



Dr Emma Cassar
Commissioner, Corrections Victoria
Corrections Victoria

by email: correctionsregulations@justice.vic.gov.au

Dear  Commissioner

Corrections Regulations 2019

Thank you for your letter dated 27 February 2019 informing us about the public consultation on the proposed Corrections Regulations 2019. The Commission for Children and Young People (the Commission) welcomes the opportunity to comment on the proposed regulations. As you know, as well as having independent oversight of Victoria's youth justice centres, the Commission monitors the safety and wellbeing of any child detained in Victorian adult correctional facilities.

Under Victorian law, in certain circumstances children under 18 years of age may be detained in adult correctional facilities, either as the result of being sentenced to an adult term of imprisonment or following a transfer from youth justice centres, authorised by the Youth Parole Board. We note at the outset that the Commission does not support these legislative provisions.¹ There is a fundamental principle, enshrined in the Convention on the Rights of the Child and United Nations rules relating to juveniles deprived of their liberty, that children should not be held in custody with adults (unless doing so is in a child's best interests).² An important reason for this principle is the negative influence adult prisoners can have on impressionable children in custody, increasing the risk that criminal behaviour will become entrenched. The 2017 *Youth Justice Review and Strategy* by Penny Armytage and Professor James Ogloff AM emphasised that keeping children and adults in custody separate 'should be a priority' and recommended that legislation 'confirm the principle that children aged 10-17 years in custody should be separated from adults'.³

It is well-recognised that, because of children's developmental stage, children who offend have greater potential to rehabilitate than adult prisoners.⁴ However, children need specialised, age-appropriate responses to reduce the risk of further offending and, as the

¹ In 2013, the Victorian Ombudsman recommended that consideration be given to removing the power to transfer children to the adult prison system under s 467 of the *Children, Youth and Families Act 2005*: See *Investigation into children transferred from the youth justice system to the adult prison system*, December 2013.

² Article 37(c) of the Convention on the Rights of the Child; rule 29 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty; rules 13.4 and 26.3 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice. Section 23(1) of Victoria's *Charter of Human Rights and Responsibilities* provides that a child accused of a criminal offence who is detained or a child detained without charge must be segregated from all detained adults.

³ Recommendation 6.23.

⁴ As noted by the Royal Commission into the Protection and Detention of Children in the Northern Territory – see volume 2A, chapter 9, page 42; volume 2B, chapter 27, page 417.

Commission has noted before,⁵ the adult correctional environment is not compatible with the rehabilitative and specialised response children require.

It is also well-recognised that children under the age of 18 in adult prisons are highly vulnerable. Following an investigation in 2013, the Victorian Ombudsman stated that children should not be placed in the adult prison system under any circumstances, because of their vulnerability, including the risk that children 'may be subjected to sexual assaults', and inconsistency with children's Charter rights.⁶ The vulnerability of children in prisons is recognised in the Standard Guidelines for Corrections in Australia, which state that 'special care should be taken with any prisoners under 18 years of age'; that they be placed appropriately 'to ensure their safety'; and that they be provided with programs and services which have 'regard to their age and circumstances'. Those circumstances commonly involve backgrounds including experiences of trauma, abuse and neglect; mental health issues; a history of self-harm or suicidal ideation; disability; and cognitive impairments.

Children in adult corrections also have important rights under the *Charter of Human Rights and Responsibilities Act 2006*. Children convicted of offences must be treated in a way that is appropriate for their age,⁷ and all children are entitled, without discrimination, to such protection as is in their best interests and is needed by them by reason of being a child.⁸

For all of these reasons, it is essential that the position of children in adult corrections is appropriately recognised in the new Corrections Regulations. The regulations must contain appropriate safeguards to ensure that children's safety, wellbeing and rights are protected and their rehabilitation prospects are not diminished. To this end, we suggest the following improvements to the proposed regulations relating to:

- use of restraints
- separation
- classification and placement
- management of prisoner privileges.

Restrict the use of spit protective hoods and use of restraints for lengthy periods

Corrections Victoria proposes that 'spit protective hoods' be included in the list of approved instruments of restraint (proposed regulation 13). The Discussion Paper notes that these are currently used in Victorian prisons and accommodation areas under certain circumstances and that, in practice, their use is subject to oversight and reporting requirements.

The Commission echoes the recommendations of the Royal Commission into the Protection and Detention of Children in the Northern Territory (Royal Commission) and firmly believes spit protective hoods should not be used on children under 18. Their use was banned in the Northern Territory in 2016 immediately following the national outrage at the treatment of children in youth detention brought to light by *Four Corners*. The Royal Commission recommended that this prohibition remain in place,⁹ referring to the potential for the use of spit hoods to cause distress to young people and citing expert evidence that using spit hoods on children and young people is an inhumane practice.¹⁰

The Corrections Regulations 2019 should therefore prohibit the use of spit protective hoods on children. Spitting at staff is, of course, unacceptable and dangerous. However, as the

⁵ See the Commission's 2017-18 Annual Report.

