Human Rights Law Centre

Justice for children

Human Rights Law Centre's 2018 CROC Shadow Report

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Human Rights Law Centre

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Executive summary

The Human Rights Law Centre (**HRLC**) welcomes the opportunity to provide a shadow report to the Committee on the Rights of the Child.

Our report highlights systemic human rights abuses that undermine the health, safety and wellbeing of children residing in Australia and in jurisdictions over which Australia has direct oversight and control.

Since Australia last reported to the Committee, protection of children's rights have regressed in fundamental ways. Australia continues to imprison Aboriginal and Torres Strait Islander children at some of the highest rates of any minority group in the world. Around 600 children under the age of 14 are locked away in youth jails each year. Children remain trapped in limbo in Australia's cruel off-shore detention centre on Nauru. And religious organisations are still permitted, in law, to discriminate against lesbian, gay, bisexual and transgender children.

Australia should be a world leader when it comes to protecting the rights of children. Unfortunately, Australian governments have much work to do to address the following:

- criminalisation of young and vulnerable children by maintaining an indefensibly low age of criminal responsibility;
- failure of governments to divert children from the formal criminal legal system.
- punitive and harsh responses to children in trouble with the law through youth justice systems geared to punishment rather than support and rehabilitation;
- abuse and mistreatment of children in youth prisons, particularly through routine strip searching, solitary confinement, excessive use of force and restraints;
- indefinite offshore detention of children and families in Nauru and Manus Island in conditions that compromise their lives and safety;
- forced separation of asylum seeker and refugee children and families as part of the Australian Government's punitive offshore immigration processing policy;
- high levels of violence, discrimination and bullying of lesbian, gay, bisexual, trans and intersex (LGBTI) children in schools and online;
- discrimination of LGBTI children by religious organisations, facilitated by religious exemptions in discrimination laws;
- unequal respect and recognition of trans and gender diverse children and the inability to change their legal gender to reflect their gender identity; and
- forced, coercive or otherwise involuntary modification of sex characteristics of intersex children.

This report makes targeted recommendations aimed at remedying the injustices highlighted above.

Summary of recommendations

Australian governments should:

1 Raise the age of criminal responsibility to at least 14 years.

2 Divert children away from the criminal legal system by:

   a) properly resourcing culturally appropriate health, education, housing and social services; and

   b) changing laws and policies to make diversion the primary preference of police and courts.

3 Change bail laws to drastically reduce the number of children held on remand (pre-trial detention).

4 Repeal mandatory sentencing laws.

5 Fully fund the implementation of the recommendations of the Royal Commission into the Protection and Detention of Children in the Northern Territory and investigate implementation across Australia.

6 End racial inequality in the youth legal system by:

   a) changing existing laws that negatively and disproportionately impact Aboriginal and Torres Strait Islander peoples and not introducing new ones;

   b) introducing Aboriginal justice agreements in every jurisdiction; and

   c) implementing justice targets and creating a framework to coordinate services, map progress and ensure accountability for ending the over-imprisonment of Aboriginal and Torres Strait Islander children.

7 Stop building new youth prisons, and develop alternative, smaller, child appropriate accommodation and therapeutic options to replace existing youth prisons.

8 Provide thorough medical, disability and mental health assessment and care to all children in youth prisons and tailored, community-equivalent education to all children in youth prisons.

9 Prohibit the use of routine strip searches, restraints, excessive force and solitary confinement in all youth prisons.

10 Immediately bring all refugee and asylum seeker children and their families held on Nauru to safety in Australia.

11 Reunite, in Australia, all families that have been separated by offshore immigration processing.

12 Commit to funding and implementing activities to reduce violence, bullying and harassment experienced by LGBTI children.

13 Remove religious exemptions which allow government funded religious organisations and schools to discriminate against children on the basis of their sexual orientation or gender identity.

14 Commit to removing barriers to legal gender recognition for trans and gender diverse children, while sex or gender continues to be registered on birth certificates

15 Commit to introducing legislation prohibiting medical interventions on intersex infants and children without their full, free and informed consent except in cases of absolute medical necessity, and

implement the recommendations of the 2013 Australian Senate Report *Involuntary or Coerced Sterilisation of Intersex People in Australia*.

