



**Submission to the National Children's Commissioner from the North Australian Aboriginal Justice Agency and the Central Australian Aboriginal Legal Aid Service**

***On the Optional Protocol to the Convention against Torture (OPCAT) in the context of Youth Justice Detention Centres***

**June 2016**

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The North Australian Aboriginal Justice Agency (NAAJA) and the Central Australian Aboriginal Legal Aid Service (CAALAS) welcome the opportunity to provide a written submission to the National Children's Commissioner relating to the OPCAT in the setting of Youth Justice Detention Centres. NAAJA and CAALAS have a wealth of experience providing legal assistance, representation and support to young Aboriginal and Torres Strait Islander (ATSI) clients both in the Top End and Central Australia.

The North Australian Aboriginal Justice Agency (NAAJA) provides high quality, culturally appropriate legal aid services for Aboriginal people in the northern region of the Northern Territory in the areas of criminal law, civil law, welfare rights, prison support and through-care services. NAAJA is active in systemic advocacy and law reform in areas impacting on Aboriginal peoples' legal rights and access to justice. NAAJA travels to remote communities across the Top End to provide legal advice and advocacy.

CAALAS has provided culturally appropriate, specialist legal services to ATSI people in Central Australia and the Barkly region for over 40 years. CAALAS operates across a vast catchment area, covering the southern region of the NT and reaching communities nearing the QLD, SA and WA borders. CAALAS provides legal assistance on a range of issues to Aboriginal men, women and young people. Our areas of legal practice include criminal, civil, family, child protection and welfare rights. Separate to our legal casework, CAALAS hosts the Youth Justice Advocacy Project (YJAP), which assists young people engaging with the criminal justice system by providing court support and advocacy, making therapeutic referrals, and developing proposals for bail and non-custodial outcomes. CAALAS also hosts the Kungas Stopping Violence Program, an innovative program that supports women in custody for violent offences, seeking to reduce rates of recidivism by providing holistic case management and training in the custodial setting and post-release. Accordingly, we have much relevant in-house experience to inform our responses.

Our responses to the questions outlined are as follows:

***Are the current oversight, complaints and monitoring mechanisms relating to the treatment and rights of children and young people in detention (youth justice centres and adult facilities) adequate? If not, how could they be improved?***

The Australasian Juvenile Justice Administrators Standards (AJJA) for Juvenile Custodial Facilities clearly outlines best practice standards, at section 2.7 Complaints and Grievances. These standards include sample indicators based on the United Nations Rules for the Protection of Juveniles Deprived of their Liberty. Australia is a signatory to these standards. CAALAS can confirm that sample A to G of the (AJJA) have not been adhered to in regards to young people detained in the Alice Springs Youth Detention Centre. Further detail about



the content of these standards is provided in our below response regarding best practice examples.

NAAJA and CAALAS observe significant shortcomings in the current oversight, complaints and monitoring mechanisms that operate in the NT. The options available in the NT can be described as follows.

s163 of the *Youth Justice Act 2005 (NT)* states that a detainee or their responsible adult may complain about a matter that affects the youth. The procedure set out in its regulations, reg 66 is that a complaint is to be made in writing (and a youth assisted by staff if unable to do so personally) and must go directly to the Superintendent. The Superintendent alone is to deal with the complaint and may dismiss the complaint outright. There does not appear to be any avenue for appeal or review. The Superintendent has discretion to refer complaints which could come within the purview of the NT Children's Commissioner to her office. It is notable that there is no mandatory referral obligation and the decision to refer sits purely with the Superintendent, who lacks impartiality due to being located within the same department as individual staff members that may be the subject of the complaint.

The requirement for a complaint to be in writing is a significant barrier for many youth who experience language or literacy barriers. Whilst a young person may be able to access legal assistance for the purpose of making a written complaint, young people serving a sentence of detention following the finalisation of their legal matters may not have ongoing contact with a lawyer. In the absence of assistance from an adult who is separate to the Corrections system, this complaints mechanism is inaccessible to many young people. Aside from possible language and literacy barriers, young people will also face significant cultural barriers to utilising the complaints system, and will be affected by the power imbalance that exists between them as individuals and the Corrections system.

