

Queensland Family and Child Commission Submission

To: Australian Human Rights Commission

Date: 28 July 2017

Topic: OPCAT in Australia: consultation paper

Submission summary:

The Queensland Family and Child Commission (QFCC) is pleased to provide a submission to the Australian Human Rights Commission regarding ratification of the Optional Protocol to the Convention against Torture (OPCAT).

This submission will focus on providing the Australian Human Rights Commission with information about current Queensland priorities to support children and young people in the youth justice system, including opportunities for the ratification of OPCAT to contribute to oversight, diversion and rehabilitation strategies.

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1. What is your experience of the inspection framework for places of detention in the state or territory where you are based, or in relation to places of detention the Australian Government is responsible for?

Recommendation

The QFCC recommends Queensland adopt an independent inspection body similar to the Inspectors of Custodial Services in Western Australia and New South Wales. This could form part of the OPCAT National Protective Mechanism when OPCAT is ratified.

In Queensland, the Youth Detention Inspectorate, an internal oversight mechanism established under s. 263 of the *Youth Justice Act 1992*, conducts quarterly inspections of youth detention centres.¹ Youth detention facilities can also be inspected by the Office of the Public Guardian's community visitors and child advocates, and officers from the Queensland Ombudsman. At present, there is no independent oversight agency in place.²

Youth Detention Inspectorate

The Youth Detention Inspectorate has published *Expectations of Youth Detention Centres*, a benchmark 'to help ensure the highest level of safe custody and well being of young people, whilst also maintaining the integrity and security of the centre.'³

The Youth Detention Inspectorate publishes quarterly reports of their inspections of the Cleveland and Brisbane Youth Detention Centres.⁴ These provide recommendations to improve practices in the centres.

Office of the Public Guardian

The Office of the Public Guardian's community visitors conduct weekly visits to youth detention centres, to ensure that the voice of the child or young person is heard, and offer child-friendly

¹ Department of Justice and Attorney-General, *Youth Justice Feedback*, response to the *Consultation Paper – Best practice principles in responding to complaints of child sexual abuse in institutional contexts*, <https://www.childabuseroyalcommission.gov.au/getattachment/7abd2713-2af8-4fa7-9f75-99d1f71264e0/Queensland-Corrective-Services>, accessed 5 July 2017.

² Australian Children's Commissioners and Guardians, *Human rights standards in youth detention facilities in Australia: the use of restraint, disciplinary regimes and other specified practices*, <http://www.childcomm.tas.gov.au/wp-content/uploads/2016/10/report-accg-human-rights-the-use-of-restraint-disciplinary-regimes-and-other-specified-practices.pdf>, accessed 5 July 2017, p. 83.

³ Youth Detention Inspectorate, *Youth Detention Inspectorate Expectations for Queensland Youth Detention Centres*, <https://publications.qld.gov.au/dataset/6942b295-59ce-443a-8d14-cef88aa58a45/resource/6ffbebe7-8996-4b6d-8d6e-9cbeb125fc00/download/youthdetentioninspections.pdf>, accessed 5 July 2017, p. 4.

⁴ Queensland Government, *Youth detention centres quarterly reports*, <https://publications.qld.gov.au/dataset/youth-detention-centres-quarterly-reports>, accessed 10 July 2017.

complaints mechanisms. Child advocates are legally qualified officers who can also make contact with children in detention if they are referred.⁵

Queensland Ombudsman

The Queensland Ombudsman can review administrative actions and decisions in youth detention. The Ombudsman has powers to investigate and, where appropriate, report on complaints received about maladministration, and can take initiative to investigate administrative actions.⁶

Interstate examples

Western Australia and New South Wales have developed a more comprehensive process for inspecting detention centres, in the form of the Office of the Inspector of Custodial Services (WA) and the Inspector of Custodial Services (NSW). These bodies provide reports to Parliament on performance standards in custodial facilities, while also running independent visitor programmes on a similar basis to the Queensland Office of the Public Guardian.⁷

The QFCC would support the introduction of an Inspector of Custodial Services in Queensland.

