

# First Peoples Disability Network

Submission:

Australia's youth justice and incarceration system

October 2024





## First Peoples Disability Network:

# Australia's Youth Justice and Incarceration System

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## About First Peoples Disability Network

FPDN is the community-controlled disability peak and a member of the Coalition of Peaks, a partner to all Australian governments to the Closing the Gap National Agreement. We are also the First Nations Disability Representative Organisation actively representing the voices of First Nations peoples across Australia's Disability Strategy, the NDIS and related governance structures.

For millennia, First Nations peoples, communities, and cultures have practiced models of inclusion.

However, despite this, since colonisation, First Peoples with disability and their families have been and continue to be amongst the most seriously disadvantaged and disempowered members of the Australian community. FPDN gives voice to their aspirations, needs and concerns and shares their narratives of lived experience. Our purpose is to promote recognition, respect, protection, and fulfilment of human rights, secure social justice, and empower First Peoples with disability to participate in Australian society on an equal basis with others.

To do this, we proactively engage with communities around the country, influence public policy and advocate

for the interests of First Peoples with disability in Australia and internationally.

We are also guided by both the social and cultural models of disability. The social model views disability to be the result of barriers to equal participation in the social and physical environment. These barriers can and must be dismantled. However, FPDN recognises the critical need to move beyond a social model to ensure the cultural determinants of what keeps First Nations people with disability strong is centered when working with and in designing policies and programs to improve outcomes for First Nations people. We call this a cultural model of inclusion.

A cultural model of inclusion recognises the diversity of cultures, languages, knowledge systems and beliefs of First Nations people and the importance of valuing and enabling participation in society in ways that are meaningful to First Peoples<sup>1</sup>.

Our work is underpinned by the [United Nations Declaration on the Rights of Indigenous Peoples \(UNDRIP\)](#) and the [Convention on the Rights of Persons with Disability \(CRPD\)](#).

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## Recommendations

Please note, for the purpose of this submission, FPDN's response has solely focused on justice issues for First Nations young people with disability in Australia's youth justice and incarceration systems.

### **FPDN makes the following overarching recommendations in relation to Australia's youth justice and incarceration system:**

1. For First Nations young persons with disability, 'youth justice' must not be taken to be synonymous with 'youth incarceration'. Youth incarceration can be (and often is for First Nations young people) a result of contact with the youth justice system.
2. All jurisdictions need to move away from punitive approaches to youth justice such as incarceration, and instead focus on Justice Reinvestment strategies such as early intervention and prevention.
3. The use of spit hoods in youth detention should be banned across all jurisdictions.
4. To stop the 'school exclusion to incarceration pipeline', all jurisdictions need to make significant investments in culturally responsive disability assessments and disability supports, to drastically reduce the need for suspensions and exclusions.
5. Significant steps must be taken by all jurisdictions to move toward First Nations control of child protection systems to reduce the child protection to prison pipeline. This must also include working in this space with a culturally responsive disability rights lens.
6. 'National minimum standards for youth justice' must take the form of a National Human Rights Act to enshrine Australia's international obligations, including under the United Nations Declaration on the Rights of Indigenous Peoples, the United Nations Convention on the Rights of Persons with Disabilities, and the United Nations Convention on the Rights of the Child.
7. First Nations cultural concepts of care and disability alongside the human rights framework must be adopted by all jurisdictions to ensure that approaches, services and supports are culturally safe and inclusive, trauma and disability rights informed.
8. All states and territories must immediately raise the minimum age of criminal responsibility to 14 years of age.
9. The infrastructure needs to be developed for the collection of precise, disaggregated figures regarding the First Nations young people with disability in partnership with organisations like FPDN.



## Introduction and Context

FPDN's position is that the high prevalence of disability, and the subsequent double discrimination of ableism and racism, means that First Nations children and young people with disability need to be thoroughly represented in any review of Australia's youth justice system. FPDN's submission is intended to be read through an overarching lens of several key topics and themes. Whilst these are mentioned specifically in certain parts of the submission, it is intended that the reader apply the following themes to all aspects of the submission. These are:

- Intersectional Discrimination: First Nations people with disability and 'double disadvantage'
- First Nations concepts of care and disability – Culture is Inclusion
- The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)
- The United Nations Convention of the Rights of Persons with Disabilities (UNCRPD)
- The National Agreement on Closing the Gap
- *Australia's Disability Strategy 2021-2031*
- Geographic remoteness

### **Intersectional Discrimination: First Nations people with disability and 'double disadvantage'**

First Nations people with a disability are amongst the most marginalized members of the Australian community<sup>1</sup> and are twice as likely to be living with disability as non-Indigenous Australians.<sup>2</sup> However, given the lack of data on prevalence of disability, and issues around overall data collection in this space, this is almost certainly a conservative estimate. Additionally, contributing to under-representation in statistics is the extremely poor levels of diagnosis combined with the reluctance of First Nations people with disability (including youth) to take on another perceived negative label of disability, especially when they already experience discrimination based upon their First Nations status.

Further to this, First Nations children and young people with disability experience a double disadvantage due to the intersection of racism and disability discrimination.<sup>3</sup> This is compounded on the inherent vulnerability of children generally. Frequent exposures to various forms of discrimination can have cumulative impact and can manifest into 'apprehended discrimination'.<sup>4</sup> Further to this, statistical data and testimony show that intersectional inequality is acute and pervasive across all supports for First Nations people with disability, including disability services, health, education, employment, housing and transport.<sup>5</sup>

### **First Nations concepts of care and disability – Culture is Inclusion**

*...in traditional language there was and is no word for disability. This is a wonderful thing in our communities – we have always been "come as you are"*<sup>6</sup>

FPDN is guided by both the social model and cultural concepts of disability. The social model views disability to be the result of barriers to equal participation in the social, cultural, structural and physical environment. These

<sup>1</sup> Bostock, L., (1991) Access and inequity for people with a double disadvantage, Australian Disability Review, Vo1.2, pp 3-8.

<sup>2</sup> Australian Institute of Health and Welfare, Aboriginal and Torres Strait Islander Health Performance Framework, 1-14, viewed 4 September 2024 at <https://www.indigenoushpf.gov.au/measures/1-14-disability>

<sup>3</sup> Lester Bostock, (1991) *ibid*

<sup>4</sup> Avery, S., Culture is Inclusion, Executive Summary, viewed on 1 October 2024 at [https://fpdn.org.au/wp-content/uploads/2018/07/Culture-is-Inclusion-exec-summary-\\_2.pdf](https://fpdn.org.au/wp-content/uploads/2018/07/Culture-is-Inclusion-exec-summary-_2.pdf)

<sup>5</sup> Avery, S., *Ibid*.

<sup>6</sup> Griffis, D., (2019) *In traditional language, there is no word for disability*, Indigenous X, The Guardian, viewed 10 October 2024 at <https://www.theguardian.com/commentisfree/2019/nov/21/in-traditional-language-there-is-no-word-for-disability>





barriers can and must be dismantled. However, FPDN recognises the critical need to move beyond a social model to ensure the cultural determinants of what keeps First Nations people with disability strong is centred when working with and in designing policies and programs to improve outcomes for First Nations people. We call this a cultural model of inclusion.

A cultural model of inclusion recognises the diversity of cultures, languages, knowledge systems and beliefs of First Nations people and the importance of valuing and enabling participation in society in ways that are meaningful to First Peoples.<sup>7</sup> A First Nations cultural model of inclusion is operationalized alongside human rights framework and the social model of disability to ensure that all approaches, services and supports are culturally safe and inclusive, and disability rights informed. It is the only disability model that seeks to improve the human condition through focusing on what keeps people strong, as distinct from merely negating the adverse impact of difference. By centring a cultural model of disability inclusion, through elevating the experiences, aspirations, needs and rights of First Nations people with disability, justice and incarceration outcomes can be improved not only for First Nations people with disability but for all.

