



## **NSWCCL SUBMISSION**

### **SENATE STANDING COMMITTEES ON LEGAL AND CONSTITUTIONAL AFFAIRS**

### **APPLICATION OF THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES IN AUSTRALIA INQUIRY**

**2 June 2022**

## **Acknowledgment**

In the spirit of reconciliation, the NSW Council for Civil Liberties acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples across Australia. We recognise that sovereignty was never ceded.

## **About NSW Council for Civil Liberties**

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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The New South Wales Council for Civil Liberties (NSWCCL) welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs References Committee, in regard to the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia Inquiry.

## 1. Executive summary

### 1.1. Age of criminal responsibility

- 1.1.1. Australia's low minimum age of criminal responsibility presents significant obstacles to Aboriginal and Torres Strait Islander peoples (**First Nations peoples**) exercising their rights under the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**).
- 1.1.2. Australia has been criticised internationally for its low age of criminal responsibility and has been strongly encouraged to raise the age, yet it has failed to do so. The impacts of engaging with the criminal justice system at a young age are far-reaching and ultimately extremely negative, resulting in trauma, health issues, poor educational and vocational outcomes, a high likelihood of recidivism, and intergenerational impacts.
- 1.1.3. First Nations peoples are disproportionately affected by all aspects of the criminal justice system, and First Nations children and young people are disproportionately affected by the low age of criminal responsibility. In addition to the negative impacts of incarceration summarised above, First Nations young people also suffer from disconnection from their culture and communities and are subject to widespread discrimination on the basis of their cultural identity and their status as First Nations peoples.
- 1.1.4. Australia's low age of criminal responsibility is contrary to the principles enshrined in the UNDRIP, particularly those concerning freedom from discrimination, the right to self-determination, and the rights to health, liberty and security of person.

### 1.2. Rates of over-incarceration, over-policing and over-criminalisation

- 1.2.1. First Nations peoples are incarcerated, policed and criminalised at a significantly higher rate than non-First Nations peoples, preventing First Nations peoples from the full exercise of their rights under the UNDRIP.
- 1.2.2. The harmful impacts of being imprisoned are multi-faceted and long-lasting, affecting not only prisoners (both during incarceration and post-release) but also their families and communities. For First Nations peoples, this is compounded by the systemic discrimination they face in the criminal justice system.
- 1.2.3. The overrepresentation of First Nations peoples in the criminal justice system is argued to be a symptom of historical and ongoing systemic discrimination, perpetuating a cycle of intergenerational disadvantage that, without the opportunity to exercise self-determination and control over their own futures as enshrined in the UNDRIP, First Nations peoples have little power to ameliorate.
- 1.2.4. Furthermore, Australia's failure to implement recommendations arising from the Royal Commission into Aboriginal Deaths in Custody is indicative of Australia's poor efforts to adhere to the principles of the UNDRIP in Australia.
- 1.2.5. Australia needs to introduce meaningful reforms to the criminal justice system and associated systems to ensure that First Nations peoples are not over-incarcerated, over-policed and over-criminalised, but are given the opportunity to fully engage with their rights under the UNDRIP.

### 1.3. Key community efforts to promote UNDRIP principles

- 1.3.1. There are a number of ways in which the UNDRIP principles could be implemented in Australia to address the issues raised in these submissions. Three of those include a 'justice reinvestment' approach to the criminal justice system, the full implementation of the National Agreement on Closing the Gap (the **National Agreement**) and the establishment of a constitutionally recognised First Nations Voice and a Makarrata Commission to oversee a process of agreement-making and truth-telling as set out in the Uluru Statement from the Heart.

- 1.3.2. We strongly support the reforms proposed by the Justice Reform Initiative, and for the purposes of this submission, particularly those relating to First Nations peoples. As stated below, we recommend that the Australian Government implement the proposed reforms.
- 1.3.3. A justice reinvestment approach to the criminal justice system would have significant impacts on the issues that First Nations peoples face such as overrepresentation in the criminal justice system. Such an approach would address the systemic discrimination faced by First Nations peoples in the criminal justice system by addressing the disadvantage that leads to engagement with the criminal justice system in the first place. Some organisations working in this space include Just Reinvest NSW and Justice Reinvestment Network Australia.
- 1.3.4. The Coalition of Peaks (a representative body of over 70 First Nations community-controlled peak organisations and members) is working together with all levels of government to improve the lives of First Nations peoples under the National Agreement. The National Agreement aims to enable First Nations peoples and governments to work together to overcome the inequality experienced by First Nations peoples, and to achieve life outcomes equal to non-First Nations Australians.<sup>1</sup>
- 1.3.5. The Uluru Statement from the Heart calls for the establishment of a First Nations Voice enshrined in the Australian Constitution and a Makarrata Commission to supervise a process of agreement-making between governments and First Nations peoples as well as truth-telling about the history of First Nations peoples in Australia.<sup>2</sup>
- 1.3.6. While such community efforts go some way to informally implementing key principles of the UNDRIP, such as the right to self-determination and the right to maintain and strengthen their distinct political institutions, the Australian Government needs to formally enshrine these rights in Australian law.

## 2. Summary of recommendations

2.1.1. We make the following recommendations:

- (a) The Australian Government should implement the reforms proposed by the Justice Reform Initiative, particularly as they relate to First Nations peoples, including:
  - i) building pathways out of the criminal justice system with a focus on First Nations communities; and
  - ii) breaking the cycle of First Nations criminal justice system involvement (with a focus on supporting the leadership of First Nations-led campaigns and communities).<sup>3</sup>
- (b) All Australian jurisdictions should increase the minimum age of criminal responsibility to 14 years of age and ensure that no child under 14 years of age is deprived of their liberty by the criminal justice system.
- (c) The Australian Government should establish and implement justice reinvestment programs as a means of addressing over-incarceration of First Nations peoples across Australia.
- (d) The Australian Government should fully implement the National Agreement on Closing the Gap.
- (e) The Australian Government should establish a constitutionally recognised First Nations Voice and a Makarrata Commission to oversee a process of agreement-making and truth-telling.

<sup>1</sup> Closing the Gap, 'National Agreement on Closing the Gap', <<https://www.closingthegap.gov.au/national-agreement>>.

<sup>2</sup> The Uluru Statement, 'Uluru Statement from the Heart', <<https://ulurustatemdev.wpengine.com/wp-content/uploads/2022/01/UluruStatementfromtheHeartPLAINTEXT.pdf>>.

<sup>3</sup> Justice Reform Initiative, 'Breaking the Cycle of Incarceration' (July 2021) 7

<[https://assets.nationbuilder.com/justicereforminitiative/pages/274/attachments/original/1648776963/JRI\\_Breaking\\_the\\_Cycle\\_Report\\_V8\\_APPROVAL.pdf?1648776963](https://assets.nationbuilder.com/justicereforminitiative/pages/274/attachments/original/1648776963/JRI_Breaking_the_Cycle_Report_V8_APPROVAL.pdf?1648776963)>.

### 3. Age of criminal responsibility

#### 3.1. Australia's minimum age of criminal responsibility

- 3.1.1. The term 'minimum age of criminal responsibility' (**minimum age**) refers to the legal age at which a child is considered to have understood that their actions were wrong and can be held criminally responsible.<sup>4</sup> In all Australian jurisdictions, the minimum age is 10 years,<sup>5</sup> one of the lowest in the world.<sup>6</sup>
- 3.1.2. In addition to the minimum age, the rebuttable legal presumption of *doli incapax* also operates in Australia. The prosecution must prove beyond reasonable doubt that a child over 10 years but under 14 years knew that the act was seriously wrong as opposed to merely naughty or mischievous.<sup>7</sup> From the age of 14 years, offenders may be held fully responsible for their actions, although they may be subject to different sanctions than adults committing the same offences.<sup>8</sup>
- 3.1.3. Australia has been criticised internationally for its low minimum age and has been strongly encouraged to raise the age.<sup>9</sup>

#### 3.2. Disproportionate impacts of the minimum age on First Nations young people

- 3.2.1. Australia's low minimum age disproportionately affects First Nations children and young people. Despite comprising only six per cent of Australia's population of young people aged 10 to 17 years, First Nations young people accounted for 50 per cent of children in detention in 2021 (410 out of 819 children in detention).<sup>10</sup> The number of First Nations young people in detention varies across state and territory jurisdictions, but remains disproportionate in all instances. Please refer to **Table 1** below for a summary of this data.

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<sup>4</sup> Amnesty International, 'Explainer: Why we need to raise the age of criminal responsibility', 25 January 2022.

<<https://www.amnesty.org.au/why-we-need-to-raise-the-minimum-age-of-criminal-responsibility/#:~:text=The%20age%20of%20criminal%20responsibility%20is%20the%20age%20in%20which,at%20only%2010%20years%20old>>.

<sup>5</sup> *Children (Criminal Proceedings) Act 1987* (NSW), s 5; *Young Offenders Act 1993* (SA), s 5; *Criminal Code Act 1899* (Qld) subs 29(1); *Children, Youth and Families Act 2005* (Vic), s 344; *Criminal Code Act Compilation Act 1913* (WA), s 29; *Criminal Code Act 1924* (Tas), subs 18(1); *Criminal Code Act 1983* (NT), subs 38(1); *Criminal Code 2002* (ACT), s 25; *Crimes Act 1914* (Cth), s 24M.

<sup>6</sup> Amnesty International, 'Explainer: Why we need to raise the age of criminal responsibility', 25 January 2022.

<<https://www.amnesty.org.au/why-we-need-to-raise-the-minimum-age-of-criminal-responsibility/#:~:text=The%20age%20of%20criminal%20responsibility%20is%20the%20age%20in%20which,at%20only%2010%20years%20old>>.

<sup>8</sup> Gregor Urbas, 'The Age of Criminal Responsibility', *Trends and Issues in Crime and Criminal Justice* (Australian Institute of Criminology, November 2000) <<https://www.aic.gov.au/sites/default/files/2020-05/tandi181.pdf>>.

<sup>9</sup> United Nations Committee on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia*, 82nd Sess, UN Doc CRC/C/AUS/CO/5-6 (30 September 2019) [49(a)].

<sup>10</sup> Australian Institute of Health and Welfare, *Youth detention population in Australia 2021 – Data Visualisation* (Report no. JUV 136, Australian Institute of Health and Welfare, 14 Dec 2021) vi.



**Table 1: Percentage of First Nations young people detained across jurisdictions in 2021 (descending order)**

Jurisdiction	First Nations young people as a percentage of the youth detention population (%) <sup>11</sup>	First Nations people as a percentage of jurisdiction's population (%) <sup>12</sup>
Northern Territory (NT)	94	30.9
Western Australia (WA)	79	4.1
Queensland	62	4.1
South Australia (SA)	58	2.6
Tasmania	44	5.7
New South Wales (NSW)	40	3.5
Australian Capital Territory (ACT)	27	1.9
Victoria	11	0.9

- 3.2.2. The number of First Nations young people as a percentage of the youth detention population is unacceptably high across the majority of Australian jurisdictions, reaching a peak of 94 per cent in the NT, closely followed by 79 per cent in WA and 62 per cent in Queensland. In NSW, First Nations young people make up 40 per cent of the population of children in detention. These statistics are particularly concerning given the typically minute proportion of First Nations peoples in the general population of each jurisdiction.
- 3.2.3. A four-year study by the Australian Institute of Health and Welfare (AIHW) found that, across Australia, the rate of First Nations children and young people in detention on an average night decreased slightly from 2017 to 2021. However, it was also reported that First Nations young people aged between 10 to 17 years were, on average, 20 times more likely to be in detention on a given night (though this varied from 16 to 25 times more likely over the four-year period).<sup>13</sup>
- 3.2.4. Clearly, Australia's minimum age disproportionately affects First Nations young people. In the NT, despite First Nations peoples only comprising just under 31 per cent of the population, 94 per cent of children in detention are First Nations peoples. In 2019, during an enquiry, the NT Department of Children and Families disclosed that on that particular day, 100 per cent of detained young people were First Nations young people.<sup>14</sup> This glaring imbalance is present across all jurisdictions. Even in Victoria where First Nations young people comprise only 11 per cent of children in detention, this is put into perspective when considering First Nations people as a whole make up less than one per cent of Victoria's population.

<sup>11</sup> Australian Institute of Health and Welfare, *Youth detention population in Australia 2021 – Data Visualisation* (Report no. JUV 136, Australian Institute of Health and Welfare, 14 Dec 2021) 7.

