

Submission to the Federal Senate Inquiry into Australia’s youth justice and incarceration system

Acknowledgment of Country

Youth Law Australia acknowledges all the Traditional Owners and Elders of the lands on which we work, including the Bedegal People of the Eora Nation and the palawa and pakana peoples of lutruwita. We acknowledge their continuing custodianship of these lands, pay our respects to their Elders past and present, and commit ourselves to the ongoing journey of Reconciliation.

Introduction

We welcome this inquiry into Australia’s youth justice and incarceration system. Our interests in and commitment to children’s rights, safety and wellbeing mean that we are continually horrified at the harm that is being occasioned to children in Australia through the criminal law system. We are also disturbed by the apparent systemic discrimination evident in this system, revealed by the overrepresentation of Aboriginal and Torres Strait Islander children, and children living with disability. To take one example of research supporting this observation, the Central Australian Aboriginal Congress submitted that its data on young people in detention ‘suggests that the vast majority (>80%) would have an undiagnosed or inaccurately diagnosed neurodevelopmental disorder’.¹

We acknowledge that this inquiry follows a report by the National Children’s Commission, *Help way earlier!*, and we endorse many of this report’s findings and recommendations. This report, like other research and advocacy over many years, highlights how a child’s involvement in the criminal law system reflects, in the vast majority of cases, societal failings – in self-determination, closing the gap and redressing past wrongs, child protection, safety, education, housing, health, and the provision of other essential services and supports.² We agree with the comments of the Koorie Youth Council in a submission to this Inquiry:

Media reporting focuses primarily on the criminal acts allegedly committed by young people, but rarely provides commentary on the circumstances that have led them down this path. The voices of young people, including the positive stories in community, are being ignored in favour of discourse that stigmatises young people for their challenges. With the vacuum this creates, public sentiment about young people is warped to be fear-driven and punishment focused, rather than holistically

¹ Central Australian Aboriginal Congress, Submission to Inquiry into Australia’s Youth Justice and Incarceration System, 21 October 2024 (Submission 192). Available at [Submissions – Parliament of Australia](#), pp 8-9.

² See for example Centre for Crime, Law & Justice, UNSW, Replacing the Youth Justice System for Children Aged 10-13 Years in NSW: ‘A Best Interests’ Response, September 2021 (available at: *Microsoft Word - CCLJ Best Interests Response Report September 2021.docx (unsw.edu.au), p 6.

*considering the context and experiences that shape an individual, and focusing on strengths-based approaches that emphasise early intervention and prevention.*³

While we welcome this inquiry, it is important to recognise that it does follow many other inquiries, reviews and royal commissions which have examined similar issues – both at the state or territory, and commonwealth level – over many, many years.⁴ These inquiries require both a commitment of time and emotional resources from communities, organisations, and individuals who care about the rights and wellbeing of children in this country. Yet, they have led to very little substantive change in the underlying issues and systems. If anything, we have seen a worsening of rhetoric, laws, practices and systems in some jurisdictions, the cumulative result of which will inevitably be greater harm to disadvantaged children, and their families and communities.

This inquiry must be different. It must lead to continual improvements across Australia in the protection of the rights, safety and wellbeing of all children. Where a child lives should not impact the extent to which their rights are met.

The only way this inquiry can lead to positive change is by recognising that the Commonwealth Government can and must take a leadership role, including by legislating national, enforceable minimum standards on the children’s criminal law system. These standards should reflect the commitments Australia has made internationally to protect and enhance the rights of children.

We submit that:

- Australia is not meeting international law on the rights, safety and wellbeing of children
- Australia has been disingenuous and misleading in previous reports to the Committee on the Rights of the Child about its powers to act
- The Commonwealth Government can and must play a leadership role in protecting the rights, safety and wellbeing of children
- The Commonwealth Government must legislate national, enforceable minimum standards and a monitoring, reporting and accountability framework for the children’s criminal law system.

We respectfully hope that this Committee will provide clear direction to the Commonwealth Government on what needs to be done, how it should be done, and the timeframes for implementation. This must be treated as a national priority.

Australia is not meeting international law on the rights, safety and wellbeing of children

The *Help way earlier!* report includes at Appendices 1 and 2 an overview of key internationally-recognised child rights relevant to the children’s criminal law system in

³ Koorie Youth Council Submission, Inquiry into Australia’s Youth Justice and Incarceration System, 10 October 2024 (Submission 142), available at: [Submissions – Parliament of Australia](#), p 4.