Often it will be inappropriate and potentially unsafe to make a complaint internally. It is therefore critical that a rigorous external complaints process exists and that there is an independent mechanism to identify and address systemic issues. In the NT, official visitors and the Children's Commissioner deal with complaints. Few detainees, however, have knowledge or understanding of the role and functions of these bodies. Where complaints have been made to one or both of these bodies, there is often little action because of resourcing issues. Systemic issues are rarely addressed.

Whether or not the Children's Commissioner receives a referred complaint from the Superintendent, the Commissioner can also receive and investigate complaints directly from youth in detention in relation to a failure to provide services or the inadequate provision of services. In dealing with a complaint the Commissioner will often seek to resolve the matter directly with the Superintendent and staff within the detention centre. This may, for example, take the form of recommendations designed to initiate or to improve service provision and/or to ensure a satisfactory level of service into the future. The Commissioner is required to monitor the response of the Superintendent and/or staff, as to any recommendations that have been made.

The Children's Commissioner can also undertake an inquiry relating to the care and protection of children in detention. This type of inquiry can be commenced on the Commissioner's own initiative or where the Minister directs the Commissioner to do so. An inquiry has to be consistent with the objective of the Commissioner which is to ensure the wellbeing of vulnerable children (which include youth in detention). One such own initiative inquiry was conducted into Northern Territory youth detention centres in the past two years surrounding complaints and events leading up to and including 21 August 2014. It is notable



that the Commissioner continued with her own investigation even though the NT Government had commissioned Michael Vita to undertake an internal review. The Children's Commissioner's report,<sup>1</sup> was provided to the Minister soon after the Vita report and provided a number of recommendations which go further to protecting and advancing the rights of youth within detention as opposed to those in the Government commissioned report. As opposed to the Vita recommendations, it is of concern that there does not appear to be any commitment by the NT Government to implement these recommendations. The lack of action by the NT Government with regard to these recommendations shows the practical limitations of this process.

It is further of concern that whilst the Children's Commissioner may make recommendations to the Superintendent and detention staff, there is no ability to ensure compliance or enforce these. As was noted in the recent Children's Commissioner Report,<sup>2</sup> since 2012 there had been repeated notifications of inappropriate and unsafe use of restraints by staff with recommendations to review and implement alternative practices, yet these were ignored in the subsequent 18 months that followed.

In addition to the above complaint mechanisms there is provision for complaints to be made directly to the Ombudsman,<sup>3</sup> or the Official Visitors.<sup>4</sup> Whilst the Official Visitors have the mandate to inquire into the treatment and behaviour of, and the conditions for, detainees in the detention centre, they do not provide an independent recourse for action and report directly to the Minister. It is again a cause for concern that the Minister who is responsible for the administration of the centres is placed to receive complaints about the same.

These shortcomings have fostered a culture where complaints are not seen to be taken seriously. Young people have stated to NAAJA that complaining is not worth it because complaints are simply not addressed.

The internal complaints handling policy should be reviewed to ensure compliance with best practice complaints handling principles, and all staff should receive regular training on the complaints handling process. There must also be independent and external oversight of the manner in which internal complaints are handled.

There is overwhelming need for an independent statutory body to be established to identify systemic issues in the delivery of correctional services in the NT, and to ensure greater governmental accountability. We strongly recommend that the NT Government establish an independent statutory body with specific responsibility to ensure correctional services meet minimum standards and adequately safeguard the rights of detainees and inmates. The Western Australian Inspector of Custodial Services could be used as a model.

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<sup>1</sup> <http://www.childrenscommissioner.nt.gov.au/publications/Childrens%20Commissioner%20DDYDC%20-%20Report%20to%20Minister%20170915.pdf>

<sup>2</sup> Ibid 29- The issue of poor training and practice around crisis intervention was raised by Dr Bath in 2012. In April 2012, surveillance tapes depicting the inappropriate and unsafe use of restraint were shown to senior staff of the Department of Justice (which incorporated Correctional Services) ('DOJ') and undertakings were provided that such practices would cease. In December 2012, the Office of the Children's Commissioner sent DOJ formal recommendations regarding the review and suggested implementation of safe intervention techniques.

