



COMMISSION FOR CHILDREN AND YOUNG PEOPLE

4 July 2016
CCYPD/16/412

Ms Megan Mitchell
National Children's Commissioner
Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2001

Dear Ms Mitchell

Re: Submission to the National Children's Commissioner's Review of the Optional Protocol to the Convention against Torture (OPCAT) in the context of Youth Justice Detention Centres

The Victorian Commission for Children and Young People (the Commission) welcomes this opportunity to contribute to the National Children's Commissioner's examination of 'how the special needs and interests of children and young people under the age of 18 in youth justice detention centres could be considered and monitored in a NPM under OPCAT'.

The Commission supports OPCAT ratification by the Australian Government noting this would require the Australian Government, in collaboration with the states and territories, to establish a National Preventative Mechanism (NPM). The establishment of an NPM would enhance the protection of children in detention and the promotion of their rights and best interests, strengthen accountability of those who provide services to vulnerable children, and encourage innovation and best practice through enhanced and more consistent monitoring of children in closed environments around the country.

The Commission supports the establishment of an NPM:

- with the dedicated expertise and resources required to best meet the needs of children
- which has the capacity to investigate complaints, as well as the capacity to undertake robust and regular visiting of places of detention and the monitoring of key data
- whose leaders include Aboriginal people and whose work is guided by Aboriginal community controlled organisations given the significant overrepresentation of Aboriginal children in detention.

Given the terms of reference for this review, this submission focuses on the work of the Commission in relation to youth justice detention and the need for robust and independent monitoring of these services. The Commission notes that the remit of OPCAT extends beyond the detention of individuals accused or convicted of crime.

For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority. (OPCAT, Article 4.2)

If an NPM is established, the Commission supports the adoption of an inclusive definition of 'detention' in relation to children which should include children in youth justice detention, children in the custody of police



in police cells or in police transit, secure welfare services, inpatient mental health services, children in immigration detention and children residing in prisons with their mothers.

The Commission's functions in relation to children in youth justice detention

The *Commission for Children and Young People Act 2012* (CCYP Act) provides for the establishment of the Commission as an independent body with a broad mandate and a wide range of functions. The CCYP Act provides that the Commission is to have a special focus on children who are vulnerable and to promote their best interests. The CCYP Act defines 'vulnerable children and young people' as including:

- a child who is detained awaiting trial, the hearing of a charge or sentence, and
- a person detained in a youth justice centre or a youth residential centre or a child detained in youth justice services.

Under the CCYP Act, the Commission can, in relation to children and young people detained in youth justice services:

- advise government in relation to services
- promote their interests
- monitor and report to Ministers on the effectiveness of strategies
- conduct inquiries.

Consistent with these functions the Commission currently undertakes a range of functions in relation to children in youth justice detention including:

- coordinating an Independent Visitor Program in youth justice centres
- reviewing all Category One Client Incident Reports for children in youth justice detention
- monitoring decisions to transfer children to adult prisons
- undertaking inquiries which examine services provided to children in youth justice detention
- examining the services provided to Aboriginal children and young people who are clients of both out of home care and youth justice services through an ongoing critical review of a sample of children through Taskforce 1000
- advocating for reform to laws, policies and practices which impact on children in youth justice detention
- promoting new child safe standards which apply to a wide range of services, including youth justice services.

The *Charter of Human Rights and Responsibilities Act 2006* (Charter Act) includes in section 10 a right to protection from 'torture and cruel, inhuman or degrading treatment', as well as in sections 23 and 25 specific provisions in relation to children involved in the criminal justice system. As a public authority, the Commission must act in ways which are compatible with the rights articulated in the Charter Act. These rights inform and guide the Commission in relation to the functions described below.