⁴ The Australian Institute of Criminology report identified 22 reviews or inquiries into youth justice across six Australian jurisdictions over a four-year period. See Garner Clancey, Sindy Wang and Brenda Lin, Youth Justice in Australia: Themes from recent inquiries, Australian Institute of Criminology, No. 605, October 2020, p 4.

Australia. These arise from international human rights treaties and declarations that Australia has ratified, which means Australia has agreed to uphold these rights. These treaties include:

- *Convention on the Rights of the Child*
- *United Nations Declaration on the Rights of Indigenous Peoples*
- *Convention on the Rights of Persons with Disabilities*
- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

In its submission to this inquiry, SNAICC (the national non-government peak for Aboriginal and Torres Strait Islander children) summarises the United Nations Committee on the Rights of the Child's response to Australia's latest (2019) report on implementation of the Convention of the Rights of the Child.⁵ The Committee expressed regret that its previous recommendations have not been implemented, and outlined eight areas in relation to the administration of child justice in Australia where it remained 'seriously concerned'. It also made eight recommendations to bring Australia's child justice system 'fully into line with the Convention'.⁶

Yet, a cursory review of media reporting in Australia since 2019 clearly shows that Australia's criminal law system has not evolved to provide greater protections of children's rights, and if anything, that the legal and policy frameworks have moved further away from compliance with Australia's child rights obligations. Many of the submissions to this Inquiry outline ways in which Australia is in breach of its international obligations, and these observations deserve to be taken seriously.

Other submissions to this Inquiry provide other examples of Australia's poor international record on meeting its international obligations in relation to the children's criminal law system. For example, the Queensland Aboriginal and Torres Strait Islander Child Protection Peak observed that the United Nations Committee Against Torture in its 2022 *Concluding Observations on Australia's sixth report* expressed its concerns that indigenous men, women and children 'continue to be disproportionately affected by incarceration'.⁷ Similarly, the Victorian Aboriginal Legal Service noted that in Australia's last Universal Periodic Review in 2021 over 30 countries recommended Australia raise its age of criminal responsibility, and that 'Australia's treatment of Aboriginal people was repeatedly chastised'.⁸

We agree with SNAICC's submission that the UN Committee on the Rights of the Child's 2019 recommendations to Australia 'represent a considered and targeted set of reforms which all Australian governments can and should undertake', and that the Commonwealth Government should lead a national approach to implementation.⁹

⁵ See submission 173, from page 9.

⁶ United Nations Committee on the Rights of the Child, 'Concluding observations on the combined fifth and sixth periodic reports of Australia', 1 November 2019. Accessible at: <https://www.ohchr.org/en/documents/concludingobservations/committee-rights-child-concluding-observations-combined-fifth-and>, pg. 14.

⁷ United Nations Committee Against Torture, 'Concluding observations on the sixth periodic report of Australia', 5 December 2022. Accessible at: [CAT C AUS CO 6-EN.pdf](#), p 10.

⁸ Victorian Aboriginal Legal Service, Submission to the Senate Inquiry into Youth Justice, October 2024 (Submission 196). Available at: [Submissions – Parliament of Australia](#), pp 33-34.

⁹ SNAICC, Submission to the Senate Inquiry into Australia's Youth Justice and Incarceration System, October 2024 (Submission 173). Accessible at: [Submissions – Parliament of Australia](#).

Australia has been disingenuous and misleading in previous reports to the Committee on the Rights of the Child about its powers to act

We have analysed statements made over almost twenty years by Australia to the UN Committee on the Rights of the Child as part of its reporting obligations as a signatory to the Convention. A commonality across these reports is Australia's emphasis on its federal system, and on the responsibilities of State and Territory Governments. Australia's reports include statements that states and territories are responsible for the following areas under the Australian Constitution:

- juvenile justice¹⁰
- child protection¹¹
- education and healthcare.¹²

In a 2007 report, for example, Australia wrote that: '...matters such as education, child protection, healthcare and youth justice fall predominantly within the constitutional responsibility of the States and Territories'.¹³

This misrepresents the legal position. The Commonwealth Government has the power, under the Australian Constitution, to legislate to implement all its human rights obligations, including the entirety of the Convention on the Rights of the Child.¹⁴ Statements limiting the Commonwealth Government's responsibility in areas such as juvenile justice and child protection are inaccurate and misleading, and appear to be an excuse for inaction. Our analysis accords with the observations of the Queensland Aboriginal and Torres Strait Islander Child Protection Peak to this Inquiry that 'the Australian Government has often deferred responsibility to state and territory governments, resulting in inconsistent youth justice practices across the country'.¹⁵

The UN Committee against Torture, in its response to Australia's 2022 report, saw through this position, observing:

*While taking note of the complex structures in [Australia] The Committee notes that the federal Government is primarily responsible for ensuring the implementation of the Convention and providing leadership to the state and territory governments in that context.*¹⁶

While states and territories have undoubtedly contributed to Australia's failure to meet its international child rights obligations, as the Victorian Aboriginal Legal Service submitted, 'It is

¹⁰ CRC/C/129/Add.4, 29 December 2004, second and third report for 1998 and 2003, para 440; CRC/C/Aus/4, 14 June 2011, fourth report for 2007, para 18.

