6 million over five years to implement the Royal Commission's recommendations.<sup>190</sup> Some indications of progress are also apparent in Western Australia following the similarly condemnatory report in its jurisdiction,<sup>191</sup> and the Victorian Government has accepted or accepted in principle all 21 recommendations contained in its own report.<sup>192</sup> However, progress is occurring incrementally and in a piecemeal fashion, especially when viewed holistically from a nationwide perspective. Aboriginal and Torres Strait Islander organisations have expressed disappointment regarding the Commonwealth Government's nominal response to the Royal Commission, as has the Law Council which stated in May 2018 that this was a 'missed opportunity to deliver a national, comprehensive, intergovernmental response'.<sup>193</sup> In February 2018 the Inspector of Custodial Services in WA reflected on the stop-start nature of reform at the Banksia Hill juvenile detention facility, which is indicative of broader trends in this space:

*For the nine years I have been in this job, Banksia Hill has lurched from crisis to partial recovery and then back into crisis... There are some common features to all these cycles. Every period of crisis has been preceded by poor leadership and management, compounded by denial and*

---

<sup>189</sup> Ibid.

<sup>190</sup> Northern Territory Government, 'Safer Communities: Response to the 227 Recommendations of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory' (Media Release, 1 March 2018).

<sup>191</sup> See, eg Office of the Inspector of Custodial Services (Western Australia), *Behaviour management practices at Banksia Hill Detention Centre* (2017);

<sup>192</sup> Victoria, Parliamentary Debates, Legislative Council, 23 March 2017, 1591-2 (Jenny Mikakos, Minister for Families and Children).

<sup>193</sup> Law Council of Australia, 'NT Gov urged to act immediately to raise age of criminal responsibility, other States should follow' (Media Release, 2 March 2018).

*spin. Every time, experienced people from the adult prison system have been placed there to improve security, safety, and governance. And every time, progress has begun, only for mismanagement and chaos to descend once more.*

*This begs the important question: can Banksia Hill maintain the momentum this time round? As events across the country have confirmed, managing young people in detention is not easy. But in my view, we have seen too many attempts to reinvent the wheel and too little focus on delivering services and meeting the basics.<sup>194</sup>*

#### *Non-rehabilitative focus*

85. The AIHW reported that nationally in 2016-17 (excluding the NT)<sup>195</sup>, 4,194 young people experienced 8,243 receptions into detention.<sup>196</sup> Almost half (46 per cent) of young people who were received into detention during the year were received more than once.<sup>197</sup> As various inquiries have indicated, punitive approaches may hinder rehabilitation and prevent young people from breaking the cycle of disadvantage and recidivism.<sup>198</sup> The NT Royal Commission stated that '[w]hen recidivism rates are high, as they are in the Northern Territory, and children and young people are often progressing to adult corrections, the logical conclusion is that the system is failing'.<sup>199</sup> Similar observations have been made by Australian courts.<sup>200</sup>
86. In NSW, custody, as opposed to diversion or community-based sentences amongst children and young people, is linked to a higher rate of reoffending. For example, in 66.2 per cent of NSW children who received a custodial sentence reoffended within 12 months of their release, compared to 44.7 per cent who received a sentence other than prison.<sup>201</sup>
87. The North Australian Aboriginal Justice Alliance (**NAAJA**) has highlighted that overly punitive approaches are especially problematic considering that many children in the juvenile detention system live with trauma-related developmental and mental health conditions.<sup>202</sup> The Justice Project's final report chapters highlight evidence of a striking over-representation of people with disability in the juvenile corrections systems, including particularly Aboriginal and Torres Strait Islander peoples. For example, as noted in the Justice Project's People with Disability chapter:
  - (a) a recent Telethon Kids Institute study with respect to youth detainees at Banksia Hill Detention Centre in Western Australia revealed 'unprecedented levels of severe neurodevelopmental impairment amongst sentenced youth',

---

<sup>194</sup> Office of the Inspector of Custodial Services (Western Australia), *Behaviour management practices at Banksia Hill Detention Centre* (2017) vi-vii.

<sup>195</sup> The date was not available for the NT.

<sup>196</sup> Australian Institute of Health and Welfare, *Youth Justice in Australia 2016-17* (2018) 19.

<sup>197</sup> *Ibid.*

<sup>198</sup> See, eg Northern Territory, *Royal Commission: Final Report*, vol 2B, 210; Australian Law Reform Commission, *Pathways to Justice*, 40; NSW Bureau of Crime Statistics and Research, *Re-offending statistics for NSW* (2017).

<sup>199</sup> Northern Territory, *Royal Commission: Final Report*, vol 1, 122-123.

<sup>200</sup> *Webster v The Queen* [2016] VSCA 66 [7]-[9]. See also *R v Tokava* [2006] VSCA 156 at [22] and *R v Dixon* (1975) 22 ACTR 13, [20].

<sup>201</sup> NSW Bureau of Crime Statistics and Research, *Re-offending statistics for NSW* (2017) <[http://www.bocsar.nsw.gov.au/Pages/bocsar\\_pages/Re-offending.aspx](http://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Re-offending.aspx)>.

