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Protecting the Rights of Children and Young People in Detention: Evaluating Credibility and Effectiveness of Human Rights Monitoring Bodies

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The need to protect the rights of children and young people in detention is the subject of a recent United Nations study (Nowak 2019) and is highlighted by national and international controversies. This article examines the role of external monitoring in preventing the ill-treatment of children and young people in detention. Australia has until recently shown limited interest in protecting the rights of people in detention, but, in 2017, it finally ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (OPCAT). This article examines Australia's steps to ensuring the effective monitoring of the rights of people in detention, specifically the rights of children and young people in criminal justice detention. As a federal state, Australia must establish a comprehensive network of monitoring bodies constituting OPCAT's National Preventive Mechanism across nine jurisdictions and with a range of existing monitoring bodies. This article highlights the importance of the "monitoring of monitoring" to ensure the fair treatment of children and young people in correctional detention. It identifies factors relevant to the effectiveness and credibility of child-centered monitoring processes and analyzes the opportunities for maximizing both in the Australian context and globally.

INTRODUCTION

This article examines independent monitoring as a means of rights protection for children and young people in criminal justice detention and identifies factors enhancing the effectiveness of monitoring. There is an extensive body of literature on prison monitoring (see, for example, van Zyl Smit and Snacken 2009; Daems and Robert 2017; Bicknell, Evans, and Morgan 2018; Deitch 2020; Herzog-Evans 2020; Cliquennois, Snacken, and van Zyl Smit 2021; Naylor 2021). Less attention has been paid, until recently, to evaluating the effectiveness of such monitoring. Important evaluative work on monitoring in Europe, engaging directly with people in adult prisons, is now being conducted in Ireland.[1] The evaluation in this article addresses the monitoring of facilities detaining children and young people, drawing on existing research with young people where it is available.

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1. See O'Connell and Rogan 2023; Rogan 2021; Van der Valk and Rogan 2021.

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The article adopts a human rights-based approach, an approach that looks to the realization of formal legal rights through laws, policies, and standards that provide practical responses to rights violations. A rights-based approach addresses the central relationship between duty bearers (such as nation-states and detaining authorities) and rights holders (such as people detained).[2] Human rights standards articulate protections for the dignity and safety of children and young people in detention. They are also important statements of their entitlement to respect for their rights (Forde and Kilkelly 2019). Specific protections for children and young people in detention are called for under the United Nations (UN) Convention on the Rights of the Child (CRC) and the international 1985 Beijing Rules and the 1991 Havana Rules and also by regional rights bodies.[3] However, little analysis has been focused on the effectiveness of rights protections in places where children and young people are detained.[4]

The detention of children and young people has been the subject of controversy and scandals in recent years. In Australia, there have been revelations of violence by guards and the use of tear gas and spit hoods at the Don Dale youth detention center in the Northern Territory; the overuse of isolation practices in Victoria and other states; the extended incarceration of children in watch houses in Queensland; and similar abuses in other states (Meldrum-Hanna 2016; Commonwealth of Australia 2017; Grant, Lulham, and Naylor 2017; Victorian Ombudsman 2019; Willacy 2019). Similar issues are well documented in other jurisdictions (see, for example, Goldson and Kilkelly 2013; Children's Commissioner for England 2020, 2021). Crises in detention can bring otherwise hidden sectors into the public eye. They can even trigger reforms: Australia's ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (OPCAT) was in part a response to the Northern Territory revelations.[5]

This article addresses the question how monitoring regimes that have been created to implement OPCAT—including those being established currently in Australia—can themselves be monitored and guided to be most responsive for children and young people in detention. It is widely recognized that holding children and young people in custody is harmful and should be avoided if possible. Detention can be particularly damaging for the development of children and young people, impacting their mental health, increasing risks of trauma and self-harm, and leading to poor education outcomes and harm to family relationships (see, for example, Baldry, Cunneen, and Russell 2019, 5). It is 'independently associated with worse adult physical and mental health outcomes' (Barnett et al. 2017).

Children and young people in contact with the criminal justice system can already be extremely vulnerable, coming from marginalized communities and having often experienced a range of disadvantages and trauma: many have themselves been victims

2. The author appreciates the comments provided by an anonymous reviewer on this point.

3. Convention on the Rights of the Child, November 20, 1989, 1577 UNTS 3 (CRC); United Standard Minimum Rules for the Administration of Juvenile Justice, Doc. A/RES/40/33, November 29, 1985 (Beijing Rules); United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, Doc. A/RES/45/113, April 2, 1991 (Havana Rules).

4. Although see Kilkelly and Casale 2012; Goldson and Kilkelly 2013.

5. Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, December 18, 2002, 2375 UNTS 273 (OPCAT).

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of violence and abuse (see, for example, Cunneen, Goldson, and Russell 2016; Nowak 2019, 74–181; Goldson et al. 2020). In the Australian context, the impact of brutal colonization has been traumatic for the First Nations communities, and First Nations children are significantly overrepresented in youth detention, as are children with mental and cognitive impairments (Cunneen, Goldson, and Russell 2016; Goldson et al. 2020, 100–28; Victorian Commission for Children and Young People 2021). Strong arguments have been advanced for moving toward the abolition of youth detention (see, for example, Goldson and Kilkelly 2013; UN Committee on the Rights of the Child 2019). Arguments made here for effective monitoring for the prevention of abuses, and for rights-compliant detention practices, should not be read as endorsing the current use of detention for young offenders but, rather, as the recognition of the ongoing uses of detention at present and, thus, the need for close oversight.