<sup>12</sup> Australian Institute of Health and Welfare, *Profile of First Nations Australians* (Web Page, 23 July 2020) <<https://www.aihw.gov.au/reports/australias-health/profile-of-first-nations-australians>>.

<sup>13</sup> Australian Institute of Health and Welfare, *Youth detention population in Australia 2021 – Data Visualisation* (Report no. JUV 136, Australian Institute of Health and Welfare, 14 Dec 2021) vi.

<sup>14</sup> Lorena Allam, 'All children in detention in the Northern territory are Indigenous', *The Guardian* (Web Page 26 June 2018) <<https://www.theguardian.com/australia-news/2018/jun/25/all-children-in-detention-in-the-northern-territory-are-indigenous>>.

### 3.3. Comparison of Australia's minimum age against other international jurisdictions and overview of consequences

- 3.3.1. As indicated at paragraph 3.1 above, Australia's minimum age is one of the lowest in the world. According to the United Nations Global Study on Children Deprived of Liberty conducted in 2019 (the **Global Study**), the global average minimum age was 11.3 years, and the median was 12 years,<sup>15</sup> both of which fall below the minimum of 14 years as recommended by the Committee on the Rights of the Child (the **Committee**) in 2007.<sup>16</sup>
- 3.3.2. While not the lowest, Australia's minimum age clearly falls below the global average and median, and well below the Committee's recommendation. Since the Committee made that recommendation, a number of countries have raised their minimum age to 14 years, including China, Russia, Germany, Cambodia and Rwanda, amongst others.<sup>17</sup>
- 3.3.3. In recent years, there has been a wealth of research undertaken into neuroscience, neurodevelopment and the capacity of the developing brain to understand right from wrong.<sup>18</sup> Science has shown that the regions of the brain responsible for decision-making are the last and slowest to develop (our emphasis):<sup>19</sup>

The executive functioning of the brain is essentially the "captain of the ship". It is situated in the frontal lobes, giving the orders to the rest of the brain and the body, regulating emotion and behaviour, organising and planning. It is the last part of the brain to mature and if it is severely impaired, development very slowly or not at all, chaos reigns. The child acts on whim and impulse, is not able to consider the consequences of their actions, and struggles to understand cause and effect. The front lobes, in fact, do not develop efficient and mature executive function until the age of 25 years.

**Despite this, Australia is detaining children as young as 10, who are scientifically incapable of properly regulating their behaviour, which results in a higher rate of re-offending than adults.**

- 3.3.4. It has been reported for years that exposure to the criminal justice system as a young child can lead to a higher likelihood of offending into adulthood.<sup>20</sup> In fact, it has been found that 94 per cent of children imprisoned between the ages of 10 to 12 receive another prison sentence before they reach

<sup>15</sup> United Nations Global Study on Children Deprived of Liberty (November 2019), 278

<[https://www.chr.up.ac.za/images/publications/UN\\_Global\\_Study/United%20Nations%20Global%20Study%20on%20Children%20Deprived%20of%20Liberty%202019.pdf](https://www.chr.up.ac.za/images/publications/UN_Global_Study/United%20Nations%20Global%20Study%20on%20Children%20Deprived%20of%20Liberty%202019.pdf)>.

<sup>16</sup> UN High Commissioner for Human Rights, General Comment 24 (2007), paragraph 33

<<https://www.ohchr.org/sites/default/files/Documents/HRBodies/CRC/GC24/GeneralComment24.pdf>>.

<sup>17</sup> Raise the Age, *Our petition* (Web Page) <<https://www.raisetheage.org.au/>>.

<sup>18</sup> See: Enys Delmage, 'The Minimum Age of Criminal Responsibility: A Medico-Legal Perspective', (2013)

<<https://journals.sagepub.com/doi/abs/10.1177/1473225413492053>>; Claire McDiarmid, 'An Age of Complexity: Children and Criminal Responsibility in Law', (2013)

<[https://strathprints.strath.ac.uk/44045/1/McDiarmid\\_An\\_age\\_of\\_complexity.pdf](https://strathprints.strath.ac.uk/44045/1/McDiarmid_An_age_of_complexity.pdf)>; Gideon Yaffe, 'The Age of Culpability: Children and the Nature of Criminal Responsibility', Oxford University Press (2018)

<[https://books.google.com.au/books?hl=en&lr=&id=XWpNDwAAQBAJ&oi=fnd&pg=PP1&dq=criminal+responsibility+children&ots=zdg162bMr0&sig=axNWT3IAK7YBk8lq1Vd0Or-\\_EpE#v=onepage&q=criminal%20responsibility%20children&f=false](https://books.google.com.au/books?hl=en&lr=&id=XWpNDwAAQBAJ&oi=fnd&pg=PP1&dq=criminal+responsibility+children&ots=zdg162bMr0&sig=axNWT3IAK7YBk8lq1Vd0Or-_EpE#v=onepage&q=criminal%20responsibility%20children&f=false)>.

<sup>19</sup> Meg Perkins, 'Science and Raising the Age of Criminal Responsibility', Amnesty International (2019)

<<https://www.amnesty.org.au/science-raising-age-criminal-responsibility/>>.

<sup>20</sup> National Institute of Justice, 'From Youth Justice Involvement to Young Adult Offending', (2014),

<<https://nij.ojp.gov/topics/articles/youth-justice-involvement-young-adult-offending>>; Kimberly A Rhoades et al, 'Predicting the Transition from Juvenile Delinquency to Adult Criminality: Gender Specific Influences in Two High-Risk Samples', *Criminal Behaviour and Mental Health* (2016) <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4624625/>>.



adulthood,<sup>21</sup> and it is not disputed that incarceration is widely recognised to lead to recidivism.<sup>22</sup> According to the Councils of Social Services:

Early contact with the criminal justice system can also increase the likelihood of poor outcomes for already vulnerable young people. Involvement in the criminal justice system at a young age can cause further harm and young people aged 10-14 in the youth justice system are at risk of becoming chronic, long-term offenders, through exposure to harmful environments and the isolation from family and support networks.<sup>23</sup>

- 3.3.5. For First Nations young people, there are additional impacts relating to their connection to Country, culture and community. The incarceration of First Nations young people aged 10-14 (recognised as “a critical time in a person’s development”)<sup>24</sup> disconnects them from their culture and community, robbing them of the opportunity to connect with and learn from their elders and other important persons in their community about their traditions and customs, language, lore and Country. Raising the age safeguards First Nations young people from isolation, culture and community and protects the opportunity for knowledge to be passed down between generations.<sup>25</sup>
- 3.3.6. Australia should raise its minimum age to at least 14 years of age in line with the Committee’s recommendations and a great number of other countries. There are a number of indisputable reasons to support this, which are touched on throughout this submission, summarised as follows:
- (a) many children involved in the criminal justice system come from disadvantaged backgrounds and have complex needs more effectively addressed outside the criminal justice system;
  - (b) community-based programs reduce the likelihood of recidivism and the promotion of culturally strong environments support and reinforce “positive gains made by Aboriginal people through engaging in offender rehabilitation programs”, and change the environments which gave rise to offending behaviour in the first place;<sup>26</sup>
  - (c) a strong sense of cultural identity is associated with better outcomes for First Nations young people including “a sense of purpose and belonging, increased social support (relational health) and self-worth”,<sup>27</sup> and serves as a protective factor which helps to “build resilience, [enhance] health outcomes, improvements in education and employment, and positive coping strategies to deal with life stressors and the continued impacts of colonisation”;<sup>28</sup>
  - (d) raising the age would decrease the unacceptable rate of overrepresentation of First Nations young people in detention;
  - (e) research on brain development has demonstrated that young children do not have the requisite maturity to form the necessary intent for full criminal responsibility;

<sup>21</sup> Amnesty International, ‘Explainer: Why we need to raise the age of criminal responsibility’, 25 January 2022.

<[<sup>22</sup> Kelly Richards, ‘What makes juvenile offenders different from adult offenders?’ \(Trends & issues in crime and criminal justice Paper No. 409, February 2011\), 6–7.](https://www.amnesty.org.au/why-we-need-to-raise-the-minimum-age-of-criminal-responsibility/#:~:text=The%20age%20of%20criminal%20responsibility%20is%20the%20age%20in%20which,at%20only%2010%20years%20old>.</a></p>
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<sup>23</sup> Councils of Social Services, ‘Review on Raising the Age of Criminal Responsibility: Joint Council of Social Service Network statement to the Council of Attorneys-General’ (no date) <[https://vcoss.org.au/wp-content/uploads/2020/03/SUB\\_Joint-COSS\\_Age-of-Criminal-Responsibility-FINAL.pdf](https://vcoss.org.au/wp-content/uploads/2020/03/SUB_Joint-COSS_Age-of-Criminal-Responsibility-FINAL.pdf)>.

<sup>24</sup> The Royal Australasian College of Physicians, ‘Physicians say age of criminal responsibility must be raised to help end abuse in custody’ (Media Release, 14 May 2019).

<sup>25</sup> House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing: First Nations Youth in the Criminal Justice System* (Report, June 2011) [27].

<sup>26</sup> See Victoria Hovane, Tania Dalton (Jones) and Peter Smith (2014) ‘Aboriginal Offender Rehabilitation Programs’ in Pat Dudgeon, Helen Milroy and Roz Walker (eds) *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice* (Commonwealth of Australia, 2nd ed, 2014) 509, 510.

<sup>27</sup> Vanessa Edwige and Dr Paul Gray, *Significance of Culture to Wellbeing, Healing and Rehabilitation* (Bugmy Bar Book Report, 2021) 21 [87].

<sup>28</sup> Vanessa Edwige and Dr Paul Gray, *Significance of Culture to Wellbeing, Healing and Rehabilitation* (Bugmy Bar Book Report, 2021) 22 [89].

- (f) children under 12 years of age lack the capacity to properly engage with the criminal justice system, resulting in a higher likelihood of accepting plea bargains, giving false confessions or failing to keep track of court proceedings;
- (g) the younger a child is when they encounter the criminal justice system, the more likely they are to reoffend.<sup>29</sup>

### 3.4. Significant literature on harmful impacts of youth justice system

3.4.1. Several reports and inquiries have been undertaken in Australia to explore the harm resulting from the youth justice system, the overrepresentation of First Nations young people in detention, the current and historical systematic disadvantages experienced by First Nations communities, and the cycle of disadvantage and recidivism which youth incarceration creates. The following leading reports are explored below:

- (a) the Final Report resulting from the Royal Commission into Aboriginal Deaths in Custody (**Royal Commission**), initially chaired by the Hon. James Muirhead QC and subsequently chaired by the Hon. Elliott Johnston QC (1991) (**RCIADIC**);
- (b) the 'Significance of Culture to Wellbeing, Healing and Rehabilitation' Expert Report written by Vanessa Edwige and Dr Paul Gray, commissioned by the Bugmy Bar Book (2021) (**Edwige and Gray (2021)**);
- (c) the 'Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples' Final Report by the Australian Law Reform Commission (2017) (**Pathways Report**); and
- (d) the 'Australia's children' Report by the Australian Institute of Health and Welfare (2022) (**AIHW Report**).

#### Final Report of the Royal Commission into Aboriginal Deaths in Custody

3.4.2. The Royal Commission was established in 1987 and investigated 99 deaths in custody in each State and Territory between 1 January 1980 and 31 May 1989, as well as the actions taken in respect of each death. The interim report was issued on 21 December 1988, and the final report was published in April 1991.

3.4.3. While the Commission concluded that First Nations peoples in custody did not die in custody at a greater rate than non-First Nations peoples, it found that First Nations peoples were grossly over-represented in custody, at rates twenty-nine times greater than the general community<sup>30</sup> The RCIADIC noted the deliberate and systematic disempowerment of First Nations people and the significant role of child removal can play in association with later imprisonment.<sup>31</sup> The final report also detailed the disadvantaged and unequal position in which First Nations peoples find themselves in society – socially, economically and culturally – as the most significant contributing factor to the over-representation of First Nations peoples in custody.<sup>32</sup> Central to reducing this over-representation was the empowerment of First Nations peoples and the right to self-determination.<sup>33</sup>

3.4.4. The Royal Commission made 339 recommendations, including that imprisonment should be a last resort, and that a process of reconciliation with First Nations peoples must occur.<sup>34</sup> A section of the recommendations also dealt with ensuring the application of the self-determination principle and working with First Nations communities and organisations to implement services and strategies.

