



Australian
Human Rights
Commission

In safe hands? Protecting the rights of children and young people in youth justice centres

A summary of material contained in the
National Children's Commissioner's
Children's Rights Report 2016



'Remorse' – an original artwork by a young person detained in a youth justice centre, submitted as part of the 'Ur Tru Colours' art competition.

In 2016, the National Children's Commissioner invited children and young people in youth justice centres to express their thoughts and feelings about being in detention through the 'Ur Tru Colours' art competition. The artworks submitted are featured throughout this summary.

1 Oversight of youth justice in Australia: towards a national approach

In 2016 the National Children's Commissioner conducted a national investigation into the Optional Protocol to the Convention against Torture (OPCAT) and how it relates to children and young people detained in youth justice centres or adult facilities.

This document provides a summary of the key findings and recommendations from this investigation. Chapters 3 and 4 of the *Children's Rights Report 2016* contain the full results.

1.1 Introduction

In 2009 Australia committed to improving the standards of oversight and monitoring of places of detention across Australia, including juvenile detention facilities. We did this by signing an international human rights treaty called the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (OPCAT)*.¹

However, Australia has not yet ratified the OPCAT. Ratification involves implementing the treaty in domestic laws and processes.

The OPCAT requires the government to put into place new and expanded oversight mechanisms in order to prevent torture, as well as cruel, inhuman and degrading treatment in places of detention and closed environments.

The OPCAT does not involve Australia agreeing to any additional human rights or state responsibilities. It is intended to assist countries to implement more effectively their existing commitments under the *Convention against Torture and other Cruel, Inhuman and Degrading treatment or Punishment (CAT)*² which Australia ratified on 8 August 1989.

Ratification of the OPCAT is intended to be a collaborative process whereby the Commonwealth, states and territories work together to embed better scrutiny processes. It is preventative in focus – the emphasis is on proactively working towards preventing mistreatment from occurring in the first place.

To prevent torture and ill treatment, the OPCAT sets out a monitoring system made up of two complementary and independent expert bodies at the international and national level – the Subcommittee on the Prevention of Torture (SPT) and a National Preventive Mechanism (NPM).

The Subcommittee on the Prevention of Torture (SPT) is a United Nations body established under the OPCAT. By ratifying the treaty Australia would be allowing it to conduct visits to any place of detention within Australia.

A National Preventive Mechanism (NPM) is a body, or series of bodies, that monitor any place of detention within Australia. They would be quasi-independent agencies of governments in Australia and would take on the main role of monitoring and standards development.

To be an NPM, a body must meet a list of requirements in the OPCAT.³ These requirements include criteria like functional independence, the power to access information, and access to places of detention.

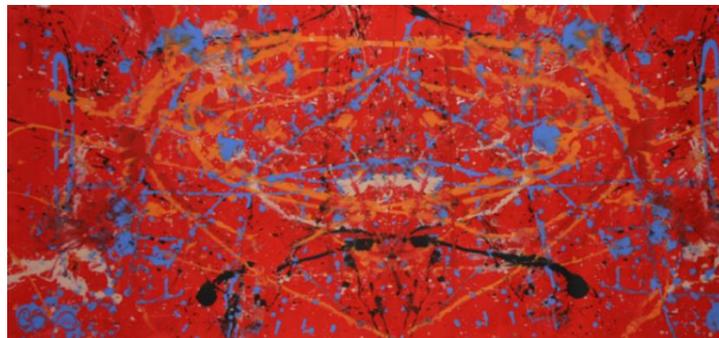
Youth justice detention is only one aspect of the OPCAT. Places of detention and closed environments could include a broad range of places, such as:

- prisons
- youth justice centres
- police lock-ups and police stations
- involuntary placement in psychiatric units
- immigration detention centres
- detention facilities under military jurisdiction
- court custody centres / holding cells
- transport vehicles for prisoners or youth detainees or arrestees or any other person journeying to or from a place of detention
- places where persons are held under applicable laws against terrorism before being transferred to prison jurisdiction
- transit zones and health quarantine areas at international airports
- facilities where people are detained by national intelligence services
- secure care facilities for children and young people in statutory out-of-home care
- aged care homes and hostels where restrictions are placed on the movement of residents for their own safety.

1.2 Existing human rights standards for children and young people in detention

A range of human rights treaties provide for standards of treatment of children and young people detained in youth justice centres, including:

- Convention on the Rights of the Child (CRC)
- International Covenant on Civil and Political Rights (ICCPR)
- Various UN rules and guidelines to assist in interpreting the provisions of these treaties.⁴



'Mixed Emotions' - The artist stated about his work: 'It's abstract self-expression about my feelings in here. Frustrated, happy, sad, confused, helpless ... and surrender. The different colours in the painting reflect these feelings. I stood on the table to do the artwork – to let my feelings out through the splashing of the paint and folding of the paper.'

1.3 *The National Children's Commissioner's work on the OPCAT*

The focus of the National Children's Commissioner's work in 2016 was to assess the readiness of youth justice processes to implement the provisions of the OPCAT. This included a stocktake of current oversight, complaints and reporting arrangements across the jurisdictions, an analysis of their adequacy in meeting the OPCAT requirements, and identification of opportunities for improvements nationally over time.

Ultimately, the OPCAT will require improvements to oversight mechanisms and accountability processes relating to youth justice.

This has been made all too clear by the release of disturbing footage in mid-2016 relating to the Don Dale Youth Detention Centre in Darwin and subsequent footage from Cleveland Youth Detention Centre in Queensland. In both cases, it appeared that children and young people were being mistreated.

We are, however, starting from a relatively high standard (compared internationally) where many of the required elements are in place. There are many good practices currently in operation in different states and territories that could be adopted by other states and territories. There are also gaps across jurisdictions.⁵

Information gathered for this project came from: formal requests to relevant state and territory departments; a series of expert roundtables; publicly available reports; submissions from non-government bodies and oversight agencies; and consultations with detained children and young people in each jurisdiction.

1.4 *Who is in youth justice detention?*

On an average day in 2014-15, almost 900 (16%) of all the children and young people who were in contact with the youth justice system were in detention. More than half (54%) of those children and young people in detention were not sentenced, and were awaiting the outcome of their legal matter or sentencing.⁶

Indigenous children and young people aged 10–17 were about 24 times as likely as non-Indigenous children and young people to be detained on an average day.⁷ The overrepresentation of Indigenous children and young people was consistently raised in submissions and at roundtables.

According to the Australian Bureau of Statistics (ABS), in 2015, 65 young people under the age of 18 years were held in adult correctional facilities. Most of these appear to be located in Queensland with a small number imprisoned in the Northern Territory. Most were males and 50 per cent were Indigenous.⁸



'Archie after Jandamarra' – The young person who created this artwork was inspired by the artwork 'Proud', an Archibald Prize winning portrait of the singer Archie Roach, painted by the artist Jandamarra Cadd.

1.5 *The OPCAT and youth detention in Australia: a stocktake*

The National Children's Commissioner examined the legislative requirements across all jurisdictions in relation to youth detention to establish: their existing levels of compliance with the OPCAT; how they document and monitor the use of force and methods of restraint; solitary confinement and isolation; critical incidents; searches; and complaints. For overall OPCAT compliance, each jurisdiction will need to undertake a similar review of monitoring systems in all places of detention.

