ANTAR

Submission: Australia's youth justice and incarceration system

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ANTAR is proud to acknowledge and pay our respects to First Nations Peoples as the traditional owners of the lands on which we work across the continent.

About ANTAR

ANTAR is a national advocacy organisation working for Justice, Rights and Respect for Australia's First Nations Peoples. We do this primarily through campaigns, advocacy and public education.

ANTAR campaigns for the principles of the Uluru Statement from the Heart, including the establishment of a Makarrata Commission to oversee national agreement-making and truth-telling processes, as well as for the self-determination of First Nations Peoples. We actively support state and territory-based voice, treaty and truth-telling.

ANTAR engages in national advocacy across various policy and social justice issues affecting First Nations communities, including cultural heritage protection; justice reinvestment, over-incarceration and raising the age of criminal responsibility; child safety, development and wellbeing; anti-racism campaigns, native title and land rights, and closing the life equality gap.

ANTAR is a foundational member of both the Close the Gap Campaign and Change the Record Campaign Steering Committee, and an organisational and executive committee member of Just Reinvest NSW. ANTAR has been working with First Nations communities, organisations and leaders on rights and reconciliation issues since 1997. ANTAR is a non-government, not-for-profit, independently funded and community-based organisation.

> **“Prison does nothing to rehabilitate young people. It only perpetuates cycles of trauma and leads to further youth offending. Prison is no place for a child.”**

June Oscar, former Aboriginal and Torres Strait Islander Social Justice Commissioner[1]

> **“Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are aliened from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future. These dimensions of our crisis tell plainly the structural nature of our problem. This is the torment of our powerlessness.”**

The Uluru Statement from the Heart[2]

Introduction

ANTAR welcomes the opportunity to provide commentary and recommendations on Australia’s youth justice and incarceration system. As a non-partisan advocacy organisation working for justice, rights and respect for First Nations Peoples, ANTAR is deeply concerned with the criminalisation, over-incarceration and mistreatment of First Nations children in Australia.

The over-representation of First Nations Peoples – especially children and those with complex needs – at all stages of the criminal legal system has long been a crisis in Australia. This national crisis is only exacerbated by recent jurisdictional

[1] June Oscar, Governments must urgently address youth justice crisis, Joint statement from June Oscar AO, Anne Hollonds, Lorraine Finlay and Chin Tan, Australian Human Rights Commission, 15 November 2022.
[2] The Uluru Statement from the Heart

regressions into politically motivated, reactive and punitive 'law and order' policymaking. Rather than addressing the root causes of offending, these 'tough on crime' policies exacerbate criminal offending and result in the abuse and denial of the basic human rights and dignity of vulnerable children.[3]

With the recent announcement from the Albanese Government that it will introduce legislation to enforce a minimum age for children to access social media, Prime Minister Albanese announced:

> "Australian young people deserve better. I stand with them and with all Australian parents in protecting our kids. The safety and mental and physical health of our young people is paramount."[4]

It is both hypocritical and illogical that the same children who will soon be too young to open an Instagram account or 'like' a Facebook page, will nonetheless be old enough to be incarcerated and deprived of their inherent rights and basic freedoms. If the safety and mental and physical health of our young people is in fact paramount, children as young as 10 should not be criminalised, ripped away from their loved ones and locked in cells.

Several governments in Australia are currently showing an overt lack of political will to support First Nations children to remain safe and strong with their families and in their communities, instead favouring more onerous bail laws, reliance on prisons and watchhouses, truancy officers and boot camps, and a lower minimum age of criminal responsibility. These misguided 'tough on crime' policy reforms not only fail to meet the complex needs of vulnerable young children, they also reveal an inconvenient truth about Australia: to the settler colonial state, the safety and health of some children – namely, children with greater proximity to whiteness – matters more than others.

Some of our most disadvantaged and vulnerable children face not only the structural disadvantages of the settler colonial project, but are then used as a political scapegoat for governments seeking to blame a lack of 'community safety'

[3] Lorelle Holland, Claudia Lee, Maree Toombs, Andrew Smirnov and Natasha Reid, Resisting the incarceration of Aboriginal and Torres Strait Islander children: A scoping review to determine the cultural responsiveness of diversion programs, *First Nations Health and Wellbeing – The Lowitja Journal* (2024)
[4] Michelle Grattan, Albanese promises to legislate minimum age for kids' access to social media, The Conversation, 9 September 2024.

on their behaviour. Put simply, locking children behind bars is a policy choice, and one that not only flies in the face of good conscience, but also in many instances runs counter to Australia's obligations under international law. If the Australian Government can raise the minimum age for social media use to 16 based on evidence of harm, surely it can do the same for vulnerable children exposed to criminal legal systems.

Rather than devaluing the safety and health of these children, many of whom are First Nations children, governments at all levels – under the leadership of the Australian Government – should be making priority investments into preventative and targeted early intervention support services that address the underlying causes of offending. By locking children up, governments are simply reinforcing any pre-existing challenges that these children are facing. Volumes of documented evidence supports this position, clearly linking youth incarceration with lifelong disadvantage, lasting psychological impacts, increased rates of recidivism and poor outcomes in education and employment. Two children have died by suicide in custody in Western Australia within a year. Recent reports from Victoria suggest that it is a matter of when, not if, a child dies by suicide in Victoria's broken youth justice system, with kids as young as 10 being locked in their prison cells for periods of more than 20 hours per day.[5] Governments in Australia must act now.