¹¹ CRC/C/129/Add.4, 29 December 2004, second and third report for 1998 and 2003, para 258; CRC/C/Aus/4, 14 June 2011, fourth report for 2007, para 18.

¹² CRC/C/Aus/4, 14 June 2011, fourth report for 2007, paras 18 and 240.

¹³ CRC/C/Aus/4, 14 June 2011, fourth report for 2007, para 18.

¹⁴ This derives from the 'external affairs' power, s 51(xxix) of the Constitution. However, as the Victorian Aboriginal Legal Service noted in its submission, there are other potential powers under the Australian Constitution that could be relied upon. See Victorian Aboriginal Legal Service, Submission to the Senate Inquiry into Youth Justice, October 2024 (Submission 196). Available at: [Submissions – Parliament of Australia](#), pp 33-34.

¹⁵ Queensland Aboriginal and Torres Strait Islander Child Protection Peak, Submission to the National Youth Justice Inquiry, October 2024 (Submission 62). Available at: [Submissions – Parliament of Australia](#), p 7.

¹⁶ United Nations Committee Against Torture, 'Concluding observations on the sixth periodic report of Australia', 5 December 2022. Accessible at: [CAT_C_AUS_CO_6-EN.pdf](#), pp 2-3.

meaningless for the Federal government to sign on to treaties and not make them enforceable domestically.¹⁷ We note that other submissions to this Inquiry have outlined the Commonwealth Government's responsibility in relation to treaty obligations.¹⁸

The Commonwealth Government can and must play a leadership role in protecting the rights, safety and wellbeing of children

Youth Justice, and policies that affect our most vulnerable children, must be separated from politics. Irrespective of which political party holds office, we must hold firm the expectation that the Government of the day make sound legal and policy decisions based on evidence, consistent with human rights and minimum standards and in compliance with international law. We must never lower our expectations for children – we must want them to thrive in life, be safe in their communities and be seen in the capacity of their full potential. At present in the Territory, the public narrative lies in the sentiment that some children are deserving of protection, care and support but not those who are most at risk of contact with the youth justice system. Proposed reforms to laws and policies that impact often the vulnerable and marginalised children are reflective of this.¹⁹ (Shahleena Musk, NT Children's Commissioner)

Other submissions to this Inquiry emphasised the harmful approaches to children that have been adopted in other states and territories. For example, the Aboriginal Legal Service of Western Australia noted that, 'The youth justice system in Western Australia appears to endure an almost endless cycle of dysfunction and recovery, and has done so for many decades', and that in Western Australia, 'the youth justice system has comprehensively failed the young Aboriginal people entrusted to its care'. It included an appendix listing the 97 complaints it has lodged against the two youth detention centres in WA on behalf of young Aboriginal people.²⁰

It is apparent that the issue of children's involvement with the criminal law system cannot be left to the responsibility of State and Territory Governments. To adopt the submissions of the Western Australian Aboriginal Legal Service: 'The crisis that many states and territories currently face in relation to youth justice highlights the need for the Federal Government to take urgent action to ensure that children's rights are respected all across the country'.²¹ The Commonwealth Government needs to provide leadership to insulate the lives of disadvantaged and vulnerable children from harmful political discourse. As the NT Children's Commissioner submitted to this Inquiry, 'Populist politics and tough on crime debates see

¹⁷ Victorian Aboriginal Legal Service, Submission to the Senate Inquiry into Youth Justice, October 2024 (Submission 196). Available at: [Submissions – Parliament of Australia](#), p 34.

¹⁸ See for example Aboriginal Legal Service of Western Australia, Submission to the Senate Inquiry into Australia's Youth Justice and Incarceration System, 10 October 2024 (Submission 179). Available at: [Submissions – Parliament of Australia](#), pp 36-37.

¹⁹ Shahleena Musk, Children's Commissioner, Office of the Children's Commission Northern Territory, Submission, 10 October 2024 (Submission 194). Available at [Submissions – Parliament of Australia](#), pp 2-3.

