



New South Wales  
Council for Civil Liberties

**Report on Juvenile Justice  
Legislation and Human Rights in  
Australia**

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### **About NSW Council for Civil Liberties**

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## 1. Introduction

The image you have just seen isn't from Guantanamo Bay... or Abu Ghraib... but Australia in 2015. A boy, hooded, shackled, strapped to a chair and left alone. It is barbaric.<sup>1</sup>

Concerns over human rights standards in Australian juvenile justice centres were brought to national attention with *Four Corners'* recent expose on Don Dale Detention Centre in the Northern Territory. However, these revelations were not unprecedented. After a two-year inquiry, Australian Law Reform Commission's 1997 *Seen and Heard* report presented a number of proposals for reform of juvenile justice processes and detention facilities.<sup>2</sup> 15 years later, the UN Committee on the Rights of the Child ('UNCRC') noted that Australia's juvenile justice system 'still requires substantial reforms for it to conform to international standards.'<sup>3</sup> In 2013, the Australian Human Rights Commission called for a review of the Australian Government's reservations to the Convention on the Rights of the Child. It also recommended ratification of the Optional Protocol to the Convention Against Torture and better monitoring of juvenile justice legislation and policy.<sup>4</sup> These were echoed in a report published by Amnesty International last year, especially to address the overrepresentation of Aboriginal children in detention.<sup>5</sup>

It follows that, while only a small proportion of Australia's youth population has contact with the criminal justice system,<sup>6</sup> there remain serious, yet still unaddressed, concerns about protection of the rights of those who do. This report will evaluate juvenile justice legislation across Australian states and territories in relation to international human rights law. Those areas of law which do not comply with Australia's human rights obligations include: the age of criminal responsibility for young people, mandatory sentencing, detention on remand, discipline, living conditions within detention centres and both national and international mechanisms for investigation of detention facilities. In doing so, the report will highlight how law reform and other practical initiatives may be necessary to better protect the civil liberties and human rights of children throughout all stages of the juvenile justice system; in particular, the right to protection from cruel, inhuman or degrading treatment, freedom from arbitrary detention and the right to a fair trial.

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<sup>1</sup> Caro Meldrum-Hanna, Mary Fallon and Elise Worthington, *Australia's Shame* (26 July 2016), Australian Broadcasting Corporation, <<http://www.abc.net.au/4corners/stories/2016/07/25/4504895.htm>>

<sup>2</sup> Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997).

<sup>3</sup> Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention*, 60<sup>th</sup> sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012) [82].

<sup>4</sup> Australian Human Rights Commission, *Children's Rights Report 2013* (2013) <<https://www.humanrights.gov.au/sites/default/files/document/publication/ChildrenRightsReport2013.pdf>>

<sup>5</sup> Amnesty International, *A Brighter Tomorrow: Keeping Indigenous Kids in the Community and Out of Detention in Australia* (2015)

<[http://www.amnesty.org.au/images/uploads/aus/A\\_brighter\\_future\\_National\\_report.pdf](http://www.amnesty.org.au/images/uploads/aus/A_brighter_future_National_report.pdf)>

<sup>6</sup> Australian Institute of Health and Welfare, *Youth Justice in Australia 2014-15* (April 2016) Australian Government <<http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129554930>> 2.

## 2. United Nations Framework

United Nations treaties relevant to juvenile justice and ratified by Australia (subject to reservations) include:

- The *International Covenant on Civil and Political Rights* ('ICCPR');
- The *Convention on the Rights of the Child* ('CROC'); and
- The *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('CAT').

The Optional Protocol to the CAT, which allows the UN to inspect detention centres, has been signed but not yet ratified by Australia. The Third Optional Protocol to the CROC ('OP3'), which establishes a communications procedure between detained children and the UN, has been neither signed nor ratified by Australia.

