



Ms Anne Hollonds
National Children's Commissioner
Australian Human Rights Commission
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by email only to: anne.hollonds@humanrights.gov.au

Friday, 30 June 2023

Dear Anne

Youth Justice and Child Wellbeing Reform across Australia

I write to provide the attached material to assist with your current consideration of *Youth Justice and Child Wellbeing Reform across Australia*.

Noting that this will be a matter canvassed in upcoming ANZCCG meetings, I see that as an imminent opportunity to discuss relevant matters.

You will be aware that I have been involved recently in some public commentary about a particularly problematic youth justice detention matter, excessive isolation of children and young people, that I assume will be picked up through your review process.

I offer for your consideration some of the more recent documents generated through my work as Training Centre Visitor¹ and Guardian for Children and Young People in South Australia² that bear upon the subject of your current review.

1. Training Centre Visitor Annual Report 2021-22

In addition to addressing the usual formalities, the Annual Report provides detailed discussion about matters that are of interest to your current review, including –

¹ Section 11, Youth Justice Administration Act 2016

<https://www.legislation.sa.gov.au/legislation/lz/c/a/youth%20justice%20administration%20act%202016/current/2016.6.auth.pdf>

² Part 3 - Children and Young People (Oversight and Advocacy Bodies) Act 2016

[https://www.legislation.sa.gov.au/legislation/lz/c/a/children%20and%20young%20people%20\(oversight%20and%20advocacy%20bodies\)%20act%202016/current/2016.48.auth.pdf](https://www.legislation.sa.gov.au/legislation/lz/c/a/children%20and%20young%20people%20(oversight%20and%20advocacy%20bodies)%20act%202016/current/2016.48.auth.pdf)

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- the ongoing impact of a staffing crisis resulting in excessive recourse to isolation (with details about what this means for children and young people; p23ff)
- availability of cultural safety and support, for Aboriginal children and young people as well as those from other culturally diverse backgrounds (p25ff)
- challenges faced by ‘dual involved’ children and young people (p26), with some focus on what was learned in relation to their detention in police cells and vehicles (p28)
- mental health care (p29) and general health care (p30)
- food and nutrition while in detention (p32)
- education (p34ff)
- Youth Treatment Orders (p37)

These matters go to a central concern: whether the Youth Justice Centre is meeting its core rehabilitative obligation or not.

2. Dual Involved children and young people

Dual involved (or dual status or ‘crossover’) children and young people are some of the most vulnerable in our community, often finding themselves caught in the interstices of various systems and failed by most.

Three reports have been published in SA in recent years, with an update report currently being prepared in my office. The Final Report contained 15 recommendations that I forward for consideration within your review (see *Attachment*). While these address substantive matters in the two primary systems, child protection and youth justice detention, they also relate to the impact of other agencies and processes, notably, the role of police and the courts, and associated arrangements such as bail and remand.

These three reports relate to the work of the *South Australian Dual Involved Project* (SADI) and draw attention to what we refer to as the process of *care criminalisation*.

A PERFECT STORM? Dual status children and young people in South Australia’s child protection and youth justice systems (November 2019)

<https://gcyp.sa.gov.au/wordpress/wp-content/uploads/2021/04/Dual-Status-CYP-in-SA-A-Perfect-Storm.pdf>

Six Month Snapshot of the South Australian Dual Involved Project Children and young people in South Australia’s child protection and youth justice systems (September 2021)

<https://gcyp.sa.gov.au/wordpress/wp-content/uploads/2021/10/OGCYP-South-Australian-Dual-Involved-Project-Interim-Report-September-2021.pdf>

Final Report of the South Australian Dual Involved Project: Children and young people in South Australia’s child protection and youth justice systems (June 2022)

- <https://gcyp.sa.gov.au/wordpress/wp-content/uploads/2022/07/OGCYP-Final-Report-of-the-South-Australian-Dual-Involved-Project.pdf>

3. OPCAT

The *Optional Protocol to the Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT) went ‘live’ in Australia in January 2023. You will be aware of Australia’s current problematic situation with respect to potential United Nations sanctioning for failure to meet basic implementation requirements.

Government has assigned to me a National Preventive Mechanism (NPM) role solely for the Kurlana Tapa Youth Justice Centre. I have advised government that I am unable to meet the obligations of that role (even with that very limited focus) without appropriate legislative and resourcing arrangements being made.

I maintain a role on the National Preventive Mechanism Network convened by the Commonwealth Ombudsman as a good faith contribution within the currently stalled process, noting that proper OPCAT coverage of places of detention within which children and young people are deprived of their liberty is an important preventive human rights mechanism.