ANTAR invites the Australian Government to consider this: any society which professes to care about the safety, health and wellbeing of children cannot at the same time enable the continued torture of these children in detention centres, isolation cells and watchhouses for behaviour which, in many cases, they are not yet developmentally mature enough to have fully understood the impact of.[6] It is nothing short of a collective societal failure that such behaviour – often the product of compounded structural disadvantage and trauma – is criminalised instead of being met with appropriate holistic early intervention, rehabilitation and care. Not only does incarceration fail children, it also fails to build safer communities.[7] Nearly

[5] Sarah Schwartz, 'It is a matter of when, not if, a child dies by suicide in Victoria's broken youth justice system', Crikey, 12 September 2024.
[6] For more on the limited capacity of children aged 10–14 for abstract reasoning and the impact of child brain development on understandings of criminal responsibility, see 'The Minimum Age of Criminal Responsibility', Australian Human Rights Commission (2021) as well as Elly Farmer, 'The age of criminal responsibility: Developmental science and human rights perspectives', *Journal of Children's Services*, 6, 2 (2011): 86-95.
[7] Chris Cunneen, Fiona Allison and James C. Beaufils, 'Locking up young people might make you feel safer but it doesn't work, now or in the long term', The Conversation, 3 September 2024.

three-quarters of children aged 10–13 who are sentenced to community-based supervision return to the youth justice system within 12 months.[8]

Whilst ANTAR is encouraged to see Australia's first nationwide inquiry into youth justice and incarceration, we are disheartened by the continuing lack of government action on the many evidence-based recommendations that have come out of various state and territory inquiries, royal commissions and similar processes, several of which took place decades ago. Perhaps most notably, it has been 33 years since the release of the Royal Commission into Aboriginal Deaths in Custody Final Report, with specific recommendations targeted at breaking the cycle of First Nations young people disproportionately forced into contact with the criminal legal system. A 2021 review found that most of these recommendations remain unimplemented.[9]

The 1997 Bringing Them Home report recommendations, and in particular recommendations 43 and 44, recognised the need for immediate change in the level of control by First Nations communities and organisations in the decisions that affect the future of their children and young people. The report also recognised the urgent need for the development of national minimum standards for the treatment of First Nations children and young people. The recommended national minimum standards and rules relevant to youth justice cover:

- principles relating to the best interests of the child;
- the requirement for consultation with accredited Indigenous organisations thoroughly and in good faith when decisions are being made about an Indigenous young person, including decisions about diversion, bail, and other matters;
- minimising the use of arrest and maximising the use of court attendance notices;
- notification of an accredited Indigenous organisation whenever an Indigenous young person has been arrested or detained;
- protections during the interrogation process;

[8] 'Help way earlier!': How Australia can transform child justice to improve safety and wellbeing', Australian Human Rights Commission (2024): 22.
[9] T. Anthony, K. Jordan, T. Walsh, F. Markham, M. Williams, 30 years on: Royal Commission into Aboriginal Deaths in Custody recommendations remain unimplemented, Centre for Aboriginal Economic Policy Research, Australian National University (2021)

- minimising bail and detention in police cells;
- prioritising the use of Indigenous-run community-based sanctions;
- the consideration of relevant sentencing factors; and
- the minimisation of custodial sentences.[10]

These calls remain as necessary and as urgent as ever.

Just last year the Australian Human Rights Commission completed a project investigating opportunities for reform of youth justice and related systems across Australia.[11] The project culminated in the recently released 'Help Way Earlier!' report, which found that despite numerous inquiries and reviews, including Royal Commissions, Australia continually fails to implement evidence-based reforms to our child justice systems and that a national, coordinated approach to this crisis is needed.[12]

Experts from all over the world have spoken out about Australia's failures when it comes to the overrepresentation of First Nations children in the criminal legal system, with the UN Committee on the Rights of the Child along with thirty-one other UN member states explicitly urging Australia to raise the minimum age of criminal responsibility to 14.[13] Most importantly, First Nations individuals, communities and organisations have repeatedly lobbied, protested, written about and advocated for the solutions to the problems this very inquiry seeks to address. What the many recommendations, inquiry reports and submissions have in common is this: they begin with the need for structural change.

ANTAR urges the Australian Government to reflect on the commitments it has made thus far to enact meaningful structural change that will drive improved outcomes for First Nations Peoples, including on the urgent matter of the crisis-level incarceration and mistreatment of First Nations children. One such commitment was to the full and proper implementation of the Uluru Statement from the Heart, the single greatest consensus of First Nations peoples on a proposal for

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[10] Bringing Them Home Recommendations

[11] Transforming child justice to improve safety and wellbeing, Australian Human Rights Commission, 3 July 2023.

[12] 'Help way earlier!': How Australia can transform child justice to improve safety and wellbeing, Australian Human Rights Commission (2024): 8.

[13] Concluding observations on the combined fifth and sixth periodic reports of Australia, UN Committee on the Rights of the Child, United Nations (2019): 14. See also, Oliver Gordon, 'Australia urged by 31 countries at UN meeting to raise age of criminal responsibility', ABC News, 21 January 2021.

substantive change in Australia's history. Similarly, the National Agreement on Closing the Gap – in particular Priority Reform Three – necessitates the systemic and structural transformation of mainstream government organisations in order to respond to the needs of Aboriginal and Torres Strait Islander people.[14] The Productivity Commission's recent review of the National Agreement made it clear that the required structural transformation is not being prioritised and has in fact barely begun.[15]

By now, the Australian Government surely understands its obligations towards all vulnerable children, and in particular First Nations children who are disproportionately suffering at the hands of so-called 'justice' systems. The Government should also be well aware of the solutions that will work to deliver justice for these children, as they have been articulated by First Nations communities ad nauseam for many years. The knowledge, evidence and answers are there; it is now beyond time for governments to take action.

Summary of Recommendations

1. Urgently implement recommendations from the Royal Commission into Aboriginal Deaths in Custody (in particular Recommendations 234–245 on breaking the cycle for First Nations youth) and the Bringing Them Home Report, including by providing resources to ensure that all state and territory governments fully implement the recommendations in their jurisdictions;
2. Carefully consider and implement the 24 evidence-based recommendations from the Australian Human Rights Commission's 2024 Help Way Earlier! Report, with particular attention given to the priorities that will enable national reform. In doing so, ANTAR recommends that the Australian Government ensure that adequate First Nations leadership is present and that the principle of free, prior and informed consent is strictly adhered to in implementation of Recommendations 1 (establishing a National Taskforce) and 4 (codification of CRC through incorporation of a National Children's Act);
3. Raise the minimum age of criminal responsibility (MACR) for Commonwealth offences to 14 years, with no exceptions or carve-outs. ANTAR also

[14] National Agreement on Closing the Gap (July 2020): 11.
[15] Review of the National Agreement on Closing the Gap: Study Report Volume 1, Productivity Commission (2024): 5.

