

Australia's youth justice and incarceration system

**Submission to the Senate Legal
and Constitutional Affairs
References Committee**



10 October 2024

Acknowledgment of Country

The Australian National Preventive Mechanism (NPM) acknowledges the Aboriginal and Torres Strait Islander peoples throughout Australia and the Traditional Custodians of the lands across which we conduct our business.

We pay our respects to the custodians of the lands on which we work as well as their ancestors and Elders, past and present.

The Australian NPM is committed to honouring Australian Aboriginal and Torres Strait Islander peoples' unique cultural and spiritual relationships to the land, waters, and seas, and their rich contribution to society.

Warning for Aboriginal and/or Torres Strait Islander persons

A warning for Aboriginal and/or Torres Strait Islander persons that the names of deceased Aboriginal people are included in this submission.

Introduction to the Australian NPM

We are members of the multi-body Australian National Preventive Mechanism (NPM), established to give effect to Australia's obligations under the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT). Under OPCAT we support the prevention of torture and other ill treatment of people deprived of their liberty, by examining treatment and conditions in places of detention, and making recommendations for improvement.

This submission is made by the following Australian NPM members:

- Australian Capital Territory (ACT) Human Rights Commission (ACT HRC)
- ACT Office of the Inspector of Custodial Services (ACT OICS)
- ACT Ombudsman
- Commonwealth NPM
- Northern Territory (NT) Community Visitor Program (NT CVP)
- NT Office of the Children's Commissioner (NT OCC)
- NT Ombudsman
- South Australian (SA) Training Centre Visitor (SA TCV)
- Tasmanian NPM
- Western Australian (WA) Office of the Inspector of Custodial Services (WA OICS).

This submission:

- establishes who we are and what we do;
- summarises our prior observations and concerns about youth detention and youth justice;
- explains the significance of NPMs and OPCAT in youth detention settings; and
- provides six suggested recommendations which we encourage the Committee to consider making.

Our membership

Membership of the Australian NPM is diverse, and all members perform other non-OPCAT functions, bringing different focuses, backgrounds and expertise relating to youth detention and youth justice. Members are independent of each another, but we act as a collective under the Australian NPM banner on matters of joint concern which are relevant to our mandate under OPCAT.

Individually, members may perform other, non-OPCAT functions related to youth detention or youth justice. Below is a summary of signatory members' key interactions with youth justice across NPM or other functions:

- **ACT NPM:** The ACT NPM is comprised of three entities: the ACT OICS, the ACT HRC and ACT Ombudsman.
 - As well as being part of the ACT NPM, ACT HRC can handle complaints about the Bimberi Youth Justice Centre and other services for children and young people. The ACT Children and Young People Commissioner promotes the rights of children and young people, and provides advice to government and community agencies on improving services for them.
 - ACT OICS must undertake a whole of centre review of youth justice centres in the ACT every 3 years. It also has discretion to undertake thematic reviews and critical incident reviews.

- The ACT Ombudsman has NPM oversight of ACT Policing facilities in cooperation with the Commonwealth NPM. It also handles complaints about ACT Policing and can undertake own motion investigations into systemic issues with ACT policing.
- **Commonwealth NPM:** The Commonwealth Ombudsman is designated as the Commonwealth NPM who has oversight over all places where people may be deprived of their liberty under the control of the Commonwealth.
 - The Commonwealth NPM undertakes the function of Independent Visitor for Children in Immigration Detention. This includes assessing the appropriateness of the conditions of the child's detention environment, providing an independent perspective of the living circumstances of the child and reviewing the Department of Home Affairs' frameworks and policies related to children.
 - The Commonwealth NPM also oversees Australian Federal Police and Australian Defence Force detention facilities. Although not a common occurrence, minors may be held from time to time.
- **NT CVP:** The NT CVP monitors, reports and advocates for the rights of persons, including youth, in mental health facilities under the *Mental Health and Related Services Act 1998* (NT) and *Disability Services Act 1993* (NT).
- **NT OCC:** The NT OCC is anticipated to be part of the NT NPM, but this is subject to commencement of NT legislation providing for NPMs. The NT OCC receives complaints relating to vulnerable children, undertakes informal and formal inquiries and investigations relating to the care and protection of children, and monitors places where children live in institutionalised settings such as youth detention facilities, residential out-of-home care accommodation and bail support accommodation. The NT OCC also influences legislative reform and policy, provides advice to government, and improves community awareness on issues relating to vulnerable children – directly informed by the voices of children and young people themselves across the NT.
- **NT Ombudsman:** The NT Ombudsman is currently the interim NPM for the NT. Separately, the NT Ombudsman receives complaints and enquiries, as well as conducts major investigations, including relating to youth detention involving NT Police.
- **SA TCV:** The SA TCV promotes and protects the rights of children and young people detained in the Adelaide Youth Training Centre through a range of functions, including visiting children and young people to talk to them about their rights, and conducting formal inspections of the centre. The SA TCV is also concurrently the Guardian for Children and Young People, Child and Young Person Visitor, and Youth Treatment Orders Visitor. The SA TCV has also been nominated as an NPM for SA, with regards to youth detention.
- **Tasmanian NPM:** Richard Connock is the Tasmanian NPM, as well as the Custodial Inspector (TAS CI) with responsibility for inspecting youth custodial centres in Tasmania.
- **WA OICS:** WA OICS was nominated by the WA Government to be the NPM for justice-related facilities, including police lock-ups, in WA. Under their separate, legislated mandate as Inspector, they oversee the way people in custody in WA are managed, including through regular inspections of detention centres holding young people, and carrying out thematic reviews, including on issues specific to children and young people in detention.

