First Nations and Child Rights Advocacy Team

October 2024

Youth Justice and incarceration system inquiry

Submission

Commissioner Natalie Lewis
Queensland Family and Child Commission

Queensland Family & Child Commission

Queensland Government

Commissioner Natalie Lewis
Queensland Family & Child Commission
PO Box 15217
Brisbane City East QLD 4002
qfcc.qld.gov.au

For any information about this submission please contact

For any information about this submission please contact
Ms Amy Lamoin Executive Director, First Nations and Child Rights Advocacy

Reference: TF24/811

1. Introduction

I am the Commissioner at the Queensland Family and Child Commission (QFCC). I welcome the opportunity to provide a submission to the Inquiry into Australia's youth justice and incarceration system.

Australian states and territories continue to develop and implement youth justice policy that in recent years, increasingly suggests a wilful indifference to the human rights of children in conflict with the law. They have pursued increasingly punitive responses which are incongruent with the guiding principles of the Conventions on the Rights of the Child and commitments in multiple national frameworks, including the National Agreement on Closing the Gap.

Youth justice systems across Australia perpetually violate children's rights and have resulted in serious harm and deaths. This has been evidenced through decades of research, independent civil society and oversight body reports, Royal Commission findings and Australia's international treaty reporting processes. Jurisdictions vary in relation to how they comply with child rights. All Australian jurisdictions have examples of failing to comply with or respect child rights across various aspects of the youth justice system.

Nationally, punitive and incarceration-focused policies and practices directly undermine Australian governments stated aims to rehabilitate child offenders, reduce re/offending and improve community safety. Strong national leadership is required to address egregious violations of children's rights, end the gross overrepresentation of Aboriginal and Torres Strait Islander children in detention and correct pejorative public sentiment in relation to child offenders.

Children's rights should always be respected and protected in line with our human rights obligations, and this is particularly important in youth justice where young people who come into contact with the youth justice system (noting the over-policing of Aboriginal and Torres Strait Islander children) are a population with a range of intersecting and complex needs whose rights are particularly likely to be breached.

True reform of youth systems and a genuine commitment to meeting Australia's international human rights obligation requires a national approach (see references to the Vienna Declaration section 3.3) There is a need for Commonwealth leadership to re-establish a solid 'floor' and foundation which guarantees human rights protections for all children in conflict in the law in Australia. The monitoring and safeguarding of children's rights in youth detention settings is paramount, but is currently unregulated, under-resourced, and devoid of clear accountability measures.

2. About the Queensland Family and Child Commission

The QFCC is a statutory body of the Queensland Government. Our purpose is to influence change that improves the safety and wellbeing of Queensland's children and their families. We are committed to Aboriginal and Torres Strait Islander children and families and to advancing the rights of all children.

Through our systems oversight work, the QFCC has observed how past policies and practices influence present day drivers of over-representation of Aboriginal and Torres Strait Islander children and families in the youth justice system. Simultaneously, we see continuing under-representation of First Nations peoples in leadership of services and decision-making models.

The QFCC has published many reports about Queensland's youth justice system outlining serious child rights violations. Some examples include:

- Changing the sentence
- Child rights report 2023 -Spotlight: Youth justice in Queensland
- Young people in Queensland watch houses
- Exiting youth detention.

Collectively, these reports point to a harmful and failing system that is not adequately held to account for the massive over-representation of First Nations children, nor the high number of children in detention with a disability or health concerns.

3. Response to Terms of Reference for the inquiry

This submission provides comments across the following sections in the Terms of Reference:

b) the over-incarceration of First Nations children;
c) the degree of compliance and non-compliance by state, territory and federal prisons and detention centres with the human rights of children and young people in detention;
d) the Commonwealth's international obligations in regard to youth justice including the rights of the child, freedom from torture and civil rights; and
e) the benefits and need for enforceable national minimum standards for youth justice consistent with our international obligations.

3.1 ToR B: the over-incarceration of First Nations children

The extent to which over-representation is a product of poverty, intergenerational trauma, limited availability of specialist education and health services and systemic bias, rather than family neglect or criminality, is well known but has yet to be consistently acknowledged, communicated or applied to practice.

There has been an inability or unwillingness to name and address the structural and systemic racism and take direct action to acknowledge and end discrimination experienced by Aboriginal and Torres Strait Islander people in contact with the criminal justice system (police, courts and institutions) that has endured since colonisation.

