

Australia's Ratification of the *Optional Protocol to the Convention against Torture* (OPCAT) in the context of Youth Justice Detention Centres

Written Submission

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Dear Human Rights Commission,

Thank you for the invitation to provide a written submission on the *Optional Protocol to the Convention against Torture* (OPCAT) in the context of juvenile justice. This submission is informed by the authors' extensive experience in the field of juvenile justice.² We are delighted to share our views on this important issue, and strongly support Australia's ratification of the protocol.

OPCAT is a bi-partisan supported United Nations (UN) protocol which was signed by Australia in 2009, however, it remains unratified. To date, 81 countries including comparative jurisdictions New Zealand and the United Kingdom (UK) have ratified the OPCAT.³ There already exists considerable support for Australia's ratification of OPCAT: in 2014, 64 organisations signed a statement to the Attorney General endorsing Australia's ratification of the protocol.⁴

Ratifying OPCAT would provide a system of regular inspections to places of juvenile detention, including detention centres and police-lockups, by the UN Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and through the establishment of a National Preventative Mechanism (NPM). We strongly support the development of an NPM and believe that such an independent monitoring body would work to strengthen a culture of human rights within Australia, not only protecting juveniles deprived of their liberty, but also those who are detained in mental health facilities, prisons, police lock-ups, and immigration detention centres.

In various sections of this submission we draw on contemporary research and secondary analysis of issues faced by young people in detention. We also draw on interview material with young people in detention and criminal justice professionals from the UNSW *Comparative Youth Penalty Project* (CYPP) and the *Australians with Mental Health Disorders in the Criminal Justice System* (MHDCD) Project.

1. Current oversight, complaints, and monitoring mechanisms

Australia has a relatively comprehensive complaints-based system for children and young people in detention. All states and territories in Australia have various investigation, review and reporting procedures in place. Inspection and monitoring bodies include the Ombudsman (in New South Wales, Victoria, Queensland, Australian Capital Territory, South Australia, Tasmania, Western Australia and the Northern Territory); Official Visitor Schemes

² The authors include members of the Comparative Youth Penalty Project (CYPP): an ARC Discovery project comparing approaches to youth punishment, penal culture and practice in Australia, England and Wales. The CYPP is analysing developments in the punishment of children and young people in the last 30 years. For more information see: www.cypp.unsw.edu.au

³ United Nations Treaties (2016) *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Status*.
https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9-b&chapter=4&lang=en

⁴ Castan Centre for Human Rights Law (2014) *Open Letter to the Attorney-General Regarding the Optional Protocol to the Convention Against Torture*.

(NSW and QLD); and the Office of the Inspector of Custodial Services (WA). These organisations conduct both announced and unannounced inspections of places of juvenile detention.

While all juvenile detention centres in Australian jurisdictions are monitored, Australia does not have a consistent, comprehensive system operating across all places of detention. A significant issue is that monitoring bodies tend to respond to singular events in their respective jurisdictions and do not provide a framework for addressing institutional and systemic problems which occur to varying degrees in all states and territories, such as problems of abuse, the use of excessive force and inadequate staff training. These systemic problems negatively affect Australia's compliance with children's rights. In addition to this, various oversight bodies are generally reactive to infringements of human rights in places of juvenile detention and do not prevent human rights abuses from occurring, which is evidenced below in Section 4.

2. Best-practice in promoting and safeguarding the rights of detained children

We make no comment on 'best practice', however we note that the United Kingdom (UK) provides a system that deserves further investigation. The UK ratified the OPCAT in 2003 and designed its NPM in 2009. In the UK, there are 20 visiting or existing inspection bodies to fulfil the State's requirements under OPCAT. Her Majesty's Inspectorate of Prisons (HMIP) operates as the coordinating body for the UK's NPM. The investigations and inspections carried out by HMIP demonstrate how an NPM can be proactive and effective in carrying out their role to prevent human rights abuses and to ensure that Nation States are consistent with international standards of monitoring. However having said that, we note that abuses in juvenile institutions still occur as evidenced by the recent events in Medway Secure Training Centre.⁵

In places of detention there is a significant power imbalance between those detained and those in authority, indicating that complaints based systems in places of juvenile detention must be both personal and responsive to the needs of children and young people. This emerged out of interviews for the CYPP: One interview respondent commented that although the Ombudsman exists, complaints made by young people about their treatment by police are often referred back to the police for internal investigation. This respondent commented that negative interactions with the police are "so ingrained in their life that they don't see that [*mistreatment by police*] as an infringement of their rights" and as a result it can be difficult to motivate these young people to make a complaint.⁶

Our research, and research by other organisations, shows that young people in detention are most likely to engage with oversight, complaints and monitoring mechanisms face-to-