The detailed mapping of legislation and relevant authorities tells us that:

- Across the jurisdictions, there has been considerable recent work undertaken to improve oversight and monitoring mechanisms for children and young people who are detained.
- Some jurisdictions are more developed than others.
- The mechanisms utilised by some jurisdictions could be used to guide the work occurring in jurisdictions with fewer protections.

It is heartening to see that jurisdictions like Western Australia and New South Wales have already established monitoring mechanisms that are leading practices on meeting the requirements of the OPCAT.

Jurisdictions like Tasmania and South Australia have recently passed legislation that will strengthen their monitoring mechanisms and increase their likelihood of becoming OPCAT compliant.

The ACT and Victoria have Human Rights Acts; *Human Rights Act 2004* (ACT) and *Charter of Human Rights and Responsibilities Act 2006* (Victoria). Under that legislation, it is unlawful for a public authority to act in a way that is incompatible with a human right, or to fail to give proper consideration to a relevant human right in decision-making.⁹ These 'human rights jurisdictions' have the capacity to use that legislation as a base from which to scrutinise human rights compliance generally, including with the CAT.

Some jurisdictions rely on internal government scrutiny only.

All jurisdictions have some gaps that must be addressed as they move towards compliance with the NPM criteria. It is therefore critical that any reforms undertaken occur in conjunction with an assessment of existing systems against the requirements of the OPCAT for the NPM. However, there is also capacity to take a **progressive realisation approach** where steps are taken over time within a targeted plan to ensure full coverage and appropriate arrangements are in place.

Some jurisdictions have multiple government departments and statutory bodies with responsibilities in the youth justice context. Often, these departments and bodies appear somewhat uncoordinated in their approach. This is concerning because it indicates, that in some jurisdictions, there is no overall mechanism acting in the best interests of children and young people who are in detention. This may also impede the ability for young people to readily identify the key sources of external support and advice.

This illustrates another potential benefit that will hopefully arise once OPCAT implementation begins: an opportunity to rationalise and clarify the roles of existing authorities within each jurisdiction.

The purpose of using the NPM criteria as a basis of analysis was to identify the main challenges moving forward and highlight ways that different jurisdictions can learn from initiatives and practices in other states and territories.

A discussion of the key NPM criteria follows.

a) Functional independence

The OPCAT requires that inspecting bodies should be functionally independent from the facilities that they inspect, including all agencies with responsibility for those facilities. The ‘operational independence of the NPM should be guaranteed’¹⁰ and ‘the NPM should enjoy complete financial and operational autonomy when carrying out its functions under the Optional Protocol’.¹¹

The following are examples of legislative provisions drawn from across Australian jurisdictions. They identify different elements of ensuring functional independence:

- Functions may be exercised on the Inspector’s own initiative, as well as in response to a reference or request by Parliament, other independent officials (such as Ombudsman or Police Integrity Commission), or any public authority or public official (for example NSW Inspector of Custodial Services¹²)
- Inspectors are appointed for fixed terms of employment, with clearly defined dismissal processes (for example Tasmanian Custodial Inspector¹³)
- Inspectors are accountable to parliament (for example NSW Inspector of Custodial Services¹⁴).

The *Guidelines on national preventive mechanisms* state that:

the relevant legislation should specify the period of office of the member/s of the NPM and any grounds for their dismissal. Periods of office, which may be renewable, should be sufficient to foster the independent functioning of the NPM’.¹⁵

The process for the selection and appointment of members of the NPM should be open, transparent and inclusive and involve a wide range of stakeholders, including civil society.¹⁶

The jurisdictions across Australia vary in the degree of independence held by their monitoring and oversight departments.

While all jurisdictions have at least one body with a high degree of independence, those bodies are not always established with a specific mandate to routinely inspect and monitor places of detention and their functions.

Western Australia and **NSW** have established independent inspectors of custodial services. Both have a high level of statutory independence, with provisions establishing appropriate appointment processes and with appropriate powers and protections for officeholders.

The parliaments of **South Australia** and **Tasmania** have recently passed legislation to establish independent statutory positions with the express function of monitoring places of detention.

The **Victorian** and **ACT** Ombudsman positions have broad remits because they have the mandate to consider administrative acts, which may have breached the human rights legislation in each of those jurisdictions. However, the Victorian Ombudsman has stated that this broad mandate is little known or used at the moment.¹⁷

Victoria and **Queensland** have detailed inspection regimes run from within internal government departments. However, the lack of independence from the departments responsible for administering the detention of children and young people means these arrangements would not fully meet the OPCAT requirements.

In addition to independent ombudsmen, most states and territories have independent statutory positions of commissioners for children and young people. Many lack the legislative mandate to regularly visit and inspect youth justice detention centres. Mostly they focus on children and young people who are in out-of-home care due to child protection concerns, though they may also elect to visit youth justice settings.

The **Northern Territory** relies upon its Ombudsman and Children's Commissioner for independent oversight. Both bodies have the necessary level of independence. However, neither body has a specific mandate to visit and inspect youth justice centres.

b) Independence and expertise of personnel

The following are examples of existing provisions that ensure the independence of personnel working at inspection bodies, and which ensure appropriate expertise:

- Provisions which set out required expertise for people to be eligible for appointment to an inspection role (for example NT Children's Commissioner¹⁸)
- Provisions which ensure diversity and plurality among the membership of inspection bodies (for example NT Youth Justice Advisory Committee¹⁹)
- Provisions which prevent conflict of interest in appointment processes and appointments themselves (for example NSW Inspector of Custodial Services²⁰)
- Offences for hindering or obstructing the Inspector, failing to comply with the Inspector, and making false statements or misleading the Inspector (for example NSW Inspector of Custodial Services²¹)
- The Inspector and staff are protected from liability for acts done or omitted to be done in good faith under the legislation (for example Tasmanian Custodial Inspector²²).

Few jurisdictions make legislative provision regarding the expertise required of appointments to relevant bodies, the staff of those bodies and experts used.

Additionally, few jurisdictions make legislative provision regarding a gender balance or representation for ethnic minorities. In the context of the overrepresentation of Aboriginal and Torres Strait Islander children and young people in youth justice centres across Australia, representation of Aboriginal and Torres Strait Islander people in an NPM is particularly important.

The **Northern Territory** has a Youth Justice Advisory Committee (YJAC) provided for in legislation.²³ The YJAC gives advice and information to the Minister for Correctional Services on the administration of the Northern Territory's youth justice system. The legislation provides that membership of the Committee should reflect the composition of the community at large and so far as practicable should include:

- an equal number of men and women
- at least two Aboriginal members
- at least one member who is under the age of 25 years at the time of their appointment
- at least one former detainee
- an Official Visitor
- one member residing in Alice Springs and one member residing in a remote community at the time of appointment.²⁴

Where positions are held voluntarily or by insecure employment, it is arguable that either the expertise and qualifications of the position-holders is likely to be insufficient or the independence of the individuals might be threatened.