National spending on detention services is now over $855 million, the highest on record. It costs taxpayers over $2,827 to house one youth offender in detention per day, or $1.03 million per year. The utilisation rate of detention centres in Queensland sits at 98 per cent of designed capacity. Rates in New South Wales, Tasmania, the Northern Territory, and the ACT are now above 50 per cent of designed capacity. This means significant costs will be incurred building new prisons if numbers continue to grow.[1]

The 2024 *Closing the Gap* data tells us there has been no improvement in the proportion of First Nations children in youth justice. Indigenous youth are disproportionately represented in youth justice orders. Despite making up around 6% of the youth population, they account for approximately 50% of all youth in detention and under supervision. Although Indigenous youth are more likely to receive custodial sentences, they are also over-represented in community-based orders. Indigenous youth are less likely to be diverted from the system and more likely to receive formal orders compared to non-Indigenous youth. Indigenous youth are far more likely to be placed on remand than their non-Indigenous counterparts. Indigenous young people are 17 times more likely

1

than non-Indigenous youth to be in detention, whether on remand or sentenced. They represent nearly 50% of all young people in detention despite being a small portion of the youth population[2].

In Queensland, 55% of children in the statutory youth justice system are First Nations, compared to a population of First Nations children aged 10-17 of around 8%.[1] Yet with each round of changes to toughen Queensland's Youth Justice Act, the causes of this overrepresentation are never considered.

On an average day there are 314 children in Queensland's three youth detention centres.[2] 70% of them are First Nations.

About 273 (87%) of these children are unsentenced and they spend an average of 48 days in detention unsentenced. 69% of children in unsentenced detention are Indigenous.

On the morning of 9 October, a further 23 children were being held in police watch houses throughout Queensland.[3] Eleven were First Nations. Four children (2 First Nations) had been in a watch house for longer than a week.

All youth detention centres are housing children beyond their safe capacity. A new 76 bed remand centre and a fourth 80 bed detention centre are under construction. However, the reoffending rates for children leaving youth detention facilities are between 80-90%, raising questions about the appropriateness of state government spending on these facilities.

A better investment would be for the Federal and state governments to provide families living in poverty or with disability or health issues with the support they need from the health, disabilities and social security systems. This would help prevent or mitigate the factors leading to children entering the youth justice system in the first place.

3.2 ToR C: the degree of compliance and non-compliance by state, territory and federal prisons and detention centres with the human rights of children and young people in detention

In October 2022, the UN sub-committee on the Prevention of Torture (SPT) visited Australia to examine progress towards implementing our commitment to the **Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**. Due to multiple issues obstructing their ability to perform their work, notably, refusal of access to detention facilities in New South Wales and forensic facilities in Queensland, the SPT suspended its visit on 23 October 2022 and formally terminated it on 20 February 2023. Its report included the following:

> Throughout its visit, the Subcommittee observed a fundamental lack of understanding, among both federal and state authorities, of the Optional Protocol, the State party's obligations and the mandate and powers of the Subcommittee, including a misunderstanding of the Subcommittee's power to access all information concerning persons deprived of their liberty and all places of deprivation of liberty in an

[2] Fourth Annual Data Compilation Report on the National Closing the Gap Agreement. 2024. View at: **https://www.pc.gov.au/closing-the-gap-data/annual-data-report**

> unrestricted manner, and to conduct private interviews with persons deprived of their liberty and others who may supply relevant information.
>
> The Subcommittee regrets that it experienced a discourteous, and in some cases hostile, reception from a number of government authorities and officials in places of deprivation of liberty, not in keeping with the collaborative and assistance-based nature of its visit.

The failure of this visit demonstrates the lack of understanding of Australia's international treaty commitments and a disregard of the importance of upholding human rights in places where power imbalances are most acute.

Recent reports from Queensland's new Inspector of Detention Services have identified serious concerns with watch house accommodation for children and the separation of children at the Cleveland Youth detention centre, Townsville.[4]

Queensland has a Human Rights Act, introduced by the Labor government in 2020. However, the same government 'overrode' the Act[5] twice during 2023. The first override was to create:

- a breach of bail offence for children
- a mechanism to make a declaration that a child is a serious repeat offender, which impacts the sentencing process
- a requirement for a child to serve a suspended period of detention upon breach of a conditional release order where the order was imposed for a prescribed indictable offence, unless special circumstances exist.[6]

The second override occurred when the government quickly legislated that children can be housed in watch houses (a long-standing practice in Queensland), amidst legal action on behalf of children detained for an extensive period in a watch house. Overrides must expire after five years. These are the only override declarations so far made by the Queensland parliament.

