

# Submission to the Australian Human Rights Commission's investigation into Youth Justice and Child Wellbeing Reform across Australia

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## About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is leading social justice law and policy centre. Established in 1982, we are an independent, non-profit organisation that works with people and communities who are marginalised and facing disadvantage.

PIAC builds a fairer, stronger society by helping to change laws, policies and practices that cause injustice and inequality. Our work combines:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change and public interest outcomes.

Our priorities include:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for First Nations people
- Access to sustainable and affordable energy and water (the Energy and Water Consumers' Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Improving outcomes for people under the National Disability Insurance Scheme
- Truth-telling and government accountability
- Climate change and social justice.

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The Public Interest Advocacy Centre office is located on the land of the Gadigal of the Eora Nation.

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# 1. Introduction

The Public Interest Advocacy Centre (PIAC) is pleased to provide a submission to this investigation of opportunities for reform of youth justice and related systems across Australia.

We make recommendations on three issues impacting negatively on the rights and wellbeing of children and young people in Australia. Those are:

- the **age of criminal responsibility**, which we recommend be raised in all jurisdictions to at least 14 years of age, without exception;
- the use of **pre-emptive policing tools**, which we recommend should not be used on children and young people; and
- the use of **solitary confinement** in youth justice centres, which we recommend should be subject to more stringent safeguards.

## 2. Age of criminal responsibility

PIAC is a member organisation of the national campaign to Raise the Age of criminal responsibility, and is co-ordinating the Raise the Age campaign within NSW. We are undertaking this work in partnership with a wide range of other groups, including First Nations, legal and human rights, medical, youth, and community services bodies. Key partners include the Aboriginal Legal Service NSW/ACT, Just Reinvest NSW and the Justice Reform Initiative.

PIAC has consistently argued for the minimum age of criminal responsibility to be raised in all jurisdictions around Australia to at least 14 years of age, without exception. This includes in our February 2020 submission to the Council of Attorneys-General Working Group review<sup>1</sup> considering this subject.

The arguments for raising the age, expressed in that submission and elsewhere,<sup>2</sup> are closely aligned with the objectives of the current inquiry, which seeks ‘opportunities for reform of youth justice and related systems across Australia, based on evidence and the protection of human rights’, and ‘ways to reduce children’s involvement in crime, including through prevention and early intervention.’<sup>3</sup> These arguments include:

- *A minimum age of criminal responsibility lower than 14 does not reflect current evidence on child development.* Peak medical groups, including the Royal Australasian College of Physicians (RACP), support the view that the current minimum age of criminal responsibility is inappropriate in light of the physical and neurocognitive vulnerabilities of

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<sup>1</sup> PIAC, ‘Submission to Council of Attorneys-General – Age of Criminal Responsibility Working Group Review’, 28 February 2020, available at <https://piac.asn.au/2020/02/28/submission-to-council-of-attorneys-general-age-of-criminal-responsibility-working-group-review/>

<sup>2</sup> See, for example: PAIC, ‘Submission to NSW Parliamentary Inquiry into the Adequacy of Youth Diversion Programs’, 23 March 2018, available at: <https://piac.asn.au/2018/03/23/submission-to-nsw-parliamentary-inquiry-into-the-adequacy-of-youth-diversion-programs/>

<sup>3</sup> Australian Human Rights Commission, Call for Submissions: Youth Justice and Child Wellbeing Reform across Australia’, <https://humanrights.gov.au/have-your-say/call-submissions-youth-justice-and-child-wellbeing-reform-across-australia>

children in the 10-13 age bracket. From our submission to the Council of Attorneys-General:<sup>4</sup>

The RACP observe that behaviours which typically bring children aged 10 to 13 in conflict with the law are better understood and responded to 'as behaviours within the expected range in the typical neurodevelopment' for this group of children, particularly when considering children whose behaviours arise out of significant past trauma or severe disadvantage.

