

Australia's Youth Justice and Incarceration System

October 2024

About ACYP

The Advocate for Children and Young People (ACYP) is an independent statutory appointment overseen by the Parliamentary Joint Committee on Children and Young People. ACYP advocates for and promotes the safety, welfare, wellbeing and voice of all children and young people aged 0-24 years, with a focus on the needs of those who are vulnerable or disadvantaged.

Under the *Advocate for Children and Young People Act 2014*, my functions include:

- (a) to advocate for and promote the safety, welfare and wellbeing of children and young people.,
- (b) to promote the participation of children and young people in the making of decisions that affect their lives and to encourage government and non-government agencies to seek the participation of children and young people appropriate to their age and maturity.
- (c) to conduct special inquiries under Part 5 into issues affecting children and young people.
- (d) to make recommendations to government and non-government agencies on legislation, reports, policies, practices, procedures and services affecting children and young people.
- (e) to conduct, promote and monitor research into issues affecting children and young people.
- (f) to promote the provision of information and advice to assist children and young people.
- (g) to prepare, in consultation with the Minister, a 3-year strategic plan for children and young people in the State.
- (h) such other functions as are conferred or imposed on the Advocate by or under this or any other Act.

Further information about ACYP's work can be found at: <https://www.acyp.nsw.gov.au/>.

Introduction

I welcome the opportunity to contribute to the Senate Standing Committee on Legal and Constitutional Issues Inquiry into Australia's youth justice and incarceration system. It is my intention that this submission builds on the input from the submission provided by the Australian and New Zealand Children's Commissioners, Guardians and Advocates to this inquiry, their joint statement around ending Isolation practices in Youth Detention (2024)¹ and the joint statement from the

¹ Australian and New Zealand Children's Commissioners, Guardians and Advocates (ANZCCGA) (2024) 'Joint Statement on Isolation in Youth Detention'

Australian Children's, Guardians and Advocates around raising the minimum age of criminal responsibility (2022)². This Inquiry comes at a critical time. Consecutive inquiries and reports have continuously highlighted the systemic failures within the youth justice system. I urge all levels of government and agencies responsible for youth justice to proactively engage in a reform agenda that focuses on prevention, early intervention, diversion and child rights. In addition to reform within the system, there must be a whole of government effort across jurisdictions to address the underlying psycho-social determinants that disproportionately impact those in the youth justice system, such as poverty, disengagement from education and a history of trauma. The current approach of a punitive justice system that fails to provide holistic support to children, young people, their families and communities ignores the complex and interconnected factors that exist which bring children and young people to the attention of the youth justice system.

Recommendations

As previously discussed, there have recently been a series of commissions and inquiries into the state of our youth justice system. I support the findings and recommendations of the following reports:

1. The Australian Human Rights Commission Report 'Help Way Earlier!' How Australian can transform child justice to improve safety and wellbeing (2024).³
2. Australian and New Zealand Children's Commissioners, Guardians and Advocates (ANZCCGA) 'Submission to the Senate Inquiry into Youth Justice and Incarceration Settings' (2024)
3. The ACYP Report 'What Children and Young People in Juvenile Justice Centres Have to Say' (2019).⁴
4. The ACYP Submission 'Inquiry into the adequacy of youth diversionary programs in NSW'.⁵

In addition, I make the following recommendations:

1. Prioritise investment in prevention, early intervention and diversionary practices. Policy, legislation and investment should not assume any dependency on youth justice.
2. That where possible, services targeted to First Nations children and young people are delivered through First Nations owned and controlled organisations.
3. That referral pathways are improved to connect First Nations children and young people in conflict with the law and with community-based cultural programs before, during and after their engagement with the system.

² Australian Children's Commissioners, Guardians and Advocates (ANZCCGA) (2022) 'Joint Statement: Incarceration of children as young as 10 years of age in Australian youth detention centres is a national shame'

³ Australian Human Rights Commission (2024). 'Help way earlier!': How Australia can transform child justice to improve safety and wellbeing.

⁴ Advocate for Children and Young People (2019) 'What children and young people in juvenile justice centres have to say'.