OPCAT and NPMs

OPCAT does not create new substantive human rights obligations. Instead, OPCAT creates 'procedural' human rights obligations through establishing NPMs who undertake a system of preventive visits to places where people are deprived of their liberty. Its objective is to better

protect existing human rights in such places, particularly the obligations to prevent torture and other ill treatment which Australia has held for decades. NPMs are central to OPCAT's visit system.

Under OPCAT, NPMs must have unrestricted access to all places where people may be deprived of their liberty and all people held in such places, as well as all information relevant to such places and people. NPMs must also have the power to make recommendations to relevant authorities towards improving treatment and conditions, and to make proposals and other observations on current or draft legislation.

Respect for human rights, and consistency with international human rights standards and good practice, are critical means of torture prevention. Accordingly, these closely guide NPMs' oversight of detention environments. However, NPMs' core focus is on prevention. Being preventive means looking at risks of future harm, root causes of concern, and systemic issues – giving the advantage of raising concerns so potentially harmful outcomes may be avoided. This often means looking beyond solely compliance with specific human rights obligations, standards and good practices. NPM activity, as such, requires a wide, dynamic and flexible approach when examining treatment and conditions in detention.

Australian NPM members' concerns about youth justice

Issues affecting children in youth detention have been central to the Australian NPM's joint work. We remain deeply concerned about the state of youth justice in Australia, the high rates of incarceration of children (particularly of Aboriginal and Torres Strait Islander children, and children with disability), the widespread use of isolation, the detention of children in adult facilities, and the unacceptable rates of self-harm of children in detention settings.

Our observations and experience show us that several factors are coming together to compound the risks of ill treatment of children in detention, but ultimately also to exacerbate issues in the wider community. Laws and policy settings mean more children and young people are being detained at a younger age and for longer periods of time. A lack of appropriate facilities, ongoing staffing issues, uses of isolation, and a lack of meaningful engagement and other supports, mean detention is much more likely to dehumanise, fail to serve any rehabilitative purpose, reinforce negative cycles, and lead to recidivism. This creates profoundly poor outcomes for children and young people themselves, but also means community safety is worse rather than better.

The Australian NPM has commented publicly on a number of issues in youth justice that we see across our respective jurisdictions. Below is a summary of the key issues we have identified. We have provided links to relevant publications below and would encourage the Committee to review this work for further information.

Detaining children in adult facilities

Adult facilities are fundamentally unsuitable for the detention of children. This includes police watchhouses, in which children in Queensland continue to be detained for prolonged periods, where there is limited natural light, fresh air, exercise, and activity opportunities. We continue to be alarmed by reports of children in Queensland watchhouses being subjected to uses of force as behavioural control, allegedly sexually assaulted, and held in isolation with no toilet or running water.¹

Isolation of children in detention

Isolation practices of all kinds – however described – are widespread. They are leading to severe limitations on meaningful human contact, quality time outside of cells, and impacts on access to and participation in education activity, access to appropriate healthcare, and access to legal support.

Compounding our concerns are the links between many uses of isolation and staffing shortages across facilities and jurisdictions. Insufficient staffing has led to increased time children are isolated

¹ See ABC News, [Youth Advocacy Centre taking legal action against Queensland government over watch house crisis](#) (29 April 2024); ABC News, ['Jason' was beaten repeatedly with a baton in a watch house. An investigation found the use of force was 'reasonable'](#) (10 July 2024); The Guardian, [Screaming, freezing, struggling to breathe: confronting Queensland watch house footage exposes anguish of children locked in isolation cells](#) (17 July 2024).

in their cells – along with various other consequences such as impacting access to healthcare and other support services.

