Aboriginal Legal Service of Western Australia Limited

Submission to the Senate Inquiry into Australia's Youth Justice and Incarceration System

10 October 2024

The Aboriginal Legal Service of Western Australia Limited acknowledges the Traditional Custodians of the land on which we all live and work, and pay our respects to their elders past, present and emerging. We acknowledge and respect the continuing culture and contributions that our First Nations Peoples make to the life of this state and country.

1. EXECUTIVE SUMMARY

The Aboriginal Legal Service of Western Australia Limited ('ALSWA') is grateful for the opportunity to make a submission to the Senate Inquiry into Australia's youth justice and incarceration system.

ALSWA's submission is that the youth justice system in Western Australia (and across Australia more broadly) is in crisis and requires Federal intervention. For years, the Western Australian State Government has been denying young people in detention basic human rights, which has not only had serious and long-lasting consequences for the young people, but for Australia's reputation on the international stage. Banksia Hill Detention Centre ('BHDC') and Unit 18 of Casuarina Prison ('Unit 18') have been heavily criticised by the United Nations Committee on the Rights of the Child, particularly in regards to the regular use of solitary confinement. Complaints submitted by ALSWA on behalf of young people reveal a myriad of human rights abuses, ranging from inhumane living conditions, to limited access to education, to a lack of appropriate health care. These complaints demonstrate that Western Australia has not been complying with its human rights obligations with respect to young people in detention, including those obligations under the *Convention on the Rights of the Child* and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment.*

ALSWA submits that in light of this, urgent action by the Federal Government is required. In particular, legislating enforceable national minimum standards for youth justice could contribute to essential and meaningful change in youth justice systems across the country, and would be a step towards remedying the rights abuses that continue to be perpetuated against one of the most vulnerable cohorts in our society.

2. ABOUT ALSWA

ALSWA is a community-based organisation which was established in 1973. ALSWA aims to empower Aboriginal and Torres Strait Islander people and advance their interests and aspirations through a comprehensive range of legal and support services throughout Western Australia. ALSWA aims to:

- deliver a comprehensive range of culturally matched and quality legal services to Aboriginal people throughout Western Australia;
- provide leadership which contributes to participation, empowerment and recognition of Aboriginal people as the First Peoples of Australia;
- ensure that government and Aboriginal people address the underlying issues that contribute to disadvantage for Aboriginal people on all social indicators, and implement the relevant recommendations from the Royal Commission into Aboriginal Deaths in Custody; and
- create a positive and culturally matched work environment by implementing efficient and effective practices and administration throughout ALSWA.

ALSWA uses the law and legal system to bring about social justice for Aboriginal people as a whole. ALSWA develops and uses strategies in areas of legal advice, legal representation,

legal education, legal research, policy development and law reform, as well as providing a number of important support services.

ALSWA is governed by a Board of Directors who are all Aboriginal. ALSWA is company limited by guarantee registered with the Australian Securities and Investment Commission and a public benevolent institution registered with the Australian Charities and Not-for-Profits Commission.

ALSWA provides legal advice and representation to Aboriginal people in a wide range of practice areas including criminal law, family law, child protection, civil law and human rights law. Our legal services are available throughout Western Australia via 11 regional and remote offices and one head office in Perth. ALSWA also provides a number of additional wraparound services to support clients, including the Custody Notification Service, the Bail Support Service and Prison In-Reach Program, the Work and Development Permit Service, the Youth Engagement Service, the South East FDV Healing Service, the Marni Pirni Healing Service, the Custody Wellbeing Service (Perth Watchhouse) and Old Ways New Ways, a newly launched youth diversionary program run by ALSWA in partnership with other community organisations.

3. BACKGROUND TO THE INQUIRY AND TERMS OF REFERENCE

On 11 September 2024, the Senate referred an inquiry into Australia's youth justice and incarceration system to the Legal and Constitutional Affairs References Committee ('the Committee') for inquiry and report by 26 November 2024. The terms of reference of this inquiry are:

(a) the outcomes and impacts of youth incarceration in jurisdictions across Australia;

(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 regards to youth justice including the rights of the child, freedom from torture and civil rights;

(e) the benefits and need for enforceable national minimum standards for youth justice consistent with our international obligations; and

(f) any related matters.

In referring the matter to the Committee, Senator Shoebridge referenced numerous problems that have been identified in youth justice across Australia, including the high incarceration rates of Aboriginal and Torres Strait Islander children, systemic abuse of young people in detention centres, including physical and sexual abuse and violence, detention centres operating in breach of State laws (including in Western Australia), torturous conditions for children in detention, and deaths of young people in custody.[1]

[1] Commonwealth, *Parliamentary Debates,* Senate, 11 September 2024, 112 (David Shoebridge, Senator NSW).

Senator Shoebridge argued that these issues in youth justice have been allowed to continue in the states and territories for too long and without any Commonwealth intervention, despite the Commonwealth's international obligations in relation to the rights of children and persons incarcerated. He posited that the states and territories have demonstrated that they will not address the systemic problems on their own, and therefore Commonwealth intervention is needed. In particular, Senator Shoebridge said that the inquiry should look at whether enforceable national minimum standards of youth justice that are consistent with the Commonwealth's international obligations should be created. Further, Senator Shoebridge expressed that the inquiry 'needs to deliver a pathway for reform that's going to get some kids, as many kids as we can, out of jail; that's going to push back against the flow of incarceration; that's going to put an obligation on the Commonwealth to do more than just wring its hands'.[2]

4. SCOPE OF ALSWA'S SUBMISSION

This submission is informed by ALSWA's extensive experience in representing Aboriginal and Torres Strait Islander people throughout the state of Western Australia. Wherever possible, ALSWA refers to examples of our own work to provide evidence of the views expressed in this submission. ALSWA lawyers with extensive experience acting for young people involved in the justice system have provided these examples. Many other examples exist but the tight timeframe for submissions coupled with the enormous workload of ALSWA lawyers has made it impossible to provide more. ALSWA asks the Inquiry to view the examples included in this submission as a sample of examples rather than as the only evidence of the various problems discussed. The examples discussed in this submission draw on issues from Western Australia but many of these issues are not unique to Western Australia, and involve issues that need to be addressed by both the Federal and State and Territory governments.

5. OUTCOMES AND IMPACTS OF YOUTH INCARCERATION IN WESTERN AUSTRALIA

The outcomes and impacts of youth incarceration are well-known. Numerous studies and reports have found that incarceration has negative outcomes for young people and makes the community less safe.[3] It can trigger or exacerbate trauma and lead to further disengagement from society, deteriorate young people's mental health by increasing feelings of isolation, hopelessness and depression, and undermine the potential for rehabilitation and positive outcomes for young people.[4] It disrupts normal brain development, impedes education progress and often exposes them to abuse.[5] Further, it does little to prevent recidivism – a report released by the Australian Institute of Health and Welfare in August 2023 found that of the young people released from sentenced detention, 66% returned to the youth justice system

[2] Ibid.
[3] The Sentencing Project, *Why Youth Incarceration Fails: An Updated Review of the Evidence,* (Report, December 2022); Australian Human Rights Commission, *'Help way earlier!': How Australia can transform child justice to improve safety and wellbeing,* (21 June 2024); *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory,* (Report Overview, 2017).
[4] Australian Human Rights Commission, *'Help way earlier!': How Australia can transform child justice to improve safety and wellbeing,* (21 June 2024) 112 – 113.
[5] The Sentencing Project, *Why Youth Incarceration Fails: An Updated Review of the Evidence,* (Report, December 2022) 4.

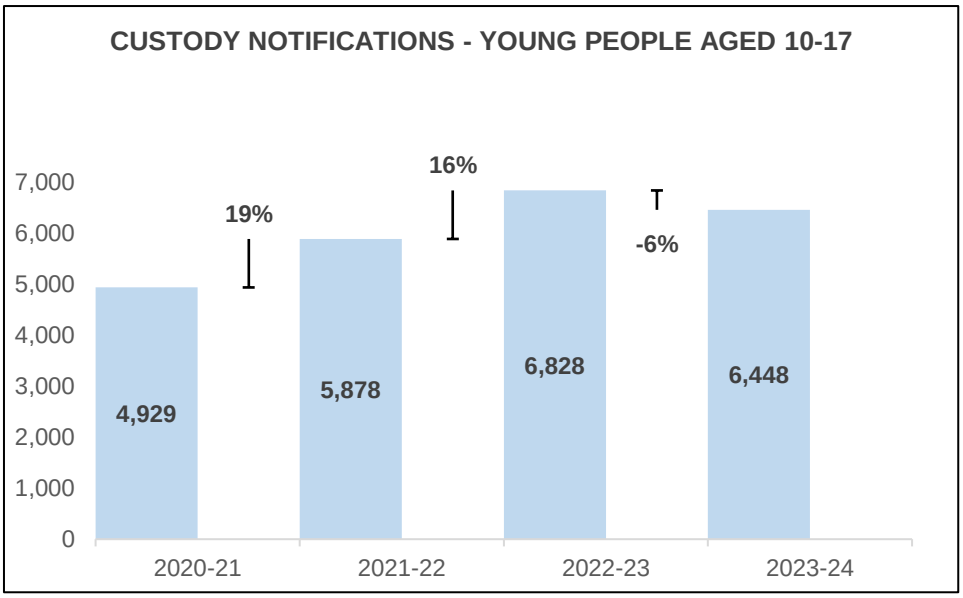
within 6 months, and 85% within 12 months.[6] The additional impacts of incarceration on ALSWA clients are detailed in section 7 below, particularly in relation to the non-compliance of the Western Australian Government with the human rights of children and young people in detention.

6. OVERINCARCERATION OF ABORIGINAL CHILDREN AND YOUNG PEOPLE

Aboriginal young people continue to be grossly over-represented in the youth justice system in Western Australia. In 2022/2023, despite making up approximately 6% of the youth population, 71% of children in detention in Western Australia were Aboriginal children. Further, at least 62% of children subjected to community justice supervision were Aboriginal children.[7]

The Custody Notification Service ('CNS') is a phone service run by ALSWA which operates 24 hours per day 7 days per week every day of the year for Aboriginal people in Western Australia who are detained by the Western Australian Police Force ('WA Police') in a police facility. WA Police are required to phone the CNS every time an Aboriginal person is arrested or apprehended and detained in a police facility throughout the state, irrespective of the reason. Of the 24,083 custody notifications regarding young people aged 10 - 17 received by the CNS from 2020 - 2024, over 33% (7982) related to young people aged 10 - 13. Of these notifications, almost 67% (5312) came from police stations in outer regional, remote, and very remote communities. For the period 2023 - 2024, almost 35% (2,255) of custody notifications received by ALSWA related to young people aged 10 - 13 years old.

Although the number of calls received by CNS during 2023 – 2024 were less than the previous year, the numbers of overall calls received remains very high.



Over the past three decades, there has been a plethora of inquiries, reports and recommendations about the causes of and solutions to address the alarming level of overincarceration of Aboriginal young people in the justice system. As highlighted by Eddie

[6] Australian Institute of Health and Welfare, 'Young people returning to sentencing youth justice supervision 2021 - 2022', (25 August 2023).
[7] Department of Justice, *Annual Report 2022/23,* (September 2023) 34.

Cubillo, these recommendations are typically ignored resulting in a 'catastrophic failure to address the impact of systemic and structural racism on Indigenous people'.[8]

In this section of the submission, ALSWA highlights through case examples and data some of the major causes of the over-incarceration of Aboriginal young people in Western Australia, and highlights the continued and current impact of systemic racism and structural bias within the justice system against Aboriginal young people.

A. Police discretion, diversion & decision to charge

WA Police are the primary gate keepers to the criminal justice system, and hold the primary discretion with respect to who enters the formal justice system. In every Australian jurisdiction, the proportion of Aboriginal young people who are diverted away from formal court proceedings by police is less than the proportion of non-Aboriginal young people.[9] In 2017, a report by the Western Australian Auditor General found that 35% of Aboriginal young people were diverted compared to 58% of non-Aboriginal young people.[10] This report also observed that police do not, and are not, required to record their reasons for deciding not to a divert a young person. Therefore, ALSWA's capacity to interrogate the failure of police to divert Aboriginal young people away from the justice system is impeded by limited data.

In Western Australia, the *Young Offenders Act 1994* (WA) provides police with discretionary powers to divert alleged young offenders from court proceedings by way of a caution or referral to a Juvenile Justice Team ('JJT'). Police are to prefer the use of a caution over charging a young person unless the number of previous charges or cautions the young person has received would make doing so inappropriate.[11] When determining the appropriateness of a caution, the seriousness of the alleged offence and of any previous offences is to be considered.[12] In the case of a first offence, a referral to a JJT should usually be preferred over charges.[13] If a young person has previously been cautioned, issued an infringement notice, engaged with a JJT, or accepted responsibility for an act or omission, he or she is not to be taken to have previously offended for the purpose of assessing previous offences.[14] Except in the case of specified serious offences (contained in Schedule 1 of the *Young Offenders Act 1994* (WA)), both of these diversionary options are available to police whenever a young person is apprehended.

Despite these provisions, the general principles underpinning the *Young Offenders Act 1994* (WA), and years of highlighting the unequal treatment of Aboriginal young people, ALSWA continues to represent young people in court facing charges of a very minor nature. In many instances such charges bring young people before the court for the first time; in others, they bring young people back before the courts on a more frequent basis. The following are

[8] Cubillo, E, '30th Anniversary of the RCIADIC and the 'White Noise' of the Justice System is Loud and Clear' (2021) 46(3) *Alternative Law Journal* 185, 186.
[9] Australian Government Productivity Commission, 'Report on Government Services 2024: Police services', (28 May 2024), table 6A.9.
[10] Western Australia Auditor General, *Diverting Young People Away from Court,* (Report 18, 2017), 11.
[11] *Young Offenders Act 1994* (WA) s 23.
[12] Ibid.
[13] *Young Offenders Act 1994* (WA) s 29.
[14] Ibid.

examples of such cases ranging from almost 20 years ago to the present day. These cases also highlight the over-use of arrest powers by police in relation to minor offending.

1. In 2005, a 15-year-old Aboriginal boy from a very remote area was charged with attempting to steal a $2.05 ice cream. This offence could have been the subject of a caution or a JJT referral. Instead, the boy was arrested by police and refused police bail. He was then remanded in custody by a court and transported to a juvenile detention centre in Perth, where he spent 10 days in custody prior to his matter being dealt with in Perth Children's Court. The charge was dealt with by way of a dismissal pursuant to s 67 of the *Young Offenders Act 1994* (WA) on the basis that the boy had already been punished as a consequence of the time spent in pre-sentence detention.

2. In 2006, a 16-year-old Aboriginal boy from an outer regional area attempted to commit suicide by throwing himself in front of a moving vehicle. The attempt was unsuccessful. The police were called and arrested the boy. The boy was charged with damaging the vehicle. At the time of the attempt the boy had a visible scar on his neck from a previous attempted suicide when he tried to slash his throat with a knife. The charge was later withdrawn, but only after ALSWA made numerous representations to police.

3. In 2006, an 11-year-old Aboriginal girl with no prior contact with the justice system was charged with threats to harm following an incident at her primary school where she allegedly threatened her teachers whilst holding plastic scissors. The girl was arrested by police at her school and sprayed with capsicum spray before being hosed down with cold water in the yard of her school after the capsicum spray had been administered. She was then transported in police custody, without notifying her family, to a Perth police station. The case was not dealt with by way of either a police caution or a referral by police to a JJT but instead proceeded by way of a formal prosecution. The girl was ultimately found not guilty by a Magistrate.

4. Around 2006, a 13-year-old Aboriginal boy from a very remote area was throwing water balloons at his friends. A water balloon was accidentally thrown through the open window of a passing car. The balloon burst on impact inside the car. A rear seat passenger was covered in water. It was not suggested that the passenger was injured or that the driver's capacity to control the car was affected. The boy was charged with common assault. Repeated representations to police to withdraw the charge, effectively endorsed by the local Magistrate, failed.