- *A minimum age of criminal responsibility lower than 14 entrenches children in the criminal justice system, decreasing community safety.* Not only does engaging children aged 10-13 in the criminal justice system not act as a deterrent, it actually increases the likelihood of future offending. In the words of leading Australian criminologist Professor Chris Cunneen:<sup>5</sup>

We... know that a small number of offenders commit a large proportion of detected offences and these tend to be those young people who first appeared in court at an early age. For this reason, it is recognised that criminal justice systems can themselves be potentially criminogenic, with early contact being one of the key predictors of future juvenile offending.

- *A minimum age of criminal responsibility lower than 14 has a disproportionate impact on Aboriginal and Torres Strait Islander children.* Available data shows that Aboriginal and Torres Strait Islander children tend to come into conflict with the law at a younger age than non-Indigenous children. Notably, the greatest over-representation occurs between the ages of 10 and 14.<sup>6</sup>

Disappointingly the over-representation of First Nations children in prison is getting worse, not better, with recent figures from the NSW Bureau of Crime Statistic and Research (BOCSAR)<sup>7</sup> revealing that:

-'56.7% of imprisoned children in NSW are Aboriginal or Torres Strait Islander', and  
-'The number of Aboriginal young people in custody [in NSW] is now 122, an increase of 28.4% in the 12 months to March 2023. Of those Aboriginal young people, 92 (75.4%) were on remand.'

- *A minimum age of criminal responsibility lower than 14 has a disproportionate impact on some of our most vulnerable children.* This includes children and young people experiencing intellectual disability and mental illness, and children and young people who have been in contact with child protection services.

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<sup>4</sup> PIAC, 'Submission to Council of Attorneys-General – Age of Criminal Responsibility Working Group Review', 28 February 2020, 3, available at <https://piac.asn.au/2020/02/28/submission-to-council-of-attorneys-general-age-of-criminal-responsibility-working-group-review/>, drawing on Royal Australasian College of Physicians, 'Submission to the Council of Attorneys-General Working Group Reviewing the Age of Criminal Responsibility', July 2019, 3.

<sup>5</sup> Cunneen, Comparative Youth Penalty Project, 'Arguments for Raising the Minimum Age', 2017, 12.

<sup>6</sup> NSW Parliament, Legislative Assembly, Committee on Law and Safety, 'Adequacy of Youth Diversion Programs', September 2018, [2.76] citing Australian Institute of Health and Welfare, 'Juvenile Justice National Minimum Dataset 2015-16', 2017, Supplementary Tab.

<sup>7</sup> PIAC and Aboriginal Legal Service NSW/ACT, Joint Media Release, 'NSW prisons more unequal than ever with record level of Aboriginal people behind bars', 30 May 2023, available at: <https://piac.asn.au/2023/05/30/nsw-prisons-more-unequal-than-ever-with-record-level-of-aboriginal-people-behind-bars/>

As observed in our submission to the Council of Attorneys-General, raising the minimum age of criminal responsibility would also be consistent with international human rights law, and the situation in comparable countries.<sup>8</sup> Finally, as noted in that submission:<sup>9</sup>

In advocating for the minimum age of criminal responsibility to be raised to at least 14, we are not arguing that actions should not have consequences. Rather, that those consequences should not be harmful, counter productive, contrary to evidence and unjust... There are many ways in which children can be effectively supported to take responsibility for their actions which avoid the blunt, harmful and criminogenic processes of the criminal justice system... We must move away from a narrative of accountability that emphasises reactive measures and the imposition of penalties and recognise the hard work involved in engagement and diversion and restorative justice processes that address the underlying causes of offending, and ultimately, improve community safety.

For all of these reasons, raising the minimum age of criminal responsibility to at least 14, without exception, would help achieve improved child wellbeing across the country.

### ***Recommendation 1***

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*The age of criminal responsibility be raised in all jurisdictions to at least 14 years of age, without exception.*

## **3. Pre-emptive policing of young people**

### **3.1 Pre-emptive policing in New South Wales**

PIAC has experience representing young people in NSW who have been subjected to two NSW Police Force (**NSWPF**) tools, premised on the 'pre-crime logic of confronting and countering threats before they emerge'<sup>10</sup>. These are the Suspect Targeting Management Plan (**STMP**) and bail compliance checks in the absence of a court ordered enforcement condition.