### **The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)**

The United Nations Declaration on the Rights of Indigenous Peoples establishes a universal framework of minimum standards for the survival, dignity and well-being of the indigenous peoples of the world and it elaborates on existing human rights standards and fundamental freedoms as they apply to indigenous peoples.

. In particular:

- Article 1: Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.
- Article 7, 2: Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.
- Article 14.2: Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.
- Article 21.1: Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
- Article 21.2: States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

### **The UN Convention of the Rights of Persons with Disabilities (UNCRPD)**

Adherence to international standards, such as the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), is crucial for ensuring that First Nations children with disabilities receive positive outcomes under Australia's justice system, including reduced contact with the criminal justice system altogether. In particular:

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<sup>7</sup> Avery, S., 'Culture is Inclusion,' First Peoples Disability Network, 2018



- Article 13: Access to Justice for persons with disabilities, which sets out that States Parties must ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations.
- Article 14: Liberty and Security of Person, which sets out, amongst other things, that States Parties must ensure that persons with disabilities are not deprived of their liberty unlawfully or arbitrarily, and that the existence of a disability shall in no case justify a deprivation of liberty.
- Article 15: Freedom from torture or cruel, inhuman or degrading treatment or punishment, which sets out that States Parties must take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.

### **National Agreement on Closing the Gap**

All Australian jurisdiction governments are parties to the National Agreement on Closing the Gap, including all 17 Targets and 4 Priority Reforms. As such, all governments need to adhere to and support the application of the Priority Reforms and progression against the relevant CTG targets in all the work that they do. FPDN's position is that while all the targets and Priority Reforms are applicable, the outcomes and targets that relate in particular to this inquiry into Australia's youth justice and incarceration system include the following:

Outcome 11: Aboriginal and Torres Strait Islander young people are not overrepresented in the criminal justice system

Target: By 2031, reduce the rate of Aboriginal and Torres Strait Islander young people (10-17 years) in detention by at least 30 per cent.

Outcome 12: Children are not overrepresented in the child protection system

Target: By 2031, reduce the rate of over-representation of Aboriginal and Torres Strait Islander children in out-of-home care by 45 per cent.

Additionally, consideration must be given to the *Transformational Elements* set out under Priority Reform Three: Transforming Government Organisations. These include commitments to "identify and eliminate racism" and "embed and practice meaningful cultural safety" which should be considered and responded to considering the evidence provided in this submission. State and territory corrective services and youth justice services are obviously relevant 'government organisations', but this Priority Reform must also be considered to encompass the management, staffing and provision of services to the detention centres themselves which, as places of institutionalised detention, absolutely require immediate and continuing reforms.

### **Australia's Disability Strategy 2021-2031**

All Australian jurisdictions are signatories to *Australia's Disability Strategy 2021-2031* and have a responsibility to ensure that policy, services and legislation demonstrate leadership towards a society in which people with disability can participate as equal members, with equal opportunities to fulfil their potential. The Strategy also includes a dedicated Safety, Rights and Justice Outcome Area that sets out the commitment all governments have made to promoting, upholding and protecting the rights of people with disability and ensuring they feel safe and enjoy equality before the law. This outcome is of particular significance to Australia's youth justice system.



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All six policy priorities apply, and all governments need to be embedding these in their approaches, which currently infringe upon, rather than uphold, the rights of young people with disability engaged by the justice system. Policy Priority 6 requires that “the criminal justice system responds effectively to the complex needs and vulnerabilities of people with disability” - this is a good example of the how current approaches fail to meet commitments in the Strategy, and urgent reforms and a significant investment in justice staff training are needed to ensure better responses.

### **Geographic remoteness**

The high percentages of First Nations young people who are living in these remote communities needs to be taken into consideration throughout this submission as specific issues arise for First Nations young people with disability related to access to diagnosis and to supports, on top of the ‘double discrimination’ that all First Nations people with disability experience.





## Impacts and outcomes for First Nations youth incarceration and over-incarceration across Australia

### First Nations Young People and Disability

First Nations children are far more likely to experience disabilities, with rates of disability among Aboriginal children being 1.7 times higher than the non-Aboriginal population.<sup>8</sup>

However, it is vital to note that ABS statistics do not reflect the true level of disability due to several factors. These include issues with First Nations identification, high non-response rates, and different conceptualisations of disability may mask hidden disability which contribute to under-reporting.<sup>9</sup> Additionally, many First Nations young people with disability are overlooked in these statistics, due to a narrow definition of disability<sup>10</sup>, and a lack of diagnosis opportunities in rural and remote communities. This narrow definition of disability is an important consideration, as mental health issues disproportionately affect First Nations young people. The 2000–2002 Western Australian Aboriginal Child Health Survey found that “among children aged 4–17, Indigenous children were 1.6 times as likely than non-Indigenous children to be at risk of social and emotional difficulties based on the SDQ (24% and 15%, respectively)”<sup>11</sup> Additionally, First Nations young people also face disproportionately higher levels of neurodiversity, psychosocial and episodic disability than their non-First Nations peers. Anecdotally, and through community-led qualitative engagements, FPDN is aware that, in many remote areas of Australia, rates of disability may now exceed 90% due to a combination of intergenerational trauma and the continuing impacts of a legacy of colonisation and underservicing.

It must be noted that many First Nations families do not identify with western concepts of disability, leading to underreporting, ineffective use or access to diagnoses, and less access to services. Therefore, a Culture model of disability, as outlined in our introduction, needs to be part of the discussion about defining disability. Further to this, First Nations families can often face challenges when trying to engage with disability services and agencies, due to geographical, literacy, linguistic, or cultural barriers. Limiting the ability to access adequate diagnoses and supports children need.

### First Nations Young People with Disability and Incarceration

The data on First Nations children in youth detention is even more troubling. Overlaid with the disability statistics and qualitative annotations, overall, in Australia, First Nations young people with disability are grossly overrepresented in the justice system. According to the Australian Institute of Health and Welfare, on an average day in 2021–22, First Nations young people represented 47% (1,746) of young people under community-based supervision, and 55% (452) of young people in secure detention facilities.<sup>12</sup> Firstly, due to a lack of adequate data

<sup>8</sup> ABS, 4429.0 - Profiles of Disability, Australia, 2009, viewed 26 September, 2024 at <https://www.abs.gov.au/ausstats/abs@.nsf/lookup/4429.0main+features100292009>

<sup>9</sup> Productivity Commission: Disability Care and Support, Report no. 54. 2011, Canberra: Commonwealth of Australia, ISSN 1447-1329

<sup>10</sup> Cappiello MM, Gahagan S: Early Child Development and Developmental Delay in Indigenous Communities. *Pediatric in North Am.* 2009, 56 (6): 1501-1517. 10.1016/j.pcl.2009.09.017.