Some jurisdictions make provision to ensure against conflicts of interest. For example, the Western Australian legislation establishing the Inspector of Custodial Services provides that a person who has, in the last three years, been a member of the Parliament of the Commonwealth or any State or Territory cannot be appointed as Inspector.²⁵

Protections for officeholders and staff are found in most legislation establishing Ombudsman offices and children's commissioners. The custodial inspectors have varying degrees of protections. For example, neither the **NSW Inspector of Custodial Services** nor his or her staff is subject to 'liability, claim or demand' for anything 'done or omitted to be done' if it was 'in good faith' for the purpose of executing the Inspector's functions.²⁶



'After Jandamarra' – original artworks by young people detained in a youth justice centre, submitted as part of the National Children's Commissioner's 'Ur Tru Colours' art competition.

c) The necessary resources for functioning

Article 18(3) of the OPCAT provides that an NPM must be provided with the necessary resources to function.

Government agencies and non-government organisations commonly expressed concerns about ensuring that inspectorates have sufficient funding to maintain a routine program of inspections and follow up, and to ensure appropriate expertise.

Lack of resourcing can compromise the capacity of relevant agencies to fulfil monitoring functions effectively. Resourcing can also impact on the functional independence of monitoring and oversight bodies.

Few jurisdictions' legislation addresses resourcing and where it does, it is unclear whether it has the effect of ensuring sufficient resourcing. The existing legislation establishing the Guardian for Children and Young People in South Australia requires that the Minister 'provide the Guardian with the staff and other resources that the Guardian reasonably needs for carrying out the Guardian's functions'.²⁷ The Guardian for Children and Young People advised that, at the time of writing, limited resources constrained the frequency of visits²⁸ with current monitoring focusing on the immediate physical, mental and emotional safety of residents.²⁹ The new legislation in South Australia provides that the Minister must deliver the Training Centre Visitor with the staff and other resources that the Visitor may reasonably need for exercising her or his functions.³⁰

d) Access to places of detention and the children and young people detained

The OPCAT requires the following elements for preventive mechanisms:

- Access to places of detention (article 20(c))
- The right to conduct private interviews with detained people and others (article 20(d))
- Liberty to choose places visited and people interviewed (article 20(e))
- Confidential information shall be privileged (article 21(2))
- Protections from sanctions or prejudice for individuals or organisations communicating with an NPM (article 21(1)).

The 'visiting mandate of the NPM should extend to all places of deprivation of liberty, as set out in article 4 of the Optional Protocol'.³¹

This means that the inspection mandate of the relevant monitoring bodies should extend to places like police cells and lock-ups, court holding cells, and vehicles used to transport people in the youth justice system.

No jurisdiction has an independent body with a mandate to inspect *all* places of detention where children and young people might be held. In particular, in most jurisdictions, the relevant bodies cannot inspect police cells or vehicles used to transport people detained.

The following are some examples of legislative provisions from across the country in this regard:

- Functions enable the body to routinely inspect and monitor places of detention, including a requirement to visit, such as every three years (for example WA Inspector of Custodial Services³²) and the power to access any detention centre at any time with any assistants and equipment (for example WA Inspector of Custodial Services³³)
- It is an offence to hinder a person exercising the powers of access (for example NSW Inspector of Custodial Services³⁴)
- Jurisdiction extends to police holding cells (for example NT Ombudsman³⁵), access to vehicles used to transport people detained (for example Tasmanian Custodial Inspector³⁶), and court holding cells (for example WA Inspector of Custodial Services³⁷), and includes the mandate to inspect adult facilities if any children are held there (for example Queensland Community Visitors³⁸)
- There is unfettered access to the people in detention centres (for example WA Inspector of Custodial Services³⁹)
- There is an express provision that there is no requirement to give notice of inspections (for example WA Inspector of Custodial Services⁴⁰)
- There is an express requirement that an inspector is provided privacy to conduct interviews with people detained and staff (for example Tasmanian Custodial Inspector⁴¹)
- Information received is confidential (for example NSW Inspector of Custodial Services⁴²) and privileged (for example Tasmanian Custodial Inspector⁴³)
- There are protections against recriminations for people who have complained or provided information (for example NSW Inspector of Custodial Services,⁴⁴ ACT Human Rights Commission,⁴⁵ Queensland Ombudsman⁴⁶)
- Officials *and* those making complaints or providing information to the Commission are protected from civil and criminal liability for acts done honestly and without recklessness (for example ACT Human Rights Commission⁴⁷).

e) Power to make recommendations that will be considered

The OPCAT requires the following criteria be met by an NPM:

- Ability to make recommendations (article 19(b))
- Ability to submit proposals and observations concerning existing or proposed legislation (article 19(c))
- Authorities must examine recommendations and enter into dialogue with the NPM on implementation measures (article 22).

Each relevant body in each jurisdiction in Australia, if not expressly then impliedly and certainly in practice, generally meets the first two criteria.

The OPCAT requires that authorities appropriately consider the recommendations of an NPM and engage with the NPM on implementation. Article 22 applies to how governments receive and act upon reports and recommendations regarding the conditions and treatment of those deprived of their liberty.

The legislation establishing some of the relevant bodies in some jurisdictions includes provision to encourage engagement by government and to require at least a response from government to recommendations. However, many of the bodies involved in monitoring and oversight of youth detention across Australia do not require engagement and response by government and in particular, do not require a public response.

Some examples of existing legislative provisions regarding these requirements include:

- Reports ‘may include recommendations for any changes to any written law, draft law, policy, practice or procedure, or for the taking of other action, that the Commissioner considers appropriate to safeguard and promote the wellbeing of children and young people’ (WA Commissioner for Children and Young People⁴⁸)
- The Inspector must give the Minister a draft of each report intended for Parliament and give the Minister a reasonable opportunity to make submissions on the draft report. The Inspector is not bound to amend a report in light of any submissions made by the Minister (NSW Inspector of Custodial Services⁴⁹)
- The Ombudsman may request a response from the authority within a specified time, with the steps proposed to give effect to the recommendation or, if no steps are proposed, the reasons why. If the Ombudsman does not consider that appropriate steps have been taken he or she may send to the Premier a copy of the report, the recommendations and a copy of relevant comments. The inspecting body may lay before Parliament reports on such a matter as he or she thinks fit (Ombudsman WA⁵⁰)
- Where the Ombudsman is not satisfied that sufficient steps have been taken, the Ombudsman may make a report to Parliament, and the responsible Minister must make a statement to Parliament in response to the report within 12 sitting days (NSW Ombudsman⁵¹)
- The annual report to Parliament must include an evaluation of the response of relevant authorities to the recommendations of the Inspector (Tasmanian Custodial Inspector⁵²).



‘Injustice’ – The artist stated that his work was about ‘being in juvenile justice at a young age and what I would do better to keep myself free’.

f) Access to information, including about treatment and conditions

The OPCAT requires that NPMs have:

- Access to information concerning the number of children and young people detained and places of detention (Article 20(a))
- Access to information on treatment and condition of people in detention (Article 20(b)).

In most jurisdictions, there is at least one body with sufficient powers to access information regarding the treatment and conditions of young people in detention. However, in relation to those agencies which are not dedicated inspectors, those powers are often in the context of an inquiry or an investigation of a complaint, rather than as a part of routine oversight.

At present, there are insufficient legislative requirements for jurisdictions to maintain registers logging the use of force, isolation or restraint.

Each jurisdiction to varying degrees keeps records and registers of the use of force, restraint, isolation, searches, and critical incidents. Each has varying levels of access to these records, but broadly speaking, few are required to be provided to external bodies and fewer are made publicly available.

It appears from publicly available information and information provided by governments and in other submissions, that most of this information in the form of registers is also not routinely requested by the relevant bodies, even when the powers to do so exist.