recommends that the Australian Government undertake urgent action to encourage all state and territory governments to raise the MACR to at least 14 for all other offences, in line with commitments under the UN Convention on the Rights of the Child (UNCRC);

4. Raise the minimum age of detention for Commonwealth offences to 16 years, including remand;
5. Legislate in order to override state and territory-based laws that do not conform with Australia's international obligations under the Convention on the Rights of the Child under s 51(xxix) of the Australian Constitution, in particular those pertaining to the minimum age of criminal responsibility, those that treat a child up to and including age 17 as an adult for the purpose of criminal prosecution, and those that that contradict the principle that the arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time;
6. Urgently establish enforceable national minimum standards for youth justice consistent with Australia's international obligations, as called for in the 1997 Bringing Them Home Report;
7. Incorporate the UNCRC into Australian law through a National Children's Act;
8. Withdraw the reservation to Article 37(c) of the UNCRC as a matter of urgency;
9. Implement the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) into Australian law, policy and practice, guided by the development of a National Action Plan in partnership with First Nations Peoples;
10. Work closely with all states and territories to support their implementation of The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) and to facilitate the urgent resumption of the UN Subcommittee on the Prevention of Torture (SPT) visit to Australia;
11. Work with state and territory governments to ensure that First Nations community-based initiatives and programs based on the principles of justice reinvestment are adopted across all jurisdictions in partnership with First Nations communities and their representative bodies. This includes ensuring that states and territories have adequate funding, scaling and resourcing for place-based community initiatives and programs which centre the needs of children;

12. Ensure that every First Nations child has access to trauma-informed, culturally responsive, 'On Country' diversionary programs and prioritise diversion as a response to all children at risk of involvement with the criminal legal system. As part of this, clear training and guidance should be provided to all police officers across the jurisdictions on how to issue cautions and refer First Nations children to appropriate diversionary services;
13. Ensure that children are fully assessed for cognitive impairment, intellectual disability, trauma, FASD and other complex needs at their first encounter with police and before formal entry into the criminal legal system in order for specific and appropriate interventions and care plans to be established;
14. Immediately abolish the practice of solitary confinement and the use of spit hoods for children;
15. Prioritise and be led by the principle of First Nations self-determination, in order to remove the barriers for Aboriginal and Torres Strait Islander communities to enact systems of kinship and community care and have the power to make decisions regarding their children. Furthermore, respect and incorporate the fundamental principle of free, prior and informed consent (FPIC) in all processes, consultation and decision-making with First Nations Peoples on matters of child justice.

Context

The violent settler colonial policies that involved the removal of First Nations children from their families, communities and kin, and that culminated in the Stolen Generations, continues today by way of child protection and criminal justice intervention. The disproportionate criminalisation and removal of First Nations children – including through the use of police custody and incarceration in detention centres and watchhouses – is a key neo-colonial and transcarceral process that disrupts First Nations communities and maintains extensive state control.[16]

[16] Bringing them Home, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (April 1997): 427. See also, Chris Cunneen and Amanda Porter (2017) 'Indigenous Peoples and Criminal Justice in Australia', in Deckert, A. and Sarre, R. (eds) *The Palgrave Handbook of Australian and New Zealand Criminology*, Crime and Justice, Palgrave Macmillan (2017): 2.

Criminal legal institutions tend to trap First Nations people in ongoing cycles of re-imprisonment.[17] This is particularly true - and particularly damaging - for First Nations children, for whom contact with the criminal legal system in the early chapters of their lives often further entrenches them in a cycle of poverty, instability and incarceration.[18]

First Nations children are 4.5 times more likely to have contact with the criminal legal system, in comparison to non-Indigenous children.[19] Since September 2020, the number of imprisoned First Nations children aged 10 and over has been steadily increasing.[20] On an average night in the June quarter 2023, 63% of children aged 10–17 in detention were First Nations, despite making up only 5.7% of the general population.[21] As of June 2023, First Nations children aged 10–17 were 29 times as likely to be imprisoned than non-Indigenous young people.[22] Importantly, many of these children are being detained on remand, a significant number of which ultimately have their charges withdrawn or are found to be not guilty.

Concerningly, evidence also suggests that female First Nations children are being increasingly targeted and detained. On an average night in the June quarter 2023, the proportion of First Nations children aged 10–13 in detention who were female was almost double (13%) the proportion of non-Indigenous girls the same age (6.9%).[23]

First Nations children with neurocognitive impairment

It is of grave concern to ANTAR that First Nations children with neurocognitive impairments, disabilities and other complex needs are particularly overrepresented in criminal legal systems and in correctional facilities. Rather than supporting these children – the most vulnerable within our community – governments are

[17] Chris Cunneen, 'Surveillance, Stigma, Removal: Indigenous Child Welfare and Juvenile Justice in the Age of Neoliberalism', *Australian Indigenous Law Review*, vol. 19, no. 1, (2015): 42
[18] Donald, B. B. 'Effectively addressing collateral consequences of criminal convictions on individuals and communities' *Criminal Justice*, vol. 30, no. 4 (2016): 33.
[19] Allard T et al. Police diversion of young offenders and Indigenous over-representation, *Trends & issues in crime and criminal justice* no. 390. Canberra: Australian Institute of Criminology (2010): 4.
[20] Youth detention population in Australia 2023, Australian Institute of Health and Welfare, 13 December 2023.
[21] ibid
[22] ibid
[23] ibid

criminalising, imprisoning and further traumatising them. This is not only a grievous breach of the human rights of these children, but it is an immense moral failure on the part of governments in Australia.