5. In 2009, a 12-year-old Aboriginal boy with no prior convictions faced the Children's Court after being charged with receiving a Freddo Frog chocolate bar which had allegedly been stolen by his friend. The Freddo Frog cost 70 cents. The boy faced a further charge involving the receipt of a stolen novelty sign from another store, which read, 'Do not enter, genius at work.' The boy missed the first court appearance due to a misunderstanding about court dates and was subsequently apprehended by police at 8.00am on a school day. He was taken into police custody where he was detained for several hours. After spending most of the day in the police lock-up, the boy appeared before Justices of the Peace and was released to bail with conditions that he remain at his home between the hours of 7pm and 7am and not attend the central business district of his local area except in the company of his mother or older brother. The charges were

eventually withdrawn and costs awarded to the boy's legal representative, despite police defending their actions as 'technically correct'. ALSWA maintained that the charges were scandalous and would not have occurred if the boy had come from a middle-class non-Aboriginal family in Perth.

6. In 2020, a 15-year-old Aboriginal boy from a very remote community entered a roadhouse which had a sign erected stating 'Window Service Only' and shoplifted a bag of lollies worth $7.95. The boy was charged with trespass and stealing. The following day, the boy entered the front yard of a residential address and removed an 'ashtray' containing used cigarettes from a doorstep. He was later charged with trespass and stealing. Prior to being charged, the boy was arrested, taken into police custody, and formally interviewed. A request made by ALSWA to have the stealing charge in relation to the ashtray discontinued was refused. In particular, ALSWA noted that the alleged victim did not initially report to police that the ashtray had been stolen and that it was only some two weeks later when a police officer inquired whether an ashtray had been stolen did the victim tell police that a 'small tin *that we use* as an ashtray had been stolen from the front door'. Police refused to discontinue the charge stating that the boy had 'trespassed on the property and stole the ashtray which demonstrates he was trespassing on the property for an unlawful purpose. He also admitted to stealing the ashtray during his suspect interview which is why police contacted the victim.'

7. In 2020, an 11-year-old Aboriginal boy from a very remote area entered an office in the community and stole a 'Texta' pen valued at $5.00. The office had been broken into by other boys and the boy had followed them inside. Three days later, the boy entered another office and stole a pencil valued at $4.00. Again, other boys had entered the premises first and the boy had followed them inside. Prior to being charged, the boy was arrested, taken into police custody, and formally interviewed. The boy's explanation for the first set of offences was that he 'was just following the boys'. For the second set of offences, his explanation was 'I was just having a look'.

8. In 2020, a 15-year-old Aboriginal boy was charged with trespass after entering his neighbour's front yard and looking around the front area of the house for used cigarette butts. The boy was also charged with the unlawful possession of a watch worth $150. The watch had been stolen in a burglary which the boy was not involved in and had been given to him by another boy. The watch was returned. Finally, the boy was charged with trespass after unsuccessfully attempting to open a sliding door of a house. The boy was also arrested by police, taken to the police station in police custody, and formally interviewed.

9. In 2020, a 14-year-old boy from a remote community was charged with the unlawful possession of a pram which had earlier been stolen in a burglary. The boy had no prior court appearances. A photo of the boy, which showed him pushing the pram, was provided by police. The photo has been de-identified and is attached to these submissions (Appendix A). Police prosecutions initially refused to discontinue this charge, and it required the intervention of the Commissioner of Police for the charge to be discontinued.

10. In 2024, a 13-year-old Aboriginal girl was arrested and charged with stealing a 'paddle pop' ice cream valued at $4.50 from a convenience store. The girl was in the care of the Department of Communities – Child Protection and had diagnoses of FASD and ADHD. Although the charge has now been discontinued, this girl spent over six weeks on bail before the charge was discontinued by the prosecution.

B. Mental health, impairments & vulnerability

The proportion of Aboriginal young people in detention who have mental health issues and/or cognitive or neurological impairments is extremely high. For example, a 2018 study by the Telethon Kids Institute found that 89% of the young people in BHDC had at least one form of severe neurodevelopmental impairment, and 36% were diagnosed with FASD.[15] 74% of the participants were Aboriginal. The authors concluded:

> This study, in a representative sample of young people in detention in Western Australia, has documented a high prevalence of FASD and severe neurodevelopmental impairment, the majority of which had not been previously identified. These findings highlight the vulnerability of young people, particularly Aboriginal youth, within the justice system and their significant need for improved diagnosis to identify their strengths and difficulties, and to guide and improve their rehabilitation.[16]

In July 2024, the Office of the Inspector of Custodial Services ('OICS'), Western Australia's independent prison and juvenile detention monitoring agency, released a report on people in custody with an intellectual disability. The report noted a 44% increase in identified intellectual disabilities among young people in detention between 2018 and 2022, and that 73% of young people in custody with a known intellectual disability or cognitive impairment during the period reviewed identified as Aboriginal or Torres Strait Islander.[17]

Learning disabilities, poor mental health, and experiences of trauma and adversity in childhood are factors known to increase the risk that a young person will be exposed to the criminal justice system.[18] This risk is further amplified by societal factors including inequality and disadvantage.[19] A New South Wales study which sought to examine whether children with emerging mental health problems were at an increased risk of contact with police followed children from their first year of full-time schooling up to the age of 13.[20] The study found that children with teacher-identified emotional or behavioural problems at school entry had an incidence rate of police contact (for any reason) that was twice that of children without such problems.[21] While Aboriginal and Torres Strait Islander boys were only slightly more likely to have any police

[15] Bower C, Watkins RE, Mutch RC, et al, 'Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia', (2018) *BMJ Open*.
[16] Ibid.
[17] Office of the Inspector of Custodial Services, *People in custody with an intellectual disability,* (23 August 2024) 3.
[18] Hughes N, Ungar M, Fagan A et al, 'Health determinants of adolescent criminalisation' (2020) *The Lancet Child & Adolescent Health* 2(2).
[19] Ibid.
[20] Dean K, Whitten T, Tzoumakis S et al, 'Incidence of early police contact among children with emerging mental health problems in Australia,' (2021) *JAMA Network Open* 4(6).
[21] Ibid.

contact, they were twice as likely to have contact as a person of interest. On the importance of the study's findings overall, it was noted that:

> Prevention of poor outcomes, including repeated contact with the criminal justice system, relies on the identification of vulnerability early in life and at the start of such contact.[22]

The following case example highlights the vulnerability of young people with neurodevelopmental impairments in the youth justice system and the inappropriate responses of police. ALSWA further notes the vulnerability of young people who do not necessarily experience neurodevelopmental impairments but who come into contact with police while experiencing mental distress. Research suggests that police responses to people experiencing mental distress can escalate situations of distress, increasing the likelihood of force being used against people in distress and undermining the confidence of distressed persons in services designed to support them.[23]

1. In early 2024, a 17-year-old Aboriginal boy who had been diagnosed with Autism with substantial deficits in social communication and cognitive and mental health impairments, was arrested, taken into police custody, and interviewed in relation to a suspected burglary. The responsible adult present during the boy's interview was his 18-year-old brother, who had a diagnosis of FASD, a language disorder and significant cognitive and executive functioning impairments. The boy, who communicated exclusively with the words 'yes' or 'no', was later charged with the offence based on admissions made in his police interview. The charge was subsequently dismissed after a court ruling that the police interview was inadmissible as a consequence of the boy's lack of his understanding of his right to silence and the inappropriateness of the brother acting as an 'interview friend' in the interview.

C. Bail

Young people who are granted bail are often required to comply with strict bail conditions. These include partial or total exclusions from specified public places, overnight or 24-hour curfews, and 'non-association' conditions which preclude young people from associating with friends or family members. Frequently, the restrictions that these conditions place on the liberty of a young person – and, inevitably, on the adults responsible for their care – do not correlate with the purpose of bail or reflect the seriousness of the alleged offending. Instead, they often appear purely punitive in nature. Further, ALSWA notes that police frequently choose to place young people on bail for minor offences when a summons or a notice to attend court could have been issued. Furthermore, policing of young people's bail conditions can be unduly onerous and inconsistent, which can be very confusing and stressful for young people.

All of these reasons often result in young people breaching their bail conditions, being arrested and taken into police custody. In 2023 - 2024, 14% (876) of the CNS notifications ALSWA received regarding Aboriginal young people aged 10 - 17 related to young people who were taken into in police custody without any charges - either for breaching their bail conditions or

[22] Ibid.
[23] Karanikolas, P, Randall, R, Bashfield, L, et al, *Police apprehension as a response to mental distress: A resource for future initiatives,* (2023).

failing to attend court in answer to bail. Of these young people, the majority (81%) were arrested by police for breaching bail conditions.

Below are examples of police enforcement of bail conditions and issues that cause the most problems for Aboriginal young people.

(a) 'Boundary' conditions

Conditions prohibiting a young person from entering certain areas have a significant impact on a young person's liberty and freedom of movement. Further, such conditions are often grossly disproportionate to the seriousness of the alleged offending. In 2024, ALSWA acted for a 14-year-old girl charged with several offences, including a charge of damaging a pair of jeans and stealing clothing. The girl had no prior court history. Police bail conditions prevented the girl from entering two shopping centres and one local retail store in her regional town. Shopping centres in regional towns are frequently used by young people to meet and socialise. Less than three weeks later after her release to bail, the girl was arrested, charged with breaching the bail condition, and refused bail by police. Given the minor nature of the girl's charges, she was later the subject of a referral for diversion to a Juvenile Justice Team, but obviously spent several arguably needless hours in police custody following the bail breach.

(b) Curfews

24-hour curfews are often imposed as bail conditions. Curfews are then enforced rigorously with police attending and entering the young person's house in the depths of the night, waking up entire households and causing serious disruption. This has flow on impacts, including making it very difficult for a young person (and other young people residing in the house) to get up to attend school the next morning. Further, young people often feel unsafe at home due to substance abuse by older family members, family and domestic violence and other anti-social behaviours. If home is unsafe and young people feel compelled to leave their home, then breaches of 24 hour curfews are inevitable, condemning young people to stints in custody for bail breaches.

The punitive nature of curfew conditions is highlighted in this case example. In early 2024, a 10-year-old Aboriginal boy living in a very remote Aboriginal community was arrested by police for breaching his bail conditions, including breaching a 24-hour curfew condition on two occasions. The first breach involved police encountering the boy walking around the community while police were holding a barbeque at the local swimming pool. Police noted that the boy was 'given a sausage sizzle, told to go home and warned about breaching his curfew.' On the second occasion, the boy was seen by police a few days later at the community basketball court, in circumstances where police confirmed that the boy had been seen at a time where police were 'conducting community engagement with the accused and approximately 15 other juveniles by playing sport including basketball and football.'

(c) 'Non-association' conditions

Bail conditions preventing young people from associating with other young people are a common feature of grants of bail. ALSWA regularly acts for young people as young as 10 years old who are forbidden by 'non-association' bail conditions from communicating with or being in

the company of other young people, including family members. These conditions are especially onerous for young people living in small Aboriginal communities in remote or very remote areas. These conditions are also very difficult to comply with when contact can occur in such communities on an entirely innocent basis. Further, disconnection from family and kinships is a well-documented cause of historic and ongoing trauma to Aboriginal people.

D. Support to meet court obligations

In a 2021 article published by the Australian Bar Review, authors examining the overrepresentation of First Nations people in the criminal justice system noted that:

> In the 2016 census among Indigenous peoples, 34% were under 15 years old (compared with 18% for non-Indigenous Australians), and 4% were aged 65 and over (compared with 16% for non-Indigenous Australians).
>
> …
>
> What this age distribution also reveals, however, is that although there is a large number of young people, there are relatively fewer, healthy adults and older people, such as grandparents and elders, to provide the level of support, supervision and guidance required to enhance wellbeing. [24]

Research shows that formal support programs can help young people who face barriers to complying with their court obligations.[25] However, young people in regional, remote and very remote areas are often seriously disadvantaged by the lack of formal supports available to them.[26] ALSWA notes that, from 2020 - 2024, at least 59% (14,217) of all CNS notifications regarding Aboriginal young people aged 10-17 came from police stations in outer regional (14% or 3,381), remote (19% or 4,527), and very remote communities (26% or 6,309). Of those, over 37% (5,312) related to young people aged 10-13.

The following cases are provided as examples of the various supports young people received as part of ALSWA's Youth Engagement Program ('YEP'), which is a holistic, culturally-secure and trauma-informed support program for Aboriginal young people involved in the justice system which is located at four sites across Western Australia (Perth, Broome/Derby, Kununurra and Halls Creek). YEP Metro and YEP West Kimberley are funded by the Western Australian Department of Justice and YEP East Kimberley and YEP Halls Creek are funded by the National Indigenous Australian Agency. The overwhelming majority of YEP diversion officers are Aboriginal people.

These cases also demonstrate some of the impediments young people face in meeting their court obligations due to factors which are often beyond their control, and highlights the extent and various types of assistance young people require in order to overcome these. Included among these examples are cases which indicate that young people with complex needs often require more complex support, and the importance of service providers having the capacity to work collaboratively in order to achieve this. All of these cases highlight the extent of the

[24] Milroy, H, Watson, M, Kashyap, S, & Dudgeon, P. 'First Nations peoples and the law', (2021) *Australian Bar Review* 50(3), 510–522.
[25] See, for example: Australian Institute of Criminology, *Bail and remand for young people in Australia: A national research project* (Research and Public Policy Series No. 125, 2013).
[26] Ibid.

resources young people require to meet their court obligations and reduce their likelihood of further contact with the youth justice system in the future.

1. In early 2021, a 17-year-old Aboriginal boy from a very remote area was referred to YEP by his ALSWA lawyer. YEP provided ongoing mentoring and assistance in relation to the boy's application for a driver's licence and necessary identification documents. YEP referred the boy to a training course and helped him complete a resume. Significantly, YEP provided ongoing reminders to the boy for each court date and provided transport to and from court on at least four occasions. The boy complied with bail and his charges were dismissed at trial.

2. In 2021, a 14-year-old boy residing in a very remote area was facing a fitness to stand trial hearing due to mental impairment and was referred to YEP for support. During a hearing of the boy's matters, the Magistrate stated that all service providers needed to come together to provide supports for this boy including NDIS supports because if appropriate supports were not put in place, this young boy was facing (if found unfit to enter a plea to his charges), the imposition a custody order under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA).

   YEP attended the first inter-agency meeting for the boy with representatives from WA Police, Department of Education, Department of Communities - Child Protection, Youth Justice Services, and a local Senior High School. Concerns were raised about the boy's pattern of offending, lack of engagement with education, and decline in presentation (hygiene, health and wellbeing). Each service provider advised the role they would play in his life and what supports they would provide. YEP advised that its role would be to communicate with the boy's mother and engage her with the other service providers by advocating at appointments, providing transport to attend appointments, and to communicate with the boy, in a culturally appropriate way, what NDIS was and its role in helping him.

   In mid-2021, the boy was remanded in custody due to new charges. The next day, YEP attended a second inter-agency meeting which was held at the local Senior High School. The meeting was held for all services providers to advise on updates and to discuss the client's relocation to another very remote community to live with his grandmother. While the boy was in custody, YEP had multiple communications with other service providers and family, and met with the boy in custody to provide support and mentoring. YEP spoke to the boy's grandmother and organised for the boy to reside with her if released on a short-term basis until long-term accommodation could be sourced.

   Less than a month after the boy had been remanded in custody, YEP provided a report to the court outlining the supports the boy had been provided together with proposed ongoing supports.

   Although the boy was found unfit to enter a plea, rather than being the subject of a custody order, the boy was released unconditionally. The boy was flown from custody in Perth to a regional town and YEP met him at the airport to meet up with

his grandmother who then drove him back to his new residence. YEP provided financial assistance to the boy's grandmother for fuel for this journey, which was over a two-hour drive. After this move, YEP maintained contact with the boy and his grandmother and visited her so that referral forms for further supports for the boy could be signed. YEP also arranged a meeting in relation to the client's ongoing education.

3. In late October 2021, a 14-year-old Aboriginal girl from a very remote area was referred to YEP to support her with a referral to a JJT. YEP met the girl at court and transported her home once court had finished. YEP subsequently liaised with Youth Justice Services ('YJS') about the requirements of the girl's JJT action plan. YEP provided reminders to the girl and her family about outstanding actions, in particular, an apology letter. This JJT referral was completed in November 2021.

