# Submission to the Committee against Torture

## Convention against Torture follow-up procedure: Sixth periodic review of Australia

Australian National Preventive Mechanism

# Contents



# Acknowledgment of Country

The Australian National Preventive Mechanism (NPM) acknowledges the Aboriginal and Torres Strait Islander peoples throughout Australia and the Traditional Custodians of the lands across which we conduct our business.

We pay our respects to the custodians of the lands on which we work as well as their ancestors and Elders, past and present.

The Australian NPM is committed to honouring Australian Aboriginal and Torres Strait Islander peoples' unique cultural and spiritual relationships to the land, waters, seas and their rich contribution to society.

# Warning for Aboriginal and/or Torres Strait Islander persons

**A warning for Aboriginal and/or Torres Strait Islander persons that the names of deceased Aboriginal people are included in this submission.**

# Introduction

## The Australian NPM

We are members of the multi-body Australian National Preventive Mechanism (NPM), established to give effect to Australia's obligations under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

This submission is made by the following Australian NPM members:

- Australian Capital Territory (ACT) Human Rights Commission (ACT HRC)
- ACT Office of the Inspector of Correctional Services (ACT OICS)
- ACT Ombudsman
- Commonwealth NPM
- Northern Territory (NT) Community Visitor Program
- NT Office of the Children's Commissioner (NT OCC)
- NT Ombudsman
- South Australian (SA) Training Centre Visitor (SA TCV)
- Tasmanian NPM
- Western Australian (WA) Office of the Inspector of Custodial Services (WA OICS).

Each body has its own jurisdiction and areas of expertise which have contributed to the development of aspects of the submission.

## Our submission

We make this submission to the Committee to support its consideration of Australia's state party follow-up submission of 13 May 2024 under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

In accordance with the follow-up process, our submission focuses on recent developments since the Committee's sixth periodic review of Australia in November 2022. It is structured around the Committee's three areas for follow-up, on:

- immigration detention (paragraph 28 of the *Concluding Observations*)
- conditions of detention (paragraph 32 of the *Concluding Observations*)
- youth justice (paragraph 38 of the *Concluding Observations*).

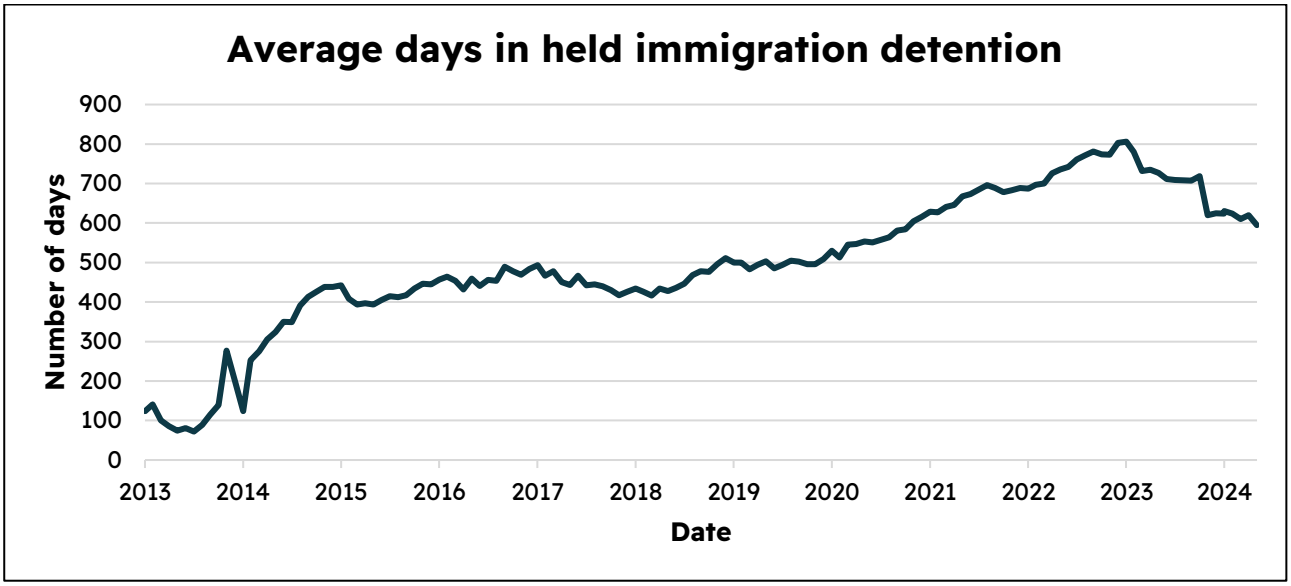
We look forward to engaging further with the Committee in future, including as part of Australia's seventh periodic review under the CAT.

# Area 1 for follow-up: Immigration detention

Oversight of immigration detention within the Australian NPM is undertaken by the Commonwealth NPM.[1] As well as the information below, the Committee may also wish to review the Commonwealth NPM's most recent Annual Report for further information.

## 1.1 The average time spent in immigration detention remains high, despite Australia's highest court ruling on indefinite detention

**Paragraph 7 of the state party submission** asserts 'immigration detention is administrative in nature and is not used for punitive purposes'. While this may be the theoretical basis of immigration detention, the average time that people detained spend held in immigration detention remains high.




Source: Refugee Council of Australia, *Statistics on people in detention in Australia*, drawn from Department of Home Affairs, *Immigration Detention Statistics*. Based on publicly reported figures as at the end of each month.

**Paragraph 9 of the state party submission** refers to the decision of the High Court of Australia in the case of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCA 37 (NZYQ). On 8 November 2023, the court ordered the release from immigration detention of a stateless refugee, to whom Australia owed international protection obligations but had previously refused a visa due to a criminal conviction. The

[1] The Commonwealth Ombudsman performs the following distinct functions under OPCAT:
- NPM for places of detention under the control of Australia's national government (Commonwealth NPM)
- As ACT Ombudsman, one part of the NPM for places of detention under the control of the ACT (ACT NPM)
- the body coordinating the members of Australia's multi-body Australian NPM (NPM Coordinator).

man had been facing indefinite immigration detention because there was no real prospect of his removal from Australia, yet he was unable to be granted a visa.