<sup>11</sup> Australian Institute of Health and Welfare, Social and Emotional Wellbeing, 25 February 2022, viewed 26 September 2024 at <https://www.aihw.gov.au/reports/children-youth/australias-children/contents/health/social-emotional-wellbeing>

<sup>12</sup> Australian Institute of Health and Welfare, Aboriginal and Torres Strait Islander Health Performance Framework, 2.11 Contact with the criminal justice system, viewed 2 October 2024 at <https://indigenoushpf.gov.au/measures/2-11-contact-with-the-criminal-justice-system>



collection, FPDN suspects that this is a very conservative figure. Secondly, it must also be understood within the context that only around 6 per cent of children aged 10 to 17 in Australia are First Nations.<sup>13</sup>

Additionally, on average, First Nations children enter youth justice supervision at a younger age than non-Indigenous children and make up a higher proportion of those on remand.<sup>14</sup>

Statistics that are disaggregated to show disability in young people and contact with the justice system do not exist, even though all jurisdictions of Australian government have made commitments to ‘shared access to data and information at a regional level’ under Priority Reform 4 of the *National Closing the Gap Agreement*. FPDN wants to highlight in this submission that this information is not currently being collected and this needs to immediately change. However, if an overlay of the number of young people with disability, is placed over those who have had contact with the justice system, it can be reasonably ascertained that the majority of First Nations children who have had justice contact, will have had a disability (either diagnosed, or undiagnosed).

FPDN would also like to stress that for First Nations young people with disability, ‘youth justice’ must not be taken to be synonymous with ‘youth incarceration’. Youth Incarceration can be (and often is for First Nations young people) a result of contact with the Youth Justice system. Because of this, FPDN is concerned that the way this inquiry has been framed, has the potential negative consequence of diverting attention away from evidence based and proven solutions to the issue of youth justice outcomes which Australian governments seek. Unfortunately these solutions, such as Justice Reinvestment, and primary prevention initiatives are not routinely considered, instead these ‘alternative solutions’, vital for First Nations young people with disability are ignored.

**Recommendation:**

Data on disability and First Nations young people must be collected at all jurisdictional levels and being made available to the public. Additionally, it must be made available as disaggregated data.

**Disability is a major driver of exposure to the criminal justice system**

Overwhelmingly, developmental disabilities and intellectual disabilities are simply not being diagnosed for First Nations children even after they ‘formally’ enter the criminal justice system. To the extent that the youth justice system does attempt diagnosis, culturally appropriate tools and training are non-existent or insufficient.

Entire models of criminology seek to demonstrate the link between poor legal outcomes and the social determinants of justice (i.e. socio-economic disadvantages).<sup>15</sup> If outcomes for First Nations children, including those with disability, are ever going to improve, then Australia must move away from a focus on punitive strategies which have been demonstrated time and time again to be ineffective in reducing “crime”, but have the effect of incarcerating First Nations young people at alarming and disproportionate levels.

First Nations young people are already marginalised, and thus, First Nations persons with disability are, by virtue of intersectional oppression and discrimination, even more vulnerable to police contact and poor legal outcomes.<sup>16</sup> The reality is that:

<sup>13</sup> Australian Institute of Health and Welfare, *ibid*

<sup>14</sup> Australian Institute of Health and Welfare, Aboriginal and Torres Strait Islander Health Performance Framework, 2.11 Contact with the criminal justice system, viewed 2 October 2024 at <https://indigenoushpf.gov.au/measures/2-11-contact-with-the-criminal-justice-system>

<sup>15</sup> See, for example, <https://www.unsw.edu.au/newsroom/news/2023/04/the-social-determinants-of-justice--8-factors-that-increase-your>

<sup>16</sup> See, for example, Indigenous Justice Clearinghouse, ‘Indigenous People, Mental Health, Cognitive Disability and the Criminal Justice System’, Brief 22, August 2017.



- There is no real evidence that mandatory (or even increased) periods of imprisonment deter crime;<sup>17</sup> and
- Periods of imprisonment (in addition to the subsequent consequences of possessing a criminal history) can ‘entrench’ criminal behaviour, and effectively teach someone to ‘be a better criminal’.<sup>18</sup>

## Justice Reinvestment

The concept of justice reinvestment (‘JR’) dictates that evidence-based interventions are employed to achieve cost savings (primarily the direct and indirect costs of incarceration). In a circular manner, these savings can then be ‘re-invested’ into further targeting social justice outcomes (e.g. reduction of poverty), whilst continuing to reduce offending, prison and court system expenses. Additionally, in non-economic terms, these initiatives align with early intervention and prevention strategies.

Despite the undeniable need for Justice Reinvestment programs, the overwhelming focus of Australian jurisdictions remains on haphazard, reactionary and devastating ‘tough on crime solutions’. FPDN wishes to stress that measures such as NSW’s unprecedented introduction of the Bail and Crimes Amendment Bill 2024 (which ensures that young people charged with certain serious offences will practically almost always be refused bail) are driving children towards youth incarceration at massively inflated rates and guaranteeing poor outcomes.<sup>19</sup>

FPDN is also deeply concerned about the QLD’s Government’s approach to youth justice, joining ongoing calls for them to reverse their removal of the principle of “detention as a last resort” from the Youth Justice Act and end the practice of detaining young people in police watch houses designed for adults (where we frequently hear of abuse and neglect towards these young people). More than once, they have demonstrated their disregard for human rights by suspending the state’s Human Rights Act to allow such detention. Many of these children who are detained this way are disabled.<sup>20</sup> Additionally, the QLD’s Government’s “tough-on-crime” stance is causing more harm than good, and, according to University of Queensland researcher Tamara Walsh, “is based on no good evidence and is making youth crime worse”.<sup>21</sup>

FPDNs position is that First Nations children with disability need supported access to education, housing security, nutrition, psychosocial support, early intervention and rehabilitation. These are the most important drivers of positive youth justice outcomes, and why the concept of JR is so applicable to First Nations populations generally and First Nations children with disability specifically. At their core, JR initiatives seek to demonstrate that methods aimed at reducing poverty and food insecurity, providing access to health services, drug rehabilitation clinics, and ensuring baseline standards of access to education/ job security, *can and will* provide better short and long-term outcomes, even when not every measure is not specifically targeted at ‘young people’ or ‘disabled people’.

<sup>17</sup> Australian Law Reform Commission, 11 January 2018, accessed 9 October 2024, <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/8-mandatory-sentencing/impact-of-mandatory-sentencing/>, para 8.9.

<sup>18</sup> Ibid, para 8.9.

<sup>19</sup> The Law Society of New South Wales, viewed 9 October 2024 at <https://www.lawsociety.com.au/youth-justice-package-missed-opportunity>

<sup>20</sup> Smee, B., The Guardian, “Screaming, freezing, struggling to breathe: confronting Queensland watch house footage exposes anguish of children locked in isolation cells” Viewed 9 October 2024 at <https://www.theguardian.com/australia-news/article/2024/jul/17/queensland-youth-crime-watch-house-footage-police-treatment-ntwnfb>

<sup>21</sup> Australian Broadcasting Corporation, UQ law academic Tamara Walsh says Queensland’s tough approach not fixing youth crime, 2023, viewed 9 October 2024 at <https://www.abc.net.au/news/2023-11-30/uq-law-tamara-walsh-qld-tough-approach-make-youth-crime-worse/103154150>





Such an approach is also far more consistent with the concept of self-determination. I.e. The fundamental right of people to shape their own lives,<sup>22</sup> – which is enshrined in the UNDRIP and outlined in the 1997 *Bringing Them Home Report*.<sup>23</sup> Research shows that self-determination is linked with positive social and economic outcomes, including reduced crime.<sup>24</sup> However, the youth justice system does not currently protect or foster this right, including via guiding children towards rehabilitation and reintegration.

There are countless examples of when these initiatives do take precedence over incarceration, the outcomes are overwhelmingly positive.

Case Study: *The Maranguka Justice Reinvestment Project in Bourke, is collaboration between the Bourke Tribal Council, 'Just Reinvest NSW' and the community of Bourke.*<sup>25</sup>

*Despite having only commenced in 2012 and relying on a combination of philanthropic funding and state government grants, the project has already produced a large amount of data indicating improvements in key outcomes, such as: A 31% increase in year 12 student retention rates and a 38% reduction in charges across the top five juvenile offence categories; and a 14% reduction in bail breaches and a 42% reduction in days spent in custody.*<sup>26</sup>

#### Recommendation:

- FPDNs position is that, before jurisdictions considers the role of police, courts and detention centres, community based and First Nations controlled justice reinvestment initiatives must take precedence.

