THE EXTERNAL AFFAIRS POWER AS A CONSTITUTIONAL BASIS FOR COMMONWEALTH INTERVENTION IN NATIONAL CHILD RIGHTS REFORM

ADVICE

INTRODUCTION

1. We have been asked to advise on the following questions:

   (a) whether s 51(xxix) of the Constitution (also known as the **external affairs power**), in conjunction with art 40(3)(a) of the *Convention on the Rights of the Child* (**CRC**)[1] is likely to provide the Commonwealth Government with legislative power to prescribe a minimum age of criminal responsibility for offences against state and territory criminal laws (**Question 1(a)**);

   (b) whether s 51(xxix) of the Constitution, in conjunction with various articles of the CRC, is likely to provide the Commonwealth Government with legislative power to set minimum standards for the treatment of children and young people in state and territory criminal legal systems, including for example:

      i. that arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time (in reliance on art 37(b));

      ii. that no child shall be held in a correctional facility designed for or used by adults, for any period of time (in reliance on art 37(c));

      iii. that any detention amounting to solitary confinement be absolutely prohibited for children, for any period of time (in reliance on art 37(a), along with other international law materials); and

      iv. that every child accused of a criminal offence and/or deprived of their liberty have prompt access to legal assistance and representation (in reliance on art 37(d) and art 40(2)(b)(ii)) (**Question 1(b)(i)-(iv)**).

2. Our advice is sought in the context of international and domestic pressure to strengthen child rights in Australia, specifically in relation to the operation and application of different State and Territory laws. The Committee on the Rights of the Child (**Committee**) has recommended Australia:

   > "[e]nact comprehensive national child rights legislation fully incorporating the Convention and providing clear guidelines for its consistent and direct application throughout the states and territories of the State party".[2]

[1] 1577 UNTS 3 (adopted 20 Nov 1989, entered into force 2 Sept 1990).

[2] Committee on the Rights of the Child, "Concluding observations on the combined fifth and sixth periodic reports of Australia", CRC/C/AUS/CO/5-6 (1 November 2019), [7(a)] (**2019 Concluding Observations**).

3. In 2024, the Australian Human Rights Commission (**AHRC**) recommended that the Australian Government incorporate the CRC into Australian law through a National Children's Act as well as a federal Human Rights Act.[3] The question of whether s 51(xxix) of the Constitution would support legislation incorporating international obligations with respect to child rights was raised in the interim report of the Senate Legal and Constitutional Affairs References Committee on Australia's youth justice and incarceration system in February 2025 (**Interim Report**).[4] We also note the Parliamentary Joint Committee on Human Rights has also recently considered s 51(xxix) in its Inquiry into Australia's Human Rights Framework (in the context of economic, social and cultural rights).[5]

4. In summary, our advice on the questions is as follows:

   (a) **Question 1(a):** Section 51(xxix) of the Constitution provides the Commonwealth Government with legislative power to prescribe a minimum age of criminal responsibility for offences against state and territory law to the extent such a law is appropriate and adapted to give effect to Australia's obligations described in art 40(3)(a) of the CRC and the Committee's recommendations. Prescription of a minimum age of 14 years would, in our view, be appropriate and adapted to art 40(3)(a) of the CRC, read with the Committee's recommendations.

   (b) **Question 1(b)(i), (iii), and (iv):** Section 51(xxix) of the Constitution provides the Commonwealth Government with legislative power to set minimum standards for the treatment of children and young people in state and territory criminal legal systems:

      i. that arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time;

      ii. that any detention amounting to solitary confinement be absolutely prohibited for children, for any period of time;

      iii. that every child accused of a criminal offence and/or deprived of their liberty have prompt access to legal assistance and representation.

   (c) **Question 1(b)(ii)**: Were Australia to withdraw its reservation to art 37(c) of the CRC, then art 37(c) of the CRC could be relied on to enact federal legislation providing that "no child shall be held in a correctional facility designed for or used by adults, for any period of time, unless holding the child in such a facility is considered to be in the best interests of the child". Consideration should be given to reliance on art 10 and art 24 of the *International Covenant on Civil and*

[3] Australian Human Rights Commission, "'Help way earlier!' How Australia can transform child justice to improve safety and wellbeing" (2024), pp 29-31 and Recommendation 4.
[4] Interim Report at [4.98]; [5.25]-[5.27]; [5.54]; and Additional Comments by Senator Lidia Thorpe at [1.29].
[5] The Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (May 2024), [6.46]-[6.59]. See also discussion of the Law Council of Australia's submissions at [6.115].

Political Rights (**ICCPR**)[6] as a basis for federal legislation supported by s 51(xxix) if the Commonwealth Government declines to withdraw its reservation to art 37(c) of the CRC.

RELEVANT INTERNATIONAL LAW AND ITS STATUS UNDER AUSTRALIAN LAW

International Conventions

5. Under art 26 of the *Vienna Convention on the Law of Treaties* (**VCLT**),[7] a treaty in force is binding upon parties (for the purpose of international law) to it and must be performed by them in good faith.

Convention on the Rights of the Child

6. The CRC entered into force on 2 September 1990 and has 196 States Parties.[8]

7. Article 3(1) of the CRC provides:

> "[i]n 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".

8. Article 4 requires all States Parties to:

> "undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention". A more flexible standard adopted with respect to economic, social and cultural rights, which States Parties are to undertake "to the maximum extent of their available resources".

9. Article 37 addresses the deprivation of liberty, and is set out in full below:

> "States Parties shall ensure that:
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> (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
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> (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
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> (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner

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[6] 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976). See "International Covenant on Civil and Political Rights" (accessed 4 June 2025).
[7] (1969) 1155 UNTS 331 (concluded 23 May 1969, entered into force 27 January 1980).
[8] UNTC, "Convention on the Rights of the Child".

which takes into account the needs of persons of his or her age. 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 and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."

10. Article 40 addresses the rights of a child accused of a crime. Article 40(1) provides:

> "States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."

11. Article 40(2) then sets out a series of rights which States Parties are bound to ensure "to this end". These relevantly include that "every child alleged as or accused of having infringed the penal law" is guaranteed, amongst other rights:

(a) "To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence" (art 40(2)(b)(ii)); and

(b) "To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance …" (art 40(2)(b)(iii)).

12. Article 40(3)(a) expressly addresses the minimum age of criminal capacity. It states:

> "States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:
>
> (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law".

13. Article 41 provides that "[n]othing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child" contained in either the law of a State Party or international law in force for that State. This provision confirms that CRC rights are complemented by those available under

other international instruments to which a State is party.[9]

14. When Australia ratified the CRC it made one reservation, with respect to art 37:[10]

> "Australia accepts the general principles of article 37. In relation to the second sentence of paragraph (c), the obligation to separate children from adults in prison is accepted only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia. Australia, therefore, ratifies the Convention to the extent that it is unable to comply with the obligation imposed by article 37 (c)."

15. In addition, we note the following provisions of international conventions to which Australia is a party:

(a) Article 9(1) of the ICCPR provides for the right to liberty and security of person and prohibits arbitrary arrest or detention. Article 24(1) of the ICCPR provides that "[e]very child shall have … the right to such measures of protection as are required by his status as a minor…".

(b) Article 10(1) of the *International Covenant on Economic, Social and Cultural Rights*[11] states that States Parties recognise the "widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children". Article 10(3) provides that "[s]pecial measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions".

(c) Article 11 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (**Convention Against Torture**)[12] provides that "[e]ach State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture".

(d) Article 7(1) of the *Convention on the Rights of Persons with Disabilities*[13] provides that "States Parties shall take all necessary measures to ensure the full

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[9] See CRC, art 41; see also, with respect to art 40 CRC, John Tobin with Cate Read, 'Article 40. The Rights of the Child in the Juvenile Justice System' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (OUP 2019) at 1617.
[10] UNTC, "Convention on the Rights of the Child".
[11] 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976).
[12] 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987).
[13] 2515 UNTS 3 (opened for signature 13 December 2006, entered into force 3 May 2008).

enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children. In addition:

i. Article 7(2) provides that "[i]n all actions concerning children with disabilities, the best interests of the child shall be a primary consideration";

ii. Article 14(1) provides that "States Parties shall ensure that persons with disabilities, on an equal basis with others, (a) [e]njoy the right to liberty and security of person; (b) [a]re 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";

iii. Article 14(2) provides that "States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation";

iv. Article 23(4) provides that "States Parties shall ensure that a child is not separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child", and that "[i]n no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents".

