



Australian  
Human Rights  
Commission

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# Submission to the Committee Against Torture

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Australian Human Rights Commission

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October 2022



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# 1 Introduction

1. This submission is made by the Australian Human Rights Commission (Commission). The Commission is an 'A status' national human rights institution, operating in conformity with the Paris Principles.<sup>1</sup> This submission is based on work that has been undertaken by the Commission in accordance with our mandate and functions.
2. The Commission is a federal body that has oversight over federal issues. However, it is important to note that the Federal Government has a significant leadership role and specific responsibilities with respect to ensuring human rights standards are met nationally. Therefore many of the concerns raised in relation to states and territories are also pertinent to the Federal Government and its duties.

## 1.1 Priority areas

3. The matters addressed in this submission are all of importance to Australia's compliance with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).<sup>2</sup> However, the Commission wishes to draw the Committee's attention to four areas of critical importance:
  - The length of time that people are held in immigration detention, discussed in section 4.2 of this submission.
  - The need to ensure compliance with obligations under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)<sup>3</sup> by the 20 January 2023 extended deadline, discussed in section 3.
  - Non-fulfilment of the principle of *non-refoulement*, discussed in section 4.1.
  - Cruel treatment of children and young people in youth justice centres, discussed in section 5.2.
4. The Commission recommends that the Committee request an update from the Australian Government on progress in the three priority areas in 12 months' time.

## 2 Legal and institutional framework

### Relevant provisions of the CAT: Article 2(1)

#### 2.1 Legislative and institutional rights protections

5. The Commission welcomes the ratification of OPCAT by Australia in December 2017. Australia's progress with respect to OPCAT implementation is addressed below.
6. Australia has legislated to criminalise torture in the *Criminal Code Act 1995* (Cth),<sup>4</sup> which includes reference to the CAT and the definition of torture.<sup>5</sup> Despite this, Australia lacks a comprehensive legislative framework implementing its human rights obligations at the federal level. There are limited avenues to seek review of government decisions or to obtain redress for human rights violations.

#### 2.2 National Human Rights Institution

7. The Commission has a statutory power to promote and protect human rights under the *Australian Human Rights Commission Act 1986* (Cth) Act (AHRC Act). Human rights are defined as the international instruments scheduled to or declared under the AHRC Act. The Commission's legislation does not include the CAT within the definition of 'human rights'.
8. The *International Covenant on Civil and Political Rights* (ICCPR),<sup>6</sup> and the *Convention on the Rights of the Child* (CRC),<sup>7</sup> are included in the definition of human rights under the AHRC Act. The Commission can therefore investigate allegations of torture, cruel, inhuman and degrading treatment through the ICCPR and the CRC. If the Commission considers the 'act or practice' to be a breach of a human right, it reports to the Attorney-General. However, there is no recourse to courts for individuals making complaints to the Commission under these instruments.<sup>8</sup>
9. The definition of human rights in the AHRC Act is narrower than the range of rights that guide the Joint Parliamentary Committee on Human Rights. The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) defines human rights as the seven instruments to which Australia is a party, including the CAT.
10. The Commission needs the necessary tools and resources to protect and promote human rights in line with the Paris Principles. In 2022, the Commission's re-accreditation as an A-status institution was deferred by the Global Alliance of National Human Rights Institutions' Subcommittee on Accreditation, and will be reconsidered in October 2023.

11. While the deferral was primarily due to concerns about the appointment process for Commissioners,<sup>9</sup> the Subcommittee also raised concerns that the AHRC Act does not include explicit reference to the CAT or the International Covenant on Social, Economic and Cultural Rights.<sup>10</sup> It similarly noted that the Commission has faced funding challenges, and emphasised that ‘to function effectively, an NHRI must be provided with an appropriate level of funding in order to guarantee its ability to freely determine its priorities and activities’.<sup>11</sup>
12. The Commission has itself recommended that the AHRC Act be amended to ensure full compliance with the Paris Principles, including to incorporate a definition of human rights in the AHRC Act that references all of Australia’s international human rights obligations, and to:
  - Specify that all Commissioner appointments can only be made following a clear, transparent, merit-based and participatory selection and appointment process. The Commission welcomes the introduction of a Bill drafted to this effect, which is currently under consideration by Parliament.<sup>12</sup>
  - Include a reference to the Paris Principles in the objects clause of the legislation acknowledging that the Commission is intended to be a Paris Principles compliant National Human Rights Institution.
  - Specify that all Commission functions may be exercised independently of government authorisation.
13. The Commission has also recommended that the Australian Government periodically conduct a re-baselining review of the Commission to ensure that it has adequate resourcing to conduct its statutory functions.<sup>13</sup>

**Recommendation 1: The Australian Government amend the AHRC Act to ensure that the Commission is guided by a comprehensive definition of human rights, including through CAT being a scheduled instrument.**

**Recommendation 2: The Australian Government take steps to ensure that the Commission is fully compliant with the Paris Principles, including through amending the AHRC Act, and ensuring adequate resourcing of the Commission’s functions.**

## **2.3 Role of the Parliamentary Joint Committee on Human Rights**

14. The Parliamentary Joint Committee on Human Rights (PJCHR) analyses bills and legislative instruments before the federal Parliament for compliance with human rights.<sup>14</sup> The definition of human rights is the seven international instruments to which Australia is a party, including the CAT.<sup>15</sup>
15. The PJCHR considers legislative instruments and raises concerns when they believe that proposed legislation places an unjustifiable limitation on human rights. However, legislators are under no obligation to amend bills to reflect these concerns. The Commission notes that the findings of the PJCHR are often not taken into account by legislators when they are deliberating on proposed legislation.<sup>16</sup> As a comparison, the views of the Parliamentary Joint Committee on Intelligence and Security are more regularly considered in relation to legislation on national security issues.<sup>17</sup>
16. The Commission is also concerned about the variable quality of ‘Statements of Compatibility with Human Rights’ that accompany bills introduced to Parliament. While sometimes they are thorough, other times they do not adequately identify how breaches of human rights in the legislation could be considered legitimate or proportionate.<sup>18</sup> The Commission notes that the quality of Statements of Compatibility and associated legislation could be improved by ensuring there is regular education and training support for public servants on human rights.<sup>19</sup>

**Recommendation 3: Government train public servants to ensure that Statements of Compatibility are of a consistently high standard; and ensure the proper consideration of PJCHR views by Parliamentarians in the enactment of legislation.**

## **3 Implementation of OPCAT**

### **3.1 OPCAT progress to date**

17. Australia signed OPCAT in 2009 and ratified it in 2017, although the obligation to establish National Preventive Mechanisms (NPMs) was postponed for three years by way of a declaration under Article 24. The Committee subsequently accepted Australia’s further request for an extension of this obligation, with the new date for full compliance being 20 January 2023.<sup>20</sup>
18. The Australian Government has elected to adopt a multiple-body monitoring system with the Commonwealth, States and Territories asked to

designate their own NPMs within their relevant jurisdictions. The Office of the Commonwealth Ombudsman has been nominated by the Australian Government as the NPM Coordinator, being tasked with coordinating the Australian NPM Network.<sup>21</sup>

19. At the time of writing, only four jurisdictions, in addition to the Australian Government, have nominated their NPMs. Others have proposed but not yet established their NPMs. New South Wales, Queensland, and Victoria have yet to designate their NPMs.
20. Funding has emerged as a significant issue delaying the establishment of the Australian NPM Network.<sup>22</sup> In July 2021 the Australian Government pledged 'funding over two years from 2021–22 to support states and territories',<sup>23</sup> however 'jurisdictions are responsible for funding their own oversight and detention arrangements on an ongoing basis'.<sup>24</sup>
21. The Commission is of the view that establishing and maintaining oversight mechanisms to perform the role of NPMs in each jurisdiction in Australia requires modest changes to existing legislation, resourcing and oversight mechanisms. The longstanding delays in implementing OPCAT are concerning to the Commission.
22. The Commission recommends that all national, state and territory governments in Australia finalise the process of designating oversight mechanisms as the NPM for their respective jurisdictions, including any changes necessary to broaden their mandates and meet the requirements of OPCAT. They also need to provide sufficient resources to enable NPMs to meet their responsibilities. Resourcing should be provided in a way that enables NPM bodies to fulfil OPCAT's core functions; respects the functional, structural and personal independence of NPM bodies; and ensures effective liaison with, and involvement of, civil society representatives and people with lived experience of detention in the OPCAT inspection process.<sup>25</sup>
23. The Commission considers that progress has been too slow to date and that immediate action is needed to fast-track implementation to ensure that Australia complies with the 20 January 2023 extended deadline.
24. The Commission is currently drafting a 'Road Map to OPCAT compliance' for the purpose of assisting the Commonwealth, State and Territory Governments with a clear pathway to meeting the 20 January 2023 extended deadline; assisting the UN SPT in its upcoming mission to Australia<sup>26</sup> and to assist with the Committee's request for Australia to develop an Action Plan for the establishment of the NPMs.<sup>27</sup>



### **3.2 Scope of places of detention**

25. The Australian Government has opted for a 'progressive realisation' of OPCAT, whereby NPMs will prioritise activities in 'primary' places of detention, as opposed to all places where people may be deprived of their liberties. 'Primary places of detention' is defined by the Australian Government as including adult prisons, juvenile detention facilities, police lock-up or police station cells, closed facilities or units where people may be involuntarily detained by law for mental health assessment or treatment, closed forensic disability facilities or units where people may be involuntarily detained by law for care, immigration detention centres and military detention centres.<sup>28</sup>
26. Article 4 of OPCAT imposes obligations on Australia to allow NPMs to visit any place under its jurisdiction and control where persons are, or may be, deprived of their liberty. The UN Subcommittee on Prevention of Torture (SPT) considers that the preventive nature of OPCAT requires a broad interpretation of Article 4 to maximise the preventive impact of the work of NPMs in places of detention.<sup>29</sup>
27. The Commission considers that Australia should adopt an inclusive approach, consistent with Articles 1 and 4 of OPCAT, that includes both 'primary' and 'secondary' places of detention within the ambit of the functions of all NPMs. This will uphold OPCAT's aim to strengthen protections for all persons deprived of their liberty.