In welcoming the decision, the Commonwealth Ombudsman as Commonwealth NPM stated there were people facing indefinite immigration detention in Australia, without any clear pathway forward. He reiterated that immigration detention must not be punitive.

The NZYQ decision resulted in the release of a significant number of people from immigration detention, which in turn reduced the average time spent detained. Nonetheless, it remains high at 595 days as of 31 May 2024, with more than 43% of people in immigration detention having been there for longer than 365 days.

The Commonwealth NPM has previously recommended the Department of Home Affairs (Home Affairs) work with the Minister to reduce the number of people in immigration detention, and this recommendation was repeated in its 2021–22 Annual Report.

The Commonwealth Ombudsman's view continues to be that immigration detention facilities are unsuitable for long term use. He has added:

> I see consistent patterns of deteriorating mental and physical health for people facing long-term or indefinite detention, which is supported by widespread evidence that shows the correlation between long-term detention and poor mental and physical health outcomes.

## 1.2 Despite detention of children needing to be a last resort, children are still held in immigration detention from time to time

While section 4AA of the *Migration Act 1958* (the Migration Act) affirms the principle that children should only be detained as a last resort, as part of Australia's mandatory immigration detention system, the Migration Act nonetheless requires that any person who is an 'unlawful non-citizen' must be detained.

While **paragraph 10 of the state party submission** indicates there were no children in immigration detention facilities on 31 August 2023, children are still held in immigration detention facilities from time to time. Below is a table of the children held in immigration detention from 1 July 2022 to 30 June 2023, totalling 25.

| Origin | Number of children detained | Age/s | Location | Number of days detained |
|---|---|---|---|---|
| Middle East | 1 | 14 | Sydney Hotel Alternative Place of Detention (APOD) | 17 |
| Indo-Pacific | 2 | 17, 15 | Brisbane Hotel APOD | 11 |
| Middle East | 5 | 9, 8, 7, 4, 1 | Brisbane Hotel APOD | 3 |
| Indo-Pacific | 1 | 17 | N/A | <1 |
| Middle East | 3 | 5, 4, 3 | Brisbane Hotel APOD | 3 |

| Origin | Number of children detained | Age/s | Location | Number of days detained |
|---|---|---|---|---|
| Indo-Pacific | 2 | 10, 5 | Cairns Hotel APOD, Brisbane Hotel APOD | 7 |
| Middle East | 5 | 13, 11, 9, 3, 1 | Broadmeadows Residential Precinct | 3 |
| South America | 1 | 14 | Sydney Hotel APOD | 3 |
| Indo-Pacific | 1 | 15 | Northern Hotel APOD | 12 |
| Middle East | 1 | 1 | Sydney Hotel APOD | 1 |
| South America | 1 | 2 | Sydney Hotel APOD | 3 |
| Europe | 2 | 4, 1 | Brisbane Hotel APOD | 2 |

Source: Commonwealth NPM, *Annual Report 2022–23*, page 38.

The Commonwealth NPM observed that Home Affairs referred to some of these children in detention as 'guests'. Home Affairs advised that the term was used for children travelling with parents who were refused entry to Australia on certain grounds and detained. In these cases, Home Affairs advised it does not consider the children 'unlawful' under the Migration Act. However, the children were detained so they could remain in their parents' care and so held in immigration detention as 'guests'. The Commonwealth NPM stated this terminology minimises the fact of their detention, and while agreeing it is usually preferable for families to stay together, recommended that possible alternative arrangements should be considered for children when this is not the case.

## 1.3 Material limitations of the immigration detention network have negative impacts on people detained

Australia's immigration detention facilities are a wide mix of facilities including purpose-built, re-purposed and ad hoc locations. Infrastructure needs have also evolved in recent years as profiles of people in immigration detention have changed.

Despite **paragraph 11 of the state party submission**, the Commonwealth NPM observed in its 2022–23 Annual Report that infrastructure limitations were impacting facilities' ability to:

- safely hold certain groups (including women, and vulnerable people in detention requiring protection)
- provide opioid substitution programs due to a lack of waiting or observation rooms and suitably secure storage
- provide sufficient office space or supply storage
- hold people in the same state/territory as their families, friends and support networks.

It also observed that some facilities were failing to offer adequate access to open air and exercise to those in 'high care accommodation' (HCA), in a manner consistent with the spirit of the United Nations *Standard Minimum Rules for the Treatment of Prisoners*.

Further, specific accommodation for women is not available in all immigration detention facilities, increasing the likelihood women may need to be detained long term in an APOD – unsuitable for long-term immigration detention – or moved interstate to other facilities and potentially away from support networks. At those facilities which could house women, women's access to amenities and services was poorer than for men, and there was also limited capacity to separate women from each other where necessary.

## 1.4 There are gaps in guidance on supporting transgender people, gender diverse people, and people with innate variations of sex characteristics

The Commonwealth NPM also observed there is no comprehensive policy or guidelines on how to accommodate and support transgender people, gender diverse people, and people with innate variations of sex characteristics in immigration detention facilities. While acknowledging advantages to a case by case, needs-based approach, the Commonwealth NPM has recommended Home Affairs develop procedural guidance grounded in best practice for supporting these cohorts of people in immigration detention.

## 1.5 A lack of meaningful activity persists in immigration detention

Despite **paragraph 11 of the state party submission**, the lack of meaningful activity is a significant point of concern for people in immigration detention – particularly in the context of the high average length of time spent in detention.

In 2021–22, the Commonwealth NPM recommended people should be able to receive formal certification for courses they complete in immigration detention, noting the assistance being able to obtain training and qualifications while in detention would provide on exit. Worryingly, some people in immigration detention express a preference for incarceration over immigration detention, both because of the uncertainty of a release date in immigration detention and because in prison they can access a better range of programs and acquire qualifications.

In 2022–23, the Commonwealth NPM maintained reservations on the range of programs and activities available. A common complaint from people in detention was that many activities (such as arts and crafts) were not age appropriate or useful. The Commonwealth NPM again recommended review of the programs and activities offered in immigration detention, observing the evident benefits to wellbeing and self-esteem from adequate programs.

