

Youth Justice Reform Select Committee inquiry into youth justice reform in Queensland

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Committee Secretary
Youth Justice Reform Select Committee
Parliament House
George Street
BRISBANE, QLD 4000

Dear Chair,

Submission to Inquiry into Youth Justice Reform in Queensland

Thank you for the opportunity to make a submission as well as your invitation to appear in person before the Committee on 24 November 2023.

As National Children's Commissioner, my role is to promote and protect the human rights of all children in Australia.

Children have human rights across the full spectrum of civil, cultural, economic, political and social rights. However, children also face specific risks and have unique rights, as set out in the UN *Convention on the Rights of the Child* (CRC).

All children in Australia, including children who commit criminal offences, are entitled to have their human rights protected. The CRC is underpinned by four Guiding Principles that are relevant for all the rights in the Convention. These principles affirm:

- non-discrimination (article 2)
- the best interests of the child (article 3)
- children's right to survival and development (article 6)
- children's right to participate in decisions that affect them (article 12).

We know that children who commit criminal offences are significantly more likely to have experienced previous trauma and adversity in their lives, and that children with disability and Aboriginal and Torres Strait Islander children are overrepresented.

There is a lack of comprehensive data on the proportion of children in youth detention with disability. However, data from New South Wales shows that young people with disability had contact with the youth justice system at more than twice the rate (13% versus 6%) and at a higher frequency (3.5 versus 2.2 offences) when compared with young people without disability.¹

Specifically in relation to youth justice, the CRC requires that 'no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment' (article 37(a)) and that 'every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age' (article 37(c)).

Article 37(c) of the *Convention on the Rights of the Child* (CRC) requires authorities to separate children from adults in detention. The Australian Government has a reservation to this article, stating previously that its geography and demography make it difficult to always detain children in juvenile facilities, while also allowing children to maintain contact with their families.² However, the CRC makes it clear that incarceration with adults is prohibited unless it is considered to be in the child's best interests. In its Concluding Observations (2019), the Committee on the Rights of the Child recommended that the Australian Government consider withdrawing its reservation to article 37(c) of the CRC. It also recommended that, in cases where detention is unavoidable, Australia should ensure that the children are detained in separate facilities and for pre-trial detention, that detention is regularly and judicially reviewed.

Whilst most states and territories do not place children in adult detention facilities, each jurisdiction has legislation that allows children to be detained in adult facilities in certain circumstances.³ In Queensland, there have been concerns raised about the practice of holding children in police watch houses built for adults, sometimes for lengthy periods of time.⁴ Queensland Family and Child Commissioner, Luke Twyford, is conducting a review of the use of watch houses as part of youth justice in Queensland. I look forward to reading his final report later this year.

While Australia has agreed to protect the rights in the CRC, the CRC is not fully incorporated into Australian law, and does not provide an effective remedy for violations of these rights. The UN Committee on the Rights of the Child, when making its Concluding Observations on Australia's combined fifth and sixth periodic reports of Australia in 2019, recommended that Australia enact

comprehensive national child rights legislation fully incorporating the CRC and providing clear guidelines for its consistent and direct application throughout the states and territories.⁵

Australia has also signed and ratified *the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT) that aims to improve how people's human rights are protected when they are detained. It does this by providing for a rigorous process of independent inspections of all places of detention in a country's jurisdiction, through a National Preventive Mechanism and international scrutiny. The Australian Government Attorney-General's Department indicated that it intended for a federated model of National Preventive Mechanisms (NPMs) to be established by January 2022. However, implementation has been slow. Australia failed to meet its extended OPCAT compliance deadline of the 20 January 2023. The Commission continues to advocate for Australia to fully implement its OPCAT obligations and in October 2022 published a Road Map to OPCAT Compliance which was intended to assist with a clear pathway to meeting the extended deadline.

Although Australia has made some reforms to youth justice systems, there remain laws, policies and practices that impact negatively on the rights and well-being of children and young people. Official inspections have repeatedly reported on the maltreatment of children in youth detention in some jurisdictions.