1. Children and youth justice systems

1.1. Raising the age of criminal responsibility (Articles 1 and 40(3)(a))

The current age of criminal responsibility in Australia is 10 years with a rebuttable presumption (known as *doli incapax*) that applies to children aged between 10 and 14 years. This presumption requires the prosecution to prove that at the time of the offence the child either knew or had the capacity to know that their conduct was wrong. However, this presumption fails to safeguard children because of inconsistent application, inability to access expert evidence and judicial discretion.[i]

The criminalisation of young children is a nationwide problem. Approximately 600 children below the age of 14 years are locked away in youth jails each year.[ii] Aboriginal and Torres Strait Islander children are disproportionately represented, making up almost 70 percent of young children detained.[iii] In 2016-17, approximately 8,900 children aged 10 to 13 were charged or dealt with by alternative action including cautions or diversion[iv] and 3,010 had charges finalised in the Children's Court.[v]

Criminalising the behaviour of young children creates a vicious cycle of disadvantage and forces children to become entrenched in the criminal justice system.[vi] The younger a child has their first contact with the criminal justice system, the higher the chance of future offending.[vii] On the other hand, the vast majority of children who are dealt with outside of the formal system by community based alternatives, in particular diversion, do not reoffend.[viii]

Recommendations:

We recommend that all Australian governments:

1. Raise the age of criminal responsibility to at least 14 years of age.

2. Divert children away from the criminal legal system by:

    (a) properly resourcing culturally appropriate health, education, housing and social services; and

    (b) changing laws and policies to make diversion the primary preference of police and courts.

1.2. Youth justice and detention as a last resort (Articles 37, 39 and 40)

a) The over-representation of Aboriginal and Torres Strait Islander children

The detention of a child results in a disruption to that child's life and removes them from protective influences, including family, social support, education and employment, whilst also exposing them to criminogenic experiences, including negative peer contagion, stigmatisation and victimisation.[ix]

The laws and policies of governments around Australia see Aboriginal and Torres Strait Islander young people over-represented in youth justice systems. Whilst Aboriginal and Torres Strait Islander children make up around 5 percent of the children aged 10-17 years nationally, they comprise 50 percent of the children under youth justice supervision and 58 percent of those *in detention* on an average day.[x] Aboriginal and Torres Strait Islander children are 24 times more likely as non-Indigenous children to be in detention.[xi]

b) Remand and unsentenced detention

The detention of a child results in a disruption to that child's life and removes them from protective influences including family, social support, education and employment whilst also exposing them to criminogenic experiences including negative peer contagion, stigmatisation and victimisation.[xii] More than half (61 percent of children in detention on an average day are unsentenced ('on remand') and of those more than half (55 percent) are Aboriginal and Torres Strait Islander children.[xiii] Whilst detention 'as a last resort' is legislated in Australian jurisdictions, in reality, children are often inappropriately detained on remand due to welfare and health concerns, lack of supports and programs, and lack of stable and safe accommodation.[xiv] In addition, many Australian jurisdictions lack youth-specific bail considerations and fail to safeguard children from punitive bail provisions, including the offence of breach of bail.[xv]

c) Mandatory sentencing

Mandatory sentencing laws require courts to impose a fixed penalty on offenders found guilty of particular crimes. They are inconsistent with the rights of a child, in particular that decisions regarding a child are in their best interests and that detention is a last resort. They remove the discretion of the court to consider mitigating factors or alternate sentencing options and result in harsh and unjust punishment.

In the Northern Territory and Western Australia, certain mandatory sentencing laws apply to children and disproportionately impact Aboriginal and Torres Strait Islander children.[xvi] These two jurisdictions also have the highest rates of Aboriginal and Torres Strait Islander incarceration.

d) Access to diversion and alternative measures

Once a child enters the formal criminal justice system, they are more likely to return, particularly if they are detained.[xvii] In contrast, diversion pathways, which operate outside the formal court system, are effective in helping children get back on track and reduce the risk of further offending.[xviii] Whilst most jurisdictions have legislation and policies that require police to consider diversion and other alternative measures, the vast majority of child offenders are instead charged and prosecuted through the courts.[xix] Aboriginal and Torres Strait Islander children are less likely to be offered cautions or diversion compared to non-Indigenous children.[xx]

Recommendations:

We recommend that Australian governments:

3. Change bail laws to drastically reduce the number of children held on remand (pre-trial detention).

4. Repeal mandatory sentencing laws.

5. Fully fund the implementation of the recommendations of the Royal Commission into the Protection and Detention of Children in the Northern Territory and investigate implementation across Australia.

6. End racial inequality in the youth legal system by:

   (a) changing the existing laws that negatively and disproportionately impact Aboriginal and Torres Strait Islander peoples and not introducing new ones;

   (b) introducing Aboriginal Justice Agreements in every jurisdiction; and

(c) implementing justice targets and creating a framework to coordinate services, map progress and ensure accountability for ending the over-imprisonment of Aboriginal and Torres Strait Islander children.

7. Stop building new youth prisons and develop alternative, smaller, child-appropriate accommodation and therapeutic options to replace existing youth prisons.