It has of course been argued that establishing rights-based managerialist standards for detention can be seen to endorse the existence of detention and to assume that it is possible for detention to be rights compliant, undermining arguments against detention and even supporting penal expansion (Armstrong 2018). Even where rights-based standards and policies are in place, the gaps between such policies and daily practice are disturbingly evident (see, for example, Carver and Handley 2020). However, risks of legitimizing detention and failures of practice do not justify abandoning the goal of protecting children and young people who are detained, while detention continues to be a policy choice of governments globally. Indeed, robust rights-based oversight regimes may help to drive the reduced use of detention for young offenders.

Both international treaties and domestic legislation emphasize that the detention of children and young people should be avoided as far as possible and should only ever be a last resort.[6] At the same time, if children and young people are detained, they should retain all their human rights other than the rights directly related to the deprivation of liberty.[7] More specifically, they are not to be subjected to torture or other "cruel, inhuman or degrading treatment or punishment" but must be treated with "humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age."[8] This includes ensuring that the environment is "conducive to the reintegrative aims of residential placement," maintaining contact with family and community, having opportunities for association and to participate in sport, physical exercise, and arts, and providing an appropriate education and access to adequate physical and mental health care (UN Committee on the Rights of the Child 2019, Principle 95). The well-being of the child should be the "guiding factor" in any decisions about children in the criminal justice system.[9] They are to be treated "in a manner consistent with the promotion of the child's sense of dignity and worth, . . . and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."[10]

The 2019 *United Nations Global Study on Children Deprived of Liberty*, however, reported widespread failure to comply with the obligations to minimize the use of detention and to ensure that all rights other than liberty are protected (Nowak 2019, 257–58).

6. See CRC, Art. 37(b); Havana Rules, Rule 2.
7. CRC, in particular, Arts. 37, 40; Havana Rules, in particular, Rule 13; Beijing Rules, Rule 17(1)(b).
8. CRC, Arts. 37(a), 37(c).
9. Beijing Rules, Rule 17(1)(d).
10. CRC, Art. 40(1).

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Places of detention are, by definition, closed environments that detainees are unable to leave. They are defined broadly in OPCAT's monitoring mandate as "any place ... where persons are or may be deprived of their liberty," which in turn is defined to mean "any form of detention ... [where the] person is not permitted to leave at will" (Articles 4(1) and (2)). This covers not only prison-like facilities but also holding cells, secure transport, and so on. They are settings in which detainees' lives are under the total control of staff and where the inherent power imbalance inevitably gives rise to the risk of abuse. At the same time, there are practical challenges for maintaining rights in detention, and rights inevitably compete with community and government demands for security and risk management (see, for example, Whitty 2011). Robust independent monitoring of rights protections is therefore a step toward asserting an appropriate balance.

This article examines the monitoring of places where children and young people are held in correction-related detention in Australia in the context of Australia's ratification of OPCAT and asks: how can monitoring regimes be child-rights consistent, and what makes them legitimate, credible, and effective?

CRIMINAL JUSTICE DETENTION OF CHILDREN AND YOUNG PEOPLE IN AUSTRALIA

In Australia, criminal justice is administered by the states and territories (rather than federally). There were around 10,800 young people in Australia under the supervision of the department responsible for youth criminal justice in 2018–19 (Australian Institute of Health and Welfare 2020), of whom 17 percent (n = 798 young people) were in detention on any one day (Australian Institute of Health and Welfare 2021, 1). Of particular significance in Australia is the high rate of incarceration of young First Nations people. Almost half of all young people in detention on an average night in 2020 were First Nations young people (48 percent), a shocking statistic when it is remembered that First Nations Australians make up just 6 percent of the Australian population aged ten to seventeen (Australian Institute of Health and Welfare 2021, 3). The data also show the connections between the experience of child protection/welfare and the criminal justice system. As internationally recognized, there is significant overlap between the welfare and criminal justice management of children and young people: children and young people who have been abused or neglected "are at greater risk of engaging in criminal activity and of entering the youth justice system" (Australian Institute of Health and Welfare 2021).

Looked at another way, offending or problematic behavior by children and young people may be dealt with using either "welfare" or "punishment" mechanisms, a critical dichotomy (see Garland 1985, 2019). A welfare disposition will in principle be preferred, but either may involve the deprivation of liberty. In Australia, forms of welfare disposition include "secure welfare units" as well as mental health and disability services, all of which may involve the deprivation of liberty, while correctional dispositions (imposed by a criminal court) can involve custodial placement at, for instance, a "youth justice center" (Victoria), a "youth detention center" (Northern Territory, Queensland, and Tasmania), or "youth training center" (South Australia).

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The likely form of disposition when a child or young person commits harmful behaviors will depend on the legal age of criminal responsibility. All Australian jurisdictions set a very low minimum age of criminal responsibility at ten years, although three jurisdictions have recently committed to an increase from ten to twelve years, with a possible later increase to fourteen years (Brennan 2023; Ilanbey and Smethurst 2023). The UN Committee on the Rights of the Child (2019), however, specifies a minimum age of criminal responsibility of at least fourteen in General Comment no. 24.