## 1.6 The Commonwealth NPM continues to monitor the responses to a concerning use of force incident

While **paragraph 13 of the state party submission** states use of force in immigration detention is a last resort and subject to stringent oversight, in its 2021–22 Annual Report the Commonwealth NPM reported on its concerning discovery of the use of firefighting equipment, including fire extinguishers, against people in immigration detention.

During two disturbances, this equipment was used in what appeared to be a pre-planned and systematic use of force to control people's movement. Equipment was discharged directly onto people, in one case onto people not involved in disturbances. Despite this, internal incident reporting made no reference to equipment being used in this manner.

Home Affairs confirmed this equipment use was unauthorised, and held an internal review. However, in its 2022–23 Annual Report, the Commonwealth NPM noted the review did not interview stakeholders involved in the incidents, nor did the review's report make recommendations to address issues it had identified, stating instead the incidents would be referred for internal investigation. As a result, the Commonwealth NPM recommended it be notified promptly of the investigation's outcome, including action taken in response.

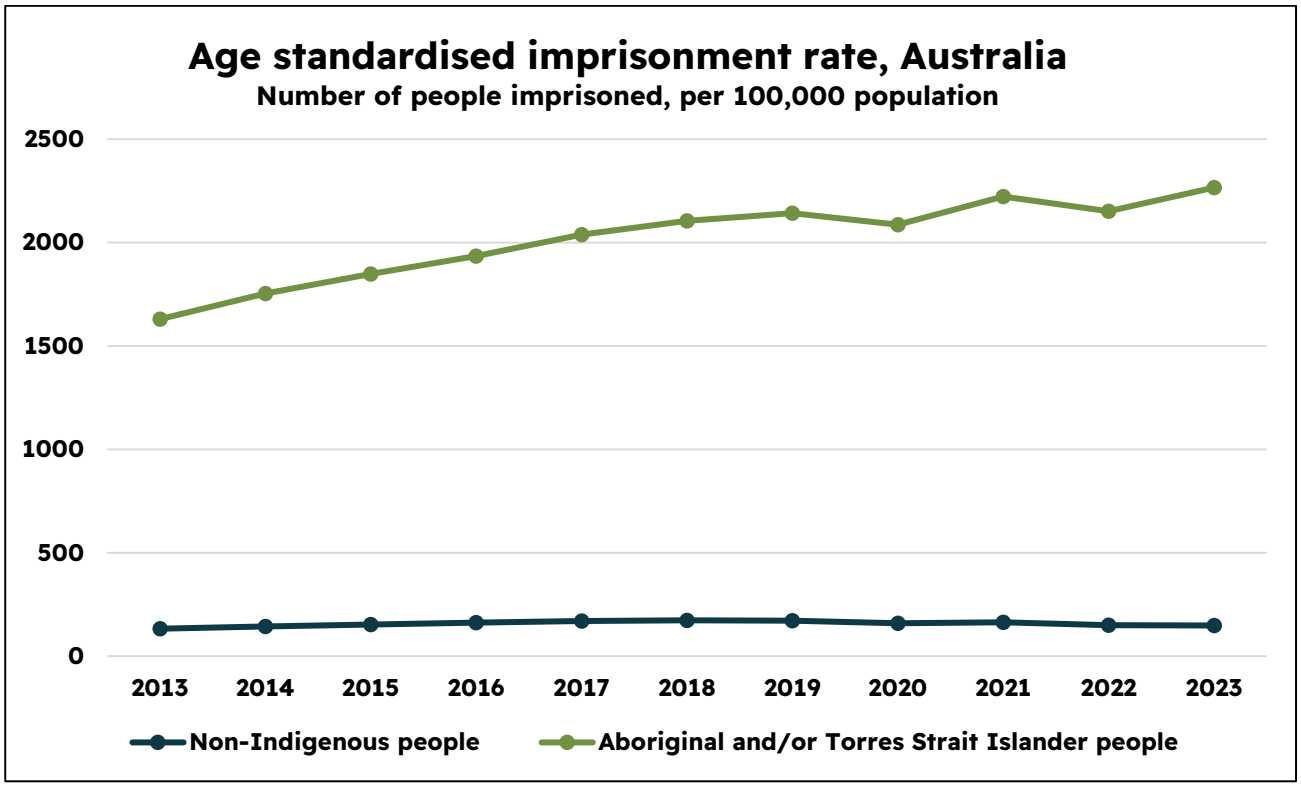
# Area 2 for follow-up: Conditions of detention

## 2.1 Aboriginal and/or Torres Strait Islander people continue to be grossly over-represented in prisons

While **paragraph 17 of the state party submission** states that Australia's national imprisonment rate has dropped, we draw to the Committee's attention important further statistics on the imprisonment of Aboriginal and/or Torres Strait Islander people.

The number of Aboriginal and/or Torres Strait Islander people in prison increased over the 10 years to 2023. There were 8,430 Aboriginal and/or Torres Strait Islander people in prison in 2013, while by 30 June 2023 this figure had grown to 13,852. The 2023 figure was an increase of 7.4% since 2022, at the same time as the number of non-Indigenous people in prison increased by just 1.8%. Further, in 2023, 40.9% of all Aboriginal and/or Torres Strait Islander adults in prison were unsentenced (mostly on remand).

At 30 June 2023, Aboriginal and/or Torres Strait Islander people made up 33% of the total prison population, while making up just 3.8% of the total Australian population. A person in an Australian prison was 15.2 times more likely to be Aboriginal and/or Torres Strait Islander than non-Indigenous, a rate that has grown since 2016. Women in Australian prisons are 21.4 times more likely to be Aboriginal and/or Torres Strait Islander.




Source: Australian Bureau of Statistics (ABS), *Prisoners in Australia, 2023*, tables 1-2, 17-18.

## 2.2 Deaths of Aboriginal and/or Torres Strait Islander people in custody reached a record high in 2022–23

There were 31 deaths of Aboriginal and/or Torres Strait Islander people in custody – prison custody, police custody or custody-related operations – in 2022–23. Alarmingly, this is the highest number since records commenced in 1979–80, despite the rate of Aboriginal and/or Torres Strait Islander deaths in custody being consistently lower in the last 20 years.