1.3. Conditions in youth detention and protection from torture and cruel, inhuman and degrading treatment or punishment (Article 37(c))

A significant number of children held in detention have a history of trauma or disadvantage. Approximately two thirds of children held in detention are victims of childhood abuse, trauma or neglect and may have a disability or mental health issue.[xxi] Allegations of children being abused and mistreated whilst in youth detention facilities have been ubiquitous in recent years, resulting in a litany of inquiries into the conditions and treatment of children behind bars in almost every jurisdiction in Australia.[xxii] These inquiries have confirmed that Australia is breaching its international obligations by failing to ensure children deprived of their liberty are protected and treated with dignity and humanity.

a) Solitary confinement

Whilst international law strictly prohibits the use of solitary confinement on children as cruel, inhuman or degrading treatment, every jurisdiction in Australia, bar the Northern Territory, permit its use. Legislation and policies are not uniform across Australian jurisdictions[xxiii] and some expressly permit the use of confinement for punishment whilst others enable isolation or confinement for behavioural management or in order to maintain the good governance, order or security in a detention centre.[xxiv]

While many legislative schemes don't name solitary confinement as a practice, a range of Australian detention policies permit the isolation or separation of children in circumstances that are akin to solitary confinement. Recent inquiries have confirmed children have been held in circumstances that equate to solitary confinement and that legislative and policy reforms are necessary to prohibit solitary confinement and to restrict the circumstance for permissible isolation of children.[xxv]

b) Strip searching

Strip searches are conducted routinely and frequently in youth detention centres in Australia. Only two jurisdictions, - the Northern Territory and Queensland – have changed policy to prohibit routine strip searches.

A strip search requires children to remove every item of clothing in front of two guards.[xxvi] A young person can be strip searched multiple times per day – on admission, when having a contact visit, attending court, leaving the facility, seeing a doctor or for any other reason. These searches are humiliating and degrading and cause unnecessary harm to vulnerable children. The vast majority of children in youth detention have experienced some form of trauma and many are survivors of family violence and or sexual abuse.[xxvii]

c) Restraints

The use of restraints on children remains a serious concern that has led to a number of independent investigations and inquiries. The Royal Commission into the Protection and Detention of Children in the

Northern Territory, in particular, was called to investigate the use of spit hoods, restraint chairs, shackles and handcuffs on children in detention facilities.[xxviii]

Most Australian jurisdictions permit the use of mechanical restraints on children in a broad range of circumstances including in escorts from and to detention facilities, to prevent escape or harm, to prevent damage to property or to maintain the good order and safety of the facility.[xxix] The broad nature of these laws and reliance on subjective judgements can lead to human rights breaches and the abuse of vulnerable children.[xxx]

Recent inquiries have confirmed the routine, inappropriate and unlawful use of restraints to punish children or manage behaviour or to ensure compliance with directions. The use of restraints in such circumstances expose children to harm and may result in children feeling 'degraded, shamed and humiliated.'[xxxi]

Recommendations:

We recommend that the Australian Government:

8. Provide thorough medical, disability and mental health assessment and care to all children in youth prisons and tailored, community-equivalent education to all children in youth prisons.

9. Prohibit the use of routine strip searches, restraints, excessive force and solitary confinement in youth prisons.

2. Refugee and asylum seeker children

2.1. Children held indefinitely on Nauru (Articles 3, 19, 22, 27, 34, 37 and 39)

a) Mandatory and indefinite detention

Any person seeking asylum who arrives in Australia by boat after 19 July 2013 is subject to mandatory removal and indefinite limbo in an Australian Government facility on Nauru or Manus Island, Papua New Guinea. This policy is applied without exception, including to children.[xxxii]

After five years, there are still more than 1500 people indefinitely held in Nauru and Manus Island, including 85 children being indefinitely held on Nauru.[xxxiii] Over a quarter of these children were born into offshore detention and have never experienced a single day of freedom in their lives.

The UN Special Rapporteur on the Rights of Migrants has observed that being indefinitely held on Nauru constitutes cruel, inhuman and degrading treatment.[xxxiv] The Committee on the Rights of the Child has previously observed 'reports of intimidation, sexual assault, abuse and threats of violence against families living in refugee settlements around the island, all of which has a detrimental impact on the psychological well-being of their children.'[xxxv]

b) Australia's legal responsibility

The Australian Government has frequently sought to evade its legal responsibility for the people it warehouses offshore by pointing to Nauruan sovereignty and claiming that the Australian Government only provides "support" for the arrangements.[xxxvi]

This is clearly wrong. Numerous UN treaty bodies, parliamentary committees and courts have found that the Australian Government maintains effective control over both the Manus and Nauru arrangements.[xxxvii] As such, the Australian Government remains legally responsible for the children it has sent to Nauru and the harm they endure while being held there under arrangements the Australian Government designed, funds and controls.