⁵ See BBC Panorama (2016) *Teenage Prison Abuse Exposed*, BBC News. <http://www.bbc.co.uk/programmes/b06ymzly>

⁶ CYPP Interview Children's Lawyer 1. See also Cunneen, C. (1990) *A Study of Aboriginal Juveniles and Police Violence*, Report Commissioned by the National Inquiry into Racist Violence. Published by the Human Rights and Equal Opportunity Commission, Sydney.

face. The NSW Ombudsman reported “young people in detention are more likely to raise their concerns with us in person than by notifying us about a complaint”.⁷

3. Staff and children’s understanding of human rights and oversight, complaints and monitoring mechanisms

The ratification of the OPCAT and the introduction of a nationally consistent NPM would help to raise awareness about human rights standards within detention facilities amongst juvenile detainees, detention centre staff, and police officers. Increased knowledge about what may constitute cruel, inhuman or degrading treatment, particularly for those with mental and cognitive impairments, would assist staff in identifying emerging issues of concern.

The importance of communicating human rights to children emerged from interviews for the CYPP. One respondent stated:

“I’ve talked to young people about their rights, and it’s really clear that especially vulnerable young people, they get a level of empowerment from just knowing that they have rights, that they can be safe, that they have a right to be safe, that they have a right to have their voice heard, that they have the right to get an education, to be healthy. These things are very empowering for young people who don’t have those things”.⁸

This respondent also noted the importance of:

“... Ensuring that children know about those rights, they can speak up if something is occurring that concerns them or they feel they’re being treated unfairly, it’s really important that they be active citizens in that sense”.⁹

In general the staff we interviewed for the Comparative Youth Penalty Project indicated some broad knowledge of children’s rights. A significant limitation is that while there was broad recognition of rights, there was a gap in knowledge and understanding as to how those rights might be reflected in day-to-day operational practices.

4. Issues of concern

Evidence from Australia suggests children and young people deprived of their liberty remain vulnerable to abuses of human rights and that the current oversight, complaints and monitoring mechanisms operating throughout states and territories are inadequate. In this submission, we draw particular attention to the following issues of concern:

- The overrepresentation of Aboriginal and/or Torres Strait Islander young people in custody
- The overrepresentation of children and young people with mental and cognitive disabilities and other complex support needs in custody

⁷ NSW Ombudsman (2010) *Annual Report 2009 – 2010*, NSW Ombudsman, Sydney, p. 53.

⁸ CYPP Interview: Policymaker 1

⁹ CYPP Interview: Policymaker 1

- The age of criminal responsibility in Australia
- Mandatory sentencing provisions for children and young people
- The detention of children and young people within adult prisons
- The treatment of children and young people in police custody
- Cases of maltreatment and abuse of young people in detention
- Conditions of juvenile detention centres and places of detention

These issues of concern demonstrate that children and young people deprived of their liberty require robust and pro-active human rights protection.

The overrepresentation of Aboriginal and/or Torres Strait Islander young people in custody

According to the Australian Institute of Health and Welfare (AIHW), just over half (54%) of all young people in detention in 2015 were Indigenous,¹⁰ making them approximately 26 times more likely to spend time in detention than non-Indigenous young people.¹¹ While the number of non-Indigenous young people in detention has decreased in recent years, the same trend has not been observed for Indigenous young people.¹²

The overrepresentation of children with mental and cognitive disabilities and other complex support needs in custody

Children in contact with the criminal justice system have significant unmet social, emotional, mental and physical health needs and are a particularly vulnerable group. Research from government bodies, non-government organisations and academics has consistently shown a concentration of disadvantage in juvenile justice populations. Juvenile detention centres are filled with the most vulnerable members of our community: these young people often have low educational attainment,¹³ backgrounds of economic and social disadvantage,¹⁴ housing instability,¹⁵ drug and alcohol addiction,¹⁶ as well as victimisation and trauma, and multiple placements in out-of-home care (OOHC).¹⁷ These compounding factors result in multiple and complex needs for this vulnerable population group.¹⁸

¹⁰ AIHW (2015) Youth Detention Population in Australia 2015, Bulletin 131, AIHW, Canberra.

¹¹ Amnesty International (2015) A Brighter Tomorrow: Keeping Indigenous Kids in the Community and out of Detention in Australia, Amnesty International, Sydney.

¹² AIHW (2015) Youth Detention Population in Australia 2015, Bulletin 131, AIHW, Canberra.

¹³ Kenny et al (2006) *NSW Young People on Community Orders Health Survey 2003-2006: Key Findings Report*. The University of Sydney; Ward S and Williams J (2014) 'Does Juvenile Delinquency Reduce Educational Attainment?' University of Melbourne, 1 – 41.