(e) Article 5(b) of the *International Convention on the Elimination of All Forms of Racial Discrimination*[14] guarantees the right to "security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution".

16. Non-binding international standards also address the incarceration of children. In particular, we note the following:

(a) The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")[15] provide in rule 4.1 that "[i]n those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity." The commentary to rule 4.1 notes: "The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal

[14] 660 UNTS 195 (opened for signature 21 December 1965, entered into force 4 January 1969).
[15] Adopted by General Assembly resolution 40/33 of 29 November 1985.

responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behaviour. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority, etc.). Efforts should therefore be made to agree on a reasonable lowest age limit that is applicable internationally." In addition, rule 13.1 provides that "[d]etention pending trial shall be used only as a measure of last resort and for the shortest possible period of time". Rule 27.1 provides that the Standard Minimum Rules for the Treatment of Prisoners and related recommendations shall be applicable as far as relevant to the treatment of juvenile offender in institutions, including those in detention pending adjudication.

(b) The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (**United Nations Rules**)[16] provide in rule 2 that "[d]eprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases". In addition, rule 28 provides that "[t]he detention of juveniles should only take place under conditions that take full account of their particular needs, status and special requirements according to their age, personality, sex and type of offence, as well as mental and physical health, and which ensure their protection from harmful influences and risk situations." Rule 11(a) provides that "[t]he age limit below which it should not be permitted to deprive a child of his or her liberty should be determined by law". Limitations on physical restraint and the use of force are set out in rules 63-65. Rule 67 provides that "[a]ll disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned".

(c) The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)[17] provide in preliminary observation 4(2) that "[t]he category of young prisoners should include at least all young persons who come within the jurisdiction of juvenile courts. As a rule, such young persons should not be sentenced to imprisonment". Rule 43 prohibits, amongst other practices, indefinite or prolonged solitary confinement. Solitary confinement is defined in rule 44 as confinement of prisoners for 22 hours or more a day without meaningful human contact, while prolonged solitary confinement is such confinement for more than 15 days.

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[16] Adopted by General Assembly resolution 45/113 of 14 December 1990.
[17] Adopted by General Assembly resolution 70/175 of 17 December 2015, [5].

17. Australia's 2021 Universal Periodic Review included recommendations from 29 countries to raise the age of criminal responsibility (see **Annexure A**).[18]

Status of international conventions and standards in Australian law

18. International law does not have any legal effect in Australian law unless and until it is enacted in legislation.[19]

19. Australian Courts have consistently said a court is bound to apply Australian statute law "even if that law should violate a rule of international law".[20]

How international law may be incorporated into Australian law to operate nationally

20. Section 51 of the Constitution does not confer an express power to make laws for the protection and promotion of human rights laws. In the absence of clear power, the external affairs power has been used to enact wide-ranging human rights laws in furtherance of Australia's international obligations.

21. Section 51(xxix) of the Constitution provides:

> "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: […]
>
> (xxix) external affairs".

22. The Commonwealth Government is empowered under s 51(xxix) to enact a national law in order to implement a treaty obligation binding upon Australia, even it if may have the effect of rendering a State law invalid.[21] The position with the Northern Territory and the Australian Capital Territory are slightly different given the effect of s 122 of the Constitution.[22]

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[18] UN General Assembly, Human Rights Council, 47th Sess., Universal Periodic Review, "Report of the Working Group on the Universal Periodic Review: Australia", A/HRC/47/8, 24 March 2021, [146].

[19] *Dietrich v The Queen* (1992) 177 CLR 292 at 305 (Mason CJ and McHugh J), 359–360 (Toohey J); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-287 (Mason CJ and Deane J), and *Victoria v Commonwealth (**Industrial Relations Act Case**)* (1996) 187 CLR 416 at 480-481 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

[20] *Polites v The Commonwealth* (1945) 70 CLR 60 at 69 (Latham CJ), 74 (Rich J), 75 (Starke J), 78 (Dixon J), 79 (McTiernan J), 81 (Williams J); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 204 (Gibbs J) and *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 384 (Gummow and Hayne JJ).

[21] *Commonwealth v Australia* (1983) 158 CLR 1 at 122, 125-126 (Mason J); 171-172 (Murphy J); 218-219 (Brennan J); and 258-259 (Deane J) (***Tasmanian Dams Case***). Such a treaty obligation must be entered into bona fide: *Tasmanian Dams Case* at 219 (Brennan J); 259 (Deane J). See further paragraphs 35 – 38 below.

[22] Section 122 of the Constitution provides that "[t]he Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit."

23. However, the Commonwealth's power to enact laws that have such an effect must be carefully considered. To be characterised as a law with respect to "external affairs", a law must be "reasonably capable of being considered appropriate and adapted to implementing the treaty".[23]

24. The external affairs power therefore has a purposive aspect, in that the purpose of the law (in the sense of the "object for the advancement or attainment of which a law was enacted") is a "test" for determining whether the law is reasonably capable of being considered as giving effect to the relevant treaty.[24]

25. There must be a reasonable proportionality between the purpose or object of a law and the means by which the law achieves that purpose – the law "must be seen, with 'reasonable clearness', upon consideration of its operation, to be 'really, and not fancifully, colourably, or ostensibly, referable' to and explicable by the purpose or object which is said to provide its character".[25]

26. It is permissible to implement treaty obligations in part, so long as the deficiency "is not so substantial as to deny the law the character of a measure implementing the Convention", or renders the law, read as a whole, substantially inconsistent with the treaty.[26]

27. The High Court has recognised that some treaties may not enliven the legislative power in s 51(xxix): *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 486 (***Industrial Relations Act Case***). There, the majority stated (footnotes omitted):

> "For example, Professor Zines has suggested that a treaty expressed in terms of aspiration (for example, 'to promote full employment') cannot support a law which adopts one of a variety of possibly contradictory ways that might be selected to fulfil the aspiration. He writes:
>
> > 'Accepting … that the agreement by nations to take common action in pursuit of a common objective amounts to a matter of external affairs, the objective must, nonetheless, be one in relation to which common action can be taken. Admittedly, this raises questions of degree; but a broad objective with little precise content and permitting widely divergent policies by parties does not meet the description.'
>
> When a treaty is relied on under s 51(xxix) to support a law, it is not sufficient that the law prescribes one of a variety of means that might be thought appropriate and adapted to the achievement of an ideal. The law must prescribe a regime that the treaty has itself defined with sufficient specificity to direct the general course to be taken by the signatory states."

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[23] *Industrial Relations Act Case* at 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).
[24] *Industrial Relations Act Case*, 487.
[25] *Tasmanian Dams Case* at 260 (Deane J).
[26] *Industrial Relations Act Case* at 488-489 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

28. The majority recognised that in answering this question of degree, it was appropriate to take into account the nature of international law. At 486, their Honours cited Deane J's statement in *Commonwealth v Australia* (1983) 158 CLR 1 at 261-262 (***Tasmanian Dam Case***) that:

> "absence of precision does not … mean any absence of international obligation … it would be contrary to both the theory and practice of international law to … deny the existence of international obligations unless they be defined with the degree of precision necessary to establish a legally enforceable agreement under the common law."

29. Recommendations by international agencies will not enliven the legislative power conferred by s 51(xxix), unless "the terms of [the recommendations] themselves can reasonably be regarded as appropriate and adapted to giving effect to the terms of the Conventions to which they relate".[27]

30. In the *Industrial Relations Act Case*, the instruments in question were two Recommendations adopted by the General Conference of the International Labour Organisation, being a body comprised of four delegates from each of the members of the ILO, representing the government, employers and "workpeople": at 489, 504. Recommendation No 90 sets out recommended procedures for the progressive application of the principles in the Equal Remuneration Convention of 1951,[28] while Recommendation No 111 supplements the Discrimination (Employment and Occupation) Convention of 1958.[29] The majority considered that these two Recommendations could reasonably be regarded as appropriate and adapted to giving effect to the terms of the Conventions to which each related, such that legislative power was enlivened.

