Submission to an Enquiry by the National Children's Commissioner on the Optional Protocol to the Convention against Torture (OPCAT) in the Context of Youth Justice Detention Centres

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We welcome the opportunity to make a submission to the National Children Commissioner's enquiry into the potential ratification of the Optional Protocol to the Convention against Torture (OPCAT) in the context of Youth Justice Detention Centres, and more broadly. We support the ratification of OPCAT, and recognise the benefits of establishing an independent National Preventative Mechanism (NPM). Our submission responds to the specific questions raised in your enquiry, and so our focus is restricted to the implications of an NPM in the context of youth detention. Nonetheless, we note that ratification of OPCAT, and the establishment of an NPM, will be of significant benefit to people held in all places of detention.

Preliminary remarks on the need to locate an NPM within a broader conceptual framework

A National Preventative Mechanism is similar in many respects to prevention initiatives established in a large number of other contexts. These prevention initiatives can take a wide variety of forms, being concerned with problems as diverse as child maltreatment, cardiac disease, substance abuse, police corruption, youth crime, safe drinking environments, corporate crime, and workplace health and safety. While attempts to prevent each type of problem require specialised institutions, specialist disciplinary knowledge, and techniques tailored to the unique contexts in which preventive actions must take place, there are nevertheless common features of successful prevention initiatives, and some overarching concepts, that we believe can be usefully applied to the implementation of OPCAT.

One such overarching concept is that of the *Interactive Systems Framework for Dissemination and Implementation*[2] An important feature of the ISF is the clear distinction between:

1. *The Prevention Delivery System* that implements innovations in the world of practice;

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[2] Wandersman, A., Duffy, J., Flaspohler, P., Noonan, R., Lubell, K., Stillman, L., Blachman, M., Dunville, R. & Saul, J. (2008). Bridging the gap between prevention research and practice: The Interactive Systems Framework for Dissemination and Implementation. *American Journal of Community Psychology, 41*, 171-181.

2. *The Prevention Support System* which provides training, technical assistance or other support to users in the field; and
3. *The Prevention Synthesis and Translation System* which distils information about innovations and translates it into user-friendly formats.

These systems are characterised by their *activities*, not by specific individuals or organisations, and each system depends on the others in complex ways. The various forms of the NPM, as discussed by Professors Harding and Morgan in their 2008 report to the Australian Human Rights Commission,[3] are essentially variants on a proposed national *prevention delivery system*, but elements of support and synthesis and translation systems are also present in their discussion. For example, at 3.10 (p.11) Harding and Morgan state that, in addition to the NPM's functions as an inspection agency, it should also develop standards to meet international and national expectations to drive improved performance and benchmarking nationally and locally. Establishing a support agency or research organisation tasked with developing principles for evidence-based practice by drawing on examples of 'best practice' from jurisdictions across the world would mark the commencement of construction of *a prevention synthesis and translation system.* This could then be elaborated, piloted and evaluated in the Australian context in pursuit of a practitioner-friendly *prevention support system*.

Our recommendation in this document for independent research to examine system performance and the experience of children speaks to the need to establish a prevention support system, including specialist research and knowledge transfer agencies. This will ensure that inspection processes are well targeted and adequately resourced to achieve the intended improvements in outcomes for youth held in youth detention centres, and in other places of detention. Implicit in our recommendation is the need to develop objective measures of child and youth wellbeing, tapping dimensions of mental and physical health and of social and emotional wellbeing. While the elimination of physical and sexual abuse and of cruel and degrading punishments like solitary confinement is the non-negotiable bottom line, it is likely that many features of youth detention centres in Australia cause harm in ways that will not be apparent without objective scientific measurement. Certainly the advocacy required to improve system conditions will be far less effective in the absence of these scientific measures. For these reasons, we submit that the process for forming an NPM in Australia could be greatly enriched by embracing an Interactive Systems Framework, and by keeping in mind the need for and distinction between the delivery, support, and translation systems as well as the interdependencies of these systems.

[3] Richard Harding & Neil Morgan (2008). *Implementing the Optional Protocol to the Convention against Torture: Options for Australia.* Australian Human Rights Commission, Sydney.

Response to specific questions raised in enquiry

The remainder of our submission focuses on the adequacy of current oversight, complaints, and monitoring mechanisms related to the treatment and rights of children and young people in detention (Q1 of the brief provided). In responding to this question, we touch on issues relevant to Qs 2-5, but do not address these questions comprehensively. There is a lack of relevant, robust and independent research available to provide an evidence-based response to Qs2-5. Indeed, one of our primary recommendations is that an NPM take a broad view of its mandate under Article 19 of OPCAT by investing in the development of high quality, ethical, culturally competent and independently funded research to examine system performance and the experience of children (and others) subject to systems of detention. We make a brief comment in response to Q8 (age of criminal responsibility), and conclude by exploring the benefits and resource implications of the establishment of an NPM (Q6 and Q7).