It appears that the recommendations were not implemented at that time, nor in the subsequent 18 months.

<sup>3</sup> *Ombudsman Act 2009 (NT)*

<sup>4</sup> See further *Youth Justice Act 2005 (NT)* s 170



***Are there particular examples of good practice in relation to the promotion and safeguarding of children's rights in detention facilities?***

The Western Australian Office of the Inspector of Custodial Services would appear to be a best practice example that can be drawn upon in an Australian context. This body is independent of government and those in charge of the administration of detention centres.

The Office of the Inspector of Custodial Services focuses on institutional and systemic issues rather than individual complaints. The Inspector inspects and reviews custodial services and has comprehensive powers to obtain and use relevant information.

Reports on inspections and reviews are tabled in Parliament and are publicly available. This helps to ensure accountability and transparency in the operation of correctional facilities. For example, the WA Inspector of Custodial Services' report 'The Management of Young Women and Girls in Banksia Hill Detention Centre' resulted in important changes to the operation of the centre. The Inspector made a number of significant recommendations to improve the operation of the centre which resulted in immediate actions and commitments from the Department of Correctional Services. This highlights the valuable role an Inspector of Custodial Services could play in addressing systemic issues, including those identified by Official Visitors, in a timely manner.

An Inspector of Custodial Services would strengthen and complement the work currently carried out by official visitors and has the potential to significantly improve the operation of not only detention facilities, but all correctional facilities in the Northern Territory.

We note that NSW has adopted the WA model and we understand that, unlike the WA Custodial Inspector, the NSW Inspector of Custodial Services has the power to undertake inspections outside NSW borders. Consideration could be given to enabling the NSW Inspector of Custodial Services to exercise his functions in the Northern Territory.

We further note that Australia is a signatory to the AJJA Standards for Juvenile Custodial Facilities, which outline best practice standards regarding complaints and grievances processes at section 2.7. It is stated that best practice standards would require that "the centre provides young people with clear, accessible and fair avenues for lodging and resolving complaints and grievances, and with the opportunity to appeal decisions." A number of sample indicators are provided, including the following:

- A. Formal and informal complaints are dealt with in accordance with written policy and procedure.
- B. Young people are assisted to raise concerns about the centre or its services without fear of retribution.
- C. Young people and their advocates know about and understand the internal and external complaints procedures, and report satisfaction with the centre's practices.
- D. Young people are presented with sufficient opportunities to voice their complaints to independent people who visit the centre, such as Official Visitors or officers of the Ombudsman.
- E. Visitors who take complaints from young people as part of their official duties report satisfaction with the centre's practices.



- F. Feedback is provided to young people who lodge or appeal complaints.
- G. Number of complaints and grievances received, and the number resolved to the satisfaction of those involved.<sup>5</sup>

These indicators would be a useful benchmark when considering potential reforms and improvements to the current monitoring mechanisms.

### ***How do children and young people in detention experience and understand the current oversight, complaints and monitoring mechanisms?***

In recent years NAAJA have received a significant number of complaints that coincide with and are reflected in the issues raised within the Vita report and Children's Commissioner reports from 2015. It is clear from our dealings with these youth over the years that many had little understanding of their rights within detention and any recourse for complaint.

The *Youth Justice Act 2005 (NT)* s 150 requires that any youth admitted into a detention centre is to be given an explanation of the rules of the centre and his/her rights and responsibilities as a detainee. This explanation must be given in a language and in a manner the youth is likely to understand having regard to their age, maturity, cultural background and English language skills. The explanation must also include information as to the consequences following a breach of any rules and information about the complaints procedure. This requirement seems to reflect the Beijing Rules.<sup>6</sup>

NAAJA has confirmed that there is no up to date 'Induction Manual' provided to any youth on first entry into detention. We have been told by Corrections that the previous manual is under review and during the review period (unknown time frame) each youth has been given a verbal induction with a briefing as to the rules of the centre, their rights and obligations incumbent on each. However there has been no disclosure as to what is actually told to each youth, and no way of assessing whether or not on each occasion the information given complies with that required by s 150 of the *Youth Justice Act 2005 (NT)*. It does not appear that there is any independent record of what if any information a youth actually receives on admission.

