Australian Permanent Mission
to the United Nations
Geneva

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Thank you for your correspondence of 6 May 2025 regarding Australia's youth justice system and, in particular, the incarceration of Aboriginal and Torres Strait Islander children.

The Australian Government thanks the Special Rapporteurs for the opportunity to respond to the Joint Communication (AL AUS 04/2025). The Australian Government, in consultation with relevant state and territory governments, has given careful and comprehensive consideration to the matters raised and provides the following response in good faith.

The Australian Government acknowledges the ongoing complexity and issues in addressing the youth incarceration cycle, particularly for Aboriginal and Torres Strait Islander young people. The Australian Government notes that, in accordance with Australia's constitution, state and territory governments have primary responsibility for child protection, justice and detention. While there are jurisdictional similarities, there are also differences, and in this context, reform is a highly complex matter, requiring significant attention, collaboration and agreement among many stakeholders. The Australian Government's response therefore incorporates input received from the Australian Capital Territory, New South Wales, Queensland, Northern Territory, South Australia, Tasmania, Victoria and Western Australia.

Australia's commitment to our international human rights obligations

Australia takes its international human rights obligations seriously and is committed to both promoting and protecting these rights through legislation, policy and programs at all levels of government.

Australia recognises that youth justice issues and matters regarding the incarceration of Aboriginal and Torres Strait Islander children, engage a number of international human rights law and treaties to which Australia is a party. This includes the treaties referred to in the Joint Communication, namely: the Convention on the Rights of the Child (**CRC**), the International Convention on the Elimination of All Forms of Racial Discrimination (**ICERD**), the International Convention on Civil and Political Rights (**ICCPR**), and the Convention Against Torture (**CAT**).

Australia is committed to ensuring children in Australia are able to enjoy the rights set out in these treaties, including on the matters raised in the joint communication, which are

addressed in more detail below. In this regard, the Australian Government recognises the importance of Article 3(1) of the CRC, which requires that, in all actions concerning children, the best interests of a child are a primary consideration.

Australian jurisdictions apply this principle in relation to the youth justice system, including sentencing and detention. For example, in the Australian Capital Territory, the *Children and Young People Act 2008* (ACT) (**CYP Act**) guides the ACT's approach to case management for children and young people at risk of youth justice involvement. Sections 8(1) and 94 of the CYP Act establish the best interests of children and young people as the paramount consideration for decision-makers. In South Australia, the *Youth Justice Administration Act 2016* (SA), which provides the legislative framework for the administration of youth justice, outlines principles that guide the treatment of young people in the justice system, including considerations related to their rehabilitation and reintegration into the community. Section 3(2)(a) requires all persons exercising powers under this Act to consider the promotion of the wellbeing and best interests of children.

Experiences of First Nations young people in the criminal justice system

The Joint Communication has raised concerns about the experiences of First Nations children in the criminal justice system, including disproportionate incarceration and consequent harm to their safety, educational and life prospects. In this respect, the Joint Communication highlights, in particular Australia's obligations under ICERD.

Australia remains committed to improving criminal justice outcomes for First Nations young people, including to reduce their overrepresentation in custody and ensure that they enjoy the rights set out in ICERD.

The Australian Government notes that discrimination is prohibited under Australian domestic law. For example, drawing on the definition of racial discrimination in the ICERD, the *Racial Discrimination Act 1975 (Cth),* provides that it is unlawful to do any act 'involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life'. Moreover, each state and territory has its own anti-discrimination laws that provide complementary protections against racial discrimination.

Australia is working towards progressing the targets it has set under the National Agreement on Closing the Gap, including Target 11 to reduce the overrepresentation of First Nations young people in contact with the justice system. Measures have been taken by Australian governments at all levels to ensure any laws or policies adopted in the criminal justice system that affect First Nations youths are compatible with the rights recognised in the ICERD.