OPCAT requirements

To ratify OPCAT, Australia is required to develop a National Preventative Mechanism (NPM). This could take the form of a single national body run by the Commonwealth, or a mixed model where a Commonwealth body coordinates responsibilities which are then carried out by the states. If the latter option is selected, existing state bodies with responsibility for overseeing detention, such as the WA and NSW inspectorates, could form part of the NPM.⁸

This would also be in line with recommendations made by the Independent Review of Youth Detention in Queensland, in its report released on 28 April 2017.⁹ These recommendations have been accepted by the Queensland Government.¹⁰

Internationally, existing government oversight agencies, such as Ombudsmen, public rights defenders and human rights commissions, typically take on NPM responsibilities. In the UK, these

⁵ Office of the Public Guardian, *Submission to the Independent Review of Youth Detention: Discussion Paper*, https://www.youthdetentionreview.qld.gov.au/_data/assets/pdf_file/0020/2549/Office-of-the-Public-Guardian.pdf, October 2016, accessed 6 July 2017.

⁶ Queensland Ombudsman, *Submission to the Independent Review of Youth Detention: Discussion Paper*, https://www.youthdetentionreview.qld.gov.au/_data/assets/pdf_file/0014/2552/Queensland-Ombudsman.PDF, 26 October 2016, accessed 6 July 2017.

⁷ Office of the Inspector of Custodial Services (WA), <http://www.oics.wa.gov.au/>, accessed 6 July 2017; Inspector of Custodial Services (NSW), <http://www.custodialinspector.justice.nsw.gov.au/>, accessed 6 July 2017.

⁸ Harding, R. and Morgan, N., *Implementing the Optional Protocol to the Convention against Torture: Options for Australia*, <http://www.ap.t.ch/content/files/npm/asiapacific/Australia1.pdf>, 2008, accessed 6 July 2017, p. 26.

⁹ Independent Review of Youth Detention, *Independent Review of Youth Detention: Confidential Report*, <http://www.youthdetentionreview.qld.gov.au/review-of-youth-detention-centres-report-updated-28-June-2017.pdf>, 2016, accessed 18 July 2017.

¹⁰ Queensland Government, *Government response to the independent review of youth detention*, <http://www.youthdetentionreview.qld.gov.au/governments-response-to-the-report.pdf>, 2017, accessed 18 July 2017.

responsibilities are divided between 21 regional bodies.¹¹ Following this example, a number of state and territory Inspectors of Custodial Services could join to form an Australian NPM. These could be coordinated by the Commonwealth Ombudsman, as outlined in the consultation paper.

If responsibilities are shared in this way, legislative and practice frameworks must be established to support information sharing between each NPM body. These must also provide for consistency in the approach to custodial oversight across Australia.

2. How should key elements of OPCAT implementation in Australia be documented?

Recommendation

Clear documentation written for members of the public will help to support young people and families interacting with youth detention centres. This will enable people to raise and resolve issues, and ask for decisions to be reviewed where appropriate.

Clear documentation has an important role in making sure policies and processes are easily understood. This could help to foster public trust in, and engagement with, an Australian NPM.

Without clear documentation, it can be difficult for people to understand their rights and work with institutions to achieve positive outcomes. As an example of this, the 2013 Queensland Child Protection Commission of Inquiry report found some children may have remained in out-of-home care longer than necessary, in part because children and parents may not have had enough information about their rights and review options.¹² The QFCC has sought to address this concern by publishing resources to explain the child protection system to children and parents.¹³

Clear information will help to make the process for inspecting detention centres transparent, and can support young people and their families to seek reviews of decisions where appropriate.

The Commonwealth Government has indicated it does not intend to create new legislation to support implementation of OPCAT. However, the QFCC believes new legislation may be necessary to establish an NPM independent from government, with clear responsibilities and information sharing powers between jurisdictions.

¹¹ United Nations Human Rights Office of the High Commissioner, *National Preventative Mechanisms*, <http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/NationalPreventiveMechanisms.aspx>, accessed 6 July 2017.

¹² Queensland Child Protection Commission of Inquiry, *Taking Responsibility: A Roadmap for Queensland Child Protection*, http://www.childprotectioninquiry.qld.gov.au/_data/assets/pdf_file/0017/202625/gcpci-final-report-web-version.pdf, 2013, accessed 10 July 2017, p. 493

¹³ See for example, Queensland Family and Child Commission, *Finding out about child protection in Queensland*, <https://www.qfcc.qld.gov.au/finding-out-about-child-protection-queensland>, 2016, accessed 10 July 2017.

