



Commissioner for Children and Young People  
Western Australia

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Our reference: 16/4066

Ms Megan Mitchell  
National Children's Commissioner  
Australian Human Rights Commission

Submitted by e-mail to: [kids@humanrights.gov.au](mailto:kids@humanrights.gov.au)

Dear Ms Mitchell,

**Implementation of Optional Protocol to the Convention Against Torture (OPCAT) in the context of Youth Justice Detention Centres**

I welcome the opportunity to make a written submission to the Australian Human Rights Commission to support the implementation of OPCAT and to establish an independent National Preventative Mechanism (NPM) in the context of youth detention centres. Australia's ratification of OPCAT will ensure that children and young people who are held in all places of detention, including youth justice facilities will be protected from torture and other forms of cruel, inhuman or degrading treatment or punishment by the external monitoring of a mandatory NPM.

**Commissioner for Children and Young People WA**

As Commissioner for Children and Young People in Western Australia, my role is to advocate for Western Australian (WA) children and young people who are under the age of 18, including a specific responsibility for advocating for, promoting and monitoring their wellbeing. Under the *Commissioner for Children and Young People Act 2006* I am required to give priority to, and have special regard for, the interests and needs of all children and young people, with particular consideration to those who are Aboriginal<sup>1</sup> and those who are vulnerable or disadvantaged for any reason.

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<sup>1</sup> For the purpose of this submission, the term 'Aboriginal' encompasses Australia's diverse regions and language groups and also recognises those of Torres Strait Islander descent. The use of the term 'Aboriginal' is not intended to imply that Aboriginal and Torres Strait Islander populations are homogenous.

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The role of the Commissioner is independent and I report directly to the WA Parliament through the Commissioner for Children and Young People Joint Standing Committee.

In undertaking my functions I must have regard to the *United Nations Convention on the Rights of the Child 1989* (CRC) ensuring that children and young people must be protected from torture or other cruel treatment or punishment and that imprisonment must only be considered as a last resort and for the shortest possible time.<sup>2</sup> The CRC also provides every child or young person with the right of legal help and fair treatment and a justice system that provides strategies and supports for diversion and rehabilitation.<sup>3</sup>

### **The benefits for children and young people in detention in ratifying OPCAT and establishing a National Preventative Mechanism (NPM)**

Whilst this Inquiry is in relation to the implementation of OPCAT in the context of youth justice detention centres the ratification of OPCAT and the establishment of an NPM will include consideration for children and young people who are held against their will in other places of detention such as: secure residential facilities utilised by the child protection authority; secure disability homes; secure psychiatric units; police stations; court cells; court security and transfer vehicles; bail houses; military detention; and immigration detention facilities. The development of the NPM for visiting and monitoring conditions of detention must have capacity for independent oversight and regular review of all places where children and young people may be detained.

The functions of the NPM should be independent and consistent across state, national and international legislation. Underpinning functional independence, NPM agencies need statutory authority; adequate resourcing to undertake regular visit-based inspections; uncontrolled access to all places where children and young people are detained involuntarily; and the authority to publicise recommendations on quality control and compliance with all matters of OPCAT.

Currently in Western Australia (WA) external reviews of the state's youth justice transport services and the State's only detention centre are undertaken by the Office of the Inspector of Custodial Services (OICS) who provide assessment of the standards of administration, policy and practices and management of WA's youth justice detention centre. However in WA external oversight of places such as police

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<sup>2</sup> *Young Offenders Act 1994* (WA), Section 7(h), reiterates that, 'detaining a young person in custody for an offence, whether before or after the person is found to have committed the offence, should only be used as a last resort and, if required, is only to be for as short a time as is necessary.'

<sup>3</sup> United Nations 1989, *Convention on the Rights of the Child*, Article 3, 19, 37 and 40.

station lock-ups, secure care facilities or immigration detention centres is lacking. Recently my office in collaboration with other Children's Commissioners and Guardians in Australia, released a paper on Human Rights Standards in Youth Detention Centres in Australia. The paper highlights the current inconsistency across Australia in regard to external monitoring of such facilities.<sup>4</sup> The ratification of OPCAT and establishment of an NPM will ensure that Australia's international obligations to the United Nations Convention on the Rights of the Child<sup>5</sup> (CRC) are upheld, all acts are in the best interests of the child and protective measures are in place to protect children and young people from harm consistently across Australia.