c) A medical crisis

As a result of the impact of prolonged indefinite detention, combined with lack of appropriate medical facilities in Nauru, rates of depression and post-traumatic stress disorder for asylum seeker and refugee children held on Nauru are among the highest ever recorded.[xxxviii] In 2018, over 25 children have been transferred for urgent medical treatment in Australia including after acts of self-harm or suicide attempts.[xxxix]

The Australian Medical Association (AMA) has described the mental health situation for children on the island as a 'humanitarian emergency requiring urgent intervention'.[xl] Several children have been diagnosed with 'resignation syndrome', a rare psychiatric condition which can cause food and fluid refusal leading to a state of profound withdrawal resulting in an unconscious or comatose state.[xli]

Médecins Sans Frontières (MSF) recently described the situation in Nauru as 'beyond desperate' and called for the immediate evacuation of all asylum seekers and refugees from the island.[xlii] Children as young as

nine told MSF staff that they would rather die than live in a state of hopelessness. Children as young as 10 have tried to kill themselves.[xliii] A 12 year old girl recently tried to set herself on fire.[xliv]

As the Special Rapporteur on the human rights of migrants has said, "repatriating all asylum seekers and refugees to the Australian mainland seems to be the only possible short-term solution".[xlv]

Recommendations:

We recommend that the Australian Government:

12. Immediately bring all refugee and asylum seeker children and their families held on Nauru to safety in Australia.

2.2. Separation of families (Articles 3, 9, 10, 14, 16 and 18)

The HRLC assists three types of separated refugee and asylum seeker families:

(a) Families permanently separated because they arrived in Australia and sought asylum on different dates.

(b) Families separated after one member is evacuated from Nauru for urgent medical treatment. In many of these cases, the Australian Government brings some of the family to Australia but chooses to leave others behind on Nauru – a cynical move designed to pressure those in Australia to return and dissuade legal claims to stay.

(c) Families separated when expectant mothers have been brought to Australia to give birth but the child's father is deliberately left behind – again, a move designed to pressure the mother and newborn to return to Nauru 'voluntarily'.

International law has long recognised that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State'.[xlvi]

Separation from family members has severe detrimental impacts on children including distress, anxiety, adjustment disorders and irreparable long-term developmental issues. The UNHCR has called for this separation to be addressed "as a matter of urgency".[xlvii] Despite these calls, the Australian Government refuses to reunite these families.

Recommendations:

We recommend that the Australian Government:

13. Reunite, in Australia, all families that have been separated by offshore immigration processing.

3. LGBTI children

3.1. Protection from discrimination & bullying (Articles 2, 19, 28 and 29)

LGBTI children in Australia face unacceptably high levels of violence, discrimination and bullying in schools and online. For example, 61 per cent of same-sex attracted young people report experiencing verbal homophobic abuse,[xlviii] and the 2017 *Trans Pathways* survey found that almost 70 per cent of trans young people had experienced discrimination.[xlix]

These experiences of discrimination cause staggering rates of mental illness, self-harm and suicide for LGBTI children. For example, 46 per cent of young lesbian women reported self-harm and 1 in 5 had attempted suicide.[l] Almost 80 per cent of young trans people surveyed in 2017 had self-harmed and almost half of trans young people had attempted suicide.[li]

All children deserve safe and inclusive learning environments, and to be free from violence or discrimination on the basis of their sexual orientation, gender identity or sex characteristics.

There have been positive developments in removing discrimination against LGBTI people, including marriage equality, adoption equality and legal protections against discrimination. However, in 2016, the Australian Government withdrew funding for the LGBTI anti-bullying program *Safe Schools*, which now receives inconsistent funding depending on state or territory government support for the program.

Recommendations:

We recommend that the Australian Government:

14. Commit to funding and implementing activities to reduce violence, bullying and harassment experienced by LGBTI children.

Federal discrimination laws allow religious organisations – including government funded religious schools and family violence and housing services – to discriminate against LGBT children where this is in accordance with religious doctrines, tenets or beliefs or where necessary to avoid injury to religious susceptibilities of adherents of that religion.[lii]

Laws which sanction discrimination against LGBT children affect students' mental health and learning, create an authorising environment for discrimination, and reduce the likelihood of a child seeking help when subjected to bullying based on their sexual orientation or gender identity. A 2017 survey revealed that almost 80 per cent of trans young people have experienced bullying in educational institutions.[liii]

Recommendations:

We recommend that the Australian Government:

15. Remove religious exemptions which allow government-funded religious organisations and schools to discriminate against children on the basis of their sexual orientation or gender identity.