It is widely acknowledged that young people in detention require special legislative protection due to their particular needs and vulnerabilities, which necessitate a 'higher duty of care than those for adult offenders'.<sup>7</sup> Accordingly, the UN General Assembly has developed additional standards specific to juvenile justice. These include:

- The *Standard Minimum Rules for the Administration of Juvenile Justice* (the 'Beijing Rules');
- The *Rules for the Protection of Juveniles Deprived of their Liberty* (the 'Havana Rules');
- The *United Nations Guidelines for the Prevention of Juvenile Delinquency* (the 'Riyadh Guidelines'); and
- The *Guidelines for Action on Children in the Criminal Justice System* (the 'Vienna Guidelines').

Key principles in the UN's juvenile justice framework include detention as a last resort and for the shortest appropriate period of time,<sup>8</sup> freedom from unlawful or arbitrary detention,<sup>9</sup> the right to liberty and security,<sup>10</sup> and priority given to the child's best interests.<sup>11</sup>

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<sup>7</sup> Australian Children's Commissioners and Guardians, *Human Rights Standards in Youth Detention Facilities in Australia: The Use of Restraint, Disciplinary Regimes and Other Specified Practices* (2016) <[http://www.childrenscommissioner.nt.gov.au/pdfs/other\\_documents/report-accg-human-rights-the-use-of-restraint-disciplinary-regimes-and-other-specified-practices.pdf](http://www.childrenscommissioner.nt.gov.au/pdfs/other_documents/report-accg-human-rights-the-use-of-restraint-disciplinary-regimes-and-other-specified-practices.pdf)> 4.

<sup>8</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 37 ('CROC'); *United Nations Standard Minimum Rules for the Administration of Juvenile Justice: The Beijing Rules*, GA Res 40/33, UN GAOR, 40<sup>th</sup> sess, 96<sup>th</sup> plen mtg, UN Doc A/RES/40/33 (29 November 1985) r 19.1 ('Beijing Rules'); *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*, GA Res, UN GAOR, 45<sup>th</sup> sess, 68<sup>th</sup> plen mtg, UN Doc A/RES/45/113 (14 December 1990) r 1 ('Havana Rules'); *Guidelines for Action on Children in the Criminal Justice System*, ESC Res 1997/30, UN ESCOR, 36<sup>th</sup> plen mtg (21 July 1997) guideline 18 ('Vienna Guidelines').

<sup>9</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9 ('ICCPR'); CROC art 37(b).

<sup>10</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 9.

### 3. How Does Australia Compare?

Juvenile justice legislation across all Australian states and territories does not fully comply with Australia's human rights obligations under the abovementioned UN treaties, guidelines and general principles. This section will examine these shortcomings in turn.

#### a. Lower and Upper Age of Criminal Responsibility in Juvenile Justice

##### Lower age of criminal responsibility

Article 40(3)(b) of the CROC imposes on its signatories an obligation to treat children convicted of crime in an age-appropriate manner. Rule 4 of the Beijing Rules stipulates that the minimum age of criminal responsibility 'shall not be fixed at too low an age level', and should further account for the child's 'emotional, mental and intellectual maturity.' Though neither instrument sets out a specific minimum age of criminal responsibility, the UNCRC has considered a minimum age below 12 years old to not be 'internationally acceptable.'<sup>12</sup>

Contrary to this recommendation, the minimum age of criminal responsibility in Australia is 10 years old.<sup>13</sup> Some protection is provided for young people at common law by the rebuttable presumption of *doli incapax*, which holds that young people aged 10 up to 14 years do not possess knowledge to form the necessary criminal intent for an offence. The prosecution must rebut the presumption in addition to proving the necessary elements of the offence. Some states and territories have incorporated the *doli incapax* presumption for youth offenders aged 10 up to 14 years into legislation.<sup>14</sup> Statute in New South Wales, Victoria and South Australia is silent on the responsibility of children aged over 10, so the common law will apply.