¹⁴ Indig et al (2011) *2009 NSW Young People in Custody Health Survey: Full Report*, Justice Health and Juvenile Justice, Sydney.

¹⁵ AIHW (2012) Children and Young People at Risk of Social Exclusion: Link Between Homelessness, Child Protection and Juvenile Justice, AIHW, Canberra, p. vii.

¹⁶ Indig et al (2011) *2009 NSW Young People in Custody Health Survey: Full Report*, Justice Health and Juvenile Justice, Sydney.

¹⁷ McFarlane K (2010) 'From Care to Custody: Young Women in Out-of-Home Care in the Criminal Justice System', *Current Issues in Criminal Justice*, 22(2), 345 – 353.

¹⁸ Baldry E (2011) 'Navigating Complex Pathways: People with Mental Health Disorders and Cognitive Disability in the Criminal Justice System in NSW', *HIV Australia*, 9(1), 35 – 44.

The prevalence of mental health disorders and cognitive disabilities amongst juveniles is well recognised, with both the 2003 and 2009 NSW Young People in Custody Health Survey (YPiCSH) finding that 88% and 87% of young people respectively have symptoms consistent with psychological disorder.¹⁹ The 2009 NSW YPiCHS found that these rates are higher for Indigenous young people, with 92% screening for any psychological disorder.²⁰ Custody health surveys also indicate that children and young people experience high rates of borderline cognitive disabilities, including Fetal Alcohol Spectrum Disorder (FASD) and traumatic brain injury.²¹

Children with mental health disorders and cognitive disabilities in detention not only have the same rights as other children, but also have specific rights under a number of international conventions including the Convention on the Rights of Persons with Disabilities (CRPD)²² and as people deprived of their liberty the right to be treated with humanity, respect and dignity.²³

The matter of Corey Brough highlights the significant human rights implications regarding the treatment of this vulnerable group.²⁴ Brough, who is Indigenous and suffers from a mild intellectual disability and Attention Deficit Disorder, was placed in solitary confinement in a NSW adult prison at the age of 16. In 2006, the UN Human Rights Committee made findings that Brough's treatment constituted violations of Articles 10 and 24(1) of the ICCPR, that is, the right of prisoners to be treated with inherent dignity and the right of a child to have protections required by his status as a minor without discrimination, respectively.²⁵

In WA under the *Criminal Law (Mentally Impaired Accused) Act* (s 24), a mentally impaired accused is to be detained in an authorised hospital, a declared place, a juvenile detention centre, or prison. Until the opening of the Bennet Brook Disability Justice Centre in August 2015, there has been no 'declared place' for people deemed by a court as unfit to plead because of their intellectual or cognitive disability. However, the facility currently accommodates only 10 adults, and as a result, it remains that there are no appropriate accommodations for young people with cognitive disability who are sentenced to detention. A result of this failure to provide alternative accommodation for people found not guilty by

¹⁹ Allerton M, Champion U, Beilby R, Butler T, Fasher M, Kenny D, Murphy M, Vecchiato C (2003) *2003 Young People in Custody Health Survey. Key Findings Report*, NSW Department of Juvenile Justice, Sydney; Indig D, Vecchiato C, Haysom L, Beilby R, Carter J, Champion U, Gaskin C, Heller E, Kumar S, Mamone N, Muir P, van den Dolder P and Whitton G (2011) *2009 Young People in Custody Health Survey: Full Report*, Justice Health and Juvenile Justice, Sydney.

²⁰ Indig et al (2011) *2009 NSW Young People in Custody Health Survey: Full Report*, Justice Health and Juvenile Justice, Sydney.

²¹ Haysom et al (2014) 'Intellectual disability in young people in custody in New South Wales, Australia – prevalence and markers', *Journal of Intellectual Disability Research*, 58(1), p. 1004; Kenny et al (2007) 'The relationship between head injury and violent offending in juvenile detainees', *Contemporary Issues in Crime and Justice*, No. 107, 1 – 15; Standing Committee on Social Policy and Legal Affairs (2012) *FASD: The Hidden Harm – Inquiry into the prevention, diagnosis and management of Fetal Alcohol Spectrum Disorders*, Commonwealth of Australia, Canberra.

²² CRPD (Articles 12, 13, 14, 15)

²³ ICCPR (Articles 7 and 10); CAT (Articles 10 and 11).

²⁴ See United Nations Human Rights Committee (UNHRC) (2006) *Corey Brough v Australia*, *Communication No. 1184/2003*, CCPR/C/86/D/1184/2003.