   In December 2021, the girl was again referred to the JJT for charges that had occurred prior to her commencement on YEP. YEP provided transport to the girl and her Responsible Adult on two occasions as well as support at court. YEP met up with the girl during fortnightly circuit visits to the very remote area she resided in and transported her to school on one occasion. YEP also spent time talking with her about her circumstances and future goals. While the girl was visiting Broome on one occasion, YEP helped her collect her belongings from a family residence and then took her out for some food. The following day, YEP drove the girl back to the area she usually resided in. YEP also liaised with the girl's father about educational options, obtained the girl's birth certificate, and provided support letters to the girl's father for a housing application and to Centrelink.

   As part of her second JJT referral, the girl was required to complete community work. YEP collected the girl from the very remote area she resided in and took her to complete the work. After the work was completed, YEP sent photos to YJS and the girl's action plan was completed.

4. In 2021, an ALSWA lawyer referred a 17-year-old girl to YEP. The girl was very distressed and suicidal as a consequence of feeling that she was being excessively monitored by the Department of Communities - Child Protection (DCP) in relation to her seven-month-old son. A mental health assessment service based at Perth Children's Court, 'Links', had contacted the ALSWA lawyer asking if an Aboriginal YEP diversion officer could speak to the girl. The girl had been arrested overnight for alleged offences against her mother, and her son had been left in the care of her mother.

   After liaising closely with the girl, her family, and the Metropolitan Youth Bail Service ('MYBS'), the girl was released on bail to reside at a hostel for one night with a plan that she then to then reside at youth accommodation. Shortly afterwards, YEP was able to identify a suitable family placement for the girl in a regional town. An application was made in the Perth Children's Court to vary the girl's bail conditions to allow her to move to the regional town with her son to live with her grandparents. On the day her bail was varied, YEP transported the girl to DCP to collect her son and then drove her to her grandmother's house, which took approximately 10 hours.

The girl was assisted by YEP for 14 months and was provided considerable support, including 71 direct contacts (averaging once every five days). In relation to her court obligations, supports included:

- transporting the girl to the Children's Court and the Family Court;
- reminding the girl of upcoming court dates;
- obtaining the girl's birth certificate for identification purposes;
- liaising with YJS and the girl about Youth Justice obligations;
- transporting the girl to report at the Youth Justice Office;
- providing face-to-face mentoring on a fortnightly basis;
- providing a support letter for a housing application;
- assisting the girl with Centrelink payments;
- referring the girl to crisis, short-term and women's refuge accommodation;
- referring the girl to Alcohol and Other Drugs counselling; and
- providing transport to travel to the outer regional town.

The girl was sentenced to a 10-month IYSO in late 2021. Although the girl was brought to court for non-compliance with the order twice, the order was not cancelled at any time and it was successfully completed in late 2022.

5. In late 2023, an 11-year-old Aboriginal boy from a very remote area was referred to YEP by his ALSWA lawyer after he was charged with aggravated robbery (his first charge). The boy consented to being on the program the following month. The boy's court matter was resolved in early 2024 by way of the charge being discontinued by the prosecution. YEP assisted the boy and his auntie to complete a school enrolment form and attend an interview at the school. YEP purchased the boy a pair of school shoes and various stationary items.

6. In 2023, a 15-year-old Aboriginal boy from a very remote area was referred to YEP by his lawyer soon after he had been released from custody. The boy had been sentenced to a community based disposition as well as being on bail for outstanding charges in the Children's Court.

   As soon as the boy commenced participation with YEP, he received assistance with Centrelink, applied for a tax file number, and football boots were purchased so that he could return to football training. YEP also reminded the boy of his bail conditions and requirements under his order.

   Within a few days, the boy was arrested for breaching his bail conditions. Police advised YEP that they would oppose bail unless the boy moved to a different location. The YEP team worked out a placement for the boy to live with his mother in a different regional area and agreed to transport him if bail was granted. YEP spoke to the boy's mother to confirm this placement and also spoke to the boy while he was in police custody. A bail application was made for the boy that day. The YEP Manager was able to address the court directly about the boy's bail plan. The boy was subsequently granted bail, with the presiding magistrate noting that if YEP had not been present and prepared to drive him to his mother's address, the boy

would not have been granted bail. After the boy was released from custody, he was driven to his mother's address. During the drive, which took over 5 hours one-way, YEP mentored the boy and reminded him of the requirements of the court.

7. In mid-2023, a 16-year-old Aboriginal boy residing in a metropolitan area was referred to YEP by his ALSWA lawyer. YEP attempted to contact the boy on several occasions via home visits and phone calls over the following few months. The boy was sentenced to a three-month Youth Community Based Order and a six-month Conditional Release Order in September 2023. YEP met with the boy at YJS for his Post Sentence Meeting later that month and the boy agreed to participate in the YEP program. YEP provided the boy with a phone and assisted him to obtain a birth certificate.

   YEP provided regular reminders to the boy to call YJS to report, and transported the boy to report for supervision on eleven occasions. On one of these occasions, the boy also completed a psychology session at YJS. YEP transported the boy to a community alcohol and drug Service for a counselling appointment. YEP also provided the boy with reminders regarding his requirements on an outstanding JJT referral from early 2023. The boy engaged well with YEP, having thirty-one contacts with his YEP worker, averaging one per week. By March 2024, the boy had successfully completed his two court orders as well as the JJT referral. As at end July 2024, the boy had not been charged with any further offences since he commenced YEP. Prior to YEP, the boy had been charged with a total of ten offences - five in 2022 and five in 2023.

7. DEGREE OF COMPLIANCE AND NON-COMPLIANCE BY STATE PRISONS AND DETENTION CENTRES WITH THE HUMAN RIGHTS OF CHILDREN AND YOUNG PEOPLE IN DETENTION

There are currently two youth detention centres in Western Australia: BHDC and Unit 18 at Casuarina Prison. BHDC opened in 1997 and was Western Australia's only youth detention centre from October 2012 to July 2022. In July 2022, Unit 18 of the maximum-security adult male prison, Casuarina Prison, was gazetted as a detention centre under the *Young Offenders Act* 1994 (WA).

In October 2023, a 16-year-old Aboriginal boy, Cleveland Dodd, took his own life at Unit 18. The Inquest into Cleveland's death and his detention at Unit 18 has been on foot since April 2024 and still continues at the time of writing. ALSWA are appearing in these proceedings and so are not able to comment on the evidence heard at this stage. For these reasons, in these submissions we do not refer to any evidence, written or oral, from the Inquest.

For many years, BHDC and more recently Unit 18 have been heavily criticised over the conditions faced by young detainees, including by OICS, judicial officers in the Children's Court and Supreme Court, the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability ('Disability Royal Commission'), Amnesty International and numerous community organisations.

Over the past decade, ALSWA has received numerous complaints from young people about BHDC and Unit 18, including the use of solitary confinement, assaults by custodial officers, lack of access to education and other services, and limited access to psychological and mental

health supports.

Since 2021, ALSWA has lodged 97 complaints about these and other issues at BHDC and Unit 18 on behalf of Aboriginal young people. 57 of these complaints were tabled in Western Australia's Legislative Council in May 2023.[27] Attached to this submission (Appendix B) is a table which provides a breakdown of these complaints.

The issues included in our submission demonstrate that there has been non-compliance by Western Australian detention facilities with the human rights of young people for many years. Outlined below are some of the main areas of non-compliance, with reference to the complaints which have been sent on behalf of young people and the international laws and rules concerning the rights of children and young people in detention.

A. Unit 18

Unit 18 was originally described as a temporary measure to house 'disruptive detainees' and as a 'circuit-breaker' to allow for a reset and repairs and renovations to be carried out at BHDC.[28] ALSWA was advised that it was anticipated that the young people would be moved back to BHDC as soon as practicable; however to date Unit 18 continues to house young people, and the State Government has advised that they have no plans to close the unit until they complete construction of a purpose-built facility for 'the most challenging' detainees on the BHDC site.[29] It's unclear how long this process will take.

ALSWA has made several complaints to the Department of Justice about the facilities at Unit 18, including those related to official and social visits. An in-person visit with an ALSWA lawyer can either be facilitated in a large room with other visitors, other detainees and staff, or in the private room, with staff sitting immediately outside the room, compromising the privacy of the meeting. Both of these areas are not confidential and not appropriate for legal visits. Official visits can also request that a Unit 18 detainee is taken to BHDC for a visit of longer than an hour, however many of our clients have stated that they do not like this option as they spend the majority of the day handcuffed and travelling in the prison van.

The *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* ('Havana Rules') state that the design of detention facilities and the physical environment should be in keeping with the rehabilitative aim of residential treatment, with due regard to the needs of young people for privacy, sensory stimuli, opportunities for association with peers and participation in sports, physical exercise and leisure-time activities.[30] The Havana Rules further state that the detention of children should only take place under conditions that take full account of their particular needs, status and special requirements according to their age,

[27] Western Australia Parliament, *Parliamentary Debates,* Legislative Council, 18 May 2023, 2516 - 2517 (Brad Pettitt, Greens MLC).
[28] WA Department of Justice, 'Disruptive detainees relocated to temporary facility', (Media Release, 20 July 2022).
[29] Giovanni Torre, 'WA Law Society "cautiously" welcomes plan for new youth prison, urges immediate closure of Unit 18', *National Indigenous Times* (online, 26 September 2024); Emma Kirk, 'WA government announce a major overhaul for notorious youth centre', *News.com.au,* (online, 27 September 3034); WA Department of Justice, 'Purpose built youth detention facility to replace Unit 18', (Media Release, 30 November 2023).
[30] Havana Rules r 32.

personality, sex and type of offence, as well as mental and physical health, and which ensure their protection from harmful influences and risk situations.[31]

International standards also dictate that the principal criterion for the separation of different categories of young people deprived of their liberty should be the provision of the type of care best suited to the particular needs of the individuals concerned and the protection of their physical, mental and moral integrity and well-being.[32] The young people detained in Unit 18 have previously been labelled as a 'difficult cohort' or 'disruptive', while the Department of Justice has also stated that the decision to transfer a young person from BHDC to Unit 18 'predominantly came down to behaviour … individuals who have been significantly involved in [fence climbs, unit roof ascents, assaults on staff, self-harm, and significant cell damage] and who … needed to be managed in a more secure area for a period of time.'[33] In ALSWA's submission this reason does not mean the criteria provided in the Havana Rules.

Young people detained in Unit 18 have reported that they are sometimes able to see adult prisoners when they are outside, partly due to a section of the fence separating Unit 18 from the rest of Casuarina Prison not being covered. Young people have also reported being able to hear adult prisoners in the adjoining Unit 17 from their cells. The adult prisoners have attempted to communicate with the young people. The risk of children being exposed to adult prisoners violates the United Nations *Convention on the Rights of the Child* which requires every child deprived of liberty be separated from adults.[34]

B. Young people are being subjected to solitary confinement

Young people at BHDC and Unit 18 have been regularly subjected to solitary confinement.

At international law, solitary confinement is defined as confinement for 22 hours or more per day without meaningful human contact.[35] The *United Nations Standard Minimum Rules for Treatment of Prisoners* ('Mandela Rules') state that such confinement should be prohibited for children as well as prisoners with mental disabilities when their condition would be exacerbated by such measures.[36] There is significant evidence that solitary confinement can have both psychological and physiological impacts on people, and that the issues for Aboriginal prisoners and detainees in segregation are magnified due to their specific cultural circumstances and needs.[37]

ALSWA has sent 78 complaints in relation to this issue. Young people have been locked down in their cells at BHDC and Unit 18 for periods of time exceeding 22 hours per day, sometimes for 23 or 24 hours per day and for consecutive days at a time, without any meaningful human contact. These practices have been occurring since 2013 and as recently as September this

[31] Havana Rules r 28.
[32] Ibid.
[33] Transcript of Proceedings, *Western Australia: Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, (Adam Tomison, 6 October 2022, Public Hearing 27 - Day 5, Perth, WA) 396.
[34] *Convention on the Rights of the Child* art 37(c); Havana Rules r 29.
[35] Mandela Rules r 44.
[36] Mandela Rules rr 44 & 45.
[37] Elizabeth Grant, 'The use of segregation for children in the Northern Territory Youth Detention System: Submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory', (2016) 10.

year.

For example, when sentencing one young person in 2022, a judge noted that out of 273 days spent in custody at BHDC and Unit 18, the young person had spent 174 days of those days (nearly 6 months) in unlawful solitary confinement, involving confinement in a cell for over 20 hours per day. Another young person was confined in the spartan Intensive Support Unit ('ISU') of BHDC for 79 days and spent more than a third of that time, 33 days, confined to his cell with no fresh air or exercise. These conditions have been regularly described in the Children's Court as a form of 'unlawful and extra-judicial punishment' and as 'a form of child abuse'.[38]

A recent complaint sent on behalf of a client in mid-September 2024 provides an example of the lockdowns that continue to persist at Unit 18:

> [The young person] instructs that on Friday 13 September 2024, he only received approximately 30 minutes out of his cell. He attended a visit in the morning for approximately 10 minutes, he attended school in the afternoon for approximately 10 minutes, and he then spent approximately 10 minutes in the wing before being told [to] return to his cell as he was being locked down. [He] was not given a reason for why he was being locked down early.
>
> On Saturday 14 September 2024, [he] received approximately 30 minutes out of his cell before being told that he had to return to his cell because they were locking him down early. Again, [he] was not given a reason for why he was being locked down early.
>
> On Sunday 15 September 2024, [he] received approximately one hour out of his cell. He was not able to make a phone call during this time.
>
> [The young person] could not remember specific dates further back than 13 September 2024, but recalled that there have been multiple other days during his current period in custody where he has received less than one hour out of his cell.

In 2022, ALSWA brought proceedings on behalf of a young client who alleged he had been unlawfully confined to his cell at BHDC. The Supreme Court found in *VYZ*[39], that our client had been unlawfully confined to his cell on 26 separate days in January, February, May and June 2022, including some days where the young person was not let out of his cell at all. Despite the Supreme Court's ruling, ALSWA continued to receive instructions about unlawful confinement after the *VYZ* decision and so in December 2022 brought a further three proceedings on behalf of two boys and a girl who were held in Unit 18 and BHDC. In July 2023, the Supreme Court delivered another decision that the three young people had been unlawfully confined to their cells over a total of 167 days.[40] Justice Tottle described the situation as a 'systemic failure'.[41]

The use of solitary confinement in BHDC and Unit 18 breaches the Mandela Rules and the Havana Rules. These Rules make it clear that all disciplinary measures constituting cruel, inhumane or degrading treatment against children are strictly prohibited, which includes solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned.[42] Given that the use of solitary confinement amounts to cruel,

---

[38] Keane Bourke, 'Barbaric' youth detention conditions in WA contribute to serious serial offender getting 12-month sentence', *ABC News,* (online, 27 July 2023).
[39] *VYZ by his Next Friend XYZ v Chief Executive Officer of the Department of Justice* [2022] WASC 274.
[40] *CRU by next friend CRU2 v Chief Executive Officer of Dept of Justice* [2023] WASC 257.
[41] Ibid [6].
[42] Havana Rules r 67.

inhuman or degrading treatment, the practice also breaches Australia's obligations under the *International Covenant on Civil and Political Rights,* the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and the *Convention on the Rights of the Child.*[43]

The use of solitary confinement is currently permitted by law in Western Australia. The *Young Offenders Act 1994* (WA) and its regulations specify that detainees can be confined to their cells when 'hearing and determining a charge that a detainee has committed a detention offence'[44] or for the 'good government, order or security of the detention centre'[45] ('good government confinement'). The good government confinement is the power that the Western Australian Department of Justice has relied upon to justify the lockdowns. Under the legislation, a detainee whose confinement is for 12 hours or longer is entitled to at least one hour of exercise every six hours during unlock hours. However, the Department treats this as entitling detainees to one hour out-of-cell per day, as the normal 'unlock hours' are 11 hours and 15 minutes. It follows that detainees can lawfully be held in their cells for up to 23 hours per day when a confinement order has been made.