31. In *XYZ v Commonwealth of Australia*, the High Court held that s 51(xxix) supported a law with respect to places, matters or things (including conduct) outside the geographical limits of Australia.[30] The legislation at issue criminalised the engagement of certain forms of sexual activity involving children by Australian citizens or residents while outside Australia.[31]

32. In *Pape v Commissioner of Taxation of the Commonwealth of Australia*, Heydon J considered the reasoning in the *Industrial Relations Act Case*, arguing that the Court had "specifically declined to decide whether legislation enacted to carry out the recommendations of international agencies made otherwise than in order to give effect

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[27] *Industrial Relations Act Case* at 509 (Brennan CJ, Toohey, Gaudron, McHugh, Gummow JJ).
[28] *Industrial Relations Act Case* at 507.
[29] See ILO, "R111 - Discrimination (Employment and Occupation) Recommendation, 1958 (No. 111)" (accessed 4 June 2025).
[30] (2006) 227 CLR 532, 542-543 (Gleeson CJ); 546-548, 552 (Gummow, Hayne and Crennan JJ). Kirby J found the legislation at issue valid the alternate basis that it was "with respect to the international relationships of Australia with other nation states and international organisations" (at 575-576, 582).
[31] See ibid, 545-546 (Gummow, Hayne and Crennan JJ).

to the terms of a treaty to which they relate could be supported by s 51(xxix)", and that "[t]he better view is that it cannot".[32]

33. Finally, it is well-established that the external affairs power is capable of expanding the legislative competence of the Commonwealth Government. In the *Industrial Relations Act Case* at 484-485, Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ stated:

> "According to basic constitutional principle, and with qualifications not presently relevant, the intrusion of Commonwealth law into a field that has hitherto been the preserve of State law is not a reason to deny validity to the Commonwealth law provided it is, in truth, a law with respect to external affairs."

34. **Annexure B** to this Advice sets out limited application provisions, objects clauses, and other provisions in Commonwealth legislation incorporating international treaties, together with clauses that indicate the legislature's intention to "cover the field" or not to do so.

The effect of a Commonwealth law that gives effect to a human rights obligation on an inconsistent state or territory law

35. Section 109 of the *Constitution* provides that "[w]hen a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid".

36. There are three principal tests for inconsistency: the "cover the field" test, the "simultaneous obedience" test, and the "conferral of rights" test. The first test involves 'indirect' inconsistency, while the second and third tests are considered 'direct' forms of inconsistency.[33]

37. The High Court has held that the word "invalid" should be regarded as meaning "inoperative".[34] Accordingly, the words "to the extent of the inconsistency" have been described as having a temporal as well as a substantive connotation.[35] The operation of the invalidated state law is suspended so long as the inconsistency continues. If the Commonwealth law, with which the state law was inconsistent, is repealed, then the state law revives.[36]

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[32] *Pape v Commissioner of Taxation of the Commonwealth of Australia* (2009) 238 CLR 1 at 164-165 (citation from 165).
[33] Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Lawbook Co, 2024), 305.
[34] *Butler v A-G (Vic)* (1961) 106 CLR 268 at 274 (Fullagar J); 278 (Kitto J); 283 (Taylor J); 286 (Menzies J); 288 (Windeyer J).
[35] *Butler v A-G (Vic)* (1961) 106 CLR 268 at 283 (Taylor J); *Commonwealth v Western Australia* (1999) 196 CLR 392 at 440 (Gummow J);
[36] *Butler v A-G (Vic)* (1961) 106 CLR 268.

38. If Parliament chooses to implement a treaty by statute, and adopts the same words used in that treaty, it is assumed that the language of the statute should carry the same meaning as in the treaty.[37] The text of an international treaty is, in turn, to be interpreted in accordance with the general principles of treaty interpretation in the VCLT. [38]

ANALYSIS

Question 1(a): Power to prescribe a minimum age of criminal responsibility for offences against state and territory criminal laws (s 51(xxix) of the Constitution and art 40(3)(a) of the CRC)

39. Section 51(xxix) of the Constitution provides the Commonwealth Government with the source of power to make laws to prescribe a minimum age of criminal responsibility for offences against state and territory criminal laws, if the law is appropriate and adapted to give effect to art 40(3)(a) of the CRC.

40. We first set out general principles on the scope of the external affairs power, before considering the Constitutional validity of a law enacted on the basis of art 40(3)(a) of the CRC.

Power to prescribe a minimum age of criminal responsibility for offences against state and territory criminal laws

41. The first issue raised by Question 1(a) is whether art 40(3)(a) imposes an obligation upon Australia, and if so, its terms. Article 40(3)(a) provides that States Parties (emphasis added):

> "shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:
>
> (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law".

42. Three points deserve comment. First, the provision is expressed in mandatory terms ("States Parties shall"). Secondly, the actual obligation imposed is of a flexible nature ("seek to promote"). Thirdly, while art 40(3)(a) singles out "the establishment of a

[37] *Addy v Federal Commissioner of Taxation* (2021) 273 CLR 613 at 623 (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ); *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 230-231; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 265 (Brennan J). See also s 15AB(2)(d) of the *Acts Interpretation Act* 1901 (Cth), which provides that "any treaty or other international agreement that is referred to in the Act" is material that may be considered in accordance with s 15AB(1) in the interpretation of a provision of that Act.

[38] See *Kingdom of Spain v Infrastructure Services Luxembourg sàrl* (2023) 275 CLR 292 at 316 (Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

minimum age", it does not specify precisely which legislated minimum age States Parties are obliged to seek to promote.

43. Read alone, art 40(3)(a) therefore supports a variety of potential legislative outcomes (or, indeed, non-legislative outcomes, given the broad ambit of an obligation to "seek to promote" a particular result).

44. The obligation in art 40(3)(a) has however been given greater specificity by the Committee in its General Comment No 24 (2019) on children's rights in the child justice system (**General Comment No 24**).[39] It states at [21]-[22]:

> "Under article 40 (3) of the Convention, States parties are required to establish a minimum age of criminal responsibility, but the article does not specify the age. Over 50 States parties have raised the minimum age following ratification of the Convention, and the most common minimum age of criminal responsibility internationally is 14. Nevertheless, reports submitted by States parties indicate that some States retain an unacceptably low minimum age of criminal responsibility.
>
> […] States parties are encouraged to take note of recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age."

45. The Committee has also provided specific recommendations to Australia in its periodic reporting. In the concluding observations on the combined fifth and sixth periodic reports of Australia (**2019 Concluding Observations**), the Committee stated:[40]

> "With reference to its general comment No. 24 (2019) on children's rights in the child justice system, the Committee urges the State party to bring its child justice system fully into line with the Convention and:
>
> (a) To 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".

46. In the *Industrial Relations Act Case*, the High Court accepted that legislation with respect to a recommendation made by an international agency could be supported by s 51(xxix) of the Constitution if its terms were regarded as appropriate and adapted to giving effect to the terms of their related Convention. The Committee is not an international agency, but rather a body of experts. However, it is established under the CRC and is empowered to "make suggestions and general recommendations" based on information received.[41] In our view, the reasoning of the High Court in the *Industrial Relations Act Case* is apt to be extended to encompass recommendations of the Committee which meet the necessary threshold.

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[39] CRC/C/GC/24 (18 September 2019).
[40] 2019 Concluding Observations, [48(a)].
[41] CRC, art 45(d) ("The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention").

47. The Committee's recommendations elaborate upon art 40(3)(a) of the Convention and direct States Parties as to how it may be implemented. In our view, the Committee's recommendations are appropriate and adapted to give effect to art 40(3)(a) of the CRC. Accordingly, art 40(3)(a) of the Convention and the Committee's concomitant recommendations are likely to provide the Commonwealth Government with legislative power to prescribe a minimum age of criminal responsibility for offences against state and territory laws. Prescription of a minimum age of 14 would, in our view, be appropriate and adapted to art 40(3)(a) of the CRC, read in conjunction with the Committee's recommendations set out above.

Question 1(b)(i): Power to legislate that arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time (in reliance on art 37(b))

48. We have been asked to advise whether art 37(b) of the CRC could be relied upon by the Commonwealth Government to enact legislation providing that "arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time".

49. Article 37(b) of the CRC provides:

> "States Parties shall ensure that [...]
>
> (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."

50. Article 37(b) is framed in obligatory terms ("States Parties shall ensure that …"). In our view, it prescribes how that obligation is to be fulfilled with the precision to be expected of an international convention.