Youth Justice Independent Visitor Program

The Commission has for the past four years conducted an Independent Visitor Program in the Parkville Youth Justice Precinct and, in addition, from 2013 at the Malmsbury Youth Justice Precinct. The Commission recruits, trains and supports volunteers to visit young people in these centres on a monthly basis, and undertake exit interview questionnaires on a fortnightly basis. Through this program, the Commission hears the voice of children and young people in custody, supports them to have issues addressed and identifies ways to improve their experiences of being in custody. Exit interviews with young people give them the opportunity to provide anonymous feedback about their experiences of custody including how they were treated and the programs and services they received.

The Independent Visitor Program has three Koori independent visitors who specifically visit Aboriginal children and young people and undertake exit interviews.

Review of Category One Incident reports

Amendments to section 60A of the CCYP Act which came into effect in March 2016 provide that:

The Secretary must disclose to the Commission any information about an adverse event relating to a child in out of home care or a person detained in a youth justice centre or a youth residential centre if the information is relevant to the Commission's functions.

As required under this provision, the Commission now receives Category One Client Incident Reports relating to children in youth justice detention. The Commission reviews the reports and may request further information about the adverse event described in the report. If the Commission holds significant concerns about services provided to a child, or treatment of that child, the Commission will initiate an inquiry under section 37(1) of the CCYP Act.

Transfer of children to adult prison

Children in Victoria aged 16 and 17 years can be held in, or transferred to, adult prisons. Under current government policy, the Commission must be notified when a 16 or 17 year old is sentenced or transferred to an adult prison. The Commission understands that since 2012, no child under 18 has been transferred to an adult prison¹.

The Commission for Children and Young People sits as an Observer on the Young Offender Transfer Review Group, which monitors the management of all young people transferred from Youth Justice to the adult system.

Undertaking inquiries

The Commission undertakes inquiries in accordance with Part 5 of the CCYP Act with the objective of promoting continuous improvement and innovation in policies and practices relating to the safety and wellbeing of children and young people. The services provided to children while in youth justice detention can be examined in inquiries. Recently the Commission has established an *Inquiry into the use of isolation, separation and lockdown in youth justice centres*. Following the review of a Category One Critical Incident Report the Commission is also conducting an inquiry relating to use of force against an individual young person in a youth justice centre.

Taskforce 1000

In collaboration with the Department of Health and Human Services, the Commissioner for Aboriginal Children and Young People critically reviewed the circumstances of 980 Aboriginal Children and Young People in out of home care during 2014-15. A significant number of these children and young people had also been (or were current) clients of youth justice services, and some had also experienced youth justice detention.

¹ 'From time to time, persons aged 16 or 17 may be transferred from a Youth Training Centre or receive an adult term of imprisonment. The Assistant Commissioner, Sentence Management Branch must be advised of any prisoners under the age of 18 entering the adult prison system. In these instances, the Manager, Sentence Management Unit Operation must advise the Principal Commissioner for Children and Young People and the Principal Practitioner, Department of Human Services. The Aboriginal Commissioner for Children and Young People must also be notified if the prisoner is Aboriginal. In addition, the Young Offenders Transfer Review Group (YOTRG) will inform Victoria Legal Aid (or the young person's legal representative, if known) in the case of the young person being Aboriginal the Victorian Aboriginal Legal Service.' Youth Justice Transfers, Corrections Victoria, Sentence Management Manual available at <http://assets.justice.vic.gov.au/corrections/resources/a8185cb1-1d5a-477e-900e-0e9d9cdf0c1/smm_pt3_youthjusticetransfers.pdf>

The Commission has committed to continuing to critically review ten per cent of Aboriginal children in out of home care (now approximately 1500 children).

Advocating for reform

Consistent with the objectives of the CCYP Act, the Commission promotes reforms to the youth justice service system, drawing upon the information and data collected through the monitoring and inquiries function of the Commission. For example, in January of 2016, the Commissioner for Aboriginal Children and Young People issued a media release highlighting concerns about the high number of children held on remand and called for legislative reforms. The media release said:

"There should be no surprise that many Aboriginal and Torres Strait Islander children and families will not celebrate 26 January tomorrow. Aboriginal children comprise approximately 50 per cent of the nation's youth justice detention population.