The stated justification for the overrides was that a spike in youth crime constituted an "exceptional crisis situation" in Queensland despite a clear general decline in youth crime statistics. Article 4 of the International Convention on Civil and Political Rights states that:

> in a time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provide that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin.

Not only was the 'exceptional crisis situation' as described by political leaders in Queensland not based on credible data, or in truth, it cannot legitimately be considered an emergency or state of emergency. Under international law a state of emergency must present exceptional circumstances, and the State must declare a public emergency that is based on the 'threat to the life of a nation'. Measures to respond to such an emergency must also be temporary, that is limiting rights for the shortest possible period. Suspending state based human rights legislation and limiting the rights of children is a serious decision that must also pass the test of being reasonable, necessary and proportionate. This action constitutes a deliberate sharing of misinformation for that then led directly to the suspension of human rights protections of an already vulnerable cohort of children.The

two overrides stand as examples of the most senior governance body in Queensland introducing ever more punitive approaches to dealing with a cohort of children that is known to have high levels of poor health and disability, poor schooling and contact with the child protection system. The roughly 50% of children in youth justice with a diagnosed health issue or disability (the true number may be higher) is an ongoing human rights violation that is further compounded by keeping these young people in custody where they may be harmed further.

The United Nations Children's Committee on the Rights of the Child Concluding Observations on the combined 5th and 6th periodic report of Australia called attention to its repeated recommendations to the Australia regarding youth justice and noted the distinct lack of progress.

> The Committee again regrets that its previous recommendations have not been implemented and remains seriously concerned about:
>
> (a) The very low age of criminal responsibility;
> (b) The enduring overrepresentation of Aboriginal and Torres Strait Islander children and their parents and carers in the justice system;
> (c) Reports that children in detention are frequently subjected to verbal abuse and racist remarks, deliberately denied access to water, restrained in ways that are potentially dangerous and excessively subjected to isolation; (d) The high number of children in detention, both on remand and after sentencing;
> (e) Children in detention not being separated from adults;
> (f) The continuing existence of mandatory minimum sentences applicable to children in the Northern Territory and Western Australia;
> (g) The continuing overrepresentation of children with disabilities in the justice system; and
> (h) Children's lack of awareness about their rights and how to report abuses.

With reference to its general comment No. 24 (2019) on children's rights in the child justice system, the Committee urged Australia to bring its child justice system fully into line with the Convention and:

> (a) To raise the minimum age of criminal responsibility to an internationally accepted level and make it conform with the upper age of 14 years, at which doli incapax applies;
> (b) To immediately implement the 2018 recommendations of the Australian Law Reform Commission to reduce the high rate of incarceration among indigenous persons;
> (c) To explicitly prohibit the use of isolation and force, including physical restraints, as a means of coercion or to discipline children under supervision, promptly investigate all cases of abuse and maltreatment of children in detention and adequately sanction the perpetrators;
> (d) To actively promote non-judicial measures, such as diversion, mediation and counselling, for children accused of criminal offences and, wherever possible, the use of non-custodial sentences such as probation or community service;
> (e) In cases where detention is unavoidable, to ensure that children are detained in separate facilities and, for pretrial detention, to ensure that detention is regularly and judicially reviewed;
> (f) To review its legislation to repeal mandatory minimum sentences for children in the Northern Territory and Western Australia;
> (g) To ensure that children with disabilities are not detained indefinitely without conviction and that their detention undergoes regular judicial review; and

(h) To provide children in conflict with the law with information about their rights and how to report abuses.

3.3 ToR D: the Commonwealth's international obligations in regard to youth justice including the rights of the child, freedom from torture and civil rights

Crucially, the Federal government (and by extension the states and territories) is party to key international conventions and declarations. Yet little has been done to bring these instruments into our legal system or decision-making processes.

A child rights-based approach to youth justice is important because:

- it is more effective in reducing crime;
- it provides a long-term solution to offending behaviours;
- it is more cost effective than taking punitive approaches;
- it will build public confidence in the system; and
- Australia should deliver on its international obligations and be accountable to children.