Advocacy is vital, then, both to raise the minimum age of criminal responsibility and—most relevantly here—to reduce the use of detention across the board for children and young people. There is a need for closer analysis of the welfare/punishment divide and whether placing more young people in welfare-based facilities necessarily leads to more rights-respecting detention. This is beyond the scope of this article, but the question remains: how to ensure the most effective and rights-respecting forms of monitoring in youth detention. This is the subject of the next section of this article.

MONITORING THE DETENTION OF CHILDREN AND YOUNG PEOPLE IN AUSTRALIA

Independent monitoring forms part of the international and regional suite of rights protections in places where children and young people are detained (UN Committee on the Rights of the Child 2019, Principle 95(j)).[11] Australia has been relatively slow to engage with international frameworks for human rights monitoring compared with other common law countries such as the United Kingdom (which was one of the first jurisdictions to ratify OPCAT in 2003) and New Zealand (which ratified OPCAT in 2007).[12] Since the 1970s, however, Australia has developed a range of complaints-focused bodies overseeing correctional facilities for both adults and young people. These organizations comprise (for each jurisdiction) a visitor scheme, under which volunteer visitors attend the facility regularly to talk with detainees, and a formal external monitoring or inspection agency. The external agency is either a dedicated prisons inspectorate (in Western Australia, New South Wales, Tasmania, and the Australian Capital Territory) or a generalist ombudsman (in Victoria, the Northern Territory, and South Australia) who has a primary focus on addressing individual complaints. All states and territories have a children's guardian or commissioner office, with varying, but generally limited, powers. Non-governmental organizations (NGOs) providing welfare services to children and young people may also visit, but these processes are not formalized or systemic.[13]

Having ratified OPCAT in 2017, Australia is required to establish comprehensive monitoring regimes for all places of detention through domestic national preventive

11. See, for example, Havana Rules, Rule 72; European Rules for Juvenile Offenders Subject to Sanctions and Measures, Council of Europe Recommendation CM/Rec, 2008, 11, part H.

12. Perhaps surprisingly, Canada, which adopted its Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, in 1982, has still not ratified OPCAT.

13. Non-governmental organizations (NGOs) can also play a role in monitoring, through litigation. See, for example, the successful NGO-led human rights-based litigation in Victoria over the placement of young people in adult prisons (Naylor 2021).

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mechanisms (NPMs). The treaty also requires visits from time to time by the UN Subcommittee on the Prevention of Torture (SPT). The SPT began a visit in October 2022 but was unable to complete the visit at that time "due to obstacles in carrying out its mandate," when access was not provided to all places of detention in two states (Office of the High Commissioner for Human Rights 2023). OPCAT sets a "gold standard" framework for effective monitoring bodies: independence; appropriate staffing and resourcing; full access to places of detention, to information, and to private interviews with people held in detention; capacity to make recommendations and to publish reports; and the protection of participants from reprisals (Articles 18–23). These features are essential—though potentially difficult to achieve—if a monitoring body is to be free of control by governments and capable of providing independent and informed protection.[14]

The implementation of OPCAT in Australia was due to begin in January 2023, but it is still incomplete. Implementation faces the challenges of federalism: the requirement for all states and territories to establish NPMs. International treaties are ratified by the federal government, and the federal government has nominated and funded the existing Commonwealth Ombudsman to be the federal NPM. However, most places of detention across Australia, including prisons and youth detention, are under state or territory jurisdiction, and implementation requires the active engagement of these governments and the commitment of resources. Many jurisdictions have expressed concern about having to bear the costs of this process, and, so far, only Western Australia, the Australian Capital Territory, and Tasmania have announced their NPMs, while some others are in the process of consultation on legislation (see Grenfell and Caruana 2022).

Many countries base their NPMs on existing domestic monitoring bodies,[15] and this is the model being adopted so far in Australia. Some of the formal bodies already operating across Australia are close to OPCAT compliance, but many others are not (Commonwealth Ombudsman 2019). Currently, monitoring bodies can address the range of issues affecting youth detention, ranging from family contact, rehabilitation, health services, education programs and meaningful activities to staffing, use of force, abuse, and ill-treatment (see, for example, Office of the Inspector of Custodial Services 2010). Monitoring specifically under OPCAT addresses torture and cruel, inhuman, or degrading treatment or punishment. It will be important that the concept is read expansively so that the current ambit of monitoring is not restricted. As already outlined, the CRC requires not only the prohibition on torture or any other ill-treatment (Article 37(a)) but also respect for the dignity of children and young people in the criminal justice system (Article 37(c)) as well as the "promotion of the child's sense of dignity and worth" (Article 40(1)).

What this means in practice has been further developed, for example, in the 2008 European Rules for Juvenile Offenders Subject to Sanctions and Measures (see also Council of Europe 2010). Rights-consistent monitoring will therefore address the range of issues in detention that protect these values for young people at various stages of development and that also go toward preventing ill-treatment. With this framework in

14. For a forceful discussion of recent challenges to the operation of OPCAT, see Evans 2020.
15. "OPCAT Database," https://www.apt.ch/en/knowledge-hub/opcat.