²⁵ United Nations Human Rights Committee (UNHRC) (2006) *Corey Brough v Australia*, *Communication No. 1184/2003*, CCPR/C/86/D/1184/2003.

reason of mental impairment has resulted in reportedly thirty people held in indefinite detention in prisons in WA. In one case, a 25-year-old intellectually disabled Indigenous man has reportedly spent over 10 years in prison after being found unfit to stand trial for crashing a stolen vehicle which led to the death of his cousin, when he was just 14 years of age. Under his custody order, 'Jason' is allowed a reintegration leave of absence from prison, however, at Acacia Correctional Centre in WA where he is detained, leaves of absence have not been permitted since 2013.²⁶

Young people in custody with mental illness, disability and borderline cognitive disability, are more vulnerable than other detainees and are more prone to victimisation.²⁷ Former Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma has stated that young people with mental and cognitive disabilities:

“...Can face additional difficulties in adapting to a custodial environment that is rarely able to meet their needs and they face ridicule and adverse attention by other detainees who do not understanding their medical predicament”.²⁸

The age of criminal responsibility in Australia

Current Australian legislation establishes 10 as the minimum age of criminal responsibility, although a presumption against responsibility exists until the age of 14 through the principle of *doli incapax*. Approximately 30% of the Indigenous young people interviewed for the CYPP reported being under the age of 12 when sent to a juvenile justice facility for the first time. The AIHW has reported that children aged between 10 and 11 years supervised in Australia only account for 0.6% of all children supervised both in the community and in detention.²⁹ However, Indigenous children make up 87% of this group.³⁰ In 2013-14 7% of all 10 – 17 year olds in detention were aged under 14 years, and 78% of these young people were Indigenous.³¹

Raising the minimum age of criminal responsibility to 12 would bring Australia into line with its obligations under the UN Convention on the Rights of the Child (CRC) and consistent with other common law jurisdictions such as Canada and Ireland. There was widespread agreement among professionals interviewed for the CYPP that the age of criminal responsibility should be higher. As a Detention Centre Director stated, children under 14 “can and should be dealt with in another way”³². Another interviewee noted “We should be looking at what the best practice is around the world... and most of the world would tell us

²⁶ Perpitch N (2014) ‘Case of mentally ill Aboriginal man jailed indefinitely to be reviewed in December’, *ABC News* (online), 17 October.

²⁷ Davis (2009) ‘People with Intellectual Disabilities in the Criminal Justice Systems: Victims and Suspects’, *The Arc*.

²⁸ Australian Human Rights Commission (2008) *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues*, p. 1.

²⁹ AIHW (2014) *Youth Justice in Australia 2013 – 14, Characteristics of Young People Under Supervision*, Supplementary Tables S74, S78, AIHW, Canberra.

³⁰ AIHW (2014) *Youth Justice in Australia 2013 – 14, Characteristics of Young People Under Supervision*, Supplementary Tables S74, S78, AIHW, Canberra.

³¹ AIHW (2014) *Youth Justice in Australia 2013 – 14, Characteristics of Young People Under Supervision*, Supplementary Tables S74, S78, AIHW, Canberra.

³² CYPP Interview: Detention Centre Director 1

that it's much higher than 10".³³ This respondent also stated: "If you're saying that a 10-year-old is responsible for criminal behaviour and activity and they understand what they are doing, then I think you don't take human rights very seriously".³⁴

Raising the age of criminal responsibility is an important human rights issue in itself. Additionally it would contribute to addressing the overrepresentation of Indigenous young people, who generally come into the justice system at a younger age than non-Indigenous children - an issue noted by almost all CYPP interview respondents. Around half (49%) of all Indigenous young people under supervision are aged 10 – 15, compared with less than one-third of non-Indigenous young people.³⁵ Youth advocates have been calling for the minimum age of criminal responsibility to be raised, with Crofts commenting that "alongside police practice and use of diversionary measures, the age of criminal responsibility is the main legal barrier to the criminal justice system; it is therefore a primary point at which the Indigenous youth can be kept out of the system".³⁶ The issue is currently in public focus because of the detention of an 11-year-old Indigenous boy charged with murder in WA.