At the federal level, the Australian Government has worked with states and territories on several actions to improve youth justice outcomes. The establishment of the National Justice Reinvestment Program is designed to enable First Nations communities to establish locally tailored initiatives that address the underlying causes of incarceration, including to reduce the contact of First Nations children with the criminal justice system. The total investment for justice reinvestment includes $79 million to support up to 30 community-led initiatives in First Nations communities across Australia, with ongoing funding of $20 million per annum from 2026-27. Of the 28 justice reinvestment initiatives funded to date, 13 have a specific focus on youth.

Since September 2024, the Australian Government has committed $41.9 million for youth engagement and intervention activities for young people aged 10 to 25 that are involved in, or at risk of being involved in, the criminal justice system. These programs support young people to positively connect with family and community, improve their life skills, and target the root causes of youth crime and anti-social behaviour.

Further, on 13 January 2025, the Australian Government established the National Commission for Aboriginal and Torres Strait Islander Children and Young people as a separate and independent entity within the Social Services portfolio. This Commission is dedicated to protecting and promoting the rights, interests and wellbeing of Aboriginal and Torres Strait Islander children and young people across a range of issues, including the over representation of First Nations children in out-of-home care and youth detention. The Commission is led by a National Commissioner for Aboriginal and Torres Strait Islander Children and Young People, Ms Sue-Anne Hunter. The Australian Government welcomes the opportunity to constructively engage with this new Commission.

At the state and territory levels, and primarily deriving from Australia's obligations under international human rights law, including the ICCPR, laws are in place to prevent discrimination in the treatment of persons in the criminal justice system. The ACT, for example, retains common law protections and presumptions relating to the right to a fair – and therefore not racially discriminatory – trial. The ACT has added to the existing common law right via the *Human Rights Act 2004* (ACT), which guarantees a right to equality before the law, fair trial, as well as additional rights of children in the criminal process (sections 8, 20, 21).

In addition, state and territory governments have implemented measures to address the overrepresentation of First Nations young people in custody. For example, South Australia has undertaken several initiatives to ensure the impacts of justice policy and legislative reform on Indigenous people, including young people, are considered (and any adverse impacts mitigated).

In 2024, South Australia established the Justice Partnership Committee, which provides advice on improving justice outcomes for Aboriginal South Australians, particularly the rates at which Aboriginal adults and young people are imprisoned or detained. The Committee is responsible for overseeing the implementation of Targets 10 and 11 of Closing the Gap to reduce the rates of Aboriginal adult and youth incarceration.

In Tasmania, Closing the Gap is one of six strategic priorities for the Department of Justice *Changing lives, creating futures – the 2023 Strategic Plan for Corrections in Tasmania.* In relation to Target 11, Tasmania has set an objective to 'reduce the rate of Aboriginal young people (10–17 years) in detention by at least 30 per cent [by 2031].' Tasmania's *Youth Justice Blueprint 2023-2033* establishes specific strategies for early intervention, diversion, and engagement with community organisations to address Aboriginal overrepresentation in a youth justice context.

In Victoria, the *Youth Justice Act 2024* (VIC) includes a Statement of Recognition in respect of First Nations children and young people. This Statement of Recognition formally acknowledges the ongoing impacts of colonisation and structural and systemic racism that have led to First Nations overrepresentation in the justice system and commits to addressing it. The Act includes principles and considerations specific to First Nations young people across the youth justice system. These include specific guiding principles, sentencing principles, custodial principles, and rights.

The Northern Territory has established a suite of culturally responsive and Aboriginal-led programs within the youth justice system. These initiatives are designed to maintain cultural identity, promote healing, and reduce reoffending among First Nations youth. For example, the Holtze Youth Detention Centre runs various programs, including the Elders Program where local Larrakia Elders and other First Nations cultural leaders visit the centre regularly to provide cultural mentoring, storytelling, yarning circles, and spiritual guidance. This program reinforces respect, identity, and belonging.

Age of criminal responsibility

The Joint Communication has raised concerns in relation to age of criminal responsibility being set at 10 years old in most Australian states and territories. The Australian Government notes that the CRC, while requiring States Parties, in Article 40(3)(a) to establish 'a minimum age below which children shall be presumed not to have the capacity to infringe the penal law', does not explicitly set a minimum age of responsibility. However, the Australian Government acknowledges that in 2019, in its non-binding general comment, the Committee has encouraged that this should be increased to at least 14 years of age.