3. What are the most important or urgent issues that should be taken into account by the NPM?

Recommendation

The NPM should take account of the following urgent issues:

- full implementation of OPCAT in Australia should be completed as soon as possible
- OPCAT implementation should include a clear definition of detention, particularly outlining whether it includes bodies such as aged care, psychiatric, medical, closed educational and secure care facilities
- the NPM should sit independently from the departments or agencies responsible for detention in each state and territory
- the NPM should be given clear powers to access places of detention, to collect and store information, and to use that information for research purposes
- implementation of OPCAT should develop consistent national guidelines for oversight
- the implementation of OPCAT should also consider:
 - over-representation of Aboriginal and Torres Strait Islander peoples in youth detention
 - the impact of Foetal Alcohol Spectrum Disorder and other cognitive impairments
 - the impact of trauma as a factor in youth detention
 - raising the Minimum Age of Criminal Responsibility from 10 to 12 years.

Timeliness of OPCAT implementation

It has been eight years since Australia signed OPCAT. Although some more preparation is needed to establish an NPM covering each state and territory in Australia, the QFCC believes full implementation of OPCAT should be completed as soon as possible.

It may also be preferable to require each state and territory to implement their NPM bodies at the same time. This will reduce the risk the NPM fails to be a truly national system.

Definition of detention

There will need to be clear guidance on how detention is defined for the purposes of OPCAT. Article 4.1 of the Protocol defines a place of detention as ‘the placement of a person in a public or private custodial setting which that person is not permitted to leave at will’.¹⁴ In the United Kingdom, France and New Zealand, the definition of detention extends beyond conventional places of detention to include such bodies as psychiatric and other medical facilities, hospitals, aged care, closed education and secure care facilities.¹⁵

¹⁴ United Nations Human Rights Office of the High Commissioner, *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx>, accessed 27 July 2017.

¹⁵ National Preventative Mechanism (UK), *Seventh Annual Report of the United Kingdom’s National Preventive Mechanism: 1 April 2015-31 March 2016*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/584215/npm-annual-report-2015-2016.pdf, accessed 27 July 2017; Le Contrôleur général des lieux de privation de liberté, *Rapport d’activité 2012*, http://www.cgjpl.fr/wp-content/uploads/2013/02/CGLPL_Rapport-2012_version-WEB.pdf, accessed 27 July 2017; Human Rights Commission (NZ), *Monitoring places of detention: annual report of activities under the Optional Protocol to the Convention against Torture 1 July 2013 to 30 June 2014*,

The NPM will need to have clear jurisdiction to inspect all facilities subject to OPCAT oversight, particularly if the definition of detention in Australia is interpreted broadly.

Independence of the NPM

The Attorney-General has announced the Commonwealth Ombudsman will be the national coordinator of the NPM in Australia. The QFCC recommends some consideration be given to how independent the NPM should be in each state and territory. The NPM should be an independent arm of government, sitting outside the departments which hold responsibility for managing detention facilities.

Consideration should also be given as to who should be appointed to the NPM, and how they should be appointed, to make sure the NPM remains independent from government.

Powers to access places and information

New legislation at the state, territory and Commonwealth levels may be required to give NPM bodies the powers to access places of detention, and share information. These powers should also allow NPM bodies to collect information, store it and use it for research purposes, to allow the information to contribute to policy improvements.

This could be developed along the lines of s. 28 of the *Family and Child Commission Act 2014* (QLD), which allows the Principal Commissioner, QFCC, to give access to data from the QFCC's child death register to a researcher if 'the opportunity for increased knowledge that may result from the research outweighs the need to protect the privacy of any living or dead person'.¹⁶

Consistent national standards

Policy guidelines and legislation should develop consistent national standards for the NPM, to be followed in each state and territory body. These should also outline clear ways for each NPM body to interact between states and territories, to collect and share information, and make sure oversight is consistent and well reported.

Over-representation of Aboriginal and Torres Strait Islander peoples in youth detention

According to a 2016 report by the Australian Institute of Health and Wellbeing, 55 per cent of all young people in detention on an average night in the June quarter 2016 were Aboriginal or Torres Strait Islander. Statistically, the level of overrepresentation in the youth detention system for Aboriginal and Torres Strait Islander peoples stood at 26 times the rate of non-Indigenous people.¹⁷ Reducing this over-representation is an urgent issue, which should inform the development and implementation of the NPM.

The QFCC considers diversion and rehabilitation key priorities for youth detention. Programs should be available to help divert Aboriginal and Torres Strait Islander children and young people away from

http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/1582/original/2014_opcat_annual_report.pdf?1466558416, accessed 27 July 2017, p. 29.

¹⁶ *Family and Child Commission Act 2014* (QLD), s. 28(4)(b).