In a groundbreaking study published in the British Medical Journal on children detained in Western Australia's only youth detention facility, Banksia Hill, researchers found that amongst sentenced children, almost every child had at least one form of severe neurodevelopmental impairment, while 36% were found to have Fetal Alcohol Spectrum Disorder (FASD).[24] This is the highest known prevalence of FASD in a custodial setting worldwide and amongst the highest reported rate of neuro-disability amongst sentenced children in the world.[25] The majority of the participants in the study (74%) were First Nations children.[26]

In Queensland, disturbing footage was recently released of a young girl with severe intellectual disabilities – who is assessed to have the mental capacity of a 5-year old – subjected to extreme abuse and solitary confinement in a cold isolation cell with no mattress, toilet or windows. She was forcibly taken by three police officers into the isolation cell after throwing toilet paper at a CCTV camera.[27]

After conducting an investigation in Queensland's watchhouses including interviews with over 150 children, National Children's Commissioner Anne Hollonds reported that prisons detaining children – and particularly disabled children – are where "the most egregious breaches of human rights are occurring in this country".[28] Despite not being sentenced or having been found guilty of any crime, some of these children were kept for up to six weeks in cells resembling cages, and most had disabilities and complex needs. The Commissioner called these most vulnerable children "victims of federation failure".[29]

[24] 'Nine out of ten young people in detention found to have severe neuro-disability', The Kids Research Institute Australia, 2018.
[25] ibid
[26] Hayley Passmore, Carol Bower, Raewyn Mutch, Almost every young person in WA detention has a severe brain impairment, The Conversation, 14 February 2018.
[27] Inside the isolation cells where Australian kids are imprisoned | In the Box, SBS The Feed [video], YouTube, 17 July 2024.
[28] Melissa Davey and Ben Smee, 'Disabled children kept 'in cages' in police watch houses, Australia's children's commissioner says', The Guardian, 23 July 2024.
[29] Melissa Davey and Ben Smee, 'Disabled children kept 'in cages' in police watch houses, Australia's children's commissioner says', The Guardian, 23 July 2024.

These examples of grave mistreatment and abuse run contrary to Australia's obligations under The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), which Australia ratified in 2017. In signing and ratifying OPCAT, the Australian Government agreed to establish an independent National Preventive Mechanism (NPM) to conduct inspections of all places of detention and closed environments, as well as to allow all places of detention to be inspected and monitored by certain independent international and domestic bodies, including the UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT). That the SPT suspended its visit to Australia after being refused entry to detention facilities in New South Wales and Queensland is a stain on our human rights record, and a clear breach of Australia's obligations under OPCAT.

ANTAR recommends that the Australian Government work closely with all states and territory governments to ensure implementation of OPCAT and to facilitate the urgent resumption of the SPT visits to Australia.

'Crossover' kids and contemporary child removal

ANTAR is alarmed by the intersection between First Nations children in youth 'justice' systems and child protection systems, including out-of-home-care (OOHC). Across Australia, First Nations children are disproportionately and often inappropriately removed from their families and communities. First Nations children are more than 10 times more likely to be placed in OOHC. Nationally, the OOHC rate for First Nations children is 57.2 per 1,000, an increase from the baseline year of 2019.[30] This means that Target 12 of the National Closing the Gap Agreement – that is, by 2031, to reduce the rate of overrepresentation of First Nations children in OOHC by 45% – is in fact worsening.

South Australia's Commissioner for Aboriginal Children and Young People, April Lawrie, has called the SA child protection system "institutionally racist", with half of all South Australian First Nations children reported at least once to child protection authorities, and one-in-10 being placed in out-of-home care.[31] In Victoria, First

[30] 'Socio-economic outcome area 12, Aboriginal and Torres Strait Islander children are not overrepresented in the child protection system', Closing the Gap Information Repository Dashboard, Productivity Commission, nd.
[31] Stephanie Richards, 'Aboriginal children 'unnecessarily' removed from families, communities in SA, report finds', ABC News, 5 June 2024.

Nations children are removed at almost double the national rate – 102.9 kids per 1,000 are placed into OOHC, 22.5 times that of non-Indigenous children – which Aboriginal family violence and legal service Djirra has identified as "another stolen generation".[32]

The likelihood of a child being under a criminal law supervision order is at least 12 times greater for children with a background of adverse childhood experiences and exposure to a child protection system.[33] For many of these kids, initial criminal justice contact occurs in the context of conflict with caregivers, ongoing maltreatment, and household adversity, or emotional and behavioural regulation challenges.[34]

More than half (53%) of children under youth justice supervision had an interaction with a child protection system in the 5-year period from 1 July 2016 to 30 June 2021 and almost one-third (30%) were the subject of a substantiated 'risk of significant harm' notification for abuse or neglect.[35] The number is even higher for First Nations children, with almost two-thirds (64%) of First Nations children who were under some type of youth justice supervision during 2020–21 also in contact with a child protection system in the 5 years prior.[36]

Children suffering from stress, trauma and/or other disadvantages (including neurodisability, exposure to family violence, maltreatment and/or abuse) can at times exhibit challenging behaviours as a result. For children placed in OOHC, these behaviours are often criminalised, with residential facility staff or foster carers more likely to prematurely engage the police to manage the child's behaviour, particularly when incidents are frequent (though not necessarily serious) and the child does not respond to other sanctions.[37] Police are often called as first responders to manage problematic or complex behaviour of First Nations

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[32] Dechlan Brennan, "Not protecting our kids": Victoria's child removal rate is creating another Stolen Generation, Djirra says, National Indigenous Times, 1 August 2024.

[33] Susan Baidawi, Crossover Children: Examining Initial Criminal Justice System Contact Among Child Protection-Involved Youth, *Australian Social Work*, 73(3), (2019): 280–295

[34] ibid

[35] Young people under youth justice supervision and their interaction with the child protection system 2020–21, Australian Institute of Health and Welfare, 2 December 2022.

[36] Child Protection, Aboriginal and Torres Strait Islander Health Performance Framework, Australian Institute of Health and Welfare, nd.