In Australia, there has been ongoing consideration being given to raising the minimum age of criminal responsibility. On 22 September 2023, a Standing Council of Attorneys-General Age of Criminal Responsibility Working Group (**AG Working Group**), made up of officials from all Australian federal, state and territory governments, delivered a report to Attorneys-General outlining a principles-based framework for jurisdictions to consider when raising the age of criminal responsibility, providing a pathway for jurisdictions to progress reforms.

Recognising that jurisdictions are now at different stages in their consideration of these reforms, and that some jurisdictions have already committed to or progressed reforms, this report sets out a principles-based framework applicable to all jurisdictions, and options for implementation are provided by way of examples, noting that implementation will need to be jurisdiction-specific.

On 1 July 2025, the Australian Capital Territory became the first jurisdiction to raise the minimum age of criminal responsibility to 14 years. In Victoria, the *Youth Justice Act 2024* (VIC) raises the age of criminal responsibility to 12 years without exceptions, and introduces a pre-charge hierarchy of options to divert children, including 12- and 13-year-olds, away from the formal criminal justice system. Work is underway in Tasmania to introduce legislation to increase the minimum age of criminal responsibility to 14 years without exception by 1 July 2029. In 2022, the NT was the first jurisdiction to raise the minimum age of criminal responsibility to 12. In October 2024, a newly elected NT government lowered the age to 10 among several other changes to the Criminal Code Amendment Bill 2024.

Australia recognises the importance of appropriate intervention and support services for young people who continue to cause harm and impact the community. Australian jurisdictions continue to develop options for diverting children from the criminal justice system.

For example, in Western Australia, the On Track to Thrive pilot program is a new initiative developed by the Department of Justice in partnership with the Western Australia Police Force and the Departments of Communities, Education, and Health. The program is aimed at diverting vulnerable young children from entering and becoming entrenched in the criminal justice system.

In New South Wales, work is underway to identify existing programs and service pathways with current and potential gaps, to consider ways to divert from the criminal justice system children aged 14 years and under who are demonstrating problematic and harmful behaviours, and to identify options for alternative and additional responses for children below the minimum age of criminal responsibility, including if the age were raised.

In Queensland, the *Making Our Community Safer* plan aims to restore community safety across Queensland. As part of this mandate, the Queensland Government is intervening to divert young children away from a life of crime as well as rehabilitating youths to stop the cycle of repeat crime, through a $560 million investment in new early intervention and rehabilitation programs. The Queensland Government has no plans for any change to the age of criminal responsibility.

In the Northern Territory, lowering the minimum age of criminal responsibility to 10 years reflects the decision of the Northern Territory Government to intervene early when children engage in repeated criminal behaviour. The Northern Territory Government believes this approach allows agencies to engage with these children and their families at a critical time. Complementary initiatives — including youth diversion, boot camps in Darwin, Tennant Creek and Alice Springs, and intensive case management — aim to improve outcomes and change the trajectory of young people's lives. The government does not intend for detention to be the first response and has also committed to addressing systemic factors contributing to youth offending. Early intervention provides an integral step in minimising long-term engagement with the criminal justice system.

The Australian Government continues to work with all state and territory governments on this matter, through both the Standing Council of Attorneys-General and other consultation mechanisms.

Detention of young offenders

The Joint Communication has raised concerns about the detention of young offenders, including in adult prisons, and the imposition of adult penalties on children.

Measure of last resort

Australia is committed to honouring its obligations under Article 37(b) of the CRC, which provides that the arrest, detention or imprisonment of a child shall only be used as a measure of last resort. Australia's federal, state and territory governments recognise the importance of Article 37(b) of the CRC and ensure that any arrest, detention or imprisonment of a child is in conformity with the law, including that it is only used as a measure of last resort and for the shortest appropriate period of time.

For example, in Western Australia, Tasmania and the Australian Capital Territory, laws on youth justice incorporate the principle in Article 37(b) that detention should be used as a measure of last resort and for the shortest period of time. In New South Wales, the Children's Court is required by law not to make an order requiring a child to spend time in custody unless it is satisfied that it would be wholly inappropriate to sentence the child to an alternative penalty.