"We must urgently address the high rates of Aboriginal children languishing in our youth justice detention centres so that we can all truly feel proud to be Australian", Commissioner Jackomos said.

Aboriginal children in Victoria continue to be removed from home and placed into State care at alarming rates and, despite the overall low numbers in Victoria, continue to be grossly over-represented in the youth justice system.

The Independent Visitors Program (IVP) operated by the Commission for Children and Young People found that 16 per cent of all children and young people detained in the State's youth justice detention centres were Aboriginal when it visited the centres at Parkville and Malmsbury this month."

Child safe standards

In 2015, the Victorian Government introduced compulsory minimum child safe standards for organisations that provide services for children. Government departments, including the Department of Health and Human Services, which has responsibility for youth justice services, are required to comply with the standards². The Commission currently has responsibility to promote capacity building and compliance with the standards and it is anticipated that in future the Commission will also have a role in monitoring compliance with the standards.

Adequacy of current monitoring mechanisms

Are the current oversight, complaints and monitoring mechanisms relating to the treatment and rights of children and young people in detention (youth justice centres and adult facilities) adequate? If not, how could they be improved?

Over the past decade, deficiencies in the monitoring of youth justice detention in Victoria have been identified. The 2010 report by the Victorian Ombudsman, *Whistleblowers Protection Act 2001 Investigation into conditions at the Melbourne Youth Justice Precinct* (October 2010) stated:

The evidence obtained by my office indicates that independent and regular oversight of the Precinct is necessary. Unlike the adult prison system, the Precinct is not subject to inspections by Official Visitors nor is there a central oversight body such as the Office of Correctional Services Review for the Victorian prison system. (p.10)

* * *

² Part 6, *Child Wellbeing and Safety Act 2005*

In addition to improving the youth justice system's internal investigations capacity, it is my view that the youth justice system should be subject to, at least, the same degree of external oversight as the adult correctional system, through the existing Official Visitors system and the Office of Correctional Services Review. The department has since said that it is exploring these options. (p.11)

In 2013 the Ombudsman published a further report on youth justice, this time focusing on the transfer of children to adult prison (*Investigation into children transferred from the youth justice system to the adult prison system*, Ombudsman Victoria (Dec 2013)). In this report the Ombudsman noted:

All of the children transferred in July and August 2012 to Port Phillip Prison were placed in the Charlotte Management Unit. Conditions in the Charlotte Management Unit are very sterile. The children were locked in their cells on their own for 23 hours a day. They were allowed one hour in the exercise yard per day and during that time they were in handcuffs. The children remained in solitary confinement for a number of months. (p.4)

* * *

When asked why handcuffs remained on the boys while they were in the exercise yard the former Operations Manager at Port Phillip Prison stated that at the time, the two exercise yards in the EPA had no 'traps' [trap doors] in the cell door to get the handcuffs on and off. Therefore they remained on throughout the hour they were in the exercise yard.

In addition, the Victorian Human Rights Commission undertook in 2013:

a review for Corrections Victoria and Youth Justice under Section 41(c) of the Charter regarding the transfer of children into adult prisons under the Children, Youth and Families Act 2005. This review provided those agencies with recommendations to improve human rights compliance in relation to the transfer of children into adult prison. A significant proportion of those recommendations have been accepted by the agencies. See page 19 for more information. (*2013 Report on the operation of the Charter of Human Rights and Responsibilities*, p.7).

In response to concerns raised, governments have enhanced the oversight, complaints and monitoring mechanisms relating to the treatment and rights of children and young people in youth justice detention in Victoria. These improvements include the establishment of the Commission with the power to conduct own motion inquiries, the establishment of the Commission's Independent Visitor Program and legislative reforms requiring the provision of adverse event information to the Commission. These changes represent significant enhancements to the monitoring of youth detention.