Pre-emptive policing of young people is harmful and ineffective. This is because:

- It increases interaction with, instead of diverting children from, the criminal justice system. When experienced by children, this early exposure is a key predictor of future involvement with<sup>11</sup> and escalation through the criminal justice system.<sup>12</sup>
- People experience these practices as harassment and discrimination, causing feelings of antipathy and hostility toward police and the criminal justice system. This policing

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<sup>8</sup> PIAC, 'Submission to Council of Attorneys-General – Age of Criminal Responsibility Working Group Review', 28 February 2020, 10-11, available at <https://piac.asn.au/2020/02/28/submission-to-council-of-attorneys-general-age-of-criminal-responsibility-working-group-review/>

<sup>9</sup> Ibid, 11.

<sup>10</sup> Jude McCulloch and Sharon Pickering, 'Pre-Crime and Counter-Terrorism: Imagining Future Crime in the 'War on Terror'' (2009) 49(5) *British Journal of Criminology* 628, 633.

<sup>11</sup> NSW Government, *2022-24 NSW Implementation Plan for Closing the Gap* (Implementation Plan, August 2022) 98 ('*Closing the Gap Implementation Plan*').

<sup>12</sup> UNSW Comparative Youth Penalty Project, *Arguments for Raising the Minimum Age of Criminal Responsibility* (Report, 2017).

‘construct[s] suspect communities’<sup>13</sup> with disproportionate impact on racial and ethnic minorities, particularly First Nations young people.

- It does not support or complement effective therapeutic and diversionary alternatives.
- There is no evidence these initiatives reduce youth crime in Australia.<sup>14</sup>

### 3.2 Suspect Targeting Management Plan

The STMP is a NSW Police policy and program that aims to reduce crime by targeting individuals considered to be at risk of offending. The STMP is both an intelligence tool that uses risk assessment to identify suspects, and a policing program that guides interaction with individuals who are subject to the program.

Concerns about the STMP led to the publication by a coalition of organisations of the 2017 Report, ‘[Policing Young People in NSW: A Study of the Suspect Targeting Management Plan](#)’, analysing the impact of the ‘STMP II’ on young people in NSW.<sup>15</sup> Some of the findings of that report included that:

- The STMP disproportionately targets young people, particularly Aboriginal and Torres Strait Islander people, and has been used against children as young as ten.
- The STMP risks damaging relationships between young people and the police. Young people targeted on the STMP experience a pattern of repeated contact with police in confrontational circumstances such as through stop and search, move on directions and regular home visits. Young people experience the STMP as a pattern of oppressive, unjust policing.
- The STMP has the effect of increasing vulnerable young people’s contact with the criminal justice system. Application of the STMP can be seen to undermine key objectives of the NSW youth criminal justice system, including diversion, rehabilitation and therapeutic justice.
- There is no publicly available evidence that the STMP reduces youth crime.

That report made a number of recommendations, including that NSWPF discontinue applying the STMP to children under 18.

The Law Enforcement Conduct Commission (**LECC**) subsequently commenced an investigation into the STMP, and how police are using it on young people. An interim report was released in January 2020 ([LECC Interim Report](#)), finding that patterns of targeting ‘appear to have led to unreasonable, unjust and oppressive interactions for young STMP targets’.<sup>16</sup> The report also identified that 72% of the young people of the investigation cohort were possibly Aboriginal or Torres Strait Islander.<sup>17</sup>

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<sup>13</sup> Louise Boon-Kuo et al, ‘Policing Biosecurity: Police Enforcement of Special Measures in New South Wales and Victoria during the COVID-19 Pandemic’ (2021) 33(1) *Current Issues in Criminal Justice* 76, 77; Vicki Sentas, *Traces of Terror: Counter-Terrorism, Law, Policing and Race* (Oxford University Press, 2002).