3.2. Legal recognition of gender for trans and gender diverse children (Articles 2, 7 and 8)

Across most states and territories in Australia, outdated legal barriers prevent trans and gender diverse children from changing their legal gender to reflect their gender identity.[liv]

Trans and gender diverse children should be legally recognised for who they are, and barriers to socially transitioning and being accepted in schools and by peers should be removed.[lv]

The Australian Government Guidelines on the Recognition of Sex and Gender have improved access to passports in the affirmed gender of Australian citizens, without requiring invasive medical procedures and allowing access to an "X" marker.[lvi]

However, most state and territory laws fall short of international best practice and generally require sterilisation, a person to be aged over 18 and only allow access to "male" or "female" classifications.[lvii]

Recommendations:

We recommend that the Australian Government:

16. Commit to removing barriers to legal gender recognition for trans and gender diverse children, while sex or gender continues to be registered on birth certificates

3.3. Forced & coerced medical interventions on intersex children (Article 24)

Intersex infants and children in Australia are subjected to medically unnecessary procedures before they are old enough to provide informed consent (e.g. surgical sterilisation).[lviii] Critical peer support services for intersex people are under-funded,[lix] and there is a notable lack of redress and compensation, support and rehabilitation for intersex people who have been subjected to medically unnecessary procedures.[lx]

The Yogyakarta Principles Plus 10 require all States to ensure that laws protect everyone from all forms of forced, coercive or otherwise involuntary modification of their sex characteristics.[lxi]

In 2013, the Australian Senate Community Affairs References Committee released its report on the involuntary or coerced sterilisation of intersex people in Australia.[lxii] However, these recommendations have not been implemented across Australia.

Recommendations:

We recommend that the Australian Government:

17. Commit to introducing legislation prohibiting medical interventions on intersex infants and children without their full, free and informed consent except in cases of absolute medical necessity, and implement the recommendations of the 2013 Australian Senate Report *Involuntary or Coerced Sterilisation of Intersex People in Australia.*