Australia is a party to seven core international human rights treaties:

- the **International Covenant on Civil and Political Rights** (ICCPR)
- the **International Covenant on Economic, Social and Cultural Rights** (ICESCR)
- the **International Convention on the Elimination of All Forms of Racial Discrimination** (CERD)
- the **Convention on the Elimination of All Forms of Discrimination against Women** (CEDAW)
- the **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** (CAT)
- the **Convention on the Rights of the Child** (CRC)
- the **Convention on the Rights of Persons with Disabilities** (CRPD)

Amongst other protocols, the Australian government is party to:

- the **Optional Protocol to the International Covenant on Civil and Political Rights** establishing an individual communication mechanism
- the **Optional Protocol to the Convention on the Rights of Persons with Disabilities** establishing an individual communication mechanism
- the **Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** establishing a system of regular visits by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

Australia is also a party to a number of international declarations, guidelines, principles and rules including:

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

The Australian Government is a party to the Vienna Convention on the Law of Treaties. This treaty establishes that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty" (article 27) and "a treaty is binding upon each party in respect of its **entire territory**" (article 29). Therefore, the Australian Government can and should pass legislation implementing its international human rights obligations, including the CRC, into domestic law.

There are no provisions in the Commonwealth Constitution or any of the State Constitutions or the Territory self-government acts that place youth justice only in the hands of the States or Territories. The Commonwealth can exercise leadership to regulate and reform youth justice systems across Australia.

The Commonwealth has expanded its powers in relation to other matters. Recent examples include the NDIS and a National Disability Strategy. What appears to be lacking is the appetite of Australian governments to evolve their policy activities regarding child rights to meet 21st century expectations of the agency held by children and young people and their right to have their best interests upheld or respond to First Nations communities' aspirations for self-determination and community responses to matters affecting them.

The Federal government convenes a Standing Council of Attorneys-General, at which decisions can be made on joint approaches to matters of national interest. Recent examples are family, domestic and sexual violence, elder abuse, and harmonisation of journalist shield laws. In 2023, a working group of the Standing Council issued a report which provided useful guidance to jurisdictions considering raising the minimum age of criminal responsibility.[7] However, no outcome or future mandate was agreed. Instead, the Standing Council noted that "officials will continue to work together to share lessons and consider cross jurisdictional- matters related to minimum age of criminal responsibility reform".[8] I suggest that the rights and wellbeing of Aboriginal and Torres Strait children should be treated with far greater urgency.

The Federal government's responsibility for primary health care, social security, and a range of Indigenous matters is already clear and uncontested, and so immediate and direct steps can be taken to better support families whose children may be at risk of entering the youth justice system. Another persistent and serious concern that could be addressed through Commonwealth intervention is the lack of care continuity (health and disability supports) based on Medicare and NDIS ineligibility of "in custody services." The Federal government could also agree to allow Medicare and the Pharmaceutical Benefits Scheme to be accessible in youth detention centres to ensure that health care and medicine equivalent to what would be available in the community is available to children in a detention centre. This has been called for via multiple agencies for many years.

3.4 ToR E: the benefits and need for enforceable national minimum standards for youth justice consistent with our international obligations

In principle I support the development of **enforceable** minimum standards for youth justice. Again, any such proposal should be treated with appropriate urgency so that the rights of Australian children do not continue to be neglected. The Federal government can develop, monitor and enforce minimum standards consistent with its international obligations. The QFCC's inaugural Child Rights report (2023) provides an example of how ongoing monitoring based on the CRC, can be achieved. The establishment of an Australian Human Rights Act (without an override provision) would provide a robust platform for national standards.

The Federal government can immediately introduce, as a standard, a minimum age of criminal responsibility of 14 across all jurisdictions. We know that if a young child enters youth justice between the ages of 10-13, they are more likely to land on a trajectory that takes them further into the criminal system. There were fewer than 700

10–13-year-olds in youth justice in 2020-21 across the whole of Australia.[9] This small cohort will not break existing and appropriately resourced human services agencies when they are removed from a criminal system that is ill-equipped to either support the health and disability needs of them and their families or alter their criminal trajectory.

The Federal government can respond directly and proactively to failures in achieving the child – related *Closing the Gap* targets, for example by directing health and disability investment to communities and community-controlled organisations to support children and their families caught up in the youth justice system, improve long term investment in primary care in regional and remote Australia, and Aboriginal and Torres Strait Islander community controlled organisations, and raise social security benefits to at least the poverty line.

4. Youth justice and national reform

Given the failure of Australian states and territories to introduce reform resulting in enduring outcomes that both protect children in the youth justice system and keep communities safer, there is an urgent need for national leadership and reform.