⁵ Advocate for Children and Young People (2018) 'Submission into the Inquiry into the adequacy of youth diversionary programs in NSW.'

4. The development of additional programs to help address racism in the community, as well as training for workers to ensure that their practices take into account how racism impacts First Nation's young people.
5. The NSW Government work with its State and Territory counterparts to develop a Human Rights Act to align with concurrent legislation within their jurisdictions.
6. As per the ACCGA statement around solitary confinement, all jurisdictions legislate to prohibit the use of solitary confinement and the use of isolation practices.
7. As per the ANZCCGA statement around raising the minimum age of criminal responsibility, all jurisdictions to increase the minimum age of criminal responsibility to at least 14 years, removing any caveat around offence and the principle of *Doli Incapax*.

Outcomes and Impact

Over the years, a key focus of ACYP has been to consult with young people in youth justice centres. Whilst I have heard of the negative impact's incarceration has on young people, I have also heard of the stability young people had while being in custody, specifically in regard to the accessibility of resources, education, medical services, programs and mental health support.

In 2018, ACYP submitted a response to the NSW Parliamentary inquiry into the adequacy of youth diversionary programs in NSW⁶. When consulting with young people in youth justice, a majority reported that the school within the centre worked well for them. They spoke of having smaller class sizes and teachers who understood and supported their needs, which allowed them to achieve accomplishments that they had not previously thought possible. One young person told us that he had learned to read in custody at the age of 16. Young people also spoke highly of opportunities in custody to obtain a white card, complete Year 10 or their HSC, engage in tertiary education and some young people even have received scholarships to universities. Other young people also told us that they had never had the opportunity to see a psychologist prior to entering custody, to address their traumas as a child.

ACYP in 2020 conducted further consultations with young people in youth justice centres across NSW. The consultations were for the purpose of the ACYP Youth Justice Exit Interviews Report. The purpose of this report was to inform work that ACYP was doing to support Youth Justice NSW and was provided to the relevant stakeholders. Each of the children and young people interviewed in custody were due to be exited in the next few days or weeks. Although young people in custody have shared some of their positive experiences whilst in custody, there are many negative impacts of youth incarceration. The number one negative impact of incarceration on young people is the institutionalisation of young people which creates dependency on the system. Young people are provided with many services and opportunities in NSW youth justice centres (such as access to school that supports their needs and healthcare). Upon their release back into the community they no longer have access to these important supports. Having these basic needs provided for are the types of support that children and young people are looking for prior to their interactions with the youth justice system and following their exit from the system. I heard from one particular young person that:

⁶ Advocate for Children and Young People (2018) 'Submission: Inquiry into the adequacy of youth diversionary programs in NSW.'

"The issue young people in the justice system face is that even through all the interventions and supports young people receive in custody, a majority will be exited into the same situations they were in before custody. You come into custody a place where money doesn't matter, we all wear the same clothes and shoes, there's a pool, we eat for free, and you forget about the realities of the outside world. Then one day you are released back into the real world, and most young people don't have the tools to deal with the stress and discomforts they once experienced prior to entering custody then they fall back into the same habits pretty easily."

Children and young people experiencing custody for the first time also reported feeling anxious and concerned about their welfare. Some felt not being able to disclose how they were feeling as they did not want to show any weakness, others found it difficult to articulate reasons for not disclosing. In some instances, children and young people reported remaining anxious for up to one week, with most saying anxiety lessened after a couple of days. One young person told us;

"...at the beginning, it feels like no one's helping you. It feels like you're trapped."

Children and young people reported they did not complain about poor treatment by staff within the centre for fear of retribution. Or when they did try and complain, they could not.

"...in terms of the complaints or if there's any issues, then the staff just shut it down and they don't respond to the boys."

Another young person mentioned;

"How are you supposed to advocate for yourself when you do not have the knowledge of the basic human rights you are entitled to."

Other young people interviewed were in custody for what appeared to be welfare issues such as not having safe, stable accommodation. The children and young people interviewed told us: it was inevitable they would end up in adult custody; being in custody was better than being in out-of-home care; and they felt very few people listened or cared, they were also the most insecure children and young people interviewed about their immediate future.

