THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CLIC:DHas1600014

22 October 2018

Mr Jonathan Smithers
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: leonie.campbell@lawcouncil.asn.au

Dear Mr Smithers,

Australia's progress in implementing the United Nations Convention on the Rights of the Child

Thank you for the opportunity to provide input to the Law Council's submission to the United Nations Committee on the Rights of the Child ("the UN Committee") on Australia's progress in implementing the United Nations Convention on the Rights of the Child ("CRC").The Law Society's Children's Legal Issues Committee and Human Rights Committee have contributed to this submission.

We endorse the issues raised by the Law Council in its submissions to the National Children's Commissioner and the Attorney-General's Department dated 15 June 2018 and 20 November 2017. Those issues continue to be of concern, and we would support their inclusion in the Law Council's submission to the UN Committee.

We **attach** again our previous submissions to the Law Council regarding Australia's progress in implementing the CRC dated 25 May 2018 and 17 November 2017. We reiterate the recommendations and concerns outlined in those submissions, and take this opportunity to address some of the points outlined in your memorandum of 5 October 2018.

Raising the minimum age of criminal responsibility

The Law Society supports the recommendation in the Law Council's *The Justice Project – Final Report* on the minimum age of criminal responsibility, namely that:

> Australian governments should increase the age of criminal responsibility to at least 12 years of age, subject to *doli incapax* being in place, and should not detain children under 14 years of age, except in the most serious of cases.

We note with concern that the report submitted by the Australian Government to the UN Committee in January 2018 did not express an intention to raise the minimum age of criminal responsibility. This is despite the recommendation made by the UN Committee in 2005[1] and

[1] UN Committee on the Rights of the Child, *Consideration of reports submitted by States Parties Under article 44 of the Convention: Concluding Observations - Australia* (20 October 2005), CRC/C/15/Add.268.

again in 2012[2] that Australia raise its minimum age of criminal responsibility "to an internationally acceptable level".

The Law Society is of the view that increasing the age of criminal responsibility would more accurately reflect the modern understanding of brain development in children, and would ensure that fewer children have contact with the court system. Raising the age of criminal responsibility to at least 12 years would be in line with recommendations from the Royal Commission into the Protection and Detention of Children in the Northern Territory, the NSW Children's Court, and the National Children's Commissioner. It would also help ameliorate the disproportionate impact of the current policy on Aboriginal and Torres Strait Island children in Australia: in 2016-17, 40% of Indigenous young people under youth justice supervision were first supervised when aged 10-13, compared with around 15% of non-Indigenous young people.[3]

The Law Society supports retaining *doli incapax* for children aged 13 and 14 years. Raising the minimum age of criminal responsibility and retaining *doli incapax* would work in a complementary way to protect the most vulnerable children.

The Law Society supports further consideration of whether the age of criminal responsibility should be raised beyond 12 to 14 years of age, based on thorough consideration of a child's development and international best practice. In this regard, we note that while there is no global consensus on the rate of cognitive development during adolescence, research studies have found that "law and order" morality is generally not achieved until mid-teens,[4] and logical thinking and problem solving abilities develop considerably between the ages of 11 and 15.[5] We also note that a study of 90 countries conducted in 2008 found that 68 had a minimum age of criminal responsibility of 12 or higher, with the most common age being 14 years.[6] Furthermore research has shown than children who first encounter the justice system at age 10-14 are more likely to experience all types of supervision in their later teens, particularly the most serious type – sentence detention (33% compared to 8% for those first supervised at older ages).[7]

Greater access to specialised courts

Currently, section 28(2) of the *Children's (Criminal Proceedings) Act (1987)* (NSW) ("CCPA Act") provides that the Children's Court of NSW does not have jurisdiction to deal with a traffic offence committed by a child of licensable age, unless the offence arose out of the same circumstances as another offence that is alleged to have been committed by the person, and for which the Children's Court of NSW has jurisdiction. As a result, children aged 16 or 17 years who commit a traffic offence are dealt with in the adult NSW Local Court jurisdiction.

The Law Society submits that s 28(2) of the CCPA Act breaches Australia's international human rights commitments which state that the best interests of a child in criminal matters should be a primary consideration, the child's privacy in closed court legal proceedings should

---

[2] UN Committee on the Rights of the Child, *Consideration of reports submitted by States parties under Article 44 of the Convention – Concluding observations: Australia* (28 August 2012), CRC/C/AUS/CO/4.
[3] Australian Institute of Health and Welfare, *Youth Justice in Australia 2016–17* (2008), 25.
[4] UK Houses of Parliament – Parliamentary Office of Science and Technology, 'Postnote: Age of Criminal Responsibility' (June 2018), 3.
[5] Michael Lamb and Megan Sim, 'Developmental factors affecting children in legal contexts' (2013) *Youth Justice*, 13(2), 131-144.
[6] Nean Hazel, 'Cross-national comparison of youth justice' (2008), Young Justice Board for England and Wales, United Kingdom, available at: http://dera.ioe.ac.uk/7996/1/Cross_national_final.pdf
[7] Youth Justice Coalition, 'Policing Young People in NSW: A Study of Suspect Targeting Management Plan' (25 October 2017), 11, available at: https://www.piac.asn.au/2017/10/25/policing-young-people-in-nsw-a-study-of-the-suspect-targeting-management-plan/

be protected, children and young offenders have a right to legal representation, and there must be an emphasis on the wellbeing and rehabilitation of a child offender. The Law Society if of the view that it is entirely appropriate, and in accordance with Australia's obligations under the CRC, that children and young people accused of a traffic offence appear before a specialist Children's Court in a closed court setting.

With reference to Australia's obligations under article 40 of the CRC, the Law Society wishes to commend the Government of NSW for its support of the Youth Koori Court, a part of the Children's Court which deals with young Aboriginal and Torres Strait Islanders charged with an offence. The Law Society acknowledges the central role that Aboriginal Elders and other members of the local Aboriginal community have played in the success of the pilot. We note that a 2018 review found that participation in the Youth Koori Court reduced reoffending – specifically the more serious forms of reoffending that result in detention – and led to positive outcomes such as safe living environments and restoring contact with Clan and Country.[8] In light of the success of the Parramatta pilot, the Law Society would support an expansion of the Youth Koori Court to appropriate regional areas in NSW such as Dubbo.

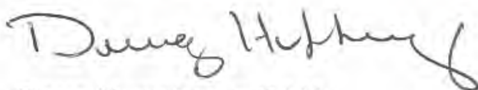
The Law Society in principle supports the reinstatement of the Youth Drug Court ("YDC") in NSW, which was closed down in 2012. The YDC was generally seen as a positive diversionary option to deal with the underlying cause of involvement in crime, and a means of keeping children from prolonged contact with the criminal justice system. The Law Society submits that if the YDC is reinstated, safeguards should be in place to ensure that children who appear before the YDC are not at risk of receiving a greater sentence if they fail to complete a YDC program, than if the matter had not proceeded through the YDC.