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<sup>29</sup> Australian Human Rights Commission, 'The Minimum Age of Criminal Responsibility', (2021) <[https://humanrights.gov.au/sites/default/files/2020-10/australias\\_minimum\\_age\\_of\\_criminal\\_responsibility\\_-\\_australias\\_third\\_upr\\_2021.pdf](https://humanrights.gov.au/sites/default/files/2020-10/australias_minimum_age_of_criminal_responsibility_-_australias_third_upr_2021.pdf)>.

<sup>30</sup> The Hon. Elliott Johnston QC, *Royal Commission into Aboriginal Deaths in Custody* (Final Report, April 1991) vol 1, section 1.3 <<http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/>>.

<sup>31</sup> Ibid, section 1.4.

<sup>32</sup> Ibid, section 1.7.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid vol 5, Recommendations.

### Edwige & Gray (2021)

- 3.4.5. This report was commissioned by the *Bugmy Bar Book* and collates research regarding ‘the significance of culture to First Nations people and the significant benefits of connecting to culture, family and community as part of culturally appropriate treatment and care to promote wellbeing, rehabilitation and healing’.<sup>35</sup>
- 3.4.6. The report identifies the impacts of over-incarceration and the disproportionate impact felt amongst First Nations peoples and communities,<sup>36</sup> highlighting harmful consequences such as social and financial costs, the risk of disconnection from Country, culture and community, and subsequent impacts on identity and wellbeing.<sup>37</sup> In particular, it notes the social exclusion, impacts on healing and rehabilitation, and loss of care networks and community relationships that might result from incarceration, resulting in adverse impacts on identity and wellbeing.<sup>38</sup> The report also highlights the risk of reoffending and reincarceration for First Nations young people who return to their communities without support or pathways to engage in culturally appropriate programs.<sup>39</sup>
- 3.4.7. Edwige & Gray (2021) stresses the importance of the right to self-determination to achieving improved outcomes for First Nations peoples in healing programs and approaches.<sup>40</sup> In dealing with the impacts of incarceration, the report notes the greater likelihood of success of approaches which address systemic issues and disadvantages.<sup>41</sup> Retaining connections with community and culture to build capacity in First Nations peoples is considered key.<sup>42</sup>

### Pathways Report

- 3.4.8. The Pathways Report was prepared by the Australian Law Reform Commission (**ALRC**) in December 2017 and details the findings of its inquiry into the incarceration rate of First Nations people. From the outset, the report recognises the “persistent and growing problem” of First Nations peoples over-representation in incarceration, with First Nations peoples incarceration rates not only increasing to 41 per cent between 2006 and 2016, but the gap between First Nations and non-First Nations imprisonment rates also widening.<sup>43</sup>
- 3.4.9. The Pathways Report echoes previous reports in identifying the key drivers of incarceration being social determinants external to the criminal justice system.<sup>44</sup> It also points to the disadvantages First Nations peoples may face in applying for bail, such as irregular employment, previous convictions and lack of secure accommodation, as well as issues First Nations peoples may face once bail is granted, such as conflicting cultural obligations.<sup>45</sup> Furthermore, the report notes that the placement of First Nations children into out-of-home care is directly linked with later involvement in the criminal system in both juvenile detention and adult incarceration.<sup>46</sup> Having a criminal record, particularly for First Nations children and young adults, is identified as increasing the likelihood of unemployment, poverty and substance abuse, which are all risk factors of future incarceration.<sup>47</sup>
- 3.4.10. The ALRC’s recommendations focus on providing effective diversion, support and rehabilitation programs, as well as the availability of appropriate alternatives to imprisonment (considering the

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<sup>35</sup> Vanessa Edwige and Dr Paul Gray, *Significance of Culture to Wellbeing, Healing and Rehabilitation* (Bugmy Bar Book Report, 2021) [1].

<sup>36</sup> Ibid [8].

<sup>37</sup> Ibid [174] – [180].

<sup>38</sup> Ibid.

<sup>39</sup> Ibid [130].

<sup>40</sup> Ibid [211].

<sup>41</sup> Ibid [213].

<sup>42</sup> Ibid [213] – [214].

<sup>43</sup> Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report, December 2017) 375-376 (‘Pathways to Justice’), <[https://www.alrc.gov.au/wp-content/uploads/2019/08/final\\_report\\_133\\_amended1.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_133_amended1.pdf)>.

<sup>44</sup> Ibid 26-27.

<sup>45</sup> Ibid 149.

<sup>46</sup> Ibid 485 – 486.

<sup>47</sup> Ibid 486 – 487.

nature of the offence and the offender's circumstances).<sup>48</sup> Critical to this is working with First Nations organisations and communities, and their involvement in developing and delivering appropriate services and programs.

### AIHW Report

3.4.11. The AIHW Report, prepared by the Australian Institute of Health and Welfare, examines recent data on children and their families across several areas, including justice and safety.<sup>49</sup> The report identifies children from First Nations backgrounds as being especially vulnerable and in greater need of health and welfare services and support.<sup>50</sup>

3.4.12. The report highlights differences between First Nations and non-First Nations children under youth justice supervision (835 per 100,000 compared to 28 per 100,000).<sup>51</sup> It also notes that for young people aged 10-17 years, First Nations young people spent 11 days longer under supervision (197 days compared with 186 days), as well as longer lengths of time in detention (74 days compared with 71 days) and community-based supervision (178 days compared with 176 days). First Nations young people also spent 8 days longer on average in unsentenced detention (52 days compared with 44 days).<sup>52</sup> First Nations boys were identified as having the highest rate under supervision (1,296 per 100,000).<sup>53</sup>

3.4.13. More broadly, the report notes that the disadvantages experienced by First Nations peoples have "deep underlying causes, including intergenerational trauma",<sup>54</sup> stemming from the impacts of colonisation, resulting loss of land, language and culture, the forced removal of First Nations children, racism and discrimination.<sup>55</sup>

### 3.5. Youth justice, parental incarceration and the intergenerational impacts of imprisonment

3.5.1. Parental incarceration is a recognised pathway to youth detention and adult offending.<sup>56</sup> It can cause financial hardship, compromise the attachment relationships between incarcerated parents and their children, and become a source of stigmatisation and shame.<sup>57</sup> This is detrimental to the social, emotional, cognitive and communicative development of children,<sup>58</sup> placing them at greater risk of alcohol and drug abuse, poor education outcomes and exhibiting aggressive and/or antisocial behaviour.<sup>59</sup>

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<sup>48</sup> Ibid 36.

<sup>49</sup> Australian Institute of Health and Welfare, *Australia's children* (Report, 25 February 2022) 357, 228 <<https://www.aihw.gov.au/getmedia/6af928d6-692e-4449-b915-cf2ca946982f/aihw-cws-69-print-report.pdf.aspx?inline=true>>.

<sup>50</sup> Ibid 8.

<sup>51</sup> Ibid 359.

<sup>52</sup> Ibid 360.

<sup>53</sup> Ibid 361.

<sup>54</sup> Ibid. 8-9.

<sup>55</sup> Ibid.

<sup>56</sup> Australian Law Reform Commission, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, 22 December 2017) <[https://www.alrc.gov.au/wp-content/uploads/2019/08/final\\_report\\_133\\_amended1.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_133_amended1.pdf)>.

<sup>57</sup> Bugmy Bar Book Committee, *Incarceration of a Parent or Caregiver* (The Bar Book Project, November 2019) 1 [2] <[https://www.publicdefenders.nsw.gov.au/Pages/public\\_defenders\\_research/bar-book/parental-incarceration.aspx](https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/bar-book/parental-incarceration.aspx)>.

<sup>58</sup> Bugmy Bar Book Committee, *Incarceration of a Parent or Caregiver* (The Bar Book Project, November 2019) [12]. <[https://www.publicdefenders.nsw.gov.au/Pages/public\\_defenders\\_research/bar-book/parental-incarceration.aspx](https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/bar-book/parental-incarceration.aspx)>

<sup>59</sup> Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into the Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (Report, June 2013) 22 [3.17] <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed\\_inquiries/2010-13/justicereinvestment/report/index](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/index)>.

- 3.5.2. Parental incarceration can also have the unintended consequence of ‘normalising’ imprisonment in the eyes of young people. Rather than becoming a deterrent to crime, it incentivises conviction as a ‘rite of passage’.<sup>60</sup>
- 3.5.3. Furthermore, the imprisonment of a parent or caregiver disrupts children’s care and living arrangements,<sup>61</sup> with many children subsequently placed in out-of-home care. This is especially common where the incarcerated parent is the mother.<sup>62</sup> In its Pathways Report,<sup>63</sup> the ALRC stated that young people in out-of-home care are 19 times more likely than the equivalent general population to be under youth justice supervision in the same year.<sup>64</sup> Victoria Legal Aid also found that, of those children aged 11-17 placed in out-of-home care between 2011 and 2016, almost one in three later returned to Victoria Legal Aid for assistance with a criminal matter.<sup>65</sup>
- 3.5.4. These issues are particularly prevalent within First Nations communities. Some estimates suggest 20 per cent of First Nations young people have a parent in prison,<sup>66</sup> and up to 80 per cent of female First Nations prisoners are mothers.<sup>67</sup> First Nations young people are nine times more likely annually, and four times more likely in their lifetime, to experience the imprisonment of their father.<sup>68</sup> First Nations young people are also more likely to experience repeat parental imprisonment.<sup>69</sup> It is also common for First Nations prisoners to be placed in custody a long distance from their communities, making it harder for them to maintain relationships with their children.<sup>70</sup>
- 3.5.5. As of June 2016, the percentage of First Nations young people in out-of-home care was 10 times that of non-First Nations children.<sup>71</sup> First Nations young people in child protection are almost three times

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<sup>60</sup> Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into the Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (Report, June 2013) 33 [4.29] <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed\\_inquiries/2010-13/justicereinvestment/report/index](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/index)>.

<sup>61</sup> Bugmy Bar Book Committee, *Incarceration of a Parent or Caregiver* (The Bar Book Project, November 2019) 1 <[https://www.publicdefenders.nsw.gov.au/Pages/public\\_defenders\\_research/bar-book/parental-incarceration.aspx](https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/bar-book/parental-incarceration.aspx)>.

<sup>62</sup> Department of Family and Community Services (Cth), *Families of Prisoners: Literature Review on Issues and Difficulties*, (Occasional Paper No 10, 2003) 21–2 <[https://www.dss.gov.au/sites/default/files/documents/05\\_2012/op10.pdf](https://www.dss.gov.au/sites/default/files/documents/05_2012/op10.pdf)>.

<sup>63</sup> Australian Law Reform Commission, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, 22 December 2017) 24 <[https://www.alrc.gov.au/wp-content/uploads/2019/08/final\\_report\\_133\\_amended1.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_133_amended1.pdf)>.

<sup>64</sup> Australian Law Reform Commission, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, 22 December 2017) 74 [2.73] <[https://www.alrc.gov.au/wp-content/uploads/2019/08/final\\_report\\_133\\_amended1.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_133_amended1.pdf)>.

<sup>65</sup> Australian Law Reform Commission, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, 22 December 2017) 75 [2.75] <[https://www.alrc.gov.au/wp-content/uploads/2019/08/final\\_report\\_133\\_amended1.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_133_amended1.pdf)>.

<sup>66</sup> Simon Quilty, ‘The Magnitude of Experience of Parental Incarceration in Australia’ (2005) 12(1) *Psychiatry, Psychology and Law* 256–7 <<https://doi.org/10.1375/pplt.2005.12.1.256>>.

<sup>67</sup> Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 81 <[https://www.humanrights.vic.gov.au/static/58264865b86dcc9da395eccfc9b767cd/Resource-Unfinished\\_business-report.pdf](https://www.humanrights.vic.gov.au/static/58264865b86dcc9da395eccfc9b767cd/Resource-Unfinished_business-report.pdf)>.

<sup>68</sup> Susan Dennison, Anna Stewart and Kate Freiberg, ‘A Prevalence Study of Children with Imprisoned Fathers: Annual and Lifetime Estimates’ (2013) 48(3) *Australian Journal of Social Issues* 339 <<https://doi.org/10.1002/j.1839-4655.2013.tb00286.x>>.

<sup>69</sup> Susan Dennison, Anna Stewart and Kate Freiberg, ‘A Prevalence Study of Children with Imprisoned Fathers: Annual and Lifetime Estimates’ (2013) 48(3) *Australian Journal of Social Issues* 341 <<https://doi.org/10.1002/j.1839-4655.2013.tb00286.x>>.