### **The vulnerabilities of WA young people in detention facilities**

Detention is the most serious sanction that can be placed on a young person. It is important to note that for the majority of young people<sup>6</sup>, offending is opportunistic and temporary yet for a small cohort of young people who are influenced by risk factors, offending continues and escalates.<sup>7</sup> Evidence shows that when detention is used as the primary intervention of offending behaviour, young people are more likely to reoffend and to continue criminal behaviours as an adult.<sup>8</sup> Therefore in order to reduce the negative consequences of detention, young people who are at risk of chronic offending need to be identified early and the fundamental causes of offending behaviour adequately addressed in order to develop sustained pro-social behaviours. My office acknowledges that the underlying causes of offending are complex and cannot be addressed by one agency alone. There needs to be a coordination of efforts by agencies to ensure that young people who are involved in the youth justice system are provided with the most effective strategies to ensure the best outcomes for young people and the community.<sup>9</sup>

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<sup>4</sup> Australian Children's Commissioners and Guardians (2016) Human Rights Standards in Youth Detention Facilities in Australia: the use of restraint, disciplinary regimes and other specified practices.

<sup>5</sup> United Nations 1989, *Convention on the Rights of the Child*.

<sup>6</sup> In this paper the term 'young people' encompasses all people who are under the age of 18-years. The age of criminal responsibility in WA is between 10 and 18-years.

<sup>7</sup> Richards K 2011, *What makes juvenile offenders different from adult offenders?*, Trends and issues in crime and criminal justice, No. 409, February 2011, Australian Institute of Criminology, p. 3.

<sup>8</sup> Ibid p. 7.

<sup>9</sup> 'The Commissioner acknowledges the work of the Department of Corrective Services in restructuring to establish the Youth Justice Services division, which will bring greater focus on issues of youth justice. The Commissioner also welcomes the establishment of the Youth Justice Board, with its focus on engaging stakeholders, service design and delivery and monitoring of the effectiveness of interventions.' The Commissioner for Children and Young People WA 2015, *Youth Justice Policy Brief*, March, Commissioner for Children and Young People WA.

Young people apprehended in custodial facilities, or anywhere else they may be detained against their will, are particularly vulnerable and disadvantaged and face specific issues with complex challenges. These challenges may include having experienced neglect or child abuse, psychological and cognitive issues, educational disengagement and substance misuse.<sup>10</sup> The critical psychosocial changes that occur in adolescence render detained young people especially susceptible to the negative effects of being in custody, which may include re-traumatisation, stigmatisation and the development of a recidivist lifestyle.<sup>11</sup> According to Judge Reynolds, President of the WA Children's Court:

If children are treated harshly when in detention, including by reason of the unsuitability of the facility, excessive use of lockdowns and restraints, and also strip searches, and also restrictions placed on visits by regimes, and also by inadequate program support for behavioural change, then it seems to me that it can be properly said that they will leave the detention centre more damaged, more hardened, more aggressive and more disconnected children...Children, and particularly damaged children, when treated like that, are made more likely to reoffend, and in a very serious way, when they go back into the community. That is clearly not in the best interests of the community.<sup>12</sup>

Detention centres must employ practices that protect vulnerable young people from harm and are externally monitored to ensure that all young people experience a sense of fairness, are treated with respect and are given ample opportunities to improve their lives. My office has reported evidence of high levels of mental illness and cognitive disorders amongst WA young people in detention and the negative effects of incarceration such as intensifying disadvantage, cultural discrimination and escalating offending behaviours.<sup>13</sup>

### **The over-representation of young Aboriginal people in WA**

WA has the second highest youth detention rate in Australia and it incarcerates more Aboriginal youths compared to those who are non-Aboriginal than anywhere else in the country.<sup>14</sup> Aboriginal young people in WA are a relatively small group, yet they

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<sup>10</sup> Australian Institute of Health and Welfare 2011, *Young Australians: their health and wellbeing*, Cat. No. PHE 140, Australian Institute of Health and Welfare, p. 111.