The incarceration of juveniles without a meaningful prospect of release

The Law Society wishes to highlight the cases of Mr Bronson Blessington and Mr Matthew Elliott, who were convicted of the 1988 murder of Ms Janine Balding, when they were aged 14 and 16 years respectively. As a result of legislation passed by the NSW Parliament in 1997, 2001 and 2005, Mr Blessington and Mr Elliott are unlikely to be released from prison during their lifetimes. While the Law Society acknowledges the nature of the crime committed, we submit that the rights of Mr Blessington and Mr Elliott under the CRC have been breached, as article 37(a) of the CRC stipulates that neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age. For further information on this matter, please see **attached** the Law Society's letter to the Attorney-General of NSW dated 31 March 2016.

Thank you for the opportunity to provide input on this topic. Should you have any questions or require further information, please contact Andrew Small, Policy Lawyer on (02) 9926 0275 or email andrew.small@lawsociety.com.au.

Yours sincerely,



Doug Humphreys OAM
President

Enc.

---

[8] Williams M, Tait D, Crabtree L, Meher M, *Youth Koori Court Review of Parramatta Pilot Project*, Western Sydney University Aboriginal and Torres Strait Islander Employment and Engagement Advisory Board, May 2018, available at:
https://www.westernsydney.edu.au/__data/assets/pdf_file/0008/1394918/YKC_review_Oct_24_v2.pdf

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CLIC/HRC:DHaj1504109

25 May 2018

Mr Jonathan Smithers
Chief Executive Officer
Law Council of Australia
GPO Box 1989
Canberra ACT 2601

By email: Nathan.MacDonald@lawcouncil.asn.au

Dear Mr Smithers,

National Children's Commissioner Consultation on Australia's progress in implementing the United Nations Convention on the Rights of the Child

Thank you for your memorandum dated 23 April 2018 seeking the Law Society's comments in relation to the National Children's Commissioner's consultation on the progress Australia has made in implementing the United Nations Convention on the Rights of the Child ("CRC").[1] The Children's Legal Issues and Human Rights Committees have contributed to this submission.

We note the issues raised by the Law Council in its submission dated 20 November 2017 on Australia's Draft Report to the Committee on the Convention on the Rights of the Child ("Law Council's 2017 submission"), and endorse the issues raised. Those issues continue to be of concern.

We attach again our submissions to the Law Council raising issues for inclusion in the Law Council's 2017 submission. We reiterate those submissions and take this opportunity to explore in further depth some specific concerns raised by members of the Law Society regarding the progress Australia has made on the cluster areas discussed below.

1. Civil rights and freedoms

1.1. The ineffective use of the Suspect Targeting Management Plan as a crime prevention tool for young people in NSW

We refer to a 2017 report from the Public Interest Advocacy Centre and the Youth Justice Coalition on *Policing Young People in NSW: A study of the Suspect Targeting Management*

[1] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 44 UNTS 25 (entered into force 2 September 1990) ('*CRC*').

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney T +61 2 9926 0333 F +61 2 9231 5809
ACN 000 000 699 ABN 98 696 304 966 www.lawsociety.com.au

Law Council OF AUSTRALIA
CONSTITUENT BODY

Plan ("STMP Report").[2] The STMP Report argues that the STMP policy is being improperly applied to young people and is ineffective in reducing crime.

The Law Society is concerned by reports that young people subject to the STMP have reported harassment and excessive contact by police, including the use of stop and search powers, presentations at the young person's home, and move on directions.[3] The STMP Report also described instances where the courts had found the STMP to be an unlawful justification of the exercise of police power, and described young people's experiences of not knowing why they were targeted in circumstances where they had not committed an offence.[4]

The Law Society's view is that the use of the STMP in relation to children is not in the best interests of the child[5] and may infringe on the rights of the child under Article 16(2) of the CRC, which requires children to be protected from arbitrary interference with their privacy, family or home. In relation to this issue, the STMP Report noted that the research undertaken:

> indicates specific instances where the STMP has contravened principles [under Article 16 of the CRC], including unlawful stop and search. More broadly, NSW Police need to be confident that the STMP does not arbitrarily interfere with children and their families as a systematic effect of the policy.[6]

We endorse the recommendation in the STMP Report that NSW Police discontinue applying the STMP to children under 18.[7]

2. Violence against children

2.1. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children

We refer to the clusters of rights which all reports to the UN Committee on the Rights of the Child ("UN Committee") are to adhere to in structure, and noted by the Children's Commissioner in calling for submissions.[8] We note that in respect of violence to children and the highest attainable standard of health, the issue of female genital mutilation ("FGM") is noted as relevant to Article 24(3): that States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

In this regard, we note that in NSW, the *Crimes Act 1900* (NSW) establishes a clear prohibition on FGM in section 45:

> (1) A person who:
> (a) excises, infibulates or otherwise mutilates the whole or any part of the labia majora or labia minora or clitoris of another person, or

---

[2] Youth Justice Coalition, *Policing Young People in NSW: A Study of Suspect Targeting Management Plan* (25 October 2017), available at: https://www.piac.asn.au/wp-content/uploads/2017/10/17.10.25-YJC-STMP-Report.pdf.

[3] Ibid 20.

[4] Ibid 6.

[5] *CRC* art 3(1).

[6] Above n 2, 46.

[7] Ibid.

[8] Australian Human Rights Commission, *Call for submissions – Children's Rights*, 1 May 2018, available at: https://www.humanrights.gov.au/our-work/childrens-rights/projects/call-submissions-childrens-rights.

(b) aids, abets, counsels or procures a person to perform any of those acts on another person, is liable to imprisonment for 21 years.

The Law Society has also advocated for better resourcing of community education and awareness initiatives, particularly in communities where FGM may continue to be a cultural practice.

However, the *Crimes Act 1900* (NSW) is otherwise silent on the legal status of acts of male circumcision which may involve the whole or partial excision of healthy foreskin from an incapable minor for non-therapeutic purposes. We also note that the issue of male genital mutilation ("MGM") (that is, non-therapeutic circumcision ("NTC")) is not included in the Children's Commissioner's discussion in respect of Article 24(3).

For the reasons set out below, we suggest that the Law Council consider advocating that the Children's Commissioner consider the human rights implications of MGM. We suggest also that the Law Council request that the issue be included in the Australian Human Rights Commissioner's report to the UN Committee if the Children's Commissioner's consideration leads to the conclusion that the practice of MGM is likely to violate the rights of children.

a) Australian review – Tasmania Law Reform Institute recommendations

In 2012, the Tasmania Law Reform Institute ("TLRI") prepared a final report on its comprehensive review of NTC,[9] and made a number of recommendations, attached in full at **annexure "A"** for the Law Council's consideration. The issue was referred to the TLRI by Mr Paul Mason, the former Tasmanian Commissioner for Children. Mr Mason was a member of the Council of Obstetric and Paediatric Mortality and Morbidity at the time of his referral of the matter to the TLRI.

We suggest that the Law Council advocate that the Children's Commissioner consider the position that the practice of MGM should be subject to regulation consistent with the recommendations made by the TLRI.

b) Human rights perspective

Relevant principles

The following human rights principles[10] may be relevant to the issue of MGM:

- The right to highest attainable standard of health.[11]
- The right to security of the person (or bodily integrity),[12] autonomy and self-determination.[13]
- The right to protection from physical injury or abuse.[14]

---

[9] Tasmania Law Reform Institute, *Non-Therapeutic Male Circumcision*, August 2012, available at: http://www.utas.edu.au/__data/assets/pdf_file/0006/302829/Non-Therapuetic-Circ_Final-Report-August-2012.pdf.

