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16 July 2022

The Hon. Mark McGowan, Premier of Western Australia

Via email: wa-government@dpc.wa.gov.au

CC:

Attorney-General: Minister.Quigley@dpc.wa.gov.au
Minister for Child Protection: Minister.McGurk@dpc.wa.gov.au
Minister for Aboriginal Affairs: Minister.Buti@dpc.wa.gov.au
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Dear Premier

Decision to transfer children to Casuarina Maximum Security Adult Prison

Australian Lawyers for Human Rights (**ALHR**) writes to express our alarm at your Government's decision to transfer 20 children and young people from Banksia Hill Detention Centre (**BHDC**) to the maximum security adult Casuarina Prison.

There are no circumstances that justify the placement of children in the adult prison system.

Moving children into an adult prison facility is not only in contravention of Australia's binding international legal obligations under the *Convention on the Rights of the Child (CRC)*¹ and other international human rights standards, it is also contrary to clear medical and psychological evidence that tells us how to reduce recidivism and facilitate rehabilitation of children without incarceration.

ALHR urges you to reconsider this regressive decision, and to consider alternatives such as releasing children being held on remand and under the age of 14 years old to reduce pressure on the Banksia Hill Youth Detention Centre.

¹ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <https://www.refworld.org/docid/3ae6b38f0.html>

We further call on the Western Australian Government to urgently examine current laws, practices and policies affecting children in contact with the criminal justice system and take an approach which respects international law, recognises best practice and evidence-based research.

ALHR is also very concerned with ongoing systemic failures within Western Australia's youth justice system, which are leading to systemic and grave breaches of children's internationally protected human rights. We particularly note the crisis at BHDC and the April 2022 findings of Western Australia's Custodial Service Inspector, Mr Eamon Ryan, following his unscheduled visit at the facility, including:

- children detained in understaffed and "inhumane" conditions;
- 24 suicide attempts between January and November 2021;
- boys who had formed a suicide pact while being held under observation in the facility's "intensive support unit";
- several days in November 2021 where four detainees spent less than an hour outside of their cells, in breach of the United Nations *Nelson Mandela Rules*;
- children who had pre-existing trauma and cognitive impairments being denied meaningful interaction, resulting in more instances of self-harm; and
- The use of adult prison officers to "assist" in maintaining order and security

Your decision to transfer children as young as 14 years of age to the maximum security adult Casuarina Prison will only further expose Western Australian children to serious human rights violations and consequent harm.

It is a regressive step that will make Western Australia a lone wolf in its abuse of children's rights. Yours will be the only state in Australia to be moving children **into** the adult prison system. This is deeply disappointing, given the last decade has seen:

- the Queensland Parliament pass legislation to remove 17-year-olds from adult jails²;
- the Victorian Government's transfer of children to the Barwon adult maximum security prison declared unlawful under the *Charter of Human Rights and Responsibilities Act 2006* (Vic),³

These developments in other states reflect an increasing recognition within Australia that "promises" or "plans" to detain children within adult prison facilities on the basis that they will be kept away from the adult prisoner population are **not sufficient to ameliorate** the reality that placing children in adult prisons is entirely inconsistent with human rights standards, and the safety of children, and counterproductive to the aims of the criminal justice system to provide for rehabilitation and community safety.

² *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Bill 2016*

³ *Minister for Families and Children v Certain Children by their Litigation Guardian Sister Marie Brigid Arthur* [2016] VSCA 343 (29 December 2016)

Disproportionate impact on First Nations children

ALHR is particularly concerned that First Nations children will be disproportionately impacted by your decision to transfer detainees to a maximum security adult prison facility. We note that Aboriginal and Torres Strait Islander children comprise the vast majority of those incarcerated and that most of the young people involved come from damaged backgrounds and have been subjected to neglect, abuse or trauma.

Thirty one years ago the Royal Commission into Aboriginal Deaths in Custody included a recommendation that imprisonment should only be used as a sanction of last resort yet, during the year 2020-2021, Western Australia had the highest rate of Aboriginal and Torres Strait Islander youth detention in Australia, at 212.8 per 10,000 young people⁴, leaving First Nations children some 24 times more likely to be imprisoned than non-Indigenous children.