In October 2023, 16-year-old Indigenous young person Cleveland Dodd died while in youth detention in WA. We discuss this further below under youth justice.

As of 23 July 2024, there have been 568 Aboriginal and/or Torres Strait Islander deaths in custody since Australia's *Royal Commission into Aboriginal Deaths in Custody* in 1991.

## 2.3 Program and activity shortcomings are undermining the core rehabilitative purpose of imprisonment

While **paragraphs 18 and 20 of the state party submission** refer to rehabilitation and reintegration programs within prisons, we have found various cases in our work where rehabilitative outcomes are being undermined.

The NT Ombudsman's separate confinement thematic investigation found almost no evidence of measures to support positive behaviour change among separately confined individuals, and access to offender behaviour programs was largely prevented.

The Tasmanian Custodial Inspector has reported only limited education and training is available for sentenced prisoners in Tasmania, and while work is available it is neither meaningful nor supportive of individual improvement. Staffing and resourcing limitations also reduce capacity to offer self-development opportunities.

In November 2022, ACT OICS reported only 67 people out of the 400-person population of the ACT's adult correctional centre, the Alexander Maconochie Centre (AMC), were offered access to vocational education and training, and those enrolled in distance tertiary education faced various ICT problems limiting access. Day to day boredom was a problem raised both by people in detention and by staff. In the same report, ACT OICS also noted that for those detained in AMC who were employed, the very low pay rates did not allow for much money to be saved – such as for possible use on release – and had not changed since 2019.

WA OICS reported on serious barriers to accessing critical criminogenic treatment programs in WA prisons, as well as suitability questions for people with learning difficulties or those from particular cultural backgrounds. Staffing shortages also impacted the delivery of organised recreation, education, training and employment.

Rehabilitation must be a core focus of time spent in prison: programs of all kinds must support this goal, including in practice. But other facets of the environment must also support rehabilitation – notably opportunities for visitation and contact. Despite this,

ACT OICS has noted that the default rule in youth detention in the ACT is currently that children in detention are not allowed to hug their parents – despite the therapeutic value of touch and connection. In WA, WA OICS also reported that access to treatment programs for many was contingent on transferring to a different facility where the program was offered, which could mean moving away from family, friends and cultural connections. This impact on contact with loved ones would seem to risk undermining the rehabilitative potential of program access.

## 2.4 People in prison and youth detention cannot access Medicare and the Pharmaceutical Benefits Scheme

**Paragraph 22 of the state party submission** states people in prison and youth detention receive the same level of healthcare as other members of the public do through Australia's public health system. However, national-level legislation which governs Medicare and the Pharmaceutical Benefits Scheme (PBS)[2] effectively excludes access to these schemes by people in prison and youth detention.[3] This effectively shifts the responsibility for healthcare from Australia's national government to the relevant state or territory to provide healthcare through their own arrangements in corrections environments.

There are problems with this approach in practice. The Australian Medical Association (AMA) argues the legislation causes 'significant health treatment disparities for people in custodial settings'. It further states that people in custody should retain Medicare and PBS access through all stages of the custodial cycle, to ensure full continuity of care as well as access to a comparable standard of healthcare. The AMA has also argued it is inequitable that state justice health departments, rather than the PBS, determine treatment for those with complex medical conditions requiring high-cost drugs.

The New South Wales Inspector of Custodial Services has observed that the lack of Medicare access is a barrier to a General Practitioner-led model of healthcare. They state that access to Medicare will assist in achieving comparable levels of care and continuity of care, and that this is particularly important for Aboriginal and/or Torres Strait Islander people, for whom there are specific healthcare 'items' available under Medicare.

Further, the Australian Government's own independent Pharmaceutical Benefits Advisory Committee has acknowledged barriers exist to people in custody accessing medicines listed on the PBS which are available to people outside of custody, as well as the need to improve access to medicines in custodial settings.

[2] Medicare is Australia's national, government-funded, public healthcare system. The PBS, part of Medicare, provides access to certain medications at prices heavily subsidised by government.
[3] Certain highly specialised drugs are available under the PBS to people in custody.

## 2.5 We have found deficiencies with health assessments on entry into prisons and youth detention

**Paragraph 22 of the state party submission** also refers to initial health assessments as soon as practicable on admission. However, our members have continued to observe some shortcomings in initial health screening of people on arrival into facilities, including:

- screening not covering cognitive or neurodevelopmental disorders
- a lack of routine dental examination on reception
- likely under-identification of hearing impairment or disability
- initial assessments sometimes being delayed by over a week after arrival.

Governments and detaining authorities must ensure initial health assessments are prompt and comprehensive in practice.

## 2.6 More is required to ensure culturally appropriate healthcare

In March 2024, the Victorian Ombudsman reported on their investigation into healthcare provision for Aboriginal and/or Torres Strait Islander people in Victorian prisons. Aboriginal and/or Torres Strait Islander people and organisations consulted advised of a disconnect between government policy and practical realities in prisons, along with issues including access delays, a lack of trauma-informed care, and inadequate mental health support.

The Tasmanian Custodial Inspector's *Adult healthcare inspection report 2023* also noted that in Tasmania, there are no specialist healthcare services for this cohort, nor identified Aboriginal and/or Torres Strait Islander healthcare staffing positions.

We acknowledge we may not represent the diverse perspectives of all Aboriginal and/or Torres Strait Islander people. However, we consider that healthcare for Aboriginal and/or Torres Strait Islander people in prisons must be culturally safe, and designed and led by Aboriginal and/or Torres Strait Islander people themselves. This should involve adequately resourced Aboriginal Community-Controlled Health Organisations (ACCHOs).[4] This is also consistent with recommendations of the *Royal Commission into Aboriginal Deaths in Custody* in 1991.

However, currently only some Australian prisons facilitate visits by ACCHOs. In a survey of 200 Aboriginal and/or Torres Strait Islander people leaving prison, only 26% reported having received treatment or consultation from an ACCHO and/or an Aboriginal Medical Service during their time in prison. We note that as an example an ACCHO does provide health services to Aboriginal and/or Torres Strait Islander people in the ACT's prison, the AMC.[5]

[4] An Aboriginal Community Controlled Health Organisation (ACCHO) is a primary health-care service initiated and operated by the local Aboriginal community.
[5] This is provided by Winnunga Nimmityjah Aboriginal Health and Community Services.