<sup>202</sup> North Australian Aboriginal Justice Alliance, Submission to the Australian Human Rights Commission, *Access to Justice in the Criminal Justice System for People with a Disability*, April 2013, 7.

with 89 per cent or nine out of ten incarcerated young people having at least one form of severe neurodevelopmental impairment;<sup>203</sup>

- (b) a 2017 report by the Mental Health Commission of New South Wales stated that 87 percent of young people in custody have a past or present psychological impairment;<sup>204</sup>
- (c) a 2014 study of 65 per cent of youth detainees across eight detention centres in New South Wales revealed 45.8 percent had borderline or lower intellectual functioning;<sup>205</sup> and
- (d) a 2014 survey of 273 young people serving custodial orders in Victoria found 39 per cent had depression, 17 per cent had a positive psychosis screening and 22 per cent had engaged in deliberate self-harm within the previous 6 months.<sup>206</sup>

88. The Law Council submits that addressing these concerns in relation to prisoners and juvenile detainees with disabilities should be seen as a priority under the OPCAT framework.

89. Justice Project stakeholders therefore emphasised the importance of therapeutic, trauma-informed approaches across every aspect of Australian youth detention systems.<sup>207</sup> For example, the Western Australian Commissioner for Children and Young People articulated the need for rehabilitative programs in youth detention centres:

*There is a clear need for programs and services that specifically target the mental health, wellbeing and education needs of all young people in detention, and to support their rehabilitation, with a special emphasis on females in the justice system as they are a particularly vulnerable group which are often overlooked for specific services/programs.*<sup>208</sup>

90. Further, the Commissioner prioritised ensuring that young people in youth detention or remand should be given educational opportunities, enabling them to:

- *attend school or education programs that are designed for students who experience difficulty engaging with mainstream schooling; and*
- *connect young people to employment vocational training and/or academic study courses.*<sup>209</sup>

---

<sup>203</sup> Telethon Kids Institute, 'Nine out of ten young people in detention found to have severe neuro-disability' (Media Release, 13 February 2018) <<https://www.telethonkids.org.au/news--events/news-and-events-nav/2018/february/young-people-in-detention-neuro-disability/>>. See also Carol Bower et al, 'Foetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia' (2018) 8 *British Medical Journal Open* 1, 2.

<sup>204</sup> Mental Health Commission of New South Wales, Mental Health Commission of New South Wales, *Towards a just system: Mental illness and cognitive impairment in the criminal justice system* (2017).

<sup>205</sup> Carol Bower et al, 'Foetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia' (2018) 8 *British Medical Journal Open* 1, 2.

<sup>206</sup> *Ibid* 2.

<sup>207</sup> Law Council of Australia, *Justice Project Final Report: Broader Justice System Players* (2018) 42.

<sup>208</sup> *Ibid* 72 citing submission by the Western Australia Commissioner for Children and Young People.

<sup>209</sup> *Ibid*.

## *Need for accountability mechanisms*

91. The poor conditions in juvenile detention centres are compounded by a lack of effective independent oversight, including monitoring and reporting laws.<sup>210</sup> As a result, many children are unable to claim their legal rights in detention.<sup>211</sup> The Law Council supported the Commonwealth Government's ratification of Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**OPCAT**),<sup>212</sup> noting that:

*Independent and regular external scrutiny will provide an incentive for those running detention facilities to develop effective prevention strategies... Ratification of OPCAT provides an opportunity for Commonwealth, State and Territory governments to work together to address long standing human rights concerns relating to the treatment of Indigenous Australians in custody, and conditions in youth and immigration detention facilities.*<sup>213</sup>

92. Some states and territories have made some progress in this respect.<sup>214</sup> The Law Council supports the establishment of a National Preventative Mechanism (**NPM**) as a means of conducting inspections of places of detention, to ensure Australia is meeting its responsibilities under the OPCAT. It encourages the establishment of an NPM system that is adequately resourced, independent, transparent in its operation, and has formal engagement with civil society and human rights institutions.<sup>215</sup> The development of the NPM must have special regard to the needs of children and young people in juvenile detention, having regard to their particular vulnerabilities, and the concerns outlined above about their treatment.<sup>216</sup>

## *Over-representation of Aboriginal and Torres Strait Islander children*

93. As noted above, the Committee has previously raised its concerns with the serious and widespread discrimination faced by Aboriginal and Torres Strait Islander children in the criminal justice system,<sup>217</sup> as evidenced by the over-representation of Aboriginal and Torres Strait Islander children and young people in the juvenile

---

<sup>210</sup> See Law Council of Australia, *Justice Project Final Report: Broader Justice Players* (2018) 60.

<sup>211</sup> *Ibid.*

<sup>212</sup> For the Law Council's views on implementing OPCAT in Australia, see the Law Council's submission to the Australian Human Rights Commission, *Response to Consultation Paper on implementing OPCAT in Australia* (26 July 2017) <<https://www.lawcouncil.asn.au/resources/submissions/response-to-consultation-paper-opcat-in-australia>> and the Law Council's submission to the National Children's Commissioner and the Australian Human Rights Commission, *Optional Protocol to the Convention against Torture in the context of Youth Justice Detention Centres* (27 May 2016) <<https://www.lawcouncil.asn.au/resources/submissions/3152-optional-protocol-to-the-convention-against-torture-in-the-context-of-youth-justice-detention-centres>>.