"I feel like when I get out, I don't really want to get out because I know I'm always going to go back to care. And I don't really want to go back to care, I just want to be with a family member. I feel like every time I go back to care, I just keep making the same mistakes, over and over. Because I get put with workers I don't like, don't know, and I like being with more permanent workers which you can call uncle, Nan, dad, like that. If there was this place for me to get put that's not care, then yeah...It's a bit like the stolen generation. I've got a bit of Aboriginal in me, but how they try and break kids up from their family and put them with other people. I don't think it's really that fair, I think kids should stay with their family, and it's not really good in the long run. And yeah, I don't know. Don't take kids away from their family."

A small number of children and young people expressed fear and anxiety about returning to life in the community. Some young people mentioned that you spend such a long time being surrounded by only a small number of people, when you are released back into the community and suddenly you are surrounded by a large crowd it is overwhelming.

Although it may seem that a young person being in youth justice offers a sense of stability that they would otherwise not have, the overall consequences are that 44.6% of young people will return to custody within 12 months⁷ and according to a 2015 BOSCAR report, 79% of juvenile offenders were reconvicted within 10 years⁸.

Over-incarceration of First Nations children

The significantly disproportionate representation of First Nations children and young people is the result of intergenerational trauma, systemic racism and the ongoing impacts of colonisation. Within NSW alone, 66.9% of the young people sentenced to detention within the 2023-2024 period identified as First Nations⁹, despite this same cohort making up less than 6% of the NSW young people population¹⁰.

During consultations with First Nations children and young people, they raised experiences of racism in their daily lives. In consultations with over 200 First Nations young people, racism and discrimination were raised by 45 per cent of participants in response to the question “what is not working well in your community?” and by 60 per cent of participants in response to the question “what makes you feel unwelcome in your community?”. Some reported that peer groups at school are defined by race. Others spoke about shopkeepers and others holding stereotypes that First Nations young people are criminals¹¹.

I recommend the development of additional programs to help address racism in the community, as well as training for workers to ensure that their practices take into account how racism impacts First Nations young people.

The First Nations children and young people who I have heard from have emphasised that connection to culture is something that makes them feel happy and welcome, with NAIDOC week and Nations of Origin both mentioned as avenues supporting them to connect with community and culture. Those in youth justice centres spoke highly of cultural programs through which they learned dance, music and language, and stressed that they would like more opportunities to connect with community and culture on the outside. I recommend that Youth Justice NSW continue to strengthen its referral to cultural programs, such as Aboriginal Language and Culture Nests and Opportunity Hubs, for young people receiving interventions or transitioning out of detention.

First Nations children and young people are best placed to determine the types of approaches that will work for them, and I join SNAICC and others in their call to ensure that local First Nations communities are empowered to design, develop and deliver diversionary interventions that meet the

⁷NSW Bureau of Crime Statistics and Research (2024) ‘Reoffending in NSW.’

⁸Winifred Agnew-Pauley and Jessie Holmes (2015) ‘Reoffending in NSW’

⁹NSW Department of Communities and Justice (2024) ‘Youth Justice Profile.’

¹⁰Australian Bureau of Statistics (2021), ‘Estimated resident Aboriginal and Torres Strait Islander and non-Indigenous populations, states and territories’ ABS Table builder

¹¹Advocate for Children and Young People (2018) ‘Submission into the Inquiry into the adequacy of youth diversionary programs in NSW’.

needs of their communities¹². This work is critically important as all levels of Government seek to meet their obligations under the National Framework for Closing the Gap targets. Consultations with First Nations children and young people confirm that wherever possible, services targeted to First Nations children and young people should be delivered through First Nations owned and controlled organisations.

I acknowledge and welcome the Government's pledge to address the issue of First Nations over-representation through Closing the Gap, including the recently announced establishment of a Commonwealth Aboriginal Commission for Children and Young People. I recognise the significant reduction in the overall number of children and young people being detained in recent years. I also acknowledge and support recent efforts to enhance training, behaviour management practices and transitional support within youth justice centres to ensure they are culturally appropriate and focused on the best outcomes for children and young people. My office has continued to engage in this work and the views of these children and young people have informed my response about what is needed to enhance the NSW Government's existing efforts to prevent children and young people from engaging in crime, divert them from the criminal justice system and reintegrate them into the community.