<sup>14</sup> Youth Justice Coalition, *Policing Young People in NSW: A Study of the Suspect Targeting Management Plan* (Report, November 2017) 52.

<sup>15</sup> Ibid.

<sup>16</sup> Law Enforcement Conduct Commission, *An Investigation into the Formulation and Use of the NSW Police Force Suspect Target Management Plan on Children and Young People: Operation Tepito – Interim Report pursuant to Part 6 LECC Act* (Report, January 2020) 11.

<sup>17</sup> Ibid.



### 3.3 Bail compliance checks

The *Bail Act 2013* (NSW) (**Bail Act 2013**) provides that a court can make 'enforcement conditions' to empower police to attend people's homes to check for compliance with bail conditions,<sup>18</sup> which reflects amendments to the former *Bail Act 1978* (NSW) and gives police powers otherwise generally unavailable at law.<sup>19</sup> However, compliance checks are routinely conducted by NSWPF beyond the scope of court ordered enforcement conditions, or in the absence of any such conditions, including against children and young people on bail. For nearly a decade, PIAC has represented clients who have been subject to these 'bail compliance checks' by NSWPF, and we continue to challenge the lawfulness of this practice.<sup>20</sup>

The experiences of our clients is that NSWPF officers regularly enter onto private property to monitor compliance with residence or curfew conditions, without first obtaining an enforcement condition from the court. These checks often occur multiple times a day, and very late at night or in the early hours of the morning. They are experienced by our clients as disruptive and as part of a pattern of targeted police harassment. Regular police attendances at our clients' homes are stigmatising and impinge on their privacy, family and home life. They are particularly disruptive for young people, trying to establish good school and life routines.

In 2022, statistics produced during NSW Budget Estimates showed that, of all bail compliance checks conducted on young people without an enforcement condition during that financial year, 75.6% were conducted on Aboriginal and Torres Strait Islander young people.<sup>21</sup> More recent statistics broken down by Police Area Command, obtained by PIAC through freedom of information laws, are similarly alarming. In Orange, the proportion of bail checks conducted on First Nations people for FY21/22 and FY22/23 were 91.5% and 90.6% respectively.

### 3.4 Alternatives to pre-emptive policing

An effective alternative to pre-emptive policing is to adopt community-led and designed place-based approaches to reduce recidivism.

In 2019, the Productivity Commission suggested that:

[G]overnments need to adopt a place-based approach to the design and delivery of services and programs for families and children... [A] place-based approach involves flexible service provision to find fit-for-purpose solutions that reflect the needs of local communities .... By its nature, a place-based approach relies on engagement between governments and the community to understand the specific issues faced by the community.<sup>22</sup>

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<sup>18</sup> *Bail Act 2013* (NSW) s 30.

<sup>19</sup> See, for example, New South Wales, *Parliamentary Debates*, Legislative Council, 24 October 2012, 1 (The Hon Michael Gallacher, MP); NSW Law Reform Commission, Report 133, *Bail* (2012) at [16.22 – 16.23].

<sup>20</sup> See, for example, <<https://piac.asn.au/2019/03/21/challenge-continues-to-excessive-bail-compliance-checks/>>.

<sup>21</sup> Legislative Council, Parliament of New South Wales, Portfolio Committee No 5 – Regional NSW and Stronger Communities, *Budget Estimates 2022-2023: Responses to Supplementary Questions*, 27 September 2022, 58 <<https://www.parliament.nsw.gov.au/lcdocs/other/17796/ASQON%20-%20Hon%20Paul%20Toole%20MP%20-%20Deputy%20Premier,%20Regional%20NSW,%20Police%20-%20received%2027%20September%202022.pdf>>.

<sup>22</sup> Productivity Commission, *Expenditure on Children in the Northern Territory* (Draft Report, November 2019) 50, cited in Aboriginal Legal Service, Submission to the Council of the Attorneys-General, *Review of the Age of Criminal Responsibility* (3 March 2020) 32.