Further exacerbating our concerns about the use of isolation is a lack of robust data – or other recordkeeping shortcomings – about the time children spend out of their cells, in lockdown, or experiencing other isolation practices. This impacts external oversight of these practices.

Children with disability in detention

People with disability of all ages, including children and young people, are disproportionately represented in detention environments. These settings can present unique challenges and risks for people with disability, who may face systems which are unwilling, unable, or under-resourced to appropriately accommodate disability-related needs.

Despite the overrepresentation, Australian NPM members have previously noted the under-assessment of disability in screening processes for people on arrival in detention, including for children entering youth detention. Indicators to assist with identifying disability-related needs may be missed during admissions processes, and the number of people with disability is likely much higher than records indicate.

We have observed the various barriers in prisons and youth detention to supports under the National Disability Insurance Scheme (NDIS), including gaps in identification of NDIS participation, initial NDIS application support, service provider access, post release planning, and communication between stakeholders. While reiterating detention of children must always be a last resort, where a child with a disability absolutely must be detained, they must have their specific needs identified, and must receive all necessary supports.

Deaths in youth detention in Western Australia

The death in October 2023 of an indigenous 16 year old, Cleveland Dodd, after self-harming in youth detention in WA came amidst a period of acute crisis in youth detention in that state, after a rise in recorded incidents of self-harm and attempted suicide, and while Cleveland was detained inside Unit 18 at WA's adult Casuarina Prison, temporarily gazetted as a youth detention centre. Another death in WA youth detention in August 2024 has further amplified our concerns.

Children held on remand in detention

The number of children in unsentenced detention – most commonly on remand awaiting trial – has increased since 2020–21. In 2022–23, 80% of children in detention on an average day were unsentenced, and the figure was even higher in some jurisdictions. This means the significant majority of children held in detention remain innocent until proven guilty, yet are subjected to detention environments and their lifelong consequences. While there are multiple reasons for this troubling statistic, members have noted strong correlations with bail law settings, and close links to an inability to find alternative appropriate accommodation outside of detention.

Mental health of children in detention

Children entering detention regularly have complex combinations of pre-existing mental health conditions, cognitive impairment, and histories of trauma. They may also have mental health conditions which present in a manner involving alleged offending behaviour. Not only does detention compound mental health circumstances, members have noted that access to mental

health services in detention is also flawed, as well as impacted consequentially by other facility concerns such as staffing shortages.

Detention of Aboriginal and/or Torres Strait Islander children

The detention rate for Aboriginal and/or Torres Strait Islander children aged 10-17 is more than 27 times higher than for non-Indigenous children aged 10-17.² Failures, shortcomings, and instances of ill treatment in youth detention have a profoundly disproportionate impact on Aboriginal and/or Torres Strait Islander people, including because youth detention itself has a profoundly disproportionate impact on Aboriginal and/or Torres Strait Islander people.

One particular impact we have noted in our collective work relates to healthcare. Healthcare for Aboriginal and/or Torres Strait Islander people in all forms of detention, including youth detention, must be culturally safe, and designed and led by Aboriginal and/or Torres Strait Islander people themselves. This should involve adequately resourced and empowered Aboriginal Community-Controlled Health Organisations (ACCHOs). However, access to ACCHOs is limited, and the lack of access to Medicare in youth detention (as in adult prisons) can lead to an inability to access some services, including culturally safe healthcare.

Minimum age of criminal responsibility

The minimum age of criminal responsibility in Australia remains out of step with international human rights standards. Despite [the urgings of the United Nations \(UN\) Committee on the Rights of the Child](#), Australia's minimum age of criminal responsibility is inconsistent between jurisdictions and, in a majority of jurisdictions, is set at 10 years old. The minimum age of criminal responsibility should be set at 14 years, across the country, and without exceptions. Consideration should also be given to ceasing the detention of children and young people aged under 16, [as encouraged by the UN Committee on the Rights of the Child](#).

But raising the minimum age of criminal responsibility cannot work in isolation. To support rehabilitative outcomes, preventive and diversionary measures complementary to a higher minimum age of criminal responsibility must take a therapeutic rather than justice-focused approach, be timely, trauma-informed, evidence-based, culturally safe, and part of a human rights framework. In the meantime, flow-on impacts of a lower minimum age of criminal responsibility continue, with children and young people who are Aboriginal and/or Torres Strait Islander, and/or people with disability, disproportionately affected.