Compliance and Non-compliance with Human Rights Instruments

Both the Australian and NSW Governments have made commitments under human rights instruments to uphold the dignity and rights of children and young people. In all services, programs and policies that we design for children and young people, we are morally and ethically required to ensure that these meet the standards in these conventions and treaties. While both Commonwealth Law¹³ and NSW Law¹⁴ incorporate elements of human rights law, these statutes are not implemented in a consistent manner across jurisdictions, or even within jurisdictions, leading to poor practice and instances of human rights violations.

I recognise that the recent report by the National Children's Commissioner includes a broader discussion around the rights of children and young people, our obligations under human rights instruments and their interaction with the justice system, that goes beyond the scope of this submission¹⁵.

Under the *United Nations Convention on the Rights of the Child*, all State parties (including Commonwealth and State Governments) are required to undertake any and all measures to uphold child rights¹⁶.

¹²[SNAICC \(2022\) 'Stronger ACCOs, Stronger Families Final Report.'](#)

¹³[Commonwealth of Australia \(2011\) 'Human Rights \(Parliamentary Scrutiny\) Act 2011'.](#)

¹⁴[NSW Legislation \(1987\) 'Children \(Criminal Proceedings\) Act 1987 s 6'.](#)
[NSW Legislation \(1997\) 'Young Offenders Act 1997 s 7'.](#)

¹⁵[Australian Human Rights Commission \(2024\). 'Help way earlier!': How Australia can transform child justice to improve safety and wellbeing.](#)

¹⁶[United Nations \(1989\) 'Convention on the Rights of the Child'.](#)

Within the context of Youth Justice, this practice should take the following forms:

- Under Article 3 of the CRC, those working with children and young people must ensure that their practice is primarily focused on the 'best interest' of children and young people. While this principle is incorporated into NSW and Commonwealth legislation, my consultations with children and young people in youth justice has found that it is inconsistently applied across centres, and staff are unsure about how this applies when internal policies may seem to divert away from this practice. For example, the practice of solitary confinement while often used to de-escalate a situation and ensure the safety of staff and individuals within a centre, clearly goes against the best interest of a child and young person. As per the Australian New Zealand Children's Commissioners, Guardians and Advocate's Joint Statement in February 2024, the use of isolation practices on children and young people should be prohibited, except when necessary to prevent an imminent and serious threat of injury to the child or others, and only when all other alternatives have been exhausted¹⁷. I further support the Commissioners calls for the development of minimum standards for isolation practices that have regard to our obligations under human rights instruments including the CRC and the Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)¹⁸.
- Article 37(a) of the CRC, states that children and young people are not to be subject to any form of cruel, inhumane, degrading or torturous treatment or punishment. These rights are further expanded upon in the OPCAT. The implementation of the OPCAT also requires the Commonwealth and State Government to develop a National Preventative Mechanism and for each State to designate an agency with oversight of its implementation and enforcement in settings where an individual's liberty is deprived. To date, both the Commonwealth and NSW Government have failed to appropriately meet its deadlines in nominating an agency to take on the National Preventive Mechanism. This failure was only exasperated when the United Nations Sub-committee on Prevention of Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment was denied entry into places of detention by the NSW Government in October 2022¹⁹. In clear violation of the Committee's right to access these premise, the NSW Government has argued that their failure to allocate a National Preventative Mechanism is due to the Commonwealth Government not providing any advice or resourcing around this mechanism or implications for any future recommendations from this sub-committee²⁰. While I recognise that this refusal of entry did not come from youth justice facilities, the ultimate decision of the subcommittee to suspend their trip prevented youth justice staff and centres

¹⁷Australian Children's Commissioner, Guardians and Advocate (2024) 'ANZCCGA Joint Statement on Isolation in Youth Detention'.

