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United Nations Committee Against Torture

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Review of Australia's Implementation of the UN Convention Against Torture

Thank you for the opportunity for the **Australian Child Rights Taskforce** (the Taskforce) to provide this brief submission to the **United Nations Committee Against Torture** (the Committee). This submission is based on previous material provided to the **United Nations Sub-Committee on the Prevention of Torture** (SPT or the Sub-Committee) in preparation for its intended visit to Australia during 2022.

The Australian Child Rights Taskforce and its work

The Australian Child Rights Taskforce¹ is a coalition of over 100 organisations, networks and individuals committed to the protection and development of the rights of children and young people in Australia. UNICEF Australia convenes the Taskforce, and its work is guided by a Steering Committee. One of the key roles of the Taskforce is to hold Australian Governments to account on the implementation of the **United Nations Convention on the Rights of the Child**.² The Taskforce is also concerned with monitoring Australia's obligations to its children and young people under other relevant human rights treaties and has taken a keen interest in the implications of the Australian Government's commitment to establish a National Preventive Mechanism.³

The Australian Child Rights Taskforce and this Review

This briefing note is based on the collaborative and collective work of the Taskforce. Our processes are consultative and draw on the experiences of children and young people and those who work with them across a range of sectors and communities. Our key concern is that the National Preventive Mechanism in Australia should be able to address the situation of children and young people who experience instances of torture, and other cruel, inhuman, or degrading treatment or punishment. Over the years, our work has identified instances of significant individual and systemic abuses that constitute breaches of the Convention Against Torture, the Convention on the Rights of the Child, and the Declaration on the Rights of Indigenous Peoples.

It is imperative that the National Preventive Mechanism should be able to effectively monitor the lived experience of children and young people in Australia. Monitoring must be comprehensive, include reference to child-centred knowledge and standards and lead to the development of child-sensitive preventative practice. The Taskforce has been involved in the public policy debate and consultations in Australia regarding the implementation of the **Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)**.

We commend the Australian Government for committing to ratify OPCAT. We acknowledge the work that the Australian Government and State and Territory Governments have begun to establish the required mechanism and its capacity to improve protections for people who are deprived of their liberty and are at risk of torture or degrading treatment.

¹ <https://childrightstaskforce.org.au/about-us/>

² Australia ratified the Convention in 1990.

³ As a result of Australia's ratification of the Optional Protocol Against Torture in 2017

Priority for Children

We support the ongoing advocacy work of the **Australia OPCAT Network** including in relation to delays and shortcomings in the implementation process and outcomes. Our comments herein highlight our key concerns regarding children and propose that the National Preventive Mechanism should give appropriate priority to children in monitoring and response.

We recommend that protecting the rights of children and young people should be prioritised in the work of National Preventive Mechanism bodies. **The Royal Commission into Institutional Responses to Child Sexual Abuse**⁴ and numerous other official inquiries and reports (including those listed below and referred to in the table accompanying this submission) have detail widespread mistreatment of children in a range of settings. Governments and institutions are failing to act in the best interests of children in the provision of care, support, and services. These failings reflect a lack of understanding of the unique needs of children as well as a lack of structural and systemic protections to ensure that their rights are respected and upheld in practice.

Over time, the work of the National Preventive Mechanism should consider all places where children experience instances of torture, and other cruel, inhuman, or degrading treatment or punishment. In the short term, we accept that initial priority should be given to settings where children are routinely deprived of their liberty and placed at risk of torture and ill-treatment. Detainment of children in the youth justice system is an obvious starting point. Attention should be given as soon as practicable to other detention settings, such as health and mental health facilities and where children are at risk including in care, immigration, disability support and education.

A Context without the Necessary Legislated Child Rights Protections

There is a lack of comprehensive legislated protections for child rights (and indeed human rights) in Australia. The Convention on the Rights of the Child has not been incorporated into domestic law to create legally enforceable rights for children in Australia. The legislated protections that would build a broad culture of respect for human rights are deficient. The legislated requirements that would reinforce the need for capacity and competence in preventative practice across government and in the community are piecemeal and easily overridden with no review mechanisms. As a result, the National Preventive Mechanism will be operating in a context that lacks the required institutional (and social) recognition. Without this recognition, the ability of the Mechanism to protect human rights and dignity is undermined.

⁴ Australian Government, Royal Commission into Institutional Responses to Child Sexual Abuse (2017)

Skills to Identify Inappropriate Practices and their Impacts on Children

It is essential that those engaged in monitoring as an effective National Preventive Mechanism should have the specialist skills and knowledge necessary to understand child and adolescent development (including the impact of trauma), identify inappropriate practices and settings for children, support appropriate complaints mechanisms,⁵ and recognise and respond to impacts on children. The National Preventive Mechanism bodies should have or have access to the skills to communicate safely and effectively with children (including those affected by trauma and disadvantage). The work of the bodies should adopt appropriate intersectional approaches informed by expertise in mental health, disability and child safety, domestic children's law and international child and human rights knowledge.