Raising the age of criminal responsibility has the potential to reduce the likelihood of life-course interaction with the criminal justice system. It is well established that one of the key risk factors for criminal justice contact is prior contact.³⁷ A study by the AIHW explored the correlation between early and later in life criminal justice supervision, and found children first supervised at 10 – 14 years are significantly more likely to experience all types of supervision – particularly sentenced detention – in their later teens when compared with children first supervised at 15 – 17 years.³⁸

CYPP interviewees commented on the difference between the chronological age of young people in custody and their emotional, mental and developmental age. One Juvenile Justice Centre Director stated, "I think it's very young... The youngest person who has been in one of our centres was 11 and... Whilst that young person might have had a chronological age of being 11, he could have just been 7 or 8... We really need to be looking at where these young people are functioning".³⁹ A Detention Centre Manager commented, "I've got 12 year-olds, 13 year-olds there that can't really link behaviour and consequences.... So I think that 10 is very, very young. I'd hate to see a 10 year old in here".⁴⁰ One juvenile detention centre worker similarly commented, "When you see a 10-year-old kid in detention it's a whole lot different to seeing a 10-year-old- kid on a community-based order.... But the 10-year-olds

³³ CYPP Interview: Policymaker 2

³⁴ CYPP Interview: Policymaker 2

³⁵ AIHW (2015) *Youth Justice in Australia 2013 – 14*, Bulletin 127, AIHW, Canberra.

³⁶ Crofts T (2015) 'A Brighter Tomorrow: Raise the Age of Criminal Responsibility', *Current Issues in Criminal Justice*, 27(1), p. 123.

³⁷ Payne J (2007) *Recidivism in Australia: Findings and Future Research*, Research and Public Policy Series No. 80, Australian Institute of Criminology, Canberra; Chen S, Matruglio T, Weatherburn D and Hua J (2005) 'The Transition from Juvenile to Adult Criminal Careers', *Crime and Justice Bulletin No. 86*, NSW BOCSAR, Sydney.

³⁸ AIHW (2013) *Young People Aged 10 – 14 in the Youth Justice System, 2011-2012*, AIHW, Canberra.

³⁹ CYPP Interview: Detention Centre Director 2

⁴⁰ CYPP Interview: Detention Centre Manager 1

I've seen on the few times I've been out to [*Detention Centre*], they might look 10 in their body and you look at their eyes and they're not 10, and that's quite scary".⁴¹

Mandatory sentencing of children

Currently, Western Australia (WA) is the only jurisdiction in Australia with mandatory sentencing laws directed towards children, after the NT repealed similar provisions. Earlier WA legislation was expanded with the passage of the *Criminal Law Amendment (Home Burglary and Other Offences) Act 2014*, which requires courts to impose custodial sentences on young people where three or more home burglary offences have been committed (s 279 (6a)). The expansion of these laws incorporates multiple offences committed within the same incident, meaning young people can receive a mandatory 12-month sentence during their first court experience.

The United Nations (UN) has named Australia for its breach of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) for mandatory sentencing provisions in WA.⁴² The Committee on the Rights of the Child⁴³ and the Committee against Torture⁴⁴ have recommended the abolition of WA mandatory sentencing provisions. Their recent expansion has been criticized by Amnesty International, which highlighted the ineffectiveness of mandatory sentencing in reducing overall crime rates and the disproportionate impact of the laws on Indigenous Australians.⁴⁵ Various Australian organisations, including the Australian Law Reform Commission and the Law Council of Australia have found that the laws do not give primacy to the best interests of the child, offend principles of proportionality and are a direct violation of Australia's international rights obligations.⁴⁶

The detention of children and young people in adult prisons

Recent evidence emerging out of Victoria, NT and WA shows incidences of children and young people held in adult correctional facilities. Adult correctional facilities are harsh environments and not suited to the needs of vulnerable young populations. In addition to this, the failure to separate children and adult prisoners on numerous occasions is in breach of Australia's obligations under international human rights agreements.

The holding of young people in adult prisons in Australia is not an uncommon occurrence. A Victorian Ombudsman investigation was launched in 2013 after allegations that a 16-year-old Indigenous boy was transferred from the Parkville Youth Justice Precinct to Port Phillip

⁴¹ CYPP Interview: Detention Centre Worker 1

⁴² United Nations Committee Against Torture (UNCAT) (2014) *Concluding Observations: Australia*, CAT/C/AUS/CO/4-5.

⁴³ United Nations Committee on the Rights of the Child (UNCRC) (2012) *Concluding Observations: Australia*, CRC/C/AUS/CO/4, para 84.

⁴⁴ United Nations Committee Against Torture (UNCAT) (2014) *Concluding Observations: Australia*, CAT/C/AUS/CO/4-5.

⁴⁵ Amnesty International (2015) *A Brighter Tomorrow: Keeping Indigenous Kids in the Community and out of Detention in Australia*, Amnesty International, Sydney.

⁴⁶ Australian Law Reform Commission (1997) *Seen and Heard: Priority for Children in the Legal Process*, Report 84, ALRC, Canberra; Law Council of Australia (2014) *Policy Discussion Paper on Mandatory Sentencing*.

