

Submission to Australian Human Rights Commission Project on Youth Justice and Child Wellbeing Reform across Australia

Angela Sdrinis Legal

June 2023

Contents

Who We Are	3
Introduction	4
A brief history of youth justice legislation in Tasmania	4
Section 137 of the <i>Children of the State Act 1918</i> (Tas) provided that:	4
Recommendations	6
Recommendation 1.....	6
Recommendation 2.....	6
Recommendation 3.....	6
Recommendation 4.....	6
Recommendation 5.....	6
Priorities for change	7
Diversionary processes	7
Court processes.....	7
Detention centres	7
I. Staff recruitment and training	7
II. Strip searches.....	8
III. Sexual abuse.....	8
IV. Physical abuse	9
V. Isolation.....	9
VI. Access to health products.....	9
VII. Incarceration of children in adult prisons	9
Barriers to change	11
Resourcing issues	11
Staff culture in youth detention centres.....	11
Barriers to reporting for children.....	11
Delays in obtaining departmental records for children.....	12
Current inadequate legislation	12
Successful reforms in this area	12

Who We Are

Angela Sdrinis Legal is a specialist legal firm based in Victoria and Tasmania with a strong interest and focus on historical institutional abuse claims.

Angela Sdrinis is a personal injuries accredited specialist with over 25 years' experience in handling sexual and institutional abuse claims and is a recognised expert in the area of institutional abuse. She has been called to give evidence before two Senate Inquiries, the Victorian Parliamentary Inquiry into Institutional Responses to Complaints of Abuse of Children, written journal articles and is a regular speaker and commentator on institutional and sexual abuse issues.

Angela Sdrinis Legal represented survivors in public hearings conducted by the Royal Commission into Geelong Grammar, the Catholic Church, the Australian Defence Force, and the Salvation Army. Angela Sdrinis has also participated in the Royal Commission Round Tables on Redress and Civil Litigation.

Since its inception in 2014, Angela Sdrinis Legal has acted for over 2,000 victims of institutional abuse including over 300 victims of abuse who are seeking compensation from the Tasmanian Government.

Angela Sdrinis Legal (ASL) established its Tasmanian office in July 2018 in response to numerous Tasmanian survivors of abuse who sought legal advice for alleged abuses in institutional settings.

Introduction

This submission draws upon our submissions to the Tasmanian Commission of Inquiry into Child and with respect to the class action we are pursuing against the State of Tasmania for alleged abuses that occurred in the Ashley Youth Detention Centre (AYDC).

A brief history of youth justice legislation in Tasmania

Section 137 of the *Children of the State Act 1918* (Tas) provided that:

[A]s far as practicable every juvenile delinquent shall be treated, **not as a criminal, but as a misdirected and misguided child**, and one needing **aid, encouragement, help, and assistance**.

[Emphasis added].

This notion of recognising and promoting the welfare of young offenders – essentially seeing them as ‘Children First’¹ – was echoed in the report of the Committee of Inquiry into the State Farm and School for Boys (now Ashley Youth Detention Centre) in 1925.

Part V of both the *Children of the State Act 1918* (Tas) and its successor, the *Infant’s Welfare Act 1935* (Tas), provided for a dedicated Children’s Court to operate with respect to youth offending in Tasmania.

The *Child Welfare Act 1960* (Tas) repealed the *Infant’s Welfare Act* and made provision for a dedicated Children’s Court in Part III. Section 4 of the *Child Welfare Act* provided that the Act was to be exercised to “secure that.... each child suspected of having committed, charged with, or found guilty of an offence shall be treated, not as a criminal, but as a child who is, or may have been, misdirected or misguided, and that the care, custody, and discipline of each ward of the State shall approximate as nearly as may be to that which should be given to it by its parents.”

In 1997, the *Youth Justice Act 1997* (Tas) (YJA) was passed by the Parliament. The Act which came into force on 1 February 2000, removed the use of Children’s Courts in Tasmania. In the Second Reading speech, the philosophical framework of the *Child Welfare Act* was described as focusing on the ‘needs’ rather than the ‘deeds’ of young offenders, limiting options available for sentencing young people. The purpose of the new legislation was described as moving towards a system more in line with a ‘justice model’:

¹ Tasmania Legal Aid (2021), ‘Children First: Children in the Child Safety and Youth Justice System’.

This approach pays more attention to the offence that a child has committed rather than the child. It assumes that the child is accountable and in this sense, **it is more like the adult justice system.**" [Emphasis added].