¹⁷ Australian Institute of Health and Welfare, *Youth detention population in Australia 2016*, <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129557685>, December 2016, accessed 10 July 2017.

custody. Connection to culture and family is a fundamental aspect of identity for Aboriginal and Torres Strait Islander peoples. A period of detention away from home and family can impact the development of positive social and behavioural norms.¹⁸

The NPM should take an interest in culturally-relevant rehabilitation and intervention programs. In its submission to the *Independent Review of Youth Detention*, the Aboriginal and Torres Strait Islander Legal Service stated ‘cultural programs must be informed by cultural practices and include content that reflects Aboriginal and Torres Strait Islander Queensland norms and experiences’.¹⁹

Cultural support is critical in preventing reoffending. Therefore, the provision of cultural services, and cultural competency training for staff, should be evaluated during the inspection process.

Diversion away from detention

The QFCC agrees with the Australian Children’s Commissioners and Guardians that ‘the evidence is clear that any approach to youth justice needs to be firmly based on diversion away from detention, with detention considered as a last resort for young people.’²⁰ Research suggests time in detention could negatively impact on life outcomes for children and young people. Young people who come into contact with the youth justice system before the age of 15 years are less likely to complete their school education or gain employment, and some children who spend time in youth detention centres progress from low-level to violent offences.²¹

Diverting children and young people away from detentions should be a key priority for the youth justice system as a whole, and the NPM could help to monitor diversion programs to ensure detention is only used as a last resort.

Use of separation and restraints

The QFCC believes restraint should be avoided where possible.²² Preventative strategies, such as the development of trauma-informed approaches to detention, should help to reduce the use of restraints.

Guidance on the use of restraint should be clear. In Queensland, restraint is only authorised if it is reasonably likely the child will attempt to escape, seriously harm themselves or others, or seriously disrupt the order and security of the centre. Reasonable steps should be taken to use restraints in a way that respects the child’s dignity and for a period no longer than reasonably necessary.

¹⁸ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing*, http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=atsia/sentencing/report.htm, 2011, accessed 10 July 2017, p. 49-51.

¹⁹ Aboriginal and Torres Strait Islander Legal Services, *Submission to Youth Detention Review on the Independent Review of Youth Detention Discussion Paper*, https://www.youthdetentionreview.qld.gov.au/data/assets/pdf_file/0017/2546/ATSILS.pdf, 2016, accessed 10 July 2017, p. 4.

²⁰ Australian Children’s Commissioners and Guardians, *Human rights standards in youth detention facilities in Australia*, p. 89.

²¹ Queensland Family and Child Commission, *The Age of Criminal Responsibility in Queensland*, <https://www.qfcc.qld.gov.au/age-criminal-responsibility>, 2017, accessed 10 July 2017, p. 30.

²² Australian Children’s Commissioners and Guardians, *Human rights standards in youth detention facilities in Australia*, p. 38.

International standards strongly discourage the use of restraints, as there is evidence to suggest using physical restraints to control behaviour can lead to more serious acts of aggression.²³

There are specific requirements in Queensland that govern the practice of separation. Separation can only be practiced if the child is ill, if the child has requested separation, for routine security purposes under the chief executive's directions, for the protection of the child, other people or property, or to restore order in the detention centre. The use of separation as a punishment for behaviour is not lawful.²⁴

An NPM could monitor the use of restraints and separation in youth detention centres to make sure these are only used when authorised and necessary.

Trauma-informed approaches to youth detention

The QFCC supports the provision of trauma-informed approaches to youth justice, which recognises the context of trauma and its effect on the cognitive development and behaviour of children and young people.

A trauma-informed approach could be based on a model of youth detention pioneered in Missouri, in the United States.²⁵ There, children in 'residential facilities' attend daily group therapy sessions together. As part of their therapy, they are held accountable by fellow detainees for any disruptive, disrespectful and destructive behaviour. They are then asked to express their thoughts and feelings and consider how their behaviour impacts others. Children are also able to access individual and family therapy.²⁶

The state of Missouri provides substantial support to children who are returning to the community after spending time in a residential facility. There is intensive aftercare planning prior to their release and this is followed by monitoring and mentoring post-release.²⁷

An NPM in Queensland could assess the extent to which youth detention programs assess and respond to the relationship between trauma and the behaviour of children and young people.

Foetal Alcohol Spectrum Disorder

The QFCC agrees consideration should be made to other systemic issues, such as detention of people with cognitive disabilities. On 9 May 2017, the QFCC held a learning forum on Foetal Alcohol Spectrum Disorder, with the aim of discussing strategies to increase awareness and improve access to support affected families and individuals.