Addressing Culture and History for Children

The United Nations Expert Mechanism on the Rights of Indigenous People under the *United Nations Declaration on the Rights of Indigenous Peoples* connects the capacity of Indigenous peoples to meet their children's needs with their ability to exercise self-determination.⁶ The Australian government has taken steps towards recognising the rights of Aboriginal and Torres Strait Islander peoples to self-determination in matters relating to children through the *Safe and Supported, National Framework for Protecting Australia's Children 2021-2031* (the Framework). The Framework commits to progressive systems transformation, which centres Aboriginal and Torres Strait Islander self-determination.⁷ However, there is currently a disconnect between this framework and the youth justice system. Enacting self-determination is critical to achieving better outcomes for Aboriginal and Torres Strait Islander children.

In July 2020, the Australian government, all state and territory governments, and the Coalition of Peaks signed the National Agreement on Closing the Gap (the National Agreement). The National Agreement seeks to overcome the entrenched inequalities faced by Aboriginal and Torres Strait Islander people, pushing for equality in life outcomes for all Australians. The National Agreement has 19 national socio-economic targets that impact on life outcomes for Aboriginal and Torres Strait Islander people. Target 11 sets an outcome that Aboriginal and Torres Strait Islander young people are not overrepresented in the criminal justice system, with a target to reduce the rate of Aboriginal and Torres Strait Islander young people aged 10-17 years in detention by at least 30 per cent by 2031.⁸ A recent report published by the Australian Government Productivity Commission indicated that five states were on track to meet this target, a state and territory had improved but were not on track, and one territory had worsened in its progress towards this target.⁹

Australia has an intergenerational legacy of colonial dispossession and child removal, ongoing institutional racism, and the overrepresentation of First Nations peoples in measures of disadvantage and incarceration (including unsentenced detention, watch-houses, and police transport). There should be greater emphasis on the need for cultural knowledge and culturally safe practices in monitoring. Monitoring policies and practices should align with the Safe and Supported Framework and the National Agreement targets.

⁵ See section "Understanding How Children (Don't) Complain" on page 6

⁶ United Nations Human Rights Council, *Rights of the Indigenous child under the United Nations Declaration on the Rights of Indigenous Peoples* (2021)

⁷ Department of Social Services, *Safe and Supported: the National Framework for Protecting Australia's Children* (2021) p51

⁸ Closing the Gap, *Closing the Gap Targets and Outcomes* <https://www.closingthegap.gov.au/national-agreement/targets>

⁹ Australian Government Productivity Commission, *Closing the Gap Annual Data Compilation Report July 2023* p31

The Absence of Enforceable National Standards in Youth Justice

The challenge of ensuring consistent monitoring and responses across Australia in youth justice is compounded by the lack of enforceable national standards. There are currently no legally enforceable standards that are consistent across all jurisdictions. There is available guidance, including *Juvenile Justice Standards*,¹⁰ *Principles of Youth Justice in Australia*¹¹ and *Human Rights Standards in Youth Detention Facilities in Australia*.¹² But there is ample evidence that unenforceable guidance has been insufficient to ensure appropriate practices and protections for children and young people in youth justice detention.

The Evidence of Unsafe Practices

A cycle of official inquiries and reports has found that youth justice systems and detention institutions across Australia are failing to protect the rights of children. The recurring nature of these inquiries suggests that systemic reform is either unsuccessful; loses momentum or fails to adequately address future needs and development. There is a case for stronger and more consistent monitoring and follow up. Systems that require greater scrutiny include behaviour management, data collection, public reporting, accessible complaints mechanisms, inadequate staffing levels and training, performance management for staff and evaluation and follow up on reforms.

There is also a need for greater specificity in law and policy regarding rehabilitation as the overarching policy framework in the youth justice system, developmentally appropriate behaviour management techniques including: de-escalation and safeguards (including prohibitions where necessary) regarding the use of force, the use of restraints, seclusion, and isolation.

We also recommend attention to the recurring practice of transferring young people to adult facilities despite this practice breaching accepted international child rights standards.¹³ We note that with Australia's minimum age of criminal responsibility, children from the age of 10 are detained in youth justice detention facilities, including watch-houses.

We refer to material included in the **Summary Table** attached to this submission.¹⁴ We offer the following case study as an example of the lack of commitment to monitoring and reform.