This legislation does not comply with Australia's obligations under international human rights treaties. In addition, the practice of locking down detainees for *more* than 23 hours a day is unlawful under both the *Young Offenders Act 1994* (WA) and at international human rights law. Concerningly, the Western Australian Government has previously indicated that it might consider amending the legislation so that it is allowed to confine young people for more than 23 hours per day.[46]

C. Young people are subject to unreasonable use of force

Since 2021, ALSWA has sent 35 complaints regarding the use of force against young people in BHDC and Unit 18 by custodial officers. These complaints have related to the use of excessive physical force, chemical agents and restraint techniques such as a three-point restraint and the 'folding up' or figure-four hold.

An ALSWA client described a folding up incident in his complaint as follows:

> On 20 January 2023, when [he] was in Karakin Unit, he was 'folded up' by three or four custodial officers. His legs and arms were placed behind his back and he felt pressure on his back.
>
> When he tried to resist by pushing away and standing up, he was placed into a chokehold by a custodial officer. He was held in that position for around 10 seconds. [He] instructs that he could barely breath during this time, and told the officer that he was choking him. The officer then released his grip.

The Western Australian Department of Justice has previously acknowledged the risks associated with the folding up technique, including the risk of suffocation and the other significant effects the practice can have on the physical and mental wellbeing of young people. The Department announced in 2022 that the use of the folding up restraint would be banned

[43] *Convention on the Rights of the Child* art 37(a); *International Covenant on Civil and Political Rights* art 7.
[44] *Young Offenders Act 1994* (WA) ss 173(1), (2)(e); *Young Offender Regulations 1995* (WA) div 2.
[45] *Young Offenders Act 1994* (WA) s 196 (2)(e); *Young Offender Regulations 1995* (WA) div 3.
[46] West Australian Government, Bill Johnston, 'WA Government to review young offenders laws', (Media Release, 4 October 2022).

by 12 December 2022. However, ALSWA is aware that this restraint was used on a young person in Unit 18 as recently as September 2024.

The use of three-point restraints on young people increased significantly after the death of Cleveland Dodd at Unit 18 in 2023. In particular, young people reported that if they covered the CCTV camera in their cell, they would be put into a three-point restraint which involved their hands and ankles being handcuffed and connected to each other by a short chain. Young people were often left for hours in this position, unable to straighten their back, causing considerable pain and discomfort. One complaint made on behalf of a young person in Unit 18 read:

> On 30 October 2023, officers restrained [him] in his cell using a 'three-point restraint' for approximately 2 hours because he covered his camera. [He] instructs that the officers handcuffed his hands and then used a chain to restrain his hands to cuffs on his legs. He describes it was like being in a 'frog' position where all he could do was sit on his bed. He was entirely unable to move and could not even use his hands to drink water.

There have also been a number of incidents where young people have been sprayed with a chemical agent and then confined in their cell without access to water or a decontaminate for an unacceptable amount of time. Other complaints have related to assaults against young people by custodial officers and instances of breathing being seriously impeded due to the level of force used by an officer.

Despite Western Australian legislation prescribing that force can only be used against a young person in detention when they are presenting an imminent risk of physical injury to themselves, any other young person or officers,[47] ALSWA has been instructed that use of force occurs in other circumstances, for example if a young person has been disobedient or simply misbehaving. For example, when a young person refused to enter a cell in Unit 18 because the bedding was wet, the following occurred:

> [He] instructs that the officers then pushed him to the ground. [He] was unable to prevent his head from hitting the floor because he was handcuffed.
>
> One officer … was on top of [him] and held his face against the floor…
>
> [His] arms had been pulled behind his back and other officers were holding him down by his legs. [He] was extremely worried that the officers might break his arm and he was screaming and crying in pain.

A similar example occurred at BHDC, when a young person refused to enter a cell because of its poor condition:

> The officers took [her] arms and forcibly placed her prone onto the ground. The officers pulled [her] arms behind her back, and folded her legs behind her back so that her ankles were touching her wrists.
>
> The angle and force of her restraint caused significant pain to [her], and she struggled against the officers because of it. The officers kept her in this 'hog-tie' position for approximately two minutes.

[47] *Young Offender Regulations 1995* (WA) regs 71 & 72.

> During this time, the officers performed a pat search of [her], and placed her in handcuffs, behind her back.

Young people have reported that the use of force against them, particularly the use of physical restraints, causes them significant distress, and has sometimes even led them to self-harm.

Western Australian legislation also specifies that a custodial officer must only use a degree of physical force which is the minimum required to control a young person's behaviour in the circumstances.[48] ALSWA has received many complaints from young people about use of force incidents where it appears that more than the minimum force required to control a young person's behaviour has been used. This was illustrated by a recent complaint, in which a young person had started to self-harm in his cell by cutting himself on his neck and forearms. The young person explained that the immediate response of custodial officers was as follows:

> Officers attended [his] cell and he was 'folded up'. The officers pushed his head into the floor in order to restrain him. When the officers put the cuffs onto [his] ankles, they were so tight that [he] lost all feeling in his feet. The officers also put the cuffs onto [his] wrists so tight that they cut into his skin and caused his wrists to bleed.

This incident suggests not only that custodial staff resort to the use force as a first option, and use much more than the minimum force required, but also that they lack the skills and training on how to engage with a distressed and traumatised young person, an issue discussed in more depth below.

Finally, force is often used against young people in degrading and inhumane ways. An example of this was outlined in a complaint in 2022 regarding a young person's treatment after a fire had started in one of the wings in Unit 18. The young person had subsequently been escorted outside into a concrete exercise yard, and the complaint read as follows:

> The boys were all chained to each other in groups. [The young person] was chained to two other boys, at their ankles. [He] did not have a t-shirt on and so was bare-chested.
>
> One of the boys started walking away from the group, and an officer pushed him back. [The young person] was chained to this boy, and this push caused the boy to fall into [the young person] and then they all fell to the ground.
>
> An officer … took hold of [the young person's] handcuffs and dragged him across the concrete floor of the exercise yard. This caused [his] bare chest and back to be scraped and grazed on the concrete floor.

The extent to which force is used against young people at BHDC and Unit 18 breaches their human rights. International rules dictate that force should only be used in youth detention when absolutely necessary and as a measure of last resort.[49] Any use of force should be proportionate in the circumstances, and appropriate for the young person's background, age, and physical and mental circumstances.[50] Restraint should not be used to secure compliance and should never involve deliberate infliction of pain.[51] The Havana Rules also state that the

---

[48] *Young Offender Regulations 1995* (WA) reg 71(1); *Young Offenders Act 1994* (WA) s 11(c)(1).
[49] Mandela Rules r 82; Havana Rules r 65.
[50] *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory,* (Report Volume 2A, 2017) recommendation 13.5.
[51] Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system*, UN doc CRC/C/GC/24 (18 September 2019) 16.

carrying and use of weapons by staff should be prohibited in any facility where young people are detained.[52]

The examples outlined above demonstrate that these rules are routinely flouted by officers at BHDC and Unit 18, with force used regularly and excessively against young people. The examples provided by ALSWA clients also demonstrate that force is regularly used as the first option by custodial staff, without recourse first to negotiation or de-escalation techniques.

Further, the Havana Rules state that instruments of restraint and force can only be used in exceptional cases, where all other control methods have been exhausted and failed, and only as explicitly authorized and specified by law and regulation. The use of restraints and force should not cause humiliation or degradation, and should be used restrictively and only for the shortest possible period of time.[53] The use of three-point restraints on young people for extended periods of time does not comply with this rule.

Practices such as the use of chains on young people also raises concerns around compliance with the *International Covenant on Civil and Political Rights,* particularly Article 10 which provides that all persons deprived of their liberty shall be treated with humanity and with respect for their inherent dignity.

D. Custodial officers not adequately trained to work with young people and children

The interactions between Youth Custodial Officers ('YCOs'), who staff detention centres, and ALSWA's clients suggest that staff do not have adequate training to deal with children and young people with trauma, disabilities and mental health challenges. Further, reported interactions also suggest that YCOs do not have adequate training to care for Aboriginal children in a culturally safe way.

BHDC and Unit 18 are also staffed with prison officers, who are not trained to work with children and young people. The Department of Justice uses several groups of prison officers in youth detention: Special Operation Group ('SOG') officers; 'Tango' officers; and prison officers to supplement shortages in staff.

The SOG team provide emergency support to the prisons and detention centres. SOG officers are prison officers and do not receive any training with respect to dealing with children. The SOG has been used increasingly at BHDC and Unit 18 and for non-emergency activities,[54] and are now used regularly in interactions with young people, for example cutting clothing from a young person so that they can be dressed in a rip-proof gown.[55] ALSWA's clients regularly report that they receive heavy use of force from SOG members.

Prison officers are not appropriately trained in trauma-informed care or working with young people with complex needs. Deploying prison officers who are not trained to work with young people frequently means that they do not have the resources and tools to de-escalate situations, resulting in the escalation of conflict into critical incidents and the use of weapons.

---

[52] Havana Rules r 65.
[53] Havana Rules rr 63 & 64.
[54] Rebecca Le May, 'Jail riot squad team fear 'getting into trouble' working increasingly with juvenile detainees', *The West Australian,* (online, 14 September 2024).
[55] Ibid.

Prison officers are also ignorant to the specific needs of young people. This is of particular concern when considered in light of the high prevalence of neurodevelopmental impairments among young people in detention.

Further, the Western Australian Government recently introduced the *Young Offenders and Prisons Legislation Amendment Bill 2024* to provide for the deployment of prison officers to youth detention facilities. As a result of the amendments, prison officers sent to the youth detention centres will be able to carry weapons as well.

While the Department has regularly maintained that prison officers do not work directly with the young people but instead only provide support to the YCOs, ALSWA's instructions are to the contrary. It is clear that prison officers are in fact involved in the day-to-day management of the young people in Unit 18. Young people frequently interact with prison officers, who are clearly identifiable by their prison uniforms. Young people instruct that these officers often lack empathy or understanding and are overly punitive in their interactions with them. The description used is that prison officers are 'harder' on young people than the YCOs. Young people also report excessive uses of force and offensive behaviour from prison officers. In December 2023, Daniel Ratten, a prison officer who had worked in Unit 18, was convicted of assault against a young person in Unit 18, involving the use of gratuitous violence against a young person who disobeyed a minor directive.[56]

However, this is not just an issue of prison officers not being adequately trained. The experience of young people is that YCOs also lack basic training in dealing with young people in detention. A recent report released by OICS revealed that trainee YCOs receive only one and a half hours of disability awareness training and three hours of FASD awareness training. Trainee prison officers receive only one and a half hours of disability awareness training.[57] Neither cohorts have ongoing refresher training thereafter.[58] ALSWA often receives complaints from young people which clearly demonstrate that YCOs and other detention staff do not understand a young person's mental health or cognitive diagnoses and how to respond or deal with young people appropriately.

One example relates to an incident which occurred in BHDC in 2021. An ALSWA client with a number of diagnosed psychiatric and psychological conditions including FASD, ADHD, post-traumatic stress disorder and numerous behavioural disorders, was upset and dysregulated in his cell, throwing items around. His cell was attended by five custodial officers and he was handcuffed, shirtless, and transferred to the Intensive Support Unit. He was brought into a bare cell with a padded bench and a toilet. The officers placed him face down on a bench with his legs outstretched and his hands behind his back. Footage of the incident showed three of the officers and a nurse in the cell with the young person, with him recoiling when touched by the nurse. The young person then began to convulse and shake uncontrollably. He then sat up, visibly distressed, sobbing and pulling at his hair. A male officer put an arm on his shoulders and pushed him backwards onto the padded bench and held him down. The officers then left the cell and at that point the young person appeared to spit at one of the officers.

[56] Sarah Steger, 'Daniel Ratten: Casuarina Prison guard found guilty of assaulting teen detainee during Unit 18 riot', *The West Australian* (online, 21 December 2023).
[57] Office of the Inspector of Custodial Services, *People in custody with an intellectual disability,* (23 August 2024) 16.
[58] Ibid.

The young person was subsequently charged with assault public officer as a result of him spitting. When the matter went to trial, the young person was acquitted of the charge. Among other findings, the magistrate found that the young person's behaviour was directly attributable to his multiple impairments and diagnosed conditions, and that he was in an extremely distressed, dysregulated and heightened state. The evidence given by the custodial officers demonstrated they had little to no understanding of the young person's disabilities, with one officer describing that the young person 'became increasingly dramatic and appeared to work himself up, it appeared he was pretending to fit and [sic] have convulsing'. Other officers described the young person's behaviour as 'dramatic', 'pretending to fit', 'poor behaviour' and 'acting out'. None of the officers appeared to understand or turn their minds to how to deal appropriately with a highly distressed young person.

International standards dictate that before beginning their duties, all prison staff must be provided with training tailored to their general and specific duties.[59] In relation to youth detention, this means staff should be trained in working with young people with complex needs, including histories of trauma, mental health issues, drug and alcohol misuse, physical and intellectual disabilities and developmental disorders. Youth detention staff should also receive training in child psychology, child welfare and international child and human rights principles.[60] Staff knowledge and professional capacity and competency should be maintained and improved through regular in-service training, professional education and refresher courses.[61] The Havana Rules also state that staff should be qualified and include a sufficient number of specialists employed on a permanent basis, such as educators, vocational instructors, counsellors, social workers, psychiatrists and psychologists.[62]

E. Young people with disabilities are not adequately cared for

As discussed above, the training of custodial officers in regards to dealing with young people with disabilities including cognitive and neurological impairments has been historically poor or non-existent at BHDC and Unit 18. This has not only led to young people not being adequately cared for, but has resulted in critical incidents occurring because staff are not trained on how best to interact and deal with a young person with a cognitive or neurological disability or appropriately de-escalate a situation. The example provided in section D above demonstrates this. Another example concerns a complaint made by a young person with FASD:

> [The young person's] experience in BHDC has consistently reflected a lack of understanding by the officers regarding his FASD diagnosis. He feels that the officers either weren't told about his diagnosis or that they didn't know how to deal appropriately with people with FASD. [He] wishes that the officers received better training regarding FASD so that they would know how to support him, particularly during the lockdowns when the long periods in his cell fuelled [his] frustration and he found it difficult to cope.

Young people entering youth detention have the right to be assessed to determine whether they have a physical or intellectual disability, mental health issues, learning difficulties or experience other forms of vulnerability, and to have those needs met.[63] Further, young people in youth detention should be provided with coordinated care and support, and where

[59] Mandela Rules rr 75(2) & (3).
[60] Havana Rules r 85.
[61] Havana Rules r 85; Mandela Rules rr 75(2) & (3); Beijing Rules r 22.1.
[62] Havana Rules r 81.
[63] Havana Rules rr 50-51.

necessary, with medical and therapeutic treatment.[64] Further, Article 23 of the *Convention on the Rights of the Child* states that children who have any kind of disability should receive special care and support so that they can live a full and independent life. There is no reason why this right should cease when a child is in detention.

F. Inhumane living conditions in cells

From 2021 to present, ALSWA has sent 31 complaints from young people detained at BHDC and Unit 18 about the poor condition of their cells, including:

(a) no water in the cells;

(b) no access to a shower for several days;

(c) unclean cells which have attracted pests;

(d) being made to sleep on wet bedding;

(e) the toilet not working;

(f) no power;

(g) no air-conditioning;

(h) insufficient bedding; and

(i) hygiene issues, such as not having access to clean clothing or soap.

An ALSWA client described his cell in Unit 18 as follows:

> [The young person] instructs that he slept on a mattress on the floor in 2022 because there were no bed frames in the cells. Now, [he] sleeps on the floor without a mattress. He instructs that this is because his cell is very hot and the floor is cooler. He instructs there is no air-conditioning in the cells nor a grill for fresh air and that the cells are extremely hot. Further, [he] instructs that the bed frame is right next to the shower and the mattress is always wet so he chooses to sleep on the ground. He instructs this is causing his back to hurt, and because he is spending long periods in his cell, he is sometimes so stiff he is unable to get off his mattress. In particular, [he] instructs that the mattress makes his neck painful and stiff.