<sup>213</sup> Law Council of Australia, 'Australia takes historic step to help prevent torture' (Media Release, 9 February 2017) <<https://www.lawcouncil.asn.au/media/media-releases/australia-takes-historic-step-to-help-prevent-torture>>.

<sup>214</sup> See, eg, Victorian Ombudsman, 'Victoria can protect human rights by acting on OPCAT: Ombudsman' (Media Release, 3 April 2017) <<https://www.ombudsman.vic.gov.au/News/Media-Releases/Media-Alerts/Victoria-can-protect-human-rights-by-acting-on-OPC>>; Victorian Ombudsman, *Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre* (November 2017) <<https://www.ombudsman.vic.gov.au/getattachment/432871e4-5653-4830-99be-8bb96c09b348>>' Office of the Guardian of Children and Young People South Australia, *Submission to the Law Council's Justice Project*.

<sup>215</sup> Law Council of Australia, *OPCAT in Australia: Stage 2*, Submission to the Australian Human Rights Commission, 21 September 2018.

<sup>216</sup> *Ibid.*; Law Council of Australia, *Response to Consultation Paper: OPCAT in Australia*, Submission to the Australian Human Rights Commission, 26 July 2017.

<sup>217</sup> 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].

justice system.<sup>218</sup> The AIHW reported that more than half (58 per cent) of all young people in detention on an average day in 2016-17 were Aboriginal or Torres Strait Islander people and that Aboriginal or Torres Strait Islander young people aged 10–17 were 24 times more likely to be in detention than young people who are not Aboriginal or Torres Strait Islander.<sup>219</sup> In the Northern Territory, 94 per cent of detainees in youth detention are Aboriginal or Torres Strait Islander people.<sup>220</sup>

94. As highlighted above, there are concerns that certain practices and policies in the realm of juvenile justice contribute to the criminalisation of young Aboriginal and Torres Strait Islander people. Some Justice Project stakeholders observed that young people who commit minor offences often receive harsh sentences including jail time, setting them on a path of future crime and imprisonment, when they should be diverted into culturally-competent rehabilitative programs instead.<sup>221</sup> Studies have shown that young Aboriginal and Torres Strait Islander people are less likely to access diversionary options and are more likely to be processed through the courts than non-Indigenous young people.<sup>222</sup>
95. Early intervention programs and diversionary sentencing options are often unavailable in remote areas where there may be limited social services to support these options. For example, in the Northern Territory, NAAJA has highlighted that young people on court orders are managed in the same way as adults, and generally do not have access to counselling or rehabilitation.<sup>223</sup> As a result, children with complex needs related to disability and mental health do not receive necessary support, and instead drift into custodial sentences from a young age.<sup>224</sup> During the Justice Project, similar concerns were raised, such as in Bourke, NSW and Mildura Victoria, where respondents described inadequate access for young Aboriginal people to mental health and drug and alcohol rehabilitation services.<sup>225</sup> Mission Australia in Bourke raised that:
- There is nowhere for young kids to detox in rural areas... A 16-18 year old can go to hospital to detox, but nowhere if they are younger. It is backwards that you can go to juvie at 10, but you can't go somewhere to detox.*<sup>226</sup>
96. The First People's Disability Network has highlighted that 'by the time an Aboriginal or Torres Strait Islander person with disability first comes into contact with the criminal justice system, they will most likely have had a life of unmanaged

---

<sup>218</sup> See, eg, Australian Law Reform Commission, *Pathways to Justice*, 43.

<sup>219</sup> This rate ratio was as high as 36 times in Western Australia: Australian Institute of Health and Welfare, *Youth Justice in Australia 2016-17* (2018) 8. See also Australian Institute of Health and Welfare, 'Youth detention population in Australia 2017' (Bulletin No 143, December 2017) 2 <<https://www.aihw.gov.au/getmedia/0a735742-42c0-49af-a910-4a56a8211007/aihw-aus-220.pdf.aspx?inline=true>>.

<sup>220</sup> Royal Commission into the Protection and Detention of Children in the Northern Territory, *Interim Report* (2017) 9.

<sup>221</sup> Law Council of Australia, *Justice Project Final Report: Aboriginal and Torres Strait Islander People* (2018) 72 citing Consultation, 13/09/2017 Bourke, (Mission Australia); Consultation, 15/09/2017, Bourke (Police Citizens Youth Club).

<sup>222</sup> Australian Law Reform Commission, *Pathways to Justice*, 453.

<sup>223</sup> North Australian Aboriginal Justice Alliance, Submission to the Australian Human Rights Commission, *Access to Justice in the Criminal Justice System for People with a Disability*, April 2013, 12, 7.

<sup>224</sup> *Ibid* 7.

<sup>225</sup> Consultation, 14/09/2017, Bourke (Aboriginal Legal Service (NSW/ACT)); Consultation, 26/09/2017, Mildura (Private practitioner).