One way in which to assess the adequacy of the current systems and identify opportunities for improvement is to evaluate the current legislative mandate of the Commission against the expectations of an NPM under the OPCAT. Against these criteria, Victoria:

- scores well in terms of having a dedicated, specialist, independent body with a broad mandate for monitoring some aspects of youth justice including youth detention
- does not fully enshrine in legislation the full scope of powers and functions expected of an NPM.

Specialist expertise in the needs and rights of children

'In relation to the prohibition on torture and cruel, inhuman or degrading treatment or punishment itself, it is recognised that treatment may be cruel, inhuman or degrading for a child when it would not necessarily be so for an adult³.

³ *Monitoring places of detention Fourth Annual Report of the United Kingdom's National Preventive Mechanism 2012-13*
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/291836/npm-ar-report-12-13-web.pdf

At the international level there is an extensive legal framework for the protection of the human rights of children in detention⁴ which recognises that the needs and rights of children are different to those of adults. In particular, the *Convention on the Rights of the Child* provides in Article 3 that the best interests of the child are to be a primary consideration in all actions taken in relation to children and in Article 37 that:

Every child deprived of liberty shall 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.

In their 2008 report to the Australian Human Rights Commission *Implementing the Optional Protocol to the Convention against Torture: Options for Australia*, Professors Richard Harding and Neil Morgan noted that based on international precedents, standards for an NPM under OPCAT:

‘... go beyond identifying individual repression or wrongdoing (though it will include any such matters) to the broad question of whether the category or place of detention is being managed in a way that is decent and equitable.’⁵

As a specialist body with a broad mandate, the Commission is well placed to promote the rights of children and to bring our knowledge and expertise in relation to children, particularly those who are vulnerable, to ask whether the services are being managed ‘in a way that is decent and equitable’.

As the data published by the Youth Parole Board⁶ outlines many of the children in youth justice detention are also current or former clients of child protection services. They also have a range of other vulnerabilities including having a mental illness, disability, and history of drug abuse. More than 60 per cent of those in the 2014 snapshot survey were victims of abuse, trauma or neglect.

In undertaking functions in relation to youth justice detention, the Commission examines how youth justice and other services are responding to the complex needs of children who experience youth detention and is able to identify gaps within and between services for vulnerable children.

Powers and functions

In their report, Professors Richard Harding and Neil Morgan identified the features to be expected of an OPCAT compliant NPM. These included features such as having ‘free and unfettered access to all categories and places of detention’ and access to data. The CCYP Act provides for the Commission to have some, but not all of these features. For example, the Commission has functional independence and is able to publish annual and other reports.

If the Commission were to be used as an OPCAT compliant NPM, a number of additional powers would require consideration:

- An explicit right of access to youth justice centres. The Commission visits youth justice centres on a regular basis through the Independent Visitor Program and by frequent staff and Commissioner visits. This attendance on site is supported by staff at the centres and the Department of Health and Human Services. However, the CCYP Act does not include an express right of access.
- A right to be provided with data and information about the way in which youth justice services are operating. The CCYP Act has recently been amended to enhance the capacity of the CCYP to obtain information about adverse events in relation to children in youth justice detention. This is a welcome

⁴ Report of the High Commissioner for Human Rights on the protection of human rights of juveniles deprived of their liberty, August 2012 http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-26_en.pdf

⁵ <https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/implementing-optional-protocol-convention-against-torture>

⁶ Youth Parole Board Annual Report 2014-15.

change, but the CCYP Act does not explicitly provide an express right of the CCYP to receive other information and data (other than for formal inquiries).

- The capacity to monitor and inspect all places of detention for children and young people.

Examples of good practice

Are there particular examples of good practice in relation to the promotion and safeguarding of children's rights in detention facilities?

Victoria has a number of examples of good practice in relation to the promotion and safeguarding of children's rights in detention facilities. Particular examples of good practice in Victoria include:

- the Independent Visitor Program conducted by the Commission
- the Commission's new role in the monitoring of adverse events, reported as Category One Incidents
- the Charter of Rights for Youth Justice detention which has been developed with young people from youth justice centres who have provided input to the Commission on what is important to them and what they expect during their time in custody.

