



OFFICE OF THE INSPECTOR
OF CUSTODIAL SERVICES

Youth justice and child wellbeing reform across Australia

Submission

June 2023

The Office of the Inspector of Custodial Services acknowledges Aboriginal and Torres Strait Islander people as the traditional custodians of this country, and their continuing connection to land, waters, and community throughout Australia. We pay our respects to them and their cultures, and to Elders, be they past or present.

Table of Contents

General information	1
1. What factors contribute to children’s and young people’s involvement in youth justice systems in Australia?	2
2. What needs to be changed so that youth justice and related systems protect the rights and wellbeing of children and young people? What are the barriers to change, and how can these be overcome?	4
3. Can you identify reforms that show evidence of positive outcomes, including reductions in children’s and young people’s involvement in youth justice and child protection systems, either in Australia or internationally?	8
4. From your perspective, are there benefits in taking a national approach to youth justice and child wellbeing reform in Australia? If so, what are the next steps?	10
Appendix A Bibliography	12
Appendix B Our functions and powers	14

General information

The Office of the Inspector of Custodial Services

The Office of the Inspector of Custodial Services (the Office) was established in 2000 under an amendment to the *Prisons Act 1981 (WA)*, and later as an independent statutory agency governed by the *Inspector of Custodial Services Act 2003 (WA)*. The intention was to:

- establish an independent inspection regime for places where prisoners, detainees and other persons in custody are held
- review certain 'custodial services'
- administer an independent visitor service for prisons and places of detention.

The Inspector is appointed by the Governor for a term of up to seven years, which can be extended (s.6). The current Inspector, Mr Eamon Ryan, was appointed in May 2019.

Except as provided by the Act, the Inspector is not subject to direction by the Minister for Corrective Services or any other person in the performance of the Inspector's functions (s.17).

Further information about the role and function of the Office can be found in Appendix B.

Submission background

The information provided in this submission is based on our reflections within the Western Australian context, and more specifically within the custodial environments of Banksia Hill Detention Centre and Unit 18 at Casuarina Prison.

Following closure of Rangeview Remand Centre in October 2012, Banksia Hill became the sole youth custodial facility in Western Australia. However, as soon as January 2013, the centre was beset by a major riot. The centre has had a troubled history since then, culminating in its current crisis (OICS, 2022A). Negative youth behaviours, largely in reaction to increasing lockdowns due to short staffing, built up in early 2022 to the extent that a decision was made in July 2022 to remove a cohort of young people to a separate facility for which Unit 18 at Casuarina Prison was used. That unit was gazetted as a youth detention facility and efforts were made to prevent any contact between young people and adult prisoners.

While similar factors, issues and perspectives may cut across the national environment, this submission expressly relates to Western Australia.

1. What factors contribute to children's and young people's involvement in youth justice systems in Australia?

Myriad and intersecting factors contribute to young people's involvement in the youth justice system. The following is an attempt to explain some of these factors based on our knowledge and experience of the young people we meet with in custodial settings and which we believe underlies some of their mental health issues, impairments, learning deficiencies, attitudes and behaviours. Many of these young people:

1. Come from impoverished backgrounds, families dependent on social services, often fractured, lacking stable accommodation, unable to afford necessities of life, let alone costs of child care, education, transport, health and participation in sports and other activities (AIHW, 2022).
2. Come from communities both urban and rural, with low social order, inadequate social investment (in facilities, governance etc), and persistent cultures of anti-social activities.
3. Have been unable to thrive within education settings, due to some combination of limitations in capacity, unstable living conditions, unresponsive education programs, and negative influences from close family, peers and others.
4. Have experienced neglect, abuse and violence within their own families or other homes in which they have lived, either as observers or victims. This impacts their own sense of belonging (attachment), sense of self, self-confidence and negatively influences their attitudes and behaviours (Malvaso, 2022; Turner D, 2021). They are more likely to lack resilience and capacity to manage their feelings and care for their own mental health. They are also more prone to use instrumental violence, that is violence to achieve a purpose.
5. Have intellectual impairments including from Fetal Alcohol Spectrum Disorder (FASD), early childhood experiences, their own substance use and other major mental health issues. Many have little understanding of the consequences of their actions or what it means to offend against the law (Bower C, 2018).
6. Come from families, communities and peers in which use of alcohol and other substances is widespread. Substance use is essentially unaffordable, and associated with unorganised lifestyles, becoming a key driver of criminal behaviour. Addictions are often fuelled by, and in turn tend to exacerbate, other mental health issues.