<sup>11</sup> Richards K 2011, *What makes juvenile offenders different from adult offenders?*, Trends and issues in crime and criminal justice, No. 409, February 2011, Australian Institute of Criminology, pp. 5-7.

<sup>12</sup> Taylor, P 2013, 'Don't give up on them', *The Australian Newspaper*, 1 May, 2013.

<sup>13</sup> The Commissioner for Children and Young People WA 2014, *The State of Western Australia's Children and Young People – Edition Two*, Commissioner for Children and Young People, p. 297.

<sup>14</sup> Australian Institute of Health and Welfare 2015, *Youth detention population in Australia 2015*, Bulletin 131, Cat. No. AUS 196, Supplementary Table S10, Australian Institute of Health and Welfare, Canberra, Australia, p. 9.

represent 70 to 80 per cent of young people in youth justice detention.<sup>15</sup> Evidence shows that young Aboriginal people enter detention at an earlier age, have significantly higher rates of multiple detentions and more than one third of young people who are detained in the only youth custodial facility in WA, Banksia Hill Juvenile Detention Centre (Banksia Hill), come from regional and remote areas.<sup>16</sup> The rate of young people who returned to Banksia Hill in 2014-2015 was 57 per cent,<sup>17</sup> with 64 per cent of those being Aboriginal. These rates may be explained in part by the higher numbers of young Aboriginal people arrested by police and the existing diversionary programs in WA that have proven to be less effective in diverting young Aboriginal people from the justice system than non-Aboriginal youth.<sup>18</sup>

Another suggested cause of the over-representation of young Aboriginal people in Banksia Hill, highlighted by research evidence conducted in the remote Aboriginal community of Fitzroy Valley, revealed that one in eight babies born between 2002 and 2003 were diagnosed with foetal alcohol spectrum disorder (FASD).<sup>19</sup> FASD is a preventable, lifelong condition that impairs cognitive and psychosocial functioning and adversely affects mental health. Several FASD symptoms are seen to influence offending behaviour; these include criminogenic characteristics like impulsivity, inappropriate sexual behaviour, lack of understanding consequences and high levels of suggestibility, compounded by environmental factors such as low socioeconomic status, unstable family-life and substance misuse.<sup>20</sup> FASD sufferers are almost

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<sup>15</sup> Aboriginal Legal Service (ALS) of Western Australia 2008, 'The Overrepresentation of Young Aboriginal People in the Western Australian Juvenile Justice System', ALS, p. 2-4. Statistics on the overrepresentation of young Aboriginal people in the WA justice system are still current eight-years on.

<sup>16</sup> The Commissioner for Children and Young People WA 2014, *The State of Western Australia's Children and Young People – Edition Two*, Commissioner for Children and Young People, p. 301. Found that 41% of detained youth came from regional and remote areas, while only representing 27% of the WA population.

<sup>17</sup> Department of Corrective Services, *Annual Report, 2014-2015*, Government of Western Australia, p. 113.

<sup>18</sup> Amnesty International Australia 2015, *There is Always a Brighter Future: Keeping Indigenous Kids in the Community and Out of Detention in Western Australia*, Amnesty International Australia, p. 25-33.

<sup>19</sup> Wynne, E 2015, 'Foetal alcohol syndrome: Fitzroy Valley leader June Oscar hopes study brings long-term change', ABC News, Tuesday 20 January 2015.

<sup>20</sup> See also, Australian Medical Association, *2015 AMA Report Card on Indigenous Health – Closing the gap on Indigenous imprisonment rates*, pp. 11-12.

certainly predisposed to being in trouble with the law and consequently being detained in youth justice facilities.<sup>21</sup>

June Oscar AO, Bunuba Leader from the Fitzroy Valley calls for action and positive reform on Aboriginal disadvantage and over-representation in Banksia Hill.