**Paragraph 24 of the state party submission** notes a review this year into healthcare for Aboriginal and/or Torres Strait Islander people in prison. Consistent with Articles 18-19 of the *Declaration on the Rights of Indigenous Peoples*, we consider it is critical Aboriginal and/or Torres Strait Islander people and ACCHOs are at the centre of any consequent reforms to healthcare provision in places of detention. Ensuring cultural safety in healthcare provision must also be central.[6]

## 2.7 People with disability are over-represented in detention environments, yet there are gaps in support for them

Thirty-nine per cent of adults entering prison reported one or more disabilities or long-term health conditions affecting participation in education, employment, or everyday activities. Women were almost twice as likely as men to report a limitation in everyday activities. For comparison, 21.4% of the Australian population of all ages has a disability.

Despite this over-representation, acknowledged **in paragraph 25 of the state party submission**, the *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Disability Royal Commission) found significant gaps and inconsistencies in data about disability in prisons and youth detention, observing:

> This means custodial agencies cannot identify the prevalence and types of disability within incarcerated populations, or adequately understand their support needs. This lack of data also limits the development, implementation and evaluation of criminal justice disability policies and programs, and the monitoring of health and disability support needs of people with disability in custody.

### *The National Disability Insurance Scheme*

The Australian NPM Annual Report raised issues regarding barriers to supports in prisons and youth detention under the National Disability Insurance Scheme (NDIS).[7] This included gaps in identification of NDIS participation, initial NDIS application support, service provider access, post release planning, and communication between stakeholders.

Further, existing NDIS participants commonly have reduced access to NDIS-funded disability supports on entering detention. This occurs as various facets of disability support in prisons are meant to be provided instead by other parties, including the justice system. However, in practice the overall level of support is often significantly reduced.

Both the Disability Royal Commission in its final report (recommendation 8.17) and the separate *NDIS Review* in its December 2023 final report (recommendation 2 / action 2.6),

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[6] The Australian Health Practitioner Regulation Agency's *National Scheme's Aboriginal and Torres Strait Islander Health and Cultural Safety Strategy 2020-2025*, states:

> Cultural safety is determined by Aboriginal and Torres Strait Islander individuals, families and communities. Culturally safe practise is the ongoing critical reflection of health practitioner knowledge, skills, attitudes, practising behaviours and power differentials in delivering safe, accessible and responsive healthcare free of racism.

[7] The NDIS is Australia's national government-funded social insurance scheme to fund supports for eligible people with disability.

called on governments to resolve issues with the NDIS–criminal justice system interface. The responses to the Disability Royal Commission from all Australian governments were released on 31 July 2024. However, rather than accept recommendation 8.17, they instead stated it was subject to their further consideration, including alongside the recommendations of the NDIS Review. We consider this work must be a priority.

## 2.8 Staffing challenges are widespread, and have flow-on impacts

**Paragraph 43 of the state party submission** notes the corrections recruitment occurring in different jurisdictions. While this is important and welcome, we stress the need to look beyond this to focus also on retention, reducing absentee rates, and ongoing supports.

Despite recruitment efforts, as we note elsewhere in this submission, staffing continues to have flow-on impacts on various facets of detention. As further examples, in 2022–23:

- WA OICS identified the impact of staffing shortages as likely the most common issue across all facilities visited. It also found that staff shortages were impacting the effectiveness of key support services in many facilities, including the WA Department of Justice-funded Aboriginal Visitors Scheme, with six facilities having no Aboriginal visitors employed.
- The Tasmanian Custodial Inspector found that staffing shortages appeared to be a major cause of a majority of lockdowns in both prisons and youth detention. They also found that lockdowns had a knock-on effect on healthcare access.
- ACT OICS reported cell lock-ins at the AMC were often due to staffing shortages and were seen to contribute to tensions between staff and people detained.
- The SA TCV found that despite some improvements in staffing numbers late in the year, the proportion of days through 2022–23 where there was an understaffed shift in the Kurlana Tapa Youth Justice Centre ranged from 88% to 97%. Staffing shortages also impacted access to the facility health centre.

These examples continue to highlight that staffing shortages can undermine the rehabilitative potential in detention, as well as authorities' capacity to take a holistic, preventive approach to torture and other ill treatment in these environments.

# Area 3 for follow-up: Youth justice

## 3.1 Youth justice in Australia urgently needs different approaches

We consider **paragraphs 32 to 49 of the state party submission** do not adequately explain the extent to which various aspects of youth justice are in crisis. There are deep issues within the youth justice system beyond just the immediate detention environment.

Justice issues, and consequently solutions, are broad. As the AHRC has recently observed, crime prevention should be evidence-based, through measures 'such as early intervention in child health and disability, keeping families in housing and out of poverty, mental health supports and keeping children at school learning'. For those exposed to the justice system, as the AHRC has also observed, on leaving detention children also need community-based throughcare, including housing, education and healthcare, to reduce risks of reoffending.

We echo the 2017 *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, which stated that trauma-informed or therapeutic care approaches should apply to all children and young people in detention, with a focus on rehabilitation. But detaining children and young people must remain a last resort, all other potential avenues must be exhausted first, and authorities must commit further to alternative preventive and diversionary strategies to reduce risks of justice system interaction in the first place.

## 3.2 The minimum age of criminal responsibility in Australia remains out of step with international human rights standards

**Paragraphs 33 and 56 of the state party submission** advise the minimum age of criminal responsibility (MACR) in 7 of the 9 Australian jurisdictions currently remains at 10 years old, with a rebuttable presumption of *doli incapax* for children aged 10-13.

As of July 2024, only 4 jurisdictions have raised or have announced an intention to raise the MACR. Further, only Tasmania has announced an intention to raise the MACR to 14 years *without exceptions* (though not until 2029).[8] Since the state party submission, legislation has been introduced to the Victorian Parliament to raise Victoria's MACR to 12 years; however in August 2024 the Victorian Government stated they were no longer proceeding with earlier plans to further raise the MACR to 14 by 2027.