#### School to Prison Pipeline – From expulsion to incarceration

While school exclusion could be considered a concept of youth justice which falls outside of the traditional conception of the (criminal) justice system, FPDN would like to raise that First Nations children are suspended, expelled and excluded from schools across Australia at disproportionately high levels compared to non-First-Nations young people.<sup>27</sup> Again, in the absence of disaggregated statistics, FPDN is taking the position that a large number of the excluded students will have a disability.

As discussed previously, lack of disability diagnosis in First Nations young people is a major issue. Dr Scott Avery highlights that, “the legacy of undiagnosed or unsupported disability in early childhood years carries forward into the schooling years.”<sup>28</sup> Instead of curiosity about our children’s behaviours and learning needs, schools act punitively with the mindset of ‘bad black kid syndrome’.<sup>29</sup>

<sup>22</sup> Australian Human Rights Commission, Self-determination, Accessed 7 June 2023, <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/self-determination#:~:text=Self%2Ddetermination%20means%20that%3A,recognition%20of%20our%20group%20identities>

<sup>23</sup> Commonwealth of Australia 1997, Bringing them home, Accessed 7 June 2023, [https://bth.humanrights.gov.au/sites/default/files/documents/bringing\\_them\\_home\\_report.pdf](https://bth.humanrights.gov.au/sites/default/files/documents/bringing_them_home_report.pdf)

<sup>24</sup> Behrendt, L., Porter, A., Vivian, A. (n.d), ‘Indigenous self-determination within the justice context, Accessed 7 June 2023, <https://opus.lib.uts.edu.au/bitstream/10453/94284/1/Accepted%20version.pdf>

<sup>25</sup> Just Reinvest NSW, accessed 9 October 2024 at <https://www.justreinvest.org.au/community/bourke-maranguka/>

<sup>26</sup> Indigenous Justice Clearinghouse, November 2018, accessed on 9 October 2024, [https://www.indigenousjustice.gov.au/resources/maranguka-justice-reinvestment-project-impact-assessment/#:~:text=KPMG%20estimates%20the%20changes%20in,operational%20costs%20of%20%240.6%20million\),](https://www.indigenousjustice.gov.au/resources/maranguka-justice-reinvestment-project-impact-assessment/#:~:text=KPMG%20estimates%20the%20changes%20in,operational%20costs%20of%20%240.6%20million),) p 22.

<sup>27</sup> National Indigenous Youth Education Coalition (NIYEC), The School Exclusion Report, 21 March, 2024

<sup>28</sup> Avery Scott 2020, ‘Aboriginal and Torres Strait Islander people with disability: Falling through the cracks’, *Precedent*, Australian Lawyers Alliance, vol. 129, issue 12, Accessed 7 June 2023, <http://classic.austlii.edu.au/au/journals/PrecedentAULA/2020/42.html>

<sup>29</sup> Avery Scott 2020, ibid



Through a combination of insufficient disability support resources, lack of cultural awareness/responsiveness and training, and widespread instances of systemic racism, more extreme disciplinary measures such as suspension and exclusion are being excessively used for First Nations young people in schools across the country, with harmful results.

Case studies:

- *In Queensland public schools in 2023, there were 81,918 incidents that lead to a suspension, expulsion or enrolment cancellation. Of these, 20,924 (26%) involved Aboriginal and Torres Strait Islander students, even though Indigenous students make up only 11% of the student population.*<sup>30</sup>
- *In NSW in 2022, First Nations children made up 25% of all suspensions.*<sup>31</sup> *It must be considered that, at least compared to jurisdictions like NT and WA, these statistics (from NSW and Qld) represent the best available data from some of the most resource-rich states in Australia.*

Once these exclusions occur, there is an undeniable ‘school to prison pipeline’. Research from the United States indicates that school exclusion contributes to what has been labelled a school-to-prison pipeline, defined by Sander as ‘systemic setbacks’ that gradually shepherd students away from positive school connections and academic success and into increasing criminal activity’.<sup>32</sup> Dr Scott Avery’s research links this to the Australian context, stating that instead of receiving appropriate diagnoses and supports, First Nations children with disability end up on a trajectory – the ‘matriculation pathway into prison’<sup>33</sup> – that increases their chances of unemployment in adulthood, and almost inevitable contact with police, courts, juvenile detention and prison. The National Indigenous Youth Education Coalition’s (NIYEC) *The School Exclusion Project* highlights that “the contemporary negative impacts of school exclusion are well-documented and include exacerbating behavioural problems, diminishing academic engagement, increased likelihood of further suspension and exclusion, and contact with the criminal justice system.”<sup>34</sup>

Once excluded, the continued accumulation of ‘race-based traumatic stress’,<sup>35</sup> in combination with an abundance of unsupervised time, increased desperation and a perceived lack of alternatives, inevitably leads many children to the commission of crimes (and subsequently, contact with the ‘criminal justice system’).

In any event, it is clear that where First Nations young people with disability have been expelled from primary school, an undiagnosed disability or the lack of accommodation of a child’s disability has typically been a key part of the child’s difficulties at school. Disturbingly often, the child is never even assessed for developmental delays or disability throughout the course of repeated disciplinary actions and ‘red flag’ events.

There are numerous reasons for this disturbing pattern of exclusion, which is incredibly complex and, to describe in full, requires a level of detail which extends far beyond the scope of this submission. FPDN recommends that, for a much more thorough analysis of the problem, reference be made to NIYEC’s *The School Exclusion Project*,<sup>36</sup> and FPDN’s recent submission to the WA Government (regarding the review of the School Education Act 1999). If

<sup>30</sup> Shay, M. et al, “Aboriginal children as young as 5 are getting suspended from school. We can’t ‘close the gap’ if this is happening”, *The Conversation*, Published: August 12, 2024, viewed 8 October, 2024 at <https://theconversation.com/aboriginal-children-as-young-as-5-are-getting-suspended-from-school-we-cant-close-the-gap-if-this-is-happening-235889>

<sup>31</sup> Shay, M. et al, *Ibid*.

<sup>32</sup> Sander, J., “School Psychology, Juvenile Justice, and the School to Prison Pipeline.” *Communique* 39, no. 4 (2010): 4-6.

<sup>33</sup> Avery Scott 2020, ‘Aboriginal and Torres Strait Islander people with disability: Falling through the cracks’, *Precedent*, Australian Lawyers Alliance, vol. 129, issue 12, Accessed 7 June 2023, <http://classic.austlii.edu.au/au/journals/PrecedentAULA/2020/42.html>

<sup>34</sup> National Indigenous Youth Education Coalition (NIYEC), *The School Exclusion Report*, 21 March, 2024, p. 7

<sup>35</sup> Shay, M. et al, *ibid*

<sup>36</sup> National Indigenous Youth Education Coalition (NIYEC), *The School Exclusion Report*, 21 March, 2024



better justice outcomes are to be achieved for First Nations children with disability, then it is vital that this ‘prison pipeline’ be severed via the taking of immediate, serious and meaningful steps to reduce exclusions for First Nations young people.