In Victoria, the *Youth Justice Act 2024* (VIC) (the Act), contains a sentencing framework which enhances the courts' ability to tailor sentences taking into consideration both community safety and each child or young person's individual risks. The Act sets out a pre-charge action hierarchy that ensures alleged offending behaviour is met with appropriate responses, including criminal charges where necessary. The pre-charge hierarchy of options

requires police to apply the lowest diversionary option suitable to respond to a child's offending. Only where a diversionary option is clearly inappropriate may the response progress further through the hierarchy. Furthermore, while there is a presumption that sentences will be served concurrently, the courts can determine otherwise.

Some states, such as South Australia, provide young people access to bail houses in recognition that their bail application can be impacted by lack of appropriate housing and to ensure that young people without access to suitable accommodation are still able to access bail.

Since consulting jurisdictions, Australia acknowledges recent legislative amendments by the NT Government to the *Youth Justice Act 2005,* which includes removal of the principle of detention or imprisonment of a young person as a last resort.

Adult detention and penalty

Noting Australia's reservation to Article 37(c) of the CRC, which provides for the separation of children from adults (addressed further below), the Australian Government notes that, generally, children under the age of 18 are not detained in adult prisons.

In South Australia, the Northern Territory and the Australian Capital Territory, children under 18 are detained in youth-specific facilities. In the Northern Territory, young people who turn 18 while in detention may transition to adult corrections based on risk and needs assessments. In South Australia, young offenders are detained in the Kurlana Tapa Youth Training Centre, a secure care facility for persons aged 10 to 18 years. Once a youth reaches 18 years, and upon application to a Judge of the Youth Court, they can be transferred to an adult prison if the court is satisfied that a prison would be an appropriate place for that person to be held for the remainder of the period of their detention order.

Importantly, it is only in limited circumstances and under specific conditions that young people are detained in adult prisons. For example, in Victoria, a person over the age of 16 years may be transferred to adult prison, taking into consideration the antecedents and behaviour of the person, their age, maturity, and stage of development, and a report outlining the steps taken to avoid the need for transfer to an adult prison. The authorities must be satisfied that the young person has engaged in conduct that threatened the security or stability of a youth justice custodial facility, or caused serious harm to, or posed a risk of serious harm to, the health, wellbeing, or safety of any other person in a youth justice custodial facility or when otherwise in the custody of the Secretary, and cannot reasonably be safely and appropriately accommodated and supported in youth justice custody.

In South Australia, the law provides for transfer of a youth of 17 years or older to a prison for the remainder of their period of remand or detention. The transfer must be made by a court order. The court must be satisfied that the young offender: cannot be properly controlled in the training centre; has, within the period of 14 days preceding the application, been found guilty of assaulting an employee of a training centre or another detainee; has persistently incited others to create a disturbance in the training centre; or has escaped or attempted to escape from a training centre.

Sentencing considerations for children are generally different to those for adults. For example, in Western Australia, the *Young Offenders Act 1994* (WA) sets out principles of juvenile justice, with penalties for young people different to those for adults.

Where adult penalties can be applied in relation to young offenders, there are generally limitations on the circumstances in which this can occur. In South Australia, for example, the

Director of Public Prosecutions can lay a charge against a youth before the court so the youth can be dealt with as an adult if they are charged with a major indictable offence and the Prosecution determines that they pose an appreciable risk to the safety of the community. Under section 15A of the *Young Offenders Act 1993* (WA), in assessing whether a youth poses such a risk, the following factors must be considered: the gravity of the offence with which the youth is to be charged; whether the offence is part of a pattern of repeated offending; whether the youth is a serious firearm offender; the degree to which the youth has previously complied with any undertakings imposed by the Youth Court or any bail agreements; the behaviour of the youth during any previous periods of detention; and where they have previously been released on licence, the degree to which they have complied with the conditions of the licence.