[W]ith practical reforms to institutional practice, justice laws, community collaboration and strategic resourcing of diversion from custody and other community-building initiatives, Western Australia can bring about positive change to the devastatingly high numbers of Aboriginal youth in detention.<sup>22</sup>

WA's mandatory minimum sentencing laws arguably contribute to the comparatively high rates of detention and the over-representation of young Aboriginal people in Banksia Hill. Some offences in WA, such as serious assault of a public officer or 'three strikes' of burglary, mandates a young person to a custodial sentence under the *Criminal Code Act 1913 (WA)*. In cases where an offender is convicted on three separate occasions of home burglary, the Criminal Code, amended in 2009, mandates a minimum sentence of 12 months detention. This overrides and contradicts both the *Young Offenders Act 1994 (WA)* and the UNCRC that require a custodial sentence to be used only as a final option and for the shortest possible time.

Judge Reynolds also expressed his concerns regarding amendments to the *Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014 (WA)* that change the way multiple offences are counted and introduces mandatory 3-year detention sentences.<sup>23</sup> Rather than adhering to the standards of the CRC and ensuring that children are dealt with in a manner that is proportionate to their offence, the changes to the law are said to weaken judicial discretion and will further exacerbate Banksia Hill's Aboriginal detention population. Judge Reynolds posits that the amendments to the justice laws;

...will likely result in an increase in the number of Aboriginal young people from country WA being sentenced to lengthy terms of detention...<sup>24</sup>

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<sup>21</sup> Education and Health Standing Committee 2012, *Foetal Alcohol Spectrum Disorder: the invisible disability*, Legislative Assembly, Parliament of Western Australia, pp. 73-79.

<sup>22</sup> Amnesty International Australia 2015, *There is Always a Brighter Future: Keeping Indigenous Kids in the Community and Out of Detention in Western Australia*, Amnesty International Australia, p. 3.

<sup>23</sup> Amnesty International Australia 2015, *There is Always a Brighter Future: Keeping Indigenous Kids in the Community and Out of Detention in Western Australia*, Amnesty International Australia, p. p. 38.

<sup>24</sup> President of the Western Australian Children's Court Denis Reynolds, 'Youth Justice in Western Australia – contemporary issues and its future direction'. *Eminent Speakers Series*, The University of Notre Dame, p. 8.



The laws pertaining to children and young people need to be amended to reflect the requirements of the CRC and to align with OPCAT.

### **Banksia Hill Juvenile Detention Centre, WA**

The Department of Corrective Services (DCS) in WA administers Banksia Hill and is also responsible for community and adult corrections. Banksia Hill accommodates both male and female young people from all over WA who are remanded in custody or sentenced to detention by the Children's Court, aged between ten and 18 years. Female young people, who are separated in a purpose-built facility, represent approximately 20 per cent of the overall population in custody. The rate of female Aboriginal young people is overwhelmingly high compared to non-Aboriginal females.<sup>25</sup>

Over 40 per cent of the young people in Banksia Hill are currently on remand and are housed with the rest of the sentenced population. The high remand rates in Banksia Hill appear to persist despite the support of supervised bail in the form of Metropolitan Youth Bail Services and young people having the unqualified right to bail.

It may be argued that young people who are routinely held in Banksia Hill for welfare issues such as homelessness and family dysfunction intensify rates of remand. The practice of detaining young people who have been granted bail but are remanded in custody due to a lack of suitable accommodation or responsible adult, clearly contravenes State<sup>26</sup> and CRC agreed use of detention as a last resort.<sup>27</sup> The mixture of remand and sentenced young people in Banksia Hill also counters national and international agreements<sup>28</sup> in that an accused person should be treated according to their unconvicted status, which includes being segregated from convicted young people. Young people on remand in Banksia Hill are subject to the same restrictive treatment as those who are sentenced for more serious offences, however they are not equally afforded the positive experiences of rehabilitation due

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<sup>25</sup> 75% of the females detained in Banksia Hill on 31 December were Aboriginal. Department of Corrective Services, 'Young People in Detention Quarterly Statistics - December Quarter 2015', Government of Western Australia.