Rather than being police-led initiatives, these involve genuine partnerships with non-government organisations, police and service providers. The NSW Implementation Plan for Closing the Gap notes that early interventions to support young people need to be community designed and driven and to support health, education and housing.<sup>23</sup>

There have been many successful examples in NSW of place-based approaches to reducing recidivism. Each year, the Maranguka Justice Reinvestment Initiative<sup>24</sup> is estimated to save Bourke's criminal justice system \$3 million, and a KPMG impact assessment in 2018 recorded an increase of 31% in year 12 student retention rates, 38% less charges across the top five juvenile offence categories, 14% less bail breaches and 42% less days spent in custody.<sup>25</sup>

Other examples of place-based approaches in NSW include:

- Dharriwaa Elders Group (Walgett) who have launched an Action Plan to be implemented in partnership with the University of NSW.<sup>26</sup>
- Deadly Connections (Sydney) which seeks to break cycles of disadvantage and trauma to directly address the over-representation of Aboriginal people in the child protection and justice systems, delivering programs including Street Smarts and Breaking the Cycle.<sup>27</sup>
- Weave Youth and Community Services (Sydney) which provides support to children, young people, families and communities facing complex situations and runs programs including Creating Futures and Kool Kids.<sup>28</sup>
- BackTrack (Armidale) which offers holistic, flexible, long-term support to young people aged between 14 and 17 years old who are having a difficult time.<sup>29</sup> A 2021 study conducted a survey of community members in Armidale and found that 75% preferred BackTrack over a greater police presence as a method to reduce youth crime.<sup>30</sup>

## **Recommendation 2**

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*State and territory police forces review their use of pre-emptive policing practices and discontinue applying any practices like the STMP, and conducting bail 'compliance checks' without a court ordered enforcement condition, to young people. This should be reflected in police standard operating procedure documents.*

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<sup>23</sup> NSW Government, *2022-24 NSW Implementation Plan for Closing the Gap* (Implementation Plan, August 2022) 98 ('Closing the Gap Implementation Plan') 99.

<sup>24</sup> Just Reinvest NSW, *Justice Reinvestment in Bourke* <<https://www.justreinvest.org.au/justice-reinvestment-in-bourke/>>.

<sup>25</sup> KPMG, *Maranguka Justice Reinvestment Project: Impact Assessment* (Report, 2018) 6, cited in Aboriginal Legal Service, Submission No 120 to Parliament of New South Wales, *Inquiry into the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody* (15 September 2020) 13.

<sup>26</sup> Dharriwaa Elders Group, *Yuwaya Ngarrali – 'Vision'*

<<https://www.dharriwaaeldersgroup.org.au/index.php/yuwayangarrali>>; UNSW Sydney, Institute for Global Development, *Dharriwaa Elders Group launches a vision for young people in Walgett*

<<https://www.igd.unsw.edu.au/dharriwaa-elders-group-launches-vision-young-people-walgett>>; Ruth McCausland et al, 'CommUNITY-Led development: A partnership to realize Aboriginal Elders' vision for change' (2021) 52(4) *Community Development* 1, 13.

<sup>27</sup> Deadly Connections, <<https://deadlyconnections.org.au/>>; Centre for Crime, Law and Justice, Faculty of Law and Justice, UNSW, 'Replacing the Youth Justice System for Children aged 10 – 13 years in NSW: A 'Best Interests' Response', (September 2021) 26.

<sup>28</sup> Weave Youth and Community Services <<https://www.weave.org.au/#>>.

<sup>29</sup> BackTrack, *What BackTrack Does* <<https://backtrack.org.au/what-we-do/>>.

<sup>30</sup> Kim Edmunds et al, 'Exploring Community-Based Options for Reducing Youth Crime' (2021) 18 *International Journal of Environmental Research and Public Health* 1, 1-2.