### **3.3 Steps towards achieving best practice**

28. The Commission supports the introduction of dedicated primary legislation that gives full effect to the key provisions of OPCAT. Legislation should provide powers of unfettered access to all places of detention by NPMs; provide a clear foundation for visits; ensure access to facilities and information; and secure the continued, long-term, and effective operation of OPCAT.<sup>30</sup>
29. The Commission considers all OPCAT reporting should adopt a human rights framework, which requires, at a base level, consideration of whether NPM activities and outcomes have resulted in better protection of human rights in places of detention. The Commission therefore recommends that NPMs report on the extent to which governments and relevant authorities are protecting detainee human rights; whether law, policy and procedures reflect best practice standards; and whether recommendations made by the NPMs are being implemented.<sup>31</sup>

30. The Commission recommends attention be given to ensuring Article 18 is complied with in the staffing of NPMs. Specific efforts, including special measures, should be made to employ First Nations staff and people with a lived experience of disability.<sup>32</sup>
31. The Commission considers it necessary for all NPMs to have technical expertise about child development, children's rights, trauma and how detention can affect children – particularly when visiting institutions where children and young people are detained.<sup>33</sup>
32. The Commission emphasises the importance of ongoing involvement in the OPCAT process of civil society organisations, academic and other experts and people with lived experience of detention.<sup>34</sup> Both domestic and international commentators, including the UN SPT and UN Committee on the Rights of Persons with Disabilities, have recommended strong and formal relationships be established between the NPM and civil society.<sup>35</sup>
33. Funding has emerged as a significant issue delaying the establishment of the Australian NPM Network.<sup>36</sup> In July 2021 the Australian Government pledged 'funding over two years from 2021–22 to support states and territories',<sup>37</sup> however 'jurisdictions are responsible for funding their own oversight and detention arrangements on an ongoing basis'.<sup>38</sup>
34. The Commission is of the view that establishing and maintaining oversight mechanisms to perform the role of NPMs in each jurisdiction in Australia requires modest changes to existing legislation, resourcing and oversight mechanisms. The longstanding delays in implementing OPCAT are concerning to the Commission.
35. The Commission recommends that all national, state and territory governments in Australia finalise the process of designating oversight mechanisms as the NPM for their respective jurisdictions, including any changes necessary to broaden their mandates and meet the requirements of OPCAT. They also need to provide sufficient resources to enable NPMs to meet their responsibilities. Resourcing should be provided in a way that enables NPM bodies to fulfil OPCAT's core functions; respects the functional, structural and personal independence of NPM bodies; and ensures effective liaison with, and involvement of, civil society representatives and people with lived experience of detention in the OPCAT inspection process.<sup>39</sup>
36. The Commission considers that progress has been too slow to date and that immediate action is needed to fast-track implementation to ensure that Australia complies with the 20 January 2023 extended deadline.

**Recommendation 4: Governments ensure full OPCAT compliance no later than the 20 January 2023 extended deadline by designating NPMs, and ensuring the mandates and resourcing of NPMs is sufficient to allow them to effectively fulfil their OPCAT functions.**

**Recommendation 5: Governments adopt an inclusive approach to the interpretation of ‘places of detention’, ensuring that both ‘primary’ and ‘secondary’ places of detention are included within the scope of all NPMs.**

**Recommendation 6: Governments give particular attention to ensuring NPMs are designed and operate in a way that reflects the particular needs, and is inclusive of, vulnerable cohorts who are disproportionately represented in places of detention, including (but not limited to) First Nations people, children and young people, and people with disability.**

## **4 Immigration detention and asylum seekers**

### **4.1 *Non-refoulement***

37. The Commission notes the continuation of Operation Sovereign Borders, a military-led border security operation which aims to counter people smuggling, including through preventing the entry to Australia of boats carrying asylum seekers. As part of Operation Sovereign Borders, boats have been intercepted and returned to their point of departure ‘where it is safe to do so’. To date in 2022 there have been 183 people who have been returned to Sri Lanka after being detected and intercepted attempting to reach Australia on maritime people smuggling ventures.<sup>40</sup>
38. The Commission remains concerned that the screening process conducted as part of Operation Sovereign Borders activities does not constitute a fair or thorough assessment of protection claims. The screening process creates a risk that asylum seekers who have legitimate needs for protection may be returned to situations where they could be in danger of being tortured or subjected to other forms of cruel, inhuman or degrading treatment.
39. The Commission is also concerned about possible refoulement, arbitrary, prolonged and/or indefinite detention and separation from family resulting from decisions to cancel visas of non-citizens under sections 501 and 116 of the *Migration Act 1958* (Cth) (Migration Act).<sup>41</sup>
40. While the Minister has a personal power under s 159A of the Migration Act to grant a visa if they consider it is in the public interest to do so, the Commission considers this to be an insufficient safeguard against indefinite detention for someone to whom Australia owes *non-refoulement* obligations,

but whose visa application is refused or who has their visa cancelled on character grounds.

41. The Minister's power under s 195A is discretionary. The Minister is not under any duty to consider whether to exercise his or her power in s 195A to grant a visa, even if he or she is requested to do so.<sup>42</sup> A person therefore cannot challenge the Minister's decision not to exercise this power.
42. The Commission is also concerned that even if the Minister grants a 'removal pending' bridging visa under s 195A, such a visa is a temporary solution which only permits the holder to remain in the Australian community until he or she can safely be removed. This offers the holder no certainty about their future in cases where removal is not currently practicable.<sup>43</sup>

## 4.2 Mandatory immigration detention

43. Immigration detention remains mandatory for all unlawful non-citizens,<sup>44</sup> which can result in prolonged and/or indefinite detention that may be arbitrary and risks mental ill-health.<sup>45</sup> The average length of detention has continued to increase reaching 736 days in May 2022 – which is the highest ever recorded.<sup>46</sup> The length of time in immigration detention is far higher in Australia than in comparable jurisdictions. For example, in the United Kingdom in 2021, 76% of all detainees had been in immigration detention for fewer than 7 days. In Canada, the average length of detention was 24.1 days between July and September 2021.<sup>47</sup>
44. People towards whom Australia has *non-refoulement* obligations and people who are stateless are at particular risk of prolonged detention, as they cannot be readily returned to their country of origin. Under the Migration Act, however, they must remain in immigration detention until they are either granted a visa or removed from Australia. Unless they can meet the requirements for the grant of a Protection Visa (which include satisfying the character test), or there is another country in which they can be resettled, they face the prospect of prolonged and indefinite detention.
45. The detention of an unlawful non-citizen is not based on an individual assessment of the need for detention. The Commission has long recommended that the Migration Act be amended to ensure that closed immigration detention is only used in circumstances where it is strictly necessary to manage unacceptable risks to the community.<sup>48</sup> A short period of closed detention aimed at managing risks to the Australian community

may be justifiable under international law, provided that the risks cannot be managed in a less restrictive way, and that detention is necessary, reasonable and proportionate in the individual's circumstances.

46. The Commission has also long recommended that the Australian Government introduce legislation to ensure that the necessity for continued immigration detention is periodically assessed by a court or tribunal up to a maximum time limit.<sup>49</sup> Independent oversight of the necessity of closed detention, and the introduction of an overall time limit on closed detention, would help to reduce the likelihood of closed detention becoming so lengthy as to breach human rights.

### **4.3 Offshore processing**

47. The Commission notes that the Australian Government has obligations under the Refugee Convention to people who arrive in its territory seeking asylum. Those obligations remain, even if Australia transfers people to a third country for their claims to be processed.

48. Whether Australia exercises 'effective control' in relation to asylum seekers and refugees subject to regional processing arrangements has been considered in detail by two Parliamentary Committees and was considered by the Commission in a report concerning a complaint against the Commonwealth of Australia under the *Australian Human Rights Commission Act 1986* (Cth).<sup>50</sup> In each instance, the evidence and degree of involvement demonstrated that Australia could be viewed as exercising 'effective control'.

49. The Commission considers that transferring asylum seekers to third countries does not release Australia from its obligations under international human rights law. Australia must ensure adequate safeguards are in place in those countries to ensure that the human rights of the people transferred are upheld.

50. The Commission welcomes the cessation the offshore processing arrangements for asylum seekers on Papua New Guinea at the end of 2021.<sup>51</sup> However, the Commission continues to hold serious concerns that those asylum seekers remaining in Papua New Guinea may be subjected to arbitrary detention and inadequate living conditions. At the time when offshore processing arrangements for asylum seekers on Papua New Guinea ceased, there were 74 refugees remaining in Papua New Guinea.<sup>52</sup>

51. Australia continues to support regional processing arrangements in Nauru. As at 30 June 2022, there were 112 transitory persons in Nauru, with 83 of these individuals being recognised as refugees.<sup>53</sup> The Commission continues to hold serious concerns that third country processing arrangements could see Australia in breach of its international human rights obligations, including the potential for breach of Australia's *non-refoulement* obligations.
52. The Commission also notes with concern that there is still no independent monitoring body for third country processing arrangements. In relation to cross-border detention arrangements, the UN SPT has advised that the 'sending State should ensure that such an agreement provides for its national preventive mechanism to have the legal and practical capacity to visit those detainees in accordance with the provisions of the Optional Protocol and the Subcommittee guidelines on national preventive mechanisms'.<sup>54</sup>

#### **4.4 COVID-19 and immigration detention**

53. The outbreak of the COVID-19 pandemic introduced new challenges for the management of Australia's immigration detention facilities, and significant risks to health and wellbeing, especially of people detained in these facilities.
54. The use of controlled movement policies increased because of COVID-19. Movement out of accommodation compounds occurred for meals, medical appointments, interviews, or visits. This restricted people to their compounds most of the time, except in limited circumstances, with the objective of preventing a COVID-19 outbreak.
55. One of the measures used to prevent the entry, and control the spread, of COVID-19 into and within immigration detention facilities is to separate some detainees from the general population by way of quarantine. The buildings used for quarantine inside immigration detention tend to be harsh and prison like, with no or very limited access to outdoor areas.
56. While acknowledging that some restrictions may need to be imposed to protect the health and safety of detainees and staff, the Commission emphasises that measures that restrict individual's basic rights – such as freedom of movement – must remain reasonable, necessary and proportionate to addressing COVID-19 risks.
57. Further controls on the movement of people in detention results in a significantly more restrictive environment. This also increases the

importance of considering alternatives to closed detention wherever possible.