[10] A comprehensive table of human rights issues raised by male circumcision can be found here: http://arclaw.org/human-rights-violations-table.

[11] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 12(1) ('*ICESCR*'); *CRC* art 24.

[12] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 3 ('*UDHR*'); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9 ('*ICCPR*').

[13] *ICCPR* art 1(1).

- The right to equality and non-discrimination.[15]
- The right to protection of status as a minor without discrimination as to sex.[16]
- The right to be free from torture and all other cruel, inhuman or degrading treatment.[17]
- The right to private life, family life.[18]
- The right to freedom of religion.[19]
- The right to take part in cultural life.[20]
- The right to identity.[21]

International human rights commentary

The UN Committee, which receives reports and comments filed by States Parties to the Convention, recognises that the CRC grants children a right to physical integrity.[22]

It is widely accepted that FGM practices are a violation of a number of human rights of children, including the right to physical integrity.

In 2014, the UN Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child ("UNCRC") released a joint statement highlighting the need to prevent harmful practices against women and girls:

> It is time to examine harmful practices from a human rights perspective. Children have a right to be protected from practices that have absolutely no health or medical benefits but which can have long-term negative effects on their physical or mental well-being.[23]

The same argument might be applied to incapable minors of all sexes. We note that there is commentary that contemplates that the human rights implications of MGM should, at least, merit further consideration. For example, in its *Concluding Observations on the Second to Fourth Periodic Reports of Israel, adopted by the Committee at its sixty-third session*, the UNCRC expressed concern about some traditional male circumcision practices and recommended that Israel "undertake a study on the short and long-term complications of male circumcision."[24]

International children's rights organisations have expressed stronger views in respect of the human rights compliance of MGM. For example, the Council on Violence Against Children, has stated that:

> a children's rights analysis suggests that non-consensual, non-therapeutic circumcision of boys, whatever the circumstances, constitutes a gross violation of their rights,

---

[14] *CRC* art 19(1).
[15] *ICCPR* art (26).
[16] Ibid art 24(1); *CRC* art 19.
[17] *UDHR* art 5; *ICCPR* art 7; *CRC* art 37.
[18] *ICESCR* art 10; *ICCPR* art 17; *CRC* art 16.
[19] *CRC* art 14; *ICCPR* art 18.
[20] *ICESCR* art 15(1)(a).
[21] *CRC* art 8.
[22] See UN Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Canada,* 20 June 1995, CRC/C/15/Add.37 para 25; UN Committee on the Rights of Child, *Concluding Observations on Report by United Kingdom of Great Britain and Northern Ireland* CRC/C15/Add.34, 15 February 1995 para 6.
[23] Committee on the Elimination of Discrimination against Women and Committee on the Rights of the Child, *UN Human Rights experts set out Countries' Obligations to Tackle Harmful Practices such as FGM and Forced Marriage*, 5 November 2014.
[24] UN Committee on the Rights of the Child, *UN Committee on the Rights of the Child: Concluding Observations: Israel*, 14 June 2013, CRC/C/ISR/CO/2-4, [41]-[42].

> including the right to physical integrity, to freedom of thought and religion and to protection from physical and mental violence.[25]

Further, Child Rights International Network argues that:

> Male circumcision is an irreversible operation; to argue that parents' freedom of religion enables them to consent to the irreversible cutting of their child for religious reasons negates the child's freedom to consent or refuse consent to such an action once they have the capacity to make an informed decision.
>
> Furthermore, under article 14, the State must respect the rights and duties of parents or guardians "to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child". In this way the Convention makes clear that these parental rights and duties to provide "direction" relate to the child's right to freedom of religion: such "direction" plainly cannot justify a serious irreversible operation. Some argue that to be circumcised is part of the child's right to identity (CRC article 8) – but having a circumcised penis is a mark of the parent's religion, not of the child's freely chosen religion. And any assumption that a child will follow his parents' religion conflicts with his independent freedoms.
>
> Indeed, the Committee on the Rights of the Child has condemned the use of religion as a justification for overruling the child's right to refuse consent to practices that affect a child's physical integrity, through a negative interpretation of children's best interests, both in its General Comment No.14 on best interests and General Comment No.8 on the right of the child to protection from corporal punishment.[26]

According to leading human rights practitioners and authors, Lord Lester and David Pannick, the right to security of the person has been connected with freedom from interference with bodily integrity.[27] Further, ethics scholars have also argued that:

> Male genital mutilation should not be considered in isolation from...female genital mutilation. From a human rights perspective, both male and female genital mutilation, *particularly* when performed on infants or defenceless small children...can be clearly condemned as a violation of children's rights.[28]

We note that the practice of FGM is criminally sanctioned in NSW, but the practice of MGM remains legal. While we acknowledge that there are different types of FGM, there is at least one type of FGM, known as Type II, which is substantially similar to the procedure undertaken during MGM.[29] Given this, we suggest further consideration of the different treatment of FGM and MGM in NSW in relation to whether it would constitute discrimination. Indeed, we note that in South Australia, the *Criminal Law Consolidation Act 1935* (SA) is express in its differential treatment of FGM and MGM:

---

[25] International NGO Council on Violence against Children, *Violating Children's Rights: Harmful Practices Based on Tradition, Culture, Religion or Superstition* (2012), 22, available at: http://srsg.violenceagainstchildren.org/sites/default/files/documents/docs/InCo_Report_15Oct.pdf.

[26] Child Rights International Network, *Call for Adequate Recognition of Children's Right to Freedom of Religion or Belief*, November 2015, 5, available at: https://www.crin.org/sites/default/files/attachments/call_for_adequate_recognition_of_childrens_right_to_freedom_of_religion_or_belief.2.pdf .

[27] Lord Lester and David Pannick (eds) *Human Rights Law and Practice* (2nd ed, 2004) 528; See also J Steven Svoboda, 'Circumcision of male infants as a human rights violation' (2013) *J Med Ethics*.

[28] SK Hellsten, 'Rationalising circumcision: from tradition to fashion, from public health to individual freedom' (2004) *Journal of Medical Ethics* 30, 248-252.

[29] End FGM European Network, *What is FGM*, http://www.endfgm.eu/female-genital-mutilation/what-is-fgm/. According to 'End FGM European Network', FGM Type II is commonly known as excision, whereby the clitoris and labia minora are partially or totally removed, with or without excision of the labia majora.

Section 22—Conduct falling outside the ambit of this Division

(1) This Division does not apply to the conduct of a person who causes harm to another if the victim lawfully consented to the act causing the harm.

(2) A lawful consent given on behalf of a person who is not of full age and capacity by a parent or guardian will be taken to be the consent of the person for whom the consent was given.

(3) A person may consent to harm (including serious harm) if the nature of the harm and the purpose for which it is inflicted fall within limits that are generally accepted in the community.