### Recommendations:

FPDN’s position is that to reduce the school exclusion to prison pipeline:

- All jurisdictions consequently need to invest in education supports for First Nations young people in schools. This include schools facilitating access to culturally responsive disability assessments.
- All Jurisdictions take measures to reduce school exclusions for First Nations Young people
- All jurisdictions need to collect, and make available, data on the number First Nations young people who are excluded from schools

### The Second Stolen Generation

Prior to colonisation, First Nations societies were structured to support the socio-cultural determinants of health and wellbeing. Colonisation sought to strip these things away, including by removing First Nations children from their families. Removing First Nations children leaves them without the protective factors of strong cultural identity and connection to community. As clearly outlined in *Our Youth, Our Way*, child removal increases the risk of our children coming into contact with the justice system.<sup>37</sup>

First Nations children are over-represented in all aspects of the child protection system, reflecting a devastating history of colonisation and trauma which continues to impact First Nations parents and communities.<sup>38</sup> As outlined above, historical practices of removal, lead to socio-economic disadvantage, intergenerational trauma and fragile family structures.<sup>39</sup>

These impacts, combined with racist child protection systems and structures, result in current levels of child removals that are at unacceptably high levels. On 30 June 2022, 43% of children in out-of-home care were First Nations children (19,432 of 45,356, where Indigenous status was known). Of the First Nations children in out-of-home care, almost one-third (6,185 or 31.8%) were placed with First Nations relatives or kin.<sup>40</sup> However, to place these statistics in starker contrast, First Nations children are only 6% of the total child population in Australia.<sup>41</sup> This means that the rate of out-of-home care among First Nations children was 12 times as high as for non-Indigenous children.<sup>42</sup>

In 1997, the ‘Bringing them Home’ report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families contained 7 whole chapters on different varieties of ‘contemporary

<sup>37</sup> See Commission for Youth People 2021, *Our Youth, Our Way*, p. 27. Accessed 8 October 2024, at <https://ccyp.vic.gov.au/assets/Publications-inquiries/CCYP-OYOW-Final-090621.pdf>

<sup>38</sup> Australian Institute of Health and Welfare, NIAA, Aboriginal and Torres Strait Islander Health Performance Framework, Tier 2 – Determinants of Health, 2.12. Child Protection, viewed 8 October, 2024 at <https://www.indigenoushpf.gov.au/measures/2-12-child-protection>

<sup>39</sup> Professor Sarah Wise, et al, “The new approach keeping Aboriginal children out of child protection”, University of Melbourne, Published 26 September 2023, viewed 8 October 2024 at <https://pursuit.unimelb.edu.au/articles/the-new-approach-keeping-aboriginal-children-out-of-child-protection>

<sup>40</sup> Australian Institute of Health and Welfare, *ibid*

<sup>41</sup> <https://www.theguardian.com/australia-news/2020/nov/16/alarming-rate-removal-of-australias-indigenous-children-escalating-report-warns>

<sup>42</sup> Australian Institute of Health and Welfare, *ibid*



separations’, including ‘child welfare care and protection’.<sup>43</sup> Since then successive State and Territory governments and child protection systems have unmitigatedly failed First Nations children and their families though their inaction on implementing the vital recommendations of this report.

Currently, Victoria has some of the highest removal rates in the country. Yoorrook Justice Commissioner Sue Ann Hunter states that “[o]ne in 10 Aboriginal children in Victoria live in out-of-home care. If that rate was applied to the entire population, it would be a national crisis. Instead, it is a forgotten crisis. Every number is a child with a family who loves them.”<sup>44</sup>

AIHW data from 30 June 2023 highlights the over-representation of First Nations children in out-of-home care across every jurisdiction.<sup>45</sup> The available data is tabled below.

Jurisdiction	Indigenous	All children	% Indigenous
NSW	6,562	14,720	45
VIC	2,668	9,132	29
QLD	4,722	9,832	48
WA	2,709	4,547	56
SA	1,752	4,534	39
TAS	395	975	41
ACT	198	724	27
NT	725	809	90

The most distressing child removal rates are in the Northern Territory, where 90% of all children in out-of-home care are First Nations children. In the Northern Territory “[o]ne in three Northern Territory children live below the poverty line,” and “[t]he other factor is that we have a dearth of Aboriginal non-government services delivering those early intervention and prevention services that would reduce the number of children coming into contact with the child protection system.”<sup>46</sup>

It is unclear from current data exactly how many children in out-of-home care have a disability, but as of 30 June 2023, disability status was known for 72% (32,500) of children in care, of whom 21% (9,700) had a disability.<sup>47</sup> Again, it is unclear how many of these children are First Nations, but historic data referenced in the 1997 *Bringing Them Home* report stated that in 1995 over half (53%) of children in care were Aboriginal and almost half of these children had disabilities.<sup>48</sup> The current rate of removals of First Nations children is a national crisis of such a magnitude that describing the issues in detail far exceeds the scope of this submission. Given this, FPDN’s position

<sup>43</sup> *Bringing them Home - Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* April 1997, Viewed 8 October, 2024 at <https://humanrights.gov.au/our-work/projects/bringing-them-home-report-1997>

<sup>44</sup> Tuohy, W., The Age, “Child protection ‘ripped’ Aboriginal child from mother’s arms at Indigenous women’s meeting”, Viewed 8 October 2024 at <https://www.theage.com.au/national/victoria/child-protection-ripped-aboriginal-child-from-mother-s-arms-at-indigenous-women-s-meeting-20240725-p5jwjb.html>

<sup>45</sup> Australian Institute of Health and Welfare, Data tables: Child protection Australia 2022-23, viewed 08 October 2024 at <https://www.aihw.gov.au/reports/child-protection/child-protection-australia-insights/data>

<sup>46</sup> Australian Broadcasting Corporation, Indigenous family support program working to reduce NT’s high rates of kids in child protection, viewed 8 October 2024 at <https://www.abc.net.au/news/2023-10-20/nt-child-protection-rate-indigenous-family-support-program/102995826>

<sup>47</sup> Australian Institute of Health and Welfare (2024), Child protection Australia 2022–23, viewed 9 October 2024 at <https://www.aihw.gov.au/reports/child-protection/child-protection-australia-insights/contents/insights/supporting-children>

<sup>48</sup> Human Rights and Equal Opportunity Commission (1997), *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (Bringing Them Home)*, viewed 9 October 2024 at [https://humanrights.gov.au/sites/default/files/content/pdf/social\\_justice/bringing\\_them\\_home\\_report.pdf](https://humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf)





is that reference be made to any of the reports described above. However, for present purposes, it must be understood that, for First Nations children and families, the harsh truth is that disability is a marker for removal.

**Recommendation:**

- Child protection systems across all jurisdictions must take immediate steps to ensure that First Nations organisations be given control over these systems. This will mean that culturally responsive and safe mechanisms are used to reduce the child protection to incarceration pipeline.

**Child Protection to Prison Pipeline**

The child protection systems and the youth justice systems are deeply connected at a systemic level – they share the same colonial legacy – and lead to self-perpetuating cycles across lifetimes and generations. They create webs in which First Nations children and young people become entangled.<sup>49</sup> As such, Child Protection systems across all jurisdictions in Australia, are another devastating “Pipeline to Prison” for First Nations young people, many of whom have a disability. Almost two-thirds (64% or 2,600) of the 4,055 First Nations children who were under some type of youth justice supervision during 2020–21 came into contact with the child protection system in the 5 years prior.<sup>50</sup>

Adding to this, most of these First Nations children with disability will have some form of contact with the criminal justice system. Many will even be reported (e.g. for assault) by their own care workers, or (in the case of those aged 10-14), have the evidence of a care worker admitted in order to rebut the presumption of ‘doli incapax’ and establish that the child can be held criminally liable despite their age. Quality data in this area is (once again) incredibly sparse, but the Australian Law Reform Commission has noted a study of 111 NSW Children’s Court criminal files (not First Nations specific), in which it was found that 34% of young people appearing before the court were, or had been, in out-of-home care, and that children in care were 68 times more likely to appear in the Children’s Court than other children.<sup>51</sup>

For as long as the systemic removal of First Nations children is ignored, youth justice outcomes cannot and will not improve. This is of particular importance for First Nations young people who have a disability.