[i] See O'Brien, W. & Fitz-Gibbon, K. (2017) 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform', Youth Justice, vol. 17, no.2.
[ii] Australian Institute of Health and Welfare (AIHW) (2017) Youth Justice in Australia 2015-16, AIHW Bulletin no. 139. Cat. AUS 211, supplementary data table S78b, Young people in detention during the year by age, sex and Indigenous, AIHW, Canberra.
[iii] Ibid.
[iv] Australian Bureau of Statistics (ABS) (2018), Recorded Crime - Offenders, 2016-17, Youth Offenders, Supplementary Data Cube, Table 21, Cat No 4519.0, ABS, Canberra.
[v] Australian Bureau of Statistics (2018), Criminal Courts, Australia 2016-17, Supplementary Data Cube, Table 2, Cat No 4513.0, ABS, Canberra.
[vi] Australian Institute of Health and Welfare 2016. Young people returning to sentenced youth justice supervision 2014–15. Juvenile justice series no. 20. Cat. no. JUV 84. Canberra: AIHW: The younger a person was at the start of their first supervised sentence, the more likely they were to return to sentenced supervision. For those whose first supervised sentenced was community-based, 90% of those aged 10-12 at the start of this sentence returned to sentenced supervision, compared with 23% of those aged 16 and just 3% of those aged 17. More staggering were those sentenced to detention as their first supervised sentence, all (100%) those aged 10-12 at the start of this sentence returned to some type of sentenced supervision before they turned 18. This rate of return decreased with age, to around 80% of those 14 and 15, 56% of those 16 and 17% of those 17.
[vii] Ibid and Australian Institute of Health and Welfare (2014), Pathways through youth justice supervision. Juvenile justice series no. 15. Cat. no. JUV 40. Canberra: AIHW, 15.
[viii] Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, Final Report (November 2017), Volume 2B, Chapter 27, 413.
[ix] Parliament of Victoria, Legal and Social Issues Committee, Inquiry into youth justice centres in Victoria, Final Report, March 2018, 71; Queensland Government, Department of Child Safety, Youth and Families, Bob Atkinson, Report on Youth Justice, 8 June 2018, 53; Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, Final Report (November 2017), Volume 2B, Chapter 25, 283-285.
[x] Australian Institute of Health and Welfare 2018. Youth Justice in Australia 2016–17. Cat. no. JUV 116. Canberra: AIHW, 7-8.
[xi] Ibid.
[xii] Parliament of Victoria, Legal and Social Issues Committee, Inquiry into youth justice centres in Victoria, Final Report, March 2018, 71; Queensland Government, Department of Child Safety, Youth and Families, Bob Atkinson, Report on Youth Justice, 8 June 2018, 53; Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, Final Report (November 2017), Volume 2B, Chapter 25, 283-285.
[xiii] Australian Institute of Health and Welfare 2018. Youth Justice in Australia 2016–17. Cat. no. JUV 116. Canberra: AIHW, 15-16.
[xiv] Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, Final Report (November 2017), Volume 2B, Chapter 25, 278-290; Northern Territory Government, J Carney, Review of the Northern Territory Youth Justice System: Report (2011), 50; Commonwealth of Australia, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Doing Time–Time for Doing: Aboriginal and Torres Strait Islander Youth in the Criminal Justice System (2011), 219-229.
[xv] Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, Final Report (November 2017), Volume 2B, Chapter 25, 278-301.
[xvi] In Western Australia, mandatory sentencing provisions applicable to children include: s 401(4)(a) Criminal Code which requires 12 months for repeat home burglary. In addition a number of serious offences committed during the course of an aggravated home burglary (including ss279(6A), 280(3), s280(4), 283(3), 294(3), 297(6), 321(15), 320(8), 324(4), 325(3), 326(3), 327(3), 328(3), 330(11) of the Criminal Code (WA)) will result in a sentence of 3 years either imprisonment or detention that cannot be suspended. In the Northern Territory, a second or subsequent breach of a domestic violence order must result in 7 days detention or imprisonment, s122 Domestic and Family Violence Act (NT).
[xvii] Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, Final Report (November 2017), Volume 2B, Chapter 25, 210; Sentencing Advisory Council, Reoffending by Children and Young People in Victoria (2016), 37-41.
[xviii] Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, Final Report (November 2017), Volume 2B, Chapter 25, 249-259;Northern Territory Government, Carney J, Review of the Northern Territory Youth Justice System: Report (2011), 94-96. See further New Zealand Police, Police Youth Services Group, Kaye McLaren, Alternative Actions That Work: A Review of the Research on Police Warnings and Alternative Action (2011).
[xix] For example, the Western Australian Office of the Auditor General found that police divert young people less than half of the time. Between 2012 and 2016 there were recorded 23,730 young people who committed 106,169 offences and of those, police could have diverted (ie the children and offences were eligible for diversion) between 88 and 96%, but diverted less than half (between 40 and 49%). Office of the Auditor General Western Australia, Diverting Young People Away From Court, November 2017. See further Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, Final Report (November 2017), Volume 2B, Chapter 25, 259.
[xx] Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, Final Report (November 2017), Volume 2B, Chapter 25, 258. In the Northern Territory in 2015, just 32.6% of Aboriginal children were diverted compared with 47.9% of non-Indigenous children. Further in the recent WA office of the Auditor General report above, n19- found that police divert Aboriginal young people less than non-Aboriginal youth with a 35% diversion rates for Aboriginal youth compared to 58% of non-Aboriginal youth over the 2012-2016 period.
[xxi] Commission for Children and Young People, The same four walls: inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system (2017), 6; In addition the Royal Commission confirmed that 'many children and young people enter detention with serious cognitive disabilities, mental illness, addiction to nicotine, alcohol and other drugs as well as physical deficits such as poor hearing and sight, and, in some cases, also functional illiteracy.' Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, Interim Report, (31 March 2017), 38.
[xxii] See for example the Royal Commission into the Protection and Detention of Children in the Northern Territory (2016-2017), the Queensland Independent Review of Youth Detention Centres (2016), the Victorian Children's Commissioner Inquiry into the use of isolation, separation and lockdown at children's prisons in Victoria (2017); Western Australia's Office of the Inspector of Custodial Services' examination of "behaviour management" practices at Banksia Hill (2017); New South Wales' Inspector of Custodial

Services' inquiry into use of force against detainees in Juvenile Justice Centres; ACT Human Rights Commission review of Bimberi practices including the use of force and strip-searching (2017).

[xxiii] Across Australia multiple terms are used to describe certain detention practices that can amount to solitary confinement in given situations, including: isolation, segregation, seclusion and separation- see further Australian Children's Commissioners and Guardians, Human rights standards in youth detention facilities in Australia: the use of restraint, disciplinary regimes and other specified practices (April 2016), 60-63.

[xxiv] Australian Children's Commissioners and Guardians, Human rights standards in youth detention facilities in Australia: the use of restraint, disciplinary regimes and other specified practices (April 2016), 60; Commission for Children and Young People, The same four walls: inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system (Melbourne: Commission for Children and Young People, 2017), 5; Children's Commissioner NT, Don Dale Youth Detention Report to Minister, September 2015; Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, Final Report, 2017, Volume 2A, 332.

[xxv] Commission for Children and Young People, The same four walls: inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system (2017); Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, Findings and Recommendations (November 2017), Recommendation 14.1; Office of the Inspector of Custodial Services, Directed Review of Allegations made by Amnesty International Australia about ill-treatment at Banksia Hill Detention Centre, June 2018, Recommendation 5.