⁶ See *Investigation into children transferred from the youth justice system to the adult prison system*, December 2013.

⁷ Section 23(3).

⁸ Section 17(2).

⁹ Recommendation 13.1.

¹⁰ Volume 2A, chapter 13, page 247.

Royal Commission recommended, 'if spitting by detainees is a concern for staff... other practical alternatives should be investigated to prevent exposure'.¹¹

The Commission also considers it unacceptable to hold a child under 18 years of age in a restraint for a continuous period of more than 18 hours or cumulative period of 36 hours in any 96 hour period, as proposed regulation 15 contemplates. The Corrections Regulations should prohibit the use of instruments of restraint on children under the age of 18 for lengthy periods.

Inappropriate use of restraints can also have detrimental effects on young people over the age of 18, including on their rehabilitation prospects, as developmental changes including the process of brain development continue up until the mid-20s.¹² Force, particularly when used inappropriately, can exacerbate rather than ameliorate young people's challenging behaviour. It can affect young people who have experienced trauma in particular, as the Commission has previously noted:

*In custody, experiences such as being isolated, body searches, threats from others and conflict with peers may trigger memories of abuse, neglect, abandonment or conflict. These are then likely to activate an aggressive or self-harming response.*¹³

In addition to the above suggestions relating to the use of spit protective hoods and the use of other restraints on children for lengthy periods, the Commission recommends that proposed regulation 14(1) include a requirement that the Governor consider the effect of a restraint on a prisoner under the age of 25 years before directing a prison officer to apply an instrument of restraint on a prisoner in this age group.

Include appropriate protections for children subject to separation

The harmful effects of solitary confinement and isolation of children in custody are well-known and have been documented extensively, including in the Royal Commission's report and the Commission's 2017 report, *The Same Four Walls*.¹⁴ As both reports noted, there are certain limited circumstances where *separation* of children in custody may be necessary (for example, where a child or young person's own safety or the safety of another person is at risk), but it should only be used as a last resort and only for the minimum period of time necessary, with proper protections for the person separated and without infringing their Charter rights. Solitary confinement (as defined by the United Nations Standard Minimum Rules for the Treatment of Prisoners – 'the Nelson Mandela Rules') of children – that is, confinement to a cell for 22 hours or more a day without meaningful human contact – is not acceptable.¹⁶

¹¹ Recommendation 13.1.

¹² See, for example, the House of Commons Justice Committee's June 2018 report, *Young adults in the criminal justice system*; the Jesuit Social Service's recent report, *All Alone: Young adults in the Victorian Justice System*; Sawyer, S, Azzopardi, P, Wickremarante, D & Patton, C 2018, 'The age of adolescence', *Lancet Child Adolescent Health*; Volume 1 of the Royal Commission's report, chapter 3 at pages 133-134. This notes the 'clear developmental differences between children, young people and adults' requires 'a tailored response to children and young people exposed to trauma'.

¹³ *The Same Four Walls: Inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system*, page 37.

¹⁴ Also see the Jesuit Social Service's recent report, *All Alone: Young adults in the Victorian Justice System*.

¹⁶ United Nations Standard Minimum Rules for the Treatment of Prisoners ('the Nelson Mandela Rules'), rules 44-45; United Nations Rules for the Protection of Juveniles Deprived of their Liberty, rule 67. The Special Rapporteur in relation to torture and other cruel, inhuman or degrading treatment or punishment uses a similar definition of solitary confinement: 'the physical and social isolation of individuals who are confined to their cells for 22 to 24 hours a

Given the well-known high risk of harm that separation poses to children in custody, we suggest that proposed regulation 32 include the following additions:

- a requirement that, before ordering separation of a prisoner under the age of 18, the Secretary must consider and mitigate any risks that separation may pose to the prisoner by reason of their age or circumstances and whether any alternative measures are reasonably available in the circumstances – noting that this suggested amendment aligns with proposed regulation 32(5), which requires the Secretary to ‘consider any medical and psychiatric conditions of the prisoner’
- a requirement that a sentence management panel consider and address the same matters before making an order extending the period of separation for a child under the age of 18 under proposed regulation 32(8)
- appropriate safeguards to protect the safety and wellbeing of children under 18 who are separated, such as those recently legislated in the Northern Territory in response to the Royal Commission’s recommendations, set out in **Attachment A**.

The Commission would welcome further discussion with Corrections Victoria about the inclusion of appropriate safeguards.

The Jesuit Social Services has also set out, in its recent report *All Alone: Young adults in the Victorian justice system*, the significant harm extended isolation does – and has done in Victorian prisons – to the physical and psychological health and rehabilitation prospects of prisoners aged 18 to 24, including because they are still developing physically and mentally. The report shows the difficulties prisoners in this age group have faced when returning to the community after experiencing extended isolation in prison; that these young people often re-offend; and their re-offending is often more severe than their previous offences. We therefore suggest there are good reasons to consider including prisoners aged 18-24 in the limitations and safeguards suggested above.