<sup>226</sup> Consultations, 13/09/2017, Bourke (Mission Australia).

disability.<sup>227</sup> Research supports these conclusions. For example, the University of New South Wales' Mental Health Disorders and Cognitive Disability in the Criminal Justice System Project has commented that 'Indigenous Australians with mental and cognitive disabilities are forced into the criminal justice system early in life in the absence of alternative pathways'.<sup>228</sup> Baldry et al's study of Aboriginal people with mental and cognitive impairment in the NSW criminal justice system found that such individuals are frequently being 'managed' by police, courts and prisons due to a dire lack of appropriate community-based support.<sup>229</sup>

97. During the Justice Project, the Law Council received disturbing examples outlining the potential outcomes where such a lack of such support exists. For example, National Aboriginal and Torres Strait Islander Legal Services (**NATSILS**) provided the following case study of 'Robert', a 16 year old Aboriginal boy from the WA Goldfields:

*Robert was charged with serious violent offences against another boy, in a similar fashion to offences he witnessed his father commit against his mother at a young age that resulted in her death. The boy did not receive counselling at the time of the domestic incident but was later diagnosed with schizophrenia and had been living a shambolic life in the care of his maternal grandmother. He was illiterate and innumerate. He did not have assistance to regularly take medication for his schizophrenia or diabetes and had no access to psychological services. The Community Adolescent and Mental Health Services in the Goldfields were responsible for managing his mental health needs but did not provide services to the Central Desert where he resided nor was there a psychiatric service in this region. Prior to the offending, he was twice admitted to the mental health ward at Kalgoorlie Hospital in 2009 demonstrating a deteriorating mental state. The boy was sentenced to 15 months detention'.<sup>230</sup>*

98. In order to address such concerns, resources must be directed towards early intervention, prevention and diversion along with strategies that strengthen communities. The Law Council emphasises the importance of respect for the principle of self-determination and endorses community-led frameworks such as Change the Record's *Blueprint for Change* and *Free to Be Kids: National Plan of Action*, and the *Redfern Statement*.<sup>231</sup> The Justice Project examines a range of worthwhile initiatives and makes a number of relevant recommendations, including:

- (a) broad adoption of justice reinvestment strategies, having regard to the emerging success of justice reinvestment trials in Bourke, NSW, to date.<sup>232</sup> The trial in Bourke has so far resulted in:

---

<sup>227</sup> First People's Disability Justice Consortium, Submission No 39 to the Senate Standing Committee on Community Affairs, *Inquiry on the Indefinite Detention of People with Cognitive and Psychiatric Impairment*, April 2016.

<sup>228</sup> Eileen Baldry et al, University of New South Wales, *A predictable and preventable path: Aboriginal people with mental and cognitive disabilities in the criminal justice system* (October 2015) 12.

<sup>229</sup> Ibid; Eileen Baldry, Elizabeth McEntyre and Ruth McCausland, 'Why Aboriginal people with disabilities crowd Australia's prisons', *The Conversation* (online), 2 November 2015 <<https://theconversation.com/why-aboriginal-people-with-disabilities-crowd-australias-prisons-48166>>.

<sup>230</sup> Law Council of Australia, *Justice Project Final Report: Aboriginal and Torres Strait Islander People* (2018), 78, citing submission by the National Aboriginal and Torres Strait Islander Legal Service.

<sup>231</sup> See generally Law Council of Australia, *Justice Project Final Report: Aboriginal and Torres Strait Islander People* (2018).

<sup>232</sup> Law Council of Australia, *Justice Project Final Report: Critical Support Services* (2018) 39- 46.

- (i) 12 per cent reduction in total number of young people proceeded against for offences from 2015 to 2017;
  - (ii) 43 per cent reduction in number of young people proceeded against for breaches of Apprehended Violence Orders from 2015 to 2017
  - (iii) 43 per cent reduction in number of young people proceeded against for domestic violence related assault from 2015 to 2017
  - (iv) Young people sentenced to less time in prison – the average sentence was 62 per cent shorter for 18-25-year olds in 2017 compared with 2016.<sup>233</sup>
- (b) increased funding for Aboriginal community-controlled and broader legal assistance services, which play a critical role diverting young people to rehabilitation and broader support, rather than incarceration;
  - (c) funding a range of critical support services in areas of need, particularly RRR areas (including youth engagement programs, mental health services, drug and alcohol rehabilitation, family support services and alternative accommodation). The social and economic value of such strategies is emerging - for example, a 2017 evaluation by Nous Management Consulting Group of three youth programs in Central Australian communities revealed that 'well-funded and consistent youth programs deliver a social return of more than \$4.50 to every dollar of investment' and have broader positive impacts on the health, education and justice systems, including reduced rates of crime and drug and alcohol abuse among young people;<sup>234</sup>
  - (d) improved cultural competence training for staff across the justice system and adjacent systems; and
  - (e) the adoption of national justice targets as part of the Council of Australian Governments' *Closing the Gap* strategy.<sup>235</sup>

#### *Limited transitional support*

99. Justice Project stakeholders raised the necessity of supported accommodation for young people exiting youth detention, with the Tasmania Children's Commissioner observing that often young people have nowhere to stay, and therefore return to detention for shelter. The need for specific accommodation for Aboriginal and Torres Strait Islander young people linked with opportunities for education and cultural integration was also noted.<sup>236</sup> Others highlighted the importance of better access to throughcare support as a means of protecting the human rights of youth detainees and reducing the risk of recidivism.<sup>237</sup>

<sup>233</sup> NSW Bureau of Crime Statistics and Research, Reference sr18-16096. See also Lorena Allam, 'unique community policing sees crime rates plunge in Bourke' *the Guardian* (online) 8 October 2018 <<https://www.theguardian.com/australia-news/2018/oct/09/unique-community-policing-sees-rates-plunge-in-bourke>>.