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mind, we proceed to consider what will be required to maximize the effectiveness of such a monitoring regime.

ASSESSING EFFECTIVENESS AND CREDIBILITY OF MONITORING

The right of children and young people to participate in decisions affecting them is articulated in Article 12(1) of the CRC. Effective monitoring processes will need to ensure that this right is protected. OPCAT sets the standard for the establishment and the powers of a best practice monitoring regime, noted earlier. This framework is taken as given here. The aim of this article is to develop criteria for monitoring the effectiveness of the monitoring itself. To be effective, a monitoring process must be seen as credible and legitimate in its monitoring and reporting to detaining agencies and governments. But it must also be credible if people in detention are to be willing to participate. It must address the rights of children and young people outlined earlier and also employ rights-based processes.

The monitoring process must itself be consistent with children's rights, aiming to strengthen the capacity of the children to claim respect for their rights and ensuring the accountability of detaining authorities (DCI 2016, 29–30). It must promote the dignity and worth of children and young people in detention and protect their rights to participation (see Council of Europe 2010). In practical terms, the child or young person in detention will need to be confident that it will be worthwhile participating, given the inherent risks of participation. They will want assurance that there will be real outcomes; that they will be listened to; that their participation will not put them at risk of reprisals; and that they will be engaging with skilled and experienced monitoring staff. Four factors, fundamental to effective monitoring for children and young people and to ensuring their participation rights, are therefore:

- effectiveness through public reporting and implementation;
- accessibility for and to people in detention;
- protection from reprisals; and
- appropriate staffing and expertise of the monitoring body.

These are not the only requirements, but they are identified here as critical. They are also interlinked and potentially contradictory. Access for young detainees creates risks of reprisals, and fear of reprisals will limit willingness to participate; public reporting can risk identification of detainees and staff. The four factors, and their challenges, will be addressed in turn.

Effectiveness through Public Reporting and Implementation

The credibility of a monitoring scheme will depend in part, from the point of view of the children and young people detained, on whether the monitoring body's intervention is taken seriously and leads to change. A key component of the preventive role of NPMs is making recommendations aimed at preventing ill-treatment and having the detaining authority engage with those recommendations. Demonstrating that the

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views of children and young people in detention are actively sought and actually given weight is also central to their participation rights. This includes making recommendations; the implementation of those recommendations; the follow-up of implementation; and the consequences if the recommendations are ignored or rejected. Monitoring reports can also support third party action, such as litigation, which is discussed in more detail below.

As provided in Article 19(b) of OPCAT, a NPM is to have the power "[t]o make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty." Monitoring bodies do not have powers of enforcement, and Article 22 of OPCAT provides no further explicit obligation on the relevant authorities than that they can "examine the recommendations" and "enter into a dialogue" on possible implementation. Monitoring bodies engage in both public reporting and recommendations as well as private or informal dialogue with detaining authorities. There will be times when private dialogue is more effective (and perhaps safer for the detainee participant) (see Casale 2010). Private dialogue and negotiation, however, risk the perception of "capture" of the monitoring body by the detaining agency and, indeed, by the state where it funds the monitoring body's work. Public reporting provides a public demonstration of the work of the monitoring body and of the value of detainee engagement, but it may risk setting up a combative relationship between the monitoring body and governments, a point discussed further below. These challenges demonstrate the importance of academic monitoring and the evaluation of monitoring practices to identify and critique their effectiveness.

Making Recommendations and Making Them Public

Monitoring bodies need to make their findings and recommendations public (unless there are specific reasons to withhold this information). Such action helps to inform the public about what is happening in these closed environments, and it facilitates the accountability of the detaining agencies by publicly reporting the conditions that need to change. It also demonstrates to people in prison and to staff who have contributed to inspections that their input has had an impact. A recent survey of NPMs and other prison-monitoring bodies in the European Union found that issuing reports and recommendations was the task given most time, after visiting places of detention (Aizpurua and Rogan 2021, 464). Most monitoring bodies in Australia publish both reports and recommendations online.[16]

A separate question will be whether prisoners and staff see the recommendations as desirable and relevant from their perspectives living in the prison. A recent study by Ciara O'Connell and Mary Rogan (2023) reported on the views of staff and prisoners in prisons in Norway and Scotland about visits by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

16. See, for example, "Office of the Inspector of Custodial Services," *Western Australia*, https://www.oics.wa.gov.au/publications/inspection/; "Inspector of Custodial Services," *New South Wales*, https://www.inspectorcustodial.nsw.gov.au/inspector-of-custodial-services/reports-and-publications.html; "Ombudsman," *Victoria*, https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/.

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Some recommendations were fully supported, and others were seen as very problematic in practice, highlighting the importance of "reality-testing" recommendations. A CPT recommendation that pre/post visit strip searches in Norway only be conducted on the basis of individual risk assessment was criticized by both prisoners and staff as putting other vulnerable prisoners at risk of being pressured to bring in contraband (O'Connell and Rogan 2023, 219).

This issue also illustrates the critique of rights-based management/ monitoring—namely, that it risks legitimizing dehumanizing penal processes (such as strip searching) by claiming that, with some adjustments, they can be carried out in a "rights-respecting" manner, "undermining efforts to dismantle or challenge this power" (O'Connell and Rogan 2023, 230). However, it is argued here that, even if this is an unintended consequence, it would be unacceptable and inhumane in practice not to have rights-based standards and monitoring.