[37] Shaw, J, Residential care and criminalisation: The impact of system abuse, *Safer Communities*, 16(3) (2017): 112–121 as quoted in CREATE Foundation Submission: Youth Justice and Child Wellbeing Reform across Australia (2023): 6.

children in OOHC, but are less likely to give First Nations children a caution or refer them to a diversionary program, meaning that these children face increased risk of involvement with criminal legal systems as a result of discriminatory police practices.[38]

It has been well established that the root causes of First Nations children 'crossing over' from child protection systems to criminal legal systems are overwhelmingly structural in nature. Widespread structural deficiencies and the continuing violence of the settler colonial project further entrench the already embedded social, economic and cultural disadvantages experienced by First Nations Peoples. This includes the intergenerational trauma inflicted on First Nations Peoples by successive Australian Governments, as well as systemic bias, racial discrimination, over-surveillance and lack of cultural safety within systems of policing, child protection and criminal justice.[39]

Not only do First Nations children removed from their families tend to disproportionately experience lifelong interactions with child protection and justice systems, they also face entrenched disadvantage, institutionalisation and disconnection from their culture, community and Country. These barriers put them at further risk of lowered social and emotional wellbeing and adverse health outcomes, including mental health challenges and suicide. The current situation facing too many First Nations families is not only immensely harmful but is therapeutically un-sound, unsupported by evidence, and compounds rather than resolves cycles of intergenerational trauma and disadvantage for Aboriginal and Torres Strait Islander peoples.[40]

ANTAR welcomes and celebrates the recent commitment from the nation's major child and family care organisations, working under the Allies for Children coalition, to let Aboriginal community-controlled organisations (ACCOs) take the lead with First Nations children in out-of-home care, allowing for community-led solutions to

[38] P Johnstone, Cross-over kids: the drift of children from the child protection system into the criminal justice system, Aboriginal Legal Service Symposium on Aboriginal Children, Culture and the Law — Changing Practice [conference paper], 5 August 2016; see also, Royal Commission into Aboriginal Deaths in Custody, National report, 1991, Vol 1 and Dr Judith Cashmore, 'The Link between Child Maltreatment and Adolescent Offending: Systems Neglect of Adolescents, *Family Matters,* Vol. 89, pp. 31-41 (2011).
[39] Catherine Chamberlain et al, Supporting Aboriginal and Torres Strait Islander Families to Stay Together from the Start (SAFeST Start): Urgent call to action to address crisis in infant removals, *Australian Journal of Social Issues* Volume 57, Issue 2 (2022): 233-471.
[40] Chamberlain et al, 'Supporting Aboriginal and Torres Strait Islander Families', 260.

be implemented.[41] Similarly, we are encouraged by the Victorian Government's legislation empowering First Nations-controlled organisations to investigate child protection cases and connect families with support before a court order is made.[42] These are significant evidence-based decisions that are based on respect for the principle of First Nations self-determination.

Until and unless the state-sanctioned removal of First Nations children into the child protection system and OOHC is urgently addressed and halted, we will not see significant progress in the disproportionate incarceration of First Nations children. ANTAR urges the Australian Government to follow the bold leadership of the Allies for Children coalition and work with all state and territory governments to effect the transfer of authority for the administration of child protective services to First Nations community controlled organisations. This will require the federal government to work in genuine partnership with the community controlled sector, and to adequately fund and resource Aboriginal and Torres Strait Islander community-controlled organisations (ATSICCOs) at the pace they need.

For First Nations children currently in OOHC exhibiting challenging behaviour, holistic, trauma-informed, and culturally safe care must be provided by appropriately trained staff rather than calling police as first responders. Furthermore, ANTAR insists that in cases where First Nations parents and families are identified as needing more intensive support, all alternatives to removing the child must be pursued and the five key elements of the Aboriginal and Torres Strait Islander Child Placement Principle must be centred and adhered to.

International human rights obligations

All children in Australia, including children who commit criminal offences, are entitled to have their human rights protected. These rights are set out in a number of international human rights instruments, in particular the UN Convention on the Rights of the Child (CRC), the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), and the International Covenant on Civil and Political Rights.

[41] Amy Remeikis, 'Out-of-home care for Indigenous children to be all Aboriginal-controlled', The Guardian, 25 September 2024.
[42] Benita Kolovos, Victorian child protection cases to consider past Aboriginal mistreatment under landmark bill, The Guardian, 21 February 2023.

And while criminal law in Australia is mainly a matter for the states and territories, the Commonwealth Government is a signatory to these international human rights treaties, meaning it has ultimate responsibility for fulfilling the human rights obligations contained in these instruments. Deferring this responsibility to the state and territory governments – some of which have overridden their own human rights acts in order to allow children to be detained in adult watchhouses[43] – is dangerous and unacceptable.

The High Court of Australia has found that the Australian Government has the power to enact legislation to specifically implement the terms of an international treaty to which Australia is a party.[44] ANTAR notes that this override of state and territory law can be carried out under the external affairs power in s 51(xxix) of the Australian Constitution. As such, ANTAR calls on the Australian Government to override state and territory laws that are incompatible with its international obligations under the UN Convention on the Rights of the Child. In particular, attention must be paid to state and territory legislation that is in contravention of the Convention's principle that arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time.

In its 2015 report on keeping First Nations children out of detention in Australia, Amnesty International noted that there is legal precedent for this, with the Commonwealth Government passing the *Human Rights (Sexual Conduct) Act 1994 (Cth)* to override certain provisions of the Tasmanian Criminal Code which the UN Human Rights Committee had found to be contrary to the International Covenant on Civil and Political Rights.[45]

Further, ANTAR calls on the Australian Government to fully incorporate the CRC into Australian law through a National Children's Act.

[43] Andrew Messenger and Eden Gillespie, ''Absolute dog act': Queensland Labor criticised for shock move to override state's Human Rights Act', The Guardian, 23 August 2023.
[44] For more, see Chapter 5: Interpretation of the external affairs power and reform proposals in Trick or Treaty? Commonwealth Power to Make and Implement Treaties, Parliament of Australia, November 1995.
[45] A brighter tomorrow: keeping Indigenous kids in the community and out of detention in Australia, Amnesty International, May 2015.

Reservation to UNCRC 37(c)

ANTAR notes that the Australian Government continues to have a reservation to Article 37(c) of the CRC which requires children to be held separately from adults while in detention, claiming that Australia's geography and demography make it difficult to always detain children in juvenile facilities and simultaneously allow children to maintain contact with their families. However, the UN Committee on the Rights of the Child has pointed out that the Australian Government's concerns are taken into account by Article 37(c), which states that incarceration with adults is prohibited unless it is considered in the child's best interest not to do so and also that a child shall have the right to maintain contact with his or her family.

