



# Youth Justice and Child Wellbeing Reform

Office of the Public Guardian submission

June 2023



## About the Office of the Public Guardian

The Office of the Public Guardian (OPG) is an independent statutory office which promotes and protects children and young people in the child protection system or staying at a visitable site and the rights and interests of adults with impaired decision-making capacity.

OPG provides individual advocacy services to children and young people through the following functions:

- child advocacy, which offers person-centred advocacy for children and young people in the child protection system, and elevates the voice and participation of children and young people in decisions that affect them, and
- community visiting, which monitors and advocates for the rights of children and young people in the child protection system including foster, kinship and residential care, and all children and young people staying at other visitable locations (youth detention centres, police watch houses, authorised mental health services and other residential facilities).

OPG provides an entirely independent voice for children and young people to raise concerns and express their views and wishes. When performing these functions, OPG will seek and take into account the views and wishes of the child to the greatest practicable extent.

OPG also promotes and protects the rights and interests of adults with impaired decision-making capacity for a matter through its guardianship, investigations and adult community visiting functions.

The *Public Guardian Act 2014* and *Guardianship and Administration Act 2000* provide for OPG's legislative functions, obligations and powers. The *Powers of Attorney Act 1998* regulates the authority for adults to appoint substitute decision makers under an advance health directive or an enduring power of attorney.

## Position of the Public Guardian

The Public Guardian welcomes the opportunity to provide a submission to the Youth Justice and Child Wellbeing Reform project. The views of the Public Guardian contained in this submission do not represent the views of the Queensland Government.

The Public Guardian's responses to the questions posed in the consultation are detailed below.

## Responses

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

In OPG's experience, a significant proportion of children and young people who engage with the youth justice system in Queensland have a range of prejudicial circumstances that impact their behaviour. The behaviours of children and young people that lead to incarceration can be a manifestation of childhood abuse and neglect. This is further exacerbated for children with neurodevelopmental disorders, who have commonly experienced multiple system failures in the health, education, child protection and justice systems in identifying the child's needs and intervening before the child or young person enters detention. It is often the case that their disability-related behaviours of concern are attributed with criminal intent and the child or young person is prosecuted by the youth justice system, when appropriate service system support may have a preventative effect.

Research conducted in the Banksia Hill Detention Centre in Western Australia, [\*Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia\*](#)<sup>1</sup>, found high levels of undiagnosed foetal alcohol spectrum disorder and other neurodevelopmental impairment amongst the young people incarcerated in the detention centre. The research recommended formal neurodevelopmental assessment for all young people entering the justice system and comprehensive training for detention centre staff. This research aligns with the experience of OPG's community visitors in Queensland and indicates that inadequate identification and provision of care and support needs early on in a child or young person's life, coupled with lack of collaboration and transition between service systems, are avoidable factors that can lead to a child or young person finding themselves in the youth justice system.

Similarly, children in the child protection system are often disadvantaged by traumatic environmental factors related to their upbringing that can lead to criminal behaviour, such as child abuse or neglect, homelessness, mental health issues or drug and alcohol use. Criminalising the trauma and behavioural manifestations of these children creates a vicious cycle of disadvantage and only further isolates and victimises the children most in need of the community's support and protection.

Education is critical to improving outcomes for children and young people, including reducing contact with the youth justice system. OPG has observed young children being subjected to suspensions and exclusions from school and even prep, which risks ongoing disengagement from the education system from a young age. In OPG's experience, children and young people with learning disabilities, particularly where these conditions are undiagnosed or unsupported, are at even greater risk of disengaging from school and subsequent exposure to the youth justice system. In 2021-22, OPG's community visitors raised 1,168 issues about education needs on behalf of the children and young people they visited with 20 education advocacy referrals also being made to OPG's child advocates.

The importance of education is further substantiated by statistics from the Department of Children, Youth Justice and Multicultural Affairs, which state that 55 per cent of children in the statutory youth justice system are disengaged from education, training or employment<sup>2</sup>.

### **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?**

As discussed above, a significant proportion of children and young people who engage with the youth justice system in Queensland have experienced trauma that can manifest in anti-social behaviour. To better protect the rights and wellbeing of vulnerable children and young people, the Public Guardian recommends the development of strategies and diversionary options that address the reasons why children and young people are committing offences.

#### *Children and young people with a disability*

For children and young people with neurodevelopmental disorders, priority must be placed on early intervention and stronger collaboration between service systems to identify and appropriately respond

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<sup>1</sup> Bower C, Watkins RE, Mutch RC, et al. *Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia*. *BMJ Open* 2018.