NAAJA has repeatedly been told by clients that they are not given much if any information about their rights within the detention centre and often they have to make enquiries from other youth as to the practice and procedure within the centre. Despite repeatedly asking youths if they are given a formal induction and a set of guidelines regarding rules and behaviour not a single youth has stated that this has happened. Many youth for whom English is not their first language have not been given this information with the assistance of an interpreter.

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<sup>5</sup> Section 2.7 Complaints and Grievances, Australasian Juvenile Justice Administrators Standards (AJJA) for Juvenile Custodial Facilities, Australasian Accessed on 15 June 2016 at <https://www.humanrights.gov.au/sites/default/files/Annexure%20H%20-%20AJJA%20Standards.pdf>

<sup>6</sup> 24. On admission, all juveniles shall be given a copy of the rules governing the detention facility and a written description of their rights and obligations in a language they can understand, together with the address of the authorities competent to receive complaints, as well as the address of public or private agencies and organizations which provide legal assistance. For those juveniles who are illiterate or who cannot understand the language in the written form, the information should be conveyed in a manner enabling full comprehension.



***How well do children and young people in correctional detention (youth justice centres and adult facilities) understand their human rights, including those under the Convention on the Rights of the Child? What could be done to better promote the human rights of children in these facilities?***

NAAJA previously provided legal education to youth within detention as to their rights whilst in custody. The most recent was conducted in June 2015, delivered by the NAAJA CLE team. The content of these legal education sessions were largely based on the guiding legislation specifically the *Youth Justice Act 2005 (NT)* and its regulations. These education sessions however were discontinued due to backlash from particular staff within the education section of the detention centre. Following the last session in June 2015, NAAJA were told that we would not be permitted to deliver such 'educational' sessions again if they involved youth rights within detention. The immediate consequence was a withdrawal from all CLE for the rest of 2015 into the early months of 2016.

It has only been in the last few months that NAAJA has been permitted back into the Don Dale Detention Centre. This was negotiated through the Superintendent who has personally fostered a more amicable working relationship with NAAJA. At present NAAJA are permitted to deliver legal education, on specific topics, none of which include human rights or specifically rights within the detention centre setting.

NAAJA have agreed to partner with CAALAS and NTLAC to develop a resource on youth rights and responsibilities whilst in detention or under the supervision of Corrections. In order to progress this project, staff from Department of Correctional Services have been involved in ongoing discussions about content. It is hoped that such a resource would be supported and resourced by Correctional Services in promotion of the human rights of youth within their centres, especially those operating within the centres themselves.

***How well do staff understand and promote children's rights, including those under the Convention on the Rights of the Child?***

Consistent with the findings of Michael Vita and the NT Children's Commissioner there is real concern held as to what understanding current staff operating with the detention centres have in relation to Australia's international obligation and commitment to promote and protect the human rights of youth. Whilst one can see signs affixed to the reception area of the Don Dale detention centre depicting the Convention on the Rights of the Child, there appears to be little understanding on the ground as to its application to those within the centre. This would seem evident when consideration is given to the number of reported instances of breaches committed by staff within the detention centres, specifically as to the use of isolation and spit hoods as behavioural management tools.

In our experience, staff have displayed a distinct lack of understanding of children's rights and the centre's obligations to the young people themselves. Some staff have commented that it is not the centre's "core business" to provide programs for the young people to enhance their wellbeing.

When NAAJA have provided sessions promoting the rights of the young people in detention staff have displayed a lack of any knowledge on the subject, to the extent of making enquiries about the source of this information.