Currently, children as young as 10 years old are being held in adult watchhouses in Queensland due to staffing issues in youth facilities, with some children being denied bail due to family circumstances or because of a lack of safe and stable accommodation.[46] In NSW and Victoria, children as young as 16 can be placed in an adult prison in certain circumstances. Likewise, the Commissioner for Children and Young People in Tasmania notes that children as young as 10 who have been arrested by police are routinely held in 'reception' prisons – in other words, adult detention facilities – while awaiting interview, bail, court proceedings or transfer.[47]

In Western Australia, the child justice system is not even run separately from adult prisons, with the corrective services minister and commissioner responsible for both adults and children.[48] In Unit 18, a stand-alone unit for children within a WA maximum security adult prison, Casuarina, there have been more than 600 self-harm attempts since its opening in July 2022.[49] Cleveland Dodd, a 16 year old Yamatji boy, died in Unit 18 in October 2023. A second child, a 17 year old boy, died inside Banksia Hill Youth Detention Centre on August 29 this year, marking the second child suicide in custody in WA in a twelve-month period.[50]

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[46] Ben Smee, 'Queensland children in adult watch houses denied bail due to family circumstances', The Guardian, 12 December 2023.
[47] Adult Prison is no place for children, Commissioner for Children and Young People Tasmania, 8 February 2024.
[48] Keane Bourke, Why the experts say WA should fall into line with Australia's other states when it comes to youth crime, ABC News, 10 August 2024.
[49] Giovanni Torre, 'Campaign for youth justice reform in WA continues', NITV, 23 September 2024.
[50] Rhiannon Shine and Andrea Mayes, Banksia Hill teenager becomes the second child to die by suicide in WA's troubled youth detention system, ABC News, 30 August 2024.

Clearly, Australia's refusal to separate children from adult detention facilities is a pervasive problem, and is indicative of much more than a logistical challenge. If Australia's reservation to Article 37(c) of the CRC was truly related to its concern that children would not be able to maintain contact with their families, a holistic, restorative, trauma-based and rehabilitative community-based approach to youth justice would surely resolve the issue, ensuring that children can receive the care and rehabilitation they need, whilst maintaining strong connections to their families, communities and kin. Instead, state and territory governments are doubling down on their 'tough on crime' approaches, with the new NT Government promising to lower the minimum age of criminal responsibility to 10, the Queensland LNP recently releasing its 'adult crime, adult time' policy,[51] the Victorian Labor Government backflipping on its commitment to raise the minimum age of criminal responsibility to 14 by 2027, and the Minns government in NSW tightening bail laws alongside the introduction of new 'post and boast' offences that will disproportionately impact First Nations children.[52]

ANTAR urges the Federal Government to demonstrate its leadership to state and territory governments, and to show its commitment to leading a national approach to youth justice reform, by immediately withdrawing its reservation to Article 37(c) of the CRC. Whilst ANTAR strongly opposes the imprisonment of children, we insist that in cases where imprisonment is considered to be unavoidable, all children must be detained in separate facilities from adults, and all provisions of CRC and OPCAT must be strictly adhered to at all times, without exception.

UNDRIP

As a signatory to UNDRIP, Australia has a responsibility under international law to enact effective and special measures to protect the rights of First Nations peoples, including First Nations children.

The detention of First Nations children violates several key provisions of UNDRIP, including Articles 7, 8, 9, and 34, which affirm the rights of Indigenous peoples to not be subject to forcible removal of children, to belong to their own communities, and to develop and maintain their own institutions and juridical systems.

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[51] https://www.abc.net.au/news/2024-07-08/queensland-youth-crime-laws-lnp-legal-experts/104071266
[52] Rudi Maxwell, ''We have been betrayed': Advocates devastated as Victoria backflips on youth justice reforms', SBS News, 13 August 2024.

Further, Article 21 of UNDRIP outlines that:

> "States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities."[53]

UNDRIP also recognises "in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child".[54] It is ANTAR's view that the treatment, discipline, rehabilitation and care of First Nations children who have had contact with criminal legal systems, or are at risk of doing so, are fundamental aspects of the 'upbringing, training and education of children', and are therefore within the purview of First Nations communities and families to determine.

ANTAR urges the Federal Government to comprehensively implement both UNDRIP and the CRC into national legislation and to ensure that these international human rights instruments form the basis of significant youth justice system reform based on the rights of the child.

Raising the Age

"If the Federal Government was as committed to this law reform as they claim to be, then they could have taken leadership and reformed Commonwealth laws a long time ago, and set a precedent for states and territories to do the same."

Maggie Munn, former National Director of Change the Record[55]

[53] United Nations Declaration on the Rights of Indigenous Peoples, United Nations.
[54] ibid
[55] Aleisha Orr, Governments accused of 'sitting on their hands' as 10-year-olds are treated as criminals (December 2023).

According to the United Nations Committee on the Rights of the Child (UNCRC), the minimum age of criminal responsibility (MACR) should be at least 14 years, with no exceptions for any offences.[56] The most common MACR globally is 14.

Children under the age of 14 years do not have the developmental capacity to form criminal intent or comprehend consequences of their actions, including the severity level of their behaviours.[57] And yet, despite decades of research into child and adolescent development that has informed evidence-based medical and legal advice, Australia continues to have one of the lowest ages of criminal responsibility in the world, sitting at just 10 years old.

While MACR reform will impact all children interacting with criminal legal systems, raising the MACR will have a particularly significant impact on First Nations children, given their gross overrepresentation in criminal legal systems.

The Australian Government possesses a unique opportunity to demonstrate their commitment to First Nations communities and to lead the state and territory governments in evidence-based reform by raising the MACR for federal offences to at least 14 years of age with no exceptions or carve-outs. This decision, supported by evidence from all of Australia's peak medical and legal bodies, would be a bold step in the right direction and signal to state and territory governments that a united and coordinated national approach to the MACR – and to protecting and promoting the rights of children in Australia more broadly – is a priority matter for the Federal Government.

Early contact with criminal legal systems is correlated with ongoing criminal legal system contact as an adult, with evidence demonstrating that the younger the child at the time of their first sentence, the more likely they are to reoffend and to reoffend violently.[58] This means that raising the MACR will not only reduce the rate of First Nations children in detention (as committed to in Outcome 11 of the National Agreement on Closing the Gap), it will also contribute to reducing the over incarceration of Aboriginal and Torres Strait Islander adults (Target 10 of the National Agreement).