As a member, I endorsed the NPM Network's separate submission to your review.

4. Youth Justice Detention as Warehousing

Youth justice processes seem to assume or accept that youth justice detention can serve as a fall-back option to secure children and young people for whom other, appropriate, options are not available.

Examples where this has system-wide implications include when -

- lack of available and/or appropriate placements in the child protection system mean that detention orders provide for potentially extended periods of remand
- there is no appropriate or available service that can accommodate and support children and young people with a range of disability, behavioural and/or mental health presentations
- homelessness makes remand in detention, potentially extended, the de facto option should lack of an 'address' be the critical factor in denying home detention or bail.

Deprivation of liberty in youth justice detention facilities should not be the go-to option to compensate for systemic failure in other social policy areas, including health and mental health, child protection and housing.

Custodial facilities are not therapeutic, rehabilitative, or properly 'trauma informed'.

5. Prioritising child-focussed legal processes

Youth justice processes should prioritise effective engagement for any children and young people involved.

The experience of my office is that there are too many barriers to this being the case. Recent examples illustrate the nature and negative impact of poor engagement on children and young people with whom I work -

- Lack of, or severely limited contact with lawyers, both pre and post hearing, compromises a young person's understanding of the legal process. Among other things, it diminishes the capacity to establish the trust and rapport necessary for developing quality legal submissions.
- Just as concerning, responsibility is often not taken for effective communication with an accused young person (who may have a range of language, cognitive or literacy issues) about court outcomes such as bail and associated conditions; it should not be the responsibility of front-line youth justice detention staff to explain such things.
- Reliance on AVL technology, which denies the right of young citizens to their day in court, should only be a recourse for specific, limited reasons, not just because it is administratively more convenient for some. When sessions are conducted in detention facilities, this process can expose

details of a young person's life to custodial staff inappropriately, and compromise opportunities for necessary dialogue with lawyers and potentially other involved parties.

- All of the above concerns play out in particular ways for certain population groups, including Aboriginal children and young people as well as those from other culturally diverse backgrounds, children and young people involved in the child protection system, and those who may have physical or psychosocial disabilities or other needs.

The implications of poor engagement with the legal process have long term implications, not least because it is an opportunity lost to build some confidence that accused children and young people have rights and should have some confidence that there is fairness at the heart of the process.

"It's taking forever. They all just talk and talk and talk and I don't know why"

"[Judges] talk a lot... I never have any idea what they're saying."

I trust this information will be of interest for your current review purposes and look forward to dialogue about these matters in upcoming ANZCCG discussions.

For any further information about issues raised in this correspondence, please contact my Principal Policy Officer, [REDACTED], on [REDACTED], or at [REDACTED]

With kind regards,

Shona Reid

Guardian | Training Centre Visitor
Office of the Guardian for Children and Young People

Recommendations from the SADI Final Report

Final Report of the South Australian Dual Involved Project: Children and young people in South Australia's child protection and youth justice systems (June 2022)

<https://gcyp.sa.gov.au/wordpress/wp-content/uploads/2022/07/OGCYP-Final-Report-of-the-South-Australian-Dual-Involved-Project.pdf>

The following text is Part 7 of the Final SADI Report

These recommendations are informed by the views and experiences described during the SADI Project by dual involved children and young people, and people who work with them.

The recommendations require action to address matters that may have an adverse impact before, during, and after a child or young person has become directly involved in the youth justice system. The recommendations are designed to improve outcomes for these children and young people through practical, constructive and systems-focused proposals [REDACTED] [REDACTED] [REDACTED]

Each is introduced by a brief explanatory statement.

Recommendation 1 – Bolstering independent oversight and advocacy

Parliament established a visitor scheme to ensure independent oversight of children and young people living in residential care in 2017, as set out in Chapter 9 of the Children and Young People (Safety) Act 2017.

In 2022 modest funding has been allocated to OGCYP to establish and partially commence this scheme. The SADI Project affirmed the need to have specialist, and relatively intensive, monitoring activated in this sector.

That the South Australian government provide the Office of the Guardian for Children and Young People with:

- a. The staff and other resources reasonably needed to carry out the functions of the role of Child and Young Person's Visitor, as are legislated in s118 of the *Children and Young People (Safety) Act 2017*; and
- b. The resourcing to establish a specialist Dual Involved Senior Advocate position to provide individual advocacy and systemic oversight for dual involved children and young people that –
 - i. Operates across government and especially in relation to the child protection, youth justice and health (including mental health) systems; and
 - ii. Must pay particular attention to the needs of Aboriginal children and young people.