*Doli incapax* affords some flexibility in the range of matters the court may consider when determining a child's criminal responsibility on the facts of a given case. These include 'the normal level of understanding of a child of that age, conduct surrounding the act, home background, appearance in court and past criminal record.'<sup>15</sup> In NSW the prosecution must meet a high threshold to rebut the presumption. As explained by Newman J in *R v CRH*, 'the evidence relied upon by the prosecution', in establishing that the 'child knew the act was seriously wrong as opposed to naughty', 'must be strong and clear beyond all doubt and contradiction.'<sup>16</sup> However, *doli incapax* still operates in a framework that permits a minimum age of criminal responsibility below that

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<sup>11</sup> CROC art 3.

<sup>12</sup> Committee on the Rights of the Child, *General Comment No. 10: Children's Rights in Juvenile Justice*, 44<sup>th</sup> sess, UN Doc CRC/C/GC/10 (25 April 2007) [32].

<sup>13</sup> Crimes Act 1914 (Cth) s 4M; Criminal Code Act 1995 (Cth) s 7.1; Criminal Code 2002 (ACT) s 25; Children (Criminal Proceedings) Act 1987 (NSW) s 5; Criminal Code Act (NT) s 38(1); Criminal Code Act 1899 (Qld) s 29(1); Young Offenders Act 1993 (SA) s 5; Criminal Code Act 1924 (Tas) s 18(1); Children, Youth and Families Act 2005 (Vic) s 344; Criminal Code Act Compilation Act 1913 (WA) Sch 1 s 29.

<sup>14</sup> Criminal Code Compilation Act 1913 (WA) s 29; Criminal Code Act 1899 (Qld) s 29(2); Criminal Code Act (NT) s 38(2); Criminal Code Act 1924 (Tas) s 18(2); Criminal Code Act 2002 (ACT) s 26(1), (2); Crimes Act 1914 (Cth) s 4N(1), (2).

<sup>15</sup> Thomas Crofts, 'Doli Incapax: Why Children Deserve Its Protection' (2003) 10(3) *Murdoch University Electronic Journal of Law* [8].

<sup>16</sup> *R v CRH* (Unreported, New South Wales Court of Criminal Appeal, Smart, Hidden and Newman JJ, 18 December 1996) [38].

recommended by the UN. Moreover, its discretionary nature has been critiqued by the UNCRC on account that,

‘The assessment of this maturity is left to the court/judge, often without the requirement of involving a psychological expert, and results in practice in the use of the lower minimum age in cases of serious crimes.’<sup>17</sup>

There is a lack of data to empirically test the UNCRC’s critique of how application of *doli incapax* may result in the conviction of children below the age of 14 years of serious crimes. While there were 1,005 children 10-14 in detention across Australia in 2011-12 (equating to 8.3 per 10,000 of that age group),<sup>18</sup> this may include children detained on remand and not just for conviction of serious crime. Still, the UNCRC has encouraged Australia, among other states, to,

‘...increase their lower MACR [minimum age of criminal responsibility] to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level.’<sup>19</sup>

By way of comparison, Australia falls short of both the common and median average age of criminal responsibility internationally, estimated at 13.5 years old.<sup>20</sup> Other countries set the minimum age of criminal responsibility at:

- 12 years old: e.g. Canada, Netherlands, Costa Rica, Turkey, Jamaica, Venezuela, Brazil, Morocco, Afghanistan, Georgia, Belgium, Bolivia, Ecuador, El Salvador
- 13 years old: e.g. Madagascar, Algeria, Guatemala, Dominican Republic, Greece, Guinea
- 14 years old: e.g. Austria, Germany, Italy, Croatia, Serbia, Colombia, Albania, Armenia, Belarus, Chile, Hungary
- 15 years old: e.g. Finland, Iceland, Norway, Sweden, Denmark, Bahrain, Czech Republic
- 16 years old: e.g. Argentina.<sup>21</sup>

### Upper age of criminal responsibility

In addition, Queensland does not comply with the maximum age of responsibility for young people recommended by the UNCRC, being 18 years old.<sup>22</sup> Almost 20 years ago, the Australian Law Reform Commission recommended that the age that a child reaches adulthood should be 18 years in all

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<sup>17</sup> Committee on the Rights of the Child, *General Comment No. 10: Children’s Rights in Juvenile Justice*, 44<sup>th</sup> sess, UN Doc CRC/C/GC/10 (25 April 2007) [30].