<sup>70</sup> <sup>70</sup> Department of Family and Community Services (Cth), *Families of Prisoners: Literature Review on Issues and Difficulties*, (Occasional Paper No 10, 2003) 20 <[https://www.dss.gov.au/sites/default/files/documents/05\\_2012/op10.pdf](https://www.dss.gov.au/sites/default/files/documents/05_2012/op10.pdf)>.

<sup>71</sup> Australian Law Reform Commission, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, 22 December 2017) 74 [2.72] <[https://www.alrc.gov.au/wp-content/uploads/2019/08/final\\_report\\_133\\_amended1.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_133_amended1.pdf)>.



more likely to be subject to youth justice supervision than non-First Nations young people.<sup>72</sup> These effects linger into adulthood, with over a quarter of First Nations prison entrants in 2015 reporting they had a parent or carer in prison during their childhood.<sup>73</sup>

3.5.6. As stated by the Councils of Social Services:

Youth offending is closely linked to disadvantage. Children who offend are also more likely to have experienced child abuse and neglect, disability, mental illness, drug and alcohol abuse, exposure to crime and violence and homelessness. Current responses fail to respond to these disadvantages in a therapeutic and effective way that addresses the reason children are committing crimes.<sup>74</sup>

3.5.7. The links between disadvantage, parental incarceration and early exposure to the criminal justice system as a child are clear. Raising the minimum age is one way in which Australia can address the disproportionate effects of the criminal justice system on First Nations peoples, particularly First Nations young people.

### 3.6. Raising the minimum age to better align with UNDRIP

3.6.1. Raising the minimum age is one way in which Australia incorporates the principles of UNDRIP within Australian law, including the Articles set out in full at **Annexure A**. Below, we discuss how the minimum age negatively impacts upon First Nations young peoples' ability to exercise their rights pursuant to these Articles of the UNDRIP.

3.6.2. As established above, the low minimum age has a disproportionate impact on First Nations young people. The causal factors for the overrepresentation of First Nations young people in detention are multifaceted and illustrative of the broader social and economic disadvantage faced by First Nations peoples in Australia (see paragraph 4.4 for an in-depth discussion of this).<sup>75</sup> As identified by the Law Council of Australia:

a legacy of dispossession, intergenerational trauma and grief, leading to cycles of poverty, as well as experiences of injustice that accumulate over a lifetime, and find expression in discriminatory or culturally incompetent mainstream institutions and systems, are major causal factors.<sup>76</sup>

3.6.3. Australia's low minimum age creates a barrier to First Nations young people's ability to exercise their rights under the UNDRIP, as follows:

- (a) **Articles 2 and 3:** There exists inherent discrimination in a system that disproportionately affects one group more than another, especially to the extent demonstrated in this submission. As discussed further at paragraph 4.4 below, discrimination against First Nations peoples in the Australian criminal justice system exists "at every step of the criminal justice process, from police contact, to sentencing and beyond".<sup>77</sup> As a result of this discrimination (and discrimination in wider society), it is difficult for First Nations peoples to exercise their right to self-determination.<sup>78</sup>

<sup>72</sup> Australian Law Reform Commission, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, 22 December 2017) 74 [2.73] <[https://www.alrc.gov.au/wp-content/uploads/2019/08/final\\_report\\_133\\_amended1.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_133_amended1.pdf)>.

<sup>73</sup> Australian Health Ministers' Advisory Council (Cth), *Aboriginal and Torres Strait Islander Health Performance Framework* (Report, 2017) <[https://www.niaa.gov.au/sites/default/files/publications/2017-health-performance-framework-report\\_1.pdf](https://www.niaa.gov.au/sites/default/files/publications/2017-health-performance-framework-report_1.pdf)>.

<sup>74</sup> Councils of Social Services, 'Review on Raising the Age of Criminal Responsibility: Joint Council of Social Service Network statement to the Council of Attorneys-General' (no date) <[https://vcoss.org.au/wp-content/uploads/2020/03/SUB\\_Joint-COSS\\_Age-of-Criminal-Responsibility-FINAL.pdf](https://vcoss.org.au/wp-content/uploads/2020/03/SUB_Joint-COSS_Age-of-Criminal-Responsibility-FINAL.pdf)>.

<sup>75</sup> House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing: First Nations Youth in the Criminal Justice System* (Report, June 2011) 7.

<sup>76</sup> Law Council of Australia "Council of Attorneys-General – Age of Criminal Responsibility Working Group Review" 2 March 2020, 17.

<sup>77</sup> Alana Couvreur, 'First Nations Representations and Criminal Justice System Impact', *Monash Law Students' Society* (Web Page, 2021) <<https://www.monashlss.com/post/First-Nations-representations-and-criminal-justice-system-impact>>.

<sup>78</sup> Australian Human Rights Commission, 'Human rights and Aboriginal and Torres Strait Islander peoples', (no date) <<https://bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-019-6614-7>>; Lorena Allam and Nick Evershed, 'Discrimination against First Nations Australians has risen dramatically, survey finds', *The Guardian* (2021)



- (b) **Articles 7 and 24:** The impact of social exclusion as a result of being detained is clearly likely to affect First Nations young peoples' overall health and wellbeing which directly impacts their right to:
    - (i) life, physical and mental integrity, liberty and security of person;<sup>79</sup> and
    - (ii) the enjoyment of the highest attainable standard of physical and mental health.<sup>80</sup>
  - (b) **Articles 15 and 23:** The lack of culturally appropriate post-release support programs to prevent recidivism presents obstacles for First Nations peoples in exercising their right to:
    - (i) determine and develop priorities and strategies for exercising their right to development, including their development of health, housing and other economic and social programmes affecting them;<sup>81</sup> and
    - (ii) the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.<sup>82</sup>
  - (c) **Article 21:** The intergenerational impacts of incarceration, including recidivism and disadvantage created by the trauma of youth detention, may also inhibit First Nations peoples' rights to the improvement of their economic and social conditions, including, amongst other things, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.<sup>83</sup> This is a direct result of the inability of First Nations families and communities to break the cycle of disadvantage perpetuated by a criminal justice system that disproportionately affects them.
  - (d) **Article 22:** The disproportionate rate at which First Nations young people are targeted by the criminal justice system does not align with Article 22, which requires that particular attention be paid to the rights and needs of children (amongst others), and that measures should be taken to ensure that children are protected against all forms of violence and discrimination.
- 3.6.4. Australia's low minimum age does not align with the UNDRIP and is a barrier to First Nations peoples' ability to fully exercise their rights under the UNDRIP. Raising the minimum age would ensure immediate beneficial outcomes for First Nations young people and is a crucial step in addressing the systemic disadvantage that First Nations peoples face.

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<[https://www.theguardian.com/australia-news/2021/may/24/discrimination-against-First Nations-australians-has-risen-dramatically-survey-finds](https://www.theguardian.com/australia-news/2021/may/24/discrimination-against-First-Nations-australians-has-risen-dramatically-survey-finds)>; Alison Markwick et al, 'Experiences of racism among Aboriginal and Torres Strait Islander adults living in the Australian state of Victoria: a cross-sectional population-based study', *BMC Public Health* (2019) <<https://bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-019-6614-7>>.

<sup>79</sup> UNDRIP, art 7.1.

<sup>80</sup> UNDRIP, art 24.2.

<sup>81</sup> UNDRIP, art 23.

<sup>82</sup> UNDRIP, art 15.

<sup>83</sup> UNDRIP, art 21.

## 4. Rates of over-incarceration, over-policing and over-criminalisation of behaviour

### 4.1. First Nations peoples are over-incarcerated

- 4.1.1. First Nations people represent 3.3 per cent of the Australian population<sup>84</sup> and make up approximately 30 per cent of Australia's prison population.<sup>85</sup>
- 4.1.2. Following the RCIADIC (discussed further at paragraph 4.5 below), it was recommended that incarceration should be the last resort for First Nations people.<sup>86</sup> However, since the RCIADIC, incarceration rates for First Nations peoples in Australia have more than doubled from 14 per cent to approximately 30 per cent.<sup>87</sup>
- 4.1.3. The rising incarceration rate of First Nations peoples is especially alarming given that arrest and conviction rates have plateaued. For instance, between 2001 and 2015, rates of First Nations peoples in remand in NSW rose by 283 percent despite dropping arrest rates. 40 per cent of those held on remand did not receive a custodial sentence.<sup>88</sup>
- 4.1.4. First Nations peoples also account for a significant proportion of deaths in custody. In 2020-2021, there were 12 First Nations deaths in prison custody, which accounted for 18 per cent of the total deaths in prison custody over that period.<sup>89</sup> In the three decades following the RCIADIC, there have been 320 First Nations deaths in prison custody.<sup>90</sup>
- 4.1.5. In NSW, the death rate of non-First Nations prisoners was 0.18 per 100 prisoners compared to 0.14 per 100 for First Nations prisoners.<sup>91</sup> Whilst the death rate for non-First Nations prisoners is slightly higher, the statistics for First Nations prisoners are particularly concerning when considering that First Nations peoples constitute only 3.5 per cent of NSW's population.<sup>92</sup>
- 4.1.6. We do not wish to attribute causality in the statistics discussed above to numbers alone, and, to that end, have discussed the role that systemic discrimination against First Nations peoples has in these statistics. Please refer to paragraph 4.4 for this discussion.

### 4.2. First Nations peoples are over-policed and over-criminalised

- 4.2.1. In addition to over-incarceration, First Nations peoples are disproportionately over-policed and over-criminalised. Two of the issues which demonstrate this ongoing discrimination are public drunkenness and offensive language.
- 4.2.2. The RCIADIC recommended that public drunkenness elicits a public health response rather than arrest. However, First Nations peoples continue to be criminalised at a disproportionate rate when compared to non-First Nations Australians for offences such as public drunkenness. This is despite the fact that public drunkenness has been decriminalised in all states other than Queensland and

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<sup>84</sup> Australian Bureau of Statistics, 'Estimates of Aboriginal and Torres Strait Islander Australians.' (Web Page, June 2016). <<https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/estimates-aboriginal-and-torres-strait-islander-australians/latest-release>>.

<sup>85</sup> Australian Bureau of Statistics, 'Prisoners in Australia.' (Web Page, 9 December 2021). <<https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release>>.

<sup>86</sup> Royal commission into Aboriginal Deaths in Custody (Report, 29 April 1998).

<sup>87</sup> Australian Broadcasting Corporation, 'Families, politicians say not enough has changed 30 years on from Royal Commission into Aboriginal Deaths in Custody.' (Web Page, 15 April 2021). <<https://www.abc.net.au/news/2021-04-15/deaths-in-custody-30-years-since-royal-commission/100068872>>.

<sup>88</sup> The Guardian, 'Number of First Nations people in NSW prisons doubles in 15 years.' (Web Page, 3 October 2016). <<https://www.theguardian.com/australia-news/2016/oct/03/First-Nations-imprisonment-rates-almost-double-as>>.

<sup>89</sup> Australian Institute of Criminology, 'Deaths in custody in Australia 2020-21' (Statistical Report 37, 2021) <[https://www.aic.gov.au/sites/default/files/2021-12/sr37\\_deaths\\_in\\_custody\\_in\\_australia\\_2020-21\\_v3.pdf](https://www.aic.gov.au/sites/default/files/2021-12/sr37_deaths_in_custody_in_australia_2020-21_v3.pdf)>, 3.

<sup>90</sup> Australian Institute of Criminology, 'Deaths in custody in Australia 2020-21' (Statistical Report 37, 2021) <[https://www.aic.gov.au/sites/default/files/2021-12/sr37\\_deaths\\_in\\_custody\\_in\\_australia\\_2020-21\\_v3.pdf](https://www.aic.gov.au/sites/default/files/2021-12/sr37_deaths_in_custody_in_australia_2020-21_v3.pdf)>, 3.

<sup>91</sup> Australian Institute of Criminology, 'Deaths in custody in Australia 2020-21' (Statistical Report 37, 2021) <[https://www.aic.gov.au/sites/default/files/2021-12/sr37\\_deaths\\_in\\_custody\\_in\\_australia\\_2020-21\\_v3.pdf](https://www.aic.gov.au/sites/default/files/2021-12/sr37_deaths_in_custody_in_australia_2020-21_v3.pdf)>, 4.