[56] General Comment No. 24 (201x), replacing General Comment No. 10 (2007) Children's rights in juvenile justice, OHCHR (2019): 9.
[57] Australian Medical Association, 2020
[58] Age of Criminal Responsibility Working Group Report, Standing Council of Attorneys-General (September 2023): 23.

ANTAR urges the Federal Government to raise the MACR for federal offences to 14 years, without exception, and to undertake urgent action to encourage all state and territory governments to raise the MACR to at least 14, in line with commitments under the UNCRC. The Australian Government must show national leadership in coordinating legislation across the states and territories to ensure that a consistent, rights-based and rehabilitative approach is adopted by governments at all levels.

Place-based community-led approaches

Research consistently shows that place-based and First Nations community-led approaches to youth justice consistently lead to improved outcomes for First Nations children, families and communities.[59] The success of these approaches is due in large part to their being grounded in First Nations self-determination and decision-making and prioritising the voices of First Nations children and young people.[60] These 'whole-of-community' approaches work because they are culturally responsive, flexible, holistic, informed by local needs and priorities, strengths-based and centred on First Nations self-determination and self-governance.

Not only is self-determination an inherent right of First Nations individuals and communities – one which is recognised and enshrined in UNDRIP – but there is consistent Australian and international evidence that self-determination and self-governance are critical to First Nations communities achieving their economic, social and cultural goals, including with respect to improved child protection and child justice outcomes.[61] Accordingly, ANTAR urges the Federal Government to be led by the principle of First Nations self-determination by committing to increased sustainable funding and resourcing of ATSICCOs to play a central role within the youth justice sector. Government action must also include the transfer of decision-making power to First Nations communities and organisations in order to ensure that they have authority over decisions about First Nations children,

[59] Kim Edmunds, Laura Wall, Scott Brown, Andrew Searles, Anthony P. Shakeshaft, and Christopher M. Doran, 'Exploring Community-Based Options for Reducing Youth Crime', *International Journal of Environmental Research and Public Health* 18, no. 10 (2021): 5097. For a comprehensive list of successful First Nations community-led approaches, see also: Sotiri, M; Schetzer, L; Kerr, A, 'Children, Youth Justice and Alternatives to Incarceration in Australia', Justice Reform Initiative (2024)
[60] Professor Chris Cunneen, 'Self-Determination and the Aboriginal Youth Justice Strategy', Jumbunna Institute for Indigenous Education and Research, University of Technology Sydney (2019): 6.
[61] Larissa Behrendt, Amanda Porter and Alison Vivian, Indigenous Self-Determination within the Justice Context, UTS: Jumbunna Institute, (2018): 20.

including decisions regarding diversion, bail, sentencing, child and family wellbeing, and other matters.

On Country diversionary programs

Involvement with criminal legal systems for First Nations children begins from their first point of contact with police, who are often engaged in racially discriminatory practices, such as racial profiling.[62] This means that for First Nations children, preventing initial contact with police is paramount. As such, ANTAR urges the Australian Government to ensure that wherever possible, culturally safe community-based non-police first responders are widely available and adequately resourced, in order to respond to the diverse needs of vulnerable First Nations children.

The Australian Government has an important coordinating and leadership role to play in ensuring that funding, resources and collaboration across service systems and sectors – a whole of system approach – is established and maintained (for example, by establishing a national framework or forum to bring decision-makers from health, education, housing, justice, police and other government ministries together with ATSICCOs to discuss, collaborate and share expertise with the goal of diverting all First Nations children away from criminal legal systems).[63]

Where contact with police occurs, a genuine spectrum of rehabilitative and needs-based options must be available for First Nations children based on the principle of diverting them away from criminal legal systems. Research shows that alternative diversion programs generally have a greater impact on reducing recidivism than formal engagement with the courts, and that diversionary programs are more likely to address and respond to the root causes of offending behaviours than participation in a criminal legal system.[64] Currently, First Nations children do not receive the benefit of diversion at the same rate as non-Indigenous youth, and are four times less likely to receive a police caution than non-Indigenous children.[65]

[62] Dechlan Brennan, 'Victorian Police accused of racial profiling as data shows Aboriginal people 11 times more likely to be searched', National Indigenous Times, 9 October 2024.
[63] For more info, see Section 4: Key evidence-based actions for reform of child justice and related systems from Help Way Earlier! Report, Australian Human Rights Commission (2024): 57.
[64] RCPDCNT 2017a: vol 2b, 413
[65] Chris Cunneen, Rob White and Kelly Richards, *Juvenile Justice: Youth and Crime in Australia*, Oxford University Press, 1st edition, Melbourne (2002): 172.

Where diversionary programs are available for First Nations children, research shows that 'On Country' models are most successful, reflecting highly localised, holistic and whole-of-community approaches that are responsive to local needs and take place in cultural and community settings.[66] Target 120 – an ATSICCO-led diversionary program in Broome WA – is one such success story, with more than 70% of participants having had no further contact with police since joining Target 120.[67]

ANTAR calls on the Federal Government to fund state and territory governments for the scaling and expansion of 'On Country' diversionary programs. The Federal Government should be working with state and territory governments to ensure that therapeutic diversionary programs are available and accessible for every First Nations child involved, or at risk of being involved, with the criminal legal system.