58. Many international bodies emphasised that measures to reduce the number of people detained were in many cases an essential precondition to the effectiveness of other prevention and control measures.<sup>55</sup> In relation to immigration detention specifically, the UN SPT advised that the use of immigration detention should be reviewed 'with a view to reducing their populations to the lowest possible level'.<sup>56</sup>

59. The number of people released from closed immigration detention in Australia was very small in comparison with other jurisdictions, such as the United Kingdom, Canada, and the United States.<sup>57</sup>

60. In August 2020, the Australian Government announced that people would be transferred to the North West Point Immigration Detention Centre (NWP IDC) on Christmas Island to 'relieve capacity pressure across the detention network in Australia'.<sup>58</sup>

61. While re-opening of the NWP IDC provided some relief, the Commission considers this was not an appropriate solution to addressing increasing numbers and overcrowding. The remoteness of Christmas Island significantly restricts communication and visits with family, friends, lawyers, and other key supports. In-person visits are difficult, if not impossible, due to geographical and other barriers. The NWP IDC is not an appropriate facility for immigration detention, particularly for people who are vulnerable or have been detained for prolonged periods of time.<sup>59</sup>

**Recommendation 7: The Australian Government ensures that its border security operations, treatment of refugees and asylum seekers, and offshore processing arrangements comply with international human rights obligations, including *non-refoulement* obligations.**

**Recommendation 8: The Migration Act be amended to ensure that closed immigration detention is only used in circumstances where it is strictly necessary to manage unacceptable risks to the community.**

**Recommendation 9: The Australian Government introduce legislation to ensure that the necessity for continued immigration detention is periodically assessed by a court or tribunal up to a maximum time limits.**

## 5 Criminal justice system

### Relevant provisions of the CAT: Articles 2, 11 and 16.

#### 5.1 First Nations Peoples

62. First Nations peoples continue to be significantly overrepresented in prisons in Australia. Reasons for over-incarceration include both legal and policy factors, and socio-economic factors such as cultural displacement, trauma and grief, alcohol and other drug misuse, cognitive disabilities and poor health and living conditions.<sup>60</sup> Institutional racism, and a 'legacy of dispossession, marginalisation and exclusion have created conditions in which Aboriginal and Torres Strait Islander peoples experience serious and multiple forms' of disadvantage and inequality.<sup>61</sup> In order to reach a solution to over-incarceration, it is necessary to attend to the root causes of First Nations inequality in a comprehensive manner, which involves addressing factors both within, and beyond, the justice system.

63. Although First Nations peoples make up 3.2% of the total population,<sup>62</sup> they constitute 30% of the prison population.<sup>63</sup> First Nations women are the fastest growing prisoner population – and they are 19 times more likely than non-Indigenous women to be in prison.<sup>64</sup> Almost half (49%) of the young people in juvenile detention on an average day in 2020–21 were First Nations children and young people.<sup>65</sup>

64. Due to the over-representation of First Nations peoples in the criminal justice system, First Nations peoples are more likely to die in police or prison custody compared to the general (non-prison) population.<sup>66</sup> In the years since the landmark report of the Royal Commission into Indigenous Deaths in Custody in 1991, which first highlighted the extent of this issue, there have been a further 517 deaths in custody that have been identified as First Nations peoples.<sup>67</sup> Many of these deaths were found in inquests to be preventable.

65. The Commission welcomes the Partnership Agreement in 2019 between the Coalition Aboriginal and Torres Strait Islander Peak Organisations and all Australian Governments (Partnership Agreement).<sup>68</sup> Parties to the Partnership Agreement have committed to reducing the rate of First Nations adults held in incarceration by at least 15% by 2031 and reducing the rate of First Nations children (10–17 years) in detention by at least 30% by 2031. The Commission also welcomes funding provided by the Australian Government to meet these justice targets,<sup>69</sup> and emphasises the importance of



consistent, sufficient resourcing to address criminal justice overrepresentation.

66. The Commission similarly welcomes the establishment of some justice reinvestment programs across Australia, and the Australian Government's commitment to provide \$79 million in funding for justice reinvestment initiatives.<sup>70</sup> The Commission also notes the introduction of the Australia New Zealand Police Advisory Agency's Anti-Racism and Cultural Diversity Principles in 2018.<sup>71</sup>
67. More action is needed to address this national crisis. There is a wealth of knowledge and recommendations outlining steps to address over-incarceration and deaths in custody that have not yet been implemented. Most of the 339 recommendations of the 1991 Royal Commission remain unimplemented or only partially implemented.<sup>72</sup> Some of these recommendations 'have been repeated again and again at various points in time in various reports',<sup>73</sup> including the Australian Law Reform Commission's 2018 *Pathways to Justice* Report – to which the Government has not published a response.
68. The Commission is concerned about certain laws, and the enforcement of those laws by police, that disproportionately impact First Nations peoples.
69. The *Pathways to Justice* report identified that First Nations incarceration is often characterised by low-level offending. This includes, for example, imprisonment for public drunkenness, which still occurs in Queensland.<sup>74</sup> The Commission has also previously raised concerns about paperless arrest laws, which were introduced by the Northern Territory government in 2014 through amendments to the *Police Administration Act 1978* (NT).<sup>75</sup> These laws provide the police with the power to detain a person and hold them in custody for up to four hours (or longer if the person is intoxicated) if they suspect that the person has committed or is about to commit an 'infringement notice offence'. Paperless arrest laws have a disproportionate impact on First Nations peoples,<sup>76</sup> and despite indications by the Northern Territory Government that the laws would be repealed,<sup>77</sup> they remain in place.
70. Mandatory sentencing laws that set a mandatory minimum sentence for particular offences,<sup>78</sup> continue to exist in most Australian jurisdictions. Some of these laws allow judges to make exceptions from the specified sentence, while others are more restrictive in how that can be applied. These laws undermine rule of law principles, including the separation of the government and judiciary and the ability of judges to impose sentences that are proportionate to the specific circumstances of the crime.<sup>79</sup> These laws have been found to disproportionately<sup>80</sup> affect First Nations peoples. The

CERD Committee found that they have a 'racially discriminatory impact on the [First Nations] rate of incarceration'.<sup>81</sup>

71. The Commission reiterates its concern that funding for National Aboriginal and Torres Strait Islander Legal Services is insufficient to meet the legal needs of First Nations communities.<sup>82</sup> It emphasises the importance of self-determined, culturally safe legal services as a means of protecting against arbitrary arrest and cruel treatment in the criminal justice system, and realising the right to a fair trial for First Nations people.
72. More must be done to work meaningfully with First Nations communities to implement substantial and ongoing solutions. The Commission has called on Australian governments to invest further in diversionary programs for adults, young people and children. Diversionary programs should be designed to effectively address the causes of offending. They should be used to divert people from further interaction with the criminal justice system in circumstances where sentencing is unlikely to be successful in preventing further offending. Resourcing should be available to communities to address the key drivers of criminal behaviour before offending occurs. Examples of successful justice reinvestment programs can be seen around the country.<sup>83</sup>
73. Governments should also prioritise prison and detention-based rehabilitative programs and invest in creating pathways out of the criminal justice system, such as the provision of throughcare programs and post-release accommodation.
74. There is evidence that institutional racism within the criminal justice system contributes to high rates of imprisonment and deaths in custody. First Nations peoples experience unequal outcomes in key areas. For example, the Australian Law Reform Commission found that First Nations people are less likely to receive community-based sentences than non-Indigenous offenders, and as a result, may be more likely to be imprisoned for the same offence.<sup>84</sup> Death inquests point to concerning instances of racism within the criminal justice system. The ongoing Northern Territory inquest into the police shooting death of Kumanjayi Walker has revealed racist attitudes within the Northern Territory police force.<sup>85</sup> When addressing the causes of Aboriginal woman Ms Dhu's death in 2016, the Western Australia Coroner found that while the individual officers were not consciously motivated by racism, 'it would be naïve to deny the existence of societal patterns that lead to assumptions being formed in relation to Aboriginal persons'.<sup>86</sup>
75. The Commission endorses the goal of the National Partnership Agreement – as agreed to by all governments in Australia – to 'identify and call out institutional racism, discrimination and unconscious bias' and to 'undertake

system-focused efforts to address disproportionate outcomes and overrepresentation of First Nations peoples by addressing features of systems that cultivate institutionalised racism'.<sup>87</sup> It urges governments to ensure that all available steps are taken to achieve this goal, including through a focus on preventative measures, and accountability processes.

76. The Commission is currently leading a project to progress a national anti-racism framework. It is very concerned that initial scoping findings from the project, to be released in late 2022, raise many of the matters set out above regarding First Nations peoples and the criminal justice system.
77. In submissions, government agencies, as well as First Nations organisations, experts, and individuals, recognised the overrepresentation of First Nations peoples in Australia's criminal justice system, documented the systemic discrimination experienced by them in the legal system and flagged this as a matter of urgent concern.
78. It was asserted that racism occurs at each stage of the legal system, from initial contact with law enforcement through bail processes, conviction, sentencing, and post prison release.
79. It is the Commission's view that the development of a national anti-racism strategy will develop, a coordinated, shared vision to tackle racism, promote racial equality, and ensure access to rights. It will be a long-term, central reference point to guide actions on anti-racism across all sectors, including in the criminal justice system.

**Recommendation 10: Governments ensure the availability of diversionary programs for Indigenous peoples, expand justice reinvestment trials and invest in pathways out of the criminal justice system.**

**Recommendation 11: The Australian Government commit adequate, ongoing funding for Indigenous legal assistance services.**

**Recommendation 12: Governments review the use and application of mandatory sentencing laws, particularly where they disproportionately impact Aboriginal and Torres Strait Islander peoples; and expand the use of non-custodial measures.**

**Recommendation 13: Governments ensure that Aboriginal-led, culturally appropriate, trauma-informed and gender responsive services and programs are resourced and available throughout the criminal justice system.**

**Recommendation 14: Governments ensure that officials and staff in the criminal justice and law enforcement systems at all levels receive sufficient training to ensure the application of culturally appropriate, trauma-informed and gender responsive approaches.**

**Recommendation 15: All Australian governments commit to the development and implementation of a national anti-racism framework to ensure targeted action to identify and address the scourge of racism, including systemic and institutional racism within government agencies including within the criminal justice system.**

## 5.2 Youth justice system

80. The Commission continues to express concern about the treatment of children in youth detention centres. Despite legislation in most states and territories prohibiting the use of isolation and limiting the use of force to certain circumstances, allegations of mistreatment of children and young people in youth detention have arisen in several jurisdictions over recent years.<sup>88</sup>
81. Reporting in 2017, the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory (Northern Territory Royal Commission) found that children and young people detained in the Northern Territory youth justice system were frequently subjected to verbal abuse and racist remarks; deliberately denied access to basic human needs, including water and food; restrained in ways that were potentially dangerous; and subjected to isolation excessively and punitively.<sup>89</sup>
82. Key recommendations of the Royal Commission remain unimplemented. The Northern Territory Government pledged to close and replace the Don Dale Youth Detention Centre in 2018, in line with recommendations to better protect the safety and rights of children in the facility.<sup>90</sup> However, the centre remains open. There were 54 incidents of self-harm between July 2021 and December 2021 inside Don Dale, 'a more than 500% increase from the corresponding period in 2020, when there were eight instances of self-harm reported'.<sup>91</sup>
83. Spit hoods are still used on children in police custody in some jurisdictions, including in the Northern Territory and Western Australia.<sup>92</sup> The Commission welcomes the recent commitment by Queensland police to desist using spit hoods in police watch houses.<sup>93</sup> In 2021, South Australia became the first state or territory in Australia to ban spit hoods in all contexts by law.<sup>94</sup> The use of spit hoods should be similarly banned Australia-wide.