51. The proposed form of the legislation mirrors the obligation binding on States Parties in art 37(b) of the CRC and can plainly be considered appropriate and adapted to implementing the obligation.

52. The Commonwealth Government is empowered under s 51(xxix) of the Constitution to legislate in order to implement a treaty obligation binding upon Australia. We consider that a law in the form proposed would be supported by s 51(xxix) of the Constitution.

53. As noted above, art 9(1) of the ICCPR provides for the right to liberty and security of person and prohibits arbitrary arrest or detention. The Human Rights Committee states in its General Comment No 35 on Article 9 (Liberty and security of person):[42]

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[42] Human Rights Committee, "General comment No. 35 Article 9 (Liberty and security of person)", CCPR/C/GC/35 (16 December 2014), [18] (citations omitted).

> "Children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors."

54. Australia has been found to have violated art 9(1) in its treatment of child applicants in a series of Communications.[43] Breaches of art 24 of the ICCPR have also been found in several cases.[44]

55. Consideration could therefore also be given to Australia's obligations to children under the ICCPR as support for legislative action under s 51(xxix) of the Constitution. The enactment of the *Human Rights (Sexual Conduct) Act 1994* (Cth) in the wake of the *Toonen* decision reflects the potential for Human Rights Committee decisions to stimulate legislative reform.[45]

Question 1(b)(ii): Power to legislate that no child shall be held in a correctional facility designed for or used by adults, for any period of time (in reliance on art 37(c))

56. We have been asked to advise whether art 37(c) could be relied upon by the Commonwealth Government to enact legislation providing that in state and territory criminal legal systems "no child shall be held in a correctional facility designed for or used by adults, for any period of time".

57. Article 37(c) of the CRC provides:

> "Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. 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 and shall have the right to maintain contact

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[43] See Human Rights Committee, *M.I. et al v Australia,* Comm No 2749/2016, CCPR/C/142/D/2749/2016 (23 January 2025), [10.4]; *A.K. et al v Australia*, Comm No 2365/2014, CCPR/C/132/D/2365/2014 (14 January 2022), [8.5]; *F.K.A.G. et al v Australia*, Comm No 2094/2011, CCPR/C/108/D/2094/2011 (28 October 2013), [2.1] and [9.4]; *M.M.M. et al v Australia*, Comm No 2136/2012, CCPR/C/108/D/2136/2012 (28 October 2013), [10.3]-[10.4]; *D and E v Australia*, Comm No 1050/2002, CCPR/C/87/D/1050/2002 (9 August 2006), [7.2]; *Bakhtiyari v Australia*, Comm No 1069/2002, CCPR/C/79/D/1069/2002 (6 November 2003), [9.3]; *Baban v Australia*, Comm No 1014/2001, CCPR/C/78/D/1014/2001 (18 September 2003), [7.2].

[44] Human Rights Committee, *Brough v Australia,* Comm No 1184/2203, CCPR/C/86/D/1184/2003 (27 April 2006), [10] (finding violations of articles 10 and 24(1) ICCPR); *A.K. et al v Australia*, Comm No 2365/2014, CCPR/C/132/D/2365/2014 (14 January 2022), [8.5]; *Bakhtiyari v Australia*, Comm No 1069/2002, CCPR/C/79/D/1069/2002 (6 November 2003), [9.7].

[45] See *Toonen v Australia*, Comm No 488/1992 (31 March 1994); Second Reading Speech on the Human Rights (Sexual Conduct) Bill 1994 by the Hon. Michael Lavarch (12 October 1994), referring to the Human Rights' Committee's findings in *Toonen* that Australia was in breach of art 17 of the ICCPR before stating that "[t]he Human Rights (Sexual Conduct) Bill translates one important element of our obligations under an international agreement into binding domestic Australian law… This bill is not a servile capitulation to the views of some international body. It is a statement of this government's belief in and support for the standards enshrined in the international covenant".

with his or her family through correspondence and visits, save in exceptional circumstances".

58. As noted above, Australia has made a reservation to the CRC with respect to art 37(c), and expressly "ratifies the Convention to the extent that it is unable to comply with the obligation imposed by article 37 (c)."[46] This reservation constitutes a unilateral statement by Australia that purports to limit the obligations imposed upon Australia under the CRC.[47]

59. Reservations that are not incompatible with the object and purpose of the CRC are permissible: CRC, art 51(2). We do not consider that Australia's reservation is incompatible with the CRC. Nor, it would appear, does the Committee. While the Committee recommends that Australia consider removing its reservation to art 37(c) CRC,[48] its reasoning is that the reservation is "unnecessary", as "there appears to be no contradiction between the logic behind it and the provisions of article 37 (c) of the Convention."[49]

60. Because of its permissible reservation, Australia is not bound by art 37(c) of the CRC.[50] It follows that art 37(c) is not presently a treaty obligation binding upon Australia that provides a basis for a valid law pursuant to the external affairs power.

61. Were Australia to withdraw its reservation to art 37(c), we consider that the sub-provision could be relied upon to pass federal legislation providing that "no child shall be held in a correctional facility designed for or used by adults, for any period of time, *unless holding the child in such a facility is considered to be in the best interests of the child*".

62. However, it is unlikely to support a law framed in the terms set out in Question 1(b)(ii) of the Brief, for the following reasons.

63. Article 37(c) of the CRC is framed in obligatory terms ("States Parties shall ensure that …") and prescribes how that obligation is to be fulfilled with some precision ("[i]n 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…").

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[46] UNTC, "Convention on the Rights of the Child" (accessed 4 June 2025).
[47] See "Guide to Practice on Reservations to Treaties", adopted by the International Law Commission (ILC) at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10, para. 75), [1.1.1]. The UN General Assembly has taken note of the "Guide to Practice on Reservations to Treaties", and encouraged its widest possible dissemination: UN General Assembly, "Resolution adopted by the General Assembly on 16 December 2013", A/RES/68/111 (19 December 2013), [3].
[48] 2019 Concluding Observations, [6], citing also Committee on the Rights of the Child, "Consideration of reports submitted by States parties under article 44 of the Convention", CRC/C/AUS/CO/4 (28 August 2012), [10] and Committee on the Rights of the Child, "Consideration of reports submitted by States parties under article 44 of the Convention", CRC/C/15/Add.268 (20 October 2005), [8].
[49] Committee on the Rights of the Child, "Consideration of reports submitted by States parties under article 44 of the Convention", CRC/C/AUS/CO/4 (28 August 2012), [9].
[50] "Guide to Practice on Reservations to Treaties", [4.2.4].

64. It is a precise obligation capable of supporting legislation enacted under s 51(xxix) of the Constitution.

65. In General Comment No 24, the Committee states:[51]

> "Every child deprived of liberty is to be separated from adults, including in police cells. A child deprived of liberty is not to be placed in a centre or prison for adults, as there is abundant evidence that this compromises their health and basic safety and their future ability to remain free of crime and to reintegrate. The permitted exception to the separation of children from adults stated in article 37 (c) of the Convention – "unless it is considered in the child's best interests not to do so" – should be interpreted narrowly and the convenience of the States parties should not override best interests. States parties should establish separate facilities for children deprived of their liberty that are staffed by appropriately trained personnel and that operate according to child-friendly policies and practices."

66. In its 2019 Concluding Observations, the Committee stated (emphasis added):[52]

> "With reference to its general comment No. 24 (2019) on children's rights in the child justice system, the Committee urges the State party to bring its child justice system fully into line with the Convention and […]
>
> (e) In cases where detention is unavoidable, to ensure that children are detained in separate facilities…"

67. The proposed formulation of the law in Question 1(b)(ii) is that "no child shall be held in a correctional facility designed for or used by adults, for any period of time". This unequivocal framing is inconsistent with the "child's best interest" exception in art 37(c) of the CRC.

68. The best interests of the child is a core principle of the CRC that is to be a primary consideration in all actions concerning children (art 3). The Committee states that this exception in art 37(c) "should be interpreted narrowly and the convenience of the States parties should not override best interests".[53] However, within these confines, it is a core aspect of art 37(c) which reflects the overriding principle of CRC art 3.

69. As noted above, it is permissible to implement treaty obligations in part, so long as the deficiency "is not so substantial as to deny the law the character of a measure implementing the Convention".[54] A law framed in the terms proposed in Question 1(b)(ii) would be open to constitutional challenge on the basis that it lacked the character of a measure implementing the CRC due to its failure to make allowance for the "best interests" principle.