<sup>234</sup> Nous Group, *Forecasting the social return on investment of central Australian youth programs* (2017) 58 <<https://www.nousgroup.com/forecasting-return-investment-youth-programs/>>.

<sup>235</sup> See generally Law Council of Australia, *Justice Project Final Report: Aboriginal and Torres Strait Islander People* (2018); Law Council of Australia, *Justice Project Final Report: Critical Support Services* (2018); Law Council of Australia, *Justice Project Final Report: Governments and Policymakers* (2018)

<sup>236</sup> Law Council of Australia, *Justice Project Final Report: Prisoners and Detainees* (2018) 52.

<sup>237</sup> *Ibid.*

## *Reliance on Police Watch Houses*

100. The lack of regulation of police watch houses and the over-reliance on watch houses as detention facilities for children were identified as serious areas of concern by several Justice Project stakeholders.<sup>238</sup> The NT Royal Commission found that children and young people were being held in police custody in watch houses for unreasonably long periods of time.<sup>239</sup> It reported:

*There is no legal restriction in the Northern Territory on a child being held in a watch house with adults, nor is there any limit on the length of time they can be held without charge.*<sup>240</sup>

101. The NT Office of the Children's Commissioner also noted that the Alice Springs watch houses were being used as a remand centre for children.<sup>241</sup> It reported that between 1 January 2017 and 30 June 2017 there were '24 per cent more children being held under powers of arrest in the Alice Springs police watch house compared to Darwin'.<sup>242</sup> The National Children's Commissioner made similar observations about children held in Tasmanian watch houses.<sup>243</sup> The Aboriginal Legal Service in Bourke similarly expressed concerns that police watch houses were being used regularly as an informal detention facility and expressed concerns that police were not properly considering the severity of any form of imprisonment for children.<sup>244</sup>

## *The incarceration of young people without a meaningful prospect of release*

102. The LS NSW has highlighted the cases of Mr Bronson Blessington and Mr Matthew Elliott, who were convicted of the 1988 murder of Ms Janine Balding, when they were aged 14 and 16 years respectively.<sup>245</sup> As a result of legislation passed by the NSW Parliament in 1997, 2001 and 2005, Mr Blessington and Mr Elliott are unlikely to be released from prison during their lifetimes, and as such the UNHRC concluded that Australia was in breach of its obligations under the ICCPR.<sup>246</sup> This is also a breach of the CRC, as article 37(a) stipulates that neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.

---

<sup>238</sup> Law Council of Australia, *Justice Project Final Report: Children and Young People* (2018) 61 citing Consultation, 25/08/2017, Canberra (National Children's Commissioner); Consultation, 29/09/2017, Teleconference (Office of the Children's Commissioner Northern Territory); Consultation, 14/09/2017, Bourke (Aboriginal Legal Service (NSW/ACT)).

<sup>239</sup> Northern Territory, *Royal Commission: Findings and Recommendations* (2017).

<sup>240</sup> Northern Territory, *Royal Commission: Final Report*, 26.

<sup>241</sup> Law Council of Australia, *Justice Project Final Report: Children and Young People* (2018) 61 citing Consultation, 29/09/2017, Teleconference (Office of the Children's Commissioner Northern Territory).

<sup>242</sup> Law Council of Australia, *Justice Project Final Report: Children and Young People* (2018) 61 citing Office of the Children's Commissioner Northern Territory, *Annual Report 2016-17*, 115.

<sup>243</sup> Law Council of Australia, *Justice Project Final Report: Children and Young People* (2018) 61 citing Consultation, 25/08/2017, Canberra (National Children's Commissioner).

<sup>244</sup> Law Council of Australia, *Justice Project Final Report: Children and Young People* (2018) 61 citing Consultation, 14/09/2017, Bourke (Aboriginal Legal Service (NSW/ACT)).

<sup>245</sup> Tom Allard, 'Bronson Blessington: former DPP Nicholas Cowdry backs mercy for Janine Balding killer' *Sydney Morning Herald* (Online) 5 February 2016.

<sup>246</sup> See Human Rights Committee, *Views: Communication No 1968/2010*, 112<sup>th</sup> sess, UN Doc CCPR/C/112/D/1968/20101 (14 April 2010, adopted 22 October 2014).