We note the Children's Commissioner in her 2015 report recommended that Correctional Services policies and procedures with the detention centres be amended to ensure the rights of youth under the Convention on the Rights of the Child are being respected and protected. Yet as of this date the internal policies and procedures applicable to NT detention centres have not yet be finalised.

We have been advised that there is currently training being offered and delivered to all new and current Youth Justice Workers (Cert. III in Correctional Practice) as a result of the Vita Report. This is a relatively new development which has seen but a small percentage of current staff undertaking the training. It is unclear from the course content guide whether there is specific instruction on children's rights and those afforded within CROC.

***How could the ratification of OPCAT and the establishment of a NPM benefit children and young people in detention (youth justice centres and adult facilities)?***

In the Northern Territory it is clear that the current oversight, complaints and monitoring mechanisms in relation to youth in detention are not adequate to ensure respect for and adherence to minimum human rights standards. Through the ratification of OPCAT and establishment of a NPM we may be closer to remedying the current system.

Ratification will enable independent international oversight through the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture, whose aim is to 'prevent torture and other cruel, inhuman or degrading treatment or punishment'. Once ratified, Australia would be required to grant the SPT unrestricted access to relevant information, to all places of detention and ability to have private interviews. Australia as with other State Parties must examine the recommendations of the SPT and discuss possible implementation measures.

Ratification will also require Australia to establish either one or several independent NPMs. The NPM or NPMS are to have certain essential elements to ensure their effectiveness and these are set out under Part IV (Articles 17 – 23) of the Protocol as follows:

- a mandate to undertake regular preventive visits
- independence (functional independence, independence of personnel)
- expertise (required capabilities and professional knowledge)
- necessary resources
- access (to all places of detention; to all relevant information; the rights to conduct private interviews)
- appropriate privileges and immunities (no sanctions for communicating with the NPM; confidential information shall be privileged)
- dialogue with competent authorities regarding recommendations
- power to submit proposals and observations concerning existing or proposed legislation.

It is notable that NPMs are not constrained to work on a confidential basis and Article 23 of the OPCAT requires states to publish and disseminate the annual reports of the NPM. It is our belief that the establishment of NPMs could ensure greater transparency and accountability by Government and those entrusted with the care of youth in detention.



**Generally, in relation to the monitoring of youth justice detention centres in your jurisdiction, are there any areas that require greater resourcing to operate more effectively?**

As outlined above, CAALAS and NAAJA have observed resourcing issues as compromising the ability of the NT Children's Commissioner and official visitors to efficiently progress complaints in a practical manner. It is essential that appropriate resourcing be provided to enable a response that affords such complaints the gravitas they deserve.

Other than the aforementioned external complaint avenues, there is no independent statutory body with specific responsibility to ensure correctional services meet minimum standards and adequately safeguard the rights of detainees and inmates. If such a body were to be established and sustainably resourced, this would make the monitoring mechanisms in the NT more robust and effective.

***The age of criminal responsibility is 10 years in all Australian jurisdictions. The Convention on the Rights of the Child does not specify what such a minimum age of criminal responsibility should be. However the Committee on the Rights of the Child recommends 12 years of age should be the absolute minimum age. The Committee on the Rights of the Child has noted Australia's non-compliance with this standard and it has recommended Australia raise its minimum age of criminal responsibility. What is your view on this?***

The current minimum age of criminal responsibility in Australia is out of touch with international law, and evidence about children's brain development clearly demonstrates that children under 12 years lack the necessary capacities for full criminal responsibility.

NAAJA has along with a group of prominent legal, human rights and social services organisations supported an open letter, facilitated by Jesuit Social Services, calling on state and federal Attorneys-General to lift the age of criminal responsibility to 12 years of age. This was released alongside a discussion paper, Too much too young: Raise the age of criminal responsibility to 12.<sup>7</sup>

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<sup>7</sup> [http://sjapc.net/sites/default/files/too\\_much\\_too\\_young\\_-\\_raise\\_the\\_age\\_of\\_criminal\\_responsibility\\_to\\_12.pdf](http://sjapc.net/sites/default/files/too_much_too_young_-_raise_the_age_of_criminal_responsibility_to_12.pdf)