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[51] General Comment No 24, [92].
[52] 2019 Concluding Observations, [48(e)].
[53] General Comment No 24, [92].
[54] *Industrial Relations Act Case* at 488-489 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

70. We consider that, were Australia to withdraw its reservation to art 37(c), the CRC could be relied upon to pass federal legislation providing that that "no child shall be held in a correctional facility designed for or used by adults, for any period of time, *unless holding the child in such a facility is considered to be in the best interests of the child"*.

71. There are some differences between the formulation of the treaty obligation in art 37(c) and the proposed law, as amended above. However, on balance, we consider the proposed law as amended to be tailored to, and consistent with, the obligation in art 37(c).

72. The treaty obligation calls for "every child deprived of liberty" to be "separated from adults unless it is considered in the child's interest not to do so", and to be treated in a manner "which takes into account the needs of persons of his or her age".

73. The proposed law (as amended) prohibits holding a child "in a correctional facility designed for or used by adults, for any period of time", unless the best interests exception applies. To the extent that this proposed law prohibits holding children in a facility "used by adults", we consider it to be sufficiently tailored to the treaty obligation to separate children from adults. This conclusion is reinforced by the statement in General Comment No 24 that a child deprived of liberty is "not to be placed in a centre or prison for adults".[55] We consider this statement to be a recommendation of the Committee that can itself "reasonably be regarded as appropriate and adapted to giving effect to the terms" of the Convention to which it relates.[56]

74. The words "designed for" could encompass a prohibition on holding a child in a correctional facility designed for adults but housing only children. We consider, however, that this aspect of the proposed law would give effect to the obligation in art 37(c) to treat every child deprived of their liberty "in a manner which takes into account the needs of persons of his or her age". While a matter of degree, we consider the obligation in art 37(c) to define the course to be taken by government with sufficient specificity to support the proposed law.[57] Article 37(c) is not apt to be described as a "broad objective with little precise content … permitting widely divergent policies".[58]

75. For these reasons, we consider that s 51(xxix) of the Constitution would support federal legislation providing that "no child shall be held in a correctional facility designed for or used by adults, for any period of time, unless holding the child in such a facility is considered to be in the best interests of the child".

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[55] General Comment No 24, [92].
[56] *Industrial Relations Act Case* at 509 (Brennan CJ, Toohey, Gaudron, McHugh, Gummow JJ).
[57] See *Industrial Relations Act Case* at 486 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).
[58] James Stellios, "Zines' The High Court and the Constitution" (6th edn, The Federation Press 2015), p 435.

Support for this approach from other relevant international treaty obligations

76. We have not been asked to advise on the scope of any relevant rights in the ICCPR. However, we note that art 10(2)(b) of the ICCPR provides that "[a]ccused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication", and that art 24(1) provides that "[e]very child shall have … the right to such measures of protection as are required by his status as a minor…".

77. In *Brough v Australia*, the Human Rights Committee found Australia had violated arts 10 and 24 of the ICCPR in its treatment of the applicant, a 16 year-old Aboriginal boy who was initially detained in Kariong Juvenile Detention Centre, but transferred to Parklea Correctional Centre (an adult prison) where he was "segregated" from other prisoners.[59] The Human Rights Committee stated at [9.4]:

> "Even assuming that the author's confinement to a safe or dry cell was intended to maintain prison order or to protect him from further self-harm, as well as other prisoners, the Committee considers that the measure incompatible with the requirements of article 10. The State party was required by article 10, paragraph 3, read together with article 24, paragraph 1, of the Covenant to accord the author treatment appropriate to his age and legal status. In the circumstances, the author's extended confinement to an isolated cell without any possibility of communication, combined with his exposure to artificial light for prolonged periods and the removal of his clothes and blanket, was not commensurate with his status as a juvenile person in a particularly vulnerable position because of his disability and his status as an Aboriginal. As a consequence, the hardship of the imprisonment was manifestly incompatible with his condition, as demonstrated by his inclination to inflict self-harm and his suicide attempt."

78. We consider that consideration should be given to reliance on arts 10 and 24 of the ICCPR as a basis for federal legislation supported by s 51(xxix) if the Commonwealth Government declines to withdraw its reservation to art 37(c) of the CRC. Any such legislation would need to be carefully tailored to ensure that it was appropriate and adapted to the precise obligations that bind Australia as a State Party under arts 10 and 24 of the ICCPR.

Question 1(b)(iii): Power to legislate that any detention amounting to solitary confinement be absolutely prohibited for children, for any period of time (in reliance on art 37(a), along with other international law materials)

79. We have been asked to advise whether art 37(a), along with other international law materials, could be relied upon by the Commonwealth Government to enact legislation

[59] Human Rights Committee, *Brough v Australia,* Comm No 1184/2203, CCPR/C/86/D/1184/2003 (27 April 2006), [2.1]-[2.14].

providing that any detention amounting to solitary confinement be absolutely prohibited for children, for any period of time.

80. Article 37(a) of the CRC does not expressly refer to solitary confinement. It provides:

> "States Parties shall ensure that … [n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age".

81. However, in its General Comment No 24, the Committee stated that solitary confinement is contrary to art 37 CRC (emphasis added):[60]

> "…Disciplinary measures in violation of article 37 of the Convention must be strictly forbidden, including corporal punishment, placement in a dark cell, solitary confinement or any other punishment that may compromise the physical or mental health or well-being of the child concerned ...
>
> Solitary confinement should not be used for a child. Any separation of the child from others should be for the shortest possible time and used only as a measure of last resort for the protection of the child or others. Where it is deemed necessary to hold a child separately, this should be done in the presence or under the close supervision of a suitably trained staff member, and the reasons and duration should be recorded".

82. In its 2019 Concluding Observations, the Committee stated (emphasis added):[61]

> "With reference to its general comment No. 24 (2019) on children's rights in the child justice system, the Committee urges the State party to bring its child justice system fully into line with the Convention and […]
>
> (c) To 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".

83. The Committee's statement that solitary confinement violates art 37 is a recommendation that can "reasonably be regarded as appropriate and adapted to giving effect to the terms" of the Convention to which it relates.[62]

84. The 2019 Concluding Observations cited above provide a further recommendation that is expressly addressed to Australia.

85. In light of the Committee's recommendations, we consider it likely that a law framed in the terms proposed would be supported by s 51(xxix) of the Constitution as a law with respect to external affairs. Such a law would be reasonably considered to be

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[60] General Comment No 24, [95(g)-(h)].
[61] 2019 Concluding Observations, [48(c)].
[62] *Industrial Relations Act Case* at 509 (Brennan CJ, Toohey, Gaudron, McHugh, Gummow JJ).

appropriate and adapted to implementing art 37(a) of the CRC, as it has been articulated by the Committee.

86. While the analysis above is sufficient to answer the question posed, we have also considered other international material in relation to solitary confinement. Specifically:

(a) Rule 67 of the United Nations Rules[63] provides that "[a]ll disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned". The UN General Assembly adopted these rules in 1990 and invited Member States to "adapt, wherever necessary, their national legislation … to the spirit of the Rules".[64] We do not consider this instrument – which does not itself impose obligations on Australia – to provide a solid basis upon which to support legislation under s 51(xxix) of the Constitution.

(b) Rule 45(2) of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) provides that "[t]he prohibition of the use of solitary confinement and similar measures in cases involving women and children … continues to apply".[65] Solitary confinement is defined, "for the purpose of these rules", as confinement of prisoners for 22 hours or more a day without meaningful human contact.[66] The Nelson Mandela Rules are not expressed as binding obligations – their preliminary observations state that they seek to "set out what is generally accepted as being good principles and practice in the treatment of prisoners", and that "not all of the rules are capable of application in all places at all times".[67] In adopting the Nelson Mandela Rules, the UN General Assembly reaffirmed the preliminary observations and "underscore[d] the non-binding nature of the Rules".[68] We therefore do not consider that the Nelson Mandela Rules provide a solid basis for engaging s 51(xxix) of the Constitution.