<sup>2</sup> Department of Youth Justice Pocket stats 2019-20, available at <https://www.cyjma.qld.gov.au/resources/dcsyw/youth-justice/resources/yj-pocket-stats-2019-20.pdf>, viewed 14 June 2023

to their needs. These include appropriate mental health services and funding for assessment for formal diagnosis of people with intellectual disabilities and acquired brain injury. The rights and wellbeing of these vulnerable children and young people at risk of entering the youth justice system could be better protected through investment in preventative strategies, as opposed to punitive measures.

#### *Children and young people in the child protection system*

Similarly, children and young people with a child protection history are often disadvantaged by traumatic environmental factors related to their upbringing such as child abuse or neglect, homelessness, mental health issues and/or drug and alcohol use, which can lead to them exhibiting criminal behaviour.

Prioritising early intervention would support governments to deliver youth justice reforms consistent with the four pillars detailed in the 2018 *Report on Youth Justice* prepared by Bob Atkinson AO (the Atkinson Report). Intervention strategies could incorporate parenting programs, access to targeted social services, mental health and disability assessment and services, drug and alcohol services and educational supports that focus on both physiological and brain-based behaviour regulation. This would require government investment in programs outside of the youth justice system; however, this investment could ultimately reduce the need for such programs within the youth justice system if children and young people were provided with the tools, resources and support necessary to encourage positive behaviour. The flow on effects to the child or young person, their family and the community have the potential to be significant.

In considering diversion and preventative strategies for children and young people, the overrepresentation of Aboriginal and Torres Strait Islander children must be addressed. Targeted strategies are urgently required, including cultural competency training to ensure that service delivery is culturally appropriate. In this regard, it is recommended that youth diversion programs in remote communities are developed and operated by, or in partnership with, Aboriginal and Torres Strait Islander communities and/or Aboriginal and Torres Strait Islander controlled organisations. The importance of early intervention was highlighted in a recommendation from the Committee Support and Services Committee report into *Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021*. In its report the Committee recommended that, “...any alternative proposal to the youth justice system considered by the Queensland Government should include adequate and effective diversion programs and services, including place-based and culturally appropriate practices, to support young people and address factors which lead to offending behaviour”<sup>3</sup>. OPG notes the delegated authority initiatives introduced by the Department of Children, Youth Justice and Multicultural Affairs which allows for Aboriginal and Torres Strait Islander children and young people, families, communities and the organisations that support them to have greater control over how authority is exercised and how government bodies work with families. Partnership initiatives such as delegated authority will play a critical role in addressing the overrepresentation of Aboriginal and Torres Strait Islander children in the youth justice system.

If the youth justice system is to truly protect the rights and wellbeing of children and young people, government must recognise the value of investment in early interventions that promote children and young people’s education, health and wellbeing and the prevention of anti-social behaviours that can

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<sup>3</sup> Report No. 16, 57th Parliament - *Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021*, March 2022, p.41.

lead to offending. Considering the over-representation of Aboriginal and Torres Strait Islander children in the youth justice system, such investments for these children are particularly critical.

### *Youth detention system*

OPG's community visitors have a unique insight into the issues that exist within the youth detention system. In 2021-22 community visitors raised 1,659 issues on behalf of children and young people in Queensland's youth detention centres that indicate what needs to be addressed to ensure the rights and wellbeing of children and young people are protected. These issues were often about:

- reintegration planning to the community, in particular the appropriate, supported and safe accommodation options upon a child's release from detention
- access to services including cultural, therapeutic, education/vocational and disability support
- improving the youth detention centre living conditions.

Chronic overcrowding in Queensland youth detention centres and staff shortages also regularly result in lockdowns, separation, and extended periods of isolation for children, limiting their access to services and support. This environment further exacerbates the trauma experienced by vulnerable children and young people and is counterintuitive to the idea of detention serving as a form of rehabilitation for children and young people who have engaged in anti-social behaviour.

OPG has held long-standing concerns about police watch houses across the state being utilised contingently to detain children and young people on remand for periods longer than what is deemed ordinarily acceptable in a temporary and primarily adult environment. The number of children in police watch houses, particularly for prolonged periods, is not conducive to the safety and psychological wellbeing of children, and by nature and design is entirely inappropriate to meet their specific needs. This is particularly relevant in view of the overrepresentation of Aboriginal and Torres Strait Islander young people, those under children protection orders and those with trauma histories in custody, all of whom require targeted attention to rehabilitate and reduce the potential for recidivism.

In conducting visits to police watch houses, OPG has been made aware of the unacceptable conditions being experienced by children and young people. Children and young people have reported the use of force, strip searches, overcrowding and having to sleep in common areas with lights on 24 hours a day, lack of access to personal hygiene items such as underwear, toothbrush, or a daily shower, being co-located with adults experiencing the effects of drugs, alcohol or psychosis, and lack of access to fresh air or sunlight. OPG has also observed the impacts of prolonged periods of isolation on the physical and emotional wellbeing of a child or young person when they are held in a police watch house and the flow on impacts on their ability to reintegrate into society.