Similarly, the ISU at BHDC was described by a Judge in 2022 as follows:

> Now, those cells then in the ISU were in a state of poor repair, small concrete cells with nothing in them other than a mattress on a slightly elevated platform, a toilet, no adequate ventilation, no stimulation for the detainees, no functioning recreation yard for the[m], no visits, entirely lacking in any form of stimulation.

Another example of the poor state of the cells, and the implications it has for the young people, is that cells are often not cleaned after capsicum spray has been deployed:

> His mattress was covered in OC Spray and was 'itchy'. As such, he slept in the shower and he had only a rip proof pillow and no bedding. He was very cold all night.

[64] Havana Rules rr 49-51, 53-55.

One young person contracted scabies multiple times while at BHDC, after his bed sheets had not been cleaned or changed following his initial contraction of the condition. Another young person reported that while in Unit 18, he spent two weeks in the same clothes, after officers refused to provide him with clean clothes.

OICS also commented on the lack of environmental hygiene and poor living conditions at BHDC. OICS described the following scene in their 2023 report:

> Discarded food was seen in many of the young people's cells we visited, and in cells that were empty and/or out of order. Bags of rubbish and piles of soiled clothes were visible throughout the units adding to the generally unhygienic conditions. We observed rat faeces throughout the centre including in unit offices where staff were expected to work. Staff advised us that there was an infestation with tens of rats seen emerging after the evening lockdown. In one unit, vermin had clearly perished in the ceiling and the smell was potent enough that some staff refused to work inside the office.[65]

While international law does not prescribe exactly what constitutes acceptable cell conditions, the Havana Rules do state that young people deprived of their liberty have the right to facilities and services that meet all the requirements of health and human dignity.[66] These cell conditions clearly do not meet this standard. Further, not providing young people with clean and sufficient clothing and bedding involves a denial of basic dignity and respect.

There are also some specific rules provided at international law regarding the condition of cells, such as that every young person should be provided with separate and sufficient bedding, which should be clean when issued, kept in good order and changed often enough to ensure cleanliness,[67] and that sanitary installations should be of a sufficient standard to enable young people to comply with their physical needs in privacy and in a clean and decent manner.[68] The conditions of the cells at BHDC and Unit 18 have not always allowed for these, demonstrating further non-compliance with the Havana Rules.

G. Young people do not have appropriate access to education

ALSWA has sent 36 complaints about young people having limited access to education in detention. This was particularly so from late-2021 to late-2023, when significant lockdowns meant young people were getting very little time out of their cells. The lockdowns meant that they had limited time to attend school and programs, and no appropriate and thorough alternative system for education was established.

When access to education was provided during lockdowns, it would only be for around one hour per day. From 2021 to mid-2022 education was only provided in the wings at BHDC or in a young person's cell, even though there was a purpose-built education facility. Further, prior to 2022, there were no IT facilities for education at BHDC.

One young person described his education experience at BHDC in 2022 as follows:

---

[65] Office of the Inspector of Custodial Services, *2023 Inspection of Banksia Hill Detention Centre and Unit 18 of Casuarina Prison (Part One)*, (Report No 148, May 2023) 23 – 24.
[66] Havana Rules r 31.
[67] Havana Rules r 33.
[68] Havana Rules r 34.

> While the unit is in lockdown, [the young person] does not attend school or receive any education. The teacher does not come to the unit. [He] has been to school only four or five times in total during his current period at BHDC, and on some of those occasions, he has been given 'colouring in and art' to do.

Sometimes young people have gone for months without receiving any education, particularly those at Unit 18. A young person's education experience at BHDC and Unit 18 was described by a judge in 2022 as follows:

> The total time that C has had in education during that 273 days he's now been in custody since the beginning of the year is 127 hours over 3 weeks. That is an average of 3.3 hours of education per week.
>
> So C has received 12 per cent of the minimum standard that the State is required to provide to him.

As recently as September 2024, young people at Unit 18 have instructed ALSWA that the most education they have receive is one hour per day. OICS has previously commented that young people in custody should not be receiving a lower standard of education than those in the community.[69] Pursuant to Regulation 26 of the *School Education Regulations 2000* (WA), children in primary or secondary school education must receive, as a minimum, education for 4 hours 10 minutes per day. The limited education services provided to young people held in custody at Unit 18 are clearly inadequate.

Other complaints by young people have related to a lack of age-appropriate or disability-appropriate education. For example, one young person recalled:

> [He] received limited education while in ISU. While [a] teacher had attended ISU to conduct 'school', the educational materials provided were generally 'primary school' maths and English, which [he] feels were well below his educational level.

For young people diagnosed with ADHD, an inability to sit still for extended periods results in them being returned to their cells without completing education classes. This demonstrates that young people with disabilities are penalised by having education curtailed by dint of their disability.

International law, including the *Convention on the Rights of the Child,* makes clear that young people in detention have a right to education and to access educational programs.[70] It specifies that education should be suited to the young person's needs and abilities and designed to prepare them for return to society.[71] Such education should be provided outside the detention facility in community schools wherever possible and, in any case, by qualified teachers through programs integrated with the education system of the country so that, after release, young people may continue their education without difficulty.[72] The experience of young people in Unit 18 and BHDC highlights that that they are routinely denied the basic human right of access to education while in detention.

---

[69] Office of the Inspector of Custodial Services, *2017 Inspection of Banksia Hill Detention Centre,* (Report No 116, February 2018) vi.
[70] *Convention on the Rights of the Child* art 28; Havana Rules rr 38 & 39.
[71] Havana Rules r 38.
[72] Havana Rules r 38.

Further, the Havana Rules specify that special attention should be given to the education of young people with particular cultural or ethnic needs, and those who have cognitive or learning difficulties should have the right to special education.[73] This is particularly relevant for Western Australia, where a large proportion of the detention population are Aboriginal or Torres Strait Islander young people, many of whom have cognitive or learning difficulties.

The *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ('Beijing Rules') also highlight that the objective of training and treatment of young people placed in institutions is to provide care, protection, education and vocational skills, with a view to assisting them to assume socially constructive and productive roles in society.[74] Detention facilities in Western Australia have fundamentally failed to prepare young people to reintegrate into society upon release.

H. Young people do not have appropriate access to health care

Young people in BHDC and Unit 18 have frequently reported experiencing issues with accessing health care, including mental health care. This has been due to lockdowns, inadequate staffing or unexplained delays in accessing treatment. ALSWA has sent 46 complaints relating to access to health care, of which 28 related to access to mental health care.

The most common health complaint ALSWA receives from young people is that their requests to see a psychologist were not facilitated, or visits with psychologists were cancelled due to lockdowns. Young people have also reported inadequate responses to self-harm threats or actual self-harm incidents; delays in accessing primary health care, with children often having to wait days before seeing medical staff; long delays in a response by staff after using the emergency cell call button; and inadequate examination by a medical officer after a use of force incident.

ALSWA clients have frequently disclosed that the lockdowns contribute to their poor mental health, including incidents of self-harm. A common complaint made by young people has been that after a self-harm incident, they were not seen by medical staff until a few days later. One young person recalled from his time in the ISU in 2022:

> [He] had injured his knuckles after he punched a wall, and repeatedly asked to see medical staff for treatment of his knuckles. It was a number of days before he was permitted to see medical staff.

ALSWA lawyers often write letters to the Director of Health Services on behalf of young people asking for them to be seen by mental health staff because the young person's verbal requests have not been facilitated. For example, one complaint stated:

> [The young person] instructs that since his most recent detention at BHDC, starting on 15 January 2023, he has made multiple requests to Youth Custodial Officers to speak to a psychologist. However, he has not yet been seen by a psychologist or mental health nurse [over a month later]. He instructs he has been locked down in his cell for significant periods of time and has been struggling to cope.

[73] Havana Rules r 38.
[74] Beijing Rules rr 1.2, 26.1.

Young people were often told that the reason they could not receive the health appointment they requested was because there were not enough staff to facilitate taking them to the appointment. A complaint by a young person in 2022 describes this issue, and the significant impact the lack of mental health support had on the young person:

> Before the 'rolling' lockdowns began, [the young person] accessed mental health services at BHDC twice a week. During the lockdowns, [he] 'rarely' saw his psychologist. The last time [he] requested to see the psychologist, he felt that the staff were not trying to facilitate his request. He waited for at least two weeks after that request to see a psychologist. He was told that the reason he could not see a psychologist was the lack of staff to move him. [He] would speak to his psychologist about the impact of the lockdowns on him and found it difficult to cope with the lockdowns without regular appointments with his psychologist. On one occasion, [he] smashed up his cell after he was continuously unable to speak with the psychologist.

These conditions constitute a breach of the young people's human rights. Every young person who is ill, who complains of illness or who demonstrates symptoms of physical or mental difficulties, has the right to be examined promptly by a medical officer.[75] Every young person in detention should also receive adequate medical care, both preventive and remedial, including dental, ophthalmological and mental health care, and ideally through services in the community.[76] The focus should be on detecting and treating physical or mental illness and other conditions that may hinder reintegration upon release.[77] Limiting access to medical services frustrates these objectives and is a clear violation of a young person's human rights.

I. Young people do not have appropriate access to recreation

The lockdowns that have occurred at BHDC and Unit 18 have also denied young people appropriate access to recreation. ALSWA clients often complained that during periods of rolling lockdowns, when they were let out of their cells, it would only be for enough time to make a phone call and not to engage in recreation or any other activities.

In Unit 18, even during the time that young people were allowed out of their cells, they were often only allowed out with handcuffs on, preventing them from engaging in recreation. They were also rarely let out of the wing into the fresh air and sunlight. One young person described the common situation in Unit 18 as follows:

> [The young person] instructs that his only opportunity to 'exercise' involves kicking a football up and down the hallway of the wing. He instructs that the hallway is only 10 metres long so he cannot properly kick the ball. [He] is only allowed to do this for approximately 10 minutes. He was not allowed outside at Unit 18 until October 2023 [some two months after his arrival]. Prior to then he had not had access to fresh air.

Another young person described their opportunity to participate in recreation when in the ISU at BHDC as follows:

> [The young person] received limited recreational time while he was in ISU. He was not permitted to leave his cell every day. On the days when he was allowed to leave his cell, [he] does not recall any occasions on which he was out of his cell for longer than an hour. On the days that he was allowed out of his cell, [he] was escorted to the 'cage' in handcuffs. The only equipment in the cage was a

[75] Havana Rules r 51.
[76] Havana Rules r 49.
[77] Havana Rules r 51.

> basketball and soccer ball, which he would kick against a wall because he had no one to play with, as he was usually in the cage on his own. If [he] touched the fence of the cage with his hand or climbed on it, he would be sent back to his cell as punishment.

The Havana Rules provide young people in detention with a right to daily free exercise in the open air, when weather permits,[78] something that very rarely occurs in BHDC or Unit 18 during periods of lockdown. The detention facilities should also ensure that each child is physically able to participate in the available programs of physical education, including by providing remedial training to those detainees who require it.[79] The Havana Rules also specify that every young person should have additional time for daily leisure activities, such as arts and crafts.[80]

J. Young people do not have access to rehabilitative programs

As with the provision of education, access to rehabilitation or training programs has been limited or not provided at all during lockdowns at BHDC and Unit 18. Some young people reported being unable to attend drug and alcohol counselling, or having their scheduled programs repeatedly cancelled. One complaint stated:

> [The young person] has not had any access to programs. She has been told they have been cancelled due to the lack of staff. For example, [she] was told that there would be lots of programs on International Women's Day on 8 March 2022. Instead, [she] was able to attend only one program on sexual health that lasted an hour.

During lockdowns ALSWA clients frequently report being bored with nothing to do, causing them to feel stressed, upset and frustrated. This can lead to acting out, including the damaging of cells.

The Havana Rules and Beijing Rules make clear that a fundamental purpose of youth detention is a focus on rehabilitation and reintegration into society. For example, the Beijing Rules state that the objective of training and treatment of young people placed in institutions is to provide care, protection, education and vocational skills, with a view to assisting them to assume socially constructive and productive roles in society.[81] The Havana Rules also provide that young people detained in facilities should be guaranteed the benefit of meaningful activities and programs which would serve to promote and sustain their health and self-respect, to foster their sense of responsibility and encourage those attitudes and skills that will assist them in developing their potential as members of society.[82] Further, the Rules state that every young person in detention should have the right to receive vocational training in occupations likely to prepare him or her for future employment.[83]

A focus on rehabilitation and therapeutic intervention has been lost in the Western Australian youth detention system for many years due to the lockdowns along with a focus by government on 'tough on crime' approaches. As one judge described when sentencing an ALSWA client in 2022:

---

[78] Havana Rules r 47.
[79] Havana Rules r 47.
[80] Havana Rules r 47
[81] Beijing Rules r 26.1
[82] Havana Rules r 12.
[83] Havana Rules, r 42.

> [The young person's] experience of detention at Banksia Hill has been one of prolonged systematic dehumanisation and deprivation. It has had no rehabilitative element or effect and has been unjustly punitive. The conditions of his detention have not met the bare minimum standards the law requires and the court expects.

K. Young people do not have appropriate socialisation with their peers

During periods of lockdowns and solitary confinement at BHDC and Unit 18, young people have very limited opportunities for social interactions, either with their peers or staff. When there have been periods of severe lockdowns in the past, young people have sometimes gone days without seeing other detainees. Young people reported that they would often attempt to speak to each other through the grills in their cells:

> As a result of the lockdowns, most of [the young person's] communication with other young people had to occur through the grills in their cells. [He] and the other young people would shout to each other through the grills in the corner of their cells. By yelling through the grill near the window of his cell in Karakin, he could sometime reach his friends in the ISU. Although it was difficult to hear, [he] and his friends were desperate to speak with each other and this seemed to be the only way.

Even when young people tried to speak to YCOs or prison officers they would often be ignored:

> [He] finds being locked down in his cell for long periods of time really hard to cope with, and he feels bored and stressed. [He] sometimes calls out to staff to try and engage with them because he wants to talk to someone, however they often ignore him.

Things were even worse in the ISU of BHDC, with one young person complaining:

> [He] was not provided with opportunities for meaningful contact with his peers, or other basic social interactions while he was in ISU. Sometimes when he was 'being good' he was allowed the company of one of the peer support officers in the cage with him. Being on his own so often made him feel 'depressed, sad and lonely'.

In *CRU (by next friend CRU2) v Chief Executive Officer of Dept of Justice* [2023] WASC 257, the Supreme Court found that depriving children of the opportunity to socialise by confining them in their cells for long hours at BHDC and Unit 18 is 'calculated to undermine the development of a sense of social responsibility and frustrate the objective of rehabilitation.'[84] Accordingly preventing young people from having social interaction contradicts the international rules around rehabilitation and reintegration of young people in detention.

L. Young people do not have appropriate contact with family and their communities

As well as limited social interaction with their peers in BHDC or Unit 18, during lockdowns young people have limited contact with their family, either by phone or by in person visits. These are rarely if ever facilitated due to the regime of lockdowns, with young people often going for days or even weeks without having any contact with their family or community.

For example in Unit 18, many clients reported only being allowed out of their cell to make one 10 minute phone call per day. This is totally inadequate to facilitate meaningful communication

[84] *CRU by next friend CRU2 v Chief Executive Officer of Dept of Justice* [2023] WASC 257 [7].

with loved ones and is a cause of acute psychiatric stress. Further during lockdowns, social visits were frequently cancelled. As one young person recalled during his time in Unit 18:

> [His mum] has made numerous requests to visit him at Unit 18 but four of these have been cancelled. [He] instructs that each time, he has only been told the visit 'won't be happening today' and then doesn't get to see his mum.

Young people deprived of their liberty have the right to maintain contact with their families and friends through correspondence and visits.[85] The Havana Rules emphasise that adequate communication with the 'outside world' is an integral part of the right to fair and humane treatment and is essential to prepare young people for their return to society. The Rules state that every means should be provided to ensure this communication occurs with their families, friends and support organisations within the community.[86] The Rules also specify that every young person should have the right to communicate in writing or by telephone at least twice a week with the person of their choice, and should be assisted as necessary in order to effectively enjoy this right.[87]

M. Young people are not assisted adequately with reintegration

As discussed above, due to lockdowns young people in detention have had extremely limited access to education, training and programs, which has meant that their opportunity to engage in any rehabilitation while in detention is very limited, and they are not provided with the opportunity to up-skill or better prepare themselves to find employment in the community. This all impacts upon their ability to successfully reintegrate into society upon release. As a judge described when sentencing a young person in 2023:

> It's damaging for a child like you to be locked in a cell, isolated from any stimulation, deprived of education, counselling, assistance programs and it is ultimately, and as I say, of no rehabilitative effect.