(a) The United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment recommends, "[w]ith reference to rule 45 of the Nelson Mandela Rules and rule 67 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty", that Australia ensure "that persons under the age of 18 years are never subject to solitary confinement,

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[63] Annexed to UN General Assembly Resolution 45/113, "United Nations Rules for the Protection of Juveniles Deprived of their Liberty" (68th Plenary Meeting, 14 December 1990).
[64] UN General Assembly Resolution 45/113 (14 December 1990), [4], [6].
[65] UNODC, "The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (undated). See also rule 43(a)-(b).
[66] Nelson Mandela Rules, rule 44.
[67] Nelson Mandela Rules, Preliminary observations 1-2.
[68] UN General Assembly Resolution 70/175, "United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)", A/RES/70/175 (8 January 2016), [8].

as this constitutes a form of ill-treatment and in some cases may amount to torture."[69] Australia is a Party to the Convention against Torture[70] and its Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[71] This recommendation provides a basis, albeit a weak one, for supporting the proposed legislation under s 51(xxix). The Sub-Committee appears to focus not on the obligation in art 2 of the Convention Against Torture, but rather on the Nelson Mandela Rules and the United Nations Rules.

Question 1(b)(iv): Power to legislate that every child accused of a criminal offence and/or deprived of their liberty have prompt access to legal assistance and representation (in reliance on art 37(d) and art 40(2)(b)(ii))

87. We have been asked to advise whether art 37(d) and art 40(2)(b)(ii) could be relied upon to enact Commonwealth legislation providing that "every child accused of a criminal offence and/or deprived of their liberty have prompt access to legal assistance and representation".

88. Article 37(d) of the CRC provides:

> "States Parties shall ensure that: […]
>
> (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."

89. Article 40(2)(b)(ii) of the CRC provides:

> "…having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that: […]
>
> (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees: […]
>
> (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence".

90. Both arts 37(d) and 40(2)(b)(ii) are framed in obligatory terms ("States Parties shall …"). In our view, each sub-provision prescribes how the obligation is to be fulfilled

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[69] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, "Visit to Australia undertaken from 16 to 23 October 2022: recommendations and observations addressed to the State party", CAT/OP/AUS/ROSP/1 (20 December 2023), [74].
[70] 1465 UNTS 85 (concluded 10 December 1984; entered into force 26 June 1987).
[71] 2375 UNTS 237 (18 December 2022, entered into force 22 June 2006).

with sufficient precision to empower the Commonwealth Government to enact appropriate and adapted legislation under s 51(xxix) of the Constitution.

91. In assessing whether the proposed law is appropriate and adapted to the terms of the CRC, we note that the formulation of the proposed legislation differs from the terms of the international obligations in arts 37(d) and 40(2)(b)(ii) of the CRC.

92. The proposed legislation conflates the obligations that bind the State in relation to a child who has been accused of a criminal offence and/or deprived of their liberty. These two circumstances are dealt with separately under the CRC and the State is bound by discrete obligations in each case:

(a) Under art 37(d) of the CRC, a child deprived of liberty is entitled to "prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority…".

(b) In contrast, under art 40(2)(b)(ii) of the CRC, a child alleged to have or accused of having infringed the penal law is entitled "*if appropriate* … to have legal *or* other appropriate assistance in the preparation and presentation of his or her defence" (emphasis added).

93. However, in General Comment No 24, the Committee recalls that art 14(3)(d) of the ICCPR enshrines the right of legal representation in the criminal justice system for all persons. Article 14(3)(d) of the ICCPR (which binds Australia)[72] provides:

> "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality […]
>
> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it".

94. The Committee accordingly recommends that States:

(a) "ensure that the child is guaranteed legal or other appropriate assistance from the outset of the proceedings, in the preparation and presentation of the defence, and until all appeals and/or reviews are exhausted;[73] and

(b) "provide effective legal representation, free of charge, for all children who are facing criminal charges before judicial, administrative or other public authorities".[74]

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[72] See "International Covenant on Civil and Political Rights" accessed 4 June 2025. Australia's reservation with respect to article 14 does not affect this obligation.
[73] General Comment No 24, [49].
[74] General Comment No 24, [51].

95. We consider that the Committee's recommendations can be "reasonably be regarded as appropriate and adapted to giving effect to the terms" of the CRC.[75]

96. In reaching this conclusion, we note that the chapeau to art 40(2)(b)(ii) expressly refers to "relevant provisions of international instruments".

97. The proposed law is therefore reasonably capable of being considered appropriate and adapted to the terms of the CRC.

98. Accordingly, we consider it likely that a law framed in the terms proposed would be supported by s 51(xxix) of the Constitution as a law with respect to external affairs.

Kate Eastman AM SC
New Chambers

Emma Dunlop
Omnia Chambers

23 June 2025

[75] *Industrial Relations Act Case* at 509 (Brennan CJ, Toohey, Gaudron, McHugh, Gummow JJ).

ANNEXURE A

Australia's 2021 Universal Periodic Review[76] included recommendations from 29 countries to raise the age of criminal responsibility, set out below.

1) 146.140 Raise the minimum age of criminal responsibility to 18 years, and prohibit isolation and the use of force as forms of punishment in juvenile justice centres (Bolivarian Republic of Venezuela);

2) 146.141 Consider raising the minimum age of criminal responsibility to at least 14 years (Slovakia);

3) 146.142 Amend Australia's legislation in order to increase the minimum age of criminal responsibility to at least 14 years and withdraw the reservations to article 37 (c) of the Convention on the Rights of the Child regarding the separation of children, which requires detained children to be separated from adults (Spain);

4) 146.143 Raise the minimum age of criminal responsibility to an internationally accepted level (Sri Lanka);

5) 146.144 Raise the age of criminal responsibility to at least 14 years, in line with the international standard and as recommended by the Committee on the Rights of the Child (Sweden);

6) 146.145 Raise the minimum age of detention for minors to 14 years or above in conformity with the recommendation of the Committee on the Rights of the Child (Switzerland);

7) 146.146 Consider revising the minimum age of criminal responsibility in accordance with the recommendations of the Committee on the Rights of the Child (Uruguay);

8) 146.147 Increase the minimum age of criminal responsibility and adopt measures to ensure children receive appropriate community support directed at addressing risk factors (Canada);

9) 146.148 Raise the current minimum age of criminal responsibility from 10 to 14 years, in line with international standards on the matter, and promote non-custodial measures (Chile);

10) 146.149 Increase the minimum age of criminal responsibility across all states and territories (Croatia);

11) 146.150 Raise the minimum age of criminal responsibility to at least 14 years (Cyprus);

12) 146.151 Raise the minimum age of criminal responsibility to at least 14 years and prohibit the use of isolation and force as punishment in juvenile justice facilities (Zambia);

13) 146.152 Promote non-judicial measures for children accused of criminal offences and raise the minimum age of criminal responsibility (Czechia);

14) 146.153 Significantly raise the minimum age of criminal responsibility (Denmark);

15) 146.154 Raise the age of criminal responsibility (Estonia);

16) 146.155 Bring the child justice system fully into line with international standards, including by raising the minimum age of criminal liability to 14 years (Finland);

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[76] UN General Assembly, Human Rights Council, 47th Sess., Universal Periodic Review, "Report of the Working Group on the Universal Periodic Review: Australia", A/HRC/47/8, 24 March 2021, [146].

17) 146.156 Raise the minimum age of criminal responsibility to 13 years and improve the conditions of detention of minors under the age of 15 (France);

18) 146.157 Raise the minimum age of criminal responsibility to at least 14 years (Germany);

19) 146.158 Consider raising the age of criminal responsibility to 14 years of age (Greece);

20) 146.159 Raise the minimum age of criminal responsibility nationwide and fund and support community-led prevention and diversion programmes that keep children and youth out of prison (Iceland);

21) 146.160 Enact laws that raise the minimum age of criminal responsibility to 14 years (Lithuania) and 146.161 Bring elements of the child justice system specified by the Committee on the Rights of the Child into line with the Convention on the Rights of the Child (Lithuania);

22) 146.162 Raise the minimum age of criminal responsibility (Luxembourg);

23) 146.163 Raise the minimum age of criminal responsibility nationwide to at least 14 years (Malta);

24) 146.164 Raise the age of criminal responsibility, and harmonize the juvenile justice system with the Convention on the Rights of the Child (Mexico);

25) 146.165 Raise the minimum age of criminal responsibility of children to 14 years, in accordance with international standards (North Macedonia);

26) 146.166 Adopt recommendations by the Committee on the Rights of the Child to raise the minimum age of criminal responsibility to at least 14 years of age (Norway);

27) 146.167 Raise the minimum age of criminal responsibility to 14 years of age (Poland);

28) 146.168 Raise the minimum age of criminal responsibility to at least 14 years old (Portugal);

29) 146.169 Adjust the national child justice system in line with the Convention on the Rights of the Child, in particular raise the minimum age of criminal responsibility from 10 to 14 years of age (Republic of Moldova).