¹⁰ Australasian Juvenile Justice Administrators, *Juvenile Justice Standards* (2009)

¹¹ Australasian Juvenile Justice Administrators, *Principles of Youth Justice in Australia* (2014)

¹² Australian Children's Commissioners and Guardians, *Human rights standards in youth detention facilities in Australia: the use of restraint, disciplinary regimes, and other specified practices* (2016)

¹³ Australia has maintained a reservation to article 37(c) of the Convention on the Rights of the Child.

¹⁴ Attachment – "Summary Table – OPCAT State and Territory Issues and Child Rights Mechanisms"

Case study: Banksia Hill Detention Centre (Western Australia)

For over 10 years, the treatment of children in detention in Banksia Hill Detention Centre has been a concern. In 2012, the Inspector of Custodial Services (the Inspector) reported the use of management regimes where child detainees were placed in solitary confinement for 22-23 hours per day and isolated from the general population for extended periods. In one instance, a child was isolated under various regimes for 95 consecutive days.

In 2017 the Inspector published a further report¹⁵ calling for greater independent oversight. The report noted that behaviour management in juvenile detention ‘is a longstanding concern’, incidents of serious damage and self-harm had ‘reached unprecedented levels’, and responses to ‘critical incidents’ which included ‘restraint use and high-level tactical response’ have conflicted with ‘a rehabilitative, trauma-informed model’. The report recommended that the use of lockdowns for staff training and staff shortages should be ‘minimised’. The recommendations demonstrated the need for improved accountability and that the management practices in Banksia Hill were falling far short of acceptable standards.

In December 2021, the Inspector began a further review of the facility and issued a Show Cause Notice to the Department considering the ongoing failures to improve conditions. The Department committed to a reform program and yet in July 2022, deemed it necessary to transfer a group of child detainees to an adult prison.¹⁶

Lack of Consistent Commitment to Rehabilitation

In 2017, the Human Rights Law Centre provided this advice to the Royal Commission into the Protection and Detention of Children in the Northern Territory¹⁷:

“For children in detention, the aim should be to create a rehabilitative environment that reflects a specialized approach to the needs of a young person. What is needed is a model that encapsulates the essentials required for healthy adolescent development – engaged adults focused on their development, a peer group that models positive behaviour, opportunities for academic success, activities that contribute to developing decision-making and critical thinking skills, and pathways to success ...”.

“The mission and overarching philosophy of youth justice facilities should move from a correctional approach to one based on the tenets of positive youth development, building on each young person’s strengths. The focus must always be on helping children get back on track through treatment and developmental programming that is trauma-informed; delivered by qualified and supported staff; and focused on prosocial skill development, academic or vocational instruction, work readiness, and work experience.”¹⁸

¹⁵ Inspector of Custodial Services, Western Australia, Behaviour Management Practices at Banksia Hill (2017)

¹⁶ <https://alhr.org.au/childrenadultprisonwa/>

¹⁷ <https://www.royalcommission.gov.au/child-detention>

¹⁸ Human Rights Law Centre, “Reforming the Northern Territory’s Youth Justice system” Submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory (2017).

Policy into Practise

It is not uncommon for government youth justice strategies, policy frameworks and even legislative statements of principle to include aspirations and objectives that align with rehabilitative, child and youth development, and child rights goals. Despite this, these statements have not consistently translated into action. For example, the clear recommendation of the Royal Commission into the Protection and Detention of Children in the Northern Territory that the Don Dale Youth Detention Centre should be closed¹⁹, over 5 years later, it remains open and operational²⁰. Nor have they led to better treatment of, or improved outcomes for children and young people. Skilled monitoring by appropriately qualified National Preventive Mechanism bodies will help to establish baseline standards for treatment and support and help to shift the detention environments towards the goal of rehabilitation.

Aligning with Child Safe Standards

We are concerned that the National Preventive Mechanism lacks access to effective systems to prevent and keep children and young people safe. This is a broader challenge than youth justice. It reflects the under-development in many sectors of child-centred practices and the lack of commitment to the creation of child safe environments. This was addressed by the **Royal Commission into Institutional Responses to Child Sexual Abuse** in its recommendation for the implementation and monitoring of **Child Safe Standards** in all organisations that work with and deal with children and young people (including governments). National Preventive Mechanism bodies should work with the bodies overseeing the implementation of Child Safe Standards in each state and territory jurisdiction. The standards are based on the **National Principles for Child Safe Organisations**, developed by the Australian Human Rights Commission and endorsed by all Australian governments:

1. *Child safety and wellbeing is embedded in organisational leadership, governance, and culture.*
2. *Children and young people are informed about their rights, participate in decisions affecting them and are taken seriously.*
3. *Families and communities are informed and involved in promoting child safety and wellbeing.*
4. *Equity is upheld and diverse needs respected in policy and practice.*
5. *People working with children and young people to reflect child safety and wellbeing values in practice.*
6. *Processes to respond to complaints and concerns are child focused.*
7. *Staff and volunteers are equipped with the knowledge, skills, and awareness to keep children and young people safe through ongoing education and training.*
8. *Physical and online environments promote safety and wellbeing while minimising the opportunity for children and young people to be harmed.*
9. *Implementing of the national child safe principles is regularly reviewed and improved.*
10. *Policies and procedures document how the organisation is safe for children and young people.*

¹⁹ <https://www.royalcommission.gov.au/system/files/2020-09/findings-and-recommendations.pdf> Volume 2A Recommendation 10.1

²⁰ <https://nt.gov.au/law/young-people/going-to-court-and-sentencing/young-people-going-to-a-detention-centre/don-dale-youth-detention-centre-darwin>

The National Principles offer an existing policy framework that has been endorsed by Australian Governments, which could provide guidance for National Preventive Mechanism bodies in setting standards for creating safe and respectful environments for children and young people.

Understanding How Children (Don't) Complain

Children are particularly vulnerable to mistreatment. Power imbalances and a lack of confidence in adult authority structures limit the ability and the trust required for children to speak up about their situations. Children are often unable to use adult-designed and adult-centric mechanisms. Access to child-friendly and child-safe approaches²¹ that support them to express their concerns, to be heard and taken seriously, are a critical protective factor for children in settings and systems where mistreatment may occur.

We note that the Australian Government has not signed the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (OP3) to help improve children's access to important mechanisms for accountability.

We are concerned that the National Preventive Mechanism lacks access to effective settings and systems that will enable children and young people to complain about their treatment. Additional barriers may exist for children and young people with disabilities, from different cultural backgrounds, those who are gender diverse and those with limited literacy and experience navigating complaint systems. A rigorous independent process is required so that children and young people can safely and confidently access opportunities to be heard and to complain, including access to appropriate timely, proportionate, and effective remedies.

Administrative and Structural Requirements

We note with approval the recommendation of the UN Committee on the Rights of Persons with Disabilities for the involvement of people with disability in the work of the National Preventive Mechanism.²² This involvement should apply with equal force for children and their representative organisations.

The National Children's Commissioner has highlighted the need for improved and nationally consistent data collection. It is essential to know the numbers of children detained in youth justice facilities, their sex, age, Indigenous status, why they are detained, for how long and whether they were detained in solitary confinement.²³ Offices performing the functions of the National Preventive Mechanism require a clear statutory mandate; guaranteed independence; appropriate access to resources; and powers of access to information and places of detention. Eventually schools and school settings, and institutions that engage in the care of children should be included within arrangements.²⁴

²¹ Commissioner for Children and Young People WA "Child Friendly Complaints Guidelines" (2021); UNICEF "Tools to Support Child Friendly Practices: Child Friendly Complaint Mechanisms" (2019)

²² UN Committee on the Rights of Persons with Disabilities, Concluding Observations – Australia (2019) at para 30(c).

²³ <https://humanrights.gov.au/our-work/childrens-rights/projects/national-childrens-commissioners-work-opcat>

²⁴ Committee Against Torture, *General Comment No. 2 – Implementation of article 2 by States parties*, UN Doc CAT/C/GC/2 (2 January 2008), [15].

Submission to the UN Committee Against Torture



Strategic Role for Children’s Commissioners

Given that Aboriginal and Torres Strait Islander children continue to be overrepresented in the youth justice and other statutory systems in Australia, this highlights the need for a fully legislated, empowered and funded National Aboriginal and Torres Strait Islander Children’s Commissioner.

A National Aboriginal and Torres Strait Islander Children’s Commissioner and the National Children’s Commissioner could play an efficient and strategic role under the National Preventive Mechanism to coordinate and provide specialist advice relating to children and young people. This role should be designated by legislation and given an appropriate budgetary allocation.

The Aboriginal and Torres Strait Islander Children’s Commissioner and National Children’s Commissioner could work with the Commonwealth Ombudsman and in coordination with State and Territory Children’s Commissioners and Guardians to build the required skills in monitoring for children and young people required by the National Preventive Mechanism bodies.

This coordinated approach could also lead to the development of enforceable and consistent national standards in youth justice (and later in other settings as required).

We have provided as an attachment to this submission, a Summary Table setting out the key issues for the implementation of the National Preventive Mechanism in each state and territory of Australia.²⁵

On behalf of the Australian Child Rights Taskforce

Yours sincerely

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²⁵ Attachment - Summary Table – OPCAT State and Territory Issues and Child Rights Mechanisms