Relevant international human rights law standards

It is the considered view of ALHR that the transfer of any child under 18 years of age into an adult jail in Western Australia is inconsistent with international human rights law standards and jurisprudence, particularly those articulated in the:

- (a) *Convention on the Rights of the Child (CRC)*⁵
- (b) *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*,⁶
- (c) *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*,⁷ and
- (d) *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*.⁸

ALHR draws your attention to the legally binding status of the core international human rights instruments to which Australia is a party. Instruments such as the CRC and CAT set out the **minimum entitlements** and freedoms that must be respected by governments. They are founded on respect for the dignity and worth of each individual, regardless of race, colour, gender, language, religion, opinions, origins, wealth, birth status or ability and therefore apply to every human being, everywhere - **including young offenders**.

⁴ Australian Institute of Health and Welfare, [Youth Justice in Australia 2020-21](#), Cat. No. JUV 138, Supplementary table S83b (2022)

⁵ op. cit

⁶ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <https://www.refworld.org/docid/3ae6b3a94.html>

⁷ UN General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")* : resolution / adopted by the General Assembly, 29 November 1985, A/RES/40/33, available at: <https://www.refworld.org/docid/3b00f2203c.html>

⁸ UN General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)* : resolution / adopted by the General Assembly, 8 January 2016, A/RES/70/175, available at: <https://www.refworld.org/docid/5698a3a44.html>

Article 3 of the CRC requires states to ensure that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The United Nations Committee on the Rights of the Child (the **Committee**) has stated that, in assessing the best interests of the child, states must have regard to factors such as:

- the child's views and aspirations;
- the identity of the child, including age and gender, personal history and background;
- the care, protection and safety of the child;
- the child's well-being;
- the family environment, family relations and contact;
- social contacts of the child with peers and adults;
- situations of vulnerability, i.e. the risks that the child is facing and the sources of protection, resiliency and empowerment;
- the child's skills and evolving capacities;
- the rights and needs with regard to health and education;
- the development of the child and her or his gradual transition into adulthood and an independent life;
- any other specific needs of the child⁹

Article 37(c) of the CRC requires states to ensure that:

[e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person...In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so...

The CRC also stresses the importance of young people who come into conflict with the law being afforded **treatment appropriate to their age and legal status**. ALHR submits that the decision to send children to a maximum security adult prison which cannot meet the complex needs of traumatised children, does not afford them treatment appropriate to their age and legal status.

We note that previous failures of state governments in Australia to respect the principle of separation have not escaped the attention of the United Nations. In its Concluding Observations in 2005¹⁰ and 2012¹¹ the Committee recommended the removal of 17-years-old children from the adult justice system in Queensland.¹⁸ In its most recent

⁹ Committee on the Rights of the Child, General Comment No. 14 (2013), Chapter V.A.1 and par. 44.

¹⁰ *UN Committee on the Rights of the Child: Concluding Observations, Australia*, 20 October 2005, CRC/C/15Add.268. See also submission by the Anti-Discrimination Commission Queensland to the Legal Affairs and Community Safety Commission (Qld), Inquiry into the Youth Justice and Other Legislation Amendment Bill 2014, submitted February 2014.

¹¹ *UN Committee on the Rights of the Child: Concluding Observations, Australia*, 28 August 2012, CRC/C/AUS/CO/4

Concluding Observations in 2019¹², the Committee:

- (a) reiterated its previous recommendations¹³ that Australia act compatibly with its acceptance of the principle of separation and “consider withdrawing its reservation on article 37 (c) of the Convention”¹⁴
- (b) expressed that it remained seriously concerned about “Children in detention not being separated from adults”¹⁵;
- (c) urged Australia to ensure that, in cases where detention is unavoidable, “children are detained in separate facilities.”¹⁶

Furthermore, the Committee urged Australia to

- (a) raise the minimum age of criminal responsibility to an internationally accepted level and make it conform with the upper age of 14 years, at which *doli incapax* applies;
- (b) immediately implement the 2018 recommendations of the Australian Law Reform Commission to reduce the high rate of incarceration among First Nations persons;
- (c) explicitly prohibit the use of isolation and force, including physical restraints, as a means of coercion or to discipline children under supervision, promptly investigate all cases of abuse and maltreatment of children in detention and adequately sanction the perpetrators;
- (d) actively promote non-judicial measures, such as diversion, mediation and counselling, for children accused of criminal offences and, wherever possible, the use of non-custodial sentences such as probation or community service.