<sup>92</sup> Australian Institute of Health and Welfare, *Profile of First Nations Australians* (Web Page, 23 July 2020) <<https://www.aihw.gov.au/reports/australias-health/profile-of-First-Nations-australians>>.

Victoria. For example, in 2017 in Victoria it was found that First Nations women were ten times more likely to be targeted by police for public drunkenness when compared to non-First Nations women.<sup>93</sup>

- 4.2.3. The case of Yorta Yorta woman, Ms Tanya Day, highlights the tragic consequences which may stem from the discrimination faced by First Nations peoples in this regard. Ms Day was asleep on a Victorian train in 2017 prior to being arrested and taken to the Castlemaine police station where she was left unattended in a holding cell, where she allegedly “fell and hit her head at least five times, causing traumatic brain injuries which led to her death”.<sup>94</sup> The Victorian coroner’s report found that police’s checks of Ms Day in the holding cell were inadequate.<sup>95</sup> According to the coroner, Ms Day’s death “was clearly preventable had she not been arrested and taken into custody.”<sup>96</sup> As a result of Ms Day’s death, legislation has been introduced in Victoria (and will take effect in late 2022) that will see public drunkenness treated as a medical issue rather than a criminal offence.<sup>97</sup>
- 4.2.4. Despite the decriminalisation of public drunkenness in most states, First Nations peoples continue to be over-criminalised and detained for offences such as failing to move on due to intoxication or failing to sober up.<sup>98</sup> For instance, in the NT, First Nations peoples account for 92.8 per cent of all individuals detained in police cells for public drunkenness.<sup>99</sup> These statistics indicate the continued use of police cells under protective custody laws to detain First Nations peoples at a disproportionate rate, despite the repeal of public drunkenness offences.
- 4.2.5. First Nations peoples in Australia are also far more likely to receive infringement notices or be arrested for offensive language.<sup>100</sup> In 2018, First Nations peoples accounted for approximately one third of all arrests for offensive language.<sup>101</sup> This continues despite the RCIADIC’s recommendation that the use of offensive language should not normally warrant arrest or charge.<sup>102</sup> Of additional concern is the fact that in many states, prison sentences can be used as a punishment for offensive

<sup>93</sup> Human Rights Law Centre, ‘Aboriginal women 10 times more likely to be targeted by police at time of Tanya Day’s death in custody.’ (Web Page, 30 April 2019). <<https://www.hrlc.org.au/news/2019/4/30/aboriginal-women-10-times-more-likely-to-be-targeted-by-police>>.

<sup>94</sup> Bridget Rollason, ‘Victorian Parliament decriminalises public drunkenness in a victory for the family of Tanya Day’, *ABC News* (19 February 2021) <<https://www.abc.net.au/news/2021-02-19/victorian-parliament-decriminalises-public-drunkenness-tanya-day/13172136?nw=0&r=Image>>;

<sup>95</sup> Inquest into the Death of Tanya Louise Day (9 April 2020) 79 [448] & [450].  
<<https://www.coronerscourt.vic.gov.au/sites/default/files/2020-04/Finding%20-%20Tanya%20Day-%20COR%202017%206424%20-%20AMENDED%2017042020.pdf>>.

<sup>96</sup> Karen Percy, ‘Victorian coroner refers ‘preventable’ death of Tanya Day in police custody to prosecutors’, *ABC News* (9 April 2020) <<https://www.abc.net.au/news/2020-04-09/tanya-day-coronial-finding-into-death-in-custody/12134398>>.

<sup>97</sup> Karen Percy, ‘Victorian coroner refers ‘preventable’ death of Tanya Day in police custody to prosecutors’, *ABC News* (9 April 2020) <<https://www.abc.net.au/news/2020-04-09/tanya-day-coronial-finding-into-death-in-custody/12134398>>.

<sup>98</sup> Adeshola Ore, ‘From lock-up to sobering up: Victoria grapples with public drunkenness reform’, *The Guardian* (15 May 2022). <<https://www.theguardian.com/australia-news/2022/may/15/from-lock-up-to-sobering-up-victoria-grapples-with-public-drunkenness-reform>>.

<sup>99</sup> Expert Reference Group on Public Drunkenness, ‘Seeing the Clear Light of Day: Expert Reference Group on Decriminalising Public Drunkenness’. (Report to the Victorian Attorney-General, August 2020).  
<<https://files.justice.vic.gov.au/2021-06/Seeing%20the%20Clear%20Light%20of%20Day%20ERG%20report.pdf>>.

<sup>100</sup> Chris Cuneen, ‘Criminalisation and Policing in Indigenous Communities’ (2019) p 4 (NB: document is unpaginated).  
<<https://opus.lib.uts.edu.au/rest/bitstreams/3f04783b-43b6-462d-bf73-6c279e09aa14/retrieve>>; Australian Law Reform Commission, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, 22 December 2017) 422 [12.171] <[https://www.alrc.gov.au/wp-content/uploads/2019/08/final\\_report\\_133\\_amended1.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_133_amended1.pdf)>.

<sup>101</sup> Australian Broadcasting Corporation, ‘Swearing in public is still illegal, but you probably won’t be charged if you’re white.’ (Web Page, 2 January 2020). <<https://www.abc.net.au/news/2020-01-02/swearing-in-public-is-illegal-unlikely-to-be-charged-if-white/11815572>>.

<sup>102</sup> *Royal Commission into Aboriginal Deaths in Custody* (Report, 29 April 1998), Recommendation 86a.

language offences.<sup>103</sup> These concerns were raised by the ALRC, which recommended that offensive language provisions be repealed or narrowed.<sup>104</sup>

4.2.6. In addition to these instances of over-policing and over-criminalisation, paperless arrest laws in the NT are a further example of the over-policing of First Nations peoples in Australia. These laws have a disproportionate effect on First Nations peoples.<sup>105</sup>

4.2.7. Whilst some progress has been made with the repeal of alcohol protection order laws in the NT, paperless arrest laws remain, allowing police to arrest people if they believe the individual may commit a minor offence.<sup>106</sup> In 2019, First Nations peoples made up 87 per cent of those arrested by police using the paperless arrest powers.<sup>107</sup> Accordingly, despite the fact that some progress is being made with the repeal of alcohol protection orders, existing laws continue to have a disproportionate impact on First Nations peoples.

### 4.3. Harmful impacts of over-incarceration, over-policing and over-criminalisation

4.3.1. Incarceration is known to have lasting harmful impacts on prisoners both whilst incarcerated and once released, including, but not limited to, the following:

- (a) negative physical health impacts including drug use and related health issues, including a higher rate of hepatitis C and HIV;<sup>108</sup>
- (b) high risk of mental ill health (noting prisoners reportedly suffer from instances of mental health illness at a rate of 2.5 times higher than the general population);<sup>109</sup>
- (c) a relatively high risk of mortality post-release, particularly through suicide, motor vehicle accidents, circulatory system diseases and drug-related deaths;<sup>110</sup>

<sup>103</sup> Australian Law Reform Commission, 'Infringement notices for offensive language.' (ALRC Report 133, 5 February 2018). <<https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/12-fines-and-driver-licences/infringement-notices-for-offensive-language-3/#:~:text=12.170%20The%20penalty%20amount%20for,maximum%20fines%20of%20approximately%20%241%2C000>>.

<sup>104</sup> Australian Law Reform Commission, 'Infringement notices for offensive language.' (ALRC Report 133, 5 February 2018). <<https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/12-fines-and-driver-licences/infringement-notices-for-offensive-language-3/#:~:text=12.170%20The%20penalty%20amount%20for,maximum%20fines%20of%20approximately%20%241%2C000>>, Recommendation 12-4.

<sup>105</sup> Chris Cuneen, 'Criminalisation and Policing in Indigenous Communities' (2019) p 5 (NB: document is unpaginated). <<https://opus.lib.uts.edu.au/rest/bitstreams/3f04783b-43b6-462d-bf73-6c279e09aa14/retrieve>>.

<sup>106</sup> Human Rights Law Centre, 'NT repeals punitive alcohol laws but unjust paperless arrest laws remain.' (Web Page, 18 August 2017). <<https://www.hrlc.org.au/news/2017/8/18/nt-repeals-punitive-alcohol-laws-but-unjust-paperless-arrest-laws-remain#:~:text=The%20Bill%20does%20not%20address,they%20are%20still%20in%20operation.>>.

<sup>107</sup> Australian Broadcasting Corporation, 'Backflip on NT Government promise to repeal 'manifestly unfair' paperless arrest laws.' (Web Page, 21 August 2020). <<https://www.abc.net.au/news/2020-08-21/chief-minister-backflip-nt-paperless-arrest-laws/12580178>>.

<sup>108</sup> Senate Standing Committee on Legal and Constitutional Affairs, 'Value of a justice reinvestment approach to criminal justice in Australia' (20 June 2013), 21 [3.24]. <[https://www.aph.gov.au/parliamentary\\_business/committees/senate/legal\\_and\\_constitutional\\_affairs/completed\\_inquiries/2010-13/justicereinvestment/report/index](https://www.aph.gov.au/parliamentary_business/committees/senate/legal_and_constitutional_affairs/completed_inquiries/2010-13/justicereinvestment/report/index)>.

<sup>109</sup> Michael Hobbs et al, *Mortality and Morbidity in prisoners after release from Prison in Western Australia 1995-2003* (Australian Institute of Criminology, Trends and Issues in Criminal Justice No 320, July 2006) <<https://www.aic.gov.au/publications/tandi/tandi320>>; Senate Standing Committee on Legal and Constitutional Affairs, 'Value of a justice reinvestment approach to criminal justice in Australia' (20 June 2013), 21 [3.25]. <[https://www.aph.gov.au/parliamentary\\_business/committees/senate/legal\\_and\\_constitutional\\_affairs/completed\\_inquiries/2010-13/justicereinvestment/report/index](https://www.aph.gov.au/parliamentary_business/committees/senate/legal_and_constitutional_affairs/completed_inquiries/2010-13/justicereinvestment/report/index)>.

<sup>110</sup> Senate Standing Committee on Legal and Constitutional Affairs, 'Value of a justice reinvestment approach to criminal justice in Australia' (20 June 2013), 21 [3.13] & [3.28]. <[https://www.aph.gov.au/parliamentary\\_business/committees/senate/legal\\_and\\_constitutional\\_affairs/completed\\_inquiries/2010-13/justicereinvestment/report/index](https://www.aph.gov.au/parliamentary_business/committees/senate/legal_and_constitutional_affairs/completed_inquiries/2010-13/justicereinvestment/report/index)>.

- (d) substance abuse, and for those prisoners with a history of substance abuse, a higher risk of death once released;<sup>111</sup>
- (e) poor post-release outcomes due to the criminogenic effects of imprisonment (including risk of recidivism);<sup>112</sup>
- (f) difficulty in finding employment;<sup>113</sup>
- (g) discrimination on the basis of having a criminal record (for example, by prospective employers);<sup>114</sup>
- (h) breakdown of social and family bonds as well as the loss of engagement with the wider community;<sup>115</sup> and
- (i) inability to meet basic needs such as housing, transport and adequate financial support (for instance, welfare payments).<sup>116</sup>

4.3.2. The negative impacts of incarceration extend to the families of people who have been in custody and the wider community. In a submission to the Senate Legal and Constitutional Affairs References Committee's *Value of a justice reinvestment approach to criminal justice in Australia* inquiry, the South Australian Justice Reinvestment Working Group stated that the "social costs of imprisonment not only to offender but also to their family and friends becomes almost impossible to calculate".<sup>117</sup> According to the Queensland Productivity Commission's report *Inquiry into Imprisonment and Recidivism*:

Imprisonment imposes many other indirect costs on prisoners, their families and the broader community. Imprisonment has been shown to worsen prisoners' physical health (Enggist et al. 2014), exacerbate mental illness (White & Whiteford 2006) and cause inmates' human capital to decline, with costs increasing with the length of imprisonment. Post-release data also shows that imprisonment adversely affects future outcomes including higher unemployment (Holzer 2009; Mueller-Smith 2014; Travis et al. 2014), social exclusion and homelessness (Payne et al. 2015).