While these factors, or some combination of, characterise most young people involved in youth justice systems, some social groups have particular pathways to crime. Certain immigrant communities have sometimes been prominent, likely due to a sense of alienation by second generation youth. While young women and girls are less likely to come to notice as offenders (AIHW, 2023), those who do are very likely to have experienced high levels of abuse and violence.

But the overwhelming reality in Australian youth justice involvement is the overrepresentation of First Nations young people. On 2 February 2023, 82% of young people in custody in Western Australia identified as Indigenous. This is believed to result from the ongoing impacts of colonisation which decimated First Nations populations, destroyed cultures and family systems to various degrees, alienated them from land which was their fundamental source of culture and identity, introduced alcohol and other substances, and relegated them to marginal status and impoverished circumstances. First Nations peoples were also subjected to generations of devastating child welfare

practices known as the stolen generation. Policing practices have long been perceived as discriminatory and conflict with the law involving incarceration has incorrectly been conceived as a rite of passage by many.

2. What needs to be changed so that youth justice and related systems protect the rights and wellbeing of children and young people? What are the barriers to change, and how can these be overcome?

Raising the age of criminal responsibility

The United Nations Committee on the Rights of the Child has indicated Australia is falling short of meeting international standards recommending we raise the minimum age of criminal responsibility. Many jurisdictions have set different ages and conditions. However, in September 2019, the UN released a general comment on children's rights in the child justice system (UN Committee on the Rights of the Child, 2019). This placed the most common minimum age of criminal responsibility internationally at 14 years.

The UN general comment cites the large volume of documented evidence in the fields of child development and neuroscience that supports their reasoning. It notes the effects of adolescence and frontal cortex development on impulse control and the inability of children below 14 years old to understand the impact of their actions. The UN also commends countries adopting an even higher minimum age, given the ongoing development of the adolescent brain.

In Western Australia, the age of criminal responsibility is currently set at 10 years. We believe this is too young and there appears to be limited justification to have an age of criminal responsibility which is not at least consistent with internationally accepted standards.

Acknowledging that the determination of the correct age of criminal responsibility is a matter for government, the national and international evidence and practice is clear that 14 is an appropriate age limit. But it is also critically important to recognise that decisions to raise the age of criminal responsibility – regardless of the age chosen – are not in and of themselves the answer. As we discuss below, there must also be evidence-based diversions and properly resourced intensive support mechanisms put in place to align with age related reforms. We believe that recommendations for reform must link the two because the success of one is largely determined by the other.

Intervention not detention is needed

One of the main barriers to raising the age is the perceived effect on community safety. Community safety is an important consideration (CAG Age of Criminal Responsibility Working Group, 2022). But safety can often be better achieved through intervention, rather than detention. Decades of research have shown that placing young people in the youth justice system does not result in preventing future crime. Instead, contact with the system increases the likelihood of future criminal behaviour (Petrosino A, 2010; Sentencing Advisory Council, 2016; Weatherburn D, 2018). These findings are supported by the return-to-detention rate in Banksia Hill. In 2022, half of all young people received into Banksia Hill under the age of 14 years (64), returned more than once and almost 80% of those were First Nations young people (51).

Raising the age of criminal responsibility may place a larger burden on alternative diversion and intervention strategies, particularly even requiring some form of secure therapeutic-based accommodation options. These services would need to be funded appropriately for the increased

expectations, but the likely outcomes for those young people, their families and the community are worthy.