## Problematic laws and practices

### *Bail laws and practices*

103. Children who are granted bail are often subject to numerous onerous bail conditions, such as strict curfews, the requirement to be in the company of a parent or carer and to follow his or her directions, place restrictions and general requirements relating to accommodation, school, and health treatment programs.<sup>247</sup> The stringency of these conditions means there is an increased likelihood of children breaching conditional bail. In some jurisdictions, breaching conditional bail can result in detention.<sup>248</sup>
104. Australia-wide, there are a large proportion of children and young people on remand. AIHW reported in March 2018 that more than half (61 per cent) of young people in detention were unsentenced (either detained by police (pre-court) or on remand).<sup>249</sup> It is well-established that being in custody, even for short periods, can increase the likelihood of further offending.<sup>250</sup> Further, in jurisdictions where breach of bail is an offence, children who breach bail multiple times can end up with a lengthy criminal history.<sup>251</sup>
105. Children who are homeless are particularly disadvantaged by bail laws, as bail is dependent on the child being released to safe and suitable accommodation.<sup>252</sup> For example, in NSW section 28 of the *Bail Act 2013* (NSW) imposes an accommodation requirement for children accused of a crime. It provides that 'a bail condition imposed by a court or authorised justice on the grant of bail can require that suitable arrangements be made for the accommodation of the accused person before he or she is released on bail'.<sup>253</sup> This operates to discriminatory effect on homeless children without suitable accommodation.<sup>254</sup>
106. In accordance with the accommodation requirement, a common bail condition in NSW is 'to reside as [Family and Community Services] FACS directs' – McFarlane has commented that this is 'a bail condition that presuppose[s] that FACS would provide them with accommodation'.<sup>255</sup> However, if no accommodation is found, the child remains in custody.<sup>256</sup> A review of juvenile remand cases in NSW over a three month period in 2010 revealed that 90 per cent of children on remand were unable to meet their bail conditions and 95 per cent had 'reside as directed' orders in their

---

<sup>247</sup> Legal Aid NSW, Submission to New South Wales Law Reform Commission, *Young people with cognitive and mental health impairments in the criminal justice system*, March 2011, 3.

<sup>248</sup> See eg New South Wales Department of Justice, *Annual Report 2015-2016* (2016) 92; Northern Territory, Royal Commission into the Protection and Detention of Children in the Northern Territory, Interim Report (2017) 12.

<sup>249</sup> Australian Institute of Health and Welfare, *Youth Justice in Australia 2016-17* (2018), 15

<sup>250</sup> Northern Territory, *Royal Commission: Final Report*, vol 2B, 210; Australian Law Reform Commission, *Pathways to Justice* 40; NSW Bureau of Crime Statistics and Research, *Re-offending statistics for NSW* (2017) <[http://www.bocsar.nsw.gov.au/Pages/bocsar\\_pages/Re-offending.aspx](http://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Re-offending.aspx)>; Law Institute Victoria, Submission to the Review of Victoria's Bail System, *Review of Victoria's Bail System*, 31 March 2017, 13.

<sup>251</sup> Legal Aid NSW, Submission to New South Wales Law Reform Commission, *Young people with cognitive and mental health impairments in the criminal justice system*, March 2011, 4.

<sup>252</sup> Katherine McFarlane, 'NSW bail laws mean well but are landing homeless kids in prison', *The Conversation* (online), 16 December 2016 <<https://theconversation.com/nsw-bail-laws-mean-well-but-are-landing-homeless-kids-in-prison-68490>>.

<sup>253</sup> *Bail Act 2013* (NSW) s 28(1).

<sup>254</sup> Dr Katherine McFarlane, 'NSW bail laws mean well but are landing homeless kids in prison', *The Conversation* (online), 16 December 2016 <<https://theconversation.com/nsw-bail-laws-mean-well-but-are-landing-homeless-kids-in-prison-68490>>.

<sup>255</sup> *Ibid.*

<sup>256</sup> *Ibid.*

bail conditions.<sup>257</sup> In 2009, the NSW Committee on Children and Young People noted that the 'failure of support and care services, particularly with respect to children in out-of-home care' had contributed to the increase in children on remand.<sup>258</sup> Yfoundations submitted to the Justice Project that the relevant legislative requirements have 'the effect of inappropriately and quite wrongly using the criminal justice system for essentially welfare issues'.<sup>259</sup>

107. The lack of services and supported accommodation for children and young people on bail has been identified as potentially contributing to high rates of custodial remand in Australia. In 2013, Richards and Renshaw noted a 'lack of bail hostels and other appropriate accommodation options for young people, particularly Indigenous young people ... and those from regional/remote areas' as well as a 'lack of access to after-hours services' in many jurisdictions.<sup>260</sup> More recently, the Western Australia Commissioner for Children and Young People expressed concern in the Justice Project context that:

*children who are eligible for bail are being held in detention simply because there is nowhere else for them to go. ... An inability to locate a responsible adult demonstrates that a child or young person is in need of care and support, and it is unacceptable that such children are incarcerated by virtue of their circumstances.*<sup>261</sup>

108. It is worth noting that some jurisdictions have more accessible bail support programs and accommodation options for young people on bail. For example, in the ACT, the After-Hours Bail and Support Service aims to keep young people out of custody by assisting young people on bail to find suitable alternative community-based accommodation.<sup>262</sup> This need has been recognised recently by the Northern Territory Government, which has committed funding towards bail support programs and bail accommodation.<sup>263</sup> It is essential that similar services are adopted and resourced across all states and territories.

109. The Law Council raises the following further concerns with respect to proposed Victorian bail reforms. These include:

- (a) Electronic monitoring - Amendments contained in the Children, Youth and Families Amendment (Youth Offender Compliance) Bill 2018 that empower the Youth Parole Board to impose electronic monitoring on young people aged 16-18, who have committed serious youth offences when they are granted parole.<sup>264</sup> The Victorian Government has stated electronic monitoring is designed to be a 'constant reminder' to both the child and the community of

---

<sup>257</sup> Law Council of Australia, *Justice Project Final Report: Children and Young People* (2018) 61 citing submission by Yfoundations.