Irrespective of whether the CPT recommendations were seen as useful, O'Connell and Rogan (2023, 224) found some prisoners still valued monitoring for its positive impact on conditions in the prison during the visit; for the possibility that the CPT could be a voice for prisoners outside authority; and for the connection it provided prisoners to the "outside world." For children and young people, it can function as part of the implementation of the right to participation and for the promotion of the child's dignity and worth under the CRC. Monitoring may then be important to people in prison simply by reason of its existence as a statement that their dignity is worthy of protection (O'Connell and Rogan 2023, 228). A prerequisite will of course be ensuring that people in prison are aware of, and have some access to, the monitoring body. The question of access is discussed later in this article.

Implementation

The next step in assessing the effectiveness of monitoring bodies is to evaluate whether the detaining authorities implement or at least engage with the recommendations. Acceptance of recommendations is a widely used, if crude, measure of effectiveness of monitoring. In Australia, monitoring bodies regularly provide quantitative and qualitative data, and commentary, on rates of implementation. The Victorian Ombudsman (2020, 6), for example, has been highly critical about specific rejections of recommendations and failures to implement in recent reports, stating acerbically in her 2020 implementation report: "[W]e can all tell the difference between an authentic response and where the box is merely being ticked."[17]

Fewer European monitoring bodies report on implementation than publish their recommendations. Only fifteen NPMs surveyed by Eva Aizpurua and Mary Rogan (2021, 14) said that they generally publish the implementation status of their recommendations. There is a growing body of research on the implementation of recommendations in Europe and Scandinavia. In an examination of reports of the CPT specifically addressing youth detention between 2004 and 2011, Uursula Kilkelly and

17. See also "Tasmanian Custodial Inspector," *Tasmanian Times*, September 2021, https://www.tasmaniantimes.com/2021/09/office-of-custodial-inspector-inadequate-funding-hinders-our-work/.

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Silvia Casale (2012, 26–28) found that government responses to CPT concerns varied from acceptance, to denial that there was a problem, to long-term solutions such as building new facilities or simply ignoring recommendations. They argued, however, that the CPT's impact was not to be assessed on implementation alone: the CPT "document[s] existing conditions for children in detention, bringing that evidence to the attention of governments and ultimately, through the reports' publications, to the public" (7). These could then be used in research and advocacy and in litigation in the European Court of Human Rights, an avenue discussed further below.

In influential empirical work, Tom Daems (2017) developed a typology of responses accepting, rejecting, or avoiding engagement with recommendations of the CPT in Belgium. Analysis of responses by Nordic countries to CPT recommendations over 2011–15, drawing on Daem's work, found that around one-third of responses constituted full acceptance but that the CPT had had to restate some criticisms and recommendations more than once, particularly in relation to the controversial use of pre-trial detention and conditions of detention (Lappi-Seppala and Koskenniemi 2018). While one-third of responses accepted recommendations in full, another one-third (37 percent) involved the denial of the problem, another one-quarter (23 percent) deferred action (for instance, "we need to investigate this"), and almost 10 percent simply rejected the recommendations (152). Taking this empirical methodology further, Martine Herzog-Evans (2020) in France examined responses to CPT reports at two points of time. While she found a similar pattern of initial responses of full agreement (41 percent) and rejection ("everything is working perfectly") (39 percent), success rates fell over time, with only 26 percent of recommendations adopted some years later (104–5).[18]

Other research on the Norwegian government's responses to CPT reports (Horn and Ugelvik 2017) and on responses to the CPT in Norway, Poland, and Spain (Visschers and Daems 2017) note some prompt responses as well as some simple failures to engage, despite repeated criticisms across several visits. Some practices were clearly so embedded in culture or so subject to resource constraints as to be entirely unresponsive to criticism, however pointed.

Following Up Recommendations

Are there consequences if detaining authorities do not respond to, or reject, the recommendations? As already noted, monitoring bodies cannot enforce recommendations. However, many conduct follow-up visits and engage in dialogue (written and personal) with detaining authorities (Aizpurua and Rogan 2021, 471). It will be essential that monitoring bodies follow up recommendations with private discussions and in public reporting: reporting and making recommendations without systematic follow-up "make[s] no sense" (DCI 2016, 35, 83ff). There is however a dilemma for monitoring bodies. Public castigation of failure to adopt recommendations may lead to hostile, and less receptive, relations with detaining agencies and governments. Dialogue and engagement are probably essential in achieving many desired reforms in light of the

18. A recent evaluation of the recommendations of national preventive mechanisms in Georgia by Richard Carver and Lisa Handley (2020) demonstrates a detailed quantitative methodology for assessing the broader impact of monitoring bodies.

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inability of monitoring bodies to force adoption. The challenge then for the monitoring body is to establish a cooperative relationship with the detaining authorities and engage in negotiation, while advancing the proposed reforms and maintaining independence. Ultimately, monitoring bodies also need to provide feedback to the young people who have participated on whether and how changes have been made as a result of their engagement (DCI 2016, 89; Ewenson and Naylor 2021, 16).