Prison and held in solitary confinement for a number of months.⁴⁷The report found that between 2007 and 2013, there were 24 instances of children transferred to adult prisons. The report found that the children were locked in their cells for 23 hours a day, with 1 hour of exercise time during which they were handcuffed.⁴⁸ The Ombudsman's report also found five instances of children mistakenly remanded into adult custody. In one case, a 14-year-old boy was placed into adult custody in error due to incorrect recorded dates of birth. On his first day in custody, the child reported being threatened by adult detainees, and has said that the trauma of being detained in an adult prison has been the cause of ongoing nightmares, depression and substance misuse.⁴⁹

Juveniles from Don Dale Youth Detention Centre in the NT were transferred to an adult prison after a Magistrate approved the transfer under emergency provisions contained in s 153 of the *Youth Justice Act 2005*. However, one 14-year-old detainee was mistakenly transferred, in contravention of s 154(6) of the Act that prohibits the transfer of juveniles under 15 years of age.

In 2013, 73 children from the Banksia Hill Detention Centre in WA were transferred to Hakea Prison, following an inmate disturbance. The Office of the Inspector of Custodial Services found that whilst detained at Hakea Prison, juveniles were subject to long periods of lockdown, limited access to education and rehabilitation programs, and inadequate quantities of food.⁵⁰ The report found significant problems with staff holding no training or experience in dealing with young people in custody, and that although contact with adult prisoners was minimised, the environment itself was generally "oppressive and intimidating".⁵¹ Legal action was brought against the Department of Corrective Services. However the case was dismissed when Martin CJ determined that while the conditions within Hakea were 'acknowledged by all to be less than optimal', the Department had no other choice but to move the young people following the incident at Banksia Hill.⁵²

The treatment of children and young people in police custody

There is a need to closely monitor police practices and their dealings with juveniles, as police are given significant discretionary powers in their day-to-day operations. Statistical and anecdotal evidence suggests Indigenous children and young people are inappropriately and excessively policed.⁵³ In April 2016, the NSW Police launched an internal investigation

⁴⁷ Victoria Ombudsman (2010) *Whistleblowers Protection Act 2001 Investigation into Conditions at the Melbourne Youth Justice Precinct*, Victoria Ombudsman, Melbourne.

⁴⁸ Victoria Ombudsman (2013) *Children Transferred from the Youth Justice System to the Adult Prison System*, Victoria Ombudsman, Melbourne.

⁴⁹ Victoria Ombudsman (2013) *Children Transferred from the Youth Justice System to the Adult Prison System*, Victoria Ombudsman, Melbourne, p. 33.

⁵⁰ Office of the Inspector of Custodial Services (2013) *Post-Incident Management Review Paper*, Office of the Inspector of Custodial Services, Perth.

⁵¹ Office of the Inspector of Custodial Services (2013) *Post-Incident Management Review Paper*, Office of the Inspector of Custodial Services, Perth.

⁵² *Wilson v Joseph Michael Francis, Minister for Corrective Services for the State of Western Australia* [2013] WASC 157 (3 May 2013).

⁵³ For example, see Cunneen C (2001) *Conflict, Politics and Crime: Indigenous Communities and the Police*, Allen & Unwin, Sydney; New South Wales Ombudsman (2013) *Consorting Issues Paper – Review of the use of the Consorting Provisions by the NSW Police Force*, NSW Ombudsman,

into an 8-year-old Aboriginal boy who was left unattended in a police paddy wagon for two hours.⁵⁴ Preventive monitoring of police practices in relation to the detention of children and young people can reduce the likelihood of similar events occurring.

The importance of ratifying OPCAT is magnified by recent legislative proposals for anti-terror laws which could see children aged 14 years or older detained by police for up to two weeks without charge.⁵⁵

Cases of maltreatment and abuse of young people in detention

The importance of oversight and monitoring mechanisms to protect the rights of detained children was stated by one respondent for the CYPJ who commented "...things will happen behind closed doors, undesirable things that you have to have really strong mechanisms to make sure that people's rights are protected in those environments".⁵⁶

In 2010, the Victorian Ombudsman investigated allegations of serious staff misconduct at the Parkville Youth Justice Precinct in Victoria. The allegations related to staff inciting fights between detainees, assaulting and restraining detainees with excessive force, and supplying contraband including tobacco, marijuana and lighters.⁵⁷