While the ACT has now legislated a further MACR increase to 14 years in 2025, it has also carved out 'exceptions' for certain serious crimes. In its submission on the legislation, the ACT HRC commented on the flaws with retaining exceptions including its incompatibility with neuroscientific evidence on children's decision making capacity. It further noted that exceptions cannot rationally deter serious offending; indeed, the earlier a person interacts

[8] Tasmania also announced an intention to raise the minimum age of detention to 16 years.

with the justice system, the more likely they are to offend into adulthood. In its submission, ACT OICS recommended there be no exceptions or carveouts when raising the age, and also that the legislation should include a minimum age under which a child or young person cannot be detained – recommending 16 years.

Flow-on impacts of a lower MACR continue, with children and young people who are Aboriginal and/or Torres Strait Islander, and/or people with disability disproportionately affected. In recommending a MACR of 14 years (recommendation 8.22), the Disability Royal Commission observed '[p]lacing children with disability in detention, especially children with cognitive disability, increases the chances they will become enmeshed in the criminal justice system'.

*The voices of children and young people*

In response to the SA Government's announcement it is considering raising the MACR (to 12 years), in March 2024 the SA TCV released a publication, *From Those Who Know*, which presents the unique voices of children and young people in detention commenting for themselves on the MACR and youth justice more broadly. As the SA TCV explains:

> [The children and young people] said that detention at young ages did not help them, it did not teach them a lesson, it did not rehabilitate them… rather it made things worse. They said that they need people to be there for them when they make mistakes; they need safe places to go; they need safe people to be with.

*Appropriate alternative responses*

Raising the MACR cannot work in isolation. To support rehabilitative outcomes, preventive and diversionary measures complementary to a higher MACR must take a therapeutic rather than justice-focused approach, be trauma-informed and be culturally safe.

However, in their submission to the SA Government's consultation on a proposed model for raising the MACR, the SA TCV criticised SA's proposed alternative diversionary model, noting among other issues that the model largely replicates existing youth justice processes and may be unlikely to reduce children's exposure to police facilities.

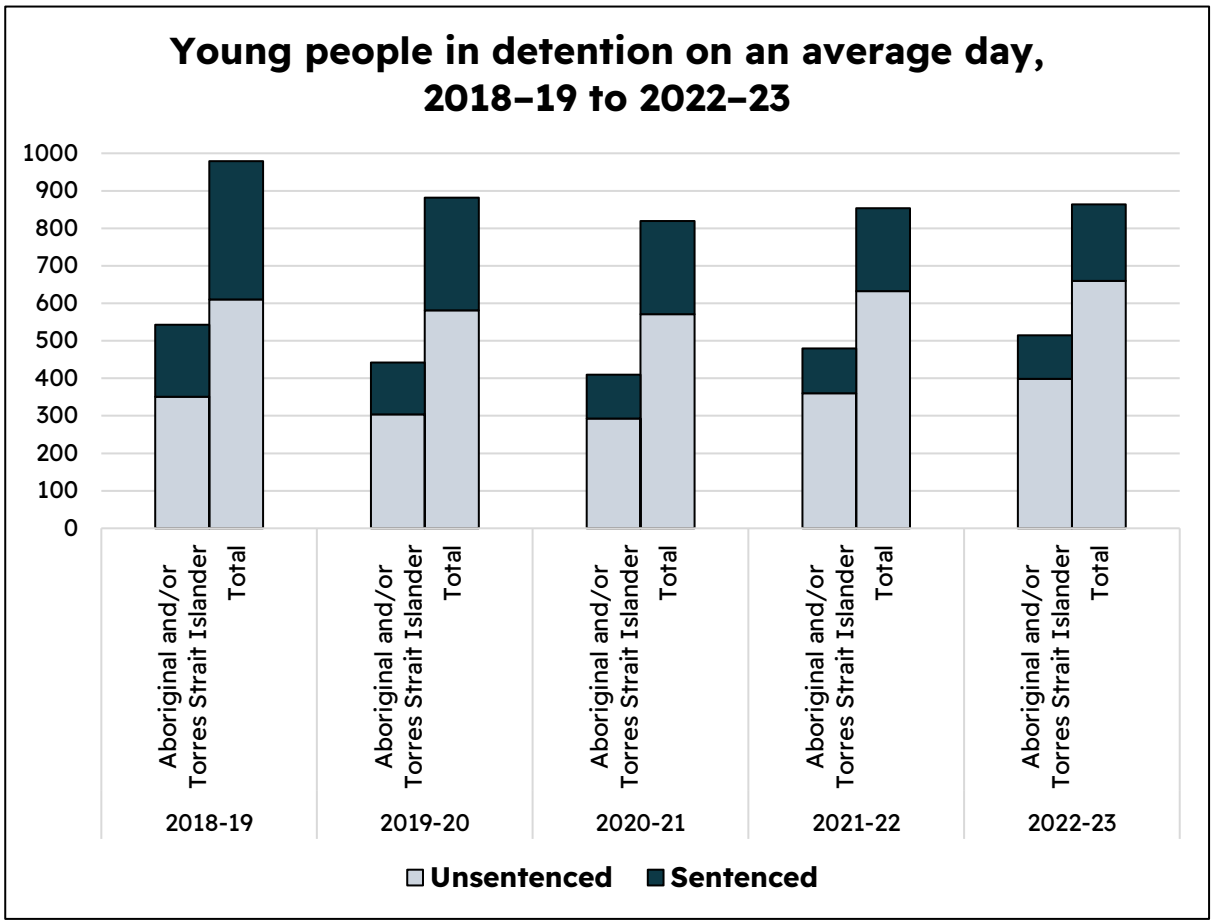
On the ACT's complementary measures, the ACT HRC observed a raised MACR must be supported by programs and service responses that are evidence-based, timely, and situated within a human rights framework. It stated the success of the ACT's MACR reforms will depend on whether this system has adequate, ongoing resourcing. ACT OICS' submission to the same enquiry is available here.