Adoption by Third Parties

European monitoring bodies (for example, the CPT) and European rights-protecting agencies such as the European Court of Human Rights have in recent years been able to engage in mutually reinforcing interactions to produce significant advances in prison policies and standards in Europe. For example, courts have drawn on monitoring reports in their fact finding and judgments, and court decisions and monitoring reports have influenced national legislation; the CPT has also been influenced by decisions of the European Court of Human Rights (van Zyl Smit and Snacken 2009; Cliquennois and Herzog-Evans 2018; Cliquennois and Snacken 2018; Lappi-Seppala and Koskenniemi 2018).

Similar cross-fertilization does not seem to have occurred to date in Australia, but this may be changing. A proposed class action on behalf of children and young people held at the Banksia Hill Detention Centre in Western Australia cites monitoring reports by the Western Australia Office of Inspection of Custodial Services and by Amnesty International as evidence of the claimed ill-treatment (Torre 2022). Existing monitoring and complaints-handling bodies have produced many reports over the years, and the establishment of a NPM network will undoubtedly increase this source of fact finding; current monitoring bodies already draw on international monitoring experience (see, for example, Victorian Ombudsman 2017, 45). Similar productive interactions will also evolve as the body of human rights jurisprudence develops in the jurisdictions that have rights instruments (Victoria, the Australian Capital Territory, and Queensland).

Accessibility for and to People in Detention

The credibility of a monitoring scheme will also depend on whether it has real insight into what is happening in detention. The UN Committee on the Rights of the Child (2009, para. 120) observed that most violence toward children and young people goes unchallenged because of the lack of child-friendly reporting mechanisms (see also Nowak 2019, 259). The Australian Children's Commissioner Megan Mitchell reported discussions with children and young people revealing that over half did not make complaints because they did not believe they would be followed up, or feared negative consequences (Australian Human Rights Commission 2016, 173).

The international treaties and rules specify that prisoners, including children and young people, are to have access to internal and external complaints mechanisms.[19] OPCAT specifies that NPMs are to have access to private interviews with people in

19. For example, Mandela Rules, Rule 56; Havana Rules, Rules 25, 72, 75, 76, 77.

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detention (of the NPM's choice) (Article 20). The participation of children and young people depends first on their having accessible information about complaints and monitoring processes. The Mandela Rules require that prisoners are immediately provided information on prison rules, and procedures for making complaints and in a form that the prisoner can understand, as do the Havana Rules for young people in detention.[20] These will clearly need to take account of the literacy levels and language requirements for the children and young people and should be in a style that is designed for relevant developmental levels.

The right of children and young people to participate in decisions affecting them also requires the establishment of child-centered monitoring practices and genuine and safe participation.[21] It requires monitoring agencies to be proactive in ensuring young people are aware of complaint and monitoring processes, placing "special emphasis on holding conversations with children in the facilities, in a confidential setting" (UN Committee on the Rights of the Child 2019, Principle 95(j)). Talking with children in detention requires particular sensitivity and skill. Detailed guidelines on interviewing children have been developed, for instance, by Defence for Children International (DCI) (2016). Its practical guide points out the complexities to be managed, including the increased levels of abuse amongst children in detention and the reality that meeting an unknown adult "may generate considerable anxiety that could lead a given child to withdraw and be less communicative and another to chat along in a compliant but superficial manner" (73). The guidelines address, amongst other things, ethical obligations, communication styles, appropriate selection of participants (including the provision of information and voluntariness of consent), safety and privacy of the interview location, requisite staff skills, and recording and confidential storage of information (34, 73ff; see also Forde and Kilkelly 2019, 79–81). Above all, underpinning the detailed guidelines is the fundamental ethical obligation to do no harm.

There is still relatively limited literature on what people in detention know of, and think about, oversight and monitoring in prisons (although see Crewe 2012; Naylor 2014; Van der Valk and Rogan 2021; O'Connell and Rogan 2023). Australian studies suggest that many people in detention are unaware of complaint mechanisms and, particularly, of the role of external monitoring bodies. For example, in one of the few studies of youth detention on this issue, the South Australian Training Centre Visitor (TCV), established in 2016 to provide regular visits to young people in correctional detention, reported on "detainees' sense of not knowing what they were supposed to do." Where they are aware of these avenues, they may query their effectiveness. A young person quoted by the TCV observed succinctly: "Everyone is about covering their arses" (cited in Ewenson and Naylor 2021, 10, 13). The CPT has also noted that young people in detention appear to have little confidence in formal complaint processes (CPT 2009, 49; Kilkely and Casale 2012, 24; Goldson and Kilkelly 2013, 366; Council of Europe 2016, 18).

Young people interviewed as part of the Royal Commission into the Protection and Detention of Children in the Northern Territory were certainly skeptical about

20. United Nations Standard Minimum Rules for the Treatment of Prisoners, Doc. A/RES/70/175. January 8, 2016, Rules 54, 55 (Mandela Rules); Havana Rules, Rules 24, 25.

21. CRC, Art. 12.

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making complaints: "The other detainees and I would joke that they would get chucked straight in the bin because it felt like we never heard back" (Commonwealth of Australia 2017, cited in Ewenson and Naylor 2021, 12). They also had no confidence in the external monitoring processes supposedly available to them, one observing: "I tried speaking to several different [monitoring agencies] people about the bad things that have happened to me whilst in detention but I don't think anyone ever really listened. . . . I then just gave up complaining" (cited in Ewenson and Naylor 2021, 10).