This statement summarises the current legislative framework around troubled young people in Tasmania, representing a regression towards a punitive approach to dealing with youth offenders – a widening of the net to bring young people into an institutionalised punitive setting with a withdrawal of notions of child welfare and rehabilitation. Remarkably, notions of youth justice were, *prima facie*, more progressive in 1918 than today.

We note at the outset the obligation of all state governments to ensure that legislation, guidelines, and practice adhere to and are informed by the *Convention on the Rights of the Child*.²

² Adopted and opened for signature, ratification, and accession by General Assembly resolution 44/25 of 20 November 1989; entry into force 2 September 1990, in accordance with article 49. Australia Signature: 1990, Ratification/Accession: 1990.

Recommendations

Recommendation 1

An updated legislative framework must be established with enhanced focus on diversionary treatments as alternatives to a custodial sentence.

Recommendation 2

That the Ashley Youth Detention Centre be closed immediately, and any replacement detention facilities have as their primary focus rehabilitation with the aim of transitioning the young person back to supported accommodation. Where incarceration is deemed necessary to ensure the safety of the community, a new custodial model be developed focusing on therapeutic treatment and community re-integration using smaller residential units rather than a large institution.

Recommendation 3

That legislation should be passed ensuring that no youth offenders can be incarcerated in adult prisons.

Recommendation 4

That the Commonwealth parliament introduces uniform human rights legislation, like that enacted in Victoria, the Australian Capital Territory, and Queensland, to provide better protections and safeguards for children and young persons in the youth justice system.

Recommendation 5

That the Australian Human Rights Commission (AHRC) hand down recommendations on best practice as to how complaints of child-on-child abuse should be handled in government institutions to ensure that the needs of the alleged victims and the alleged perpetrator are adequately met.

Priorities for change

Diversiory processes

Legislation should be amended to provide greater options for diversionary responses to youth offending, seeking to support rather than punish children. There should be consultation with Indigenous communities to determine what these processes should involve.

In Tasmania, almost all existing diversionary responses under the *Youth Justice Act 1997* (Tas) can result in a child being sent to court.³

Further, diversionary processes are having mixed success in other jurisdictions. A 2018 Queensland study examining the recidivism rates post-community conferencing found that Indigenous children were 1.58 times *more* likely to reoffend within two years of their first conference, despite *reductions* in recidivism for non-Indigenous children.⁴ The study considered that this may be because conferencing does not address the inequality of Indigenous persons in Australia, which is the primary reason for such offending.

Court processes

There should be an increase in the number of specialised courts across Australia, including children's courts and Indigenous youth courts. Specialist Magistrates with training in youth offending would ensure that sentencing focuses on rehabilitation rather than punishment.

In Tasmania, there is currently no specialised children's court, unlike other jurisdictions. There is also no Indigenous youth court in Tasmania, unlike almost all other jurisdictions in Australia. These Indigenous youth courts have proven effective in reducing recidivism rates.⁵

Detention centres

I. Staff recruitment and training

Recruitment processes for detention centre staff must be thorough and require working with children checks for all persons entering AYDC in a professional capacity (including sub-contractors).

³ *Youth Justice Act 1997* (Tas) ss 9(6), 12A(4), 20(2); Australian Lawyers Alliance, 'Reforming Tasmania's Youth Justice System', submission to Department of Communities Tasmania, March 2022, p.9, <https://www.lawyersalliance.com.au/documents/item/2248>.

⁴ Little, Stewart, and Ryan, 'Not a panacea for the over-representation of Australia's Indigenous youth in the criminal justice system', *International Journal of Offender Therapy and Comparative Criminology*, 2018.

⁵ Evann J. Ooi and Sara Rahman, 'The Impact of the NSW Youth Koori Court on sentencing and re-offending outcomes', April 2022, https://www.childrenscourt.nsw.gov.au/content/dam/dcj/ctsd/childrenscourt/documents/reports/2022-Report-Impact-NSW_Youth-Koori-Court-on-sentencing-and-reoffending-outcomes-V8.pdf.

Further, there must be extensive training of detention centre staff that is trauma-informed and prioritises nonviolent crisis intervention training. Staff must be trained to sensitively manage and respond to different children's needs and experiences, including children who identify as indigenous, as LGBTQI+, or having a disability.

Numerous ASL clients report that there were husband/wife teams working as guards at AYDC, 'Sergeant at Arms' and 'Outlaw' motorcycle gang members working as security, and security personnel referring friends for shifts at AYDC. Further, a 2019 report into AYDC noted that there is nepotism in staff recruitment and generally poor recruitment processes, and not every person who enters AYDC requires a working with children check.⁶

II. Strip searches

Strip searches should only be undertaken as a last resort and in a manner that preserves the child's sense of dignity and privacy. Children must be made aware of their rights related to strip searches.