**Recommendations:**

Very little progress has been made in this area over the last few decades that FPDN considers it appropriate to repeat the policy recommendations which were made in 2007 by the Aboriginal Disability Network NSW (which has since grown into FPDN) as part of the ‘Telling it like it is’<sup>52</sup> report:

- Significant investment needs to be made to change perceptions that service providers, be they government or non-government, have of Aboriginal communities. This will take a concerted outreach approach on the part of service providers and a long-term approach that recognises the need to focus

<sup>49</sup> See Commission for Youth People 2021, *Our Youth, Our Way*, p. 27. Accessed 31 May 2023, <https://ccyp.vic.gov.au/assets/Publications-inquiries/CCYP-OYOW-Final-090621.pdf>

<sup>50</sup> Australian Institute of Health and Welfare, NIAA, Aboriginal and Torres Strait Islander Health Performance Framework, Tier 2 – Determinants of Health, 2.12. Child Protection, viewed 8 October 2024 at <https://www.indigenoushpf.gov.au/measures/2-12-child-protection>

<sup>51</sup> Australian Law Reform Commission, 28 March 2-18, accessed on 9 October 2024 at <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>, p 31.

<sup>52</sup> Bostock, L., ‘Telling it like it is’, viewed 9 October 2024 at <https://fpdn.org.au/wp-content/uploads/2023/11/tellingitlikeitis.pdf>







upon developing relationships with Aboriginal communities that are based on trust and equitable partnerships.

- Recognition that Aboriginal parents/carers and Aboriginal communities in general need more resources to be able to meet the needs of Aboriginal children with disability. This includes development of more Aboriginal owned and operated services.
- A focus upon early intervention programs that will address the ongoing problem of Aboriginal parents/carers only engaging with service providers once they have reached crisis point or when their situation has been compulsorily notified.

## JURISDICTIONAL COMPLIANCE, NON-COMPLIANCE AND COMMONWEALTH HUMAN RIGHTS OBLIGATIONS

FPDN has elected to address both of these terms of reference together, as they are effectively the ‘negative’ and ‘positive’ aspects of the same overall topic; Australia’s human rights obligations (including Australia’s international commitments).

Additionally, a comprehensive analysis of the conditions in every jurisdiction and every youth detention centre is simply not possible, both in terms of resources and because many states conceal that information. Whilst not an issue that is strictly limited to youth detention centres, it should also be noted that, on the international stage, it has not been forgotten that the UN suspended its visit to Australia in 2023 after its Subcommittee on the Prevention of Torture was denied proper access and assurances to facilities in both NSW and Queensland. Rwanda is the only other country for which this has occurred.

### **DRC observations on torture, cruel and degrading treatment**

Whilst in this submission FPDN has mostly relied on a few select case studies, it must also be understood that Australia’s human rights abuses towards First Nations children in custody (especially those with disability) are numerous and occur throughout every state and territory. For example, Volume 8 of the Disability Royal Commission (Criminal justice and people with disability) noted the following:<sup>53</sup>

*“In 2019, in its Concluding Observations on the combined second and third periodic reports of Australia, the Committee on the Rights of Persons with Disabilities (CRPD Committee) expressed concerns about:*

- 1. the over-representation of convicted young persons with disability in the youth justice system, especially male youth from First Nations communities*
- 2. the lack of culturally suitable support for First Nations children with disability and their families*
- 3. a substantial number of persons with disability expressing suicidal ideation, particularly within First Nations communities, due to, among other things, lack of support, poverty and isolation*
- 4. the reported abuse of young First Nations persons with disability by fellow prisoners and prison staff, the use of prolonged solitary confinement, particularly of persons with intellectual or psychosocial disabilities, and the lack of safe and accessible channels for making complaints.*

*In December 2022, the Committee against Torture, which monitors CAT, said it had serious concerns about the practice of keeping children in solitary confinement at Banksia Hill in Western Australia, the Ashley Youth*

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<sup>53</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, ‘Final Report, Volume 8 – Criminal justice and people with disability’, September 2023, pp 94-95.



*Detention Centre in Tasmania and Don Dale Detention Centre in the Northern Territory. It said the practice of keeping children in solitary confinement contravened the CAT and the Nelson Mandela Rules. It expressed serious concern about the persistent over-representation of First Nations children and children with disability in the juvenile justice system.”*

### **Police, disability and the minimum age of criminal responsibility**

In many cases, particularly in rural and remote areas where community services and outreach support are absent, police are the first and only responders to concerns relating to First Nations people with disability, including younger individuals with intellectual and psychosocial disability. Police are poorly equipped to recognise and respond appropriately, resulting in jails becoming a default solution to an issue that required a disability or mental health service response (if they respond at all). Whilst being held, a lack of skilled assessment of disability requirements often results in an individual’s disability support needs not being met.

Compounding the effects of this early contact with police is the fact that the minimum age of criminal responsibility (MACR) in the majority of Australian jurisdictions is 10, despite consistent calls for this to be raised to 14, and that children under the age of 16 should not be imprisoned. As a result, some First Nations child with disability in Australia can begin accumulating convictions by age 10, which is simply unacceptable.

Compounding the effects of this early contact with police is the fact that the minimum age of criminal responsibility (MACR) in the majority of most Australian jurisdictions is 10, despite consistent calls for this to be raised to 14, and for that children under the age of 16 should not to be imprisoned. As a result, some First Nations child with disability in Australia can begin accumulating convictions by age 10, which is simply absurd.

Reform in this area is backed by strong international evidence that sending children to prison at young ages only causes harm, breaches the rights of the child (UNCRC),<sup>54</sup> and increases chances of repeat contact with the justice system and reincarceration in future; the younger a child is when first sentenced, the higher the chance of reoffending as an adult.<sup>55</sup> Additionally, medical evidence shows that children under 14 years old are not developmentally able to comprehend the consequences of their actions and therefore are unable to be legally culpable.<sup>56</sup>

Every child who enters a youth detention facility is inherently at risk, which is clearly demonstrated by the occurrences of juvenile deaths in custody. Between May 1989 and May 1996, all fifteen juvenile deaths in Australian custody were of First Nations children.<sup>57</sup> Most recently, in Western Australia, two First Nations teenagers have died in the Banksia Hill detention centre and the associated ‘Unit 18’ Casuarina Prison within a single year, with the United Nations condemning the conditions in these facilities as akin to torture, calling for their closure and an immediate increase of the minimum age of criminal responsibility.<sup>58</sup>

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<sup>54</sup> United Nations Declaration on the Rights of Indigenous Peoples, Accessed 7 June 2023, [https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP\\_E\\_web.pdf](https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf)

<sup>55</sup> Victorian Aboriginal Legal Service 2022, VALS Policy Brief – Raising the Age of Criminal Responsibility, Accessed 7 June 2023, <https://vals73.wpengine.com/wp-content/uploads/2022/08/Raising-the-Age-of-Criminal-Responsibility-Policy-Brief-August-2022.pdf>, p. 4.

<sup>56</sup> Victorian Aboriginal Legal Service 2022, *ibid*

<sup>57</sup> Australian Human Rights Commission, accessed 10 October 2024 at <https://humanrights.gov.au/our-work/projects/indigenous-deaths-custody-chapter-9-juveniles>

<sup>58</sup> ABC News, 14 September 2024, accessed 10 October 2024 at <https://www.abc.net.au/news/2024-09-14/banksia-hill-detention-centre-death-court-transcripts-revealed/104337350>





No jurisdiction has actually raised the MACR to 14, with the few jurisdictions which have announced that they will do so (ACT, VIC and TAS) declining to implement these changes, which are required immediately, until mid-2025, the end of 2027, and the end of 2029 respectively.<sup>59</sup> These changes need to be accelerated and rolled out in every state and territory.