## 3.3 Aboriginal and/or Torres Strait Islander children and young people continue to be over-incarcerated

Despite **paragraphs 35 and 57 of the state party submission** noting measures to reduce incarceration, statistics affirm the high and enormously disproportionate incarceration rate of Aboriginal and/or Torres Strait Islander children and young people.

Data from the Australian Institute of Health and Welfare indicates that on an average day in 2022–23, there were 483 Aboriginal and/or Torres Strait Islander children aged 10-17 in detention (58% of the total youth detention population). Of these 483 people, 55 were girls and 31 were aged 10-13. The detention rate for Aboriginal and/or Torres Strait Islander children aged 10-17 was more than 27 times higher than for non-Indigenous children aged 10-17.

## 3.4 People on remand are making up an increased proportion of the youth detention population




Source: Australian Institute of Health and Welfare, *Youth justice in Australia 2022–23 (Cat no JUV 143)*, tables S73, S76, S78, S112.

The number of children and young people in sentenced detention on an average day decreased from 2018–19 to 2022–23. However, the number in *unsentenced* detention – most commonly on remand awaiting trial – has increased since 2020–21. While not a uniform trend around the country, in 2022–23, 80% of children and young people in detention on an average day were *unsentenced*.

There are various reasons a child or young person may be remanded in detention, however we highlight some. The SA TCV has observed that in some cases remand is the result of an inability to find appropriate accommodation placements outside of detention. The NT OCC has also noted the direct correlation between the NT Youth Justice Amendments in 2021 and the higher number of unique children detained on remand in March 2023 at almost

triple the May 2020 numbers, as law reforms made it more difficult for children and young people to receive bail. As they observed, rather than exposing more children and young people to the justice system in this manner, what is needed are evidence-based policy approaches to community safety, as well as resourcing of prevention, early intervention and diversion from the justice system. ACT OICS has suggested high remand rates in the ACT would be improved by the removal of presumptions against bail (changing to a presumption for bail), greater bail support programs for children and young people and the permanent funding of a Sunday bail court.

## 3.5 The death of Cleveland Dodd in youth detention in WA occurred in a system in crisis

In October 2023, Cleveland Dodd, a 16-year-old Yamatji boy, self-harmed in his cell in youth detention, and later died in hospital. This was WA's first recorded death in youth custody.

Cleveland was detained inside Unit 18 at WA's adult Casuarina Prison. Unit 18 was gazetted as a youth detention centre in July 2022 to temporarily house a number of boys after repeated disturbances at the Banksia Hill Detention Centre, then WA's only youth detention centre. As of August 2024, Unit 18 remains in use as a youth detention centre.

Problems in WA's youth detention system were not sudden. While pre-dating Cleveland's death, WA OICS' most recent inspection report on both Banksia Hill and Unit 18 explains that, by February 2023, circumstances had de-stabilised to a point of 'acute crisis'. Among other concerns, there had been a rise in recorded incidents of self-harm and attempted suicide since September 2021, and staff 'were burnt out, demoralised and felt unsafe'.

A coronial inquest into Cleveland's death is ongoing, generating extensive media coverage across Australia, but the Coroner has not yet issued any findings on the matter. While the inquest continues, we briefly highlight this tragic case as a marker of the consequences of a failure to protect children and young people from harm and afford the most basic of rights in closed environments.

In August 2024, the WA Commissioner for Children and Young People released a report titled *Hear me out: inquiry into implementation progress for Banksia Hill's model of care instruction*. This recent report includes important findings and recommendations relating to youth detention in WA, which the Committee may wish to explore further.

## 3.6 The isolation of children and young people in youth detention continues to be an issue of major concern for the Australian NPM

There are various forms of, names for, and reasons for people being separated from others in Australian prisons and youth detention, and we collectively refer to these as 'isolation'. The isolation of children and young people in detention was a theme of common concern in the Australian NPM Annual Report. As with adults, isolation of children and young people should be used solely as a last resort and for the shortest possible time. It must involve robust safeguards and oversight, and less restrictive alternatives must be exhausted.

In its June 2023 thematic review of the isolation of children and young people at Bimberi Youth Justice Centre in the ACT, ACT OICS found children and young people were being required to undertake isolation in the form of COVID-19 related health segregation on admission, usually for 6-7 days. This was despite youth detention no longer being a high risk setting for transmission, and no other formal COVID-19 restrictions being in place in the ACT outside of detention. ACT OICS' recommendations on this issue were accepted, and the practice has ceased.

In SA, the SA TCV has advised that extended isolation in youth detention has been 'a reality for years', while detaining authorities have been unable to maintain accurate records of time children and young people spend outside of their rooms. Critical staffing shortages had led to modified routines resulting in more time isolated in-room.

In its February 2023 inspection of the Banksia Hill Detention Centre in WA, WA OICS observed an increase in critical incidents and consequent time spent confined to cells, as well as – consistent with the experience in SA – direct causal links between insufficient staffing and limited opportunities for children and young people to leave their cells.

**Paragraph 59 of the state party submission** asserts that solitary confinement is not used on young people in custody in WA. However, in July 2023 the WA Supreme Court found the prolonged in-cell isolation of three children – one on 133 different days – was unlawful. The judge noted that subjecting children and young people to frequent solitary confinement:

- is inconsistent with basic notions of humane treatment
- can cause lasting damage to an already vulnerable group of people
- frustrates the objective of rehabilitation.

A lack of clarity around what amounts to isolation, and differing practices between jurisdictions, does not help to reduce instances of isolation. Mindful of this, the Australian and New Zealand Children's Commissioners, Guardians and Advocates (ANZCCGA) has called on Australian governments to develop a common definition of 'isolation' with corresponding counting rules and public reporting.

All forms of isolation can have damaging impacts on the wellbeing of children and young people in detention, compound existing trauma, impact access to meaningful engagement, and inhibit the potential for rehabilitation. Detaining authorities must urgently take further steps to reduce occurrences of isolation in practice, so that it is avoided wherever possible.

## 3.7 Data collection and reporting deficiencies need to be addressed

Unlike for adult corrections, the Australian Government's *Report on Government Services* (ROGS) does not require public reporting on the amount of time children and young people spend out of their cells in youth detention. This means equivalent data to the adult data provided in **paragraph 20 of the state party submission** is unavailable for youth detention.