84. Solitary confinement and lockdowns continue to be used in youth justice centres. In the Western Australian Banksia Hill detention centre, extensive 'rolling' lockdowns in early 2022 led to one teenage boy being locked in his cell on more than 25 separate occasions for up to 20 hours a day. The Western Australia Supreme Court ruled that this breached the *Young Offenders Act 1994* (WA).<sup>95</sup> The Court found that the repeated use of lockdowns was primarily caused by 'chronic staff shortages'.<sup>96</sup> The Western Australia Inspector for Custodial Services had previously formed a view that conditions in Banksia Hill were potentially 'cruel, inhuman and degrading' and operated like 'an adult prison'.<sup>97</sup>
85. In July 2022, the Tasmanian Ashley Youth Detention Centre instituted a two-week lockdown, where detainees were locked in their rooms and only let out on a rotational 40-minute basis. This was also attributed to staffing shortages.<sup>98</sup> Currently, Tasmania's Commission of Inquiry into Government Responses into Child Sexual Abuse in Institutional Settings is also inquiring into sexual abuse at the Ashley Youth Detention Centre.<sup>99</sup>
86. The evidence indicates that children entering youth detention have significant pre-existing vulnerabilities, including neurological disabilities, trauma and mental health issues.<sup>100</sup> In detention they are not receiving the specialist therapies and treatment they need. These pre-existing issues are exacerbated by the experience of incarceration, which leads to behaviours such as suicide attempts and self-harm. The Commission is concerned about the failure to provide treatment for pre-existing conditions; the failure to ensure detention does not further traumatize children; and the failure to provide qualified acute mental health treatment for suicidality and self-harm to ensure safety and promote recovery.
87. The Commission urges the Australian Government to raise the minimum age of criminal responsibility to at least 14 years, in line with international standards.<sup>101</sup> In August 2020, the ACT became the first jurisdiction in Australia to support raising the age of criminal responsibility from ten to 14 years. In a November 2021 meeting, state Attorneys-General supported the development of a proposal to increase the minimum age of criminal responsibility from ten to 12 years.<sup>102</sup> However this has not been enacted in any of the state jurisdictions.
88. Article 37(b) of Convention on the Rights of the Child states that children should only be deprived of liberty as a last resort and for the shortest appropriate period of time. However, diversion is underutilised for a variety of reasons, including limits to who can access the programs, insufficient staffing allocated to diversion, and lack of sufficient appropriately funded and culturally appropriate programs.<sup>103</sup> The Northern Territory Royal Commission found that First Nations children and young people are less

likely to be diverted than non-Indigenous children and young people.<sup>104</sup> Additionally, children and young people may be denied bail and held in remand due to a lack of permanent accommodation, or because they are in out of home care.<sup>105</sup>

89. The Commission remains concerned about children held in adult prisons. Each state and territory has legislation that allows children to be detained in adult facilities under certain circumstances.<sup>106</sup> As recently as July 2022, Western Australia transferred a group of 20 predominately First Nations children to a maximum security prison, where they were separated from adult prisoners.<sup>107</sup> In Queensland, children are detained in police watchhouses for days at a time, despite a 2019 commitment by the Queensland Government to end this practice.<sup>108</sup> The Commission has consistently advocated for Australia to withdraw its reservation to article 37(c) of the *Convention on the Rights of the Child* regarding the obligation to separate children from adults in prison.<sup>109</sup>
90. Human rights concerns have been raised in relation to the policing of children and young people. For example, the Commission is concerned that the NSW police have repeatedly strip-searched children – more than 100 children were among those searched between July 2020 and May 2022.<sup>110</sup>

**Recommendation 16: Governments should explicitly prohibit the use of isolation practices and force as punishment in youth justice facilities. These practices should only be permitted when necessary to prevent an imminent and serious threat of injury to the child or others, and only when all other means of control have been exhausted.**

**Recommendation 17: The Northern Territory Government fully implement the recommendations of the Northern Territory Royal Commission.**

**Recommendation 18: Governments legislate against the detention in adult facilities of persons under 18 years.**

**Recommendation 19: Governments raise the minimum age of criminal responsibility from 10 years to at least 14 years.**

**Recommendation 20: Governments ensure that imprisonment of children and young people occurs only as a last resort and for the shortest appropriate period of time, including through identifying and removing barriers for young offenders accessing diversionary programs, in particular for First Nations children. Governments should expand the**

**availability and range of diversionary programs for young offenders, including community-controlled and culturally-safe programs.**

**Recommendation 21: Governments should provide screening and treatment for pre-existing conditions and disabilities when children interact with the youth justice system. Governments should ensure that qualified mental health support and therapies are provided for children in youth detention (as it is for children in community), and that the experience of incarceration does not exacerbate their mental health problems and trauma.**

### **5.3 People with disability**

91. The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission) has reported that people with disability, particularly First Nations people with disability, are 'over represented at all stages of the criminal justice system'.<sup>111</sup> There is limited data collection on this issue, but available information indicates that in Australia while only 2.9% of people have an intellectual disability they make up 15% of the prison population.
92. As noted above, there are high rates of children with disability in the youth justice system. A 2018 study with respect to youth detainees at Banksia Hill Detention Centre in Western Australia revealed 'unprecedented levels of severe neurodevelopmental impairment amongst sentenced youth'.<sup>112</sup> Children with Fetal Alcohol Spectrum Disorder (FASD) are particularly prevalent.<sup>113</sup> One study in Western Australia found that 89% of children in detention between May 2015 and December 2016 had at least one domain of severe neurodevelopmental impairment and 36% were diagnosed with FASD.<sup>114</sup> The majority of those with FASD had not been previously identified, highlighting a need for improved diagnosis.<sup>115</sup>
93. The Commission's 2014 report, *Equal Before the Law*,<sup>116</sup> found that necessary supports and adjustments for people with disabilities were frequently not provided in the criminal justice system. The *Disability Discrimination Act 1992* (Cth) and the Applied Principles to the National Disability Insurance Scheme require the criminal justice system meets the disability related needs of people who are incarcerated.<sup>117</sup>
94. There is a high rate of First Nations people with disability in Australian prisons and youth justice centres.<sup>118</sup> The University of New South Wales *Mental Health Disorders and Cognitive Disability in the Criminal Justice System Project* has commented that 'Indigenous Australians with mental and cognitive disabilities are forced into the criminal justice system early in life in the absence of alternative pathways'.<sup>119</sup> This highlights the need for

dedicated and culturally safe supports and services provided to First Nations people with disability as a means of avoiding entry into the criminal justice system.

95. The Commission continues to be concerned by the lack of government action in repealing legislation and withdrawing policies and practices that can lead to the indefinite detention of unconvicted people, including children, with disability.<sup>120</sup> Little progress has been made in addressing the indefinite detention of people with disability who are assessed as unfit to stand trial or not guilty by reason of mental impairment. Indefinite detention was raised as a serious concern in the Concluding Observations of the Committee on the Rights of Persons with Disability review of Australia in 2019.<sup>121</sup>
96. For example, in Western Australia a person can be indefinitely detained in a custodial setting without trial if found unfit to stand trial.<sup>122</sup> There are no special procedures for children.<sup>123</sup> Children with FASD are at particular risk of being held in indefinite detention.<sup>124</sup> There is a lack of data provided by governments in relation to this cohort, so it is not clear how many people are indefinitely detained on these types of orders in each jurisdiction.
97. A person who is found to be unfit to plead can spend a longer time in detention than if they pleaded guilty and were sentenced to imprisonment for the offence.<sup>125</sup> The Commission has previously reported on several cases where First Nations people have been detained for a period longer than the maximum sentence if they had been found guilty.<sup>126</sup>
98. Although the Commission welcomed the 2019 endorsement of the *National Statement of Principles Relating to Persons Unfit to Plead or Found Not Guilty By Reason of Cognitive or Mental Health Impairment* by Australian states, with the exception of South Australia, the National Principles are not implemented in state and territory legislation, policies and procedures. This falls short of expected actions.
99. The Commission has previously called<sup>127</sup> on the Australian Government to implement the recommendations of the 2013 *Inquiry into indefinite detention of people with cognitive and psychiatric impairment in Australia*.<sup>128</sup>

**Recommendation 22: Governments implement the recommendations in the Concluding Observations of the Committee on the Rights of Persons with Disabilities in 2019 concerning the criminal justice system, including but not limited to:**



- **Implementing the *National Statement of Principles Relating to Persons Unfit to Plead or Found Not Guilty By Reason of Cognitive or Mental Health Impairment* into laws, policies and procedures.**
- **Ensuring adequate disability supports and services are available in the criminal justice system, including the provision of mental health care services.**