Further, the limited ability of young people to maintain connections and contact with their family, community and other supportive people outside youth detention undermines their ability to rehabilitate and reintegrate.

The Havana Rules state that there should be services in place to assist young people in re-establishing themselves in society and to lessen prejudice against them. These services should ensure, to the extent possible, that the young person is provided with suitable residence, employment, clothing, and sufficient means to maintain themselves upon release in order to facilitate successful reintegration. The representatives of agencies providing such services should be consulted and should have access to the young people while they are detained, with a view to assisting them in their return to the community.[88] The Beijing Rules further provide that efforts should be made to provide semi-institutional arrangements, such as half-way houses, educational homes, day-time training centres and other such appropriate arrangements that may assist young people in their proper reintegration into society.[89] These

[85] Havana Rules r 59; Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system*, UN doc CRC/C/GC/24 (18 September 2019) 15.
[86] Havana Rules r 59.
[87] Havana Rules r 61.
[88] Havana Rules r 80.
[89] Beijing Rules r 29.1.

arrangements are frequently not in place in Western Australia, especially in regional and remote areas, again denying young people fundamental human rights.

8. THE COMMONWEALTH'S INTERNATIONAL OBLIGATIONS IN REGARDS TO YOUTH JUSTICE INCLUDING THE RIGHTS OF THE CHILD, FREEDOM FROM TORTURE AND CIVIL RIGHTS

A. Australia's international law framework

Australia has ratified seven core international human rights treaties:

i. the *International Covenant on Civil and Political Rights* ('ICCPR');

ii. the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR');

iii. the *International Convention on the Elimination of All Forms of Racial Discrimination* ('CERD');

iv. the *Convention on the Elimination of All Forms of Discrimination against Women* ('CEDAW');

v. the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('CAT');

vi. the *Convention on the Rights of the Child* ('CRC'); and

vii. the *Convention on the Rights of Persons with Disabilities* ('CRPD').

Australia has also ratified several Optional Protocols to the treaties, including protocols establishing complaints mechanisms for the ICCPR, CAT, CEDAW and CPRD.

Australia has also declared that it supports the United Nations *Declaration on the Rights of Indigenous Peoples*. In 2009, then Minister for Families, Housing, Community and Indigenous Affairs, Jenny Macklin, remarked that the Declaration would give Australia new impetus to work together to advance human rights and close the gap between Indigenous and non-Indigenous Australians.[90] However, this statement of support also contained the caveat that the Declaration was non-binding and would not affect existing Australian law.[91]

The Mandela Rules and Havana Rules provide guidance for interpreting Australia's treaty obligations under the CRC and CAT.[92] The Mandela Rules also assist with understanding how practices of cruel, inhuman and degrading treatment in prisons may be avoided, and are made applicable to youth detainees under Rule 27 of the Beijing Rules.[93] While not legally binding, the Rules have remained an important reference by which to measure compliance with human rights of people in detention and have been adopted by the United Nations General Assembly as universally agreed minimum standards.[94] In particular, the Mandela Rules are 'the best-

[90] Jenny Macklin, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples', *Parliament of Australia* (Statement delivered at Parliament House, Canberra, 3 April 2009).
[91] Ibid.
[92] Mackay, A, 'Human rights guidance for Australian prisons: Complementing implementation of the OPCAT', (2021) *Alternative Law Journal* 46(1) 20.
[93] Ibid.
[94] UN Office on Drugs and Crime, 'The Nelson Mandela Rules: The History of the Rules', (Web Page).

known and most widely distributed document for improving conditions of detention,'[95] and given the number of experts involved and the lengthy process undertaken to update the rules, including the United Nations approval process, they are highly relevant for the purposes of achieving compliance with Australia's treaty obligations.[96] The Committee on the Rights of the Child has previously urged all State parties to fully implement these Rules, and recommends that they be incorporated into national laws and regulations.[97]

The substantive requirements of the obligations set out in the human rights treaties, and the Mandela, Havana and Beijing Rules, have been discussed in section 7 above. This section of ALSWA's submissions will therefore focus on the responsibility of the Federal Government to ensure those obligations are met.

B. The Federal Government's responsibility in relation to treaty obligations

By ratifying a treaty such as the CRC or the CAT, the Federal Government undertakes to ensure the protection of rights to all individuals in their territory and subject to their jurisdiction.[98] For example under the CRC, Australia is required to undertake 'all appropriate legislative, administrative and other measures for the implementation of rights recognised in the present Convention'.[99] States parties are also required to give effect to the obligations in good faith.[100]

Further, these obligations are binding on every State Party *as a whole.*[101] The United Nations Human Rights Committee has emphasised that although Article 2 of the ICCPR allows States to give effect to Covenant rights in accordance with domestic constitutional processes, States cannot invoke provisions of constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty.[102] In this regard the United Nations Human Rights Committee has also emphasised that Article 50 of the ICCPR specifically provides that the Covenant's provisions 'shall extend to all parts of federal states without any limitations or exceptions.'[103]

In its concluding observations on the sixth periodic report of Australia, the United Nations Committee against Torture observed that the Federal Government is primarily responsible for ensuring the implementation of the CAT and providing leadership to the state and territory governments in that context.[104] The Committee underlined the importance of the Federal

---

[95] Tiroch, K, 'Modernizing the Standard Minimum Rules for the Treatment of Prisoners – A Human Rights Perspective', (2016) *Max Planck Yearbook of United Nations Law*, 19.
[96] Mackay, A, 'The relevance of the United Nations Mandela Rules for Australian prisons', (2017) *Alternative Law Journal* 42(4) 279.
[97] Committee on the Rights of the Child, *General comment No. 10 (2007): Children's Rights in Juvenile Justice.* UN doc CRC/C/GC/10 (25 April 2007) 23.
[98] *International Covenant on Civil and Political Rights* art 2; Human Rights Committee, *General Comment No 31 [80] The Nature of the General Legal Obligations Imposed on State Parties to the Covenant,* adopted on 29 March 2004, UN doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 2.
[99] *Convention on the Rights of the Child* art 4.
[100] *Viena Convention on the Law of Treaties 1969* art 26.
[101] Human Rights Committee, *General Comment No 31 [80] The Nature of the General Legal Obligations Imposed on State Parties to the Covenant,* adopted on 29 March 2004, UN doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 2.
[102] Ibid.
[103] Ibid.
[104] UN Committee against Torture, *Concluding observations on the sixth periodic report of Australia,* UN doc CAT/C/AUS/CO/6 (5 December 2022) 3.

Government 'ensuring that the state and territory governments established legal and policy measures that are fully compliant with the Convention…'[105].

Under Australia's dualist system, treaties need to be enacted into our domestic laws in order to be enforceable.[106] The Federal Government has the power to implement treaties into domestic law under the external affairs power, s 51(xxix) of the Commonwealth Constitution.[107] We note that there are some limitations on this power, such as the Commonwealth Parliament being prohibited from significantly impairing the states or territories to function as independent governments.[108] However in our submission these limitations would not be enlivened by the Commonwealth implementing minimum standards for the detention of children and young people. Such laws would regulate the manner in which the state or territory exercises its powers in relation to detaining young people, rather than significantly impairing them in any way.

Further, the law which is said to implement a treaty must be reasonably appropriate and adapted (i.e. proportionate) to the purpose of giving effect to the objects of the treaty.[109] In our submission, the Mandela, Havana and Beijing Rules provide relevant context to the higher-level commitments contained in the international treaties. Most of the treaty obligations are broad, and as such on their own, would not translate into legislation that creates sufficient minimum standards for youth justice. The Mandela Rules and Havana Rules directly inform the treaty obligations, and in this way, can be regarded as 'reasonably appropriate and adapted' to giving effect to the treaty obligations and relied upon to implement them. This is a recognised way of implementing treaty obligations.[110] Therefore, in our submission the standards set out in the Mandela, Havana and Beijing Rules should be used to inform the drafting of legislation which implements treaties such as the CRC and CAT.

As discussed further below, Australia has not yet taken sufficient steps to implement our treaty obligations into our domestic laws, leaving significant gaps in human rights protection and drawing extensive criticism both nationally and internationally.

C. Issues in relation to Australia's compliance with human rights obligations

(a) Australia's failure to fully ratify the CRC and failure to ratify the Third Optional Protocol to the CRC

Australia continues to hold a reservation to Article 37(c) of the CRC*,* which requires that children not be detained with adults. Australia has defended this reservation by claiming that the country's geography and demography make it difficult to always detain children in juvenile facilities and simultaneously allow children to maintain contact with their families.[111] However the United Nations Committee on the Rights of the Child has previously raised that those apparent concerns are already taken into account by Article 37(c), which states that

[105] Ibid 4.
[106] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286.
[107] *Commonwealth v Tasmania* (1983) 158 CLR 1.
[108] *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31*; Austin v Commonwealth* (2003) 215 CLR 185*; Clarke v Commissioner of Taxation* (2009) 240 CLR 272*.*
[109] *Airlines of New South Wales Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54 at 82, 102, 118, 126, 141.
[110] *Victoria v Commonwealth (Industrial Relations Act Case) (1996)* 187 CLR 416, 488-489.
[111] Australian Government, *Australia's Combined Second and Third Reports under the Convention on the Rights of the Child,* (2003) [467].

incarceration with adults is prohibited 'unless it is considered in the child's best interests not to do so' and also that a 'child shall have the right to maintain contact with his or her family.'[112] The transfer of children to Unit 18 of Casuarina Prison (a Perth metropolitan prison) clearly demonstrates that children are being housed in adult prisons for reasons other than geography and maintaining contact with family, and in conditions which are not in their best interests. The Australian Human Rights Commission recommended in 2011 that Australia should withdraw its reservation to this article,[113] and the United Nations Committee on the Rights of the Child reiterated its concerns about the reservation in 2019.[114] Despite the profound human rights issues involved with detaining children in adult facilities, such as those discussed regarding Unit 18 above, this reservation remains. By removing this reservation to Article 37(c) the federal government would be signalling to the states and territories that it is serious about meeting its obligations under the CRC, and that detaining children in facilities designed for adults is unacceptable.

Further, despite Australia playing an important role in the development of the Third Optional Protocol to the CRC, to date Australia has not signed or ratified it. The Third Optional Protocol entered into force in 2014, allowing the United Nations Committee on the Rights of the Child to hear complaints that a child's rights have been violated once domestic remedies are exhausted. The Committee is able receive complaints from children, groups of children or their representatives against any State that has ratified the Protocol. The Committee is also able to launch investigations into grave or systematic violations of children's rights.[115]

Ratifying the Third Optional Protocol would ensure that children's rights are given the same recognition in Australia as that provided to other internationally recognised rights, such as those under the ICCPR and CAT, in relation to which Australia has signed and ratified similar Optional Protocols.[116] It will complement and strengthen existing mechanisms by providing another procedure by which children can access a remedy when domestic measures fail, in line with human rights expectations. Given that most Australian states and territories lack specific legislative protection for human rights and relevant bodies to deal with complaints of a breach of a child's human rights, an international body comprising experts on the rights of children is well-placed to deal with cases that cannot be resolved satisfactorily in Australia. Ratifying the Protocol would represent a significant step forward in the promotion and protection of Australian children's rights in the international arena.

(b) Australia's failure to implement ratification of the Optional Protocol to the CAT

In 2017 Australia ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('OPCAT'), which aims to improve how

---

[112] Committee on the Rights of the Child, *Committee on the Rights of the Child Concluding Observations: Australia,* UN doc CRC/C/15/Add.268 (20 October 2005); Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention: Concluding Observations,* UN doc CRC/C/AUS/CO/4 (28 August 2012).

[113] Australian Human Rights Commission, *Information concerning Australia and the Convention on the Rights of the Child – Australian Human Rights Commission Submission to the Committee on the Rights of the Child,* (August 2011) recommendation 7.

[114] United Nations Human Rights Office of the High Commissioner, 'Committee on the Rights of the Child reviews the report of Australia', (Media Release, 10 September 2019).

[115] *Optional Protocol to the Convention on the Rights of the Child on a communications procedure,* adopted 19 December 2011, General Assembly Resolution A/RES/66/138.

[116] *Optional Protocol to the ICCPR; Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty; Optional Protocol to the CAT.*

people's human rights are protected when they are detained. It establishes a system of dual level monitoring of places where people are deprived of their liberty, namely the National Preventive Mechanism ('NPM') at a domestic level, and the United Nations Subcommittee on the Prevention of Torture ('SPT') at the international level. By ratifying OPCAT, Australia agreed to be bound by the treaty and signalled that it would comply with it. That means that Australia is obliged to set up, designate or maintain NPMs, and commit to establishing a system of regular preventive visits to places where people are deprived of their liberty, as well as allowing the SPT to have unfettered access to places of detention.[117] Australia's extended deadline for establishing this system was 20 January 2023.[118]

Being a federal system, Australia opted for a multi-NPM system, with the relevant Commonwealth, states and territories asked to designate their own NPMs within their relevant jurisdictions.[119] While the Commonwealth has established an NPM for places of detention under control of the Commonwealth (such as immigration detention centres and detention centres managed or controlled by the Australian Federal Police or Australian Defence Force[120]) not all states and territories have established their own NPMs: New South Wales, Queensland and Victoria have not yet designated their NPMs.[121] Given that this is still the case in 2024, it means that Australia has missed its compliance deadline for OPCAT, and concerningly, means that not all places of detention are being subject to domestic monitoring as envisaged by OPCAT. This leaves significant gaps in the system of rights protection for persons detained in prisons and youth detention centres in Australia.

Further, the decision by the SPT in October 2022 to suspend its visit to Australia, and in February 2023 to terminate its visit, is a stark example of Australia's failure to meet OPCAT commitments. The SPT cited a lack of cooperation by some states, having being refused entry to places of detention in New South Wales and Queensland,[122] as one of the reasons for their decision to suspend the visit and highlighted that this was 'a clear breach by Australia of its obligations under OPCAT'.[123] Australia is one of only four countries to have ever had the SPT suspend or terminate a visit.[124]

Many of the existing NPMs responsible for oversight of prisons and youth detention centres have repeatedly noted they face significant challenges arising from limited resourcing available to them both to implement and undertake this new role.[125] There has also been criticism by

[117] Commonwealth Ombudsman, *Annual Report of the Commonwealth National Preventive Mechanism under the Optional Protocol to the Convention Against Torture (OPCAT)* (2023) 7.
[118] Australian Human Rights Commission, 'Human Rights Commission calls for urgent action to address fallout from suspension of UN SPT visit', (Media Release, 24 October 2022).
[119] Australian Human Rights Commission, 'OPCAT: Optional Protocol to the Convention against Torture' (Web Page).
[120] Commonwealth Ombudsman, *Annual Report of the Commonwealth National Preventive Mechanism under the Optional Protocol to the Convention Against Torture (OPCAT)* (2023) 8.
[121] Association for the Prevention of Torture, 'OPCAT Database: Australia'. Available at: <https://www.apt.ch/knowledge-hub/opcat/australia>.
[122] United Nations Human Rights Office of the High Commissioner, 'UN torture prevention body suspends visit to Australia citing lack of co-operation', (Media Release, 23 October 2022).
[123] Ibid.
[124] Australian Human Rights Commission, 'OPCAT: Optional Protocol to the Convention against Torture' (Web Page).
[125] See for example: Australian Capital Territory Inspector of Correctional Services, *Annual Report 2022-2023,* (October 2023) 21; Office of the Inspector of Custodial Services WA, *Annual Report 2022-2023*, (September 2023) 38; Northern Territory Ombudsman, *Annual Report 2022-2023,* (September 2023) 14-16; South Australian Training Centre Visitor, *Annual Report 2022-2023*, (September 2023) 5.