<sup>26</sup> *Young Offenders Act* 1994 (WA), Section 7(h).

<sup>27</sup> Amnesty International Australia 2015, *There is Always a Brighter Future: Keeping Indigenous Kids in the Community and Out of Detention in Western Australia*, Amnesty International Australia, pp.33-36. Department of Child Protection and Family Support confirmed in an interview that accommodation options for young people on bail were unsuitable and agreed that if there was good reason, CPFS could refuse to sign a bail undertaking.

<sup>28</sup> Article 10.2 (a) of *The International Covenant on Civil and Political Rights*; Rules 8 (b) and 85.1 of the *Standard Minimum Rights for the Treatment of Prisoners*.

to the short periods they are in custody and often because their remand status makes them ineligible for programs designed to develop positive behaviours.

### **Oversight, complaints and monitoring mechanisms relating to the treatment and rights of young people detained in Banksia Hill**

Young people must be informed of their rights in detention and have access to legal advice particularly if they are held on remand. Under the 'Havana Rules'<sup>29</sup>, every child has the right to freely make a request or complaint through approved channels and to be informed of the status of their request or complaint without delay. Ordinarily children and young people rely on an adult, usually a parent, to monitor their wellbeing and assist them to raise concerns and make complaints when needed. Young people in youth justice detention are likely to experience a high level of family dysfunction, as such they may lack the protection afforded by family available to most young people and are therefore increasingly vulnerable. External oversight and review of detention centres can considerably strengthen the extent to which young people's rights are being met and guidelines such as the Havana Rules are upheld. In assessing whether young people's basic rights are being met, it is essential that they are consulted about their experiences and have access to a child-friendly complaints system meeting Australian standards that 'no complainant is disadvantaged'.<sup>30</sup>

Independent statutory oversight of Banksia Hill is provided by OICS which functions under the Inspector of Custodial Services Act (2003). A particularly good example of practice to promote and safeguard the rights of young people in detention, OICS is mandated by the Act and is guided by the Code of Inspection Standards for Young People in Detention<sup>31</sup> to monitor the rights of detainees, staff performance standards and custodial facilities. Announced inspections of Banksia Hill must be conducted at least every 3 years and OICS can conduct any number of spontaneous visits or follow up reviews in response to critical incidents or to monitor the wellbeing of young people in detention. Inspections focus on the treatment and condition of young people in custody, the effect that custody is having on a particular group or person, the provision of service, and any other matter of concern.

OICS is complemented by the Independent Detention Centre Visitors scheme, which provides the opportunity for individual young people to voice their complaints and

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<sup>29</sup> United Nations General Assembly 1990, *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (14 December 1990), Rule 76.

<sup>30</sup> Australian Standards for Customer Satisfaction – Guidelines for complaints handling in organisations 2006, Standards Australia.

<sup>31</sup> Office of the Inspector of Custodial Services, *Code of Inspection Standards for Young People in Detention*, Version 1, 2010, Government of Western Australia.



concerns to Independent Visitors, trained volunteers who attend Banksia Hill at least once every three months. Independent Visitors demonstrate an understanding and concern for young people in detention and help with: making grievances, providing information about support agencies, speaking on behalf of young people to authorities, and recording complaints. Following each visit Independent Visitors are required to submit a short report in writing to OICS, including a record of complaints made by detained young people. Analysis of these reports helps to inform OICS assessment and performance of Banksia Hill and allows them to respond directly to matters raised by young people.

Young people can also make complaints via the Ombudsman WA, which visits Banksia Hill at least every 6 months to receive complaints and provide information about their office. The Ombudsman WA is an independent agency that impartially investigates complaints made about youth justice detention practices or facilities.

The Department of Corrective Services (DCS) provides other mechanisms used to monitor the wellbeing of young people at Banksia Hill. For example, the Aboriginal Visitors Scheme (AVS), whereby Aboriginal staff employed by DCS, visit the facility on a regular basis providing support, counselling and referrals to community organisations for young Aboriginal people in Banksia Hill. My understanding is that AVS can take complaints by young people and refer them directly to the DCS for internal investigation and to OICS or the Ombudsman for independent inquiry.