The work of other agencies, particularly the Victorian Ombudsman, in monitoring youth justice detention through its inquiry reports (noted above) is another example of good practice. For example, the 2014 Ombudsman's report *Investigation into children transferred from the youth justice system to the adult prison system* expressly referenced the Victorian Charter and the Convention on the Rights of the Child.

Children's understanding of the current mechanisms

How do children and young people in detention experience and understand the current oversight, complaints and monitoring mechanisms?

The Commission is not aware of any detailed reviews of how children and young people in detention in Victoria experience and understand the current oversight, complaints and monitoring mechanisms. However, the Commission has some insight as to their perceptions through the comments expressed by the children when speaking to independent visitors. In addition, the Independent Visitor Program has been evaluated recently and the evaluation indicates that the young people are aware of the independent visitor process and are confident to use it. Young people and particularly those who have been in youth justice centres more than once, or for extended periods, are very familiar with the program and use it on an ongoing basis.

Children's understanding of their rights

How well do children and young people in correctional detention (youth justice centres and adult facilities) understand their human rights, including those under the Convention on the Rights of the Child? What could be done to better promote the human rights of children in these facilities? How well do staff understand and promote children's rights, including those under the Convention on the Rights of the Child?

The development of the Charter of Rights (noted above) is one way in which the rights of children can be promoted. Staff and management of the youth justice centres were consulted as part of the development of the charter and were supportive of having a youth justice charter.

As part of assisting young people to understand their rights while in a youth justice centre, each young person is provided with a copy of the publication, *What I need to know... Your rights and rules in youth justice custodial centres*, produced by the Department of Health and Human Services. In addition, posters are displayed that promote the role of the Commission, Legal Aid and the Victorian Ombudsman. Each poster contains relevant contact numbers.

Benefits of OPCAT

How could the ratification of OPCAT and the establishment of a NPM benefit children and young people in detention (youth justice centres and adult facilities)?

While there has been increasing recognition in Victoria of the importance of independent monitoring of youth justice centres, ratification of OPCAT and the establishment of an NPM would ensure these mechanisms are not diminished in future, provide guidance on how current systems could be strengthened and create opportunities for establishing strong benchmarks and best practice standards which could then be applied nationally. It would also ensure more consistent monitoring across Australian jurisdictions and across different places of detention.

Areas requiring improvement

Generally, in relation to the monitoring of youth justice detention centres in your jurisdiction, are there any areas that require greater resourcing to operate more effectively?

As noted above, further strengthening of the monitoring mechanisms would be required to ensure Victoria is fully compliant with the principles in OPCAT. Increasing oversight of youth justice is a priority for the Commission in 2016-2017. Of particular importance are aspects of detention that directly impact on the human rights of children, including the use of isolation, lockdowns, separation and restraints.

Given the over-representation of Aboriginal children and young people in youth justice, the Commission will also ensure its monitoring includes issues directly relevant to Aboriginal children.

Age of criminal responsibility

The age of criminal responsibility is 10 years in all Australian jurisdictions. The Convention on the Rights of the Child does not specify what such a minimum age of criminal responsibility should be. However the Committee on the Rights of the Child recommends 12 years of age should be the absolute minimum age. The Committee on the Rights of the Child has noted Australia's non-compliance with this standard and it has recommended Australia raise its minimum age of criminal responsibility. What is your view on this?

The Commission supports an increase in the age of criminal responsibility from the current 10 years of age to at least 12 years of age and has advocated in a number of forums for this change to occur.

The Commissioner for Aboriginal Children and Young People has particularly noted that the low age of criminal responsibility has a significant adverse impact on Aboriginal children and young people.

If you would like to discuss this submission further, please contact Brenda Boland, Chief Executive Officer on 8601 5255 or email brenda.boland@ccyp.vic.gov.au.

Yours sincerely,



Liana Buchanan
Principal Commissioner



Andrew Jackomos PSM
Commissioner for Aboriginal Children and Young People