Examples—

1 A person may (within the limits referred to above) consent to harm that has a religious purpose (eg male circumcision but not female genital mutilation).

c) The perspective of health authorities

Medical authorities in comparable jurisdictions do not recommend the routine circumcision of every newborn male. The Law Society is of the view that there should be consideration of the benefits, disadvantages and ethical issues.

The Royal Australasian College of Physicians ("RACP") policy document on the circumcision of infant males states:

> Ethical and human rights concerns have been raised regarding elective infant male circumcision because it is recognised that the foreskin has a functional role, the operation is non-therapeutic and the infant is unable to consent.
>
> After reviewing the currently available evidence, the RACP believes that the frequency of diseases modifiable by circumcision, the level of protection offered by circumcision and the complication rates of circumcision do not warrant routine infant circumcision in Australia and New Zealand.[30]

In this document, the RACP cites the British Medical Association statement on the Law and Ethics of Male Circumcision that:

> if it was shown that circumcision where there is no clinical need is prejudicial to a child's health and wellbeing it is likely that a legal challenge on human rights ground would be successful. Indeed if damage to health was proven there may be obligations on the State to proscribe it.[31]

Similarly, the Canadian Paediatric Society "does not recommend the routine circumcision of every newborn male."[32]

It is worthwhile noting that in 2013, a Joint Statement by the Nordic Ombudsmen for Children and paediatric experts stated "Circumcision, performed without medical indication, on a person who is incapable of giving consent, violates fundamental medical-ethical principles,

---

[30] The Royal Australasian College of Physicians, *Circumcision of infant males*, September 2010, 5, available at: https://www.racp.edu.au/docs/default-source/advocacy-library/circumcision-of-infant-males.pdf.

[31] British Medical Association, 'The Law and Ethics of Male Circumcision: Guidance for Doctors' (2004) *Journal of Medical Ethics*.

[32] Canadian Paediatric Society, 'Neonatal circumcision revisited. Fetus and Newborn Committee' (1996) *Canadian Medical Association Journal*.

not least because the procedure is irreversible, painful and may cause serious complications."[33]

We note that the TLRI stated in its final report on NTC that "No authoritative health policy maker in any jurisdiction with a frequency of relevant health conditions as low as that in Australia recommends circumcision as an individual or public health measure."[34]

d) Relevant case law

Australian jurisprudence

In general, the question of parental capacity to consent to a non-therapeutic treatment has been considered by the High Court of Australia in *Department of Health and Community Services v JWB and SMB*[35] (*'Marion's case'*). In 1993, the Queensland Law Reform Commission ("QLRC") considered male circumcision in light of this case, summarising the ratio decidendi as follows:

> ... if the nature of the proposed treatment is invasive, irreversible and major surgery and for non-therapeutic purposes, then court approval is required before such treatment can proceed. The court will not approve the treatment unless it is necessary and in the young person's best interests. The basis of this attitude is the respect which must be paid to an individual's bodily integrity.[36]

The issue has also been considered by the Family Court of Australia. See for example *K & H* [2003] FamCA 1364, in which the court also found in favour of a secular mother and upheld the best interests of the child to determine whether to undertake the procedure later in life.

International jurisprudence

In the United Kingdom in 2015, in a case involving female genital mutilation, a British judge found that non-therapeutic circumcision of male children is considered "significant harm".[37]

Another notable case is *Re J*[38] which concerned the need for parental consensus rather than the legality of the procedure itself. In that case, the court balanced a Muslim father's right to perpetuate his religious belief by having his son circumcised against the mother's right to resist the procedure on the basis of the best interests of the child. In deciding J's best interests, the court weighed up the father's religious motivations against J's secular upbringing and environment, ultimately finding that in the absence of clearly demonstrable religious benefits and with no parental consensus, an irreversible surgery like circumcision should not be allowed.[39]

---

[33] S Todd Sorokan, Jane C Finlay, Ann L Jefferies, 'Newborn male circumcision' (2015) *Paediatric Child Health*, 20(6) 311 – 315.

[34] Tasmania Law Reform Institute, *Non-Therapeutic Male Circumcision*, August 2012, 13, available at: http://www.utas.edu.au/__data/assets/pdf_file/0006/302829/Non-Therapuetic-Circ_Final-Report-August-2012.pdf.

[35] (1992) 175 CLR 218.

[36] Queensland Law Reform Commission, *Circumcision of Male Infants*, Research Paper (1993) 38.

[37] *B and G (Children) (No 2) v Leeds City Council* [2015] EWFC 3 (Fam).

[38] [2000]1 FCR 307.

[39] *Re J* [1999] 2 FCR 34 per Wall J at 367-69.

Importantly, in balancing competing human rights, the court held on appeal that "the newborn does not share the perception of his parents or of the religious community to which the parents belong."[40]

In 2012, a German court held that circumcision constitutes criminal assault by causing bodily harm and denying a child's right to physical integrity (although the decision was later reversed by the introduction of legislation).[41]

A comprehensive analysis of the human rights, legal, religious and medical implications of neonatal male circumcision can be found in an article by Ranipal Narulla entitled "Circumscribing Circumcision: traversing the moral and legal ground around a hidden human rights violation."[42]

3. Family environment and alternative care and the intersection with juvenile justice

We note that Australia's ratification of the CRC includes the following guidance:

1. A child should not be separated from his or her parents against their will;[43] and
2. That the arrest, detention and imprisonment of a child should be a measure of last resort.[44]

In its report to the UN Committee, the Australian government acknowledged that there were, "ongoing issues with the high number of children entering out-of-home care and protection systems".[45] We submit the extent of this issue is not adequately described by this statement, for the reasons noted below.

The Law Society submits that the repeated reviews and inquiries in child protection suggest that there is a lack of in-depth understanding of what is driving poor outcomes for children and their families. We support a solutions-focused and evidence-based approach to child protection and child wellbeing to address the failures by governments.[46]

3.1. Care and protection

Recent statistical research and anecdotal evidence supports the need for urgent action to improve the approach to child protection in Australia. In 2009, the Council of Australian Governments ("COAG") endorsed the National Framework for Protecting Australia's Children 2009 – 2020 which provides a set of indicators relating to the safety and wellbeing of Australia's children, including the number of child protection substantiations, placement

[40] *Re J* [2000] 1 FCR 307 per Thorpe LJ at [15].
[41] Wendy Zeldin, *Germany: regional court ruling criminalizes circumcision of young boys*, 2 July 2012, Global Legal Monitor, available at: http://www.loc.gov/law/foreign-news/article/germany-regional-court-ruling-criminalizes-circumcision-of-young-boys/.
[42] Volume 12(2), *Australian Journal of Human Rights*, 2007, available at: http://www.austlii.edu.au/au/journals/AJHR/2007/24.html.
[43] *CRC* art 9(1).
[44] *CRC* art 37.
[45] Australian Government. *Australia's joint fifth and sixth report under the Convention on the Rights of the Child, second report on the Optional Protocol on the sale of children, child prostitution and child pornography and second report on the Optional Protocol on the involvement of children in armed conflict*, 20, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fAUS%2f5-6&Lang=en.
[46] Law Society of NSW, *Shaping a Better Child Protection System*, 1 December 2017, 1.