Use and impact of youth detention

Appropriate treatment in detention, including a focus on preventing torture and other ill treatment, is critical. However, while detention is NPMs' core focus, we recognise youth detention is downstream in the youth justice timeline. Detention of children must always be a measure of last

² Australian Institute of Health and Welfare, [Youth justice in Australia 2022-23 \(Cat no JUV 143\)](#), table S78c: Young people in detention on an average day(a) by Indigenous status and age, states and territories, 2022-23 (rate). The rate of Aboriginal and/or Torres Strait Islander children and young people aged 10-17 in detention is 29.8, and the rate of non-Indigenous children and young people aged 10-17 in detention is 1.1.

resort, used *only* when there are no other alternatives. We remain concerned by laws, policies and practices which whether by design or in effect undermine this fundamental position.

Our collective concerns within youth detention environments are all matters of utmost importance to address. They undermine potential for rehabilitation and preparation for life outside of detention, and contribute to detention becoming entrenched and cyclical. They represent risks of ill treatment, or ill treatment itself. International good practice on alternative models of care in youth facilities, such as the therapeutic model developed by the Spanish [Diagrama Foundation](#), provides examples of the different approaches that are possible, and the meaningful impacts this can have.

Our concerns within Australia's youth detention environments as they stand also underscore the broader picture that the primary focus of a youth justice system must be on avoiding interactions with detention environments – and indeed the broader system – in the first place, through a holistic approach to youth justice. Detaining children does not make our community safer, and masks more fundamental issues which left unaddressed lead to a lack of any meaningful change.

Further work

For more information on Australian NPM members' collective observations, we encourage the Committee to consider:

- our [submission to the United Nations Committee against Torture's follow-up procedure](#) (August 2024)
- our first [Australian NPM Annual Report, for 2022-23](#) (July 2024)
- our [joint statement on Queensland law changes and detention of children in watch houses and adult prisons](#) (September 2023)
- our [joint statement on detention of children and young people](#) (November 2022)

We also encourage the Committee to look at a selection of reports from some of our individual members, which focus wholly or partly on observations and concerns relating to youth detention and/or youth justice:

- ACT OICS, [Children & Young People Detention Expectations: Isolation](#) (2023)
- ACT OICS, [ACT Standards for Youth Detention Places](#) (April 2024)
- ACT OICS, [Report of a healthy centre review of Bimberi Youth Justice Centre 2020](#) (June 2021)
- ACT OICS, [Thematic Review of Isolation of children and young people at Bimberi Youth Justice Centre](#) (November 2023)
- ACT OICS, [Submission – Inquiry into Justice \(Age of Criminal Responsibility\) Legislation Amendment Bill 2023](#) (June 2023)
- SA Office of the Guardian for Children and Young People (SA OGCYP), [From Those Who Know: Minimum Age of Criminal Responsibility](#) (2024)
- SA OGCYP, [Training Centre Visitor 2022-23 Annual Report](#) (2023)
- SA OGCYP, [Youth Treatment Order Visitor 2022-23 Annual Report](#) (2023)
- TAS CI, [Youth health care inspection report 2023](#) (July 2024)
- TAS CI, [Youth wellbeing inspection report 2024](#) (July 2024)
- WA OICS, [Report 148: 2023 Inspection of Banksia Hill Detention Centre and Unit 18 at Casuarina Prison \(Part One\)](#) (May 2023)
- WA OICS, [People in custody with an intellectual disability](#) (July 2024)
- WA OICS, [People in custody with a hearing impairment](#) (October 2023)
- WA OICS, [Review: Youth custody: follow-up to 2023 inspection \(Part 2\)](#) (forthcoming; due for publication by end of 2024)

The significance of NPMs and OPCAT in youth detention settings

The treatment of children and young people in detention has been, and will continue to be, a significant common focus for Australian NPM members. As a collective, we benefit from information sharing and collaboration across jurisdictions, including to support promoting consistency across Australia, something critical from a human rights perspective. And this is especially important in our oversight of youth detention.

NPMs are uniquely designed not just to consider specific human rights concerns in detention environments where children and young people are held, but broader practices which are linked to their treatment in such places. Their broad and flexible approach means they may also consider other matters which are risk factors towards ill treatment or, conversely, enablers of improved treatment. The preventive approach from NPMs also means members may be able to listen to and develop relationships with children and young people in detention in a manner that, due to power imbalances, reactive bodies or processes such as complaints and investigations of prior and existing ill treatment, cannot. This is especially important when considering the treatment of children and young people in detention.