²⁰ See for example Aboriginal Legal Service of Western Australia, Submission to the Senate Inquiry into Australia's Youth Justice and Incarceration System, 10 October 2024 (Submission 179). Available at: [Submissions – Parliament of Australia](#), pp 17-18, 36-42, 47, Appendix B.

²¹ Aboriginal Legal Service of Western Australia, Submission to the Senate Inquiry into Australia's Youth Justice and Incarceration System, 10 October 2024 (Submission 179). Available at: [Submissions – Parliament of Australia](#), pp 42.

children routinely used as footballs in political campaigns for advantage and point scoring, their rights impinged as part of the political discourse.²²

In a previous submission on this topic, Youth Law Australia outlined some of the other benefits of a national approach to reform in this area, including:

- A national approach to reform would assist Australia to better meet its international human rights obligations
- The policy issues, challenges and solutions are broadly similar across Australia
- There have been a high number of state and territory inquiries into youth justice which have not resulted in systemic change
- There is a need to move away from existing models, embedded structures and unhelpful rhetoric
- There has been inadequate political will at the state and territory level
- Reforms following the Royal Commission into Institutional Responses to Child Sexual Abuse illustrate the benefits of national leadership on strategic areas of importance.²³

We would add to this that a national approach is necessary to ensure children receive equal treatment, no matter where they live in Australia.

Many of the recommendations of the National Children's Commissioner in the *Help way earlier!* report relate to the issue of Commonwealth leadership to enable national reform. As the Commissioner noted in her report, the 'idea of taking a national approach is not new' and has been recommended in numerous previous inquiries.²⁴ The Aboriginal Legal Service of Western Australia observed that 'A national approach to youth justice would also be consistent with other social problems that are benefiting from a national approach, such as the *National Plan for Ending Violence Against Women and Children 2022-2031*.'²⁵

Internationally, Australia has previously acknowledged in relation to the overrepresentation of indigenous peoples in the criminal justice system that 'a transformational change is required to reverse this trend and that, in order to achieve that change, the State party [Australia] needs to implement comprehensive measures that include, inter alia, legislative and policy reforms'.²⁶

²² Shahleena Musk, Children's Commissioner, Office of the Children's Commission Northern Territory, Submission, 10 October 2024 (Submission 194). Available at [Submissions – Parliament of Australia](#), p 2.

²³ See Youth Law Australia, Submission to the National Children's Commissioner's *Youth Justice and Child Wellbeing Reform across Australia* project, 30 June 2023. Available at [Microsoft Word - MH and PG working draft - Draft submissions - National Children's Commissioner Youth Justice Inquiry](#).

²⁴ National Children's Commissioner, *Help way earlier! How Australia can transform child justice to improve safety and wellbeing*, 2024. Available at [Help way earlier! How Australia can transform child justice to improve safety and wellbeing](#), p 27.

²⁵ See for example Aboriginal Legal Service of Western Australia, Submission to the Senate Inquiry into Australia's Youth Justice and Incarceration System, 10 October 2024 (Submission 179). Available at: [Submissions – Parliament of Australia](#), p 47.

²⁶ United Nations Committee Against Torture, 'Concluding observations on the sixth periodic report of Australia', 5 December 2022. Accessible at: [CAT_C_AUS_CO_6-EN.pdf](#), p 10 citing comments of the Australian delegation.

The Commonwealth Government must legislate national, enforceable minimum standards and a monitoring, reporting and accountability framework for the children’s criminal law system

We endorse the structural recommendations of the National Children’s Commissioner to enhance the leadership of the Commonwealth Government in this area, such as the establishment of a National Taskforce and a Ministerial Council for Child Wellbeing, and the appointment of a Cabinet Minister for Children.

However, to truly demonstrate a commitment to the rights, safety and wellbeing of all children in Australia, we consider that the Commonwealth Government needs to legislate national standards to implement all human rights obligations relating to children’s involvement with the criminal law system.²⁷ These standards should apply to all aspects of the children’s criminal law system, and not just detention facilities. They should be enforceable, and the Commonwealth Government should develop a monitoring and accountability framework to ensure that they are being met. We endorse the recommendation by SNAICC to this Inquiry for ‘a national Aboriginal and Torres Strait Islander-led independent monitoring and oversight mechanism to monitor implementation of enforceable national child justice standards’.²⁸

There are a variety of mechanisms by which the Commonwealth Government can try to enforce these standards, including legal, funding or other monetary processes. A range of levers should be used to ensure compliance with international minimum standards. As the Victorian Aboriginal Legal Service has submitted, ‘Legislation is one mechanism that should be used by the Federal Government, but so is its budget’.²⁹ We also recommend that the standards be subject to periodic review, for example every 5 years, to ensure continual improvement.