stability, kinship placement and family contact.[47] In June 2017 indicators from the National Framework and Standard show that over the last few years:

1. The rate of children who were the subject of child protection substantiations increased;
2. The rate of children in out of home care increased; and
3. The proportion of Aboriginal children in out of home care placed with extended family or other Aboriginal caregivers decreased.[48]

We further note that Chapter 30 of the Final Report of the Royal Commission into the Protection and Detention of Children in the Northern Territory ("NT Royal Commission Report") discussed in depth the child protection systems across Australia and concluded that, "In all Australian jurisdictions, child protection systems are facing unprecedented demands and challenges, and are generally seen to be in crisis."[49]

The NT Royal Commission Report made the following concerning observations with respect to the reforms in Australia over the past approximately 20 years, which we submit are necessary to repeat in full:

1. There have been more than 21 inquiries into child protection services in Australia since 2006;
2. The inquiries have all recommended urgent systemic changes to the services system (including legislation, organisational structure, workforce training, recruitment and policies and procedures);
3. The inquiries have recommended adopting a public health approach to the care and protection of children;
4. Governments have not acted upon many of these proposals as it has been easier to maintain the status quo and 'tinker with' existing systems;
5. As a result, there has been:
   a) An exponential increase of reporting of children at risk;
   b) Unmanageable numbers of investigations;
   c) An overburdened workforce;
   d) A failure to address the needs of children who, along with their families, are often re-traumatised by the system; and
   e) Families, communities and a system in a constant crisis.[50]

Given the above, we are concerned that the Australian Government's comments to the UN Committee do not adequately represent the extent of the issues regarding child protection, and therefore do not provide an accurate picture of Australia's compliance with children's rights under the CRC. We submit that the above observations should be drawn to the attention of the National Children's Commissioner by the Law Council.

---

[47] Australian Institute of Health and Welfare, *Child protection Australia 2015–16*, 2016, 5.

[48] The indicators are available from Australian Institute of Health and Welfare, *Indicator reporting for the National Framework for Protecting Australia's Children*, 29 June 2017, available at: https://www.aihw.gov.au/reports/child-protection/nfpac/contents/summary .

[49] Royal Commission into Children and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Final Report*, 17 November 2017, Volume 3A, Chapter 30, 199, available at: https://childdetentionnt.royalcommission.gov.au/Documents/Royal-Commission-NT-Final-Report-Volume-3A.pdf.

[50] Royal Commission into Children and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Final Report*, 17 November 2017, Volume 3A, Chapter 30, 210 - 211, https://childdetentionnt.royalcommission.gov.au/Documents/Royal-Commission-NT-Final-Report-Volume-3A.pdf.

The Law Society is of the view that addressing issues around children, particularly Indigenous children, in out-of-home care will also assist with the attainment of other rights, such as in respect of education. In this regard we refer to the NSW Ombudsman's August 2017 inquiry into behaviour management in schools. We note the alarming statistics in respect of school attendance for children in out-of-home care. The Ombudsman's inquiry found that for 295 school age children and young people who had been in out-of-home care for three or more months in 2016, 43% (128) missed 20 or more school days in 2016 for reasons other than illness. About one third (42) of these children were Aboriginal. These 128 children missed an average of 44% of the school year.[51]

We note the Ombudsman's view that:

> The department's [of education] lack of documented information about the OOHC status of the children we reviewed highlights the need for improved work between the department and FACS to ensure that children in OOHC are accurately identified at an early point to enable an appropriate and informed response to meeting their learning and support needs.[52]

For example, anecdotally, we understand that learning plans are often not made or maintained in respect of these children. In our members' experience, despite the obligatory nature of learning plans, the out-of-home care caseworker may not be in contact with schools to develop those learning plans in respect of children in out of home care.

We note further that issues in relation to children in out of home care and their educational needs have been raised previously, most notably in the Wood inquiry in 2008. The Ombudsman's view is that "It is disappointing to note the lack of progress in addressing these issues."[53]

The poor outcomes that result from non-attendance at school are myriad, not least of which is the fact that it is a risk factor for children in respect of entering the juvenile justice system. The Law Society notes that anecdotally the Children's Court of NSW believes that roughly 40% of children coming before the court in its criminal jurisdiction are not attending and are totally disengaged from school.[54] The Law Society supports the efforts of the Children's Court to adopt a similar model to the Victorian Education Justice Initiative. Under this model, officers of the Department of Education are placed in the Children's Court to assist in identifying those children who are not attending school and to help them to re-engage in school.

3.2. Care criminalisation

With the reported increase in the rates of children in out-of-home care, the Law Society is also concerned about how this leads to greater numbers of vulnerable children coming into the juvenile justice system. For example, in NSW, the 'drift' from care to crime is significant.

[51] NSW Ombudsman, *Inquiry into behaviour management in schools*, August 2017, 46, https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0018/47241/NSW-Ombudsman-Inquiry-into-behaviour-management-in-schools.pdf.
[52] Ibid 48.
[53] Ibid.
[54] Children's Court of NSW, *Legislative Assembly Law and Safety Inquiry into the adequacy of youth diversionary programs in NSW*, 8 February 2018, 16, available at: https://www.parliament.nsw.gov.au/committees/DBAssets/InquirySubmission/Body/59799/Submission%2019.pdf.

Research from 2011 highlighted that 80% of Legal Aid's criminal law high service users had some history of out-of-home care.[55]

We specifically note the link between Indigenous children in out-of-home care and the criminal justice system. Of the 99 Indigenous people who died in custody, and who were the subject of the Royal Commission into Aboriginal Deaths in Custody, 43 involved individuals who were separated from their families as children.[56]

The Law Society supports an approach to this issue which targets early intervention to address risk issues arising for children well before they have contact with the criminal justice system.[57] In particular, we support an emphasis on diversionary measures as a way of reducing and preventing police contact with children, noting that the arrest, detention and imprisonment of a child should be used only as a measure of last resort.

We submit that compliance with Article 37 of the CRC will not be possible unless there is targeted action by government to address ongoing issues with the crossover of the care and crime jurisdictions. We note that the issue of "care criminalisation" was also identified in Chapter 35 of the NT Royal Commission Report. The NT Royal Commission report noted the two primary factors contributing to care-criminalisation are:[58]

1. The use of police to manage behaviour; and
2. The lack of care, staff training and support.

The experience of our members also reflects that the above factors have a significant impact on "care-criminalisation". We wholly endorse a whole-of-government solution to this problem. Recommendations 35.2 and 35.3 in the NT Royal Commission Report recommend protocols between the out-of-home care service sector and police to address the management and response to criminal behaviour, together with monitoring of the use of police callouts by out-of-home care providers.

The Law Society supports interagency collaboration to prevent children in care being drawn into the criminal justice system, particularly where a therapeutic approach may better assist to resolve conflict and address the underlying causes of youth offending.

In NSW, a joint protocol to reduce the contact of young people in residential care was published in 2016 and applies to children under 18 years of age living in residential out-of-home care.[59] While we are aware of positive reports in individual cases from our members, the Law Society is aware that there are still a high number of police events arising from

[55] Legal Aid NSW, *The Drift from Care to Crime: A Legal Aid NSW Issues Paper*, October 2011, available at: https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0019/18118/The-Drift-from-Care-to-Crime-a-Legal-Aid-NSW-issues-paper.pdf.