Adequacy of current oversight, complaints, and monitoring mechanisms (Q1)

The *Youth Justice Act 1992, Youth Justice Regulations 2003,* and the *Public Guardian Act 2014* contain a number of provisions which, together, create an oversight system designed specifically to safeguard the rights and interests of young people in youth detention in Queensland. In addition, there are other legislative structures and agencies that have some responsibility and/or power to monitor activities within detention centres, or to act protectively for specific cohorts of children within centres (e.g. children subject to care orders etc).[4] This makes the oversight landscape quite crowded, which reduces transparency and impedes effective system-wide knowledge-sharing and mobilisation. Within this context, we can nonetheless point to three dimensions to the system: the facilitation of and response to individual complaints; rules and regulations governing operational performance (within youth detention centres); and broader system oversight and monitoring. There are strengths and weaknesses within and across these dimensions, which we highlight below.

Facilitation and response to individual complaints:

The legislative framework attempts to ensure that young people are adequately informed of their rights, and provides access to independent support persons (through the Office of the Public Guardian (OPG)) capable of hearing the complaints of young persons in detention. The oversight

[4] For example, the Queensland Ombudsman has power to investigate 'administrative actions of agencies' (see, section 12 of the *Ombudsman Act 2001* (Qld); the Crime and Corruption Commission has power to investigate corrupt conduct, (see *Crime and Corruption Act 2001,* (Qld)); the Anti Discrimination Commission Queensland may respond to complaints regarding discrimination, (see *Anti-Discrimination Act 1991* (Qld)) and the Department of Communities, Child Safety, and Disability Services may have particular duties with respect to children under its care who are also within a detention centre (see *Child Protection Act 1999* (Qld)).

system as a whole relies heavily on a young person's ability to understand, access, and activate, rights protections, and this is supported by provisions such as s.267 of the *Youth Justice Act* which requires a child to be informed 'as soon as practicable after a child is admitted to a detention centre' of their rights and of the complaint mechanisms available to them. Similarly, the child advocate and community visitor structures set out in the *Public Guardian Act* ensure that children in detention centres have access to an independent person with whom they can speak about complaints and concerns, and who will advocate on their behalf. Together, the emphasis of the legislative framework is on the creation of a robust complaints-handling system, predicated on maximising a young person's capacity to understand their rights and to complain about concerns or mistreatment.

Rules and Regulations Governing Operational Performance

At an operational level, the *Youth Justice Act* and *Regulations* are framed by the Charter of Youth Justice Principles contained in Schedule 1 to the Act. The Charter provides an articulation of core principles designed to guide the operation of Queensland's youth justice system as a whole, and it reflects a commitment to rights protection which closely mirrors the content of the *United Nations' Convention on the Rights of the Child* (CROC). In addition, the Act and Regulations define the scope and use of certain kinds of coercive powers within detention centres, including search powers and powers to restrain or segregate children. Oversight of youth detention system performance as a whole rests predominantly with the Chief Executive, thus depending on a robust system of responsible government (i.e. ministerial oversight) as its primary regulatory mechanism, which is supported by a variety of internal monitoring work teams and processes.

Broader System Oversight and Monitoring

At a system level, the OPG operates as an independent agency for the benefit of young people in youth detention. Importantly, the OPG also extends its functions to 17 year olds held in adult correctional centres. This is significant as these children are not provided with the same protections as those who benefit from the safeguards created by adherence to the principles underpinning the *Youth Justice Act.* The *Youth Justice Act* and the *Public Guardian Act* requires that information be shared between agencies in certain circumstances, and the OPG provides information to the public in its Annual Report which allows some public oversight of system performance (at least, with respect to visits and complaints). This is augmented by the work of other agencies, the most significant of which is the Queensland Ombudsman who has a wide mandate to investigate administrative actions and who occupies an important position as an independent agency with a watching brief for system performance.

In addition, youth justice systems in Australia aspire to reflect the Australasian Juvenile Justice Administrators' (AJJA) *Principles of Youth Justice*, *Juvenile Justice Standards 2009*, and relevant United Nations' instruments such as CROC and related Rules. The extent to which jurisdictions adhere to these principles is not stringently regulated and indeed, in Queensland, the exclusion of 17 year olds from the youth justice system is a noteworthy departure from the 'best practice' reflected in these documents.