While an external monitoring agency can provide recommendations on the performance standards of a detention facility, it is limited in its authority to ensure the proposals are acted upon. The OICS report of an announced inspection in January 2012 recommended that serious issues be addressed at Banksia Hill such as reducing 'the number of scheduled and unscheduled lockdowns of detainees'.<sup>32</sup> In its report following a serious incident in the facility in January 2013 the Inspector concluded;

These included low staff morale, high levels of absenteeism, excessive unscheduled lockdowns of detainees, inconsistent and ineffective responses to detainee misbehaviour, and deteriorating staff/detainee relations. Unfortunately, the Department appeared to be in denial about the severity of these issues...The Department failed to follow through on promised risk mitigation strategies, and neglected the change management processes required for successful amalgamation...

It was entirely predicable that the Centre would experience another serious incident, and on 20 January 2013 it did. A riot broke out and more than 60 male detainees – a

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<sup>32</sup> Office of the Inspector of Custodial Services 2012, *Report of an Announced Inspection of Banksia Hill Juvenile Detention Centre*, January 2012, Government of Western Australia, p. 22.

third of the male population – managed to break out of their cells...The riot caused immeasurable cultural and emotional damage.<sup>33</sup>

### **Children and young people’s understanding and experience of oversight, complaints and monitoring mechanisms in detention**

DCS participated in my office’s 2015 Complaints Survey and demonstrated availability of material related to lodging a complaint in a child-friendly format, and that there were multiple child-friendly avenues through which complaints could be lodged. DCS were encouraged by my office to use the *Are you listening?*<sup>34</sup> guidelines to promote better understanding of young people and to develop and improve the complaints procedures.

It appears that young people in Banksia Hill are provided with sufficient occasions to make requests and complaints and have free access to external agencies such as OICS and the Ombudsman of WA. However it is difficult to assess young people’s level of understanding without asking them directly.

In order to critically assess the existing approaches to youth justice, it is imperative that young people with experience of the criminal justice system are given opportunities to provide information and participate in decisions about their lives. For this purpose I am currently collaborating with DCS to consult with young people involved in youth justice to hear their views on what works to address their offending behaviours. The project engages with young people and their families in custodial and community settings throughout WA who represent the diversity of the youth justice population. Through verbal interviews and art-based activities young people describe what led to their youth justice involvement, the barriers they face and the help they need to stay out of trouble.

The report on the consultation findings, which will be released in July this year, will capture young people’s lived experience and highlight their most important issues, including their recommendations on how the systems they interact with need to be improved.

Reflecting OPCAT, young people in detention must be treated with dignity and instilled with a sense of justice and respect. I urge all agencies whose work affects young people in detention centres to encourage them to have a say and involve them in planning and decision making.

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<sup>33</sup> Office of the Inspector of Custodial Services 2015, *Report of an Announced Inspection of Banksia Hill Juvenile Detention Centre*, April 2015, Government of Western Australia, p. iv.

<sup>34</sup> The Commissioner for Children and Young People *Are you listening?* guidelines can be found here: <https://www.cyp.wa.gov.au/media/1414/report-are-you-listening-guidelines-for-making-complaints-systems-accessible-and-responsive-to-children-and-young-people-june-2013.pdf>

## **Children and young people in correctional detention understanding their human rights, including those under the Convention on the Rights of the Child**

International treaties relevant to the detention of young people, not only include the CRC which sets out the political, social, civil, economic and cultural rights of the child, Australia is also a signatory to the *International Bill of Human Rights*<sup>35</sup> and the *International Covenant on Economic, Social and Cultural Rights, 1966*. There are other International instruments that provide guidelines for the treatment of young people in detention, including "The Beijing Rules"<sup>36</sup> and "The Havana Rules"<sup>37</sup>. Under these international rules, Australia is obliged to act in the best interests of the child and to allow a detained young person to participate in decisions that affect them and to freely express their views.