Towards a trauma-informed and disability aware approach in youth custody

We have repeatedly recommended that the Department of Justice in Western Australia adopt a trauma-informed model of care for youth custody (OICS, 2021A, pp. 6-7; OICS, 2018A, pp. 10-11). We have also highlighted the need for improved disability awareness and intervention for youth custodial populations. These practices are essential to understanding how trauma and disability, frequently overlaid in the same individual, affect these young people's lives in order to adequately and appropriately meet their individual needs. The Department has made many attempts at developing an appropriate operational philosophy and model of care since 2010 but has generally failed at the implementation stage (OICS, 2022A).

As part of our most recent inspection in February 2023, we were pleased to note that some work had progressed (OICS, 2023). In 2021, the Department engaged NOUS Group to consult, review best practice and develop an operational philosophy and service model (OPSM). It was drafted by April 2022 and has since been adopted. An implementation project led by the former Mental Health Commissioner, Mr Tim Marney, has commenced.

Implementing trauma-informed and disability aware practice

Currently, Banksia Hill lacks the administration of any kind of standardised mental health checklist such as the Massachusetts Youth Screening Instrument (MAYSI-2) (McCoy, 2016), which is designed to identify young people aged 12-17 years who have mental health symptoms in seven domains. An evidence-based assessment tool (e.g. the MAYSI-2) should be administered as part of the reception process as we believe is the case at other Australian youth detention facilities. This would assist in immediate decisions about care and placement and provide a reliable basis for prioritising and planning mental health treatment for those needing it.

We also believe that there needs to be a dedicated focus in youth justice on increasing disability awareness and interventions. This focus would improve conditions for young people in custody and positively contribute to their health and re-socialisation. It should involve:

1. Ensuring all young people are screened for functional impairments each time they enter custody with suspected impairments referred for neurodisability testing (Bower C, 2018).
2. Additional consideration of the diverse needs of young people with physical disability.
3. Ensuring that specific guidance is available to those working with each young person in custody in relation to their specific disabilities so that a high standard of care and behavioural management is provided.
4. Onsite clinical interventions to help individual young people address their specific treatment needs.

5. Recognition of neurodisability as an important consideration in case management of young people, from first point to last point of contact with the justice system. This should include as appropriate, engagement with the NDIS.
6. Staff capacity and training to support the above functions.

Barriers to implementing trauma-informed and disability aware practices in youth detention

To date, implementing a model of care has always been the stumbling point in Western Australia. In any business, significant reform cannot be achieved without all parties being 'on the same page'. This has become more acute recently in Western Australia over the public attention given to the crises in Banksia Hill and Unit 18. There has been widespread appeal for broad engagement by all stakeholders in plans to reform youth detention. Including the young people themselves and those with lived experience, the staff, those providing services and the families and communities to which young people will return after they transition through custody. Our own experiences of inspection and monitoring have shown that superimposing a philosophical or theoretical framework without this essential buy-in, dooms it to failure.

Since building works commenced in 2010 for the expansion of Banksia Hill, the centre has experienced major disruptions, including riots, which have caused and often followed periods when young people were locked down. Since mid-2021, these restrictions have often been such that aspects of the regular program, (education, after school sports, and rehabilitative activities) could not proceed. This in turn generated more disruption by bored and angry youth, with staff increasingly injured and abused, and thus increasing staff attrition. It also increased serious and destructive behaviours by some young people, and led to some of them being managed in a separate facility within an adult prison (Unit 18).

Youth detention systems in Australia have always sought to progress their rehabilitation back into community living and to develop in them a sense of social responsibility. Banksia Hill appears to be failing in that regard with already traumatised young people in recent months often locked in cell for up to 23 hours per day (OICS, 2023). This has also been the case at Unit 18. Rates of self-harm and disruptive incidents are elevated, and staff are having to save young people from suicide or self-harm on a regular basis (OICS, 2023; OICS, 2022B).

Some express disbelief to us that Banksia Hill will ever be fit for purpose. That includes some in the Noongar community who call the place 'warra wirrin', in Noongar language meaning a place with bad spirits, unsuitable as a place for young people. People from regional communities have long grieved for young people taken so far away to Perth and expressed concern that young people are learning new offending behaviours to take back to their towns and communities.

But the sad reality is that for the foreseeable future there needs to be suitable detention options within the youth justice system.