Strengths and Weaknesses

Oversight and Monitoring: The OPG and other agencies provide a form of independent oversight which helps to shine light on problems within youth detention centres. For example, the OPG's Annual Report provides information about the number and form of complaints made in these contexts. However, the functions of these various agencies do not in practice allow for a robust overview of whole system performance. For various reasons, they do not necessarily operate to prompt, facilitate, or require pre-emptive, preventive, or best practice standards to be developed or improved. Although there appears to be a strong culture of principle-based practice within the youth justice sector in Queensland, system performance remains predominantly internally rather than independently monitored. This places a great deal of power and discretion into the hands of the chief executive, and makes the system vulnerable to political pressure. The establishment of an independent body capable of unifying the sector, and enforcing minimum standards for youth justice would help to safeguard and promote the system's commitment to principle.

Understanding of oversight mechanism and of human rights more broadly (Qs 2-5):

The extent to which children experience and understand the current oversight, complaints, and monitoring mechanisms in place is unclear, given the paucity of independent research on this issue. The same comment applies to children's understanding of their human rights. Studies done on children's understanding of their rights in other contexts would suggest that providing children with information may not, in itself, foster full comprehension[5]. It is likely that the regime set out in the *Youth Justice Act* which requires a 'point-in-time' provision of information at intake to detention[6] is

[5] Peterson-Badali, M., Abramovitch, R., Koegl, C. J. and Ruck, M. D. (1999). Young people's experience of the Canadian youth justice system: interacting with police and legal counsel. *Behavioural Sciences and the Law, 17,* 455–465; Viljoen, J., Klaver, J., and Roesch, R., (2005). Legal Decisions of Preadolescent and Adolescent Defendants: Predictors of Confessions, Pleas, Communication with Attorneys, and Appeals. *Law and Human Behavior*, *29(3),* 253-277; Crawford, E., and Bull, R., (2006). Teenagers' difficulties with key words regarding the criminal court process. *Psychology, Crime & Law, 12(6),* 653-667.

not sufficient without further processes and contexts that support an on-going conversation with children about their rights, and to ensure that rights protection is embedded into culture.

Moreover, the system's focus on assisting children to know their rights may not, in itself, equate to the promotion of rights. In many ways, this places the burden of 'rights protection' primarily on the child; he or she must protect themselves (of course, with many opportunities provided to access protection, and with assistance to prompt it). A strong system of rights protection would ensure the system itself operates to protect children at every level without being 'triggered' by a child or by a child's advocate. The Charter and other similar instruments help to promote this, but without a stable and robust system of independent oversight these can be rendered ineffectual. Finally, it is clear that the current mechanisms in place are primarily aimed at rights protection in order to ensure that harms are minimised. This is undoubtedly important. However, we argue that there is a need to move beyond a limited interpretation of children's rights in the context of youth detention, by actively embedding and supporting processes that safeguard children's rights to positive development and achievement of well-being at the broadest societal level.

Age of criminal responsibility (Q8)

We strongly recommend that the minimum age of criminal responsibility be raised to at least 12 years old, and preferably higher. In Queensland, children between the ages of 10-14 are presumed to be incapable of forming the requisite mental state necessary to be held criminally responsible for their actions. Children in this age range are thereby purportedly provided with a measure of protection, despite the minimum age of criminal responsibility being set at 10 years. However, the presumption can be rebutted, and in practice the majority of children plead guilty to charges against them, thereby accepting responsibility. Raising the minimum age to better reflect children's developmental capacities is imperative, especially given that the operation of the presumption does not offer effective protection.

Benefits of OPCAT ratification and NPM establishment for children and young people in detention (youth and adult facilities) (Q6 and Q7)

Oversight mechanisms are very important and their utility should not be underestimated. An NPM would help ensure that problems facing young people in detention, and their physical and social-emotional wellbeing, are appropriately scrutinised; a process that would help to ensure against negligence and abuse. We argue, moreover, that an NPM should take the opportunity to be more than simply a compliance mechanism. At its broadest, a system which maximises children's potential

[6] Section 267 *Youth Justice Act 1992* (Qld)

and agency, where detention is an option of last resort in every context (not just for the imposition of punishment), would consider processes that support children's wellbeing and healthy development as an integral part of the achievement of CROC and OPCAT objectives. An NPM could promote transparency, cross-institutional and cross-jurisdictional knowledge-sharing and best practice, and investment in research to explore system performance and to promote rights in systemic and effective ways. At the same time, this must be supported by an ongoing commitment to research and investigation to ensure that values are understood in practice as well as in theory, and the NPM apparatus must be appropriately resourced to ensure that it can operate in an independent and robust manner. This amounts to a commitment to build the prevention support and translation systems that will be critical to the healthy functioning of an NPM.