Recent incidents at the Alice Springs Youth Detention Centre and the Don Dale Youth Detention Centre in the NT have raised human rights concerns. In 2010, a 13 year-old detainee (DV) was stripped naked (to be placed in a suicide gown) and left in a cell. One of the youth workers was subsequently charged with assault in relation to the incident but was later discharged. In 2015, DV now aged 17, was reportedly strapped to a restraint chair with a spit hood placed over his head for almost two hours.⁵⁸ On the evening he was restrained, DV had been moved from the Alice Springs Youth Detention Centre to the Adult Correctional Centre. This incident prompted the NT Children's Commissioner to call for federal, state and territory governments to ratify the OPCAT and that doing so would prompt "a national monitoring mechanisms for juvenile and other secure facilities to help drive consistency and transparency" of juvenile justice systems.⁵⁹

In August 2015, the NT Children's Commissioner released findings of an investigation into allegations that tear gas and hooding were used in response to detainees after they had been held in isolation for an extended period of time. These findings included an assessment that the training of prison officials was inadequate to ensure appropriate treatment and

Sydney; Law Reform Commission of Western Australia (2006) *Aboriginal Customary Laws, Final Report*, Law Reform Commission of Western Australia, Perth.

⁵⁴ ABC News (2016) Investigation launched into why child was allegedly left in police paddy wagon for two hours. *ABC News*, 15 April 2016.

⁵⁵ Safi M (2016) Teenage terrorism suspects could be detained for two weeks under proposed NSW laws. *The Guardian*, 4 May 2016.

⁵⁶ CYPJ Interview: Policymaker 1

⁵⁷ Victoria Ombudsman (2010) *Whistleblowers Protection Act 2001 Investigation into Conditions at the Melbourne Youth Justice Precinct*, Victoria Ombudsman, Melbourne.

⁵⁸ Wild K (2015) 'Use of restraint chair and hood 'archaic': National Children's Commissioner', *ABC News* (online), 14 November.

⁵⁹ Wild K (2015) 'Use of restraint chair and hood 'archaic': National Children's Commissioner', *ABC News* (online), 14 November.

respect for human rights. This manifested itself in many ways, including inability to de-escalate the situation, poor security awareness and monitoring allowing for escalation and uncertainty as to what actions taken by staff were authorised by the *Youth Justice Act 2005* (NT).⁶⁰ Further allegations made about Don Dale prompted an investigation by the NT Police Child Abuse Task Force. The allegations included incidents of staff inciting fights between detainees for rewards, and a staff member pressuring a detainee to eat animal faeces, later filmed and shared on social media.⁶¹

Of particular concern is the recent passing of the *Youth Justice Amendment Act 2016* in the Northern Territory. The Act allows mechanical restraint chairs with cable ties to be used against children in detention, despite expert evidence that such punitive measures run the risk of causing long-term mental harm to vulnerable children and young people.⁶²

Conditions of juvenile detention centres and places of detention

In 2010, the Victorian Ombudsman reported that Parkville Youth Justice Precinct was overcrowded and many of its design features were unsuitable for a custodial environment for young people and posed a number of health and safety concerns, including: hanging points and opportunities for self-harm, blind spots in common areas, roof access points, excessive graffiti, mouldy and unhygienic conditions, as well as a high prevalence of communicable infections amongst detainees.⁶³ In addition, a large percentage (36%) of current staff working at the Precinct did not have a Working with Children Check on file.⁶⁴ The Ombudsman determined the facility as inappropriate for custodial purposes and in clear breach of the Havana Rules, as well as a number of domestic safeguards.

In 2015, the WA Inspector of Custodial Services raised concerns over the high number of strip-searches, inadequate visiting schedules, under-resourced educational facilities, weak-case management, and severely stretched mental health services at the Banksia Hill Detention Centre.⁶⁵

Prior to its closure in 2015, a 2011 NSW Ombudsman's report identified a number of concerns with the Kariong Juvenile Justice Centre in NSW. The NSW Ombudsman

⁶⁰ NT Children's Commissioner (2015) *Own Initiative Investigation Report: Services Provided by the Department of Correctional Services at the Don Dale Youth Detention Centre*, NT Children's Commissioner, Casuarina.

⁶¹ NT Police, Fire and Emergency Services (2015) *Mistreatment Allegations Don Dale Juvenile Detention Centre*, 23 September. <http://www.pfes.nt.gov.au/Media-Centre/Media-releases/2015/September/23/Mistreatment-Allegations-Don-Dale-Juvenile-Detention-Centre.aspx>; James F (2015) 'NT police investigating criminal allegations at Don Dale Youth Detention Centre amid claims teens forced to fight, eat animal poo', *ABC News* (online), 5 October.

⁶² Garrick M (2016) 'Psychologist Professor Tim Carey says youth offenders at risk of mental harm if forced into mechanical restraint chairs', *NT News*. <http://www.ntnews.com.au/news/northern-territory/psychologist-professor-tim-carey-says-youth-offenders-at-risk-of-mental-harm-if-forced-into-mechanical-restraint-chairs/news-story/730ff46b6a78581d328c042b076759f1>

⁶³ Victoria Ombudsman (2010) *Whistleblowers Protection Act 2001 Investigation into Conditions at the Melbourne Youth Justice Precinct*, Victoria Ombudsman, Melbourne.