It seems that no jurisdiction has tackled this reporting systematically to ensure that:

- All types of prohibited or limited treatment and punishment are addressed in the primary legislation.
- All uses of force, restraint, isolation, critical incidents and complaints are the subject of reporting.
- This reporting is required by primary or secondary legislation which parliament has a chance to scrutinise, including some detail regarding what information must be recorded.
- The records or registers are available for review by external agencies involved in the monitoring and oversight of the detention of children and young people and that this availability is required by legislation.
- There is a degree of public reporting on the records.

Examples of existing legislative provisions for independent bodies to access information include:

- The express power to access all documents in the possession of the Department in relation to a detention centre or to a detainee (for example WA Inspector of Custodial Services⁵³)
- The right to access all records of any custodial centre, and requirement for staff to supply information and produce documents (for example NSW Inspector of Custodial Services⁵⁴)

- Requirements for the independent body to be notified when a young person is segregated for more than 24 hours (for example NSW Ombudsman⁵⁵)
- Requirement for the government to report all adverse incidents involving children in youth justice to a relevant body (for example Victorian Commission for Children and Young People⁵⁶)
- Government is not entitled to prevent or obstruct records or evidence being given for the purpose of an inspection even if that was to be allowed in a legal proceeding before a court (for example Tasmanian Custodial Inspector⁵⁷)
- A youth justice centre or other relevant government or non-government organisation will be obliged to provide information relevant to the exercise of the office-holder's functions (for example SA Training Centre Visitor⁵⁸)
- Power to require any staff member or person who provides services to people in custody to supply information, produce documents, and to attend and answer questions before the Inspector (for example Tasmanian Custodial Inspector⁵⁹)
- Legislation provides relevant offences for failing to comply with requests and provide assistance to the Inspector (for example NSW Inspector of Custodial Services⁶⁰)
- Conditions and treatment, including prohibited or limited types of treatment and punishment, are addressed in the primary legislation and it is an offence to punish a detainee in such a way (for example NSW Inspector of Custodial Services⁶¹)
- There are protections against recriminations for people who have complained or provided information to the oversight body (for example NSW Inspector of Custodial Services,⁶² ACT Human Rights Commission,⁶³ Queensland Ombudsman⁶⁴)
- The types of restraints which can be used are in primary legislation or regulations which Parliament can scrutinise (for example ACT⁶⁵).

Examples of requirements which are arguably necessary for best practice in relation to transparency around the use of force, segregation, restraint, critical incidents include:

- All uses of force, restraint, isolation, critical incidents and complaints are required by the primary legislation to be the subject of reporting; details of what should be included in the reporting should be in the primary or subordinate legislation which parliament can scrutinise
- There is a specified degree of public reporting on the records required by the legislation
- The records or registers are available for review by external agencies involved in the monitoring and oversight of the detention of children and young people and this availability is required by legislation.

g) Annual reports and other public reporting

The OPCAT requires that the annual reports of an NPM be published publicly and disseminated (article 23).

The OPCAT does not specifically require other reporting to be made public, however, given the importance of transparency to the preventative focus of the OPCAT, public reporting of substantive information on treatment and conditions is important.

Further, the quality of the content of annual reports is relevant, as is their public accessibility.

Generally, across jurisdictions, there is little in the way of detail in the legislative requirements for annual reporting that is relevant to the treatment and conditions in youth justice detention centres.

All agencies involved in monitoring and oversight of places in which children and young people are detained publish their annual reports online and they are easily accessible to the public. However, the degree of useful information contained in these reports varies substantially.

A number of jurisdictions provide some reporting on treatment and conditions to external agencies and some have internal reporting arrangements. This is not always legislatively required or reported on publicly. However, they provide a basis for the development of more comprehensive reporting systems.

Examples of existing legislative provisions regarding annual reporting and other public reporting include:

- Any directions from the Minister to the Inspector, and any reasons for the Inspector deciding not to comply with such directions, must be included in the Inspector's annual report to Parliament (WA Inspector of Custodial Services)⁶⁶
- Official Visitors must report the number and kind of complaints made, and action taken, to the Minister every quarter and the Minister must provide an annual report on the complaints received by the Official Visitor to the Parliament (Official Visitor ACT)⁶⁷
- The Inspector's annual report to parliament must include the following:
 - a) a description of the Inspector's activities during that year in relation to each of the Inspector's principal functions
 - b) an evaluation of the response of relevant authorities to the recommendations of the Inspector
 - c) any recommendations for changes in the laws of the State, or for administrative action, that the Inspector considers should be made as a result of the exercise of the Inspector's functions (NSW Inspector of Custodial Services).⁶⁸

2 Data on children in detention

Comprehensive data about children and young people in detention deepens our understanding of their experiences, their backgrounds and the impact of detention on their lives.

Apart from very basic demographic information, there is currently limited available data about the characteristics of children and young people in detention.

The National Children's Commissioner approached the Australian Institute of Health and Welfare (AIHW), the Australian Government Productivity Commission, the Australian Bureau of Statistics (ABS) and the National Centre for Longitudinal Data and asked them to provide details of the types of data that they collect.

The **AIHW** and **ABS** primarily collect demographic data such as age, sex, Indigenous status, age at first supervision, supervised orders, order start and end dates, end reason, order type, location, detention periods, detention type.

The AIHW is provided with annual data from the states and territories on young people under youth justice supervision in Australia, including in detention. However, currently, WA and NT provide non-standard data.

Once validated, the AIHW produces and publishes on its website four routine reports from this data set.

The AIHW is able to link its youth justice data with its other datasets, including child protection systems, hospital and other health care and specialist homelessness services.

The AIHW acknowledges that it currently lacks data items that would enable reporting on aspects of the OPCAT and notes that additional data items could potentially be added.⁶⁹

The annual Report on Government Services (RoGS) and the Overcoming Indigenous Disadvantage Report (OID), prepared by the **Productivity Commission** for the Commonwealth-State Steering Committee for the Review of Government Service Provision, both report data on children and young people detained in youth justice centres. This program is in its 22nd year and is, in effect, authorised by the Council of Australian Governments (COAG). All data is reported publicly.⁷⁰

Much of the RoGS and OID youth justice data are sourced from the Juvenile Justice National Minimum Data set maintained by the Australian Institute of Health and Welfare (AIHW). Additional data items contained in RoGS highlight systemic issues such as education and training attendance, deaths in custody and escapes, with partial data available for self-harm, attempted suicides, and case plans prepared.