<sup>18</sup> Australian Institute of Health and Welfare (Australian Government), *Young People Aged 10-14 in the Youth Justice System 2011-12* (2013) 3.

<sup>19</sup> Committee on the Rights of the Child, *General Comment No. 10: Children’s Rights in Juvenile Justice*, 44<sup>th</sup> sess, UN Doc CRC/C/GC/10 (25 April 2007) [32]

<sup>20</sup> Neal Hazel, *Cross-National Comparison of Youth Justice* (2008) Youth Justice Board of England and Wales, <[http://yjbpublications.justice.gov.uk/Resources/Downloads/Cross\\_national\\_comp\\_summary.pdf](http://yjbpublications.justice.gov.uk/Resources/Downloads/Cross_national_comp_summary.pdf)>.

<sup>21</sup> Don Cipriani, *Children’s Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (Routledge, 1<sup>st</sup> ed, 2016) 97-110.

<sup>22</sup> Committee on the Rights of the Child, *General Comment No. 10: Children’s Rights in Juvenile Justice*, 44<sup>th</sup> sess, UN Doc CRC/C/GC/10 (25 April 2007) [36].

jurisdictions.<sup>23</sup> While most Australian states define that a person will be charged as a minor until they reach 18 years old,<sup>24</sup> this is lowered in Queensland to 17 years old.<sup>25</sup> This gives rise to procedural disadvantages as the levels of formality and technicality of adult trials are considered unsuitable for children at their stage of intellectual, psychological and emotional development.<sup>26</sup> The case of *R v GAM* illustrates the practical consequences of Queensland's maximum age of criminal responsibility in the youth justice system.<sup>27</sup> In that case, the appellant was convicted of a series of offences incurred during a violent burglary. Originally, the only evidence against the appellant was his admission to police. In her judgment, McMurdo P commented,

'Had the appellant been treated as a child consistent with the Convention, as he would have been in every other Australian jurisdiction, he would not have been questioned by police before they had allowed him to speak to a support person who would have been present whilst he was questioned... If the appellant had spoken to his parents before the police interview, he may not have made those unreliable admissions and the resulting unfortunate consequences, including a costly trial and appeal, may have been avoided.'<sup>28</sup>

It is therefore in the interests of fairness and consistency of treatment of young people that Queensland raise its age of criminal majority for young offenders from 17 to 18 years old.

#### **b. Sentencing and Alternatives to Detention**

Article 40 of the CROC delineates the right of the child to legal assistance and fair treatment in an independent and impartial juvenile justice system directed ultimately towards their reintegration in society. Across Australia, diverse programs and mechanisms operate as alternatives to detention, including police warning and cautioning systems,<sup>29</sup> community-based rehabilitation programs and youth justice conferencing.<sup>30</sup> One of the minimum guarantees for children in court proceedings listed in Article 40(2)(b) is for the hearing to account for the child's age, situation and parents or legal guardians. The Beijing Rules further stipulate that, with the objective of protecting the young person's wellbeing and ensuring proportionality of punishment,<sup>31</sup> the gravity of the offence and the needs of both the child and society be further taken into account.<sup>32</sup> The development of sentencing

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<sup>23</sup> Australian Law Reform Commission, above n 2.

<sup>24</sup> *Criminal Code Compilation Act 1913* (WA) sch 1 (1) ('child'); *Children and Young People Act 2008* (ACT) s 11; *Children (Criminal Proceedings) Act 1987* (NSW) s 3; *Youth Justice Act* (NT) s 6(1); *Young Offenders Act 1993* (SA) s 4(1) ("youth"); *Youth Justice Act 1997* (Tas) s 3(1) ("youth"); *Children, Youth and Families Act 2005* (Vic) sch 3 s 2 ('child'); *Young Offenders Act 1994* (WA) s 3 ('young person').

<sup>25</sup> *Youth Justice Act 1992* (Qld) Sch 4 ('child').