Western Australia's NPM, the Inspector of Custodial Services, that lack of agreement between the Western Australian Government and the Commonwealth has delayed meaningful progression of the OPCAT in Western Australia and nationally. In 2021 the Inspector noted:

> The delay in achieving national consensus and agreement has stalled further meaningful steps towards implementing the protocol … Without national agreement around implementation, it has not been possible for us to commit resources to developing important processes and structures around how we will undertake this new work. This includes: the development of legislation to expand our jurisdiction to cover inspection of police lockups; the development of appropriate inspection standards and protocols; preparing reporting frameworks and templates; identification of resource needs; and the development of consultation networks with civil society groups that should have input into OPCAT activities.[126]

In September 2023, the Disability Royal Commission made several recommendations on OPCAT ranging from widening the definition of 'place of detention' to providing adequate resourcing to NPMs.[127]

The Australian Human Rights Commission has also made a number of recommendations regarding the implementation of OPCAT.[128] A key recommendation is that the Australian government introduce primary legislation to ensure full effect is given to the provisions of OPCAT and the national coordination of Australia's OPCAT response. This legislation should provide powers of unfettered access to all places of detention by NPMs and the SPT, as well as include provisions dealing with the operation, structure and independence of the NPMs.[129] The need for legislation to incorporate the key OPCAT provisions on NPMs has been long advocated for by the SPT, who has stated that the adoption of such legislation is a 'crucial step to guaranteeing this compliance.'[130] However, the Australian Government has previously stated that it does not intend to enact legislation that enshrines the NPM model or inspections by the SPT.[131]

The SPT also released a report in December 2023 expressing concern about the implementation of OPCAT in Australia in many ways, including the concerns around existing gaps in NPM designation and the lack of legislation. The SPT was also concerned that there appears to be a fundamental lack of understanding among both federal and state authorities of the OPCAT, the State party's obligations and the mandate and powers of the SPT, and a discourteous and in some cases hostile reception from a number of Australian government authorities and officials in places of deprivation of liberty.[132]

Therefore as it currently stands, Australia has failed to meet its obligations under the OPCAT. Urgent attention needs to be given to the full implementation of Australia's responsibilities

---

[126] Office of the Inspector of Custodial Services, *Annual Report 2020-2021,* (28 September 2021) 19.
[127] Disability Royal Commission, *Criminal justice and people with disability,* (Final Report, Volume 8) (29 September 2023) 71 – 72; Disability Royal Commission, *Independent oversight and complaint mechanisms,* (Final Report, Volume 11), (29 September 2023) 89 - 111.
[128] Australian Human Rights Commission, *Road Map to OPCAT Compliance,* (17 October 2022).
[129] Ibid.
[130] Subcommittee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Visit to the Netherlands for the purpose of providing advisory assistance to the national preventive mechanism: recommendations and observations addressed to the State party*, UN doc CAT/OP/NLD/1 (3 November 2016) 26.
[131] Australian Human Rights Commission, *Implementing OPCAT in Australia,* (2020).
[132] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Visit to Australia undertaken from 16 to 23 October 2022: recommendations and observations addressed to the State party,* UN Doc CAT/OP/AUS/ROSP/1 (20 December 2023).

under the OPCAT to implement systems of oversight for all places of detention in the country, particularly given the egregious human rights breaches that continue to occur in youth detention facilities. The implementation of a mechanism for the conduct of inspections at all juvenile detention centres would establish consistent, regular and systematic monitoring of detention conditions, and be an important safeguard against the mistreatment of children in juvenile detention.[133]

(c) Australia's failure to enact national legislation which implements its human rights obligations

Australia has not yet implemented all of its obligations under international human rights treaties into domestic law. The legal protection of human rights in Australia currently relies on a patchwork of statutory, common law and constitutional protections at the State and Federal levels. This patchwork offers limited protections that do not comprehensively cover the full range of human rights recognised under international law. While the ACT, Victoria and Queensland have enacted their own Human Rights Acts, Western Australia and the remaining states and territories have not, and there is similarly no equivalent legislation at the federal level. This has meant that decisions such as those to transfer children to an adult prison, and to keep children detained in solitary confinement, can be challenged in certain states (like Victoria) but not in others.[134]

In relation specifically to youth justice, Australia has taken no active steps to comprehensively implement the CRC, often stating that this is difficult to achieve at the national level because state and territory governments are responsible for delivering many of the programs and services that give effect to Australia's obligations, including in relation to matters such as education, health, youth justice and child protection.[135] As a result there is a significant implementation gap in Australia with respect to children's rights, with legal protections existing in a piecemeal and inconsistent way across the country. Certain concepts which are included in the CRC (such as the concept of best interests and imprisonment as a last resort) are included in some domestic laws; however this is not consistent across Australia and many more of the important concepts in the CRC are not reflected in domestic laws at all (such as the prohibition on cruel, inhumane and degrading treatment). In addition, very few steps have been taken to implement the rules set out in international instruments such as the Mandela Rules and the Havana Rules. The legal protection for child rights are not comprehensive and nor do they provide an effective remedy for violations.

The United Nations Committee on the Rights of the Child has previously recommended that Australia enact comprehensive national child rights legislation incorporating the CRC and providing clear guidelines for its consistent and direct application throughout the states and territories.[136] It has also called on the Australian Government to ensure it assesses the impacts of all legislation on child rights.[137] Australia needs to strengthen its efforts to bring its domestic

---

[133] Australian Human Rights Commission, *Information concerning Australia and the Convention on the Rights of the Child: AHRC Submission to the Committee on the Rights of the Child,* (August 2011) [176].
[134] See for example: *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* [2016] VSC 796.
[135] Australian Government, 'Committee on the Rights of the Child: List of Issues in relation to the combined fifth and sixth reports of Australia', (June 2019) 1.
[136] Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia,* UN doc CRC/C/AUS/CO/5-6 (1 November 2019) 2.
[137] Ibid.

laws and practice into conformity with the principles of the CRC, and to ensure effective remedies will always be available in case of violation of the rights of the child.[138]

Beyond the benefits that legislation can have in ensuring government accountability and driving greater understanding and commitment to child rights principles at all levels of government, the incorporation of the CRC at a national level has impacts outside the legal system too.[139] It means that decision-making by policy makers is better informed by the rights of the child and has been shown to generate a greater culture of respect for children as individuals, leading to important reforms and other progressive changes in how children are treated.[140]

To comprehensibly protect the rights of children and young people, ALSWA submits that the Federal Government should enact comprehensive child rights legislation as well as a Human Rights Act which implements all of the key international human rights treaties that Australia is party to, and other key human rights instruments including the *United Nations Declaration on the Rights of Indigenous Peoples.* This would allow young people who are detained to have greater protection of their rights and the ability to seek redress for any breaches of their rights. Legislated human rights protections would also help Australia to build a culture of respect for the human rights of people in all contexts.

(d) Australia's failure to act as a leader in relation to youth justice and ensure that all children everywhere are treated the same and their rights are respected

The criticisms that continue to be levelled at Australia by the United Nations Committee on the Rights of the Child, such as the inhumane conditions in youth detention, the high rates of incarceration of Aboriginal youth and the lack of comprehensive national child rights legislation,[141] demonstrate that Australia is failing to act as a global leader in relation to youth justice and is fundamentally failing to protect the rights of children and young people. The crisis that many states and territories currently face in relation to youth justice highlights the need for the Federal Government to take urgent action to ensure that children's rights are respected all across the country.

<u>Age of criminal responsibility</u>

One critical example of Australia's failure to act as a leader in relation to youth justice is the issue of low and inconsistent ages of criminal responsibility across the country. Australia's average minimum age of criminal responsibility, which has been 10 years old across all states and territories until recently, falls short of internationally accepted standards and is one of the lowest ages in the OECD.[142] The age of criminal responsibility has repeatedly been criticised as being too low by the United Nations Committee on the Rights of the Child, the United Nations Committee on the Elimination of Racial Discrimination, international human rights

[138] Committee on the Rights of the Child, *Committee on the Rights of the Child Concluding Observations: Australia,* UN doc CRC/C/15/Add.268 (20 October 2005).
[139] Australian Human Rights Commission, *'Help way earlier!': How Australia can transform child justice to improve safety and wellbeing,* (21 June 2024).
[140] Ursula Kilkelly and Laura Lundy, 'Does legal incorporation of the UN CRC matter?' (4 September 2020).
[141] Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia,* UN doc CRC/C/AUS/CO/5-6 (1 November 2019).
[142] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Visit to Australia undertaken from 16 to 23 October 2022: recommendations and observations addressed to the State party,* UN Doc CAT/OP/AUS/ROSP/1 (20 December 2023) 5 – 6.

organisations and domestic human rights organisations and advocates. While neither the CRC nor the Beijing Rules determine an appropriate minimum age for criminal responsibility, the United Nations Committee on the Rights of the Child has stated that 14 years of age is the absolute minimum and that States should work towards higher age levels.[143] While some Australian states and territories have progressed reforms to raise the age of criminal responsibility, with a raise to 14 years old (with some exceptions) in the Australian Capital Territory,[144] the age of criminal responsibility remains too low in other jurisdictions. Although the Northern Territory has raised the age of criminal responsibility to 12 years old,[145] the government has recently announced its intention to lower the age back to 10 years old.[146] Further, Victoria recently introduced a Bill to raise the age to 12 years old,[147] after backflipping on a commitment to raise the age to 14.[148]

ALSWA believes that the age of criminal responsibility should be raised in all Australian jurisdictions from 10 years of age to 14 years of age for all offences. Raising the age of criminal responsibility is appropriate and necessary given the current evidence regarding the psychological, cognitive and neurological development of children,[149] and would mean that very young Aboriginal children would avoid the detrimental consequences of early contact with the criminal justice system, which is particularly relevant given the current state of the youth detention system in Western Australia.

The minimum age of criminal responsibility has a significant impact on justice, social outcomes and children's rights. As such, a consistent and coordinated national approach to raising the age is necessary to ensure that Australia is meeting our international obligations and respecting the human rights of children and young people in all states and territories. The current inconsistent minimum ages and fragmented approaches to reform risk exacerbating existing inequalities and creating discriminatory outcomes for children.[150] Further, the recent announcement by the Northern Territory government of its intention to lower the age of criminal responsibility back to 10 years old demonstrates that the debate continues and highlights why consistent guidance is needed across the country.[151] ALSWA notes that the Council of Attorneys-General convened a working group in 2019 to look into standardising any increase in the minimum age across Australia. That Working Group finalised a draft report, released publicly in 2022, which made a number of recommendations including in relation to an

[143] Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system*, UN doc CRC/C/GC/24 (18 September 2019) 6; UNICEF Regional Office for Europe and Central Asia, *Systematic Responses to Children Under the Minimum Age of Criminal Responsibility who have been (Allegedly) Involved in Offending Behaviour in Europe and Central Asia,* (Guidance Note, December 2022) 9.
[144] *Justice (Age of Criminal Responsibility) Legislation Amendment Act 2023* (ACT).
[145] *Criminal Code Amendment (Age of Criminal Responsibility) Act 2022* (NT).
[146] Australian Human Rights Commission, *'Help way earlier!': How Australia can transform child justice to improve safety and wellbeing,* (21 June 2024) 92.
[147] *Children, Youth and Families Amendment (Raise the Age) Bill 2022* (VIC).
[148] Amnesty International, 'Shocking backflip on raising the age of criminal responsibility a profound betrayal by Victorian Labor Government', (13 August 2024).
[149] See for example: Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system*, UN doc CRC/C/GC/24 (18 September 2019) 6 - 7; *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory,* (Final Report Volume 1, 2017) 133.
[150] Australian Human Rights Commission, *'Help way earlier!': How Australia can transform child justice to improve safety and wellbeing,* (21 June 2024) 92.
[151] Grace Robbie, 'Lawyers slam 'unacceptable' plan by incoming NT government to lower age of criminal responsibility,' *LawyersWeekly* (Online, 2 September 2024).

appropriate age of criminal responsibility (being 14 years of age), but this was not agreed to by all jurisdictions nor was it provided to the Council of Attorneys-General for consideration.[152] The Standing Council of Attorneys-General Minimum Age of Criminal Responsibility Working Group subsequently released a further report on the issue in September 2023.[153] That report demonstrates that there is existing broad agreement across the federation on the types of system reforms required and provides a framework and guidance to jurisdictions to raise the age. The Federal Government now has the opportunity to build on this agreement and commit to whole-of-government action across the federation on this issue, including setting a minimum age to apply across all jurisdictions.

Mandatory minimum sentencing laws

Another issue is the existence of mandatory minimum sentencing laws for children in some Australian jurisdictions. The United Nations Committee on the Rights of the Child has repeatedly raised concerns about the application of such laws in the Northern Territory and Western Australia, stating that such laws contravene the CRC.[154] Under the CRC, criminal justice responses for children must be age-appropriate, proportionate and rehabilitative,[155] which is something that mandatory sentences of any kind, and particularly detention, undermine. Further, mandatory minimum sentences are incompatible with the principle enshrined in the CRC that detention should be a measure of last resort,[156] and they have a disproportionate impact on Aboriginal people.[157] The Northern Territory has since repealed many of its provisions, however minimum mandatory sentences for certain offences still apply to children in Western Australia.[158] This issue would similarly benefit from national guidance and must be addressed to prevent Australia continuing to contravene international law.

Solitary confinement

As discussed above, solitary confinement of children has been occurring regularly in youth detention centres across the country, in direct conflict with international law. While the power to isolate a child in a detention facility is subject to statutory limitations, these protections vary by jurisdiction, and no jurisdiction prohibits solitary confinement.[159] The example provided above of Western Australia's legislative scheme regarding confinement of children represents a significant violation of international law and ALSWA submits that national intervention is needed to end this extremely harmful and inhumane practice.

Lack of national oversight and investment in youth justice

[152] Council of Attorneys-General, *Age of Criminal Responsibility Working Group DRAFT Final Report 2020.*
[153] Standing Council of Attorneys-General, *Age of Criminal Responsibility Working Group Report,* (September 2023).
[154] Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia,* UN doc CRC/C/AUS/CO/5-6 (1 November 2019) 14; Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system*, UN doc CRC/C/GC/24 (18 September 2019) 13.
[155] *Convention on the Rights of the Child* art 40.
[156] *Convention on the Rights of the Child* art 37.
[157] *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory,* (Final Report Volume 4, 2017) 172.
[158] *Criminal Code Act Compilation Act 1913* (WA) ss 297, 318 & 401(4).
[159] Royal Commission into Violence, Abuse, Neglect & Exploitation of People with Disability, *Independent oversight and complaint mechanisms,* (Final Report, Volume 8) (29 September 2023) 105.

Finally, ALSWA considers that there has been a failure to consider disparate youth justice issues across Australia as a national priority. The dominant punitive rhetoric on the issue of youth crime has led to a lack of political will to reform the youth justice system and a lack of strong leadership and commitment to change. Although past inquiries and Royal Commissions have been held into youth justice issues at state, territory and federal levels, governments across Australia have been criticised for failing to act on recommendations from those inquiries, with no accountability for these failures.[160] For example, the Australian Institute of Family Studies has identified that there has been at least 61 reports and inquiries into child protection and child justice between 2010 and 2022, producing 3005 recommendations for reform of those systems.[161] Relevant governments have responded to just 51% of those reports and inquiries in some way.[162] In addition, despite the importance of the Royal Commission into Aboriginal Deaths in Custody ('RCADIC') in highlighting the continued over-representation of Aboriginal and Torres Strait Islander children and young people in the youth justice system, many of its recommendations remain to be implemented in Western Australia and other jurisdictions, and deaths in custody, including deaths in youth detention, continue at alarming rates. ALSWA submits that the Federal Government should hold a Royal Commission into Youth Justice and ensure a coordinated and consistent approach to addressing the many issues in youth justice across Australia. However, it is critical that such a Commission be conducted in such a way that ensures that the recommendations are acted on as quickly as possible, to avoid being faced with the same issues regarding the lack of implementation of the RCADIC.