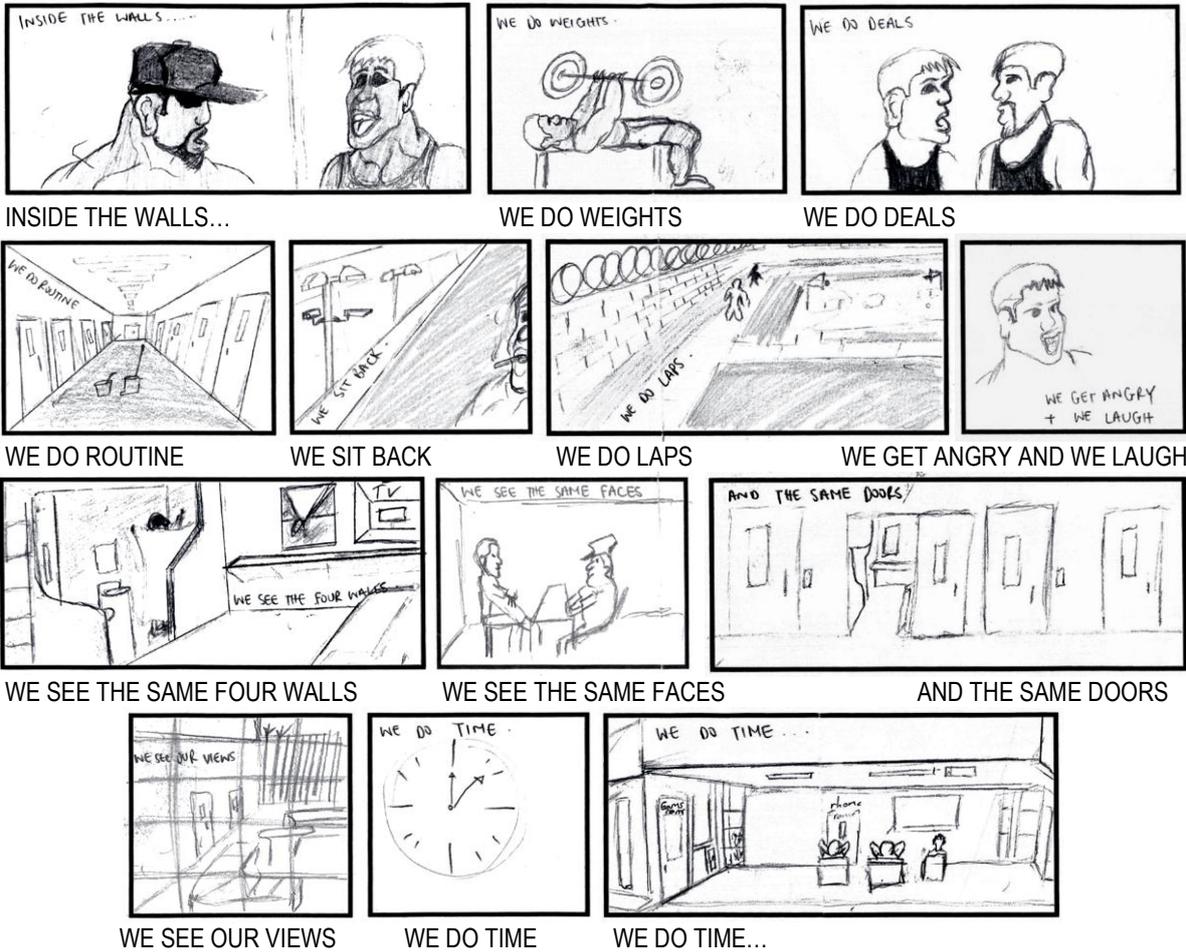
However, examination of the performance indicator framework shows limited collection of **outcome data**.⁷¹

The **National Centre for Longitudinal Data** (NCLD) administers Growing Up in Australia: The Longitudinal Study of Australian Children (LSAC) and Footprints in

Time: The Longitudinal Study of Indigenous Children (LSIC). The National Centre for Longitudinal Data collects information on contact with the judicial system as part of the LSAC and LSIC work. These sources have great potential to strengthen our understanding of outcomes for children involved in Australia’s youth justice systems.

The LSAC has followed the development of 10,000 children, young people and families from all parts of Australia since 2004. The LSAC items regarding contact with the judicial system has been collected since 2014. The children and young people in the study are now between 15 and 16 years of age.

The LSIC study began in 2008 and includes two groups of Aboriginal and/or Torres Strait Islander children who were aged 6 to 18 months (B cohort) and 3½ - 5 years (K cohort). This means these children are now between 7 and 13 years old. Items on contact with the judicial system will be included in the survey in 2016 for the first time.



'Doing Time' – The artist stated his work was about: 'how life is inside'.

3 The voices and experiences of children and young people in detention

Respect for the views of children and young people is one of the four guiding principles of the CRC, as stated in article 12.⁷²

This is especially important for children and young people in vulnerable situations, like those involved in the youth justice system.

In 2016, the National Children's Commissioner conducted eight workshops with 74 children and young people who were detained in youth justice centres, and a workshop with 20 young people, aged 17 years, who were detained in an adult correctional facility in Queensland. Children and young people in these centres also completed individual surveys.

3.1 What did children and young people in detention tell me?

In the consultation workshops children and young people were asked about their knowledge of their rights and their perspectives on their treatment and living conditions. Some of the feedback from the children and young people included:

- An understanding that they had lost their right to physical freedom
- A lack of awareness of their rights: 64% of children and young people in youth justice centres and 60% of young people in the adult facility were either not told about their rights or did not remember being told about their rights when they arrived at the centre.
- When a child did raise his or her rights with staff, their behaviour was deemed challenging
- The majority of children and young people knew how to complain if they are unhappy with their treatment, however, more than half did not make complaints. The main reasons given for not making complaints included:
 - a belief that making a complaint is a waste of time and that their complaint would not be followed up on (20%)
 - fear of negative consequences as a result of complaining (11%)
 - fear that staff would target, punish, or treat them differently if they made a complaint (40%)
 - fear of being seen as a 'snitch' (11%).
- Most children and young people in youth detention and adult correctional settings had never felt unsafe (73%).
- Of those who had felt unsafe (12%) reasons included:
 - they did not believe they could rely on staff at the centre;
 - fear and conflict associated with other children and young people;
 - unfair decisions or feeling ripped off.
- Of the young people in the adult facility who said they had felt unsafe (25%) reasons included: physical assault by staff; sexual assault by another inmate; other young people knowing the details of their charges; [it's] natural to be fearful; feeling the system was corrupt.

- Common conditions identified as impacting on wellbeing included the importance of:
 - contact with family members and friends
 - well-targeted education and purposeful activities, in particular, learning programs with the potential to result in formal qualifications that can be used to gain employment or engage in further training
 - access to recreational and leisure activities
 - increased access and contact with caseworkers, official visitors, ombudsman and legal representatives, in particular, increased frequency of visits by consistent (and perhaps fewer) visitors.
 - use of Audio Visual Link (AVL) facilities to the court, for example to avoid travelling long distances for brief court appearances, and waiting a long time in court cells
 - speedy and simple access to health services such as dentists, physiotherapists, optometrists and mental health services.
 - respectful interactions with staff, in particular that staff listened to them, shared jokes with them, were fair, responded to their needs, did not retaliate against them
 - that staff not use collective punishment, unnecessary force, segregation, isolation and lock-downs
 - reward and punishment systems such as points systems that are fair and not arbitrarily and discretionarily applied by staff
 - access to fresh and healthy food in sufficient portion sizes
 - clean, well-maintained facilities, such as decent mattresses, clean showers, appropriate cooling and heating for the climate
 - access to basic toiletries
 - decent-quality, well-fitting clothes and shoes.