## 5.4 Other issues – Prison and remand

100. The Commission is concerned about the high numbers of people incarcerated in Australian prisons overall. The rate of imprisonment in Australia has risen by 130% since 1985.<sup>129</sup>
101. In October 2021, the Productivity Commission reported that a third of Australia’s prison population is on remand, awaiting trial or sentencing, and that the remand prison population has nearly doubled since 2000.<sup>130</sup> The average time spent on remand has also increased from 4.5 months in 2001 to 5.8 months in 2020.<sup>131</sup> The remand rate continues to rise – in December 2021 the Australian Bureau of Statistics reported that the number of prisoners on remand in Australia increased by 16% since June 2020.<sup>132</sup> First Nations people accounted for 31% of the remand population in 2020 – up from 23% in 2006.<sup>133</sup>
102. The proportion of people on remand is even higher in the youth justice context. Across Australia, nearly 3 in 4 (72%) young people in detention in June 2021 were unsentenced.<sup>134</sup>
103. The high remand population in adult prisons and youth justice centres is due in part to changes to bail legislation in Australian jurisdictions.<sup>135</sup> For example, in November 2021 youth detainee numbers in the Northern Territory reached their highest point since the 2017 Royal Commission report,<sup>136</sup> and this has been linked to harsh bail laws<sup>137</sup> passed in 2021. The Productivity Commission has found that remand rates reflect ‘a combination of systemic resourcing constraints, largely relating to courts, as well as a judicial response to wider contextual factors such as reduced judicial discretion over bail decisions’.<sup>138</sup>
104. The high numbers of people in prison and on remand has led to overcrowding. The Commission raised the issue of overcrowding in prisons in its 2014 CAT Submission.<sup>139</sup> There has been little improvement on this issue.
105. Overcrowding in prisons has also increased risk factors for the spread of COVID-19.<sup>140</sup> Available reporting indicates that prisoners have lower

vaccination rates and limited access to testing, despite prisons being particularly susceptible to COVID-19 outbreaks.<sup>141</sup>

106. The Commission also notes that there were severe public health restrictions in the criminal justice system, including at times where the general population had regained most of its freedoms. It is unclear whether this was necessary or proportionate. For instance, in Victoria, as of March 2021, anyone entering the justice system had to complete a 14-day quarantine in complete isolation.<sup>142</sup>

107. The expanding use of post-sentence preventive detention regimes in Australia is also of concern to the Commission. Such laws have previously been primarily focused on narrow categories of offending, specifically terrorist offenders<sup>143</sup> and high-risk sexual offenders.<sup>144</sup> The reach of these laws has gradually expanded in a number of jurisdictions to encompass a broader range of offending behaviour.<sup>145</sup> One example is in Western Australia where reforms introduced in 2020 allow for a 'continuing detention order' to be made with respect to 'high-risk serious offenders', which is defined to potentially encompass individuals convicted of a broad range of criminal offences, including robbery, grievous bodily harm, and criminal damage by fire.<sup>146</sup> This expanded use of post-sentence preventive detention regimes raises serious concerns about indefinite and arbitrary detention, and disproportionately impacts First Nations peoples.

**Recommendation 23: Governments take steps to reduce the number of people on remand, including by amending overly harsh bail laws.**

**Recommendation 24: Governments review the use of post-sentence preventive detention regimes throughout Australia to ensure compliance with international human rights obligations.**

## **6 Violence against women and children**

**Relevant provisions of the CAT: Articles 2, 9, 12, 13, 14 and 16.**

### **6.1 Rates of violence and sexual harassment**

108. Domestic and family violence against women remains endemic in Australia.<sup>147</sup> The intersection of gender with other forms of inequality results in women with disability and from Indigenous, LGBTIQ+, and culturally and linguistically diverse backgrounds experiencing higher rates of violence, and additional barriers to support.<sup>148</sup> The Australian Institute of Health and Welfare and ANROWS report that:

- one woman is killed every nine days by a current or former intimate partner<sup>149</sup>
- one in six women have experienced physical or sexual violence by a current or former partner<sup>150</sup>
- one in four women have experienced emotional abuse by a current or former partner<sup>151</sup> and
- intimate partner violence is a leading contributor to illness, disability and premature death for women aged 18-44.<sup>152</sup>

109. Women and girls faced particular challenges during the COVID-19 pandemic, including increased risk of violence at home.<sup>153</sup>

110. The Commission welcomed the \$600 million invested by the Australian Government in the 2021–22 budget to address family violence. Additional positive steps taken by the Australian Government include introducing a minimum standard for domestic violence leave,<sup>154</sup> and prioritising women and children who are escaping family violence in the National Housing and Homelessness Agreement.<sup>155</sup>

111. The Commission also notes the significance of the Fourth Action Plan of the National Plan to Reduce Violence Against Women and Their Children 2010–2022 and that the development of a subsequent National Plan is currently underway.<sup>156</sup> The next plan should cover all forms of gender-based violence including domestic and family violence, sexual violence, online violence, gendered based elder abuse and sexual harassment. Children and young people should be recognised as victim/survivors of domestic and family violence in their own right, and their voices should be heard in the design of policy and service systems. The Commission emphasises the importance of prevention and early intervention measures to address family and domestic violence.

112. Sexual harassment is also prevalent in Australia, including workplaces and university settings. The Commission's 2018 National Survey on sexual harassment found that 33% of people who had been in the workforce in the previous five years said they had experienced workplace sexual harassment.<sup>157</sup>

113. The Commission's *Respect@Work* report identified drivers and impacts of workplace sexual harassment, the adequacy of the current legal framework and measures to address this issue.<sup>158</sup> The Commission welcomes legislative reforms introduced in 2021 and 2022 to implement key recommendations of the report, and the Australian Government's commitment to implement all 55 recommendations of the report.<sup>159</sup>

114. In March 2021, the Commission was asked by the Australian Government to conduct a review into Commonwealth parliamentary workplaces, to ensure that they are safe and respectful, and that the Parliament reflects best practice in prevention and responses to bullying, sexual harassment and sexual assault. The *Set the Standard* report was subsequently released in November, making 28 recommendations for reform.<sup>160</sup> The Commission welcomes steps taken to implement the report recommendations, including a statement of acknowledgement delivered to Parliament; the establishment of a Parliamentary Leadership Taskforce to monitor and progress the implementation of recommendations; and the passage of the *Parliamentary Reform (Set the Standard) Act 2022* (Cth) which improves workplace protections for Parliamentary staff.<sup>161</sup>

115. To address systemic failures associated with domestic and family violence, the recommendations of Coronial Inquests should be fully implemented. The Commission has previously called for a coherent national system of death reviews to consider cross-jurisdictional issues and ensure accurate monitoring. The Commission made recommendations to support this in its 2016 report, *A National System for Domestic and Family Violence Death Review*.<sup>162</sup>

**Recommendation 25: Government increase prevention and early intervention initiatives on domestic and family violence; advance tailored measures to address the needs of women and girls experiencing intersectional discrimination; and implement the further National Plan from 2022.**

**Recommendation 26: Governments address systemic failures to protect women from domestic violence, including through instituting a national death review system.**

## 6.2 First Nations women and girls

116. First Nations women and girls experience higher rates of domestic and family violence compared to the non-Indigenous population. Factors relating to exclusion, inequality, intersectional discrimination including sexism and racism, and inherited trauma, increase First Nations families' vulnerability to family violence.<sup>163</sup> The Commission urges governments to address the structural and root causes of family violence in First Nations communities, through solutions led by First Nations peoples and organisations, including by adopting strength-based approaches.

117. Three in every five First Nations women have experienced physical or sexual violence.<sup>164</sup> First Nations women are 32 times more likely to be

hospitalised because of violence, and the rates of such violence are significantly underreported.<sup>165</sup> First Nations women are 11 times more likely to die due to assault than non-Indigenous women.<sup>166</sup>

118. First Nations children are significantly over-represented in care and protection systems, and family violence is a key factor driving the contact of First Nations families with child protection authorities<sup>167</sup> It is also a factor that leads to women having greater interaction with the criminal justice system.<sup>168</sup>

119. The Commission's *Wiyi Yani U Thangani* project has been funded by the Australian Government and identifies actions to improve the human rights of First Nations women and girls. This includes an urgent focus on reducing over-representation of Indigenous people victims of family violence, and in care and protection systems, with a focus on trauma recovery. A key recommendation is the development of a National Action Plan for Aboriginal and Torres Islander Women and Girls.<sup>169</sup> The Commission welcomes the recent commitment by the Australian Government to delivering a dedicated National Plan for First Nations people to end family violence and violence against women.<sup>170</sup> The Commission will host a summit of First Nations women and girls in early 2023 to input into government policies and frameworks.

120. The Commission emphasises the importance of ensuring that this National Plan is self-determined, and that First Nations women and children are at the centre of its design and delivery.<sup>171</sup> The Commission also stresses that sustained investment in community-controlled services and programs is crucial to preventing and responding to family violence and its impacts on children.

121. To address systemic failures associated with domestic and family violence, the recommendations of Coronial Inquests should be fully implemented. The Commission has previously called for a coherent national system of death reviews to consider cross-jurisdictional issues and ensure accurate monitoring. The Commission made recommendations to support this in its 2016 report, *A National System for Domestic and Family Violence Death Review*.<sup>172</sup>

**Recommendation 27: Governments implement the recommendations of the *Wiyi Yani U Thangani* report.**

**Recommendation 28: Governments resource Aboriginal-controlled organisations to lead prevention efforts and respond to family violence and its impacts on children.**

### 6.3 Need for child-focused responses

122. Children and young people are victim/survivors of domestic and family violence in their own right, and their voices should be heard in the design of policy and service systems. The historical ‘invisibility’ of children has led to a lack of data and lack of prevention, support, response and recovery services to address the unique needs of children.
123. The Australian Child Maltreatment Study findings will be launched in March 2023 and will for the first time provide a clear picture of the prevalence of child maltreatment. Research is also showing that experience of violence in childhood has serious negative outcomes throughout life.<sup>173</sup> The work of the National Children’s Commissioner in 2015 highlighted the damaging effects of family and domestic violence on children.<sup>174</sup> The 2016 Victorian Royal Commission into Family Violence also shed light on how children are affected in their own right.<sup>175</sup> The Commission emphasises the importance of increasing prevention measures and responses to family violence that address the distinct impacts on children, including through resourcing specialist children’s services.
124. Child abuse is a serious problem in Australia. Child protection data indicates that the rate of substantiations of child abuse and neglect was at 9 per 1,000 children in 2020–21, up from 8 per 1,000 in 2015–16.<sup>176</sup>
125. *Safe and Supported: National Framework for Protecting Australia’s Children 2021-2031* is Australia’s ten-year strategy for improving the lives of children at risk of child abuse and neglect. Two five-year Action Plans will deliver the Framework, and for the first time there will be an Aboriginal and Torres Strait Islander Action Plan developed in partnership with Aboriginal and Torres Strait Islander leaders and communities. In 2021, the National Children’s Commissioner heard from children, young people and families across Australia, about what they need to keep safe, in order to inform the Action Plans. The Commissioner’s report, *Keeping Kids Safe and Well: Your Voices*, makes recommendations for child safety, including the need for redesign of the basic systems that are meant to support children and their families, especially those living with poverty and disadvantage.<sup>177</sup>
126. There is a strong need for Australian jurisdictions to improve the quality of child protection systems. While there have been numerous inquiries in Australia which have included out-of-home care in their terms of reference<sup>178</sup> there has been little systemic change to address the increasing rates of children living in out-of-home care and the reasons why children are being placed in out-of-home care.<sup>179</sup> Early intervention policies and practices

comprise a relatively small proportion of overall child protection expenditure compared to tertiary services.<sup>180</sup>