Recommendation 2 – Making residential care units safer

Dual involved children and young people often expressed that they did not feel safe in residential care placements. These serious safety concerns require the South Australian government to act with greater urgency to implement key recommendations from the Nyland Report.

That DCP accelerate implementation of Nyland Report recommendations 145 and 149³ and provide quarterly implementation progress reports to OGCYP.

³ M Nyland (Hon), *The life they deserve: Child protection Systems Royal Commission Report (2016)*. These recommendations require developing a streamed model of residential care for short term assessment, long-term care and care for children with high therapeutic needs (recommendation 145) and that no child should be housed in a residential care facility with more than four children or when they are under 10 years old, except where necessary to keep a sibling group together (recommendation 149).

Recommendation 3 – Assessment of needs and potential

Assessment of the needs and potential of dual involved children and young people did not always occur or sometimes happened too late, when they were about to age out of care. As a result, opportunities to intervene early – which may have diverted youth justice involvement – were missed.

3.1 That the South Australian government commission an independent review of DCP and DHS files to investigate and determine:

- a. The rate of compliance with existing policies regarding health, disability and cultural support needs assessments for children and young people in care, including the extent to which assessments occurred within the requisite timeframes. The audit should specifically consider policies that address the:
 - i. Cultural needs of Aboriginal children and young people;
 - ii. Disability needs of children and young people, including access to the NDIS and implementing NDIS plans; and
 - iii. Health and development needs of children and young people, including mental and psychosocial health.
- b. The extent to which case plans appropriately incorporate identified strategies, applicable placement principles, access to services and other cultural and therapeutic supports;
- c. The extent to which identified strategies, applicable placement principles, access to services and other cultural and therapeutic supports are implemented; and
- d. Targeted recommendations to improve compliance with policies regarding assessment, case planning and implementation of health, disability and cultural support needs.

3.2 That DCP develop and incorporate the following into the assessment and planning procedures for children and young people in care:

- a. Culturally appropriate tools to identify risk factors for offending behaviours;
- b. Targeted therapeutic and other interventions to mitigate these risks and divert potential youth justice involvement; and
- c. Clear placement principles to avoid placing children and young people with an identified risk of offending behaviours in criminogenic environments.

Recommendation 4 – Increased support for Aboriginal children and young people

Aboriginal children and young people are seriously overrepresented in both the child protection and youth justice systems, and feature within the dual involved population. Several individuals made important contributions to the SADI Project, including through personal interviews. It will be important to evaluate the implementation of the current recommendations with respect to this large sub-population of the dual involved cohort.

That DCP deploy additional effort and investment to support connection to culture for Aboriginal children and young people living in residential care, paying particular attention to the causes of, and potential consequences for, those who have offending behaviours or whose behaviours may risk involvement in the youth justice system.

Recommendation 5 – Enabling effective care and support

The residential care environment is characterised by skilled staff shortages, limited placement options and placement decision-making that does not always respond to the child or young person's best interests. Placement in residential care disproportionately leads to youth justice involvement. Children and young people deemed 'complex' may be offered little scaffolding or support within their placement to address or manage their behaviour. Dual involved children and young people told us that residential care staff often were not equipped to manage their behaviour and relied on calling the police as a core behaviour management strategy.

5.1 That DCP provide the resources, training and framework necessary to enable residential care staff to provide the best possible care and, in particular to ensure that staff are appropriately qualified and staff ratios are sufficient to respond to the complex support and management needs of the residential care population, as a whole.⁴

5.2 That the resources, training and framework at 5.1 should include:

- a. Specialist mental health, disability, and drug and alcohol training for residential care staff to improve their capacity to identify and respond to behaviour associated with factors such as mental ill health or substance misuse;
- b. An accreditation scheme which sets specific competency and training benchmarks for staff who work directly with a category of dual involved children and young people who have exceptionally complex support and management needs;
- c. Reviewing the appropriate classification and remuneration for relevant accredited DCP staff members under the relevant industrial instrument; and
- d. A staffing model that incorporates requirements for designated positions to hold or undergo the above accreditation, supported by appropriate roster arrangements.

Recommendation 6 – Reviewing and analysing police involvement in residential care

The SADI Project confirmed that police are often called to attend residential care properties for incidents that should be managed as behavioural, not criminal, matters. These callouts create and normalise engagement with the youth justice system. Other jurisdictions are more judicious about recourse to police intervention based on clear protocols to manage the occasional need for such intervention.

Improved data collection, analysis and reporting in relation to critical incidents in residential care is urgently required to identify and promote good preventive practice and child focussed intervention.