For the families of prisoners, imprisonment can lead to a loss of income and reduce total resources available for meeting household expenses. Besemer & Dennison (2017), for example, show an increased dependence on welfare benefits among families with experience of imprisonment. For prisoners who are parents to young children, imprisonment 'disrupts parent-child relationships, alters the networks of familial support, and places new burdens on governmental services such as schools, foster care, adoption agencies, and youth-serving organizations' (Beil et al. 2018). In Australia, the increase in women's imprisonment has been shown to impact on children's welfare in both the short and long term (Goulding 2007).<sup>118</sup>

4.3.3. Edwige and Gray (2021) have stated that:

<sup>111</sup> The Senate Legal and Constitutional Affairs References Committee, *Value of a Justice Reinvestment Approach to criminal justice in Australia* (20 June 2013), 23-24

<[https://www.aph.gov.au/parliamentary\\_business/committees/senate/legal\\_and\\_constitutional\\_affairs/completed\\_inquiries/2010-13/justicereinvestment/report/index](https://www.aph.gov.au/parliamentary_business/committees/senate/legal_and_constitutional_affairs/completed_inquiries/2010-13/justicereinvestment/report/index)>.

<sup>112</sup> Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Final Report, August 2019) vol 1, 90; Australian Bureau of Statistics, *Prisoners in Australia, 2021* (Former Catalogue Number 4517.0, 9 December 2021).

<sup>113</sup> Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, January 2018), 2.35.

<sup>114</sup> Australian Human Rights Commission, *Human rights and prisoners* (no date),

<[https://humanrights.gov.au/sites/default/files/content/letstalkaboutrights/downloads/HRA\\_prisoners.pdf](https://humanrights.gov.au/sites/default/files/content/letstalkaboutrights/downloads/HRA_prisoners.pdf)>.

<sup>115</sup> Senate Standing Committee on Legal and Constitutional Affairs, 'Value of a justice reinvestment approach to criminal justice in Australia' (20 June 2013), 21 [3.13] & [3.14].

<[https://www.aph.gov.au/parliamentary\\_business/committees/senate/legal\\_and\\_constitutional\\_affairs/completed\\_inquiries/2010-13/justicereinvestment/report/index](https://www.aph.gov.au/parliamentary_business/committees/senate/legal_and_constitutional_affairs/completed_inquiries/2010-13/justicereinvestment/report/index)>.

<sup>116</sup> Anthea Susan Krieg, 'Aboriginal incarceration: health and social impacts' (2006) 184 (10) *Medical Journal of Australia* 534, 534.

<sup>117</sup> South Australian Justice Reinvestment Working Group, Submission 28, p. 4.

<sup>118</sup> Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Final Report, August 2019) vol 1, 89–90.



Various inquiries have heard how imprisonment disrupts important connections for Aboriginal and Torres Strait Islander people. Given the distributed networks of care and focus on extended family and community relationships, the absence of family and community members (and particularly the incarceration of Aboriginal and Torres Strait Islander women) can disrupt these processes.

It is perhaps worth noting that the harm inflicted on Aboriginal and Torres Strait Islander cultures and future through the disruption of community relationships is a function of colonialism, and both contributes to, and is perpetuated by, current over-representation in the criminal justice system, the disproportionate removal of Aboriginal and Torres Strait Islander children from their families and communities, and even the disparities in health outcomes. That is, the disruption to family, community and cultural relationships, including through the over-incarceration of Aboriginal and Torres Strait Islander children, youth and adults, is a continuation of the traumatic experiences of invasion and colonisation experienced by Aboriginal and Torres Strait Islander communities over generations. These disruptions are likely to continue to entrench the social determinants of offending (and undermine wellbeing).<sup>119</sup>

4.3.4. As discussed at paragraph 3.5 above, children of one or more parents who have been incarcerated also bear the burden of incarceration-related issues. According to a 2018 study which investigated development vulnerabilities in children of convicted parents, there is evidence that “[p]arental incarceration may have impacts upon a child’s emotional, behavioural, and psychology development, educational performance, delinquency and offending.”<sup>120</sup> As a result, children of incarcerated parents are at risk of poor developmental and educational outcomes.

4.3.5. In addition to these far-reaching harmful effects of incarceration, there are further and distinct negative impacts for First Nations peoples who have been imprisoned, particularly women. Incarceration disconnects First Nations peoples from their “children, family, community and country”,<sup>121</sup> and incarcerated First Nations women suffer from “disruptions to their cultural responsibilities and dislocation from their communities.”<sup>122</sup>

4.3.6. Anthea Susan Krieg, in an article published in the Medical Journal of Australia, stated:

A culturally responsive health perspective [on solutions for the excessive incarceration of Aboriginal and Torres Strait Islander peoples] allows us to hear what Aboriginal people have been telling us for a long time — that patterns of criminal behaviour are often an expression of the deep wells of pain, anger and grief experienced by Aboriginal people on a daily basis as a consequence of their long history of dispossession in this country. Forced separation through incarceration intensifies this, creating a further marginalised and destabilised young Aboriginal population and placing added burdens, both financial and social, on the individuals and on Aboriginal women and children.<sup>123</sup>

4.3.7. For reasons similar to those outlined at paragraph 3.6 above in relation to the minimum age, the over-incarceration, over-policing and criminalisation of behaviour of First Nations peoples in Australia infringes upon the rights granted by Article 2 of the UNDRIP to be free from any discrimination based on their cultural identity.

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<sup>119</sup> Vanessa Edwige and Dr Paul Gray, *Significance of Culture to Wellbeing, Healing and Rehabilitation* (Bugmy Bar Book Report, 2021) 42 [176]-[177].

<sup>120</sup> Megan Bell, Donna Bayliss, Rebecca Glauert and Jeneva Ohan, 'Using Linked Data to Investigate Developmental Vulnerabilities in Children of Convicted Parents' (2018) 54 *Developmental Psychology* 1219, 1220.

<sup>121</sup> Human Rights Law Centre, Change the Record Coalition, *Over-Represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women’s Growing Over-Imprisonment* (May 2017) 13.

<sup>122</sup> Human Rights Law Centre, Change the Record Coalition, *Over-Represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women’s Growing Over-Imprisonment* (May 2017) 13.

<sup>123</sup> Anthea Susan Krieg, 'Aboriginal incarceration: health and social impacts' (2006) 184 (10) *Medical Journal of Australia* 534, 535.



#### 4.4. Over-incarceration, over-policing and over-criminalisation as a result of systemic discrimination

- 4.4.1. Systemic change must be introduced to reduce the disproportionate effects of the criminal justice system on First Nations peoples in Australia. As noted at paragraph (a), discrimination against First Nations peoples occur not only in the criminal justice system but in broader society across many systems and public institutions:

Dodson and Strelein have observed that “disrespect occurs not just in the relationship between the state and Indigenous peoples, but has engendered a more personal disrespect that is experienced by Indigenous people on a daily basis.” This was observed by the RCIADIC quotation used in the introduction when attempting to describe what Indigenous peoples mean by institutional racism: They are talking about the laws, the systems, that were put in place pursuant to the laws which operate every day, whether the people who operate the system are well meaning and helpful or personally racist. The belief about the racism of Australian public institutions has been confirmed by external human rights institutions. In 1999 and 2000 the United Nations Committee on the Elimination of Racial Discrimination found that Australia was in breach of its obligations in international law by suspending the operation of the *Racial Discrimination Act 1975* (Cth) to enable Aboriginal people to be discriminated against on the basis of race in amending the *Native Title Act 1993* (Cth). Again in 2003 the United Nations Special Rapporteur on Racism expressed serious concerns about how racism affects Indigenous Australian. According to the United Nations Special Rapporteur on adequate housing, “Indigenous peoples experience substantial discrimination in Australia in accessing adequate housing [in the] private housing market”. Institutional discrimination in State housing is also a controversial issue.<sup>124</sup>

- 4.4.2. Systemic racism and discrimination are also present in the Australian education system, indicating that First Nations peoples are faced with discrimination from childhood, and not just from a criminal justice perspective. According to Bodkin-Andrews and Carlson (2016), both the media and certain academic perspectives “may be argued to promote varying degrees of resistance to acknowledging the ongoing impact” of inequalities faced by First Nations peoples, such as being at “greater risk for lower levels of unemployment, greater contact with the justice system, and increase negative physical health and mental health complications”.<sup>125</sup> When looking critically at the western lens applied in the Australian education system to topics relevant to First Nations peoples, “it becomes apparent that the insidious effects of epistemological racism still plagues the Indigenous Australian educational research agenda.”<sup>126</sup>

- 4.4.3. The impacts of systemic discrimination are significant and far-reaching and have been present for hundreds of years. Pat Dudgeon (2010) stated:

Since the arrival of white people in Australia in 1788, Aboriginal and Torres Strait Islander peoples have experienced displacement, been the targets of genocidal policies and practices, had families destroyed through the forcible removal of children, and continue to face the stresses of living in a world that systematically devalues their culture and people. Such experiences have profound effects on health, mental health and social and emotional wellbeing, for individuals, families and communities.<sup>127</sup>

<sup>124</sup> Megan Davis, ‘A Culture of Disrespect: Indigenous Peoples and Australian Public Institutions’, University of Technology Sydney Law Review (2006), 142. <<http://classic.austlii.edu.au/au/journals/UTSLawRw/2006/9.pdf>>.

<sup>125</sup> Gawaian Bodkin-Andrews and Bronwyn Carlson, ‘The legacy of racism and Indigenous Australian identity within education’, *Race Ethnicity and Education* 19(4), 784, 785. <<https://www.tandfonline.com/doi/pdf/10.1080/13613324.2014.969224>>.

<sup>126</sup> Gawaian Bodkin-Andrews and Bronwyn Carlson, ‘The legacy of racism and Indigenous Australian identity within education’, *Race Ethnicity and Education* 19(4), 784, 786. <<https://www.tandfonline.com/doi/pdf/10.1080/13613324.2014.969224>>.

<sup>127</sup> Pat Dudgeon et al, ‘Aboriginal Social, Cultural and Historical Contexts’ (2010) in Pat Dudgeon, Helen Milroy and Roz Walker (eds), *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice* (Telethon Institute for Child Health Research/Kulunga Research Network, 2 nd ed, 2010) 18.

- 4.4.4. As a result of colonisation, First Nations peoples experienced a constant denial of their rights and their ways of existing.<sup>128</sup> Through the dispossession of land, forced removal of children and community massacres, Indigenous peoples were oppressed and consistently discriminated against.<sup>129</sup>
- 4.4.5. The RCIADIC recognised the role that historical factors play in First Nations peoples being over-represented in the criminal justice system. Overrepresentation of First Nations peoples was acknowledged as “direct consequences of their experience of colonialism”.<sup>130</sup> The RCIADIC concluded that “the single significant contributing factor to incarceration is the disadvantaged and unequal position of Aboriginal people in Australian society in every way, whether socially, economically or culturally.”<sup>131</sup>

### **Cultural dispossession**

- 4.4.6. The cultural dispossession of First Nations peoples during the colonisation of Australia “not only set the stage for social disintegration, it deprived Aboriginal people of their land and material livelihood, setting the stage for their economic deprivation and continuing poverty”.<sup>132</sup>
- 4.4.7. The process of dispossession was violent, and the “colonial government’s authorisation of settlement allowed Aboriginal deaths at the hands of Europeans to take place with impunity.”<sup>133</sup>
- 4.4.8. In addition to being dispossessed of their land, First Nations peoples were also forcibly disconnected from ‘culture, language, land, resources, political autonomy, religious freedom, and, often, personal autonomy’.<sup>134</sup>

### **Stolen Generations**

- 4.4.9. The Stolen Generations are the “thousands of children ... forcibly removed by governments, churches and welfare bodies to be raised in institutions, fostered out or adopted by non-Indigenous families, nationally and internationally.”<sup>135</sup> The true number of children removed may never be known, but “in some families children from three or more generations were taken”.<sup>136</sup>
- 4.4.10. The forcible removal of children “broke important cultural, spiritual and family ties and has left a lasting and intergenerational impact on the lives and wellbeing” of First Nations peoples.<sup>137</sup>

### **Intergenerational trauma**

- 4.4.11. The trauma of past events being passed on through generations is referred to as intergenerational trauma.<sup>138</sup> Often, communities impacted by such historical events experience intergenerational trauma leading to emotional and behavioural difficulties and higher rates of

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<sup>130</sup> Royal Commission into Aboriginal Deaths in Custody, 1991, Vol 2,1.

<sup>131</sup> Royal Commission into Aboriginal Deaths in Custody, 1991, Vol 1, 15.

<sup>132</sup> Royal Commission into Aboriginal Deaths in Custody, *Regional Report of Inquiry in New South Wales, Victoria and Tasmania* (1991) 26.