I am currently conducting a project to investigate opportunities for youth justice reform across Australia, based on evidence and the protection of human rights. The project's findings and recommendations will be reported to the Commonwealth Attorney-General through a National Children's Commissioner's Statutory Report under section 46MB of the *Australian Human Rights Commission Act 1986* (Cth). This report will be presented to the Attorney-General in the first half of 2024. It is consistent with the terms of reference of your inquiry.

This project is gathering information through a range of processes, including a review of existing literature and research, submissions from experts and organisations, and a series of stakeholder interviews and roundtables across Australia. It is also holding targeted, face-to-face consultations with children and young people at risk of, or in contact with, youth justice systems across the country.

At the current time, we have received 162 submissions, consulted with 146 children and young people, consulted with 39 family members, interviewed 149 key stakeholders across 73 organisations, and have held roundtables with 20 leading academics. I look forward to sharing some preliminary findings when I appear before you.

In conjunction with the Human Rights Commissioner at the Australian Human Rights Commission, I have also commenced a review of solitary confinement-like practices in youth detention. This review will examine the various laws and policies governing solitary confinement-like practices and piece together existing evidence from past inspection or inquiry reports of youth detention centres, and other relevant sources such as media articles, academic literature, and court judgements. This report will be finalised by mid-2024.

The use of solitary confinement-like practices – also known as ‘segregation’, ‘isolation’, ‘lockdown’, ‘separate confinement’ or use of ‘night-mode’ during the day - within Australian youth detention is well documented. Growing media reporting and court judgements alike would suggest that the use of solitary confinement-like practices is both increasing and has become normalised across Australia. This apparent normalisation has led to the United Nations Committee against Torture urgently calling on all Australian governments to immediately end the practice of solitary confinement for children across all jurisdictions. It has likewise contributed to our deepening concern about the national crisis in youth justice.

Solitary confinement of children is unacceptable and contravenes Australia’s human rights obligations under the CRC, Convention Against Torture, the Nelson Mandela Rules and the Havana Rules.

The Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) define ‘solitary confinement’ as the confinement of prisoners for 22 hours or more per day without meaningful human contact. The recent Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (DCR) found that lockdowns at Banksia Hill were ‘regularly exceeding 22 hours per day’.⁶

The Nelson Mandela Rules prohibit the use of solitary confinement for any person with mental or physical disabilities if that confinement would exacerbate their conditions.⁷ They reiterate the strict prohibition on the use of solitary confinement for children.⁸

The Commission supports the DRC recommendation 8.3 prohibiting solitary confinement in youth detention which states that all jurisdictions in Australia should:

- introduce legislation to prohibit solitary confinement in youth justice settings (being the enforced isolation or segregation for any purpose of a child or young person for 22 or more hours in any day)
- introduce legislation to prohibit the use of isolation (however described) in youth detention centres as punishment in any circumstance
- review legislation, policy and procedures to ensure children with disability are not subjected to isolation practices amounting to solitary confinement
- ensure legislation authorising isolation (including lockdowns) in youth detention centres provides for its use:
 - as a temporary response to behaviour that poses a serious and immediate risk of harm to an individual
 - as a last resort after all other measures to address risk have been exhausted
 - for a period that must not exceed a specified number of hours in any day
 - ensure legislation authorising isolation (including lockdowns) in youth detention centres provides at a minimum the following protections for children with disability:
 - a requirement to take into account the child's disability needs before any isolation period is authorised
 - meaningful human contact during the period of isolation
 - access to the community equivalent standard of health care, including mental health services during the period of isolation
 - regular review of the order and circumstances authorising isolation
 - the creation and keeping of detailed records relevant to the period of isolation and the provision of a copy of such records to the relevant body with independent oversight of places of detention (such as the Inspector of Custodial Services).