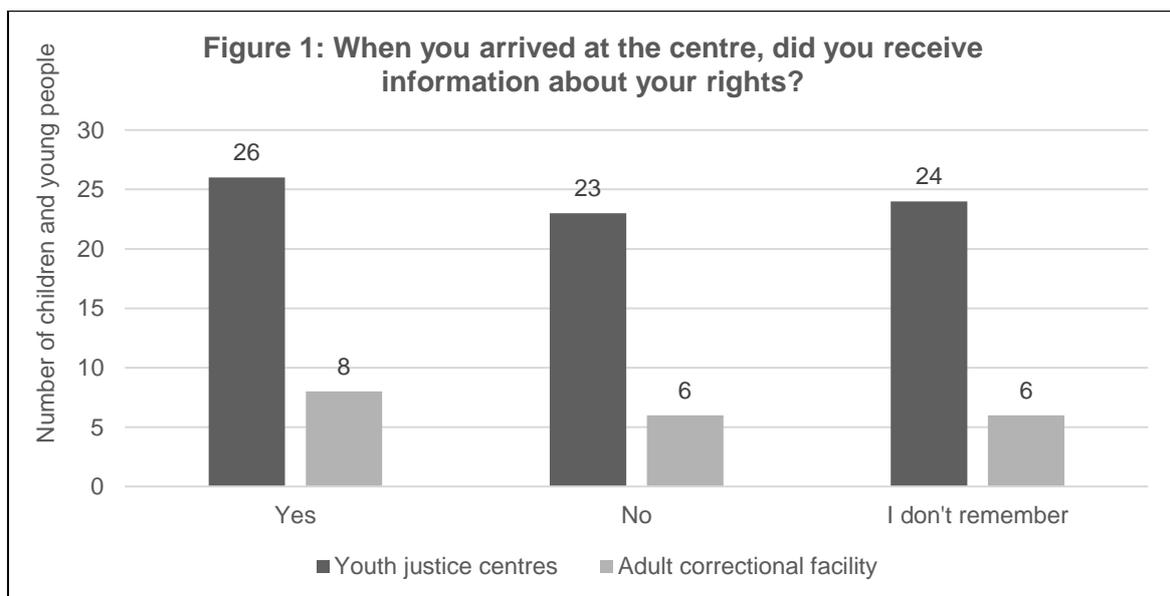


Figure 2: Do you know who you can complain to if you are unhappy with the way you are being treated?

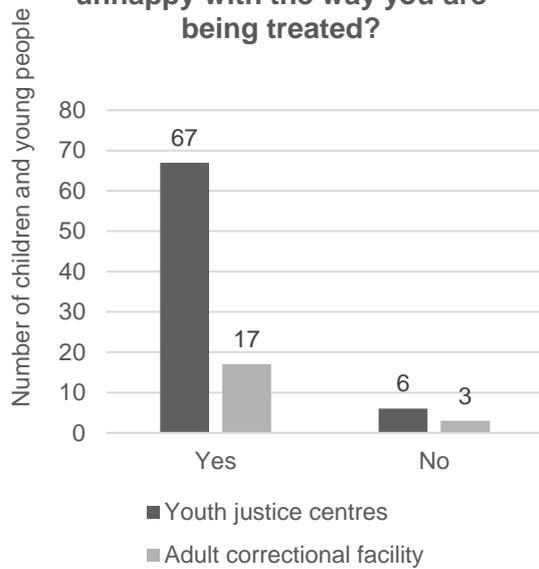


Figure 3: Who can you complain to if you are unhappy with how you are being treated? (Responses from the adult correctional facility)

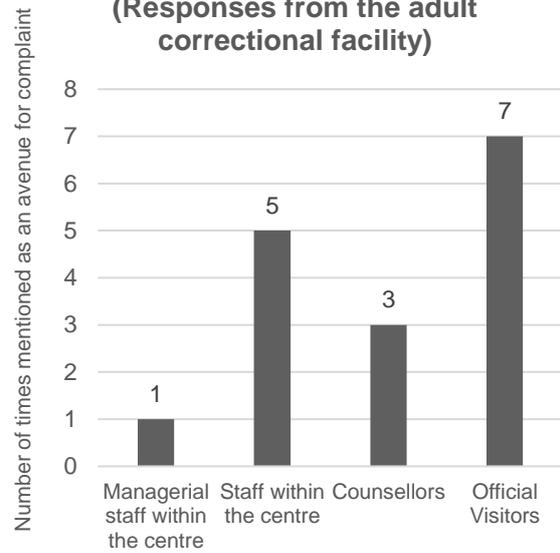
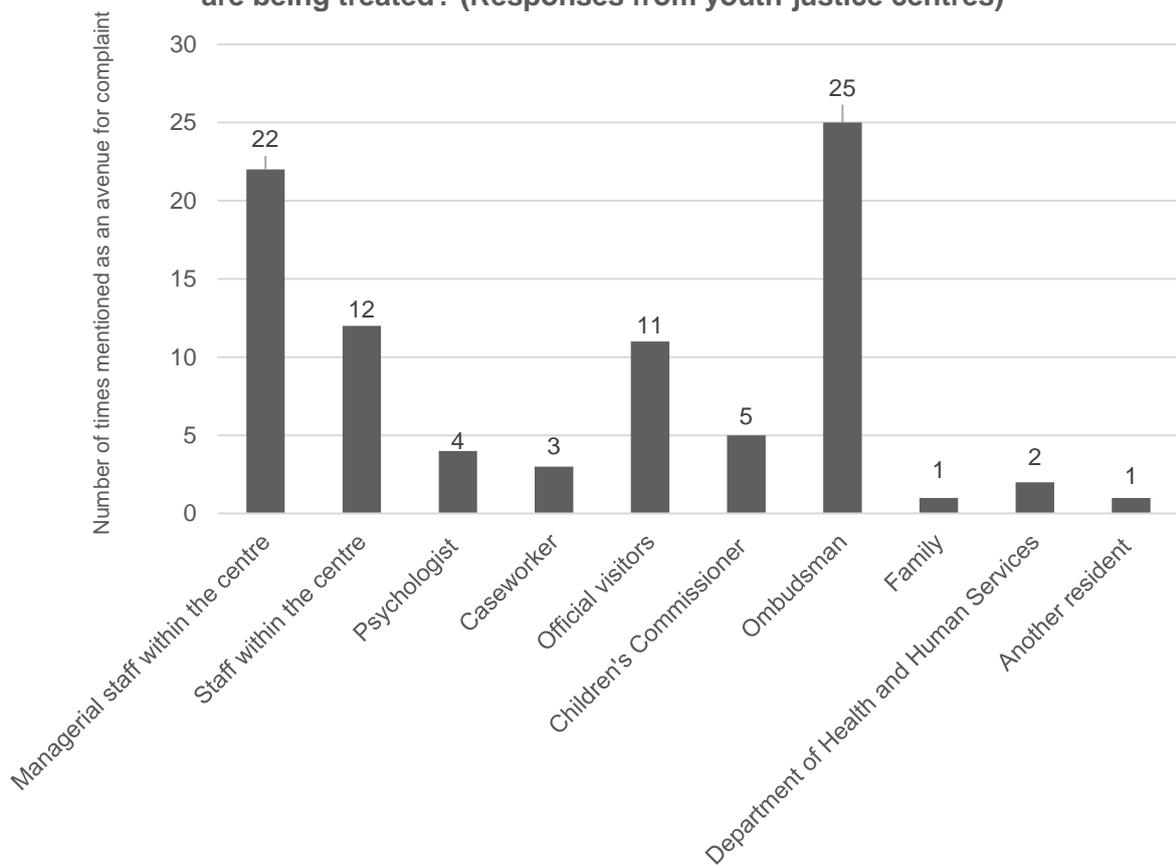


Figure 4: Who can you complain to if you are unhappy with how you are being treated? (Responses from youth justice centres)



4 Other issues regarding children and young people in the criminal justice system

4.1 Children and young people under the age of 18 years being held in adult correctional facilities.

During this examination, there was overwhelming support at roundtables and in submissions not to place children and young people under 18 years of age in adult detention facilities, given the potential risks this exposes them to and the need for specialist care, child-centered programs and education.