Focusing on and supporting the voices of children and young people in detention themselves enables them to be at the centre of NPMs' work, and to bring unique perspectives which can shed light on matters which oversight bodies may not otherwise be aware of, or which may have risk factors not otherwise apparent.

Incomplete OPCAT implementation in Australia

Despite the critical importance of the Australian NPM and of OPCAT towards addressing the challenges facing youth justice and children in detention, the Australian NPM remains incomplete. Our membership does not currently have full coverage to oversee all places of detention across Australia, most notably due to the absence of NPMs for places of detention under the control of New South Wales, Queensland, and Victoria. In addition, some of our existing members are of unclear status as NPMs, and many have no OPCAT-specific legislation providing for all the necessary powers and protections of an NPM. Critically, not one of our 12 members is adequately resourced to effectively fulfil their NPM mandate on an enduring basis, and many have received no OPCAT funding whatsoever.

Despite more than 15 years passing since Australia signed OPCAT, ongoing disputes between governments, fundamentally regarding resourcing, are a barrier to Australia meeting its OPCAT obligations. This not only undermines Australia's commitment to OPCAT, it also undermines Australia's capacity to meet its broader international human rights obligations as they relate to people deprived of their liberty. We consider this calls into question Australia's fundamental commitment to human rights.

Suggested recommendations for the Committee

Consistent with our past observations around youth detention and youth justice, as well as our ongoing commentary on Australia's incomplete implementation of OPCAT, below are key recommendations we suggest the Committee make as part of its final report.

We further suggest that careful consideration be given to the findings and recommendations made by the National Children's Commissioner in her 2024 report [*'Help way earlier!': How Australia can transform child justice to improve safety and wellbeing!*](#).



We suggest recommending implementation of a minimum age of criminal responsibility of 14 years without exceptions, Australia-wide.

This should be accompanied by appropriate programs and supports for children and young people less than 14 who would otherwise, but for a raised minimum age, come into contact with the justice system. Consideration should also be given to ceasing the detention of children and young people aged under 16.



We suggest recommending diversionary and preventive alternatives to detention, and to engagement with the justice system, including:

- pre-charge cautionary responses
- pre-trial and pre-sentence diversion, such as cultural healing programs and restorative justice opportunities.

Alternatives should be adequately resourced through long-term funding commitments, practically available when and where needed, evidence-based, and culturally safe. They should provide active opportunities for children's voices to be heard, have a focus on justice reinvestment principles, and be designed and implemented in genuine partnership with Aboriginal Community Controlled Organisations and Aboriginal and Torres Strait Islander communities.



We suggest recommending adherence by all Australian governments to all international human rights obligations and standards relating to the treatment of children and young people in detention, Australia-wide.

This should be underpinned in law and in practice, as an immediate priority, by detention of children being a last resort, and the best interests of the child being a primary consideration in all matters relating to detention. Authorities should examine international good practice on alternative, therapeutic models of care in youth facilities, such as that developed by the Spanish Diagrama Foundation.



We suggest recommending that all Australian governments and detaining authorities ensure that all appropriate healthcare – including mental healthcare – be provided to children and young people in detention. Healthcare for Aboriginal and/or Torres Strait Islander children and young people should be culturally safe, and designed and led by Aboriginal and/or Torres Strait Islander people themselves, involving adequately resourced and empowered ACCHOs.

Governments and detaining authorities should also ensure appropriate access to all appropriate disability supports for children and young people entering, in, and leaving detention, including clarifying responsibilities to ensure appropriate access to NDIS services.



We suggest recommending that all Australian governments implement improved, Australia-wide, consistent data capture and public reporting on the use of isolation practices in youth detention. This should be based on agreed and consistent national definitions, and include but not be restricted to time children and young people spend out of their cell.

Data should be disaggregated by at least age, sex, disability status, Aboriginal and/or Torres Strait Islander status, ethnic origin and geographic location.

All governments should also undertake work to identify other data gaps across youth detention and youth justice more broadly.



We suggest recommending full and consistent OPCAT implementation across all Australian jurisdictions, specifically:

- **appointment of NPMs to address all remaining gaps in coverage**
- **fully OPCAT-compliant legislation to empower all NPMs, where lacking**
- **resolution to funding disagreements to ensure NPMs are adequately resourced to meet their full OPCAT mandate on an ongoing basis.**