<sup>26</sup> Terry Hutchinson, 'Being Seventeen in Queensland: A Human Rights Perspective on Sentencing in Queensland' [2007] 32(2) *Alternative Law Journal* 81.

<sup>27</sup> *R v GAM* [2011] QCA 288.

<sup>28</sup> *R v GAM* [2011] QCA 288 [51].

<sup>29</sup> *Young Offenders Act 1997* (NSW) ss 13, 18, 24; *Youth Justice Act 1992* (Qld) s 11(1); *Young Offenders Act 1993* (SA) ss 6, 8; *Youth Justice Act 1997* (Tas) ss 8-11; *Young Offenders Act 1994* (WA) ss 22, 23.

<sup>30</sup> *Crimes (Restorative Justice) Act 2004* (ACT) ss 22, 51; *Youth Justice Act 2005* (NT) s 84; *Young Offenders Act 1997* (NSW) ss 35, 36, 52; *Youth Justice Act 1992* (Qld) ss 22, 33-38; *Young Offenders Act 1993* (SA) ss 7, 12; *Youth Justice Act 1997* (Tas) ss 13, 14, 16; *Children, Youth and Families Act 2005* (Vic) s 415; *Young Offenders Act 1994* (WA) ss 25, 29.

<sup>31</sup> *Beijing Rules* r 5.1.

<sup>32</sup> *Beijing Rules* r 17.1(a).

guidelines specific to childrens' particular needs and circumstances,<sup>33</sup> and the establishment of specialist children's court services across all Australian states and territories, help ensure the juvenile justice process remains child-centred. Another positive development is the establishment of Koori Courts in children's courts in Victoria and New South Wales for criminal offences, whereby Elders work with magistrates, young Aboriginal people and their families in the sentencing process.<sup>34</sup>

However, mandatory sentencing in Western Australia renders detention the only, and not simply last, resort for young people convicted of certain offences under the *Criminal Code Act Compilation Act 1913* (WA). The Act imposes mandatory minimum sentences on juvenile offenders (defined as having 'reached 16 but not 18 years of age when the offence was committed'<sup>35</sup>) in various circumstances. If, during an aggravated home burglary, a juvenile offender commits,

- murder,
- manslaughter,
- unlawful assault causing death,
- grievous bodily harm,
- sexual offences against a child under 16,
- aggravated indecent assault,
- sexual penetration without consent (including in circumstances of aggravation),
- sexual coercion (including in circumstances of aggravation),
- sexual offences against an incapable person, or
- an attempt to unlawfully kill another,

the court must impose a term of either imprisonment or detention for 3 years (as it thinks fit), notwithstanding the prohibition on mandatory penalties in s 46(5a) of the *Young Offenders Act 1994* (WA).<sup>36</sup> In those circumstances the court must not suspend any term of imprisonment imposed and must record a conviction against the youth offender.<sup>37</sup> Moreover, where they are convicted for

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<sup>33</sup> See, eg, *Youth Justice Act 1992* (Qld) s 150; *Young Offenders Act 1994* (WA) s 46; *Youth Justice Act* (NT) s 81.

<sup>34</sup> Children's Court of Victoria, *Koori Court* (4 September 2016) <<http://www.childrenscourt.vic.gov.au/jurisdictions/koori-court>>; Department of Justice, NSW Government, *NSW Trials Youth Koori Court* (14 November 2014) <<http://www.justice.nsw.gov.au/Pages/media-news/news/2014/NSW-Trials-Youth-Koori-Court-.aspx>>

<sup>35</sup> *Criminal Code Act Compilation Act 1913* (WA) s 1 ('juvenile offender').