²³ Ibid.

²⁴ Ibid., p. 60; *Youth Justice Regulation 2003*, s. 22.

²⁵ The Annie E. Casey Foundation, *The Missouri Model: Reinventing the Practice of Rehabilitating Young Offenders*, <http://www.aecf.org/m/resourcedoc/aecf-MissouriModelFullreport-2010.pdf>, 2010, accessed 11 July 2017, p. 20.

²⁶ Ibid.

²⁷ Ibid, p.14.

The forum identified three key themes:

- FASD is prevalent across all areas of society and is often misdiagnosed
- FASD is preventable and therefore it is important to increase community awareness
- the importance of mandatory training for all staff working in the human services area, to gain fundamental knowledge of the common features of FASD relevant to their area of practice.²⁸

Similarly, a March 2017 study in Western Australia published preliminary findings to suggest 30 to 40 per cent of young people detained at the Banksia Hill Detention Centre were affected by FASD.²⁹ While the exact number of young offenders affected by a FASD is as yet unknown, there is evidence to suggest Aboriginal and Torres Strait Islander people with cognitive impairments are over-represented in the criminal justice system.³⁰ These findings suggest policy and programs need to be developed to improve the rehabilitation rates of young people experiencing FASD and other health issues.

Minimum Age of Criminal Responsibility

Another key priority for the QFCC is the Minimum Age of Criminal Responsibility (MACR). This is the age at which a person can be held criminally responsible for any act or omission. In every state and territory in Australia, the MACR is currently set to 10 years. This is well below the European average of 14 years.

The United Nations has recommended Australia raise its MACR, and Amnesty International, the New South Wales Commission for Children and Young People and the Australian Human Rights Commission have all recommended the states and territories raise the MACR to 12 years. The QFCC supports this recommendation, and further recommends all children aged between 10 and 12 years be removed from detention.³¹ The status of 10 to 12-year-old children in detention could be a key issue for an Australian NPM once established.

²⁸ Queensland Family and Child Commission, *Foetal Alcohol Spectrum Disorder (FASD) Learning Forum, Cairns*, <https://www.qfcc.qld.gov.au/news/fetal-alcohol-spectrum-disorder-fasd-learning-forum-cairns>, 8 June 2017, accessed 10 July 2017.

²⁹ See Hamlyn, C., 'One in three in WA youth detention have foetal alcohol spectrum disorder, study finds', *ABC News*, <http://www.abc.net.au/news/2017-03-03/one-in-three-young-people-in-prison-have-fasd-in-wa/8319724>, 3 March 2017, accessed 10 July 2017.

³⁰ Queensland Family and Child Commission, *The Age of Criminal Responsibility in Queensland*, p. 26.

³¹ Queensland Family and Child Commission, *The Age of Criminal Responsibility in Queensland*.

4. How should Australian NPM bodies engage with civil society representatives and existing inspection mechanisms (e.g. NGOs, people who visit places of detention, etc.)?

Recommendation

The NPM should form strong partnerships with organisations currently visiting places of detention, including clear policy and practice guidance on raising and resolving issues, to ensure the voices of children and young people are heard when decisions are made.

As detailed above, there are a number of existing internal inspection bodies for youth detention centres in Queensland, despite the absence of an external inspection program. It could be expected that some of these existing mechanisms, notably the provision of community visitors and child advocates by the Office of the Public Guardian, may remain in place after the establishment of an NPM. Strong relationships between the NPM and these organisations, along with clear policy and practice guidance, would help these officers interact with the NPM to raise and resolve issues in youth detention.

The NPM should also partner with organisations in the community sector, such as the Youth Advocacy Centre, which regularly visit youth detention facilities.³² This would help to maintain high standards in youth detention, and ensure the voices of children and young people are heard when decisions are made.

One way to create this partnership would be to establish a youth detention oversight group, including organisations with various oversight responsibilities. In Queensland, this could include representatives from an independent inspectorate along with the Queensland Family and Child Commission, Queensland Ombudsman, Office of the Public Guardian, and also any Commonwealth bodies involved in coordinating the NPM (such as the Commonwealth Ombudsman). This group could be used to share information between oversight bodies, and offer a way for the NPM to support strong partnerships with state counterparts.

³² Youth Advocacy Centre, *Submission to the Independent Review of Youth Detention*, https://www.youthdetentionreview.qld.gov.au/_data/assets/pdf_file/0019/2557/Youth-Advocacy-Centre.pdf, 2016, accessed 10 July 2017.