[56] National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, *Bringing them Home*, 1997, 15, available at: https://childdetentionnt.royalcommission.gov.au/NT-public-hearings/Documents/evidence-2016/evidence13october/Exh-024-008.pdf.

[57] Law Society of NSW, *Inquiry into the adequacy of youth diversionary programs in NSW*, 20 February 2018, 14, available at: https://www.lawsociety.com.au/sites/default/files/2018-03/1447687.pdf.

[58] Royal Commission into Children and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Final Report*, 17 November 2017, Volume 3B, Chapter 35, 20, available at: https://childdetentionnt.royalcommission.gov.au/Documents/Royal-Commission-NT-Final-Report-Volume-3B.pdf.

[59] Department of Family and Community Services, *Joint protocol to reduce the contact of young people in residential out-of-home care with the criminal justice system*, 2016, available at: http://www.community.nsw.gov.au/?a=408679.

children in out-of-home care. The Law Society awaits the results of the independent review of the joint protocol which the NSW Department of Family and Community Services ("FACS") has commissioned to assess the effectiveness of the joint protocol. The Law Society understands that training on the joint protocol is still being rolled-out by FACS. In order for the joint protocol to be effectively utilised, we have suggested to the NSW Government that training of all the relevant stakeholders involved in the joint protocol (particularly casual case workers and police) be prioritised.

In relation to Indigenous children, our view is that addressing the complex issue of Aboriginal overrepresentation in the juvenile justice system requires a holistic, multi-pronged approach. Resources must be directed towards early intervention, prevention and diversion along with strategies that strengthen communities. It is critical that diversionary programs for young Indigenous offenders are Indigenous community-led to ensure Indigenous self-determination to provide culturally responsive (and thereby effective) approaches.

4. Special protection measures

4.1. Children outside their country of origin seeking refugee protection

We endorse the Law Council's comments in respect of child migrants, asylum seekers and refugees. In our view, the situation for refugee children detained on Nauru is at crisis point, and is clearly in violation of a number of fundamental rights. We are very concerned that offshore detention appears to be de facto indefinite detention. We note that the Minister for Home Affairs has continued to rule out resettlement in New Zealand, and has stated that the prospects for resettlement in another third country are "bleak."[60]

The Law Society strongly opposes the continued indefinite offshore detention of refugee children. We note the recent Federal Court decisions in respect of *AYX18 v Minister for Home Affairs* [2018] FCA 283 and *FRX17 as litigation representative for FRM17 v Minister for Immigration and Border Protection* [2018] FCA 63 where His Honour Justice Murphy and His Honour Justice Perram respectively ordered the transfer of refugee children to Australia to allow specialist psychiatric assessment as soon as reasonably practical. The first matter concerns a young boy of 10 years old at serious risk of self-harm and suicide. Similarly, the second matter concerns a young girl found to be suffering anxiety, depression, experiencing hallucinations and at extreme risk of suicide.

Justice Murphy set out information at [18], from clinical notes prepared by a child psychologist who saw the applicant, to illustrate the state of her mental health:

> The applicant stated that the voice tells her "dying is better than living, you'll be free". [The applicant] stated that she wants to die and she wants to kill herself and that if she was going to kill herself she would "make myself lost in the jungle and put a knife in my stomach". [The applicant] blames the Australian government for her state of mind and says that she is trapped in no land and that she thinks about dying like the Sri Lankan man (from Manus Island) who recently committed suicide.

Justice Murphy also noted the view of Professor Newman, who gave evidence in *FRX17*, that "suicidal acts in young children are rare and extremely serious events which require specialist Psychiatric assessment and treatment. Given what appears to be persistent and

---

[60] Henry Belot, *Peter Dutton says third country resettlement for Manus Island refugees 'a myth'*, 7 May 2018, ABC News, available at: http://www.abc.net.au/news/2018-05-07/peter-dutton-says-third-country-resettlment-option-a-myth/9734744 .

significant suicidality in this child I do not see it as appropriate on clinical grounds to attempt to manage her in the Nauru community setting."[61]

The Law Society notes that there is no child psychiatrist resident on Nauru.

In our view, it can never be in the child's interest to be detained on Nauru, noting additionally the following:

1. Children on Nauru are not being detained as a measure of last resort and for the shortest possible time.
2. The right to development is likely being compromised for children on Nauru.
3. The school has closed in the Nauruan detention facility, undermining asylum seeker children's right to education. Further, while refugee and asylum seeker children have access to the local school, many have reported bullying and even sexual harassment.[62]
4. The physical and psychological recovery for refugee and asylum seeker children, including those who have been exposed to armed conflict is likely to be impossible if living offshore.
5. The right to a nationality could be undermined by expanding powers of visa cancellations and citizenship cancellations.
6. The Commonwealth Redress Scheme for Institutional Responses to Child Sexual Abuse will potentially be discriminatory on the basis of citizenship and visa status. The Law Society has made submissions on this issue to the Law Council, and directly to the inquiry into the Commonwealth Redress Scheme for Institutional Responses to Child Sexual Abuse Bill 2017. That submission is attached.
7. Children on Nauru and child asylum seekers have been separated from parents because they have been removed from Nauru and have been transferred to Australia. Often one parent is with the child and the other is on Nauru or otherwise detained, such as when a child or parent is removed for medical treatment. The Law Society is aware of cases where families are at risk of permanent separation because family members in Australia will not be considered for the Australia-US refugee deal unless they return to Nauru, in conflict with medical advice, which says that it is not safe for them to return to Nauru. In our view, this undermines the rights of the child under Articles 9 and 10 of the CRC.

In support of the issues raised above, we note in particular the following reports and the recommendations made:

1. Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention*, 2014, available here: https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/forgotten-children-national-inquiry-children; and
2. Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Volume 15: Contemporary Detention Environments*, available here: https://www.childabuseroyalcommission.gov.au/contemporary-detention-environments

[61] *FRX17 as litigation representative for FRM17 v Minister for Immigration and Border Protection* [2018] FCA 63 [27].

[62] See incidents 1, 2 and 10, extracted from the Nauru Files by the Australian Lawyers Alliance, set out in the Appendix to its Supplementary Submission to the Senate Standing Committee on Legal and Constitutional Affairs on the inquiry on *Serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre,* 16 March 2017, available at: https://www.lawyersalliance.com.au/documents/item/814

4.2. Sentencing of children

The Law Society wrote to the Attorney General of NSW raising the issue of the incarceration of juvenile offenders without the meaningful prospect of release in NSW in 2016. This issue has not been addressed, and we attach our 2016 submission for the Law Council's information.

4.3. Children deprived of their liberty

The Law Society has also previously noted its general concerns regarding the use of control orders, particularly in relation to children. The Law Society considers that, from a human rights perspective, the use of control orders, including monitoring of control order subjects, is likely to be inconsistent with provisions of the *International Covenant on Civil and Political Rights* ("ICCPR")[63] and the CRC. These include the rights to liberty;[64] a fair trial;[65] freedom of movement,[66] expression,[67] and association;[68] and privacy.[69] We attach our 2016 submission for the Law Council's information. We remain opposed to the previous amendments[70] which lowered the age for the imposition of a control order from 16 years to 14 years.