The detention environment is ill-equipped to appropriately respond to childhood trauma, and in fact may often exacerbate or retrigger the trauma for the child or young person, leading to escalating behaviours of concern. For example, it may cause heightened distress to a child with autism, where accentuated behaviours of distress may then be further punished by the system. Children and young people with cognitive or intellectual disability in detention are also highly vulnerable to abuse and exploitation by others, including staff and other children and young people. The detention environment is not appropriate or adequate to support these children and young people or meet their needs where all other service systems have fallen short. This interaction with the justice system by a child or young person with complex needs can do lasting damage to their development.

Children and young people in detention also have limited access to formal education which only further isolates them from their peers, impacting their opportunity to reintegrate into society upon release.

### *Age of criminal responsibility*

Any strategies to better protect the rights and wellbeing of children and young people who engage with the youth justice system must include consideration of increasing the age of criminal responsibility.

OPG has consistently advocated for an increase to the age of criminal responsibility from 10 to 14 years of age in Queensland. This aligns with the [United Nations Convention on the Rights of the Child \(General comment: no.24 \(2019\) on children's rights in the child justice system\)](#), which encourages state parties, including Australia, to raise their minimum age of criminal responsibility to at least 14 years. Australia's current age of criminal responsibility is well below the United Nation's minimum standard and represents a significant breach of the human rights of Australian children.

Such early contact with the criminal justice system also increases the chances of re-incarceration, leading to an almost inevitable progression to the adult corrections system. The National Children's Commissioner is referred to the Australian Institute of Health and Welfare study, [Young people in child protection and under youth justice supervision – 2020-21](#), for a detailed examination of the trauma experienced by children in the child protection system, which reduces their ability and opportunities to learn and develop empathy. This can then be a precursor to engaging in anti-social or criminal behaviour and early exposure to the youth justice system.

OPG is also of the view that children aged under 14 years should not be placed in detention and no child under the age of 18 years should be held in any adult facility. As discussed above, the detention environment is not equipped to appropriately respond to children who have likely experienced trauma, and in fact may often exacerbate or retrigger the trauma for the child or young person, leading to escalating behaviours of concern and continued exposure to the youth justice system.

Recommendation 27.1 of the [Royal Commission report into the Protection and Detention of Children in the Northern Territory](#) (Royal Commission report) proposes that youth under the age of 14 years not be ordered to serve a time of detention unless strict criteria are met relating to the seriousness of the offence and the risk presented to the community.<sup>4</sup>

### **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?**

The 2022 issues paper prepared by the Queensland Family and Child Commission (QFCC), [Designing a better response to youth offending in Queensland - Raising the age of criminal responsibility: Issues paper](#) (QFCC issues paper) details a number of programs designed to address anti-social or potentially criminal behaviour and those at risk of entering the criminal justice system in the future, including the [youth and family support service](#) offered in Queensland. The QFCC issues paper discusses (on page 29) the youth justice diversionary strategies in New Zealand where criminal proceedings are deemed to be a last resort, with most youth offending handled by the police through issuing cautions, initiating alternative action plans or holding family group conferences. In New Zealand, youth justice conferences

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<sup>4</sup> Royal Commission into the Protection and Detention of Children in the Northern Territory, *Volume 2B*, 2018, p. 420.

must be held before matters are referred to Youth Court. The Scottish Government has also introduced strategies to reduce children's and young people's involvement in youth justice and child protection systems. These strategies and associated implementation plan include an increase to the age of criminal responsibility from eight to 12 years, and a commitment to end the use of youth detention centres for children under the age of 18 years<sup>5</sup>. Chapter 26 of the aforementioned Royal Commission report also details alternative youth justice and detention models adopted throughout Australia and internationally.

**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?**

Yes. A national approach to youth justice and child wellbeing reform would be a welcome initiative to ensure all children and young people can avoid exposure to the youth justice system and reach their potential. Such an approach should include investment in early intervention strategies, a commitment to end children and young people being held in police watch houses and an increase to the age of criminal responsibility.

## **Conclusion**

The Public Guardian appreciates the opportunity to contribute and trusts the Commissioner will consider the issues raised in this submission in finalising the project's recommendations to ensure the rights of children and young people are upheld in the youth justice system.

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<sup>5</sup> Scottish Government, 2022, *Keeping the promise to our children, young people and families*, <https://www.gov.scot/publications/keeping-promise-children-young-people-adults-families/documents/>.