127. First Nations children are significantly over-represented in the child protection system. Between 2017 and 2021, the rate of Indigenous children in out-of-home care increased from 51 per 1000, to 58 per 1000.<sup>181</sup>
128. The Commission notes the extent to which children in care ‘crossover’ to the youth justice system. The Australian Law Reform Commission found that that ‘the links between these systems is so strong that child removal into out-of-home care and juvenile detention could be considered as key drivers of adult incarceration’.<sup>182</sup> This is due in part to systemic issues related to out-of-home care, such as ‘badly trained and poorly supported staff’ and a ‘readiness to call police to manage children’s behaviour’.<sup>183</sup>
129. The Royal Commission into Institutional Responses to Child Sexual Abuse revealed the extent to which children have been maltreated while in the care of institutions such as schools, recreational organisations, residential care, youth detention and immigration detention. The Royal Commission highlighted the ‘significant life-long impacts’ of sexual abuse, including ‘deep and complex trauma’ that may affect all aspects of a victim/survivor’s life.<sup>184</sup> The Commission welcomes the steps taken thus far to implement the recommendations of the Royal Commission. In particular, the Commission notes the National Redress Scheme,<sup>185</sup> and the development and endorsement by all governments of the National Principles for Child Safe Organisations.<sup>186</sup> The Commission urges continuous efforts to ensure the full implementation of all the Royal Commission recommendations.
130. The Commission notes that, on the whole, there are significant gaps in the implementation of children’s rights in law, and across policy, programs and service delivery. The legal protections of children’s rights in Australia are not comprehensive. Independent monitoring of children’s rights, including the ability for children to make complaints, is limited. Overall, approaches to children experiencing vulnerability are fragmented and are largely reactive rather than preventative. The Commission has recommended the development of a National Plan for Child Wellbeing, a dedicated Cabinet Minister with overall responsibility for children’s rights, and a national children’s data framework to improve and coordinate children’s policy and service-delivery across government portfolios.<sup>187</sup>

**Recommendation 29: The Australian Government increases prevention and early intervention measures and responses to family violence that address the distinct impacts of violence on children.**

**Recommendation 30: Governments resource prevention and early intervention measures to address child abuse and neglect; and ensure**

**sufficient training for staff and adequate staffing levels for child protection services.**

**Recommendation 31: The Australian Government develop and implement a National Plan for Child Wellbeing.**

## 7 Trafficking

**Relevant provisions of the CAT: Articles 2, 12, 13, 14 and 16.**

131. While recognising the challenges of obtaining reliable estimates of the true extent of modern slavery and human trafficking, the Commission notes with concern recent estimates that there are 49.6 million people currently living in modern slavery across the world, and that this figure has grown by around 10 million people since 2017.<sup>188</sup> The number of victims of modern slavery and human trafficking in Australia from 2015–16 to 2016–17 was estimated as between 1,300 and 1,900.<sup>189</sup>

132. The Commission welcomes the introduction of the *Modern Slavery Act 2018 (Cth)* (Modern Slavery Act), which includes Government as a reporting entity. The current statutory review of the Modern Slavery Act is an opportunity to further strengthen Australia's anti-slavery legal framework. In particular, the Modern Slavery Act could be strengthened by establishing an independent Anti-Slavery Commissioner at the federal level (whose functions would include awareness raising, monitoring and oversight of the Modern Slavery Act), introducing financial penalties for non-compliant entities, and establishing a national compensation scheme for victims. The Commission notes that the NSW Government has recently appointed an Anti-slavery Commissioner, the first to do so at the state and territory level.<sup>190</sup>

133. The Commission also welcomes the *National Action Plan to Combat Modern Slavery 2020-25* (National Action Plan)<sup>191</sup> and supports the full resourcing and implementation of the five National Strategic Priorities and 46 action items that are identified in the National Action Plan. The commitment to support and protect victims and survivors is an important focus and would be further strengthened by facilitating the provision of alternative supports and pathways to remedies which are not contingent on participation in criminal prosecutions.

134. *Australia's international engagement strategy on human trafficking and modern slavery: Delivering in partnership* (International Engagement



Strategy)<sup>192</sup> recognises the critical importance of building and supporting regional and global partnerships to end all forms of modern slavery. Continued participation in regional forum such as the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime,<sup>193</sup> investment in regional programs such as the ASEAN-Australia Counter Trafficking (ASEAN-ACT) program,<sup>194</sup> and strengthening of operational cooperation between law enforcement and border agencies should be encouraged. The 40 commitments identified in the International Engagement Strategy need to be fully resourced and implemented. In particular, the Commission notes that the commitment to ratify the International Labour Organization Protocol of 2014 to the Forced Labour Convention 1930 (No. 29) was met with the ratification of the Protocol by Australia on 31 March 2022.<sup>195</sup>

**Recommendation 32: The Australian Government amend the Modern Slavery Act to establish an independent Anti-Slavery Commissioner, introduce financial penalties for non-compliant entities, and establish a national compensation scheme for victims.**

**Recommendation 33: The Australian Government resource and implement both the National Action Plan and International Engagement Strategy.**

**Recommendation 34: The Australian Government facilitate the provision of alternative supports and pathways to remedies for victims and survivors which are not contingent on participation in criminal prosecutions.**

## **8 Counter-terrorism legislation**

**Relevant provisions of the CAT: Article 2, 11.**

135. The Australian Government has enacted 92 counter-terrorism laws in the two-decades since 11 September 2001.<sup>196</sup> The Commission is concerned that many of Australia's counter-terrorism laws restrict human rights through legislation that has not been shown to be legitimate, reasonable or proportionate responses to potential harms. In particular, the Commission draws the Committee's attention to the following laws:

- Preventative detention orders enabling a person to be held in secret without arrest or charge for up to 48 hours, and control orders which can place significant prohibitions and restrictions on a person's freedom of movement, expression, association and right to privacy.<sup>197</sup>

- Continuing detention orders, which enable the continued detention of 'high-risk offenders' after the conclusion of their custodial sentence, for up to three years.<sup>198</sup>
- Australian Security Intelligence Organisation (ASIO) 'questioning warrants' under which an individual can face five years in prison for refusing to answer a question.<sup>199</sup>
- 'Declared areas' offences under the *Foreign Fighters Act 2014* (Cth) which criminalise entry into a specified area without having committed any other offence, or intending to perform any wrongful conduct.<sup>200</sup>
- Presumptions against bail and parole.<sup>201</sup>
- Broad powers which allow police to stop, question, search, enter and seize in areas declared by the Minister to be a security zone, without a warrant.<sup>202</sup>
- Restrictions on fair trial rights.<sup>203</sup>
- Measures limiting children's rights such as in the prosecution and sentencing of children for terrorism offences.<sup>204</sup>
- Surveillance laws, including metadata retention laws enabling access to data by law enforcement agencies, without a warrant.<sup>205</sup>

136. These laws, alongside other broad terrorism legislation,<sup>206</sup> impact upon rights to liberty, privacy, fair trial, freedom from arbitrary detention and freedom of speech.

137. The Independent National Security Legislation Monitor (INSLM) has a statutory mandate to review the operation, effectiveness and implications of Australia's counter-terrorism and national security laws on an ongoing basis. INSLMs have played a valuable role in recommending amendments to aspects of counter-terrorism laws to better safeguard rights and freedoms. The Commission also notes the work of the Parliamentary Joint Committee on Intelligence and Security (PCIS) in examining counter-terrorism laws passed through Parliament. However, the recommendations of the INSLM and PCIS are often not implemented by Government, or responded to in a timely manner,<sup>207</sup> and both face 'ongoing limitations in their resourcing and statutory frameworks'.<sup>208</sup> Despite recommendations for reforms of problematic laws, Kieran Hardy and George Williams have found that the 'framework laid out by laws from the first decade after September 11 remains almost entirely in place. In fact, many of these laws exist in the

same form in which they were enacted, except where their reach has been expanded'.<sup>209</sup>

**Recommendation 35: The Australian Government amend existing counter-terrorism laws that disproportionately limit human rights.**

## 9 People with disability

### Relevant provisions of the CAT: Articles 2 and 16

138. The Commission welcomed the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission) and commended the broad scope of the Terms of Reference. The Commission looks forward to the release of the Final Report. Similarly, the Committee on the Rights of Persons with Disabilities has previously made recommendations in 2019 relating to the issues raised below for people with disability.<sup>210</sup> These recommendations have not been acted upon.
139. In 2018, the Commission published *A Future Without Violence: Quality, safeguarding and oversight to prevent and address violence against people with disability in institutional settings*.<sup>211</sup> The recommendations included improved quality, safeguarding and oversight mechanisms in the disability and mainstream sectors. The Commission remains concerned the need for improved quality, safeguarding and oversight mechanisms remains in these sectors.
140. The Commission is concerned about the lack of a nationally consistent approach to monitoring, regulating and eliminating the use of restrictive practices.<sup>212</sup> The National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector only applies to disability services. These practices still occur in a range of environments, including mental health facilities, hospitals, aged care facilities and schools. There are inconsistent approaches between states and territories with respect to this issue, including in the mental health space, where it falls to each jurisdiction to regulate. Mental health services reported 1.6 physical restraint events per 1,000 bed days and 0.7 mechanical restraint events per 1,000 bed days during 2020–21.<sup>213</sup>
141. The NDIS Quality and Safeguards Commission oversees the regulation of restrictive practices within the National Disability Insurance Scheme.<sup>214</sup> Progress made towards minimising the use of restrictive practices, including data on the reported use of regulated and non-regulated restrictive practices, should continue to be made publicly available.<sup>215</sup>

142. The Senate Community Affairs References Committee considered the use of restrictive practices in relation to people with disability in 2016. The Committee recommended that the Australian Government work with State and Territory governments to implement a national zero-tolerance approach to eliminate restrictive practices in all service delivery contexts.<sup>216</sup> This issue is currently being examined by the Disability Royal Commission.<sup>217</sup>
143. Australia has not implemented a nationally consistent supported decision-making framework and lacks legislation prohibiting the sterilisation of people with disability without consent.<sup>218</sup> The Commission remains deeply concerned that the non-therapeutic sterilisation of people with disability, particularly women and girls<sup>219</sup> continues to take place in Australia without their free, prior and informed consent. The Commission is also concerned by the forced administration of contraceptives and abortion procedures.<sup>220</sup> The Commission encourages the Australian Government to work with state and territory governments to adopt uniform legislation prohibiting forced sterilisation and abortions in the absence of the free, prior and informed consent of the person concerned.
144. The Commission remains concerned that mental health laws, frameworks and policies in Australia permit the provision of mental health services to people with psychosocial disability and mental health conditions in ways that breach their human rights, including their right to liberty and security.<sup>221</sup> The Commission is particularly concerned about the imposition of compulsory treatment and involuntary hospitalisation.<sup>222</sup> Almost one in five (19.9%) residential mental health care episodes were for people with an involuntary mental health legal status during 2019–20.<sup>223</sup> State and territory approaches are inconsistent in this regard. The Commission recommends that all mental health laws, frameworks and policies be examined and reformed to ensure alignment with human rights standards.
145. There remain high rates of violence against people with disability,<sup>224</sup> in particular women and girls.<sup>225</sup> Initiatives aimed at addressing violence against women and children often fail to adequately address the extra challenges faced by people with disability.