Confinement practices should cease

As outlined in our most recent reports of Banksia Hill and Unit 18, confinement practices continue to be a significant and concerning aspect to managing young people in custody (OICS, 2023; OICS,

2022B). Under Parts 9 of the *Young Offenders Act 1994* and *Young Offenders Regulations 1995*, confinement is permissible for the good government, good order or security of the centre. The absence of sufficient staff in Banksia Hill, has meant that young people have been confined to cell for extended periods, the legality of which continues to be tested in the courts.

By its very nature, confinement means restricted access to rehabilitative services and supports, reducing any positive influence time in custody may serve for the young person. But, as stated above, it also has a significant negative impact on the health and wellbeing of young people, particularly those with mental health concerns and disability.

Rule 45 of the United Nations Standard Minimum Rules for the Treatment of Prisoners prohibits the use of solitary confinement in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such confinement measures (UN General Assembly, 2016). Many young people in custody are severely impacted by mental health issues. In 2018 the prevalence of neurodevelopmental impairment was almost 90% of the Banksia Hill population while more than a third had FASD (Bower C, 2018). We have observed a correlation between extended time spent in cell and incidents of self-harm and attempted suicide by young people (OICS, 2022B).

3. Can you identify reforms that show evidence of positive outcomes, including reductions in children's and young people's involvement in youth justice and child protection systems, either in Australia or internationally?

Smaller youth custodial facilities

Detention should be an option of last resort. But when it is necessary, providing for a young person's individual rehabilitative needs must be its central purpose. Smaller diversion, remand and detention facilities that meet those needs are more successful at reducing young people's involvement in the justice system.

This is highly relevant, particularly in Western Australia, which geographically forms one third the size of the country, and where we detain largely First Nations young people away from Country in a single detention facility in the metropolitan area. Smaller facilities that service regional needs and involve the communities to which the young people will return, have better buy-in. They provide a level of cultural safety and permit greater involvement by families. And local service provider engagement allows for continuity of throughcare reducing the risk of recidivism.

However, Western Australia has persevered with large Perth-based custodial facilities and a patchwork of regional prevention, diversion and reintegrative programs. To date Western Australia has only committed to a single regionally-based custodial alternative, the Marlamanu on-country diversionary program on an Aboriginal community managed cattle station in the Kimberley Region (McTiernan, 2022). Since being announced, the region was affected by significant flooding. Potentially, the program may not be viable for up to six months of the year in the wet season.

Further to this, while they make up a small cohort, the young women and girls ought to be provided a safe and secure centre away from males. While we acknowledge that some people do not identify with the gender binary, we support international standards which clearly stipulate females and males should be separated (UN General Assembly, 2016). Ideally, females should be accommodated in a separate facility, rather than in a segregated unit within a detention centre where they tend to be marginalised compared to the broader population.

Until we raise the minimum age of criminal responsibility, there is also an argument to have separation based on age. Many young people age out of criminality (Farrington, 1986). But exposure at a young age, and intensive exposure that can occur within a detention centre that accommodates 10 to 18-year-olds, increases the likelihood of prolonged involvement in the justice system (Sentencing Advisory Council, 2016).

Moving away from custodial staffing supervision

We also believe that there needs to be a fundamental shift away from custodial staffing as the primary youth-facing roles within detention centres. Having a mainstay workforce that is uniformed and securitised is neither trauma-informed nor respectful of Australia's racialized history.

In our most recent report on youth custody, we recommended the Department of Justice establish a youth care role separate from youth custodial officers (OICS, 2023). These positions, based on the model used by Spanish youth detention agency Diagrama, are described as:

Social educators - Qualified to degree level and guided by the technical team, they support young people throughout every aspect of their day, from getting up in the morning to when they go to bed and are included in classes, vocational training and leisure activities. They are at the heart of our approach and genuinely care about the young people they work with (Diagrama Foundation, 2019, p. 15)

We would expect that such a role would be deployed on an eight- or 10-hour shift system to ensure continuity of care between individual staff and young people. And that such staff should take on the case management role for youth in their care. Professional case managers are also required to support and guide the youth carers in their case management role, taking the lead in more complex cases.