4.2 The high number of 18-25 year olds in adult prisons.

Research suggests that the brain is not fully matured until around 25 years of age and young people in adult prisons are particularly vulnerable. State, Territory and Federal education and employment policies may be contributing to the high numbers of young people in this age cohort in the adult prison system. This is an area that warrants further research.

4.3 The age of criminal responsibility in Australia.

The Committee on the Rights of the Child recommends 12 years of age should be the absolute minimum age at which a child can be held criminally responsible for crimes committed.⁷³ However, every jurisdiction in Australia has the age of criminal responsibility at 10 years. There was strong support for the raising of the age of criminal responsibility and exploring alternative responses to offending behaviour at earlier ages.

4.4 The Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (the Third Optional Protocol).

Ratification of the Third Optional Protocol to the Convention on the Rights of the Child (CRC) would enable children to make complaints to the Committee on the Rights of the Child about specific violations of their rights under the CRC, the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (OPSC); and the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (OPAC). This could only occur after domestic avenues were exhausted, thus having the effect of lifting the standard in relation to local complaints and redress schemes for children and young people.

5 Recommendations

In the *Children's Rights Report 2016*, the National Children's Commissioner made the following recommendations:

Recommendation 1: That the Australian Government ratify the OPCAT as soon as possible. Further, that at the time of ratification, the Government issue a standing invitation to the UN Subcommittee on the Prevention of Torture.

Recommendation 2: That all jurisdictions review how their existing systems of monitoring and inspection meet the criteria laid out in the OPCAT, and amend their legislative frameworks accordingly.

Recommendation 3: The Australian Institute of Health and Welfare (AIHW) and the Australasian Juvenile Justice Administrators (AJJA) work together in 2017 to develop a reporting framework to meet OPCAT requirements over time

Recommendation 4: The Australian Institute of Health and Welfare (AIHW) and the Australasian Juvenile Justice Administrators (AJJA) work together in 2017 to generate additional publically available data on characteristics of detainees, their treatment and conditions

Recommendation 5: The Productivity Commission, the Australian Institute of Health and Welfare (AIHW) and the Australasian Juvenile Justice Administrators (AJJA) work together in 2017 to progress the collection of 'outcome' based data for children and young people in the youth justice system.

Recommendation 6: The Australian Government commissions research which explores the processes and contexts that support children and young people's appreciation of their rights and responsibilities in institutional settings.

Recommendation 7: Australia withdraws its reservation under article 37(c) of the *Convention on the Rights of the Child* on the obligation to separate children from adults in prison.

Recommendation 8: The Australian Government commissions research which investigates the pathways, experiences and needs of young people aged 18-25 years in the prison system.

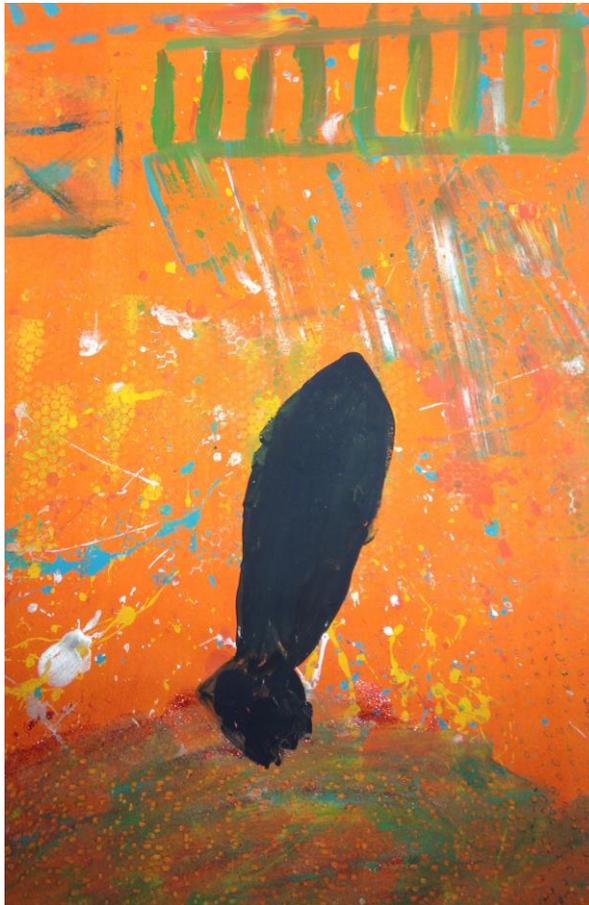
Recommendation 9: The age of criminal responsibility should be raised from 10 years to 12 years in the first instance, with preservation of *doli incapax*.

Recommendation 10: That the Australian Government signs and ratifies Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPCP).

Recommendation 11: That the Council of Australian Governments resource a national strategy to reduce the over-representation of Aboriginal and Torres Strait Islander children and adults in detention under the Close the Gap Framework, including:

- a) Strategies to address underlying social and economic causes of children and young people coming into contact with the criminal justice system.
- b) Establishing justice targets and strategies aimed at significantly reducing the number of Aboriginal and Torres Strait Islander children and young people in detention.
- c) Developing a commitment to working in genuine partnership with Aboriginal and Torres Strait Islander communities, leaders and representative bodies
- d) Investing sufficient resources to ensure practical implementation.

Recommendation 12: Mandatory sentencing for children and young people should be discontinued in all jurisdictions that are currently using it.



'In Captivity' – The dark shape floating in the middle represents a killer whale. The young person who painted this piece was learning about Tilikum, a killer whale captured when he was 2 years old and held in captivity for over thirty years. Tilikum is known for having killed his trainer in 2010 and is associated with the deaths of two other people. Reports describe his aggressive behaviour towards humans as symptomatic of a highly stressful and traumatised existence.

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¹ Joint Standing Committee on Treaties, Parliament of Australia, *Report 125: Review into Treaties tabled on 7 and 28 February 2012* (2012) 52.

² *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

³ Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) art 17-23.

⁴ The following instruments are internationally recognised standards for the treatment of children and young people detained in youth justice facilities and provide guidance on how Australia's binding treaty obligations can be met:

- *Rules for the Protection of Juveniles Deprived of their Liberty* (JDL Rules or Havana Rules), GA Res 45/113, 45th sess, 68th plen mtg, UN Doc A/RES/45/113 (14 December 1990).
- *Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing Rules), GA Res 40/33, 40th sess, 96th plen mtg UN Doc A/RES/40/33 (29 November 1985).
- *Guidelines for Action on Children in the Criminal Justice System* (Vienna Guidelines), ESC Res 1997/30, 36th plen mtg (21 July 1997).
- *Guidelines for the Prevention of Juvenile Delinquency* (Riyadh Guidelines), GA Res 45/112, 45th sess, 68th plen mtg (14 December 1990).

⁵ Appendix 7 to the 2016 CRC provides further detail on a jurisdiction-by-jurisdiction basis.