### **Recommendation 3**

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*State and territory governments consult with communities and community-led organisations to identify opportunities to expand the availability of programs that take a place-based approach to reducing recidivism, with a focus on young people. Governments should also deliver adequate funding to support the implementation of any such new programs.*

## **4. The use of segregation, separation and confinement in youth justice centres**

In 2018, the NSW Inspector of Custodial Services (**Inspector**) published a report on the use of force, separation, segregation and confinement in NSW juvenile justice centres. The Inspector found that 'confinement is the most prevalent punishment in all [Youth Justice Centres] in NSW. This is despite there being no evidence that supports the use of confinement to effect positive behavioural change.'<sup>31</sup>

We are concerned that Youth Justice NSW relies on segregation, separation and confinement as a form of punishment and behaviour management, when it should be prioritising therapeutic and rehabilitative approaches. In October 2022, the NSW Ombudsman reported a 46% rise in periods of segregation lasting more than 24 hours in youth justice centres during the 2021-22 financial year.<sup>32</sup>

Solitary confinement interferes with child development and can traumatise young people, potentially causing permanent psychological damage which may lead to self-harm, psychosis, and suicide. We currently represent a person who was seventeen years old when subjected to solitary confinement in Cobham Youth Justice Centre in 2016, locked in a cell for 25 days and only allowed half an hour out each day while handcuffed and ankle-cuffed, forced to eat all meals with his hands and punished for trying to communicate with other young people in the centre. Similar concerning practices have been identified in other states and territories, such as recently in Western Australia at the Banksia Hill Detention Centre,<sup>33</sup> and in Queensland at the Cleveland Youth Detention Centre.<sup>34</sup>

Drawing on the Inspector's report and the experiences of our clients, PIAC has identified a number of policy and regulatory improvements we believe should be implemented by Youth Justice NSW and by similar bodies nationally in order to avoid the harmful effects of segregation on young people.

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<sup>31</sup> NSW Inspector of Custodial Services, *Use of force, separation, segregation and confinement in NSW juvenile justice centres* (Report, November 2018) 16.

<sup>32</sup> NSW Ombudsman, *Annual Report 2021 – 2022* (Report, 25 October 2022).

<sup>33</sup> Office of the Inspector of Custodial Services, *2023 Inspection of Banksia Hill Detention Centre and Unit 18 at Casuarina Prison (Part One)* (Report No. 148, May 2023) 15-16.

<sup>34</sup> Ellen Fanning, 'Queensland government may have broken own laws by locking 13yo in detention cell for up to 24 hours a day', *ABC News* (Web Page, 15 March 2023) <<https://www.abc.net.au/news/2023-03-15/qld-youth-crime-human-rights-watch-house-detention/102093378>>.

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**Recommendation 4**

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*State and territory youth justice authorities should decrease their reliance on segregation, separation and confinement in youth justice centres, and should instead prioritise therapeutic and rehabilitative approaches.*

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**Recommendation 5**

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*Any young person subject to a behaviour management plan (such as a Detainee Risk Management Plan (DRMP) in NSW) should be provided with ongoing access to a psychologist. Consultations with a psychologist should occur at a minimum once weekly, or as requested. These consultations should be out of cell, face to face, and for a minimum of half an hour per consultation.*

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**Recommendation 6**

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*State and territory youth justice authorities should develop policies which allow any young person subject to a behaviour management plan (such as a DRMP in NSW) the opportunity for meaningful interaction with other detainees where appropriate.*

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**Recommendation 7**

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*Where a behaviour management plan (such as a DRMP in NSW) involves segregation, six hours of time out of cell per day should be a mandatory minimum. Time out of cell each day should, at a minimum, include one hour of physical activity and time outdoors, and occur between the hours of 8 am and 6 pm.*

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**Recommendation 8**

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*State and territory youth justice authorities should ensure that:*

- a. Young people subject to segregation pursuant to a behaviour management plan (such as a DRMP in NSW) are able to consume meals outside of their room.*
- b. Meals provided to young people in isolation, separation or segregation are nutritious.*
- c. An investigation is undertaken into the provision of cutlery that young people can use, that is not able to be used for self harm.*