ANNEXURE B – PROVISIONS IN COMMONWEALTH LEGISLATION INCORPORATING INTERNATIONAL TREATIES

A. Limited application provisions incorporating international treaties

Age Discrimination Act 2004 **(Cth)**

10 Application of Act – constitutional powers

(7) The limited application provisions have effect in relation to discrimination against a person on the ground of age to the extent that the provisions:

(a) give effect to the Discrimination (Employment and Occupation) Convention, 1958 adopted by the General Conference of the International Labour Organization on 25 June 1958 (a copy of the English text of which is set out in Schedule 1 to the *Australian Human Rights Commission Act 1986*); or

(b) give effect to the International Covenant on Civil and Political Rights (a copy of the English text of which is set out in Schedule 2 to the *Australian Human Rights Commission Act 1986*); or

(c) give effect to the International Covenant on Economic, Social and Cultural Rights; or

(d) give effect to the Convention on the Rights of the Child; or

(e) relate to matters external to Australia; or

(f) relate to matters of international concern.

Racial Discrimination Act 1975 **(Cth)**

3 Interpretation

Convention means the International Convention on the Elimination of All Forms of Racial Discrimination that was opened for signature on 21 December 1965 and entered into force on 2 January 1969, being the Convention a copy of the English text of which is set out in the Schedule.

9 Discrimination

(1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life. […]

(2) A reference in this section to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes any right of a kind referred to in Article 5 of the Convention.

Sex Discrimination Act 1984 **(Cth)**

9 Application of Act

(10) The prescribed provisions of Part II, and the prescribed provisions of Division 3 of Part II, have effect to the extent that the provisions give effect to a relevant international instrument.

4 Interpretation

relevant international instrument means:

(a) the Convention on the Elimination of All Forms of Discrimination Against Women done at New York on 18 December 1979 ([1983] ATS 9) (a copy of the English text of which is set out in the Schedule); or

(b) the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23); or

(c) the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5); or

(d) the Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4); or

(e) ILO Convention (No. 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value done at Geneva on 29 June 1951 ([1975] ATS 45); or

(f) ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation done at Geneva on 25 June 1958 ([1974] ATS 12); or

(g) ILO Convention (No. 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities done at Geneva on 23 June 1981 ([1991] ATS 7); or

(h) ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer done at Geneva on 22 June 1982 ([1994] ATS 4).

Disability Discrimination Act 1992 **(Cth)**

12 Application of Act

(8) The limited application provisions have effect in relation to discrimination against a person with a disability to the extent that the provisions:

(a) give effect to the Convention; or

(b) give effect to the Covenant on Civil and Political Rights; or

(ba) give effect to the Disabilities Convention; or

(c) give effect to the International Covenant on Economic, Social and Cultural Rights; or

(d) relate to matters external to Australia; or

(e) relate to matters of international concern.

4 Interpretation

Convention means the Discrimination (Employment and Occupation) Convention, 1958 adopted by the General Conference of the International Labour Organization on 25 June 1958, a copy of the English text of which is set out in Schedule 1 of the *Australian Human Rights Commission Act 1986*.

***Privacy Act 1988* (Cth)**

12B Severability—additional effect of this Act

(2) This Act also has the effect it would have if its operation in relation to regulated entities were expressly confined to an operation to give effect to the following:

(a) the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23), and in particular Articles 17 and 24(1) of the Covenant;

(b) Article 16 of the Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4).

26XE Constitutional basis of this Division [Division 5 – Dealing with personal information involved in eligible data breaches]

This Division relies on the Commonwealth's legislative powers under paragraph 51(xxix) (external affairs) of the Constitution as it relates to giving effect to Australia's obligations under relevant international agreements, in particular Article 17 of the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23).

B. Objects provisions incorporating international treaties

***National Disability Insurance Scheme Act 2013* (Cth)**

3 Objects of Act

(1) The objects of this Act are to:

(a) in conjunction with other laws, give effect to Australia's obligations under the Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006 ([2008] ATS 12); and

….

(i) in conjunction with other laws, give effect to certain obligations that Australia has as a party to:

(i) the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23); and

(ii) the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5); and

(iii) the Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4); and

(iv) the Convention on the Elimination of All Forms of Discrimination Against Women done at New York on 18 December 1979 ([1983] ATS 9); and

(v) the International Convention on the Elimination of All Forms of Racial Discrimination done at New York on 21 December 1965 ([1975] ATS 40).

C. Other types of provisions incorporating international treaties

***Australian Human Rights Commission Act 1986* (Cth)**

3 Interpretation

Convention means the Discrimination (Employment and Occupation) Convention, 1958 adopted by the General Conference of the International Labour Organization on 25 June 1958, a copy of the English text of which is set out in Schedule 1, as that Convention applies in relation to Australia.

Covenant means the International Covenant on Civil and Political Rights, a copy of the English text of which is set out in Schedule 2, as that International Covenant applies in relation to Australia.

human rights means the rights and freedoms recognised in the Covenant, declared by the Declarations or recognised or declared by any relevant international instrument.

31 Functions of Commission relating to equal opportunity

The following functions are hereby conferred on the Commission: […]

(f) when requested by the Minister, to report to the Minister as to the action (if any) that, in the opinion of the Commission, needs to be taken by Australia in order to comply with the provisions of the Convention;

(g) on its own initiative or when requested by the Minister, to examine any relevant international instrument for the purpose of ascertaining whether there are any inconsistencies between that instrument and the Convention, and to report to the Minister the results of any such examination;

Part IIA—Aboriginal and Torres Strait Islander Social Justice Commissioner

46C Functions of the Commission that are to be performed by the Commissioner etc.

(4) In the performance of functions, or the exercise of powers, under this section, the Commissioner must, as appropriate, have regard to:

(a) the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child; and

(b) such other instruments relating to human rights as the Commissioner considers relevant.

Part IIAA—National Children's Commissioner

46MB Functions of Commission that are to be performed by the National Children's Commissioner etc.

(6) In performing functions, or exercising powers, under this section, the National Children's Commissioner must, as appropriate, have regard to:

(a) the Universal Declaration of Human Rights (United Nations General Assembly Resolution A/RES/217(III) A (1948); and

(b) the following, as amended and in force for Australia from time to time:

(i) the International Convention on the Elimination of all Forms of Racial Discrimination done at New York on 21 December 1965 ([1975] ATS 40);

(ii) the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5);

(iii) the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23);

(iv) the Convention on the Elimination of All Forms of Discrimination Against Women done at New York on 18 December 1979 ([1983] ATS 9);

(v) the Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4);

(vi) the Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006 ([2008] ATS 12); and

(c) such other instruments relating to human rights as the Commissioner considers relevant.

***Human Rights (Sexual Conduct) Act 1994* (Cth)**

4 Arbitrary interferences with privacy

(1) Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.

D. Provisions which relate to s 109 of the *Constitution*

D.1 Provisions reflecting an intention to cover the field

***Human Rights (Sexual Conduct) Act 1994* (Cth)**

4 Arbitrary interferences with privacy

(1) Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.

***Native Title Act 1993* (Cth)**

11 Extinguishment of native title

(1) Native title is not able to be extinguished contrary to this Act.

***Airports Act 1996* (Cth)**

112 Exclusion of State laws

(1) It is the intention of the Parliament that this Part is to apply to the exclusion of a law of a State.

(2) In particular, it is the intention of the Parliament that this Part is to apply to the exclusion of a law of a State relating to:

(a) land use planning; or

(b) the regulation of building activities.

***Biosecurity Act 2015* (Cth)**

172 Exclusion of State and Territory laws

This Part applies to the exclusion of a law, or a provision of a law, of a State or Territory to the extent that the law or provision purports to prohibit or restrict the bringing or importation of particular goods into Australian territory, or into a part of Australian territory, from outside Australian territory for the purpose of managing biosecurity risks associated with the goods.

D.2 Provisions reflecting an intention not to cover the field

***Age Discrimination Act 2004* (Cth)**

12 Operation of State and Territory laws

(1) A reference in this section to this Act is a reference to this Act as it has effect because of a provision of sections 9 and 10.