<sup>133</sup> Bugmy Bar Book Committee, *Cultural Dispossession Experienced by Aboriginal and Torres Strait Islander Peoples* (The Bar Book Project, November 2020) 5 [13] <[https://www.publicdefenders.nsw.gov.au/Pages/public\\_defenders\\_research/bar-book/pdf/BBP\\_CulturalDispossession\\_chapter-Nov2020.pdf](https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/bar-book/pdf/BBP_CulturalDispossession_chapter-Nov2020.pdf)>.

<sup>134</sup> Linda Archibald, *Decolonization and Healing: Indigenous Experiences in the United States, New Zealand, Australia and Greenland* (Aboriginal Healing Foundation, 2006), quoted in Chris Cunneen ‘Sentencing, Punishment and Indigenous People in Australia’ (2018) 3 *Journal of Global Indigeneity* 15.

<sup>135</sup> Australian Institute of Aboriginal and Torres Strait Islander Studies, ‘The Stolen Generations’ (Web page, no date) <<https://aiatsis.gov.au/explore/stolen-generations>>.

<sup>136</sup> Australian Institute of Aboriginal and Torres Strait Islander Studies, ‘The Stolen Generations’ (Web page, no date) <<https://aiatsis.gov.au/explore/stolen-generations>>.

<sup>137</sup> Australian Institute of Aboriginal and Torres Strait Islander Studies, ‘The Stolen Generations’ (Web page, no date) <<https://aiatsis.gov.au/explore/stolen-generations>>.

<sup>138</sup> Judy Atkinson, ‘Trauma-Informed Services and Trauma-Specific Care for First Nations Australian Children’ (Resource Sheet No 21, Closing the Gap Clearinghouse, 2013) 2.

substance abuse,<sup>139</sup> factors which are associated with being at a higher risk of encountering the criminal justice system. The trauma experienced by First Nations peoples stemming from colonisation and subsequent government policies which perpetuated First Nations peoples' experiences of disadvantage and discrimination is reinforced by the criminal justice system.

4.4.12. The Healing Foundation's summary of intergenerational trauma states:

If Stolen Generations survivors don't have the opportunity to heal from trauma, they're likely to live in a state of distress, which can lead to a range of negative outcomes for themselves and their descendants.

Their children may experience difficulties with attachment, disconnection from their extended families and cultural and high levels of stress from family and community members who are dealing with the impacts of trauma. This can create developmental issues for children, who are particularly susceptible to distress at a young age. This creates a cycle of trauma, where the impact is passed from one generation to the next.<sup>140</sup>

4.4.13. According to Edwige and Grey, some of the ways in which intergenerational trauma manifests in the lives of First Nations peoples include impacts on mental health, domestic and family violence, substance abuse and homelessness.<sup>141</sup> Furthermore:

[t]here is substantial overlap between the social determinants of incarceration, the development impacts of [adverse childhood experiences] and early life stress, and the experience of stressors that contribute to, and in some cases overwhelm, the core capabilities of Aboriginal and Torres Strait Islander individuals and families.<sup>142</sup>

4.4.14. The Pathways Report found that "intergenerational trauma contributed significantly to the disproportionate experience of social and economic factors that are recognised as determinants of incarceration" amongst First Nations peoples.<sup>143</sup>

**Social and economic disadvantage**

4.4.15. According to the Senate Standing Committee on Community Affairs' *A hand up not a handout: Renewing the fight against poverty (Report on poverty and financial hardship) (Poverty and Financial Hardship Report)*:<sup>144</sup>

Indigenous Australians remain the most disadvantaged and marginalised group in Australia. On all standard indicators of poverty and disadvantage, Indigenous people emerge at the most socially and economically deprived.

4.4.16. In its 2017 report (the *Aboriginal and Torres Strait Islander Health Performance Framework 2017 Report*), the National Indigenous Australians Agency (NIAA) stated:

<sup>139</sup> Robert Parker and Helen Milroy, 'Aboriginal and Torres Strait Islander Mental Health: An Overview' in Helen Milroy, Pat Dudgeon and Roz Walker (eds), *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice* (2014) 25, 30.

<sup>140</sup> Healing Foundation, 'What is intergenerational trauma?' (Webpage, no date) <<https://healingfoundation.org.au/intergenerational-trauma/>>.

<sup>141</sup> Vanessa Edwige and Dr Paul Gray, *Significance of Culture to Wellbeing, Healing and Rehabilitation* (Bugmy Bar Book Report, 2021) 15 [60].

<sup>142</sup> Vanessa Edwige and Dr Paul Gray, *Significance of Culture to Wellbeing, Healing and Rehabilitation* (Bugmy Bar Book Report, 2021) 17 [68].

<sup>143</sup> Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report, December 2017) 375-376, <[https://www.alrc.gov.au/wp-content/uploads/2019/08/final\\_report\\_133\\_amended1.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_133_amended1.pdf)>.

<sup>144</sup> Senate Standing Committee on Community Affairs, 'A hand up not a handout: Renewing the fight against poverty (Report on poverty and financial hardship)' (11 March 2004), Chapter 13 [13.1]. <[https://www.aph.gov.au/parliamentary\\_business/committees/senate/community\\_affairs/completed\\_inquiries/2002-04/poverty/report/c13#:~:text=The%20social%20and%20economic%20disadvantage,and%20high%20levels%20of%20incarceration.>](https://www.aph.gov.au/parliamentary_business/committees/senate/community_affairs/completed_inquiries/2002-04/poverty/report/c13#:~:text=The%20social%20and%20economic%20disadvantage,and%20high%20levels%20of%20incarceration.>)>.

[t]he links between different forms of socio-economic disadvantage such as poverty, unemployment, poor education and consequent social dysfunction, stress, social exclusion, racism and health are well documented (Martmot, 2015; Paradies, 2006; Saunders & Davidson, 2007; Sassi, 2009).<sup>145</sup>

4.4.17. The Pathways Report noted that:

[t]he significant drivers of incarceration external to the criminal justice system was repeated by many submissions to this Inquiry. For example, Aboriginal Peak Organisations Northern Territory submitted that ... [c]olonisation, dispossession and displacement from traditional lands, weakening of culture, the separation of families through past government policies, high levels of incarceration, and ongoing discrimination and racism, have all contributed to continuing disadvantage, poor health and poor social outcomes for many Aboriginal people.<sup>146</sup>

4.4.18. Additionally, it was stated that:

the role of the criminal justice system cannot be disentangled from the complex dynamics that sustain and compound high levels of disadvantage and in turn contribute directly to high levels of victimisation in many ATSI communities.<sup>147</sup>

4.4.19. The over-incarceration of First Nations peoples is perpetuated by systemic discrimination that has been present in Australian society since colonisation, and the resulting cycle of disadvantage. If the disproportionate rate at which First Nations peoples are incarcerated, policed and criminalised is to be seriously and adequately addressed, the Australian Government must address the discrimination that is pervasive in Australian society and which First Nations peoples face in many aspects of daily life.

4.4.20. Such a response requires policy and legal solutions which look forward and respond to the past, and which are guided by community leaders.<sup>148</sup> To this end, a more fulsome implementation of the UNDRIP in Australia's domestic legislation would greatly assist in addressing both the causal factors of the over-incarceration of First Nations peoples and, in turn, the over-incarceration itself.

#### 4.5. Australia's failure to implement Royal Commission's recommendation is poor adherence to UNDRIP

4.5.1. The RCIADIC confirmed that racism was a fundamental cause of the high rates of incarceration and deaths in custody visited on the country's First Nations peoples.<sup>149</sup> The RCIADIC explained that racism is "institutionalised and systemic, and resides not just in individual institutions, but in the relationship between the various institutions."<sup>150</sup>

4.5.2. In October 2018, the Australian Government commissioned an independent review into the implementation status of the recommendations of the RCIADIC (the **Recommendations**). The review was conducted by Deloitte Access Economics who provided a report of its conclusions (**Deloitte Report**). The Deloitte Report stated that 78 per cent of the 339 Recommendations had

<sup>145</sup> National Indigenous Australian Agency, 'Aboriginal and Torres Strait Islander Health Performance Framework 2017 Report' (2017). <<https://www.niaa.gov.au/sites/default/files/publications/indigenous/hpf-2017/tier2/209.html>>.

<sup>146</sup> Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report, December 2017) 62 [2.26], <[https://www.alrc.gov.au/wp-content/uploads/2019/08/final\\_report\\_133\\_amended1.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_133_amended1.pdf)>.

<sup>147</sup> Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report, December 2017) 62 [2.27], <[https://www.alrc.gov.au/wp-content/uploads/2019/08/final\\_report\\_133\\_amended1.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_133_amended1.pdf)>.

<sup>148</sup> Australian Law Reform Commission, 'Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples' (Final Report, 27 March 2018) [2.96]-[2.97] <<https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>>.

<sup>149</sup> Cubillo, E., (2021), 'Real Action Needed on Aboriginal Deaths in Custody', University of Melbourne <<https://pursuit.unimelb.edu.au/articles/real-action-needed-on-aboriginal-deaths-in-custody>>.

<sup>150</sup> Cubillo, E., (2021), 'Real Action Needed on Aboriginal Deaths in Custody', University of Melbourne <<https://pursuit.unimelb.edu.au/articles/real-action-needed-on-aboriginal-deaths-in-custody>>.

been fully or mostly implemented, 16 per cent partially implemented, and six per cent not implemented.<sup>151</sup>

- 4.5.3. However, the finding that the Australian Government has implemented the vast majority of the Recommendations has been heavily disputed. In 2019, a research paper prepared by eight academics through the Centre for Aboriginal Economic Policy Research (**CAEPR Paper**) suggested that due to its scope, methodology and substantive findings, the Deloitte Report “had the potential to misrepresent the extent to which the [Recommendations] had been implemented.”<sup>152</sup> The CAEPR Paper argued that Deloitte’s findings that 78 per cent of the recommendations have been fully or mostly implemented was “highly questionable” and “obscures the issue of the effectiveness of any responses to the [Recommendations].”<sup>153</sup>
- 4.5.4. The Centre for Aboriginal Economic Policy Research at the Australian National University states that the Australian Government has continued to rely on the Deloitte Report to defend its implementation of the Recommendations and has ruled out further substantive action to implement the Recommendations, prevent further deaths in custody, and dignify the lives of all First Nations peoples.<sup>154</sup>
- 4.5.5. In 2017, the UN Special Rapporteur on the Rights of First Nations Peoples described Australia’s failure to respect the rights of First Nations peoples to self-determination as “alarming”.<sup>155</sup> These observations indicate that the Australian Government’s failure to implement the Recommendations which concern self-determination displays a lack of adherence to the UNDRIP principles, in particular, Articles 3, 4 and 23.
- 4.5.6. As the landscape has only worsened since the RCIADIC’s final report in 1991, it is clear from the increasing rates of First Nations peoples’ incarceration and deaths in custody that the issues underlying the over-incarceration and overrepresentation of First Nations peoples in the criminal justice system as referred to in the RCIADIC have not been adequately addressed, including systemic racism.<sup>156</sup> It follows that the UNDRIP principles set out in Article 2, which proclaims the rights of First Nations people to be free from any kind of discrimination have certainly not been adhered to by the Australian Government.<sup>157</sup>

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<sup>151</sup> Deloitte Access Economics, (2018), ‘Review of the implementation of the Royal Commission into Aboriginal Deaths in Custody’, National First Nations Australians Agency <[https://www.niaa.gov.au/resource-centre/First Nations-affairs/review-implementation-royal-commission-aboriginal-deaths-custody](https://www.niaa.gov.au/resource-centre/First-Nations-affairs/review-implementation-royal-commission-aboriginal-deaths-custody)>.

<sup>152</sup> Anthony, T., Jordan, K., Walsh, T., Markham, F. and Williams, M., (2021), ‘30 years on: Royal Commission into Aboriginal Deaths in Custody recommendations remain unimplemented’, Centre for Aboriginal Economic Policy Research, Australian National University <[https://caepr.cass.anu.edu.au/sites/default/files/docs/2021/4/WP\\_140\\_Anthony\\_et\\_al\\_2021.pdf](https://caepr.cass.anu.edu.au/sites/default/files/docs/2021/4/WP_140_Anthony_et_al_2021.pdf)>.