We recommend that the Inquiry provide clear direction to the Commonwealth Government:

- that it can legislate to implement international child rights obligations under the Australian Constitution, and that under international law, it must do so
- on what the minimum standards should be, noting that they should encompass the full range of international child rights set out in treaties Australia has ratified, and which are relevant to children’s involvement in the criminal law system
- on what mechanisms the Commonwealth Government can and should use to ensure compliance with these standards by all state and territory governments
- on a plan for designing, consulting on and legislating minimum standards, and timeframes associated with each step, noting the urgent need for reform in this area and the need to give effect to self-determination of Aboriginal and Torres Strait Islander peoples.

²⁷ We note the reservations of the Victorian Aboriginal Legal Service in their submission to this Inquiry arising from a demonstrated lack of political will, and their emphasis on the need to consider practically, what mechanisms will be effective. See Victorian Aboriginal Legal Service, Submission to the Senate Inquiry into Youth Justice, October 2024 (Submission 196). Available at: [Submissions – Parliament of Australia](#), p 35.

²⁸ SNAICC, Submission to the Senate Inquiry into Australia’s Youth Justice and Incarceration System, October 2024 (Submission 173). Accessible at: [Submissions – Parliament of Australia](#), pp 28-29.

²⁹ Victorian Aboriginal Legal Service, Submission to the Senate Inquiry into Youth Justice, October 2024 (Submission 196). Available at: [Submissions – Parliament of Australia](#), p 34.

We acknowledge that standards will not be sufficient to achieve the degree of change required to protect the rights, safety and wellbeing of children in this area. We also acknowledge concerns that have been raised about whether it is possible to effectively enforce national standards.³⁰ However, we consider this is an essential first step to reform.

Finally, we endorse SNAICC's call for 'accessible, appropriate remedies for rights breaches', and their observation that 'Rights without pathways for redress are not protected.'³¹ This should be considered in the context of:

- the current work of the UN Committee on the Rights of the Child on children's rights to access to justice and effective remedies (General Comment 27)
- calls for the Australian Government to ratify the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, including by the UN Committee on the Rights of the Child.³²

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About us

Youth Law Australia (YLA) is an accredited national community legal service dedicated to helping young people understand their legal rights and find solutions to their legal problems. We work with children and young people under 25 across the country in relation to their legal issues, including issues relating to the rights and experiences of children and young people involved in the criminal legal system, including children who have experienced harm, caused harm or both.

Associate Professor Maria Giannacopoulos is the Director, and Professor Luke McNamara is a member, of the Centre for Criminology Law and Justice at UNSW. CCLJ is a research centre driven by a commitment to more just futures. Our work is rigorous and grounded

³⁰ See for example Victorian Aboriginal Legal Service, Submission to the Senate Inquiry into Youth Justice, October 2024 (Submission 196). Available at: [Submissions – Parliament of Australia](#), part E.

³¹ SNAICC, Submission to the Senate Inquiry into Australia's Youth Justice and Incarceration System, October 2024 (Submission 173). Accessible at: [Submissions – Parliament of Australia](#), p 29.

³² National Children's Commissioner, *Help way earlier! How Australia can transform child justice to improve safety and wellbeing*, 2024. Available at [Help way earlier! How Australia can transform child justice to improve safety and wellbeing](#), p 97; SNAICC, Submission to the Senate Inquiry into Australia's Youth Justice and Incarceration System, October 2024 (Submission 173). Accessible at: [Submissions – Parliament of Australia](#), p 29; Aboriginal Legal Service of Western Australia, Submission to the Senate Inquiry into Australia's Youth Justice and Incarceration System, 10 October 2024 (Submission 179). Available at: [Submissions – Parliament of Australia](#), pp 37-38.

criminological and critical legal research that is community connected and social justice oriented. We address entrenched structural justice issues with our sustained focus on decolonisation, decriminalisation, defunding, harm reduction and countering gendered and sexual violence.

Dr Noam Peleg is based at the Faculty of Law and Justice at the University of New South Wales and is a leading scholar of international children's rights law and its intersection with human rights law, childhood studies, and family law. His book 'The Child's Right to Development' was published by Cambridge University Press in 2019. Together with the Diplomacy Training Programme (DTP) and Youth Law Australia, Noam has established the "Monitoring Children's Rights Capacity Building Programme" and he is a board member of the DTP since 2023.