Numerous ASL clients report being strip searched in a way they felt was unnecessarily invasive and traumatic, often involving aggressive restraint and even digital penetration by guards. Only two clients report being aware of a rule that guards were supposed to use a towel for privacy during a strip search, meaning a child would only ever be partially naked during a search. Further, only one client reported a guard utilising this method during a strip search. Children were not provided with a choice as to whether a male or female guard performed the search.

In the 2021 decision of *Minogue*,⁷ the Victorian Supreme Court found that in some circumstances, requiring strip searches may be incompatible with the right to privacy and the right to be treated humanely and with dignity whilst detained. Justice Richards noted that due to the "inherently demeaning" nature of a strip search, any policy allowing such a search in prison must be demonstrably justifiable for its purpose.

Whilst unlike Victoria, Tasmania does not have a human rights charter, Justice Richards' comments should apply as a matter of common sense in respect to strip searches regularly performed on children placed in detention centres such as AYDC.

III. Sexual abuse

There must be greater commitment to prevent sexual abuse against children perpetrated by guards and other children within detention centres.

Allegations of sexual abuse suffered by ASL clients whilst at AYDC spans over 40 years, with many of the same perpetrators (resident or employee) committing repeated abuse against children. Almost all clients who experienced sexual abuse suffered multiple types of abuse, and commonly at the hands of the same few perpetrators.

⁶ Office of the Custodial Inspector's report into youth custodial services Tasmania 2019.

⁷ *Minogue v Thompson* [2021] VSC 56.

The allegations entail a devastatingly extensive range of abuse, including rape, grooming, oral rape, object rape, forced sexual acts between children, and contact abuse.

Disturbingly, in some cases children were manipulated into performing sexual acts on each other, or on guards, sometimes through threats of physical violence or denial of certain privileges, such as personal visits, or to avoid “lockdown” (isolation). Children were also encouraged to participate in abuse through perceived rewards or treats such as cigarettes.

IV. Physical abuse

There must be greater commitment to preventing physical abuse against children perpetrated by guards and other children within detention centres.

A significant number of ASL clients report being physically abused at AYDC. Common types of physical abuse include regular brutal beatings by multiple guards (sometimes with ‘weapons’ such as a vacuum cleaner pipe), choking, being picked up by the throat or ears, being dragged along the ground whilst the child’s head forcefully collides with walls and doorways, being ‘hog-tied’ or placed in straitjacket-like restraints or cable ties, and having an arm pinned behind one’s shoulder almost to the point of breaking or dislocation. Some clients report being beaten every 2-3 nights for the entirety of their detention.

V. Isolation

Isolation must be used only as a last resort and confined to circumstances where a child is at risk of harm to themselves and/or to others.

ASL clients report that isolation was used at AYDC during the admissions process as well as routinely as a tool for punishment and a form of control. Numerous ASL clients report that no toilet was available whilst they were in isolation. Many report being given a bucket in which to urinate and defecate. Some report having the option to knock on a side door of the isolation cell to access a toilet, but if no guard was available, they were forced to urinate or defecate on the floor of their cell.

VI. Access to health products

There must be greater access to health, hygiene, and menstrual products in detention centres.

Female ASL clients report that they were denied adequate health care in AYDC, including that they were not allowed to have sanitary bins in their room, and were forced to ask for a pad/tampon and bin access each time they needed to change their products. One client reported that it was an entire week before she was able to access menstrual products.

VII. Incarceration of children in adult prisons

Legislation must be amended to prevent children being detained in adult prisons.

In Tasmania and other jurisdictions, the judicial system allows for children to be detained in prison rather than in a detention centre in specific circumstances.⁸ ASL represents a number of clients who report that they were not only abused at AYDC but also at Risdon Prison Complex (RPC), as minors. Clients report they were placed in RPC for various reasons, including being transferred from AYDC to RPC, awaiting transfer to AYDC from RPC, or by a client's request to be transferred to RPC.

Despite safeguards provided by the *Youth Justice Act 1997 (Tas)* and the *United Nations Convention on the Rights of a Child*, to which Australia is a signatory, children imprisoned at RPC experienced sexual and physical abuse.⁹ Children who were abused were not kept safe or separate from adult prisoners. Four (4) of the five (5) clients represented by ALS who suffered abuse at RPC as minors were gang raped by adult inmates. Like client experiences at AYDC, these children experienced immense fear at the prospect of reporting the abuse.