¹⁸United Nations (2002) 'Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment'.

¹⁹United Nations Office of the High Commissioner (2022) 'UN torture prevention body suspends visit to Australia citing lack of co-operation.'

²⁰Tasmin Rose (2022) 'NSW's refusal to allow UN inspectors in prisons 'raises questions', human rights commissioner says' *The Guardian*.

from developing a partnership with this entity and increasing their capacity to protect individuals within their centres from harm. Failure to uphold this obligation, despite repeated extensions to the deadline and calls from the international community, risks significant reputational damage to the NSW Government and reduces the ability of children and young people to make a complaint about their treatment within these premises beyond the mechanisms already in place.

- Article 37(b) of the CRC, stipulates that the detention of children and young people shall be used as a 'last resort' and for the 'shortest amount of time.' Recent changes by the NSW Government to introduce new Bail Laws have restricted the ability of the Courts and Police to exercise this function and seriously risk undermining the critical work that the NSW Government has undertaken in previous years around reforming their Short-Term Remand Program²¹.
- Article 40(3)(a) of the CRC stipulates that all State parties must enact legislation to create a minimum standard of criminal responsibility. Currently under NSW legislation this age is set at 10 years, with the principle of *Doli Incapax* in practice between those aged 10-14 years²². There has been significant reform at State and Territory levels to change the age of criminal responsibility, however, the NSW Government has remained opposed to such a movement.

Socially excluded children and young people, like those in out-of-home care, experiencing homelessness, or from low socio-economic backgrounds, are more likely to come into contact with the law. Criminalising the behaviour of vulnerable children and young people creates a cycle of disadvantage and forces children to become entrenched in the criminal justice system.

I recommend that the minimum age of criminal responsibility be raised to at least 14 years, in line with recommendations by the United Nations Human Rights Council and medical consensus on child brain development²³. Further, I am of the view that the minimum age of criminal responsibility should not vary based on the type of offence. Varying the minimum age of criminal responsibility would not be logically consistent with the basis for having a minimum age of criminal responsibility. If a child is too young to be fairly tried for an offence, this does not alter based on the seriousness of the offence. I recognise that by raising the age of criminal responsibility to 14 years this would also remove the principle of *Doli Incapax*. In practice, I understand that this principle has proven to be extremely hard to apply in court and has created confusion as to whether the defence or prosecution bears the responsibility of proving a child knew their conduct was wrong. By removing caveats for offence type and the principle of *Doli Incapax*, the NSW Government would be aligning our legislation with the recommendations and findings of the Committee on the Rights of the Child²⁴.

²¹[NSW Legislation \(2013\) 'Bail Act 2013.'](#)

²²[NSW Legislation \(1987\) 'Children \(Criminal Proceedings\) Act 1987 - Sect 5'](#)

²³[United Nations Human Rights Council \(2021\) 'Universal Periodic Review: Matrix of Recommendations'.](#)

²⁴[United Nations Committee on the Rights of the Child \(2019\) 'Concluding observations on the combined fifth and sixth periodic reports of Australia.'](#)

If the minimum age of criminal responsibility were raised, then for the small number of children below age 14 who do commit acts that would otherwise be criminal, it is important that the absence of a justice response must not mean that there is an absence of any response. Children who commit criminal or antisocial behaviour require a response that diverts them from further harmful behaviour and helps them take responsibility for their actions. Such responses should take a therapeutic and restorative approach.

A therapeutic approach involves recognising that the child's behaviour is a product of their environment and circumstances, and ensuring the needs of the child and their family are addressed by expert assessment and appropriate referrals to support. A restorative approach (such as group conferencing) encourages responsibility and accountability for actions. In the very small number of cases of children at risk of causing serious harm, this may involve forms of supervision. However, this supervision should be therapeutic and focused on their rehabilitation with a goal of returning children and young people to their families and communities.

Conclusion

I thank the Committee for the opportunity to provide a submission to this important inquiry and congratulate them on bringing the issues canvassed above to the forefront of legislation, policy and program reform. I welcome any follow up questions from the Committee directed to my Office at acyp@acyp.nsw.gov.au.

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