**Recommendation 36: Governments develop a nationally consistent framework to reduce and eliminate the use of restrictive practices.**

**Recommendation 37: Governments adopt a human rights-based approach to mental health laws and ensure that mental health services do not violate the human rights of people with disability.**

**Recommendation 38: The Australian Government implement a nationally consistent supported decision-making framework. Governments ensure supports are provided to people with disabilities to exercise their legal capacity and exercise free and informed consent.**

**Recommendation 39: The Australian Government work with state and territory governments to adopt uniform legislation prohibiting, in the absence of the free, prior and informed consent of the person concerned: the sterilisation of adults and children with disability; and the administration of contraceptives and abortion procedures on women and girls with disability.**

**Recommendation 40: The Australian Government ensure that national policies to reduce violence against women and children prioritise disability.**

## **10 Older persons**

### **Relevant provisions of the CAT: Articles 2 and 16**

146. Elder abuse, in many various forms, is a fundamental human rights issue faced by many older people and is presenting a range of complex challenges for the Australian community. In 2019–20, residential aged care services reported 5718 allegations of assault under the mandatory reporting requirements of the *Aged Care Act 1997* (Cth).<sup>226</sup> In the same year, a further 27,000 to 39,000 alleged assaults occurred that were exempt from mandatory reporting because they were resident-on-resident incidents.<sup>227</sup>

147. The Commission welcomes the National Plan to Respond to the Abuse of Older Australians (2019–2023),<sup>228</sup> and the findings of the Royal Commission into Aged Care Quality and Safety, which highlight the importance of a rights-based approach to the aged care system.<sup>229</sup> The Commission also draws attention the Australian Law Reform Commission’s 2017 report, *Elder Abuse—A National Legal Response*, which itself recommended a national plan on elder abuse, alongside a number of legislative reforms to institute safeguards and improve oversight.<sup>230</sup> The Commission encourages the Australian Government to fully implement the priorities outlined in the National Plan, alongside Australian Law Reform Commission and Royal Commission recommendations.

148. A disproportionate number of deaths from COVID-19 occurred in residential aged care facilities.<sup>231</sup> In December 2020 Australia's COVID-19 death rate in residential aged care facilities was ‘among the worst in the world’.<sup>232</sup> Approximately 30% of Australia's total COVID-19 related deaths as of April 2020 were among aged care residents.<sup>233</sup> This was compounded by

problems with Australia's initial vaccine rollout which involved lengthy delays.<sup>234</sup>

149. Large numbers of aged care staff tested positive to COVID-19 or were deemed to be close contacts, resulting in significant staff shortages. This led to 'in some instances, aged-care residents faced deplorable conditions, with some left without food, water, or help showering and toileting'.<sup>235</sup> The Senate Select Committee on COVID 19 found that 'the crisis in aged care was entirely predictable and – to a large extent – avoidable',<sup>236</sup> noting key, unimplemented, Royal Commission recommendations to address staffing issues and improve aged-care capacity.<sup>237</sup> This highlights the importance of strengthening Australia's aged care regime, including by implementing outstanding recommendations without delay.

**Recommendation 41: Government implement recommendations of the Australian Law Reform Commission's report, *Elder Abuse—A National Legal Response* and the recommendations of the Royal Commission into Aged Care and Quality Safety.**

## 11 Sexual orientation, gender identity and intersex issues

**Relevant provisions of the CAT: Articles 2 and 16.**

150. The Commission is concerned about involuntary surgery on people born with variations in sex characteristics, especially infants.<sup>238</sup> The 2019 concluding observations of the Committee on the Rights of the Child called for the Australian Government to 'enact legislation explicitly prohibiting coerced sterilisation or unnecessary medical or surgical treatment, guaranteeing bodily integrity and autonomy to intersex children as well as adequate support and counselling to families of intersex children'.<sup>239</sup> In 2017, the UN Human Rights Committee also made comments on the issue when considering Australia's obligations under the ICCPR.<sup>240</sup>

151. The Commission notes that the Senate Community Affairs Committee conducted an inquiry into the involuntary or coerced sterilisation of intersex people in Australia in 2013.<sup>241</sup> The Government responded to the recommendations of that inquiry in 2015.<sup>242</sup> Many of the recommendations were not implemented; particularly at the state and territory level.

152. The Commission's own 2021 report, *A human rights-based approach for people born with variations in sex characteristics*, makes recommendations for how Australia should protect and promote the human rights of people born

with variations in sex characteristics in the context of medical interventions to modify these characteristics.<sup>243</sup> The recommendations are designed around human rights principles, including protecting bodily integrity and children's agency. The report also focuses on the need for new legislative protections, guidance and oversight processes when there is consideration of medical interventions for people under the age of 18 years born with variations in sex characteristics.

153. The Victorian Royal Commission into Family Violence referred to research suggesting intimate partner violence is as prevalent in LGBTIQ+ communities as it is in the general population.<sup>244</sup> Transgender and intersex people are at particular risk of violence, including from parents.<sup>245</sup> The Australian Institute of Family Studies has also 'significant levels' of sexual harassment and sexual violence experienced by LGBTIQ+ people.<sup>246</sup> LGBTIQ+ people also experience high rates of verbal abuse, physical assault and harassment, including bullying in schools.<sup>247</sup> The Commission notes the need for governments to invest in specialised and inclusive services designed to address the needs of LGBTIQ+ people in relation to family and domestic violence.

154. LGBTIQ+ people, particularly transgender and intersex people, are generally not adequately accommodated by the prison system. The Association for the Prevention of Torture has stated that LGBTIQ+ people in detention 'are in a situation of particular vulnerability, at risk of human rights violations and abuses – including by fellow detainees – throughout the entire criminal justice system'.<sup>248</sup> The Commission found in 2015 that while transgender guidelines do exist, they are 'inconsistent and often left to the discretion of managers'.<sup>249</sup> The Commission recommended 'all states and territories to develop and implement policies on the placement of trans and gender diverse prisoners in correctional services and for access to hormone therapy to be based on medically-identified need, not discretion'.<sup>250</sup> The Commission acknowledges the complexity of the issues surrounding the placement of trans and gender diverse people in custodial contexts. Placement policies and procedures must be developed consistently with human rights principles, and to ensure that the safety and welfare of all people in detention is protected.

155. The Commission is concerned that, in NSW and Queensland, people must undergo surgical or medical treatment to change the legal record of their sex.<sup>251</sup> All other Australian jurisdictions have now removed that requirement.

**Recommendation 42: Governments implement the recommendations of the Commission's report, *A human rights-based approach for people born with variations in sex characteristics*.**

**Recommendation 43: The Australian Government invest in specialist and inclusive services to address domestic and family violence experienced by LGBTIQ+ people.**

**Recommendation 44: Governments develop specific, transparent and human-rights based policy and procedures on accommodating LGBTIQ+ people in prisons and other places of detention (including immigration detention).**



# Appendix: List of Recommendations

## Legal and institutional framework

**Recommendation 1:** The Australian Government amend the AHRC Act to ensure that the Commission is guided by a comprehensive definition of human rights, including through CAT being a scheduled instrument.

**Recommendation 2:** The Australian Government take steps to ensure that the Commission is fully compliant with the Paris Principles, including through amending the AHRC Act, and ensuring adequate resourcing of the Commission's functions.

**Recommendation 3:** Government train public servants to ensure that Statements of Compatibility are of a consistently high standard; and ensure the proper consideration of PJCHR views by Parliamentarians in the enactment of legislation.

## Implementation of OPCAT

**Recommendation 4:** Governments ensure full OPCAT compliance no later than the 20 January 2023 extended deadline by designating NPMs, and ensuring the mandates and resourcing of NPMs is sufficient to allow them to effectively fulfil their OPCAT functions.

**Recommendation 5:** Governments adopt an inclusive approach to the interpretation of 'places of detention', ensuring that both 'primary' and 'secondary' places of detention are included within the scope of all NPMs.

**Recommendation 6:** Governments give particular attention to ensuring NPMs are designed and operate in a way that reflects the particular needs, and is inclusive of, vulnerable cohorts who are disproportionately represented in places of detention, including (but not limited to) First Nations people, children and young people and people with disability.

## Immigration detention and asylum seekers

**Recommendation 7:** The Australian Government ensures that its border security operations, treatment of refugees and asylum seekers, and offshore processing arrangements comply with international human rights obligations, including *non-refoulement* obligations.