⁸ See *Youth Justice Act 1997 (Tas)* ss 88 and 107; Review of the Secretary DHHS of Resident Safety Ashley Youth Detention Centre, September 2005, p. 32.

⁹ Hobart Community Legal Service – Fact Sheet: Sentencing Options for Youth Offenders, March 2021. hobartlegal.org.au; *United Nations Convention on the Rights of a Child*, opened for signature, ratification, and accession by General Assembly resolution 44/25 of 20 November 1989 (entered into force 2 September 1990)

Barriers to change

Resourcing issues

There are a myriad of factors contributing to children's involvement in the youth justice system, including poverty, mental illness and other health issues, lack of quality housing, lack of education, exposure to family violence, alcohol and drug abuse, peer pressure, and structural barriers, including systemic racism.

To minimise these risk factors, there must be an emphasis on the prevention and early intervention of youth offending, rather than mere punitive responses.

Prevention requires greater funding for community services available to support families and guardians of at-risk youth, including mental health services, social workers, alcohol and drug counselling, disability services, respite opportunities, and general financial assistance.

Early intervention requires ongoing funding for the services noted above, as well as more specific funding to support the child. For example, funding towards mental health services, alternative education institutions, diversionary processes, children's courts, housing for children at risk of homelessness and family violence, recreational programs, trauma-informed training for police officers, and the de-stigmatisation of drug use to allow children to be treated for their addiction, rather than punished for their offending.

Staff culture in youth detention centres

Numerous ASL clients report a despicable culture among staff at AYDC, whereby staff abuse their power through acts of degradation, isolation, and physical and sexual abuse towards children.

Further, ASL clients describe a sense of collusion and solidarity between staff, with staff often protecting each other by denying children's complaints, telling children that they will not be believed, or intimidating them with threats of further harm if they chose to pursue a complaint. A 2019 report into AYDC noted that staff are discouraged from filing incident reports and reporting of incidents is very low.¹⁰

Barriers to reporting for children

There are significant physical, psychological, and social barriers to children reporting misconduct or abuse.

In most cases, statements made to ASL signify the first time many clients have disclosed the abuse suffered in AYDC. Physical barriers to reporting include the lack of confidential help lines for young people,¹¹ and procedural failures or complete inaction when clients have reported, or attempted to report, abuse suffered.

¹⁰ Office of the Custodial Inspector's report into youth custodial services Tasmania 2019.

¹¹ Office of the Custodial Inspector's report into youth custodial services Tasmania, 2019.

Further, there is evidence of a culture within AYDC that creates and exacerbates social and psychological barriers to reporting, including but not limited to fear of being disbelieved, distrust in authority, fear of negative repercussions, the presence of significant pre-existing trauma and the general brutal environment experienced by our clients within the AYDC.

Delays in obtaining departmental records for children

A significant hurdle for survivors of abuse in Tasmania having access to justice lies in the enormous delays in obtaining relevant records, with some clients waiting up to 2 years to obtain their records.

Records are essential to a client's claim as they provide proof that a child was placed in the relevant institution and may provide other important evidence to support their claim. These delays can cause clients to lose motivation to continue their claim and revert to the National Redress Scheme (NRS), settling for an amount far less than their claim is worth at common law.

In the 2019-2020 annual report, the Ombudsman reported that Tasmania has a rate of refusal of access for RTI applications that is 750% higher than the rate in Australia's most open jurisdictions, Victoria, and the Northern Territory.¹²

Current inadequate legislation

As indicated above, current legislation is insufficient to ensure that the rights and wellbeing of children are protected within youth justice systems.

Tasmania and other jurisdictions' legislative framework must be reformed to prohibit the placement of children in adult prisons, and a human rights charter must be introduced to provide increased safeguards against harm.

Successful reforms in this area

As noted in the Australian Lawyers Alliance Submission to Legislative Council Government Administration Committee 'B': Inquiry into Tasmanian Adult Imprisonment and Youth Detention Matters, the NSW Post Release Support Program (PRSP) is favourably recognised for its impact with qualitative interviews among staff and offenders 'overwhelmingly positive'. The diversion programs were also recognised as 'invaluable for enabling youths to gain insight into their behaviour through meeting face-to-face with their victims and admitting their errors to their community'. The return of adults to detention that were in detention as youths demonstrated '*the acute need for effective rehabilitation programs*', like the Te Whare Wakaahuru residential diversionary programs in New Zealand and Baund-a near the Clarence River in NSW.

¹² ANNUAL-REPORT-2019-2020-Ombudsman-Tasmania.PDF.