**Recommendation:**

- All states and territories must immediately raise the minimum age of criminal responsibility to 14 years of age.

**Australia's Disability Strategy 2021-2031**

The need for the criminal justice system to support young people with disability is emphasised in the Safety, Rights and Justice Outcome Area under *Australia's Disability Strategy 2021-2031*, which we previously outlined. This area includes commitments from all Australian governments to ensure policies, processes and programs provide better responses to people with disability who have experienced trauma (Policy Priority 2), ensure the rights of people with disability are promoted, upheld and protected (Policy Priority 4), and ensure the criminal justice system responds effectively to the complex needs and vulnerabilities of people with disability (Policy Priority 6). Subjecting First Nations children with disability to the trauma of justice processes which have primarily been designed for adults fails to uphold these rights and prevent further trauma.

**Case Study Examples**

FPDN has also chosen to further address these terms of reference via a series of case studies to more strongly convey the reality of the human rights violations which occur towards First Nations children in detention, on a routine basis.

**Case Study (WA): Banksia Hill Detention Centre and 'Unit 18' at Casuarina Prison**

The continued existence of operation of the Banksia Hill Detention Centre reflects the extent of Australia's failures to ensure the human rights of First Nations children in custody, as well as an unwillingness to comply with international obligations.

On any given day, more than 70% of young people in custody at the Banksia Hill Detention Centre are First Nations young people.<sup>60</sup> This was a finding of the Office of the Inspector of Custodial Services following their 2023 inspection of the facility (carried out on their three-yearly schedule), which is WA's only custodial facility for young people, outside of the infamous 'unit 18' within the adult, maximum security facility at Casuarina Prison.

The Office of the Inspector's report also referred to the results of a '2018 study at Banksia Hill', which 'found the prevalence of neurodevelopmental impairment was almost 90 per cent while more than a third of youth had Foetal Alcohol Spectrum Disorder'.<sup>61</sup>

<sup>59</sup> Australian Institute of Health of Welfare, 13 December 2023, accessed 9 October 2023 at <https://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2023/contents/understanding-youth-detention-in-australia/raising-the-age-of-criminal-responsibility>

<sup>60</sup> Office of the Inspector General of Government Services, '2023 Inspection of Banksia Hill Detention Centre and Unit 18 at Casuarina Prison (Part One)', May 2023, p. 2.

<sup>61</sup> Ibid.



FPDN must stress that none of the above is data that is regularly collected and published under the initiative of the WA Government or management staff at Banksia Hill. These numbers represent an unmitigated catastrophe yet this is something that is simply not being addressed in any context.

The limited details that we do have are unacceptably barren and indicative of yet another blatant failure to respect and comply with obligations under, Priority Reform 4 of the National Closing the Gap Agreement, which commits the WA Government to enabling shared access to data at a regional level.<sup>62</sup> The infrastructure needs to be developed for the collection of precise, disaggregated figures regarding the First Nations population of these detention centres (e.g. broken down into age, gender, type of disability, types of offences, etc.) in partnership with organisations like FPDN.

Banksia Hill has long been in a state of crisis, unfit for any child. FPDN wishes that it could lay out as part of this submission, in excruciating detail, the many failures that are currently taking place at the facility. However, FPDN considers that the words of the Office of the Inspector speak for themselves:

*This inspection was part of our routine three-yearly schedule set to look at all facets of life in Banksia Hill and the gazetted Unit 18 at Casuarina Prison (Unit 18). Our inspection team included specialist advisers covering education, young people, health and mental health, and cultural safety.*

*Given what we know about the needs of the young people in custody in Western Australia, our intention was to use our experts' knowledge and advice to examine whether the care being provided to the young people was trauma informed and contemporary. We had intended to overlay various perspectives to the inspection report...*

*Despite this objective, we have been unable to apply such focus to this report. The situation we observed was so far from a normal routine that anything above getting many of the young people out of cell for a few hours each day seemed unattainable.<sup>63</sup>*

Instead of having their basic needs met, these children are being subjected to treatment that is so reprehensible as to bring into application the *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984*. On 11 May 2023, Amnesty International unequivocally condemned the extreme force used against children who left their cells in process (including threats with guns and pepper spray).<sup>64</sup> It was also completely unsurprising that, in July 2023, Justice Tottle of the WA Supreme Court was able to make findings that the 'solitary confinement of a frequent basis' of over 20 hours per day was a 'systemic failure' and 'not only inconsistent with the objectives and principles of the [Young Offenders] Act but also with basic notions of the humane treatment of young people'.<sup>65</sup>

FPDN also wishes to stress that these failures extend far beyond the fundamental need to prevent abuses and degrading treatment. The inalienable rights and basic needs of those children, including health and mental health, and cultural safety, are nowhere even close to being met. In essence, FPDN can barely begin discussing the adequacy of any 'services' (e.g. education, rehabilitation, mental health treatment, disability diagnosis, etc.) provided at Banksia Hill (yet alone 'unit 18'), because it is beyond obvious that, for all meaningful intents and purposes, no such services exist. The facility is in such dire straits that custodial staff insist that routine lockdowns are a necessity, and detainees are regularly reported as having been subject to solitary confinement for up to 23

<sup>62</sup> See <https://www.closingthegap.gov.au/national-agreement/priority-reforms>, accessed 2 October 2024.

<sup>63</sup> Office of the Inspector General of Government Services, '2023 Inspection of Banksia Hill Detention Centre and Unit 18 at Casuarina Prison (Part One)', May 2023, pp 1-2.

<sup>64</sup> See <https://www.amnesty.org.au/amnesty-international-condemns-violence-against-youth-detained-in-banksia-hill-youth-detention-centre/>, accessed 2 October 2024.

<sup>65</sup> See <https://www.als.org.au/supreme-court-of-wa-orders-government-to-comply-with-the-law-after-finding-frequent-use-of-solitary-confinement/>, accessed 2 October 2024.





hours per day on a frequent basis.<sup>66</sup> It would be nonsensical to even suggest that any child detained there receives anything close to a healthy lifestyle. The facility has an incredible deficiency of staff working in education, cultural, health or support roles, which is almost certainly even worse than the dire shortage of custodial staff.

The human rights of children are not suspended or diminished by reason of their imprisonment. For example, the right to education that is enshrined in Article 28 of the *United Nations Convention on the Rights of the Child* operates alongside Rules 38 and 39 of the *Havana Rules* which specifically affirm the continued existence of that right for juveniles in detention.

The children at Banksia Hill (who are overwhelmingly First Nations children with disability) have become hopelessly lost in the gaps between prison and school, in large part due to the critical lack of support services available to them both at school, in prison, and at all stages in between.

It must also be remembered that the above comments are in relation to Banksia Hills specifically. For 'unit 18', as set out in the Disability Royal Commission segment specifically focusing on young detention in WA, Children' Court judgements record that, amongst a myriad of other horrors, *"detainees were deprived of sunlight, some for several weeks...education was not provided due to 'operational matters', with the Court finding that it was not due to detainees' behaviour... at Unit 18, there are no school facilities, no health or psychological support facilities, no program facilities and no ability to provide for a woodwork shop or any program which requires space or dedicated equipment"*.<sup>67</sup>

The situation at Banksia Hill (and 'unit 18') is, and has never been anything other than, a national disgrace. These children are forgotten, abused, ignored, and little genuine process has been made to prevent violations of international law or respect their human rights and basic dignity.

