



## Calling for Australian Government action to protect children

The National Aboriginal and Torres Strait Islander Legal Services ('NATSILS') and the Justice and Equity Centre ('the JEC') have received expert legal advice that the Australian Government has the constitutional power to:

- raise the minimum age of criminal responsibility to 14 years old across Australia; and
- set minimum legislated standards for the treatment of children and young people in state and territory criminal legal systems.

### The Constitution and the states

The Australian Constitution divides-up power between the national (Australian) and state governments, giving the Australian Government the ability to make laws on certain issues. All other law-making powers remain with the states.

If there is an overlap between powers, and an inconsistency between laws, the laws of the Australian Government apply and the law of the state has no effect – to the extent of the inconsistency.

Power to make laws relating to policing, prisons and youth detention centres mostly belong to states, not the Australian Government.

### The 'external affairs' power

However, the Commonwealth has the power to make laws about 'external affairs'.

The High Court of Australia has said that this power includes giving effect to treaties that Australia has signed with other countries. If a treaty requires Australia to do something, the Australian Government can pass laws to make it happen.

### The Convention on the Rights of the Child

Treaties cover lots of different topics – trade, air travel, border disputes.

Some treaties are commitments to respect the rights of certain people within the borders of the country that signs. For example, Australia has signed treaties to protect the rights of people with disability, women and workers. This has enabled the Australian Government to pass laws about disability discrimination, sexual harassment and the minimum wage.

Australia has also signed the Convention on the Rights of the Child. This is a treaty which sets out what countries must do to protect children within their borders.

### Protecting children

NATSILS and the JEC are concerned that the states and territories are not doing enough to protect children who have involvement with police and courts.

We asked two expert lawyers for their advice about the Australian Government's power to make laws that give effect to the Convention on the Rights of the Child, that would override state or territory laws that are inconsistent.

We asked the experts if the Australian Government can pass a law to raise the age of criminal responsibility to 14 years, so that children younger than 14 cannot be sent to prison.

They say yes, the Australian Government can.

We asked the experts if the Australian Government can make a law that a child or young person can only be arrested or held as a last resort – when there is no other option – and for as short a period of time as possible.

They say yes, the Australian Government can.

We asked the experts if the Australian Government can make a law that forbids any child or young person being held in solitary confinement.

They say yes, the Australian Government can.

The experts have told us clearly that the Commonwealth government *can* take action. Now, NATSILS and the JEC say, with a majority of states and territories failing children and failing on community safety, the Australian Government *must* take action to implement its international treaty obligations and protect all children in Australia.

*The information provided is general information and is not legal advice.*