4. From your perspective, are there benefits in taking a national approach to youth justice and child wellbeing reform in Australia? If so, what are the next steps?

The Office sees significant benefit in Australia taking a national approach to youth justice and welcomes this as an opportunity for consistency. We acknowledge that justice systems are the purview of the States and the inherent challenges these restrictions bring as well as geographical particularities. However, we believe there is capacity to have a coordinated national approach.

Coordination reduces fragmentation and duplication. Many early intervention and diversionary programs are ad hoc and not systematised. There are endless trials and pilot programs, replicated across jurisdictions, that do not last beyond initial phases. Consequently, they cannot produce the longitudinal data necessary for ongoing funding, or to embed programs, refine practice and make systemic change.

In this context, a consistent national commitment would allow the leveraging of resources and the pooling of funding and investment. Reducing duplication and wastage is essential. In 2021-22 the cost of keeping a young person in custody in Western Australia was \$1,361 per day or almost \$500,000 per year compared to \$139 per day and \$50,000 per annum to manage them in the community. The cost per day of detention in Western Australia is set to rise exorbitantly in 2022-23 as the damage bills from repeated destructive incidents and riots continue to come in (estimated figure as at 30 June is \$2,039 per day, ~\$750,000 per year).

A national framework could also educate the wider community, increasing awareness of underlying causal and corollary factors for children and young people involved in the justice system. This also has the capacity to improve outcomes in other sectors such as health and social services.

Courage is one of the most important virtues in reform. It is our considered view that the next steps in youth justice reform require decision-maker bravery to take advice from experts, listen to families and community, and reimagine what youth justice might be into the future. Reform needs to lead the agenda away from populist 'tough on crime' and 'keeping the community safe' approaches to an informed position that shows that effective rehabilitation of young people is actually tough on crime and ultimately keeps the community safer. This will take time. Public opinion and support will change when programs are permitted the time and space to deliver sustainable outcomes rather than target quick wins or low risk opportunities. This requires a well-managed and coordinated strategy with tangible targets to move beyond trials and one-off funding arrangements. As such, a set of agreed national policy priorities should be established and used to guide state practice in areas such as:

1. Raising the minimum age of criminal responsibility.
2. Reducing First Nations incarceration rates (aligned to Closing the Gap in justice).
3. Developing standards, assessment tools and best practice interventions and custodial management of young people with mental health issues and functional impairments.
4. Developing standards for the delivery of services and interventions in youth justice facilities.
5. Developing localised, community involved interventions, facilities and supports.
6. Building national youth justice research capacity to highlight international and national best practice.

7. Developing an effective clearing house for sharing of best practices and lessons learned across the youth justice sector on a national basis.

We also trust independent nation-wide oversight of places of detention will ensure the rights and wellbeing of children and young people are protected while helping to drive reform. In 2017 Australia became signatory to the United Nations Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). Australia postponed its obligations under the protocol until January 2023. However, we are yet to have a fully operationalised National Preventative Mechanism (NPM) with all states and territories legislated and resourced to perform this crucial function. It is imperative that governments throughout Australia prioritise legislation and funding for their respective NPMs. Only a coordinated Australia-wide NPM network can provide much needed oversight of places where children and young people can be detained and ensure national consistency in the protection of their human rights.