<sup>258</sup> Committee on Children and Young People, Parliament of New South Wales, *Children and Young People Aged 9-14 years in NSW: The Missing Middle*, Report No 5/54 (2009) vol 1, 189.

<sup>259</sup> Law Council of Australia, *Justice Project Final Report: Children and Young People* (2018) 45 citing Yfoundations, *Submission 98*.

<sup>260</sup> Kelly Richards and Lauren Renshaw, 'Bail and remand for young people in Australia: A national research project' (Research and Public Policy Series Report No 125, Australian Institute of Criminology, 2013) 80.

<sup>261</sup> Law Council of Australia, *Justice Project Final Report: Children and Young People* (2018) 46 citing submission by the Western Australia Commissioner for Children and Young People.

<sup>262</sup> Australian Institute of Health and Welfare, *Youth justice in Australia 2015-16: Australian Capital Territory* (8 May 2018) <<https://www.aihw.gov.au/reports/aus/211/youth-justice-in-australia-2015-16/contents/introduction/australian-capital-territory>>.

<sup>263</sup> Northern Territory Government, *Budget Overview* (2018)

<[https://budget.nt.gov.au/\\_\\_data/assets/pdf\\_file/0003/500583/Budget-Overview-book.pdf](https://budget.nt.gov.au/__data/assets/pdf_file/0003/500583/Budget-Overview-book.pdf)> 9.

<sup>264</sup> Children, Youth and Families Amendment (Youth Offender Compliance) Bill 2018 section 8, inserting section 458A(2) into the *Children, Youth and Families Act 2005* (Vic).

their offending, which is likely to further ostracise young offenders, undermine their attempts at re-integration and cause them shame and embarrassment in their communities, leading to more alienated and alienating behaviour.<sup>265</sup> These amendments are contrary to the rights of a child convicted of a criminal offence to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, taking into account the child's age and the desirability of promoting the child's reintegration.<sup>266</sup>

- (i) These amendments may be contrary to the rights of a child convicted of a criminal offence to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, taking into account the child's age and the desirability of promoting the child's reintegration,<sup>267</sup> and using electronic monitoring to surveil children and restrict their movements may be contrary to their right to be free from arbitrary interference with their privacy.<sup>268</sup> Further, the presumption in favour of parole cancellation, which brings the law into line with the laws as they relate to adults, is contrary to the right of a child convicted of an offence to be treated in a way that is appropriate for their age and the principle that children should only be detained as a measure of last resort, for the shortest appropriate period of time.<sup>269</sup>
- (b) Alcohol and drug testing - proposed Victorian reforms will see young people on parole as young as 16 being subject to drug and alcohol tests as a condition of their bail.<sup>270</sup> This reform is contrary to the rights of a child to have their privacy respected at all stages of the criminal process.<sup>271</sup>

#### *Mandatory sentencing laws*

- 110. The Committee's 2012 Concluding Observations recommended the abolition of mandatory sentencing laws in jurisdictions where they still existed or were threatened (then, WA and Victoria). However, mandatory sentencing laws that affect children and young people are still in force in Western Australia.<sup>272</sup>
- 111. Additionally, the Law Council is concerned about the Victorian Government's reforms contained in the *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) to elevate injury offences against on duty emergency workers, custodial

---

<sup>265</sup> Minister for Families and Children, 'Tougher Monitoring For Young Parolees' (Media Release, 25 July 2018) <<https://www.premier.vic.gov.au/tougher-monitoring-for-young-parolees/>>.

<sup>266</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) article 40(1).

<sup>267</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) article 40(1).

<sup>268</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) articles 16 and 40(2)(b)(vii).

<sup>269</sup> Children, Youth and Families Amendment (Youth Offender Compliance) Bill 2018 sections 9 and 10, inserting sections 460(9) and 460D into the *Children, Youth and Families Act 2005* (Vic); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) articles 37(b) and 40(1).

<sup>270</sup> Children, Youth and Families Amendment (Youth Offender Compliance) Bill 2018 section 13, inserting section 458B into the *Children, Youth and Families Act 2005* (Vic).

<sup>271</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) article 40(2)(b)(vii).

<sup>272</sup> See, eg, *Criminal Code Act Compilation Act 1913* (WA), s 401(4).

officers and youth justice custodial workers to 'Category 1 offence' and to narrow the 'special reasons' exceptions.<sup>273</sup>

112. These changes are likely to have a disproportionate impact upon children and young people in out of home care and the youth justice system as they have increased contact with exposed workers, and the disproportionate impact may be compounded in relation to Aboriginal and Torres Strait Islander children who are already over-represented in the child protection and youth justice system, and other over policed groups such as the Victorian African community.<sup>274</sup> The inclusion of aggravated home invasion and carjacking in the definition of 'Category 1 offences', two crimes that are now popularly associated with youth 'gangs', also disproportionately targets vulnerable young people.<sup>275</sup>
113. Further, the Law Council is concerned about the requirement under the Victorian amendments for higher courts, when sentencing children between the ages of 16 and 17, to have regard to the existence of the statutory minimum sentencing provisions that would apply if the offender were an adult.<sup>276</sup> The requirement will interact with the recently introduced presumption of uplift to result in more 16 and 17-year-olds being detained and facing harsher sentences.<sup>277</sup>
114. The Law Council considers that mandatory sentencing laws can result in unjust and harsh sentences for minor offences, failing to account for a child's particular circumstances. They undermine Australia's compliance with article 37(b) of the CRC, which requires that the detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time.
115. More generally, the Law Council considers that mandatory sentencing regimes impose unacceptable restrictions on judicial discretion and independence, disproportionately affect particular social groups — particularly Aboriginal and Torres Strait Islander people — and undermine fundamental rule of law principles.<sup>278</sup> In this context the ALRC has also found that 'mandatory sentencing increases incarceration, is costly and is not effective as a crime deterrent'.<sup>279</sup> The Law Council considers that the relevant Western Australian and Victorian provisions should be abolished.