### **Case Study (Qld): Michael and indefinite detention**

Australia is the only advanced democracy without a national Human Rights Act or charter. Within the context of many jurisdictions' cruel treatment and denial of procedural justice to First Nations children with disability, this is unsurprising.

The reported case of Queensland teenager with intellectual disabilities (Michael – name redacted) is one such example. Michael was reportedly locked in solitary confinement for more than 500 days.<sup>68</sup>

During this time, Michael received no treatment as services did not have capacity to see young people with trauma based mental health issues. Rather, logbook data indicates that Michael was confined to a cell for more than 20 hours on 125 days, with a United Nations expert concluding that the case likely amounted to torture.<sup>69</sup>

This matter indicates that, depending on location, First Nations Young Persons with disabilities are not even afforded access to a bare minimum service and may be traumatised for life in extreme circumstances. FPDN is compelled to ask --- how many more unreported cases are there of incidents like Michael's?

In light of cases like Michael's, Australia's claims in international forums often seem to amount that little more than 'paying lip service' to commitments that Australia has made, such as Article 14 of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), which has supposedly been implemented via

<sup>66</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 'Final Report, Volume 8 – Criminal justice and people with disability', September 2023, p8.

<sup>67</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 'Final Report, Volume 8 – Criminal justice and people with disability', September 2023, p8.

<sup>68</sup> Human Rights Watch, 3 July 2024, accessed 9 October 2024 at <https://www.hrw.org/news/2023/07/03/australian-teen-locked-solitary-confinement-500-days>

<sup>69</sup> Human Rights Watch, Ibid.





Policy Priority 6 of the Australia's Disability Strategy Justice Target (under the NDIS): **States Parties shall ensure that persons with disabilities, on an equal basis with others:** (a) Enjoy the right to liberty and security of person; (b) **Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law**, and that the existence of a disability shall in no case justify a deprivation of liberty fThe commitments have been made, but substantive actions that implement them into practice have not follow.ffCase Study (NT): Spit Hoods UsefThe Northern Territory is another example of a jurisdiction with an abysmal record of complying with international obligations and respecting the human rights of First Nations children with disability within the youth incarceration system.fThe Don Dale Youth Detention Centre is a particularly egregious example, to the extent that, following the *Royal Commission into the Protection and Detention of Children in the Northern Territory*, the leading reform that was recommended by the Commission was simply '[c]losing the current Don Dale Youth Detention Centre and High Security Unit'.<sup>70</sup> It was further stated that '[a]ll the youth detention facilities the Commission looked at in the Northern Territory were not fit for purpose and should be closed' (i.e. Alice Springs Youth Justice Centre).<sup>71</sup>Use For reference, an inquiry revealed in 2016 that 100% of the held in youth detention at that time, were First Nations.<sup>72</sup> Due to a lack of diagnosis and transparency, proper data regarding the prevalence of disability in these children has never been consistently available. Not even the Royal Commission appeared to have that specific information,<sup>73</sup> but in line with comparable facilities such as Banksia Hill Detention Centre, FPDN assumes that the true figure is somewhere between 90-100% of youth in this facility.Only following repeated documentation of horrific incidents, including the strapping of a 17-year-old boy at Alice Springs Youth Justice Centre to a mechanical restraint chair whilst fitted with a spit hood, was the use of spit hoods was finally banned in NT youth detention centres in 2022.<sup>74</sup> FPDN is a member of the National Ban Spit Hoods Coalition, and fully endorsed the position that the usage of spit hoods is violation of:

- *the Convention on the Rights of the Child;*
- *the Convention Against Torture;*
- *the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), and;*
- *the United Nations Rules for the Protection of Juveniles Deprived of their Liberty*

It is concerning that NT youth detention centres previously allowed this practice, which raises further concerns about disregard for the rights and dignity of people held in these centres and the ongoing impacts (including trauma). However, it must also be noted that the NT allowed the usage of spit hoods on children to continue throughout police custody until as late as April 2023, and now the newly elected Coalition Government has regressed and promised the reintroduction of this abominable measure in youth detention centres.<sup>75</sup>

<sup>70</sup> Royal Commission into the Protection and Detention of Children in the Northern Territory, 17 November 2017, accessed 9 October 2024 at <https://www.royalcommission.gov.au/child-detention/final-report>.

<sup>71</sup> Ibid.

<sup>72</sup> National Indigenous Television, News and Programs, 26 June 2018, accessed 9 October 2024 at <https://www.sbs.com.au/nitv/article/100-of-children-detained-in-nt-are-aboriginal/fgy1zolf3>

<sup>73</sup> See Royal Commission into the Protection and Detention of Children in the Northern Territory, 17 November 2017, accessed 9 October 2024 at <https://www.royalcommission.gov.au/child-detention/final-report>, Volume 3B.

<sup>74</sup> ABC News, 7 October 2022, accessed 9 October 2024, <https://www.abc.net.au/news/2022-10-07/nt-bans-spit-hoods-on-children-police-custody/101511140>

<sup>75</sup> Central Australian Youth Justice, 4 September 2024, accessed 9 October 2024 at <https://www.cayj.org.au/media-releases/threats-of-a-return-to-spit-hoods>





## The benefits and need for enforceable national minimum standards for youth justice

FPDN believes that the issue of the potential ‘benefits and need for enforceable national minimum standards for youth justice consistent with [Australia’s] international obligations’ is clear. FPDN’s analysis is that this term of reference of ‘national minimum standards’ must include the following international rights and responsibilities set out by the:

- United Nations Convention on the Rights of the Child (UNCROC)
- United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)
- United Nations conventions that uphold the Rights of People with Disability (UNCRPD)

Of particular concern, there is a continued nation-wide reluctance to adopt, respond and implement the Articles set out in the UNDRIP. Australia is a signatory to UNDRIP and has no legitimate justification for failing to ensure and implement the rights contained within. This is also despite the findings and recommendations of the recent Inquiry into the application of the UNDRIP in Australia<sup>76</sup>, which noted many areas in which the Australian Government’s is ultimately falling short of its responsibilities to honour its commitments under UNDRIP, including failing to respect Indigenous self-determination and participation, leading to worsening incarceration and child removal rates.

FPDN has, via a joint position statement with other Disability Representative Organisations (DROs), already clearly outlined its position that, especially following the revelations and recommendations of the Disability Royal Commission (DRC), the creation of a comprehensive national Human Rights Act (‘HRA’) is currently the most effective step that can be taken towards supporting the legal protection of the rights of First Nations persons with disability (in addition to the rights of all persons residing in Australia).<sup>77</sup> The joint position statement outlines the need for a national HRA, including the creation of a positive duty which proactively requires institutions and organisations to prevent human rights contraventions before they occur, and meaningfully addresses the concerns, issues and past traumas that are specific to First Nations persons with disability by incorporating UNDRIP.<sup>78</sup>

### Recommendation:

That a Human Rights Act is created with tailored and detailed sections addressing each of Australia’s international human rights agreements and allows for the understanding of intersectional discrimination

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<sup>76</sup> Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia*, 2023, viewed 10 October 2024 at [https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/RB000083/toc\\_pdf/InquiryintotheapplicationoftheUnitedNationsDeclarationontheRightsofIndigenousPeoplesinAustralia.pdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/RB000083/toc_pdf/InquiryintotheapplicationoftheUnitedNationsDeclarationontheRightsofIndigenousPeoplesinAustralia.pdf)

<sup>77</sup> See <https://wwda.org.au/our-resources/publication/strengthening-protection-of-the-rights-of-people-with-disability-through-a-national-human-rights-act-hra/>

<sup>78</sup> Ibid.