Justice reinvestment

As a model, justice reinvestment advocates for reinvesting funds from prisons and the criminal legal system through carefully targeted and holistic community services that seek to address the root causes of criminal legal system involvement.[68] As of 2022/2023, the average cost of jailing a single child is $1,032,027 annually.[69] Not only is imprisonment traumatic and ineffective, it does not make economic sense. By contrast, justice reinvestment is a long-term approach that focuses on the well-being of children and young people in ways that are place-based and responsive, including prevention, early intervention and rehabilitation. It utilises and prioritises genuine community partnerships and engagement, First Nations community-led planning and solutions, and the use of local evidence and data.[70]

[66] Chris Cunneen, Amanda Porter and Larissa Behrendt, 'Discussion Paper: Aboriginal Youth Cautioning', Jumbunna Institute (2018): 57. See also, Lorelle Holland, Claudia Lee, Maree Toombs, Andrew Smirnov and Natasha Reid, Resisting the incarceration of Aboriginal and Torres Strait Islander children: A scoping review to determine the cultural responsiveness of diversion programs, *First Nations Health and Wellbeing – The Lowitja Journal* (2024)
[67] Marlamanu on-country diversionary program to tackle youth offending in Kimberley, NACCHO, 22 November 2022.
[68] Youthlaw, Justice reinvestment
[69] Justice Reform Initiative, Children's Imprisonment in Australia 2023, 2024
[70] Youthlaw, Justice reinvestment

ANTAR commends the Federal Government on the roll out of its National Justice Reinvestment Program, including the commitment of $79 million to support up to 30 community-led Justice Reinvestment initiatives.[71] The many place-based models of justice reinvestment across the country are clear evidence that there are working solutions to reducing crime, creating safer and stronger communities, meeting the needs of children and addressing the gross over-representation of First Nations children in criminal legal systems.

"We developed the Maranguka proposal with a clear focus on creating better coordinated support to vulnerable families and children in Bourke through community-led teams working in partnership with existing service providers, so that together we could look at what's happening in our town and why Aboriginal disadvantage was not improving, and together we could build a new accountability framework which wouldn't let our kids slip through."

Alistair Ferguson, CEO Maranguka[72]

Case study: Bourke (Maranguka), New South Wales

In an Australian first, Maranguka is a collaboration between the Bourke Tribal Council, Just Reinvest NSW and the community of Bourke to address the root causes leading to incarceration in the Bourke area. It is unique, being the first Aboriginal-led place-based model to reallocate resources from the criminal legal system to prevention and early intervention programs. Rather than take a siloed approach, Maranguka works as a multidisciplinary team in partnership with the relevant government and non-government agencies.[73]

Importantly, the first stage of the Maranguka project worked on building trust between community and service providers, allowing First Nations communities to contribute their thoughts and expertise on how to stop the cycle of

[71] Dechlan Brennan, 'Federal government announces six more justice reinvestment initiatives', National Indigenous Times, 30 September 2024.
[72] Bourke (Maranguka), Just Reinvest, nd.
[73] Ibid.

justice-involvement and incarceration. This included identifying community priorities and circuit breakers, and data collection; importantly, the data was handed over to the community members via the Bourke Tribal Council, in line with principles of Indigenous Data Sovereignty, so that they were in partnership when making decisions.

Case study: Glasgow, Scotland

A 'whole system' approach has recently been adopted by Scotland's youth justice system which promotes the welfare of children and young people by taking a 'child-centred' approach and successfully integrating the framework of the United Nations Convention on the Rights of the Child.[74] With an emphasis on prevention and early intervention, including prioritising the needs of children and addressing the social determinants of violence, this public health approach is an effective model that is consistent with principles of justice reinvestment currently practised in the Australian context.

As the progressive site of this public health approach, the Violence Reduction Unit in Glasgow utilises a multi-agency approach based on a 'risk and protective factor paradigm', which focuses on reducing potential risk factors for children (e.g. social exclusion or disconnection from parents) and enhancing protective factors (e.g. access to social support and educational services). Such an approach recognises that most cases of criminal legal system involvement for children are due to social determinants and structural disadvantage, including family and community factors, exposure to violence and trauma.

ANTAR reiterates the importance of governments continuing to adequately fund and expand a justice reinvestment approach consistently across the states and territories, including by ensuring that funding is made available for early-stage community-led processes aimed at determining justice reinvestment readiness.[75] It is also critical that funding decisions and allocation are guided by First Nations perspectives and framed by First Nations definitions of reinvestment, with direct input from First Nations children and young people.[76] The Australian government

[74] Hannah Klose, Re-Thinking Approaches to Youth Justice: A Public Health Model Approach to Respond to Young People's Involvement in Violence in Australia, *Court of Conscience* Issue 14 (2020): 23.
[75] ibid
[76] Fiona Allison, Redefining Reinvestment. An opportunity for Aboriginal communities and government to co-design justice reinvestment in NSW. Final Report. Just Reinvest NSW (2022)

must trust and invest in the capability of First Nations communities to deliver solutions, led by the principle of free, prior and informed consent.

Conclusion

ANTAR thanks the Legal and Constitutional Affairs References Committee for this opportunity to comment on Australia's youth justice and incarceration system. ANTAR is particularly thankful for the opportunity to highlight the disproportionate and negative impact of these systems on First Nations children. As the Victorian Aboriginal Child and Community Agency (VACCA) highlighted in their submission, the Committee has a unique opportunity to lead transformative change that transcends jurisdictional boundaries and creates a more just system for all.[77]

Whether we come to this inquiry as concerned individuals, those with lived experience, advocacy and community-led organisations, or government stakeholders, we have a responsibility to act in the face of injustice, particularly where it concerns children. This responsibility is legal in nature, with several international human rights documents binding all governments in Australia to act in defence and protection of children and their human rights, but it is above all a moral obligation based on the collective responsibility we all share to protect, care for and love the youngest members of our society. Our children are the most vulnerable members of our communities, and they are also our future.

Successive governments in Australia have largely failed to act and implement the reforms that First Nations communities, as well as consecutive inquiries and reports, have called for consistently since the release of the Royal Commission into Aboriginal Deaths in Custody report in 1991. Thirty three years later, significant and transformative structural change remains elusive, and First Nations children are still being actively targeted, criminalised and in many cases tortured by a system that was designed to harm rather than protect them. ANTAR calls on the Australian Government to use its influence and leadership to implement a national approach

[77] Australia's youth justice and incarceration system Submission 5, Victorian Aboriginal Child and Community Agency (VACCA), Parliament of Australia, 2 October 2024.

to youth justice that is culturally responsive, rehabilitative, holistic, rights-based, trauma informed and fundamentally based on care for and wellbeing of the child.

Australia's most vulnerable children are all of our children, and if we cannot love and protect them, we have failed. We can and must do better.

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