The ROGS notes for adults, 'time out of cell' data 'is an indicator of governments' objective of providing a safe, secure and humane custodial environment'. We believe the same is true for youth detention, and such data should also be reported through the ROGS.

The ANZCCGA has also argued for this data reporting, recommending it be disaggregated by, at least, 'age, Aboriginal and/or Torres Strait Islander status, culturally and linguistically diverse status, sex, disability and legal status (e.g. on remand or sentenced)'.

## 3.8 Detaining children and young people in Queensland watchhouses is leading to ill treatment

We are deeply concerned by the ongoing detention of children and young people in police watchhouses in Queensland. Watchhouses are not suitable for the detention of children for any length of time, and are especially unsuitable for long-term detention. As the President of the Children's Court of Queensland has noted, watchhouses are not designed to house children and do not have the capacity to enable exercise, programs, and visits from family.

Despite this, data indicates that in each month of 2022–23, there were over 500 children and young people held in Queensland watchhouses for at least some period – some as young as 10 – with 146 occasions of a child or young person held there for 15 or more days.

**Paragraph 61 of the state party submission** refers to legislative changes to the youth justice framework in Queensland in August 2023. What that does not explain is that not only did these changes make it lawful for children to be held in watchhouses indefinitely, they involved the Queensland Government overriding their own human rights legislation. Australian NPM members made a joint statement on this at the time.

Since then, widespread use of Queensland watchhouses for detaining children has continued. Recent media reporting has revealed further alarming incidents, including:

- a young person allegedly sexually assaulted in a watchhouse in January 2024
- a young person detained in a watchhouse subjected to use of force by three police officers, including with a baton, as a means of behaviour control
- a 13-year-old Aboriginal and/or Torres Strait Islander girl with an intellectual disability held in an isolation cell with no toilet, mattress or running water, injured when her arm was shut in the cell door by officers trying to stop her exit.

On 19 July 2024, the Australian Human Rights Commission expressed grave concern over the public footage of this last incident, labelling it 'an "egregious breach" of human rights'. Australia's National Children's Commissioner and Aboriginal and Torres Strait Islander Social Justice Commissioner have also described Queensland youth justice policies as a 'race to the bottom', affirming that detaining children does not create a safer community.

The Queensland Human Rights Commission has called for urgent action:

> to address the prolonged detention of children in adult watch houses, along with the implementation of well-resourced, evidence-based early intervention programs, to ensure both immediate and long-term community safety.

**Paragraph 45 of the state party submission** states that '[a]cross jurisdictions, the detention of young people is generally a measure of last resort'. However, the Queensland Government has introduced legislation to remove the explicit principle that detention should only be a last resort for children and young people. The Queensland Human Rights Commission has said this is a 'foundational principle of international law [which] recognises that detention is inherently harmful for children and, by extension, the community as a whole'. It suggests the current debate about youth crime demonises and dehumanises children, and has led to a normalisation of the mistreatment of children in watch houses.

# Status of OPCAT in Australia

Australian governments have largely made insufficient progress on OPCAT implementation since November 2022. Most notably, no members of the Australian NPM are nominated in Queensland, New South Wales and Victoria – Australia's three most populous states. Legislation for both NPMs and visits of the Subcommittee on Prevention of Torture (SPT) remains a patchwork,[9] and adequate funding for all members is still a critical gap: subject to unresolved discussions between different levels of government.

Current Australian NPM members continue to face immense challenges in our OPCAT implementation work. Among us, there are varying levels of:

- clarity from the relevant governments as to bodies' NPM status
- legislative authority specifically for OPCAT activity
- funding and other necessary resourcing from government
- practical capacity to undertake OPCAT-specific activity, and
- maturity and familiarity with preventive visits and other functions of an NPM.

Attorneys-General from all Australian jurisdictions meet quarterly through the Standing Council of Attorneys-General (SCAG). At the second most recent SCAG meeting, participants agreed that jurisdictions continue to work towards OPCAT compliance. The communiqué from the most recent SCAG meeting in July 2024 does not address OPCAT.

Further, despite the Disability Royal Commission's final report containing multiple recommendations specific to OPCAT implementation, the responses from Australian governments announced on 31 July 2024 in most cases either accept OPCAT-specific recommendations 'in principle' only,[10] or state they are subject to further consideration.

One of the most important, effective torture prevention tools for states parties continues to be the full implementation of OPCAT, and especially an appropriately resourced and empowered NPM.

The Australian NPM's inaugural Annual Report contains four recommendations to Australian governments. We restate these for the Committee's benefit:

[9] As of 19 August 2024, only Tasmania and the Commonwealth have legislation in force specifically providing for NPMs. The NT has NPM-specific legislation in place but this has not commenced, while the ACT has a Bill before its Legislative Assembly which, if passed, would provide for the ACT NPM. Other legislation provides for nominated NPMs to perform OPCAT-related functions to varying degrees.

[10] The Australian Government states accepting 'in principle' means that while the overarching policy intent is supported, government(s) 'may consider different approaches to implementation'.

***Recommendation 1:***

- Within 12 months, all Australian governments provide appropriate and ongoing funding to enable all NPMs to undertake their OPCAT mandate.

***Recommendation 2:***

- Within 12 months, where they have not already done so, Australian governments should legislate to provide a clear, legislative basis for all NPMs' functions, powers, protections and independence.

***Recommendation 3:***

- Within 12 months, where they have not already done so, Australian governments should legislate to enable the SPT to:
    - visit all places of deprivation of liberty within Article 4 of OPCAT, and
    - benefit from all powers and protections necessary to fulfil their own mandate under OPCAT with regards to places of detention under Australia's jurisdiction and control.

***Recommendation 4:***

- Within 12 months, to ensure coverage across the country of all places falling under Article 4 of OPCAT:
    - the New South Wales, Queensland and Victorian governments must appoint NPMs for all places of detention under their control, and
    - all other Australian governments, where they have not done so, must ensure they have one or more NPMs in place for all places of detention under their control.

We encourage the Committee to review these as well as our response to the SPT's report of its 2022 Australian visit.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