As far back as March 2015, the United Nations Special Rapporteur on Torture, Juan Mendez, tabled a report outlining the current international benchmarks that are expected of countries when it comes to detaining children. Mr Mendez, in interpreting and setting standards under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* in the context of Australia’s youth detention policies, said:

*...Australia’s youth detention policies are out of date. We’re allowing a number of physically and psychologically harmful practices to continue, and permitting punitive policies and practice, which do not prioritise young people’s rehabilitation or reintegration.*¹⁷

ALHR draws your attention to the forthcoming visit to Australia of the UN Subcommittee on Prevention of Torture (SPT) and notes these matters are likely to be of significant interest to the SPT. It is our considered view that children currently imprisoned within Western Australia’s youth detention system are being subjected to cruel, inhuman or degrading treatment or punishment, in violation of the CAT.

¹² UN Committee on the Rights of the Child: *Concluding Observations, Australia, November 2019* CRC/C/AUS/CO/5-6

¹³ CRC/C/AUS/CO/4, para. 10, and CRC/C/15/Add.268, para. 8

¹⁴ CRC/C/AUS/CO/5-6, para 6

¹⁵ *Ibid* para 47

¹⁶ *Ibid* para 47

¹⁷ *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez* 5 March 2015 A/HRC/28/68*

Placing children in an adult prison facilities causes irreversible harm

Available data¹⁸ irrefutably evidences that children transferred into a maximum security adult prison setting will be exposed to drastically increased risks of:

- irreversible emotional and psychological harm;
- physical abuse;
- sexual abuse;
- recidivism when released back into the community;
- entrenchment in a life of crime; and
- suicide.

When the Western Australian government previously sent a number of children to the adult Hakea Prison, to cope with operational issues at BHDC in 2013, the children involved experienced significant mental harm including post-traumatic stress disorder.

The juvenile justice system was developed more than a century ago, precisely because it was recognised that placing young offenders within adult prisons not only subjected those children to very serious abuse in adult jails, but it caused harm that returned them to society more likely to reoffend.¹⁹

Children are not little adults. They are not suited to environments designed for adults. Their behavior and needs are different because their brains are different.²⁰ There now exists extensive medical and scientific evidence that teenage brains are still developing,²¹ and that young people are highly subject to reward and peer-influence. Your decision to place children under the age of 18 years in a maximum security adult prison facility fails to acknowledge the fundamental differences between adults and children and the way in which these differences impact upon behaviour, criminal responsibility, rehabilitative and therapeutic needs.

As was pointed out by the Australian Law Reform Commission more than 20 years ago:

“Children have particular needs that are very different from those of adult offenders. For instance, they tend to have a reduced fear of danger and display 'acting out' behaviours. They may have volatile behavioural patterns –and emotional states, self-harming behaviour, different perceptions of time and shorter concentration spans. Their different behavioural and emotional characteristics require different approaches than those for adult offenders. Separating juveniles from adult offenders...recognises

¹⁸ *The Risks Juveniles Face When They Are Incarcerated With Adults*, Youth Justice Policy Institute http://www.justicepolicy.org/images/upload/97-02_rep_riskjuvenilesface_jj.pdf; 5 Sullivan, James M, "From Monkey Bars to Behind Bars: Problems Associated with Placing Youth's in Adult Prisons" (2014). Law School Student Scholarship. Paper 587. http://scholarship.shu.edu/student_scholarship/587

¹⁹ see: *The Risks Juveniles Face When They Are Incarcerated With Adults*, Youth Justice Policy Institute http://www.justicepolicy.org/images/upload/97-02_rep_riskjuvenilesface_jj.pdf;

²⁰ This is recognised in *The Integrated Approach: The Philosophy and Directions of Juvenile Detention* Qld Corrective Services Commission Brisbane 1997, 16. See also for example, H Blagg & M Wilkie *Young People and Police Powers* Australian Youth Foundation Sydney 1995 rec 22.