6.1 That DCP establish a system to specifically record and monitor critical incidents in residential care which result in police involvement or attendance, in order to –

- a. Track and analyse the prevalence, severity and management of incidents across individual residential care facilities; and
- b. Identify and mitigate causal factors.

6.2 That DCP urgently review and address the practice of relying on police intervention for behavioural management.

Recommendation 7 – Reducing police involvement in residential care

7.1 That DCP and SAPOL develop a joint protocol to govern the procedure, purpose and required benchmarks for requesting police attendance and response at residential care facilities, with the objective of:

- a. Minimising unnecessary resident contact with the youth justice system; and
- b. Reducing the incidence of charging children and young people living in residential care with property offences.

7.2 That the above protocol be monitored in consultation with:

- a. Children and young people with an experience of residential care;
- b. A representative Aboriginal Community-Controlled Organisation; and
- c. The Office of the Guardian for Children and Young People.

Recommendation 8 – Restrictive practices in residential care

Some of the young people interviewed referred to causing property damage due to being unable to get outside. Some residential care units lock children and young people inside that facility, at times, to minimise the risk of them going missing. Unless properly authorised as a restrictive practice of last resort, supported by planned behaviour support

⁴ Recommendations 147 and 150 in the Nyland report, *ibid*, also address this issue.

plans and interventions to reduce its necessity, such a practice breaches a child's fundamental right to liberty and security of person and may constitute arbitrary detention.⁵

8.1 That DCP investigate the extent and circumstances under which the restrictive practice of locking children and young people inside, or otherwise depriving them of liberty within a residential care unit, is occurring.

8.2 That DCP review policies and staff training to ensure residential care staff are provided with adequate training, support and guidance to implement alternatives to restrictive practices.

Recommendation 9 – Accountability

Accurate data collection, analysis and reporting is required to identify and respond to key population groups, trends and system pressure points, in order to provide a focus for systemic improvement and accountability. It should be possible to better understand and account for the circumstances of dual involved children and young people and thus improve efforts to support and divert them from the youth justice system.

9.1 That DCP and DHS collaborate with other relevant government departments and agencies (such as SAPOL, the Courts Administration Authority, Education and SA Health) to undertake improved collection of data and other information pertaining to the circumstances of dual involved children and young people. Data capture should enable analysis of the following matters for all children and young people in care:

- a. The reasons for and outcomes of police attendance at care placements;
- b. Instances and periods of detention in police vehicles and cells;
- c. [REDACTED] ersio [REDACTED] [REDACTED]
- d. Access to bail;
- e. Bail conditions and breach of bail offences;
- f. The practice of 'over-charging',⁶
- g. Charges that relate to conduct occurring at the care placement;
- h. Charges that relate to a child or young person being missing from placement; and
- i. Sentencing practices and outcomes.

9.2 That the data should be disaggregated to enable reporting regarding children and young people according to their gender and the following characteristics:

- a. Aboriginal children and young people;
- b. Children and young people with disability; and
- c. Placement type, including residential care.

Recommendation 10 – Vehicles as places of detention

South Australian children and young people in custody continue to be vulnerable while detained in vehicles. Although the TCV/Guardian has raised this publicly several times, the South Australian government has yet to address the fact that there is no independent oversight of what happens in transit (be that under the authority of DHS/Kurlana Tapa, SAPOL, DCP, SA Health or a private contractor).

That the SA parliament legislate to provide the Training Centre Visitor with the mandate and resources to enable independent oversight of children and young people when they are compulsorily detained in transport vehicles under the authority of DHS/Kurlana Tapa, SAPOL, DCP, SA Health or a private contractor, including in the context of the commencement of the Optional Protocol to the Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) in South Australia.

⁵ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1996, 999 UNTS 171, art 9.1.

⁶ Over-charging occurs when police charge children and young people with offences that are not supported by the evidence, which are later withdrawn.

Recommendation 11 – Children and young people in police cells

A matter commonly raised by the dual involved children and young people who were interviewed was their experience of being held in general police cells, especially in the City Watchhouse. These are adult focussed facilities, not geared to holding and managing custody of children and young people. This practice should be reviewed urgently to ensure that minors are not exposed to the adult custodial environment and management practices, including strip searching.

11.1 That the South Australian Government undertake an urgent independent review of the practice of holding children and young people in police facilities to ensure that any such detention only occur in accordance with strict compliance with child safe principles.

11.2 That the Training Centre Visitor be granted statutory oversight responsibilities for police facilities that function as a place of detention for children and young people, including in the context of the commencement of the Optional Protocol to the Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) in South Australia.