A recent survey of adult prisoners in Ireland found that half of all prisoners surveyed were unaware of the domestic inspector (the Office of the Inspector of Prisons), and nearly 30 percent were unaware of the Visiting Committee (a more informal body that visits prisons regularly to follow up on prisoner concerns). Those who were aware of these bodies generally did not engage with them (Van der Valk, Aizpurua, and Rogan 2021). The authors question whether prisoners are in fact being informed about these bodies and/or whether they are only being informed on arrival and thereafter not retaining that information (12). The legitimacy of the whole process is raised here. As the authors observe, prisoners' perceptions of trustworthiness (or futility) of the process are critical: "It may be that oversight bodies have limited opportunity to build trust among prisoners, which could be compounded by concerns prisoners may have about the possible negative consequences of speaking to an outside body, or a sense that raising concerns is futile" (13; references omitted).

The visibility of these external bodies in the prison will be vital, a product not only of the provision of accessible information but also of the frequency with which these bodies visit the prisons (Hardwick and Murray 2019; Van der Valk and Rogan 2021). For children and young people in detention, it will be even more important for monitoring bodies to visit regularly in order to develop rapport and trust. Some monitoring reports detail the methods used to engage children and young people in detention. For example, in 2019 when the Victorian Ombudsman reviewed the use of solitary confinement in the detention of children and young people, the young people were invited to participate in the inspection both through individual surveys and group meeting. The ombudsman also reported wide-ranging consultations with European, Scandinavian, and New Zealand NPMs and NGOs beforehand to design "an appropriate inspection methodology involving children and young people" (Victorian Ombudsman 2019, 78).

Innovative child-centered practices were developed by the Irish Ombudsman for Children in a review of the detention of young people aged sixteen and seventeen in a facility with older people, a consultation methodology to take account of the "potentially reduced capacity of young people in the Institution and the corresponding challenges this might present as regards facilitating their effective participation" (Ombudsman for Children's Office 2011, 15). The young people took part in focus group interviews on themes that had themselves been developed in consultation with the young people about aspects of life in the facility. They also engaged in a facilitated drawing session to engage in different ways to address the topics, and the interviews and drawing were later presented in a short animated film. It is essential to have accessible monitoring where children and young people are able to fully participate. This will include the provision of information about the role of monitoring bodies in appropriate languages and levels of literacy and monitoring processes that are themselves child

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centered (DCI 2016). Whether this is happening currently requires research with the affected young people.

Protection from Reprisals

If a monitoring body is not able to ensure the safe participation of people in detention and staff, the monitoring process will not be effective. This a particular concern for young people in detention, whose vulnerabilities, levels of trauma, and inevitable mistrust of authority all put them at risk. Places of detention are potentially dangerous for people detained, given the entrenched power imbalance between people detained and staff. Monitoring procedures must address the fact that such people are highly vulnerable: they live in institutions, with all aspects of their lives controlled by staff and prison management. Staff too can be at risk if they provide information about ill treatment (Carver and Handley 2020, 404; Aizpurua and Rogan 2022, 384).

Fear of reprisals was reported, for example, by the Irish Ombudsman for Children's Office (2011, 60) in the report on young people held in an adult institution mentioned earlier (see also Australian Human Rights Commission 2016, 173). A study by Marie Brasholt and colleagues (2020) in adult prisons in Albania and Honduras found that one-fifth of detainees had experienced sanctions after a monitoring visit, mainly in the form of threats and humiliation, meaning that detainees were less willing to participate in monitoring work. Adult prisoners in Victoria, Australia, reported in interviews that they experienced recriminations when they made complaints. They observed that complaining "would 'make your life harder'" and could result, for instance, in transfers to other units or prisons (Naylor 2014, 114).

The first requirement of any monitoring process is to do no harm (Association for the Prevention of Torture 2012, 6). In its 2019 United Kingdom (UK) visit report, the SPT (2019, para. 107) recommended that the risk of reprisals should always be part of the NPM's planning: it should "always consider that there is a risk of intimidation, sanctions or reprisals, and therefore take steps to address that risk." The Penal Reform International's (2011, 13) *Training Manual for Independent Monitors of Juvenile Detention Facilities* similarly highlights that the risk of reprisals against children should be addressed. What is less clear is how this is to be achieved. The DCI's (2016, 57–58) guide does identify possible responses to a perceived risk of reprisals, including requesting surveillance to protect the child from mistreatment from peers or staff, supporting transfers for children, and ensuring protocols for safe storage of children's reports of abuse.

OPCAT prohibits reprisals against anyone engaging with the SPT (Article 15) or a NPM (Article 21(1)). It also specifies the protection of confidentiality (Articles 16 and 21(2)). European monitoring bodies surveyed by Aizpurua and Rogan (2022, 395) reported that most (77.8 percent) had mechanisms in place to prevent reprisals against people in detention who spoke to the monitoring agency, but less than half (45.2 percent) had mechanisms to protect the inspectors themselves. Both the SPT and the CPT have reported on concerns about reprisals (see, for example, CPT 2010, 16). The SPT will remind states of the prohibition on reprisals when making arrangements for a country visit (SPT 2016, para. 27), and it can, for example, raise alleged reprisals

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with government authorities, bring its concerns to the facilities themselves, and highlight the issue through "appropriate channels," including local and international media (para. 28). The UK's NPM (2015) has published a more detailed protocol on managing and preventing reprisals for its three correctional inspectorates. We may however question how useful the various protocols are in practice, particularly for children and young people; they are also limited in that they establish responses to reprisals only after these have occurred.