**Recommendation 8: The Migration Act be amended to ensure that closed immigration detention is only used in circumstances where it is strictly necessary to manage unacceptable risks to the community.**

**Recommendation 9: The Australian Government introduce legislation to ensure that the necessity for continued immigration detention is periodically assessed by a court or tribunal up to a maximum time limits.**

## **Criminal justice system**

### **First Nations Peoples**

**Recommendation 10: Governments ensure the availability of diversionary programs for Indigenous peoples, expand justice reinvestment trials and invest in pathways out of the criminal justice system.**

**Recommendation 11: The Australian Government commit adequate, ongoing funding for Indigenous legal assistance services.**

**Recommendation 12: Governments review the use and application of mandatory sentencing laws, particularly where they disproportionately impact Aboriginal and Torres Strait Islander peoples, and expand the use of non-custodial measures.**

**Recommendation 13: Governments ensure that Aboriginal-led, culturally appropriate, trauma-informed and gender responsive services and programs are resourced and available throughout the criminal justice system.**

**Recommendation 14: Governments ensure that criminal justice officials at all levels receive sufficient training to ensure the application of culturally appropriate, trauma-informed and gender responsive approaches.**

**Recommendation 15: All Australian governments commit to the development and implementation of a national anti-racism framework to ensure targeted action to identify and address the scourge of racism, including systemic and institutional racism withing government agencies including within the criminal justice system.**

### **Youth justice system**

**Recommendation 16: Governments should explicitly prohibit the use of isolation practices and force as punishment in youth justice facilities. These practices should only be permitted when necessary to prevent an**

imminent and serious threat of injury to the child or others, and only when all other means of control have been exhausted.

**Recommendation 17:** The Northern Territory Government fully implement the recommendations of the Northern Territory Royal Commission.

**Recommendation 18:** Governments legislate against the detention in adult facilities of persons under 18 years.

**Recommendation 19:** Governments raise the minimum age of criminal responsibility from 10 years to at least 14 years.

**Recommendation 20:** Governments ensure that imprisonment of children and young people occurs only as a last resort and for the shortest appropriate period of time, including through identifying and removing barriers for young offenders accessing diversionary programs, in particular for First Nations children. Governments should expand the availability and range of diversionary programs for young offenders, including community-controlled and culturally-safe programs.

**Recommendation 21:** Governments should provide screening and treatment for pre-existing conditions and disabilities when children interact with the youth justice system. Governments should ensure that qualified mental health support and therapies are provided for children in youth detention (as it is for children in community), and that the experience of incarceration does not exacerbate their mental health problems and trauma.

## **People with disability in the justice system**

**Recommendation 22:** Governments implement the recommendations of the Committee on the Rights of Persons with Disabilities in 2019 concerning the criminal justice system, including but not limited to:

- Implementing the *National Statement of Principles Relating to Persons Unfit to Plead or Found Not Guilty By Reason of Cognitive or Mental Health Impairment* into laws, policies and procedures.
- Ensuring adequate disability supports and services are available in the criminal justice system, including the provision of mental health care services.

## **Prison and Remand**

**Recommendation 23:** Governments take steps to reduce the number of people on remand, including by amending overly harsh bail laws.

**Recommendation 24: Governments review the use of post-sentence preventive detention regimes throughout Australia to ensure compliance with international human rights obligations.**

## **Violence against women and children**

**Recommendation 25: Government increase prevention and early intervention initiatives on domestic and family violence; advance tailored measures to address the needs of women and girls experiencing intersectional discrimination; and implement the further National Plan from 2022.**

**Recommendation 26: Governments address systemic failures to protect women from domestic violence, including through instituting a national death review system.**

**Recommendation 27: Governments implement the recommendations of the *Wiyi Yani U Thangani* report.**

**Recommendation 28: Governments resource Aboriginal-controlled organisations to lead prevention efforts and respond to family violence and its impacts on children.**

**Recommendation 29: The Australian Government increases prevention and early intervention measures and responses to family violence that address the distinct impacts of violence on children.**

**Recommendation 30: Governments resource prevention and early intervention measures to address child abuse and neglect; and ensure sufficient training for staff and adequate staffing levels for child protection services.**

**Recommendation 31: The Australian Government develop and implement a National Plan for Child Wellbeing.**

## **Trafficking**

**Recommendation 32: The Australian Government amend the Modern Slavery Act to establish an independent Anti-Slavery Commissioner, introduce financial penalties for non-compliant entities, and establish a national compensation scheme for victims.**

**Recommendation 33: The Australian Government resource and implement both the National Action Plan and International Engagement Strategy.**

**Recommendation 34:** The Australian Government facilitate the provision of alternative supports and pathways to remedies for victims and survivors which are not contingent on participation in criminal prosecutions.

## **Counter-terrorism legislation**

**Recommendation 35:** The Australian Government amend existing counter-terrorism laws that disproportionately limit human rights.

## **People with disability**

**Recommendation 36:** Governments develop a nationally consistent framework to reduce and eliminate the use of restrictive practices.

**Recommendation 37:** Governments adopt a human rights-based approach to mental health laws and ensure that mental health services do not violate the human rights of people with disability.

**Recommendation 38:** The Australian Government implement a nationally consistent supported decision-making framework. Governments ensure supports are provided to people with disabilities to exercise their legal capacity and exercise free and informed consent.

**Recommendation 39:** The Australian Government work with state and territory governments to adopt uniform legislation prohibiting, in the absence of the free, prior and informed consent of the person concerned: the sterilisation of adults and children with disability; and the administration of contraceptives and abortion procedures on women and girls with disability.

**Recommendation 40:** The Australian Government ensure that national policies to reduce violence against women and children prioritise disability.

## **Older persons**

**Recommendation 41:** Government implement recommendations of the Australian Law Reform Commission's report, *Elder Abuse—A National Legal Response* and the recommendations of the Royal Commission into Aged Care and Quality Safety.

## **Sexual orientation, gender identity and intersex issues**

**Recommendation 42:** Governments implement the recommendations of the Commission's report, *A human rights-based approach for people born with variations in sex characteristics*.

## **Recommendation 43: The Australian Government invest in specialist and inclusive services to address domestic and family violence experienced by LGBTQI+ people**

## **Recommendation 44: Governments develop specific, transparent and human-rights based policy and procedures on accommodating LGBTQI+ people in prisons and other places of detention (including immigration detention).**

## **Endnotes**

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- <sup>1</sup> 'Principles Relating to the Status and Functions of National Institutions for the Promotion and Protection of Human Rights' General Assembly Resolution 48/134, 1993.
- <sup>2</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
- <sup>3</sup> *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT) 9 January 2003, A/RES/57/199 (entered into force 22 June 2006).
- <sup>4</sup> *Criminal Code Act 1995* (Cth) s 268.13.
- <sup>5</sup> *Criminal Code Act 1995* (Cth) Div 274.
- <sup>6</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- <sup>7</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
- <sup>8</sup> *Australian Human Rights Commission Act 1986* (Cth) s 20.
- <sup>9</sup> Global Alliance of National Human Rights Institutions, *Australia: Australian Human Rights Commission* (April 2022) 1–2  
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- <sup>10</sup> Global Alliance of National Human Rights Institutions, *Australia: Australian Human Rights Commission* (April 2022) 3–4  
<[https://humanrights.gov.au/sites/default/files/nhri\\_australia\\_no\\_cover\\_4.pdf](https://humanrights.gov.au/sites/default/files/nhri_australia_no_cover_4.pdf)>.
- <sup>11</sup> Global Alliance of National Human Rights Institutions, *Australia: Australian Human Rights Commission* (April 2022) 3–4  
<[https://humanrights.gov.au/sites/default/files/nhri\\_australia\\_no\\_cover\\_4.pdf](https://humanrights.gov.au/sites/default/files/nhri_australia_no_cover_4.pdf)>.
- <sup>12</sup> Australian Human Rights Commission Legislation Amendment (Selection and Appointment Bill) (Cth).
- <sup>13</sup> Free & Equal, *A Reform Agenda for Discrimination Laws* (Position Paper, 2021) Recommendation 37, 310. <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>>
- <sup>14</sup> The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) establishes the Parliamentary Joint Committee on Human Rights.
- <sup>15</sup> *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 3(1).
- <sup>16</sup> See, eg, Daniel Reynolds, Winsome Hall and George Williams, 'Australia's Human Rights Scrutiny Regime' (2021) 46(1) *Monash University Law Review* 256; Daniel Reynolds and George

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- Williams, 'Evaluating the Impact of Australia's Federal Human Rights Scrutiny Regime' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights* (Lawbook Co, 2020) 67.
- <sup>17</sup> See, eg, Laura Grenfell and Sarah Moulds, 'The Role of Committees in Rights Protection in Federal and State Parliaments in Australia' (2018) 41(1) *UNSW Law Journal* 40; and David Monk, 'A Framework for Evaluating the Performance of Committees in Westminster Parliaments' (2010) 16 *Journal of Legislative Studies* 1, 7–8.
- <sup>18</sup> See, eg, Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Annual Report 2018* (2018) 30  
<[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Annual\\_Reports](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Annual_Reports)>.
- <sup>19</sup> Although note that the PJCHR prepares guidance materials and provides targeted training. And the Attorney-General's Department provides some resources. Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Annual Report 2018* (12 February 2019), [3.64]; 'Tools for assessing compatibility with human rights' Attorney-General's Department  
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- <sup>20</sup> United Nations Committee Against Torture. Decision adopted by the Committee on the request submitted by Australia under article 24 (2) of the Optional Protocol to the Convention (CAT/C/73/3). 3 June 2022.
- <sup>21</sup> See <[Monitoring places of detention – OPCAT - Commonwealth Ombudsman](#)>.
- <sup>22</sup> The Hon. Mark Speakman. Budget Estimates 2021 Questions Taken on Notice Portfolio Committee No. 5 – Legal Affairs (26 March 2021), Question 14, 35  
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- <sup>23</sup> Australian Government, Closing The Gap Commonwealth Implementation Plan (July 2021), 50  
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- <sup>24</sup> Australian Senate, Question on notice no. 4249 (08 November 2021)  
<<https://www.aph.gov.au/api/qon/downloadquestions/Question-ParliamentNumber46-QuestionNumber4249>>.
- <sup>25</sup> Australian Human Rights Commission, *Implementing OPCAT in Australia* (29 June 2020), 40-43  
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- <sup>27</sup> United Nations Committee Against Torture, Decision adopted by the Committee on the request submitted by Australia under article 24 (2) of the Optional Protocol to the Convention (CAT/C/73/3) (3 June 2022) [9].
- <sup>28</sup> Commonwealth Ombudsman, 'Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)' (Report, September 2019), 8.
- <sup>29</sup> The United Nations Subcommittee on the Prevention of Torture, Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc CAT/C/57/4 (22 March 2016) 19 [1]-[3].
- <sup>30</sup> Australian Human Rights Commission, *Implementing OPCAT in Australia*, (29 June 2020), 55  
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- <sup>31</sup> Australian Human Rights Commission, *Implementing OPCAT in Australia*, (29 June 2020), 36  
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- <sup>32</sup> Committee on the Rights of Persons with Disabilities. *Concluding observations on the combined second and third periodic reports of Australia* (15 October 2019) [30(c)]  
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