[xxvi] Australian Children's Commissioners and Guardians, Human rights standards in youth detention facilities in Australia: the use of restraint, disciplinary regimes and other specified practices (April 2016), 51-59; Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, Final Report, 2017, Volume 2A, 254-265.

[xxvii] Ibid; see further Australian Institute of Health and Welfare, National data on the health of justice-involved young people: a feasibility study 2016-17 (2017), 4-7.

[xxviii] See for example the Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, Findings and Recommendations (November 2017), 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); the Queensland Independent Review of Youth Detention Centres (2016), New South Wales' Inspector of Custodial Services' inquiry into use of force against detainees in Juvenile Justice Centres; ACT Human Rights Commission review of Bimberi practices including the use of force and strip-searching (2017).

[xxix] Australian Children's Commissioners and Guardians, Human rights standards in youth detention facilities in Australia: the use of restraint, disciplinary regimes and other specified practices (April 2016), 37-45.

[xxx] Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, Final Report, 2017, Volume 2A, 262.

[xxxi] Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, Final Report, 2017, Volume 2A, 260.

[xxxii] Operation Sovereign Borders, Department of Home Affairs, available at: http://osb.homeaffairs.gov.au/en/Outside-Australia.

[xxxiii] Kids Off Nauru, *Frequently Asked Questions*, <https://www.kidsoffnauru.com/faq/>.

[xxxiv] François Crépeau, *Report of the Special Rapporteur on the Human Rights of Migrants on His Mission to Australia and the Regional Processing Centres in Nauru*, UN Doc A/HRC/35/25/Add.3 (24 April 2017) [76]–[80].

[xxxv] Committee on the Rights of the Child, *Concluding Observations on the Initial Report of Nauru*, UN Doc CRC/C/NRU/CO/1 (28 October 2016) [30].

[xxxvi] See, for example, Committee on the Elimination of All Forms of Discrimination against Women, List of issues and questions in relation to the eighth periodic report of Australia: Replies of Australia (Advance Unedited Version) 70th sess (CEDAW/C/AUS/Q/8/Add.1) (16 March 2018) at [162].

[xxxvii] See, for example, Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) at [35]; Committee on the Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, UN Doc CERD/C/AUS/CO/18-20 (26 December 2017) at [30]; Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, UN Doc E/C.12/AUS/CO/5 (11 July 2017) at [18]; Committee on the Elimination of Discrimination against Women, *Concluding Observations on the eight periodic report of Australia*, UN Doc CEDAW/C/AUS/CO/8 (20 July 2018)at [54]; Human Rights Council, Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru, A/HRC/35/25/Add.3, (24 April 2017) at [72]-[73]; Parliament of Australia, Taking responsibility: conditions and circumstances at Australia's Regional Processing Centre in Nauru (2015); Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, Incident at the Manus Island Detention Centre from 16 February to 18 February 2014 (2014). In *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483, the Federal Court held the Australian Government owed a duty of care to a refugee living in Nauru, partly because of the degree of control exercised by the government, at [253], [276].

[xxxviii] United Nations High Commissioner for Refugees, Submission No 43 to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Serious Allegations of Abuse, Self-Harm and Neglect of Asylum-Seekers in Relation to the Nauru Regional Processing Centre, and Any Like Allegations in Relation to the Manus Regional Processing Centre*, 12 November 2016, 32. The UNHCR has repeatedly raised the impact of indefinite detention on the mental health of asylum seekers and refugees in Nauru and Manus Island: at [13]–[14].

[xxxix] Refugee Council of Australia and Asylum Seeker Resources Centre, *Australia's Man-made Crisis on Nauru: 6 years on* (September 2018), https://www.asrc.org.au/wp-content/uploads/2018/09/Nauru_Manmade_Crisis.pdf, 7, plus publicly reported cases.

[xl] Chris Johnson, *AMA Demands Urgent Fix to Humanitarian Emergency on Nauru* (20 September 2018) Australian Medical Association <https://ama.com.au/ausmed/ama-demands-urgent-fix-humanitarian-emergency-nauru>.

[xli] Louise Newman, 'What is Resignation Syndrome and Why is it Affecting Refugee Children?' *ABC News* (online), 22 August 2018 <http://www.abc.net.au/news/2018-08-22/resignation-syndrome-and-why-is-it-affecting-refugee-children/10152444>.

[xlii] Medecins Sans Frontieres, *MSF Calls for the Immediate Evacuation of All Asylum Seekers and Refugees from Nauru* (11 October 2018) <https://www.msf.org.au/article/statements-opinion/msf-calls-immediate-evacuation-all-asylum-seekers-and-refugees-nauru>.