In Tasmania, the *Youth Justice Act 1997* (TAS) does not apply to specified 'prescribed' offences. This means that a child is dealt with under the general law for adults, including sentencing (although the court can still choose to use the Youth Justice Act when sentencing). Different 'prescribed' offences are tied to different age ranges. As the age brackets get higher, the list of prescribed offences builds on the preceding one. Prescribed offences for children aged 10-13 are murder, manslaughter and attempted murder. For 14-16-year-olds, additional offences are added to this list, including aggravated sexual assault, rape, persistent sexual abuse of a child, armed robbery and aggravated armed robbery. Finally, for 17-year-olds, as well the foregoing two offences lists, additions include (summary) traffic and drink driving offences under section 3.

Use of Spit hoods

The Joint Communication has raised concerns in relation to the use of spit hoods in youth detention.

In most Australian jurisdictions, the use of spit hoods in youth detention is prohibited; other jurisdictions have prohibited their use in all detention settings. For example, in 2021, South Australia passed a law to prohibit the use of spit hoods in all settings across the state. The law imposes criminal penalties, with a maximum sentence of two years' imprisonment, on anyone who uses a spit hood. Following the legislative ban, South Australian authorities have adopted alternative measures to manage safety risks. These include the use of Personal Protective Equipment by youth detention staff, and trauma-informed and developmentally appropriate de-escalation and behavioural management techniques.

Since consulting jurisdictions, Australia acknowledges recent legislative amendments by NT Government to the *Youth Justice Act 2005,* which includes the re-introduction of the use of anti-spit guards.

Australia's Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Joint Communication has requested an update on Australia's implementation of Optional Protocol to the Convention Against Torture **(OPCAT).**

OPCAT requests parties to establish independent bodies (National Preventive Mechanisms – NPMs) to visit places where a person is or may be deprived of their liberty, and allow the Subcommittee on Prevention of Torture to visit those places. It aims to prevent harm through the early detection and remediation of issues, leading to better outcomes for people deprived of their liberty, including First Nations children in places of detention.

Australia has adopted a cooperative network model of NPM implementation, where NPMs are nominated at the Commonwealth, state and territory level. To support this model, the Office of the Commonwealth Ombudsman is Australia's NPM Coordinator and undertakes a range of activities to support coordination, reporting, training, information sharing and collaboration among Commonwealth, state and territory NPMs to advance OPCAT implementation.

Currently, six out of nine jurisdictions in Australia have some NPM arrangements in place. While New South Wales, Queensland and Victoria are yet to nominate an NPM, each has an existing oversight body, or bodies, possessing many of the powers, immunities and protections required of NPMs.

Reservation to Article 37(c) of the CRC

The Joint Communication calls on Australia to remove its reservation to Article 37(c) of the CRC. Although the Australian Government accepts the general principles of Article 37, complies in all appropriate circumstances, and continuously reviews the ongoing appropriateness of its reservation, we respectfully maintain our reservation at this stage.

The Australian Government considers this reservation currently remains necessary due to our geography and demography. These factors can make it difficult to detain children in juvenile facilities in all circumstances and simultaneously act in the best interests of children and allow children to maintain contact with their families. This decision is made on a case-by-case basis taking into account all relevant considerations. Where such a decision is made, and where feasible and/or appropriate, adults and children will be kept separate. In this regard, however, individual jurisdictions retain the discretion to make the most appropriate decisions in the circumstances, as described in the examples above at page 6.

Reservation standing, the Australian Government does acknowledge the importance of access to family and community as a factor in the social and emotional wellbeing of First Nations people. Australian jurisdictions, where possible, allow for contact with family and community for young people in detention. In most jurisdictions, youth detention facilities provide contact through various means including in-person visits, phone and video calls, and written correspondence.

The Hon Michelle Rowland, Attorney-General and Senator the Hon Malarndirri McCarthy, Minister for Indigenous Australians, as well and state and territory governments, remain committed to addressing the issues raised and realising our collective obligation to uphold the rights of the child.

Thank you for bringing forward your concerns. I trust this information is of assistance.

Yours sincerely,

[redacted]

Clare Walsh
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to the United Nations and to the Conference on Disarmament, Geneva