<sup>153</sup> Anthony, T., Jordan, K., Walsh, T., Markham, F. and Williams, M., (2021), ‘30 years on: Royal Commission into Aboriginal Deaths in Custody recommendations remain unimplemented’, Centre for Aboriginal Economic Policy Research, Australian National University 1 <[https://caepr.cass.anu.edu.au/sites/default/files/docs/2021/4/WP\\_140\\_Anthony\\_et\\_al\\_2021.pdf](https://caepr.cass.anu.edu.au/sites/default/files/docs/2021/4/WP_140_Anthony_et_al_2021.pdf)>.

<sup>154</sup> Anthony, T., Jordan, K., Walsh, T., Markham, F. and Williams, M., (2021), ‘30 years on: Royal Commission into Aboriginal Deaths in Custody recommendations remain unimplemented’, Centre for Aboriginal Economic Policy Research, Australian National University 2 <[https://caepr.cass.anu.edu.au/sites/default/files/docs/2021/4/WP\\_140\\_Anthony\\_et\\_al\\_2021.pdf](https://caepr.cass.anu.edu.au/sites/default/files/docs/2021/4/WP_140_Anthony_et_al_2021.pdf)>.

<sup>155</sup> Special Rapporteur on the Rights of First Nations Peoples, (2017), ‘Report of the Special Rapporteur on the rights of First Nations peoples on her visit to Australia’, United Nations Document A/HRC/36/46/Add.2, Human Rights Council, Thirty-Sixth Session, United Nations General Assembly’.

<sup>156</sup> Megan Davis, ‘A Culture of Disrespect: Indigenous Peoples and Australian Public Institutions’, University of Technology Sydney Law Review (2006), 142. <<http://classic.austlii.edu.au/au/journals/UTSLawRw/2006/9.pdf>>.

<sup>157</sup> UNDRIP, art 2.



## 5. Key community efforts to support UNDRIP principles

### 5.1. Key community and stakeholder efforts that promote UNDRIP principles

- 5.1.1. There are many ways in which the UNDRIP principles can be incorporated into Australian society to improve the lives of First Nations peoples. Keeping in theme with the issues raised in these submissions, the key efforts discussed in this section include:
- (a) the ‘justice reinvestment’ approach to criminal justice reform;
  - (b) the Coalition of Peaks, which is a representative body of over 70 First Nations community-controlled peak organisations and members across Australia who share a commitment to legitimate community-controlled representation of First Nations communities; and
  - (c) the Uluru Statement from the Heart, which calls for the establishment of a First Nations Voice enshrined in the Australian Constitution and a Makarrata Commission to supervise a process of agreement-making between governments and First Nations peoples as well as truth-telling about the history of First Nations peoples in Australia.<sup>158</sup>

### 5.2. Justice reinvestment to address systemic issues of criminal justice system

- 5.2.1. Justice reinvestment seeks to provide a solution to the overrepresentation of First Nations peoples in the Australian criminal justice system. According to the ALRC, justice reinvestment “involves a redirection of money from prisons to fund and rebuild human resources and physical infrastructure in areas most affected by high levels of incarceration”.<sup>159</sup> In essence, justice reinvestment “suggests that prisons are an investment failure” and do not rehabilitate, treat or train prisoners, and in fact (and as has been discussed in these submissions) that they exacerbate issues such as mental and physical ill health and substance abuse, and promote recidivism.
- 5.2.2. The ALRC notes that incarceration incurs significant costs, and that justice reinvestment is supported on this basis:

Justice reinvestment has been supported on economic grounds, in that it provides a means for redirecting public money from imprisonment to strengthening individual and community capacity. Incarceration is expensive: the annual cost per prisoner of providing corrective services in 2015–16 was \$103,295, and it has been estimated that the total justice system costs of Aboriginal and Torres Strait Islander incarceration in 2016 were \$3.9 billion.

When the costs of Aboriginal and Torres Strait Islander incarceration are broadened beyond those directly related to the justice system to include other economic costs, such as loss of productive output during incarceration, the cost of crime incurred by victims, the cost of increased mortality, excess burden of tax, and welfare costs, the cost rises to \$7.9 billion.<sup>160</sup>

- 5.2.3. Justice reinvestment “has been met with enthusiasm and support in Australia, where it has been seen as a potential avenue to overcoming some of the key criminal justice issues” in the country.<sup>161</sup>
- 5.2.4. Through its emphasis on community engagement and culturally-focused strategies, justice reinvestment offers opportunities to address these issues by empowering and strengthening First

<sup>158</sup> The Uluru Statement, ‘Uluru Statement from the Heart’, <<https://ulurustatemdev.wpengine.com/wp-content/uploads/2022/01/UluruStatementfromtheHeartPLAINTEXT.pdf>>.

<sup>159</sup> Australian Law Reform Commission, ‘Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples’ (Final Report, 27 March 2018) [4.7] <<https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/4-justice-reinvestment/what-is-justice-reinvestment/>>.

<sup>160</sup> Australian Law Reform Commission, ‘Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples’ (Final Report, 27 March 2018) [4.8] <<https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/4-justice-reinvestment/what-is-justice-reinvestment/>>.

<sup>161</sup> Matthew Willis, Madeleine Kipira, ‘Justice reinvestment in Australia: A review of the literature’, (2020) 27 <[https://www.aic.gov.au/sites/default/files/2020-05/rr09\\_justice\\_reinvestment\\_in\\_australia\\_160518\\_0.pdf](https://www.aic.gov.au/sites/default/files/2020-05/rr09_justice_reinvestment_in_australia_160518_0.pdf)>.



Nations communities through the implementation of “culturally-appropriate treatment, rehabilitation, diversion and victim programs”.<sup>162</sup>

5.2.5. According to the Australian Institute of Criminology:

Specific ways that Aboriginal and Torres Strait Islander communities may benefit from [justice reinvestment] include (Schwartz 2010):

- increasing the range of parole options so that Aboriginal and Torres Strait Islander offenders do not breach parole, or do not feel that they must decline offers of parole due to an inability to satisfy reporting requirements and other conditions;
- increasing the capacity of communities to offer community correction options in order to reduce the number of Aboriginal and Torres Strait Islander persons imprisoned for public order offences and/or refused bail;
- building up existing community mechanisms to maximise the potential for local community alternatives to imprisonment and to strengthen community wellbeing;
- improving funding sustainability by shifting the focus from short-term to long-term funded programs that are culturally appropriate and community owned; and
- using not just crime-specific programs but also local programs that address broader disadvantage contributing to Aboriginal and Torres Strait Islander over-representation in the criminal justice system.<sup>163</sup>

5.2.6. We strongly recommend that the Australian Government establish and implement justice reinvestment programs to address the over-incarceration of First Nations peoples across Australia. In addition, we recommend that the Australian Government implement the reforms proposed by the Justice Reform Initiative, particularly those as follows:

- a) building pathways out of the criminal justice system with a focus on First Nations communities; and
- b) breaking the cycle of First Nations criminal justice system involvement (with a focus on supporting the leadership of First Nations led campaigns and communities).<sup>164</sup>

### 5.3. Coalition of Peaks

5.3.1. The Coalition of Peaks is a group of community-controlled organisations that work for and are accountable to communities as opposed to governments. The main vision of the Coalition of Peaks is to represent First Nations peoples on policies and programs that affect them through formal partnerships with Australian governments, at all levels.<sup>165</sup> The Coalition of Peaks:

- (a) consists of national, state and territory non-government First Nations peak bodies and independent statutory authorities that hold responsibility for policies, programs and services related to Closing the Gap;
- (b) has governing boards elected by First Nations communities and organisations that are accountable to that membership; and
- (c) supports the vision for a genuine partnership between First Nations peoples and governments in developing and implementing efforts related to Closing the Gap.

<sup>162</sup> Matthew Willis, Madeleine Kapira, ‘Justice reinvestment in Australia: A review of the literature’, (2020) 28 <[https://www.aic.gov.au/sites/default/files/2020-05/rr09\\_justice\\_reinvestment\\_in\\_australia\\_160518\\_0.pdf](https://www.aic.gov.au/sites/default/files/2020-05/rr09_justice_reinvestment_in_australia_160518_0.pdf)>.

<sup>163</sup> Matthew Willis, Madeleine Kapira, ‘Justice reinvestment in Australia: A review of the literature’, (2020) 29 <[https://www.aic.gov.au/sites/default/files/2020-05/rr09\\_justice\\_reinvestment\\_in\\_australia\\_160518\\_0.pdf](https://www.aic.gov.au/sites/default/files/2020-05/rr09_justice_reinvestment_in_australia_160518_0.pdf)>.

<sup>164</sup> Justice Reform Initiative, ‘Breaking the Cycle of Incarceration’ (July 2021) 7 <(https://assets.nationbuilder.com/justicereforminitiative/pages/274/attachments/original/1648776963/JRI\_Breaking\_the\_Cycle\_Report\_V8\_APPROVAL.pdf?1648776963)>.

<sup>165</sup> Coalition of Peaks, ‘Who are we’ (Web Page) <<https://coalitionofpeaks.org.au/who-we-are/>>.

5.3.2. The National Agreement sets out the framework for the partnership between governments and the Coalition of Peaks.<sup>166</sup> The National Agreement is an important act of self-determination for First Nations peoples in that it promotes shared decision-making, amongst other things,<sup>167</sup> and is relevant to the principles of the UNDRIP, including the right of self-determination under Articles 3 and 4, and the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their rights under Article 5 to participate fully in the political, economic, social and cultural life of Australia.

5.3.3. We recommend that the Australian Government fully implement the National Agreement.

#### 5.4. Uluru Statement from the Heart

5.4.1. The Uluru Statement from the Heart, as discussed above, seeks the establishment of a First Nations Voice and a Makarrata Commission. Related to this is the 'Voice to Parliament' movement by From the Heart which seeks to have the Australian Government establish the First Nations Voice envisioned by the Uluru Statement from the Heart.

5.4.2. The introduction of a First Nations Voice, enshrined in the Constitution, would enable First Nations peoples to provide advice to Parliament on laws and policies that affect their lives. Ultimately, it would mean that First Nations peoples are included in the law-making process as opposed to having governments decide what is best for them. Through such a body, First Nations peoples would have the opportunity to provide practical advice to Parliament in relation to how legislation and government policies impact upon and improve the lives of First Nations peoples.<sup>168</sup>

5.4.3. Enshrining the Voice in the Constitution would ensure that it could not be repealed by a change in government. It would be a clear expression of Articles 3 to 5 of the UNDRIP in Australia.

5.4.4. We strongly recommend that the Australian Government fulfil its election promise<sup>169</sup> to establish the First Nations Voice and the Makarrata Commission.

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<sup>166</sup> Closing the Gap, 'National Agreement on Closing the Gap' (Wepage, no date).  
<<https://www.closingthegap.gov.au/national-agreement>>.

<sup>167</sup> Closing the Gap, '3. Objectives and Outcomes' (Wepage, no date). <<https://www.closingthegap.gov.au/national-agreement/national-agreement-closing-the-gap/3-objective-and-outcomes>>.

<sup>168</sup> From the Heart, 'Voice to Parliament' (Web Page) <<https://fromtheheart.com.au/what-is-a-voice-to-parliament/>>.

<sup>169</sup> Labor, 'First Nations' (Webpage) <<https://www.alp.org.au/policies/first-nations#:~:text=Labor%20is%20the%20only%20party,for%20Treaty%20and%20Truth%2Dtelling.>>; Lorena Allam, 'Labor promises to 'move quickly' on Indigenous voice to parliament referendum if elected', *The Guardian* (19 May 2022) <<https://www.theguardian.com/australia-news/2022/may/19/labor-promises-to-move-quickly-on-indigenous-voice-to-parliament-referendum-if-elected>>.

## Annexure A

### UNDRIP Articles relevant to the minimum age

Article	Principle
Article 2	Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.
Article 3	Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
Article 7	<ol style="list-style-type: none"> <li>1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.</li> <li>2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.</li> </ol>
Article 15	<ol style="list-style-type: none"> <li>1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.</li> <li>2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.</li> </ol>
Article 21	<ol style="list-style-type: none"> <li>1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.</li> <li>2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.</li> </ol>
Article 22	<ol style="list-style-type: none"> <li>1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.</li> <li>2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.</li> </ol>
Article 23	Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.
Article 24	<ol style="list-style-type: none"> <li>1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.</li> <li>2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.</li> </ol>

We hope this submission is of assistance to the Senate Legal and Constitutional Affairs References Committee.

Yours sincerely,

**Michelle Falstein**  
**Secretary**  
**NSW Council for Civil Liberties**