Recommendation 12 – Bail and remand

All dual involved children and young people interviewed for the SADI Project reported being in detention for breaching their bail conditions, not their primary alleged offence, and these breaches almost always related to placement in residential care (e.g. missing their curfew, or not residing at the placement which functioned as their bail address). Many reported not feeling safe or cared for at that placement, with some frequently going missing to spend time with their family.

Some, while detained at KTYJC, were advised that their placement in the community had been closed (to enable a different child or young person to use the room), their belongings packed up, and that they would move to a different placement upon release. This created stress and exacerbates placement instability.

That DCP, SAPOL and the Youth Court collaborate to investigate and address the relationship between bail-related offences, residential care, remand and detention by –

- a. Reviewing bail and remand practices to identify discriminatory impacts for children and young people in residential care. The review should specifically consider:
 - i. Curfew and non-association bail conditions;
 - ii. The extent to which bail is denied due to unsuitable DCP placements and/or on DCP's request;
 - iii. Cautioning or charging a child or young person with the offence of breach of bail; and
 - iv. Sentencing for the offence of breach of bail.
- b. Developing alternative diversionary responses for children and young people who breach bail for offences committed while in residential care (including to prevent the subsequent impact of remand on placement stability).

Recommendation 13 – Supporting children and young people in court

Good practice suggests that personal support should be available from a responsible person whenever a dual involved child or young person attends Court, just as we would expect a parent to do for a young person who lives with family. DCP representatives, or other carers, however, are not always present, so there may be no support to help a child or young person understand what is happening to them.

The majority of dual involved children and young people who participated in interviews expressed that they did not feel supported by DCP during their involvement in Youth Court. Some felt that a lack of DCP support contributed to being denied bail or sentenced to detention.

That DCP deploy additional resources and efforts to attend court as the corporate parent for children and young people in care.

Recommendation 14 – A specialist DCP 'dual involved' team

Dual involved children and young people and youth justice and other workers expressed diverse views about the responsiveness and support they receive from DCP social/case workers. While some were very satisfied, a common view was that it can be very difficult to contact DCP case workers, get necessary information from them or have

necessary discussions in a timely way, if at all (especially if the worker is new to DCP or is newly assigned to that child or young person). The overall view was that some DCP workers often lack resources and sufficient understanding of youth justice processes to be able to support their clients to navigate the youth justice system effectively.

A specialist team within DCP would build expertise and facilitate collaboration with DHS and other agencies, to help prevent children and young people in care from entering (or re-entering) the youth justice system and to better support them should they offend.

The SADI Senior Advocate particularly noted that transition-from-care plans are generally poorly executed, a problem compounded for those detained at Kurlana Tapa (who may experience difficulties in accessing services while in detention).

14.1 That DCP establish a specialist 'dual involved team' with the role of –

- a. Providing, expert and intensive support to children and young people involved in the youth justice system;
- b. Functioning as a central contact point for other relevant agencies and service providers for dual involved children or young people;
- c. Ensuring that placements are available for dual involved children and young people when they are released from Kurlana Tapa;
- d. Coordinating appropriate bail addresses and bail support to reduce the incidence of dual involved children and young people breaching bail conditions; and
- e. Providing intensive case management to facilitate better access to established mainstream service providers [REDACTED] while [REDACTED] are with [REDACTED]

14.2 That the specialist DCP dual involved team include Aboriginal designated positions.

Recommendation 15 – Improved transition planning

The SADI Project noted poor transition processes both when children and young people were released from KTYJC into residential care, and when they turned 18 (and were no longer under child protection orders). Transition from care planning appears often to be ad hoc and rushed, although the transition is foreseeable. In some cases this causes children and young people extreme anxiety about their future and can lead them to feel fatalistic that they will inevitably 'graduate' into the adult corrections system.

Service providers reported that last-minute or poorly communicated placement decisions for dual involved children and young people upon their release could lead to poorer service access, planning, and support. Despite much good work, this can undermine the likelihood of successful disengagement from the youth justice system.

15.1 That DCP take primary responsibility for planning all transitions out of detention for dual involved children and young people.

15.2 That DCP collaborate more effectively with DHS and other relevant agencies to plan for transitions by –

- a. Developing timely plans for transitioning back into the community and/or transitioning from care, in consultation with dual involved children and young people;
- b. Recognising the potentially disruptive effects of transitioning out of detention into community living or 'ageing out' of care;
- c. Retaining placements that are valued by detained children and young people (to maintain accommodation stability and minimise disruptive moves); and
- d. Co-ordinating interventions and services that provide dual involved children and young people with care, rehabilitation, support and development opportunities.