⁶⁴ Victoria Ombudsman (2010) *Whistleblowers Protection Act 2001 Investigation into Conditions at the Melbourne Youth Justice Precinct*, Victoria Ombudsman, Melbourne.

⁶⁵ Office of the Inspector of Custodial Services (2015) *Report of an Announced Inspection of Banksia Hill Juvenile Detention Centre*, Office of the Inspector of Custodial Services, Perth.

particularly criticised the centre's rehabilitation programs, particularly in relation to compliance with the program requirements, the adequacy of programs and activities, and a lack of program oversight, reporting and evaluation.⁶⁶ The report highlighted a lack of case management by detention centre staff, particularly for young people with mental health issues, and also criticised the length of time detainees were segregated in isolation, whether as punishment or for their own safety.⁶⁷

5. Benefits of a National Preventive Mechanism (NPM)

As these issues of concern show, children and young people deprived of their liberty are vulnerable to breaches of their human rights. There are five key benefits of establishing an NPM in Australia as identified by the Human Rights Commission,⁶⁸ including:

- **Preventive monitoring can identify emerging issues of concern** and rectify issues before they lead to breaches of the human rights of young people deprived of their liberty. Consistent and thorough inspections of detention centre administration records to determine the use of segregation, the use of force, and complaints made by young people would work to identify and address human rights issues at their earliest point.
- **Preventive monitoring can lead to improved protection of the rights of vulnerable children in detention**, particularly Indigenous children and those with mental health disorders, cognitive disabilities and other complex support needs whom we know are overrepresented in juvenile justice populations.
- **Preventive monitoring can lead to an improved culture within juvenile detention facilities** by promoting knowledge and understanding of Australia's obligations under international human rights law amongst juvenile justice staff, police officers and detainees themselves.
- **Preventive monitoring can lead to a reduction in claims for compensation**, for example, in 2011, the Public Interest Advocacy Centre (PIAC) and Maurice Blackburn commenced a class action on behalf of a number of young people wrongfully imprisoned by NSW Police due to Police COPS database malfunction.⁶⁹ One of the young people concerned was a 14-year-old who was arrested, handcuffed and strip-searched, and held overnight in custody on three separate occasions over a two-week period, despite having no imposed bail conditions.⁷⁰ In August 2015, a settlement of \$1.85 million was reached on behalf of all of the young people involved.
- **Preventive monitoring can work to ensure consistency in standards of treatment** across all places of juvenile detention and across all states and territories in Australia. CYPP interview respondents agreed that ratifying OPCAT would

⁶⁶ NSW Ombudsman (2011) *Kariong Juvenile Correctional Centre: Meeting the Challenges*, NSW Ombudsman, Sydney.

⁶⁷ NSW Ombudsman (2011) *Kariong Juvenile Correctional Centre: Meeting the Challenges*, NSW Ombudsman, Sydney.

⁶⁸ Australian Human Rights Commission (2012) *Consideration of Australia's ratification of the Optional Protocol to the Convention against Torture*, Human Rights Commission, Sydney.

⁶⁹ PIAC (2015) *Access to Justice: False Imprisonment of Young People Class Action*. PIAC: Sydney. <http://www.piac.asn.au/projects/node/64/information-1>

⁷⁰ PIAC (2015) *Court Win for Wrongful Imprisonment of Children*, 27 September, PIAC, Sydney. <http://www.piac.asn.au/news/2013/09/court-win-wrongful-imprisonment-children>

strengthen “at a national level the monitoring of what happens in closed detention centres” and that this would be “about ensuring we have more consistency across the jurisdictions and that we have a more transparent process for monitoring how people are treated in those settings”.⁷¹

6. Summary

- While the human rights of Australians are generally well protected, people deprived of their liberty and held in closed environments are particularly vulnerable to infringements of their human rights.
- Children and young people are especially vulnerable by their very nature, and a large body of evidence shows that juvenile detention centres are increasingly filled with young people who have multiple and complex support needs, mental and cognitive disability and who are disproportionately Indigenous.
- The current oversight, reporting and monitoring mechanism in place across Australia have been unable to prevent various breaches of the rights of juveniles in detention indicating that the current system is inadequate.
- We fully support the ratification of OPCAT which would create a more proactive system of rights protection for young people deprived of their liberty.

Yours sincerely,



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Professor Eileen Baldry

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⁷¹ CYPP Interview: Policymaker 1