⁶ Australian Institute of Health and Welfare, *Youth justice in Australia 2014-2015* (2016) 1 <<http://www.aihw.gov.au/publication-detail?id=60129554714>>.

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⁸ Australian Bureau of Statistics, 'Prisoners in Australia 2015', ABS cat. no. 4517.0 (15 April 2016) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4517.02015?OpenDocument>>.

⁹ Human Rights Act 2004 (ACT) s 40B and Charter of Human Rights and Responsibilities Act 2006 (Vic) s 38.

¹⁰ United Nations Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on national preventive mechanisms*, UN Doc CAT/OP/12/5 (9 December 2010) para 8 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/OP/12/5&Lang=en>.

¹¹ United Nations Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on national preventive mechanisms*, UN Doc CAT/OP/12/5 (9 December 2010) para 16 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/OP/12/5&Lang=en>.

¹² Inspector of Custodial Services Act 2012 (NSW) s 6(2).

¹³ Custodial Inspector Bill 2016 (Tas), sch 1.4-1.7. The legislation passed both houses of the Tasmanian Parliament in August 2016 but at the time of writing had not yet commenced.

¹⁴ Inspector of Custodial Services Act 2012 (NSW) s 17.

¹⁵ United Nations Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on national preventive mechanisms*, UN Doc CAT/OP/12/5 (9 December 2010) para 9 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/OP/12/5&Lang=en>.

¹⁶ United Nations Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on national preventive mechanisms*, UN Doc CAT/OP/12/5 (9 December 2010) para 16 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/OP/12/5&Lang=en>.

¹⁷ Victorian Ombudsman, Submission No 25 to the Australian Human Rights Commission, *National Children's Commissioner's examination into OPCAT and Youth Justice*, 24 June 2016, 3.

¹⁸ Children's Commissioner Act 2013 (NT) s 9.

¹⁹ Youth Justice Act 2005 (NT) s 203(2).

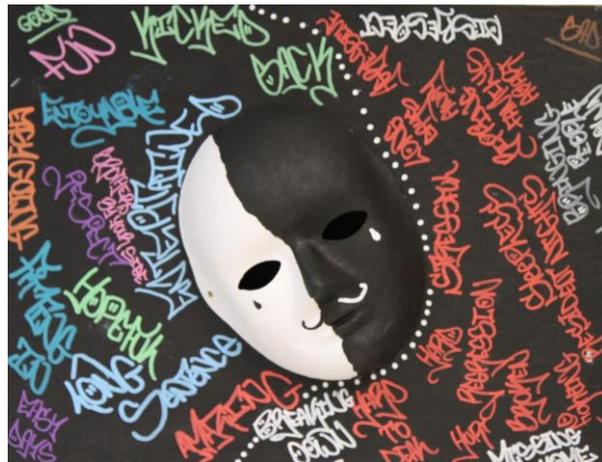
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- 20 Inspector of Custodial Services Act 2012 (NSW) Sch 1.1.
- 21 Inspector of Custodial Services Act 2012 (NSW) s 19.
- 22 Custodial Inspector Bill 2016 (Tas) cl 33.
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- 24 Youth Justice Act 2005 (NT) s 203(2).
- 25 Inspector of Custodial Services Act 2003 (WA) s 6.
- 26 Inspector of Custodial Services Act 2012 (NSW) s 22.
- 27 Children's Protection Act 1993 (SA) s 52B.
- 28 Office of the Guardian for Children and Young People SA, *Annual Report 2014-15* (2015) 9.
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- 30 Youth Justice Administration Act 2016 (SA) s 13.
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<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/OP/12/5&Lang=en>.
- 32 Inspector of Custodial Services Act 2003 (WA) s 19.
- 33 Inspector of Custodial Services Act 2003 (WA) s 29.
- 34 Inspector of Custodial Services Act 2012 (NSW) s 19.
- 35 Ombudsman Act 2009 (NT) s 5(b).
- 36 Custodial Inspector Bill 2016 (Tas), cl 8.
- 37 Inspector of Custodial Services Act 2003 (WA) s 19.
- 38 See Public Guardian Act 2014 (Qld) ss 51 and 52.
- 39 Inspector of Custodial Services Act 2003 (WA) s 29.
- 40 Inspector of Custodial Services Act 2003 (WA) s 25.
- 41 Custodial Inspector Bill 2016 (Tas) cl 16.
- 42 Ombudsman Act 1974 (NSW) s 34.
- 43 Custodial Inspector Bill 2016 (Tas) cl 23(5).
- 44 Inspector of Custodial Services Act 2012 (NSW) s 20.
- 45 Human Rights Commission Act 2005 (ACT) s 98(1).
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- 48 Commissioner for Children and Young People Act 2006 (WA) s 46.
- 49 Inspector of Custodial Services Act 2012 (NSW) s 14(3).
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- 51 Ombudsman Act 1974 (NSW) s 27.
- 52 Custodial Inspector Bill 2016 (Tas) cl 25.
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- 54 Inspector of Custodial Services Act 2012 (NSW) s 7.
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- 56 Children and Young People Act 2012 (Vic) s 60A.
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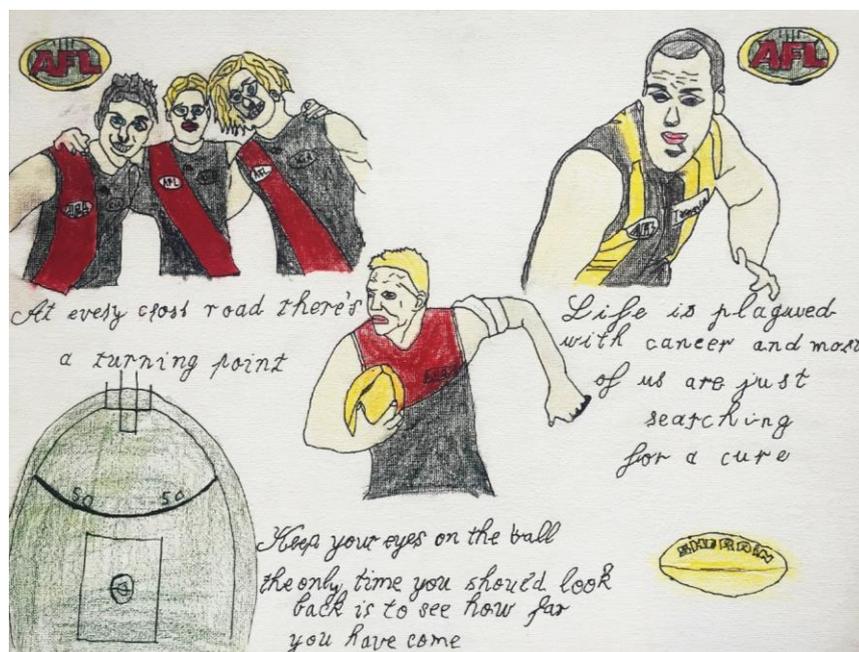
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72 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) article 12.

73 Committee on the Rights of the Child, *General Comment No 10: Children's rights in juvenile justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007), para 32.



'Smekem Smee' and 'Experience through lock up' – original artworks by young people detained in a youth justice centre, submitted as part of the National Children's Commissioner's 'Ur Tru Colours' art competition.



'A Turning Point' – The artist stated about his work: 'no matter what happens in life, there is always a turning point.'