---

<sup>273</sup> *Justice Legislation Miscellaneous Amendment Act 2018* section 73(1), amending *Sentencing Act 1991 (VIC)* section 3(1).

<sup>274</sup> Australian Institute of Health and Welfare, 'Data tables: Child protection Australia 2016-2017' (9 March 2018), Supplementary Table 43 <<https://www.aihw.gov.au/reports-statistics/health-welfare-services/child-protection/data>>; Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2017*, 17 <<https://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2017/contents/table-of-contents>>.

<sup>275</sup> *Justice Legislation Miscellaneous Amendment Act 2018* section 73(1)(b), amending *Sentencing Act 1991 (VIC)* section 3(1); A joint open letter from stakeholders including the Law Institute Victoria to the Attorney-General and Ministers Mikakos and Neville, 7 June 2017, <[https://www.flc.org.au/youth\\_justice\\_reforms\\_pso\\_bill\\_a\\_joint\\_open\\_letter\\_to\\_the\\_attorney\\_general\\_and\\_ministers\\_mikakos\\_and\\_neville](https://www.flc.org.au/youth_justice_reforms_pso_bill_a_joint_open_letter_to_the_attorney_general_and_ministers_mikakos_and_neville)>.

<sup>276</sup> *Justice Legislation Miscellaneous Amendment Act 2018* sections 3 and 76(9), amending *Children, Youth and Families Act 2005 (VIC)* section 586, and inserting *Sentencing Act 1991 (VIC)* section 5(2J).

<sup>277</sup> *Children, Youth and Families Act 2005 (VIC)* section 356(6).

<sup>278</sup> Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (2014), 5 <<https://www.lawcouncil.asn.au/docs/ff85f3e2-ae36-e711-93fb-005056be13b5/1405-Discussion-Paper-Mandatory-Sentencing-Discussion-Paper.pdf>>

<sup>279</sup> Australian Law Reform Commission, *Pathways to Justice*, 273.

### *Other Victorian developments of concern*

116. Further, the Law Council draws attention to the following Victorian reforms currently under consideration:

- (a) the Justice Legislation (Police and Other Matters) Bill 2018, includes an amendment removing the requirement for court approval in order for police to obtain DNA samples from suspects of or above the age of 15 years.<sup>280</sup> Obtaining DNA is an invasive procedure that results in the provision of extremely personal information, and requiring a court order to obtain DNA from children is an important and necessary protection given the accepted greater vulnerability of children.
- (b) the Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018 amends the current unlawful association notice scheme in Victoria as set out in Part 5A of the Criminal Organisations Control Act 2012. The scheme will now apply to children as young as 14 years of age, exposing them to a 3-year prison sentence if a notice is breached. The Bill lowers the rank of a police officer who can issue a notice from Senior Sergeant to Sergeant, and also reduces the threshold for issuing an unlawful association notice.<sup>281</sup> It is the Law Council's view that imposing limitations on children will not disrupt serious and organised crime to an extent that would justify the limitations placed on children's rights. It is also concerned that senior officers will no longer have to consider whether a notice is necessary to prevent the commission of an offence. Additionally, under the Bill, children may be subject to the same punishment as adults if they are found to be in breach of a notice, despite their status as a 'vulnerable person'.<sup>282</sup>
- (c) the Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018 also abolishes de novo appeals of criminal cases from the Magistrates and Children's Court to the County Court.<sup>283</sup> De novo appeals against conviction and sentence are an essential means by which access to justice and consistency of justice are upheld in Victoria, and the removal of the appeals is likely to create inequality in the justice system. The removal of the County Court avenue of de novo appeal for Children's Court decisions will have a significant impact on children and young people. This is contrary to the right of a child to be treated in a manner consistent with the child's age, and their right to have a decision of criminal guilt and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law.<sup>284</sup>

---

<sup>280</sup> Justice Legislation (Police and Other Matters) Bill 2018 sections 464SC, 464SD, 464SE and 464SF.

<sup>281</sup> Law Institute Victoria, Federation of Community Legal Centres (Victoria) and Human Rights Law Centre, *Joint Submission to the Scrutiny of Acts and Regulations Committee: Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018* (3 August 2018).

<sup>282</sup> Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018, section 5.

<sup>283</sup> Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018, section 23, repealing section 328 of the *Children, Youth and Families Act 2005*.

<sup>284</sup> *Charter of Human Rights and Responsibilities 2006 (VIC)* section 23(3); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) article 40(1) and (2)(b)(v).