In its Concluding Observations (2019), the Committee on the Rights of the Child urged the Australian Government to:

- explicitly prohibit the use of isolation and force, including physical restraints, as a means of coercion/discipline of children under supervision

- promptly investigate all cases of abuse and maltreatment of children in detention
- adequately sanction the perpetrators⁹

All children in Australia, including children who commit criminal offences, are entitled to have their human rights protected. For those involved in the criminal justice system, this means reintegration and rehabilitation being a key aim of how they are treated. The younger a child is at their first supervised sentence (community based or detention), the more likely they are to return to sentenced youth justice supervision.¹⁰ There needs to be a focus on expanding the availability and range of evidence-based diversionary programs and supports for children, including community-controlled and culturally safe programs. The Commission has long advocated for the age of criminal responsibility to be raised to at least 14 years.

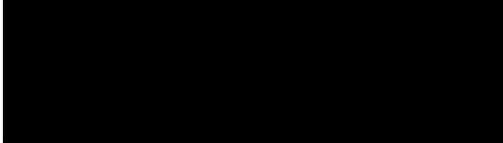
Across Australia, there is a need to address the root causes of involvement in crime and violence within communities, in order to make all of our communities safer for everyone to live and to thrive. Children with experiences of poverty, out-of-home care, maltreatment, domestic and family violence, drug and alcohol abuse and homelessness, make up the majority of those in the youth justice systems.

Other countries have implemented community-based welfare approaches which have resulted in reduced youth offending and safer communities. These approaches combined with early intervention programs are more effective than even the best rehabilitation programs provided to those in custodial arrangements.¹¹ The UN Committee on the Rights of the Child has stated that the goal of community safety is best served by full respect for, and implementation of, the principles of child justice enshrined in the CRC.¹²

Australia cannot continue to simply tinker with broken systems. We need a national approach to addressing the underlying causes of youth crime – one that will implement evidence-backed solutions to diverting and rehabilitating children and young people. The crisis in youth justice requires national leadership and cooperation across jurisdictions. It is not only about redesigning the youth justice system, but also about addressing how the youth justice system interacts with other systems that are meant to support children and their families.

I look forward to discussing these issues further with you on 24 November 2023.

Yours sincerely



Anne Hollonds
National Children's Commissioner



¹ Stewart Boiteux and Suzanne Poynton, 'Offending by young people with disability: A NSW linkage study' (2023). *Crime and Justice Bulletin No. 254*. Sydney: (NSW Bureau of Crime Statistics and Research), p 20.

² Australian Government, *Australia's Combined Second and Third Reports under the Convention on the Rights of the Child* (2003) 467.

³ Australian Human Rights Commission, *Children's Rights Report 2016* (2016) 184.

⁴ Queensland Office of Public Guardian, 'There are immediate solutions available to remove children from watch houses' (Media Release, 14 May 2019) <www.publicguardian.qld.gov.au/about-us/news-and-information/news-and-media/there-are-immediate-solutions-available-to-remove-children-from-watch-houses>.

⁵ United Nations Committee on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia*, 82nd Sess, UN Doc CRC/C/AUS/CO/5-6 (30 September 2019) para 7(a).

⁶ *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, UN Doc GA Res 70/175 (adopted 17 December 2015) Rule 44.

⁷ *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, UN Doc GA Res 70/175 (adopted 17 December 2015) Rule 5.

⁸ *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, UN Doc GA Res 70/175 (adopted 17 December 2015) Rule 5.

⁹ United Nations Committee on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia*, 82nd sess, UN Doc CRC/C/AUS/CO/5-6 (30 September 2019) para 48(c).

¹⁰ Australian Institute of Health and Welfare, *Australia's children*. (Report, 2020) p 361.

¹¹ Catia Malvaso, University of Adelaide, Submission to the National Children's Commissioner Youth Justice and Child Wellbeing Project, November 2023.

¹² United Nations Committee on the Rights of the Child, *General comment No 24 (2019) on children's rights in the child justice system*, UN Doc CRC/C/GC/24 (18 September 2019) para 2.