[xliii] Refugee Council of Australia and Asylum Seeker Resources Centre, *Australia's Man-made Crisis on Nauru: 6 years on* (September 2018), https://www.asrc.org.au/wp-content/uploads/2018/09/Nauru_Manmade_Crisis.pdf, 7.

[xliv] SBS News, *Twelve-year-old Nauru refugee tried to set herself on fire: reports* (23 August 2018), available at: https://www.sbs.com.au/news/twelve-year-old-nauru-refugee-tried-to-set-herself-on-fire-reports.

[xlv] Human Rights Council, Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru, A/HRC/35/25/Add.3, (24 April 2017) at [82].

[xlvi] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 16.
[xlvii] Dubravka Šimonović, End of Mission Statement (27 February 2017) http://un.org.au/ files/2017/02/End-of-mission-statement-by-Dubravka-Simonovic-draft-final-.docx at [38]; see also Committee on the Elimination of Discrimination against Women, Concluding Observations, CEDAW/C/AUS/CO/8 (20 July 2018) at [54].
[xlviii] Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights* (2015) 14-21 https://www.humanrights.gov.au/sites/default/files/document/publication/SOGII%20Rights%20Report%202015_Web_Version.pdf; Australian Research Centre in Sex, Health and Society, La Trobe University, *Writing Themselves in 3: The third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people* (2010) 39 http://www.glhv.org.au/files/wti3_web_sml.pdf.
[xlix] Penelope Strauss, Angus Cook, Sam Winter, Vanessa Watson, Danie Wright Toussaint & Ashleigh Lin, *Telethon Kids Institute*, 'Trans Pathways: The mental health experiences and care pathways of trans young people' (2017).
[l] National LGBTI Health Alliance, *The Statistics at a Glance: The Mental Health of Lesbian, Gay, Bisexual, Transgender and Intersex People in Australia* (2016) https://lgbtihealth.org.au/statistics/.
[li] Penelope Strauss, Angus Cook, Sam Winter, Vanessa Watson, Danie Wright Toussaint & Ashleigh Lin, *Telethon Kids Institute*, 'Trans Pathways: The mental health experiences and care pathways of trans young people' (2017).
[lii] *Sex Discrimination Act 1984* (Cth) s 37, 38.
[liii] Penelope Strauss, Angus Cook, Sam Winter, Vanessa Watson, Danie Wright Toussaint & Ashleigh Lin, *Telethon Kids Institute*, 'Trans Pathways: The mental health experiences and care pathways of trans young people' (2017).
[liv] The Australian Capital Territory and South Australia have reformed laws to remove the requirement that a person undergo "sex reassignment surgery" to change the sex marker on a birth certificate document. The Commonwealth, Australian Capital Territory, New South Wales and South Australia provided limited recognition for sex and gender outside the categories of male and female.
[lv] See The Yogyakarta Principles, *Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* (2006) Principle 3 http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf.
[lvi] Australian Government, *Australian Government Guidelines on the Recognition of Sex and Gender* (2015). We note concerns raised about these guidelines – see e.g. The Sex and Gender Advisory Group (24 September 2015) https://lgbtihealth.org.au/wp-content/uploads/2015/10/FOR-DISTRIBUTION-AGD-Sex-and-Gender-Guidelines-Review-Advisory-Group-Endorsement-Letter.pdf.
[lvii] See *Births Deaths and Marriages Registration Act 1995* (NSW); *Births, Deaths and Marriages Act 1996* (VIC); *Births Deaths and Marriages Registration Act 2003* (Qld); *Gender Reassignment Act 2000* (WA); *Births, Deaths and Marriages Registration Act 1996* (SA); *Births, Deaths and Marriages Registration Act 1999* (Tas); *Births, Deaths and Marriages Registration Act* (NT); *Births, Deaths and Marriages Registration Act 1997* (ACT).
[lviii] See e.g. OII Australia (now Intersex Human Rights Australia), *Contribution to the List of Issues Prior to Reporting to the Committee against Torture on Australia's Sixth Periodic Report* (June 2016) https://ihra.org.au/wp-content/uploads/2016/06/OII-Australia-LoIPR-CAT-2016.pdf.
[lix] Australian Senate Community Affairs Reference Committee, *Involuntary or Coerced Sterilisation of Intersex People in Australia - Second Report* (2013).
[lx] Ibid.
[lxi] The Yogyakarta Principles plus 10: Additional principles and state obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles (10 November 2017), Principle 32.
[lxii] Australian Senate Community Affairs Reference Committee, *Involuntary or Coerced Sterilisation of Intersex People in Australia - Second Report* (2013).