Thank you for the opportunity to contribute to the Law Council's submission. Questions should be directed at first instance to Amelia Jenner, Policy Lawyer, at (02) 9926 0275 or amelia.jenner@lawsociety.com.au.

Yours sincerely,

Doug Humphreys OAM
President

[63] Opened for signature 16 December 1966, 999 UNTS 277 (entered into force 23 March 1976) ('*ICCPR*').
[64] *ICCPR* art 9; *CRC* art 37.
[65] *ICCPR* art 14; *CRC* art 40.
[66] *ICCPR* art 12.
[67] *ICCPR* art 19; *CRC* art 13.
[68] *ICCPR* art 22; *CRC* art 15.
[69] *ICCPR* art 17; *CRC* art 16.
[70] *Counter-Terrorism Legislation Amendment Act (No. 1) 2016* (Cth).

"A"

The recommendations of the Tasmania Law Reform Institute report on circumcision are as follows.

1. The Institute supports the enactment of legislation to reform the law governing circumcision.

2. The Institute recommends reform to provide a clear legislative basis for the legality of circumcision performed at the request of an adult or capable minor.

3. The Institute recommends the enactment of a new and separate offence generally prohibiting the circumcision of incapable minors in Tasmania. The new legislation ought to create an exception for the performance of some well-established religious or ethnicity motivated circumcision on incapable minors.

4. The Institute recommends the enactment of legislation to require joint parental authorisation for the circumcision of an incapable minor.

5. The Institute recommends the enactment of a law to require court authorisation for a circumcision whenever parents disagree about the desirability of performing a circumcision.

6. The Institute does not recommend the enactment of legislation mandating court authorisation for the circumcision of minors.

7. The Institute recommends the enactment of a law to require that all circumcisers provide accurate information as to:

- the financial cost of the procedure;
- the non-therapeutic nature of the operation;
- the purpose and function of the foreskin;
- the procedure itself;
- the procedure's effect on the functioning of the penis;
- the risks of the procedure;
- the nature and significance of the evidenced prophylactic benefits of circumcision in an Australian context;
- the potential for children to grow up into adults who resent their circumcision (this may include a discussion of the common rationales and prevalence of circumcision);
- the availability of the procedure in adulthood;
- the legality of the procedure.

8. The Institute recommends that health policy, community and industry leaders use non-legislative avenues of reform to improve the dissemination of accurate information on the known and potential effects and significance of circumcision.

9. The Institute recommends the enactment of a criminal law that sets general principles against which to judge the acceptability of a circumciser's practice. These principles should set minimum standards that all circumcisers of incapable minors must meet in the provision of their service. Parliament should give an existing health regulatory body the responsibility

of formulating regulations to qualify the general standards set in statute. The Institute recommends the setting of standards as to matters such as:

- the pain relief provided;
- the instruments used;
- the skill of the person performing the operation;
- the skill with which the procedure is performed;
- the adequacy of the wound care and post-procedure monitoring.

The standards set by statute and in regulations ought to reflect the minimum standards the community would expect circumcisers to meet at the time of the operation in the circumstance in which they are operating. In particular, the standards should ensure that no minor be put at a needlessly high risk of pain or complication from a circumcision.

10. The Institute recommends further investigation into whether the law governing the use and sale of human tissue would benefit from reform.

11. The Institute does not recommend reform to the law regulating the commercial aspects of a circumciser's service.

12. The Institute recommends the enactment of reform to create a uniform period in which individuals harmed by a circumcision as a minor may bring an action against their circumciser. This period should extend for an appropriate time after the harmed person has reached the age of majority. This new limitation period should be enacted in a provision in a new Circumcision Act.

13. The Institute recommends the enactment of legislation to require circumcisers to transmit information relevant to actions that may be brought for harm they cause to a minor to an appropriate government authority.

14. The Institute does not recommend the enactment of a no-fault compensation scheme for harm caused by a circumcision performed upon an incapable minor.

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HRC/IIC/PWvk:1401226

17 November 2017

Mr Jonathan Smithers
Chief Executive Officer
Law Council of Australia
GPO Box 1989
Canberra ACT 2601

By email: natasha.molt@lawcouncil.com.au

Dear ~~Mr Smithers~~ Jonathan,

Australia's draft report to the United Nations Committee on the Convention on the Rights of the Child

Thank you for your memorandum dated 14 November 2017 seeking the Law Society's comments in relation to a possible Law Council submission to the Attorney-General's Department on Australia's draft combined report on the Convention on the Rights of the Child, the Optional Protocol on the involvement of children in armed conflict, and the Optional Protocol on the sale of children, child prostitution and child pornography ('draft report'). Members of the Children's Legal Issues and Human Rights Committees have contributed to this submission.

The Law Society would like the Law Council to raise with the Attorney-General concern expressed by members with the lack of publicity of the draft report and substantive consultation with NGOs, together with the tight timeframe on which to comment on the draft report.

In the time available, members of the Committees have raised the following concerns with the Government's draft report:

1. **Age of majority – criminal responsibility.** Members are concerned that Australia's position of maintaining the minimum age of criminal responsibility at 10 years old[1] is incompatible with statements of the United Nations Committee on the Rights of the Child.[2] The Law Society has previously called for the age of responsibility to be a minimum of 13 years to reflect research into adolescent brain development that links psychological development and offending.[3]

---

[1] Attorney-General's Department, *Australia's draft report to the UN Committee on the Rights of the Child* (November 2017) https://www.ag.gov.au/Consultations/Documents/Australias-draft-report-on-the-Convention-on-the-Rights-of-the-Child/Australias-draft-report-on-the-Convention-on-the-Rights-of-the-Child.pdf p. 10.
[2] United Nations Committee on the Rights of the Child, 'Concluding Observations: United Kingdom and Northern Ireland', September 2008, para 77(a).
[3] Law Society of NSW, *Review of the Young Offenders Act 1997 and the Children (Criminal Proceedings) Act 1987* (8 December 2011) http://www.justice.nsw.gov.au/justicepolicy/Documents/lsnsw.pdf p. 12.

2. **Australia's reservation to Article 37(c) of the Convention on the Rights of the Child.** Australia continues to maintain its reservation to article 37(c) of the Convention on the Rights of the Child which requires children to be separated from adults in prison unless it is in the child's best interests not to do so.[4]

   Members of the Law Society note that the Committee on the Rights of the Child has previously recommended that Australia withdraw this reservation as it is unnecessary, and has reiterated its recommendation in its 2012 Concluding Observations that Australia continue and strengthen its efforts for a withdrawal of its reservation.[5]

3. **Juvenile Justice and Detention.** While the draft report foreshadows the release of the report of the Royal Commission into the Protection and Detention of Children in the Northern Territory on 17 November 2017, the draft report does not indicate whether the Government will consider implementing the findings of the Royal Commission's report in jurisdictions other than the Northern Territory.[6] In New South Wales, members have been advised about previous practices in which it was alleged that young people were held in isolation for significant periods of time, and were not permitted peer interaction.[7] The Law Society calls on the Commonwealth Government to consider the treatment of juvenile detainees across Australia, and particularly Indigenous children who are disproportionately represented in the juvenile justice system.