Ensure children’s needs and circumstances are taken into account in decisions about classification and placement

As mentioned above, the Standard Guidelines for Corrections in Australia provide that prisoners under 18 years of age should be:

- ‘carefully assessed to determine appropriate placement’¹⁷
- ‘carefully placed to ensure their safety and should be provided with programmes and services appropriate to assessed criminogenic and welfare needs and with regard to their age and circumstances’.¹⁸

Under the proposed regulations, a sentence management panel or the Secretary making decisions about a prisoner’s classification and placement, or developing their sentence plan, may, but is not required to, have regard to any matter relevant to the prisoner’s ‘safe custody and welfare’.¹⁹ We consider that this regulation should be strengthened, to *require* a sentence management panel and the Secretary to consider ‘any matter that is relevant to the safe custody and welfare’ of a prisoner who is under the age of 18, when determining or varying their classification or placement or developing their sentence plan. This is important and necessary as a prisoner’s classification and placement affect not only their safety but also their access to programs to address their offending behaviour. The above Standard Guidelines state children in prison require age-appropriate programs that address their individual criminogenic needs and reduce the risk of their re-offending.

day’: *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 5 August 2011.

¹⁷ Guideline 1.45.

¹⁸ Guideline 1.46.

¹⁹ Proposed regulations 30(1)(b)(vii) and 31.

Ensure children's needs and circumstances are taken into account in decisions about prisoner privileges

Similarly, we consider that the Corrections Regulations 2019 should include a requirement that, if the Secretary is considering restricting privileges available to an individual prisoner or class of prisoners under the age of 18 under proposed regulation 33, the Secretary must consider the prisoner or prisoners' needs and circumstances relating to their age before deciding to restrict their privileges. We are generally supportive of the Secretary having the ability to approve a list of privileges tailored for prisoners under the age 18. However, we note the potential for this power to be exercised to the detriment of prisoners' wellbeing, by restricting the privileges available to them (noting that a prisoner's loss of all the privileges approved in 2018 would effectively create conditions akin to solitary confinement).

If the Commission can provide any further information or otherwise assist, please contact Julie Nesbitt, Manager, Analysis and Strategy on (03) 8601 5818 or at julie.nesbitt@ccyp.vic.gov.au.

Yours sincerely



Liana Buchanan
Principal Commissioner

13 March 2019



Justin Mohamed
**Commissioner for Aboriginal
Children and Young People**

13 March 2019

ATTACHMENT A

Protections under the Northern Territory's *Youth Justice Act 2005* and *Youth Justice Regulations 2006*²⁰

- Separation for the detainee's protection, the protection of another person or the protection of property:²¹
 - must be reported to the CEO and Children's Commissioner as soon as reasonably practicable after the separation
 - cannot exceed 12 hours without the CEO's approval, and approval must be given for each successive 12-hour period
 - cannot exceed 72 consecutive hours.²²
- The detainee must be given an explanation of their rights during separation, as soon as practicable after they are separated.²³
- The detainee must be examined by a medical practitioner within a reasonable time before or after the separation.²⁴
- If the period of separation exceeds three hours, the detainee must be given access to outdoor exercise or recreation for at least 15 minutes of every 3 hours between 8 am and 6 pm.²⁵
- During the separation:
 - Staff must have regular, ongoing and meaningful contact with the detainee to monitor their physical and mental health and wellbeing, encourage the detainee to reintegrate and assist the detainee to deal with the situation that led to the separation.
 - The detainee must be permitted to see family members, medical practitioner, counsellor or psychologist, case worker, lawyer or support person.
 - The detainee must be given access to education and education materials, appropriate recreation materials (e.g. reading), basic human necessities including toilets, food, clear drinking water, showers and sunlight.²⁶
- The detainee must be continuously monitored by closed-circuit TV or physically by a staff member.²⁷
- Staff must make written observations at least every 15 minutes.²⁸
- The superintendent must reassess the decision to separate every two hours.²⁹
- The superintendent must keep a journal recording matters including date and time of the separation, the detainee's name, the reason for the separation, the behavioural and therapeutic measures attempted, the observations, when the detainee was released.³⁰

²⁰ These apply to children under the age of 18 in youth justice centres.

²¹ Separation is not permitted for the management, good order or security of a detention centre: see s 155A.

²² Section 155A(4) and (5).

²³ Section 155A(7). A similar requirement exists in the proposed Corrections Regulations 2019: regulation 32(6).

²⁴ Section 155A(8).

²⁵ Section 155B(d).

²⁶ Section 155B(a)—(c).

²⁷ Regulation 72. Section 488(5) of the *Children, Youth and Families Act 2005* requires that a child or young person isolated in a youth justice facility be closely supervised and observed at intervals of not longer than 15 minutes.

²⁸ Regulation 72. See note above.

²⁹ Regulation 72.

³⁰ Regulation 72. Section 488(6) requires that, when a child or young person in a youth justice facility is isolated, particulars (as prescribed in regulation 32 of the *Children, Youth and Families Regulations 2017*) be recorded in a register.