(2) A reference in this section to a law of a State or Territory is a reference to a law of a State or Territory that deals with discrimination on the ground of age.

(3) This Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act.

(4) If:

(a) a law of a State or Territory relating to discrimination deals with a matter dealt with by this Act; and

(b) a person has made a complaint or initiated a proceeding under that law in respect of an act in respect of which the person would, apart from this subsection, have been entitled to make a complaint under the *Australian Human Rights Commission Act 1986* alleging that the act is unlawful under a provision of Part 4 of this Act;

the person is not entitled to make a complaint or institute a proceeding under the *Australian Human Rights Commission Act 1986* alleging that the act is unlawful under a provision of Part 4 of this Act.

(5) If:

(a) a law of a State or Territory relating to discrimination deals with a matter dealt with by this Act; and

(b) an act by a person that constitutes an offence against that law also constitutes an offence against this Act;

the person may be prosecuted and convicted either under that law of the State or Territory or under this Act

(6) Nothing in subsection (5) makes a person liable to be punished more than once in respect of the same act.

***Racial Discrimination Act 1975* (Cth)**

6A Operation of State and Territory laws

(1) This Act is not intended, and shall be deemed never to have been intended, to exclude or limit the operation of a law of a State or Territory that furthers the objects of the Convention and is capable of operating concurrently with this Act.

(2) Where:

(a) a law of a State or Territory that furthers the objects of the Convention deals with a matter dealt with by this Act; and

(b) a person has, whether before or after the commencement of this section, made a complaint, instituted a proceeding or taken any other action under that law in respect of an act or omission in respect of which the person would, but for this subsection, have been entitled to make a complaint under the *Australian Human Rights Commission Act 1986* alleging that the act or omission is unlawful under a provision of Part II or IIA of this Act;

the person shall be deemed never to have been, and is not, entitled to make a complaint or institute a proceeding under the *Australian Human Rights Commission Act 1986* alleging that the act or omission is unlawful under a provision of Part II or IIA of this Act and any proceedings pending under this Act at the commencement of this section in respect of such a complaint made before that commencement are, by force of this subsection, terminated.

(3) Where:

(a) a law of a State or Territory that furthers the objects of the Convention deals with a matter dealt with by this Act; and

(b) an act or omission by a person that constitutes an offence against that law also constitutes an offence against this Act;

the person may be prosecuted and convicted either under that law of the State or Territory or under this Act, but nothing in this subsection renders a person liable to be punished more than once in respect of the same act or omission.

***Sex Discrimination Act 1984* (Cth)**

10 Operation of State and Territory laws

(1) A reference in this section to this Act is a reference to this Act as it has effect by virtue of any of the provisions of section 9 other than subsection 9(10).

(2) A reference in this section to a law of a State or Territory is a reference to a law of a State or Territory that deals with work health and safety, discrimination on the ground of sex, discrimination on the ground of sexual orientation, discrimination on the ground of gender identity, discrimination on the ground of intersex status, discrimination on the ground of marital or relationship status, discrimination on the ground of pregnancy or potential pregnancy, discrimination on the ground of breastfeeding or discrimination on the ground of family responsibilities.

(3) This Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act.

(4) Where:

(a) a law of a State or Territory deals with a matter dealt with by this Act; and

(b) a person has made a complaint, instituted a proceeding or taken any other action under that law, other than a claim for workers compensation, in respect of an act or omission in respect of which the person would, but for this subsection, have been entitled to make a complaint under the *Australian Human Rights Commission Act 1986* alleging that the act or omission is unlawful under a provision of Part II of this Act;

the person is not entitled to make a complaint or institute a proceeding under the *Australian Human Rights Commission Act 1986* alleging that the act or omission is unlawful under a provision of Part II of this Act.

(5) Where:

(a) a law of a State or Territory deals with a matter dealt with by this Act; and

(b) an act or omission by a person that constitutes an offence against that law also constitutes an offence against this Act;

the person may be prosecuted and convicted either under that law of the State or Territory or under this Act, but nothing in this subsection renders a person liable to be punished more than once in respect of the same act or omission.

11 Operation of State and Territory laws that further objects of relevant international instruments

(1) A reference in this section to this Act is a reference to this Act as it has effect by virtue of subsection 9(10).

(2) A reference in this section to a law of a State or Territory is a reference to a law of a State or Territory that deals with work health and safety, discrimination on the ground of sex, discrimination on the ground of sexual orientation, discrimination on the ground of gender identity, discrimination on the ground of intersex status, discrimination on the ground of marital or relationship status, discrimination on the ground of pregnancy or potential pregnancy, discrimination on the ground of breastfeeding or discrimination on the ground of family responsibilities.

(3) This Act is not intended to exclude or limit the operation of a law of a State or Territory that furthers the objects of a relevant international instrument and is capable of operating concurrently with this Act.

(4) Where:

(a) a law of a State or Territory that furthers the objects of a relevant international instrument deals with a matter dealt with by this Act; and

(b) a person has made a complaint, instituted a proceeding or taken any other action under that law, other than a claim for workers compensation, in respect of an act or omission in respect of which the person would, but for this subsection, have been entitled to make a complaint under the *Australian Human Rights Commission Act 1986* alleging that the act or omission is unlawful under a provision of Part II of this Act;

the person is not entitled to make a complaint or institute a proceeding under the *Australian Human Rights Commission Act 1986* alleging that the act or omission is unlawful under a provision of Part II of this Act.

(5) Where:

(a) a law of a State or Territory that furthers the objects of a relevant international instrument deals with a matter dealt with by this Act; and

(b) an act or omission by a person that constitutes an offence against that law also constitutes an offence against this Act;

the person may be prosecuted and convicted either under that law of the State or Territory or under this Act, but nothing in this subsection renders a person liable to be punished more than once in respect of the same act or omission.

Disability Discrimination Act 1992 (Cth)

13 Operation of State and Territory laws

(1) A reference in this section to this Act is a reference to this Act as it has effect because of a provision of section 12.

(2) A reference in this section to a law of a State or Territory is a reference to a law of a State or Territory that deals with discrimination on the grounds of disability.

(3) This Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act.

(3A) Subsection (3) does not apply in relation to Division 2A of Part 2 (Disability standards).

(4) If:

(a) a law of a State or Territory relating to discrimination deals with a matter dealt with by this Act (including a matter dealt with by a disability standard); and

(b) a person has made a complaint or initiated a proceeding under that law in respect of an act or omission in respect of which the person would, apart from this subsection, have been entitled to make a complaint under the *Australian Human Rights Commission Act 1986* alleging that the act or omission is unlawful under a provision of Part 2 of this Act;

the person is not entitled to make a complaint or institute a proceeding under the *Australian Human Rights Commission Act 1986* alleging that the act or omission is unlawful under a provision of Part 2 of this Act.

(5) If:

(a) a law of a State or Territory deals with a matter dealt with by this Act (including a matter dealt with by a disability standard); and

(b) an act or omission by a person that constitutes an offence against that law also constitutes an offence against this Act;

the person may be prosecuted and convicted either under that law of the State or Territory or under this Act, but nothing in this subsection renders a person liable to be punished more than once in respect of the same act or omission.

Australian Human Rights Commission Act 1986 **(Cth)**
4 Operation of State and Territory laws (1) This Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act. (2) If: (a) a law of a State or Territory deals with a matter dealt with by this Act; and (b) an act or omission by a person that constitutes an offence against that law also constitutes an offence against this Act; the person may be prosecuted and convicted either under that law of the State or Territory or under this Act, but nothing in this subsection renders a person liable to be punished more than once in respect of the same act or omission.
National Disability Insurance Scheme Act 2013 **(Cth)**
207 Concurrent operation of State laws (1) It is the intention of the Parliament that this Act is not to apply to the exclusion of a law of a State or Territory to the extent that that law is capable of operating concurrently with this Act. (2) The regulations may prescribe kinds of laws of States and Territories as examples of laws to which subsection (1) applies.
Privacy Act 1988 **(Cth)**
3 Saving of certain State and Territory laws It is the intention of the Parliament that this Act is not to affect the operation of a law of a State or of a Territory that makes provision with respect to the collection, holding, use, correction or disclosure of personal information (including such a law relating to credit reporting or the use of information held in connection with credit reporting) and is capable of operating concurrently with this Act.