While it appears that Australian young people in detention have their rights sufficiently protected in law, it remains to be seen if their knowledge and understanding of their rights are supported in practice. The proportion of children and young people in detention centres who have mental health or cognitive disabilities, such as FASD, would suggest that their capacity to understand or exercise their rights is compromised, leaving them increasingly vulnerable.

The Havana Rules set out strict minimum standards for discipline procedures in youth justice facilities. The safety of the child and detention community is an overriding principal of the Havana Rules, stating that the basic rights of every person in the facility must be considered. In particular, the child's inherent dignity must be sustained and the detention centre must cultivate a sense of justice and self-respect in the child.<sup>38</sup> The rules exclude any cruel, degrading or inhuman treatment that could cause physical or mental harm to the child, including: solitary confinement; denial of family contact; food restrictions; and labour as a use of punishment.

It is therefore important to have independent oversights and monitoring in place to ensure that young people's physical and mental wellbeing is maintained while they are held in custodial facilities.

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<sup>35</sup> United Nations, *Universal Declaration of Human Rights*, 1948

<sup>36</sup> United Nations, *Standard Minimum Rules for the Administration of Juvenile Justice* (20 November 1985)

<sup>37</sup> United Nations, *Rules for the Protection of Juveniles Deprived of their Liberty* (14 December 1990)

<sup>38</sup> Ibid, Rule 66, p. 8.

## **Staff understanding and promotion of children's rights**

The Beijing Rules<sup>39</sup> state that detention staff should represent the demographics of the young people who are detained. Staff should be recruited with backgrounds in child welfare and human rights, demonstrating compassion, morality and ability to work positively with young people who are at risk. They should also receive quality training and ongoing professional development and high staffing levels should be maintained to safeguard all aspects of the detention centre.

Banksia Hill appears to have a substantial shortfall in reaching the Beijing Rules recommended demographic target of 70 to 80 per cent Aboriginal youth custodial officers. It is my understanding that selection of Banksia Hill staff is in accordance with the CRC and there appears to be adequate training in place, however OICS recently found that staff were dissatisfied with their working life.

Staff perceived that a negative culture existed at Banksia Hill, where bullying, politics, and poor staff relationships were present at all levels of the organisation.<sup>40</sup>

To my knowledge Banksia Hill currently has a 1:8 staff to detainee ratio, which is significantly higher than other jurisdictions in Australia. OICS report notes that the same staffing ratio was in effect leading up to the 2013 riot in which young people were 'locked down' in their cells because there were not enough staff to supervise them.<sup>41</sup> I have not been made aware if OICS recommendation to undertake, 'an independent review of the staffing model at Banksia Hill, including the staff-detainee ration and the 12-hour shift system'<sup>42</sup> has been acted upon.

Environments that respect the rights of children and young people can be created with a solid staffing model that are underpinned by principles of CRC. Staff training is essential in upholding the rights of young people in detention centres. In WA, youth custodial officers must undergo 12 weeks training at the DCS Academy where they receive instruction in the use of disciplinary techniques including the appropriate use of restraints and the use of force. It is my understanding that some staff training has been expanded to include complex needs such as FASD.

The *Model Charter of Rights for Young People Detained in Youth Justice Facilities*, designed in accordance with the CRC to provide young people with an understanding of their rights in custody was sent from my office to the Minister for Corrective

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<sup>39</sup> United Nations, *Standard Minimum Rules for the Administration of Juvenile Justice* (20 November 1985).

<sup>40</sup> Office of the Inspector of Custodial Services, *Report of an Announced Inspection of Banksia Hill Juvenile Detention Centre*, April 2015, Government of Western Australia, p. 25.

<sup>41</sup> Ibid, p. 23.

<sup>42</sup> Ibid, p. 24.

Services who promised to protect and uphold all the basic rights of young people held in detention in Western Australia. The Charter of Rights includes among others; equal treatment; being treated with dignity and respect; having access to and understanding the rules of the centre; health care; no unfair punishment; no unnecessary use of force or restraints and never as a punishment; no unnecessary isolation.