The method of engaging with people in detention can itself enhance safety. Sophie van der Valk and Mary Rogan (2021, 14) in their research with adult prisoners report one participant's suggestion that inspectors should select interviewees randomly because "some other lads would be very paranoid" and might be suspicious of a person talking to an outside body." Protection from reprisals includes protection of confidentiality within the place of detention. However, there can be competing challenges. Conducting interviews with a number of young people out of hearing and sight of detention staff reduces the opportunity for staff to determine the source of any particular complaint, but specific issues of concern need to be raised individually both to safeguard the discussion of sensitive issues and also because of the possibility of informers, as much in the youth justice population as in adult detention (see Ewenson and Naylor 2021, 14–15).

Safety of children and young people must therefore be addressed at the start of, and throughout, the monitoring process. In addition, the impact of monitoring processes on individuals should be assessed after completion of monitoring, where possible, to ascertain whether participants in fact have experienced retaliation or informal punishment. Independent research monitoring the operation of monitoring itself, in relation to the detention of young people, will have much to offer on these issues.

NPM Staffing and Expertise

The fourth and final point is that monitoring staff must have appropriate capabilities and professional knowledge. There should be appropriate representation of gender and ethnic and minority groups (as specified, for example, in Article 18(2) of OPCAT), and this should be reflected in selecting inspection staff for a specific detention facility, together with medical, mental health, and child development expertise. Teams monitoring youth detention need to support the right of the young people to effective participation (Article 12 of the CRC), and this requires processes and skills that are themselves "child friendly" (Council of Europe 2010; Kilkelly and Casales 2012, 32–34). The recruitment and training of appropriate staff working in detention facilities, and, indeed, the establishment of a rights-protective and child-focused culture, is also critical, though beyond the scope of this article. For example, the Council of Europe (2016, 11) reports a range of recommendations, provided by young people, for desirable skills and personal qualities for staff.

In the Australian youth justice context, where around half of the children and young people detained are from First Nations, it is essential that there are First Nations staff in the monitoring body and also that all staff are culturally competent (see also Ewenson and Naylor 2021, 11, 14). The Victorian Commission for Children and Young

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People (2021, 529) emphasized in its recent report that any designated NPM must have "specialist expertise in children and young people including child development, working with vulnerable children and young people, and Aboriginal children and young people." The DCI's (2016, 54) guide recommends a well-qualified, multidisciplinary monitoring team with "child specific training regarding children's deprivation of liberty." The composition would depend on the type of facility and the cohorts of children but would ideally include a lawyer, a health professional, and staff with expertise—where possible—in "child rights and in particular juvenile justice, social work, education/pedagogy, criminology, child psychology and/or psychiatry etc" (55). It should also be gender balanced and reflect the "ethnical, linguistic and regional background" of the children being visited, including interpreters as needed (55).

In practice, this may run into resourcing limitations, and opportunities for seconding experts from other agencies should be developed. This approach was taken in the Victorian Ombudsman's (2019, 77) investigation of solitary confinement for children and young people. Inspectors included experienced staff seconded from the Commission for Children and Young People and from several NGOs, with expertise in mental health, disability, and the needs of Indigenous young people, as well as a senior inspector for facilities for detention of children and young people from the UK's Inspectorate of Prisons (77).

CONCLUSION

Children and young people should not be detained in the criminal justice system, as stated repeatedly in international and national instruments. Detention, in itself, can be a form of ill-treatment for this cohort of the population. However, while custody is still being imposed, the protection of all relevant rights of the young people being detained must be prioritized. Robust independent monitoring can provide important rights protections, exposing otherwise hidden practices: it is the "eyes" of the community on these closed environments. The detention of children and young people gives rise to the clearest requirement for effective monitoring and monitoring that is itself being evaluated. The formal requirements for successful monitoring are now well recognized, for example, as set out in OPCAT. The effectiveness of monitoring bodies in protecting human rights and changing institutional cultures does depend on compliance with these requirements, but it also depends on the capacity to persuade and negotiate changes in the absence of powers of enforcement, on the perceived credibility of the monitoring body, and on its "moral standing" to make recommendations (Rogan 2018, 2).

There has so far been limited research on what makes monitoring schemes legitimate and, in practice, credible and effective, particularly for children and young people. More work is needed to monitor the effectiveness and credibility of monitoring practices. Many factors could be examined in future monitoring evaluation. But, as argued here, youth detention monitoring bodies that report publicly and follow up recommendations with detaining authorities and are seen to do so; that establish child-centered practices to maximize access for young detainees; that ensure access is safe; and that employ appropriately skilled staff have a greater likelihood of being

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credible and effective. They are also embodying in their procedures the rights of this most vulnerable group. While we continue to use criminal justice detention for children and young people, this is essential if we are to protect their rights in detention.

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