Further, a greater commitment to funding reform of the youth justice system needs to occur at a national level. Recent Federal funding allocations have centred on building and expanding youth detention centres, instead of funding justice reinvestment programs and youth diversionary programs that successfully keep young people out of the criminal justice system.[163] The Federal Government urgently needs to provide more funding to these programs to ensure the root causes of the issues facing youth justice in Australia are adequately resourced. Resources should also be provided to state and territory governments to implement the outstanding recommendations of the RCADIC.

D. Key steps moving forward for the Federal Government

We submit that the Federal Government needs to take the following steps as a matter of priority to ensure its obligations with international human rights obligations:

(a) remove its reservation to Article 37(d) of the CRC;

(b) ratify the Third Optional Protocol to the CRC on a communications procedure, which enables children to make individual complaints to the United Nations Committee on the Rights of the Child;

[160] Australian Human Rights Commission, *'Help way earlier!': How Australia can transform child justice to improve safety and wellbeing,* (21 June 2024) 107.
[161] Australian Institute of Family Studies, *Improving the safety and wellbeing of vulnerable children: A consolidation of systemic recommendations and evidence,* (Report, June 2024) 5.
[162] Ibid 11.
[163] Amnesty International, 'Federal budget: Labor funds more of the same and expects different outcomes for youth incarceration', (Media Release, 15 May 2024).

(c) take steps to ensure full implementation of the OPCAT, in line with Australia's ratification of the Optional Protocol;

(d) take steps to implement the United Nations *Declaration on the Rights of Indigenous Peoples*;

(e) enact national legislation to introduce a set of enforceable standards for youth justice to be observed by all jurisdictions in Australia, drawing on the CRC*,* the Havana Rules, Beijing Rules and the Mandela Rules. The need for, and benefits of, such standards, and the content of these proposed minimum standards, is discussed in more detail in section 9 below;

(f) enact a comprehensive Federal Human Rights Act and take steps to ensure equivalent Acts are introduced at the state and territory levels;

(g) hold a Federal Royal Commission into Youth Justice to examine the systemic issues and human rights violations occurring in youth justice across Australia and ensure a coordinated national and state and territory response to all of these issues; and

(h) introduce greater funding for youth justice, with a particular focus on funding for diversionary programs and holistic support programs to reduce overincarceration of young people and ensure young people receive adequate support in navigating the criminal justice system and working towards rehabilitation.

9. BENEFITS AND NEED FOR ENFORCEABLE NATIONAL MINIMUM STANDARDS FOR YOUTH JUSTICE CONSISTENT WITH OUR INTERNATIONAL OBLIGATIONS

A. The need for enforceable minimum standards

The youth justice system in Western Australia appears to endure an almost endless cycle of dysfunction and recovery, and has done so for many decades. For example, in 2013 there was a large-scale critical incident at BHDC which was precipitated in significant part by young people being locked down in their cells for extended periods.[164] A period of relative stability followed for a few years after this incident. However, by mid-2016 instability and deep dysfunction returned and critical incidents again occurred with alarming frequency, again due to a period of significant lockdowns. This cycle started again in late-2021, when conditions at BHDC deteriorated to the point where young people were being held in solitary confinement for up to 23 hours a day, and on some days not even getting out of their cells at all, in violation of the *Young Offenders Act 2004* (WA) and *Young Offenders Regulations 2005* (WA) as well as international human rights standards. Despite the Inspector of Custodial Services stating in early-2022 that BHDC was not fit for purpose as a youth detention centre,[165] the Western Australian Government did little to rectify the situation. Instead, Unit 18 of Casuarina Prison was opened to house so-called 'difficult' young people and quickly became an institution notorious for human rights abuses of the most egregious kind. These human rights abuses

[164] Office of the Inspector of Custodial Services, *Directed Review into an Incident at Banksia Hill Detention Centre on 20 January 2013*, (Report No 85, July 2013), 35 - 36; Office of the Inspector of Custodial Services, *2017 Inspection of Banksia Hill Detention Centre*, (Report No 116, February 2018) 23.

[165] Office of the Inspector of Custodial Services Western Australia, *2021 Inspection of the Intensive Support Unit at Banksia Hill Detention Centre*, (Report No 141, March 2022), iv.

continued despite two decisions by a Western Australian Supreme Court Justice which specifically found that the lockdowns were unlawful, and extensive criticisms of the lockdown regimes by OICS, Children's Court judges and the Disability Royal Commission.

In October 2023, 16-year-old Cleveland Dodd attempted to take his own life at Unit 18, the first person to do so in youth detention in Western Australia. Despite this tragedy and ongoing significant concerns about almost every aspect of the regime in Unit 18, the Western Australian Government has refused to commit to closing the unit. In August 2024 a second young person took his own life at BHDC. Both of these tragedies demonstrate that the youth justice system is in crisis and requires a complete overhaul.

While there may have been some improvements made at BHDC with the recruitment of new staff over recent months, and some repairs completed to damaged infrastructure, history demonstrates that conditions at BHDC go through periods of relative stability before they significantly deteriorate again. Further, legislation in Western Australia continues to permit human rights abuses of children in detention. For example, as discussed above, the *Young Offenders Act 1994* (WA) lawfully allows young people to be confined to their cells for 23 hours per day, which amounts to solitary confinement and is prohibited by international law.

The Western Australian experience demonstrates how the youth justice system has comprehensively failed the young Aboriginal people entrusted to its care. Grievous practices and conditions have prevailed despite the existence of numerous non-binding standards and guidance materials, including for example the Australasian Juvenile Justice Administrators' *Principles of Youth Justice in Australia (2014)* and *National Standards for Youth Justice in Australia (2023).* Although these Standards have been agreed to by all jurisdictions, they remain only 'aspirational standards of practice'.[166] The Western Australian experience also highlights that unenforceable directives have been insufficient to ensure appropriate practices and protection for children and young people.[167]

ALSWA therefore considers that urgent systemic, legal and cultural reforms are required to ensure that conditions in youth detention improve and the rights of children and young people are respected. A nationally coordinated approach to youth justice reform is needed because it is clear that the individual approaches of states and territories have been ineffective. This would provide the Commonwealth with an opportunity to take a more proactive role in how human rights and treaty obligations can be implemented in practice across the Australian jurisdictions. A national approach to youth justice would also be consistent with other social problems that are benefiting from a national approach, such as the *National Plan for Ending Violence Against Women and Children 2022-2031.*[168] A national approach has been recommended by numerous previous inquiries, such as the Atkison Report on Youth Justice

[166] Australasian Youth Justice Administrators, *National Standards for Youth Justice in Australia 2023,* (2023) 4.
[167] Save the Children, *Putting children first: A rights respecting approach to youth justice in Australia,* (April 2023) 47.
[168] Department of Social Services, *National Plan to End Violence against Women and Children 2022–2032* (Report, 11 December 2023).

in 2018,[169] and by the National Children's Commissioner Anne Hollonds.[170]

ALSWA submits that a significant part of this national approach should be the creation of national enforceable minimum standards for youth justice which are consistent with Australia's international obligations. National minimum standards would better ensure the development of consistent standards, policies, laws and practices across the states and territories, and promote equitable treatment of young people in the justice system. They could also contribute to the cultural change that is needed around youth justice, away from the current retributive narrative to a more therapeutic, rights-based approach to youth justice.

B. Proposed content for enforceable national minimum standards for youth justice

ALSWA submits that national minimum standards should reflect current research and international best practice, and be more comprehensive and have greater force than existing non-enforceable and non-binding standards and guidance material. The standards should provide consistent definitions and minimum standards for the treatment of children in detention, for example in relation to isolation practices. Key international human rights treaties, such as the CRC, CAT and CRPD, as well as the Mandela Rules, Beijing Rules and Havana Rules, should inform the basis of the minimum standards.

We submit that the Mandela, Havana and Beijing Rules provide relevant detailed standards for the implementation of articles under the CRC and CAT, thereby informing Australia's obligations under those treaties and as such can be adopted into law under the external affairs power.[171]

Based on the discussion above regarding Australia's obligations under international law, the rights of children and best practice in youth justice, ALSWA submits that the following preliminary list of principles should be included in any enforceable national minimum standards:[172]

1. Children held in detention must be separated from adults, unless it is considered in the child's best interests not to do so.[173]

2. Solitary confinement is prohibited for children. Solitary confinement is defined as confinement of more than 22 hours per day without meaningful human contact.[174]

[169] Queensland Government, *Report on Youth Justice: from Bob Atkinson AO, APM, Special Advisor to Di Farmer MP, Minister for Child Safety, Youth and Women and Minister for Prevention of Domestic and Family Violence,* (8 June 2018).
[170] Australian Human Rights Commission, *'Help way earlier!': How Australia can transform child justice to improve safety and wellbeing,* (21 June 2024).
[171] See also section 8 above.
[172] ALSWA notes that this is a preliminary proposed list and is not intended to be an exhaustive or definitive statement of what should be included in legislated minimum standards.
[173] *Convention on the Rights of the Child* art 37(c), as expanded upon by the Havana Rules r 29.
[174] *Convention on the Rights of the Child* arts 19(a) & 37(a) and *International Covenant on Civil and Political Rights* art 7, as expanded upon by the Mandela Rules rr 44 & 45 and the Havana Rules r 67.

3. Every child of compulsory school age has the right to access education suited to his or her needs, including being delivered in a language spoken by that child, or abilities commensurate to what he or she would receive in the community.[175]

4. Every child shall receive adequate medical care, both preventive and remedial, including dental, ophthalmological and mental health care, as well as pharmaceutical products and special diets as medically indicated.[176]

5. Every child should have the right to a suitable amount of time (but at one hour at the very minimum) for daily free exercise, in the open air whenever weather permits, during which time appropriate recreational and physical training should normally be provided.[177]

6. Recourse to instruments of restraint and force should be prohibited, except in exceptional circumstances where all other control methods have been exhausted and failed, and only as explicitly authorised. They should be used restrictively and only for the shortest possible period of time, and not cause humiliation or degradation.[178]

7. The carrying and use of weapons should be prohibited in any facility where children are detained.[179]

8. Children with a disability have a right to special care, assistance and access to services, and to conditions which ensure their dignity. This should include implementing systems to assess and diagnose young people when they are admitted to custody.[180]

9. Measures should be taken to promote rehabilitation of children who have been subject to neglect or abuse, in an environment which fosters the health, self-respect and dignity of the child.[181]

10. Every child in detention shall have the right to prompt access to legal assistance.[182]

11. Detention and imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time.[183]

---

[175] *Convention on the Rights of the Child* arts 28 & 29, as expanded upon by the Havana Rules rr 38 & 39.
[176] *Convention on the Rights of the Child* art 24, as expanded upon by the Mandela Rules r 27, and the Havana Rules rr 49 - 55.
[177] *Convention on the Rights of the Child* art 31, as expanded upon by the Mandela Rules r 23 and the Havana Rules r 47. The Mandela Rules specify at least one hour of exercise for adults.
[178] We consider that this standard would be captured by several provisions in human rights treaties, including the *Convention on the Rights of the Child* arts 37(c) & 40(1), and is contained expressly in the Havana Rules rr 63 & 64.
[179] We consider that this standard would be captured by several provisions in human rights treaties, including the *Convention on the Rights of the Child* arts 37(c) & 40(1), and is contained expressly in the Havana Rules r 65.
[180] *Convention on the Rights of the Child* arts 23 & 24, as expanded upon by the Havana Rules rr 49 – 51 & 53.
[181] *Convention on the Rights of the Child* art 39.
[182] *Convention on the Rights of the Child* art 37(d), as expanded upon by the Mandela Rules r 61.
[183] *Convention on the Rights of the Child* art 37(b), as expanded upon by the Havana Rules rr 1 & 2.

12. Mandatory minimum sentencing laws shall not apply to children.[184]

13. The minimum age of criminal responsibility should be 14 years of age, with no exceptions.[185]

10. CONCLUSION

History in Western Australia has shown us that the youth justice system is broken and will inevitably continue to go through cycles of dysfunction and cause irrevocable harm to children and young people. Meaningful action must be taken by the Federal Government to prevent this cycle continuing, including by fully implementing Australia's international obligations with regards to the rights of children and young people. The creation of enforceable national minimum standards for youth justice would go a significant way towards achieving this goal. However, creating these standards should not be the only step taken. A comprehensive national approach to reforming all aspects of the youth justice systems across the states and territories needs to occur, including by introducing greater funding and investment in the development of diversionary and rehabilitation programs for young people. In ALSWA's submission, nothing other than a complete overhaul of the status quo in relation to youth justice will be sufficient to address the human rights abuses that children and young people suffer in Australia on a daily basis. The Federal Government has the opportunity to lead the way and demonstrate, to everyone in Australia and internationally, that it can be a leader in reforming youth justice. But most of all, the Federal Government owes it to our young people to take immediate and urgent action to respect and protect their fundamental rights. We urge the Federal Government to act on these issues as a matter of priority.

Aboriginal Legal Service of Western Australia Limited

[184] *Convention on the Rights of the Child* arts 37(b) & 40, as expanded upon by the Havana Rules rr 1 & 2.

[185] While there is no mandated minimum age of criminal responsibility contained in human rights treaties, 14 years of age is the recommendation by the United Nations Committee on the Rights of the Child based on international best practice.

Appendix A - De-identified photo in relation to Case Study 9 on police discretion, diversion & decision to charge

Appendix B - Complaints lodged by ALSWA about BHDC and Unit 18 on behalf of Aboriginal young people

Issue		Number of complaints
Lockdowns		**78**
	No time out at all	46
	Boredom, nothing to do	13
	Eating meals in cells	22
	Lack of exercise	10
	Lack of social interactions	14
	Exacerbate disabilities	2
	Induced poor mental health, self-harm	26
	No fresh air	9
	Always inside, in the wing	8
	Unable to call family because of limited time out of cell	13
	Causes incidents/bad behaviour from young people	11
	Speak to each other through grills	4
	Handcuffed during time out of cell	8
Unit 18 conditions		**32**
	Lockdowns	18
	Use of force	15
	Education	11
	Cell conditions	12
	Access to mental health care	7
	Cameras make young person uncomfortable	7
Use of force		**35**
	3-point restraints	3
	Capsicum spray	9
	Impeded breathing by officer	5
	Folding up/ figure 4 hold	10
Sexually inappropriate behaviour by staff towards young persons		**6**
Racist language		**5**
Other staff misconduct		**13**
	Staff swearing	5
	Ignored by staff	6
	Staff taunting young person	2
Food		**15**
	Going hungry	9
	Cold or frozen	9
	Refuses to eat because of the poor hygiene in cell	1
Access to mental health care		**28**
	No action following ligature attempt	2
	Requests to see the psychologist weren't facilitated	20
	Visits with the psychologist cancelled because of lockdowns	3
	Inadequate responses to self-harm threats or self-harm actual	21
	Unable to attend drug and alcohol counselling	2
	No privacy speaking to the psychologist	2
	Mental health support is crisis focused	1
Access to education		**36**
	Limited school and programs because of lockdowns	36
	Asked for worksheets, not facilitated	1
	Primary school level work, not advanced enough	6
	Lack of disability-appropriate education	1

Access to medical care		**18**
	Inadequate examination by nurse post use of force incident	3
	External medical care not facilitated	1
	Waiting for days before seeing medical staff	6
	Long delays after using the emergency cell call button	3
Cell conditions		**31**
	No power	2
	No shower for several days while in ISU	10
	Capsicum spray on the walls, not washed off	2
	Unable to clean cell so there are bugs or rodents	5
	Toilet doesn't work	6
	Spit marks on the walls	4
	No cleaning materials provided to clean cell	3
	No water in cell	4
	No soap	1
	Wet bedding	7
	No air-conditioning	4
	Placed in a cell with other boys but only bedding for one young person	3
Hygiene issues		**3**
	No clean clothing for weeks	2
	Bedding not washed for weeks	1
	Given dirty clothing	1
Refusing basic needs as punishment		**2**
	Refusing shower as punishment	2
	Refusing calls with family as punishment	1
	Refusing meals if young person didn't hand over self-harming instrument	1
Placement in the Intensive Support Unit		**9**
	Poor communication as to reasons for placement	5
	Poor communication as to when/how to leave placement	6
Access to lawyers		**6**
Disability appropriate care		**3**
	Staff did not understand young person's diagnosis and how to respond appropriately	3