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

- detention centres are culturally safe and strictly a last resort measure
- there is a predominant focus on rehabilitation and restoration and detention centres are staffed by professionals with a strong knowledge of youth development and trauma informed practice methodologies
- Children and young people feel secure and able to express their views
- Children and young people feel that their views are taken seriously
- Workers value the views of young people, and where appropriate, act on their views.

At a minimum this could include:

- Leading a national approach that commits to addressing root causes and a child rights-based approach to youth justice (detention strictly as a last resort measure; diversion at the earliest possible stage; early intervention – the rights support at the right time; rehabilitation and trauma informed care; listening to children at every stage of the youth justice system; children are adequately supported over a reasonable period to transition back to communities)
- National Youth Justice standards (that include input from children with lived experience of the youth justice system)
- Leading a national approach to the minimum age of criminal responsibility (at 14 years and in accordance with children's development)
- A national approach to strengthening justice workforce models (adequate and standardised training, funding and staffing) to comply with human rights obligation.
- Improved independent oversight of detention and increased resourcing to effectively implement the Optional Protocol to the Convention Against Torture.
- Ratification of the United Nations Children's Convention 3rd Optional Protocol (OP3)
- Withdrawing Australia's reservation to Article 37(c) United Nations Convention on the Rights of the Child

5.Conclusion

Recognition of the fundamental human rights of children in the justice system, is only limited by political will. Children's human rights need to be uniformly and comprehensively protected across all Australian jurisdictions with strong independent oversight arrangements in place. There are positive, community-led practices being developed and piloted in service agencies and communities across Australia (Doomadgee, Bourke), and models that can be adapted from other countries (Norway, Hawaii), where most children who have offended are dealt with through child safe, culturally appropriate, wrap around support rather than by a criminogenic approach. There is opportunity and the need for Australian Government involvement and a coordinated national approach to youth justice reform. This is because Australia's international human rights obligations call for a national approach, there are significant opportunities for jurisdictions to collaborate or learn from each other to improve justice outcomes and rights compliance, and the Australian Government is responsible for many of the policy, services and investment levers required for true system reform.

I would welcome the opportunity to continue to be involved in the Committee's deliberations on this or any other matter, for example through providing policy and jurisdictional advice or advice on key stakeholders in Queensland.

---

[1] Queensland Department of Education and Youth Justice, 2024, *Youth Justice pocket stats 2023-24*, available from https://desbt.qld.gov.au/youth-justice/data, viewed 8 October 2024.
[2] Queensland Department of Education and Youth Justice, 2024, *Youth Justice pocket stats 2023-24*, available from **https://desbt.qld.gov.au/youth-justice/data** , viewed 8 October 2024.
[3] Queensland Police Service, 2024, Watch-house data, available from https://www.police.qld.gov.au/qps-corporate-documents/reports-and-publications/watch-house-data, viewed 9 October 11:50 am. Please note: because the table is refreshed twice a day the viewable data is always changing.
[4] Queensland Ombudsman, Inspections and reports, available from **https://www.ombudsman.qld.gov.au/detention-inspection/inspections-and-reports**, viewed 8 October, 2024.
[5] Queensland Human Right Act (2019), section 43, available from **https://www.legislation.qld.gov.au/view/pdf/inforce/current/act-2019-005**, viewed 8/10/2024.
[6] Bicknell, L., Queensland Council of Social Services, 3 May 2023, *If the Human Rights Act can be overridden, how effective is it?*, available from **https://www.qcoss.org.au/if-the-human-rights-act-can-be-overridden-how-effective-is-it/**, viewed 9 October, 2024.
[7] Standing Council of Attorneys-General, 2023, *Age of Criminal Responsibility Working Group report*, https://www.ag.gov.au/sites/default/files/2023-12/age-of-criminal-responsibility-working-group-report-2023-scag.pdf, viewed 8 October, 2024.
[8] Standing Council of Attorneys-General, *Communique – 1 December, 2023*, available from **https://www.ag.gov.au/about-us/publications/standing-council-attorneys-general-communiques**, viewed 9 October, 2024.
[9] AIHW 2023, quoted in Baidawi, Bell et al, *Children aged 10-13 in the justice system: characteristics, alleged offending and legal outcomes*, available from **https://www.aic.gov.au/sites/default/files/2024-01/crg_41_20_21_children_aged_10_to_13_in_the_justice_system.pdf**, viewed 8 October, 2024.