²¹ For an extensive list of references on this see: Massachusetts General Hospital Centre for Law, Brain and Behaviour at: <http://clbb.mgh.harvard.edu/juvenilejustice/>

*that children have developmental needs that require different programs and services than those for adults. It protects the well-being and safety of children.*²²

Even where children are kept separate from the adult prison population, the fact is that they are being detained in a facility designed for adults not children and often cared for by staff without appropriate specialist training in dealing with and supporting children with complex needs.

Placing a young offender in an adult prison is completely inconsistent with the principle of the best interests of the child and the rehabilitative aims of juvenile justice. It is dangerous and self-defeating.²³

ALHR calls for action.

ALHR expresses our strong support for the key asks outlined within the open letter sent to your Government by Social Reinvestment WA and to which we are a signatory organisation.

We call on the Western Australian Government to:

- 1. Immediately reverse the decision to transfer any children to adult prison.**
- 2. Develop and implement tailored trauma informed treatment and rehabilitation plans for this cohort of young people, based on comprehensive assessments of their needs.**²⁴

ALHR further calls for urgent action to progress systemic law and policy reforms to ensure Western Australia implements an approach to children in conflict with the law that is consistent with international human rights law standards and global best practise.

Specifically we call on the Western Australian Government to:

1. Raise the minimum age of criminal responsibility from 10 to 14 years.
2. Move children aged 10 to 13 out of BHDC and all places of detention in Western Australia.
3. Abolish mandatory sentencing in Western Australia.
4. Ensure all aspects of Western Australia's youth justice system reflect the core principle that detention should only be utilised as a means of last resort for children and ensure the detention of any child under the age of 18 years is limited to exceptional cases and alternatives to detention are favoured.
5. Where detention must be undertaken, ensure that children are detained in purpose

²² Australian Law Reform Commission Report: *Seen and heard: priority for children in the legal process* (ALRC Report 84) 19 November 1997: http://www.alrc.gov.au/publications/20-detention/separation-adults-and-juveniles-detention#_ftn230

²³ see: *The Risks Juveniles Face When They Are Incarcerated With Adults*, Youth Justice Policy Institute http://www.justicepolicy.org/images/upload/97-02_rep_riskjuvenilesface_jj.pdf

²⁴ As called for in the Open Letter led by Social Reinvestment Western Australia

built age-appropriate facilities with non-prison like environments which provide a therapeutic, stimulating and educational environment that can help children on a path to rehabilitation and reintegration upon release into society.

6. Ensure children's access to specialised staff trained in dealing with children and childhood trauma.
7. Identify the communities in most urgent need of youth justice action, and resource place-based justice reinvestment initiatives to address the root causes of offending.²⁵
8. Conduct an immediate review of any legislation, policies and practices that allow the use of sentence management practices such as solitary confinement, isolation and mechanical restraints against children. Given such practices breach international legal standards we call for the immediate repeal of any enabling legislation, policies or procedures that make such practices possible.
9. Introduce a **Western Australian Human Rights Bill** within the current term of parliament that is based on models already legislated in the Australian Capital Territory²⁶, Victoria²⁷ and Queensland²⁸ in order to legally protect the basic human rights and freedoms of West Australian children.

Conclusion

Recognition that children are different from adults does not mean that young people should not be held accountable for their actions. Rather, it means that children should be treated in a therapeutic, age-appropriate manner that best supports them to positively engage with the community. Many of these services already exist in the community and, with government support, can provide young people and children with the programs, health care and family supports they need to become productive contributors to our community.

Conversely, sending children who have already been subjected to solitary confinement, extensive lockdowns and deprivation at the Banksia Hill Youth Detention Centre to a maximum security adult prison will cause these children further trauma and set back any prospects of rehabilitation and reintegration.

We urge you to demonstrate a genuine commitment to all West Australian children by reversing your decision and instead implementing legislative and policy reforms which bring the juvenile justice system in line with the international human rights standards.

About ALHR

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

²⁵ As called for in the Open Letter led by Social Reinvestment Western Australia

²⁶ Human Rights Act 2004 (ACT)

²⁷ Charter of Human Rights and Responsibilities Act 2006 (Vic)

²⁸ Human Rights Act 2019 (QLD)

Yours faithfully

A handwritten signature in blue ink, appearing to be 'Kerry Weste', written over a light blue circular stamp.

Kerry Weste

President

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