   Members would like the Government to include information about specific concerns in places of detention (including with regards to isolation, use of force and restrictive practices) and outline how it intends children specifically will benefit from the implementation of the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

   Members also call on the Commonwealth Government to consider how racial profiling is a cause of the high rates of incarceration for Indigenous children and young people, particularly noting the Committee raised their concerns with the serious and widespread discrimination faced by Aboriginal and Torres Strait Islander children in the criminal justice system.[8]

4. **Health and Health services - sterilisation of intersex children and children with disabilities.** Members are concerned that the sterilisation of both intersex and children with disabilities, except where required for legitimate health reasons of the intersex child or child with a disability, has not been prohibited by Australia.[9] In the 2012 Concluding Observations, the Committee on the Rights of the Child were concerned that Australia had not introduced legislation prohibiting such sterilisation, noting it was discriminatory and in contravention of article 23(c) of the Convention on the Rights of Persons with

[4] Attorney-General's Department, *Australia's draft report to the UN Committee on the Rights of the Child* (November 2017) https://www.ag.gov.au/Consultations/Documents/Australias-draft-report-on-the-Convention-on-the-Rights-of-the-Child/Australias-draft-report-on-the-Convention-on-the-Rights-of-the-Child.pdf p. 1.
[5] UN Committee on the Rights of the Child 2012, Consideration of reports submitted by States parties under article 44 of the Convention – Concluding observations: Australia, 60th sess, UN Doc CRC/C/AUS/CO/4, 28 August ('hereafter referred to as 2012 Concluding Observations'), 10.
[6] Attorney-General's Department, *Australia's draft report to the UN Committee on the Rights of the Child* (November 2017) https://www.ag.gov.au/Consultations/Documents/Australias-draft-report-on-the-Convention-on-the-Rights-of-the-Child/Australias-draft-report-on-the-Convention-on-the-Rights-of-the-Child.pdf p. 23.
[7] Law Society of NSW, *Optional Protocol to the Convention against Torture (OPCAT) in the context of Youth Justice Detention Centres* (30 May 2016) https://www.humanrights.gov.au/sites/default/files/11.%20The%20Law%20Society%20of%20New%20South%20Wales%2C%20Michael%20Tidball%20CEO%20-%2030%20May%202016.pdf
[8] 2012 Concluding Observations 29.
[9] Attorney-General's Department, *Australia's draft report to the UN Committee on the Rights of the Child* (November 2017) https://www.ag.gov.au/Consultations/Documents/Australias-draft-report-on-the-Convention-on-the-Rights-of-the-Child/Australias-draft-report-on-the-Convention-on-the-Rights-of-the-Child.pdf p. 30

Disabilities.[10] Members are particularly concerned that in the draft report the Government has not provided any reasons why, after considering the recommendations of the 2013 Australian Senate Committee Inquiry into the involuntary or coerced sterilisation of people with disability and intersex people, the Government does not propose adopting the recommendations.[11]

5. **Child rights and the business sector.**[12] Members observe that this section in the draft report appears to omit a major development in this area. In early 2016, the Government committed to conducting a consultation on implementing the UN Guiding Principles on Business and Human Rights as part of its commitments under the Universal Periodic Review.[13] Many in the community expected that a National Action Plan on Business and Human Rights would result, through which children could have benefited. We seek Government comment on why in late 2017 it discontinued the consultation on implementing the UN Guiding Principles on Business and Human Rights[14].

6. **Children deprived of citizenship.**[15] Members are concerned that the draft report states that the provisions with the *Australian Citizenship Act 2007* (Cth) which provide for the cessation of Australian citizenship "do not apply to young children". This may require clarification as the draft report itself notes that ss 33AA and 35 can apply to children who are 14 and s 35A can apply to children who are 10.

7. **Homeless Children.** Members are concerned that the draft report does not adequately outline the measures that the Commonwealth Government intends to take to address the increase in the number of homeless children. Members observe that the draft report merely references expenditure amounts without addressing the concerns raised in the 2012 Concluding Observations regarding the need for specific strategies to combat homelessness for Aboriginal children, children from newly arrived communities, children leaving care, and children in regional and remote communities.[16]

8. **Health and health services**. In the draft report, the Government has not set out any detail on initiatives to close the gap on the health of Indigenous children.[17]

9. **International cooperation**.[18] At Australia's last appearance before the UN Committee on the Rights of the Child, the Committee commented on the level of Australia's Overseas Development Assistance (ODA) as a per cent of Gross National Income (GNI), noting then it fell well short of the internationally agreed expectation of 0.7 per cent. The Government should comment specifically on budgeted ODA as a percent of GNI.

---

[10] 2012 Concluding Observations 57.
[11] Attorney-General's Department, *Australia's draft report to the UN Committee on the Rights of the Child* (November 2017) https://www.ag.gov.au/Consultations/Documents/Australias-draft-report-on-the-Convention-on-the-Rights-of-the-Child/Australias-draft-report-on-the-Convention-on-the-Rights-of-the-Child.pdf, p. 31.
[12] Ibid p. 8.
[13] Department of Foreign Affairs and Trade, *Business and Human Rights*, http://dfat.gov.au/international-relations/themes/human-rights/business/Pages/default.aspx
[14] Human Rights Law Centre, *Government ignores advice of expert group on business and human rights*, https://www.hrlc.org.au/news/2017/10/17/government-ignores-advice-of-expert-group-on-business-and-human-rights
[15] Attorney-General's Department, *Australia's draft report to the UN Committee on the Rights of the Child* (November 2017) https://www.ag.gov.au/Consultations/Documents/Australias-draft-report-on-the-Convention-on-the-Rights-of-the-Child/Australias-draft-report-on-the-Convention-on-the-Rights-of-the-Child.pdf p. 14.
[16] 2012 Concluding Observations 71.
[17] Attorney-General's Department, *Australia's draft report to the UN Committee on the Rights of the Child* (November 2017) https://www.ag.gov.au/Consultations/Documents/Australias-draft-report-on-the-Convention-on-the-Rights-of-the-Child/Australias-draft-report-on-the-Convention-on-the-Rights-of-the-Child.pdf p. 28.
[18] 2012 Concluding Observations 25.

10. **Ratification of international human rights instruments.**[19] Members observe that the Committee encouraged the Government to accede to the Optional Protocol to the Convention on the Rights of the Child on a communications procedure and all core human rights instruments, including the International Convention for the Protection of All Persons from Enforced Disappearance, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and the International Labour Organization Convention No. 189 on Domestic Workers. Members encourage the Government to ratify these international human rights instruments.

Thank you for the opportunity to contribute to the Law Council's submission. Questions should be directed at first instance to Amelia Jenner, Policy Lawyer, at (02) 9926 0275 or amelia.jenner@lawsociety.com.au.

Yours sincerely,

Pauline Wright
President

[19] 2012 Concluding Observations 85.