To my knowledge the Charter of Rights is readily available throughout Banksia Hill. However young people in detention facing challenges such as low literacy, cognitive and intellectual disabilities and cultural disconnection are unlikely to have awareness or readily seek out their rights and may not have the ability to read a Charter of Rights. It is therefore imperative that young people's knowledge and understanding of their human rights is consistently emphasised and conveyed by those who work with them in any capacity. It is important for young people who may have experienced discrimination and bullying develop an understanding of their own human rights. As young people begin to feel that they have a right to be treated with dignity and to be treated fairly, there is more chance that they will reciprocate respectful behaviours.

### **Age of criminal responsibility and the Committee on the Rights of Child recommendation to raise the minimum aged at least 12 years**

The Commissioner for Children and Young People supports recommendation of the Committee on the Rights of the Child to increase the absolute minimum age of criminal responsibility to at least 12 years of age. Notwithstanding their age, the best interests of the child should be the primary consideration and all children in contact with a youth justice system should have less accountability because of their physical, emotional and psychological development.

There are two age levels of criminal responsibility in Australian jurisdictions: a lower age level of 10 years-old, where the child is considered too young to be capable of guilt; and a higher age level where the child's capability of committing a crime is unconfirmed. Between the ages of 10 to 14 years a child can only be convicted of a criminal offence if they have proven capacity to understand whether their behaviour is wrong (known as *doli incapax*). Australian jurisdictions have a uniform minimum age of 10 years for criminal responsibility. In all states except Queensland, 18 years is the age up to which young people are dealt with as a child.

The CRC requires that a minimum age of criminal responsibility be set 'below which children shall be presumed not to have the capacity to infringe penal law'. The Beijing Rules states that the age of criminal responsibility:

Should not be fixed too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity...The modern approach would be to consider

whether a child can live up to the moral and psychological components of criminal responsibility; that is whether a child...can be held responsible for essentially antisocial behaviour.<sup>43</sup>

Currently housed for his own protection in isolation on remand in Banksia Hill is an 11 year-old Aboriginal boy, the youngest person in Australian history to be on a murder charge. The offence occurred very late at night during a large street fight after the Australia Day celebration, it is understood that the boy was in the company of a group of older family members. The boy's chaotic life included witnessing his younger brother being killed by a car, experiencing domestic violence, his father being incarcerated and overcrowding at home. *The Australian* reports that at the time of the offence the boy was known to child protection and was not enrolled in school.

The family's myriad problems have put them on the books of the state Department for Child Protection, the Education Department, Department of Housing, the Aboriginal Derbarl Yerrigan Health Service, The Department of Corrective Services, Centrelink and programs for at-risk youth.

That an 11-year-old boy was in the centre of Perth in the early hours of a Tuesday morning hardly raises an eyebrow among experienced local youth workers.<sup>44</sup>

It is a tragic path to Banksia Hill for a very young boy, well-known to government agencies. The culpability of a child who has had entrenched disadvantage and exposure to trauma and violence is highly problematic.

This case demonstrates the extreme vulnerability of young people in contact with the youth justice system whose elementary needs are overlooked. The level of supports provided to children and the safeguards in place to protect their rights are inadequate as the child inevitably faces up to criminal responsibility that he or she is not equipped to understand. Australia should raise the age of criminal responsibility to align with the CRC and protect the basic human rights of the child.

It is essential that Australia ratifies and implements OPCAT to safeguard vulnerable young people and protect them from harm. It is also vital for the best interests of the child and the safety of the community, that young people who are identified as vulnerable to the youth justice system, receive adequate supports to maintain wellbeing and to have their basic needs met. A robust external monitoring mechanism will make sure that all young people experience a sense of fairness, are treated with respect and are given ample opportunities to improve their lives.

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<sup>43</sup> United Nations, *Standard Minimum Rules for the Administration of Juvenile Justice* (20 November 1985).

<sup>44</sup> Laurie, V, Taylor, P 2016, 'Litany of strife behind 11-year-old's murder charge', *The Australian*, February 13, 2016.



Thank you again for the opportunity to contribute to the OPCAT in the context of Youth Justice Detention Centres.

Yours sincerely



COLIN PETTIT

Commissioner for Children and Young People WA

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