Appendix A Bibliography

- AIHW. (2022). *Young people under youth justice supervision and their interaction with the child protection system 2020-21*. Canberra: Australian Institute of Health and Welfare.
- AIHW. (2023). *Youth justice in Australia 2021-22*. Canberra: Australian Institute of Health and Welfare.
- Bower C, W. R. (2018). Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia.
- CAG Age of Criminal Responsibility Working Group. (2022). *Draft Final Report 2020*. Perth: Department of Justice WA.
- Farrington, D. (1986). Age and Crime. In T. M. (eds), *Crime and justice: An annual review of research* (pp. 189-250). Chicago: University of Chicago Press.
- Malvaso, C. D. (2022, June 14). Adverse childhood experiences and trauma among young people in the youth justice system. *Trends and issues in crime and criminal justice*.
- McTiernan, A. (2022, November 22). Marlamanu on-country diversionary program to tackle youth offending in Kimberley. *Media Statements*. Perth. Retrieved from <https://www.mediastatements.wa.gov.au/Pages/McGowan/2022/11/Marlamanu-on-country-diversionary-program-to-tackle-youth-offending-in-Kimberley.aspx>
- OICS. (2018A). *Report No. 116: 2017 Inspection of Banksia Hill Detention Centre*. Perth: Office of the Inspector of Custodial Services.
- OICS. (2021A). *Report No. 135: 2020 Inspection of Bankisa Hill Detention Centre*. Perth: Office of the Inspector of Custodial Services.
- OICS. (2022A). *2021-22 Annual Report*. Perth: Office of the Inspector of Custodial Services.
- OICS. (2022B). *2021 Inspection of the Intensive Support Unit at Banksia Hill Detention Centre, Report No. 141*. Perth: Office of the Inspector of Custodial Services.
- OICS. (2023). *2023 Inspection of Banksia Hill Detention Centre and Unit 18 at Casuarina Prison (Part One), Report No. 148*. Perth: Office of the Inspector of Custodial Services.
- Petrosino A, T.-P. C. (2010). *Formal system processing of juveniles: Effects on delinquency*. Oslow: Cambell Systematic Reviews.
- Sentencing Advisory Council. (2016). *Reoffending by Children and Young People in Victoria*. Melbourne: Sentencing Advisory Council.
- Turner D, W. A. (2021). The association between adverse childhood experiences and mental health problems in young offenders. *European Child and Adolescent Psychiatry*, 1195-1207.
- UN Committee on the Rights of the Child. (2019). *General comment No. 24 (2019) on children's rights in the child justice system*. United Nations.

UN General Assembly. (2016, January 8). The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). *A/RES/70/175*. UN General Assembly.

Weatherburn D, R. S. (2018). *Crime and Justice Statistics - Offending over the life course: Contact with the NSW criminal justice system between age 10 and age 33*. Sydney: NSW Bureau of Crime Statistics and Research.

Appendix B Our functions and powers

The Office of the Inspector of Custodial Services (the Office) was established in 2000 under an amendment to the *Prisons Act 1981 (WA)*, and later as an independent statutory agency governed by the *Inspector of Custodial Services Act 2003 (WA)* (the Act).

At least once every three years the Inspector must inspect each prison, detention centre, court custody centre and certain lock-ups (s.19). Following each inspection, the Inspector is to prepare an inspection report containing such advice and recommendations as appropriate to the findings (s.20). The Inspector can also inspect a place at any other time and on any number of occasions (s.21).

Under s.22 of the Act, the Inspector may at any time review a 'custodial service' (or any aspect of a custodial service) in relation to a prison, detention centre or custodial service (relating to a court custody centre); including a custodial service in relation to one or more particular prisoners, detainees or persons in custody.

The Inspector may at any time prepare a report to the Minister on an occasional inspection (s.21) or review (s.22) and give advice or make a recommendation as appropriate to the findings (s.23).

For the purpose of performing the Inspector's functions, the Inspector (or any person authorised by them) 'at any time and with any assistants and equipment' may have 'free and unfettered access to' a wide range of people, places and documents or information relevant to prisons, detention centres, court custody centres and lockups (s. 28, 29, and 30).

The Act requires the Inspector to deliver all inspection reports (s.20), occasional inspection reports and review reports (that the Inspector decides to table) to each of the Speaker and President who are required to hold the report for 30 days and then table it on the next sitting day (s.34-35).

The Office also administers the Independent Visitor Service (Part 6). Independent Visitors (IVs) are appointed by the Minister, having regard to the advice of the Inspector, for every prison and detention centre for a period of 2 years (s.39). Our IVs are a diverse group of community volunteers whose duties are to visit and inspect prisons and detention centres at intervals of not more than 3 months and furnish a written report to the Inspector after each visit including a record of each prisoner complaint received (s.40). The Inspector is required to review each report received and follow-up, report and act as required (s.43).