<sup>36</sup> *Criminal Code Act Compilation Act 1913* (WA) ss 279(6A)(a)(i), (ii); 280(3)(a)(i), (ii); 281(4)(a)(i), (ii); s 283(3)(a)(i), (ii); 297(6)(a)(i), (ii); s 320(8)(a)(i), (ii); 324(4)(a)(i), (ii); 325(3)(a)(i), (ii); 327(3)(a)(i), (ii); s 328(3)(a)(i), (ii); 330(11)(a)(i), (ii);

<sup>37</sup> *Criminal Code Act Compilation Act 1913* (WA) ss 279(6A)(b)(i), (ii); 280(3)(b)(i), (ii); 281(4)(b)(i), (ii); 283(3)(b), (c); 297(6)(a)(i), (ii); s 320(8)(b)(c). 324(4)(b), (c); 325(3)(b), (c); 327(3)(b), (c); s 328(3)(b), (c); 330(11)(b)(c);

serious assault of a 'public officer', they must be sentenced to a minimum term of imprisonment of 3 months.<sup>38</sup>

These provisions were introduced on the Liberal National Government's promise to be 'tough on crime' and 'ensure that people who break into homes and terrorise and attack innocent people get the punishment they deserve.'<sup>39</sup> However, the Australian Law Reform Commission has argued that mandatory sentencing laws,

'violate the principle of proportionality which requires the facts of the offence and the circumstances of the offender to be taken into account, in accordance with Article 40 of [the CROC]. They also breach the requirement that, in the case of children, detention should be a last resort and for the shortest appropriate period... [The CROC requires] that sentences should be reviewable by a higher or appellate court. By definition, a mandatory sentence cannot be reviewed.'<sup>40</sup>

Mandatory sentencing also circumvents the procedural safeguards for children in legal proceedings contained in the Beijing Rules. It fails to allow for discretion at all stages of proceedings against the child, 'including investigation, prosecution, adjudication and the follow-up of dispositions'.<sup>41</sup> It also fails to ensure restrictions on a young person's liberty are 'limited to the possible minimum' and imposed only after 'after careful consideration'.<sup>42</sup> The Law Council of Australia adds that mandatory sentencing fails to prioritise the child's best interests. This may disproportionately impact children from disadvantaged or marginalized backgrounds, by 'prevent[ing] a court from considering the age, maturity, cultural background and reasons for committing the offence in the rehabilitation process'.<sup>43</sup> As a costly mechanism, critics of mandatory sentencing have suggested the government instead invest funding into educational initiatives directed at preventing crime.<sup>44</sup> This may better protect children's rights in Western Australia's legal process and orient its juvenile justice system towards rehabilitative and preventative, rather than punitive, objectives, in keeping with Article 40 of the CROC.

### **c. Pre-trial Detention**

Rates of unsentenced young people in detention on remand suggest another area where detention may not be a last resort for young people. The negative impact of custodial remand for young people includes: 'detriment to mental health owing to uncertainty of remand'; 'separation from family and community'; 'disruption to education and employment'; 'association with sentenced

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<sup>38</sup> *Criminal Code Act Compilation Act 1913* (WA) s 318(2).

<sup>39</sup> Colin Barnett and Liza Harvey, 'Tough Home Burglary Laws Come Into Force' (Media Release, 1 November 2015) <<https://www.mediastatements.wa.gov.au/Pages/Barnett/2015/11/Tough-home-burglary-laws-come-into-force.aspx>>

<sup>40</sup> Australian Law Reform Commission, above n 2, [19.55].

<sup>41</sup> *Beijing Rules* r 6.1.

<sup>42</sup> *Ibid* r 17.1(b).

<sup>43</sup> Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (May 2014) <[https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/discussion%20papers/MS\\_Discussion\\_Paper\\_Final\\_web.pdf](https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/discussion%20papers/MS_Discussion_Paper_Final_web.pdf)> 25.

<sup>44</sup> Declan Roche, *Mandatory Sentencing* (December 1999) Australian Institute of Criminology <[http://www.aic.gov.au/media\\_library/publications/tandi\\_pdf/tandi138.pdf](http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi138.pdf)>

young offenders’; and ‘greater likelihood of being given a sentence of incarceration.’<sup>45</sup>

Notwithstanding this, young people on remand constitute a significant proportion of the total youth detention population. Across Australia, the number of young people in detention on remand has increased from 20% of all young people in detention in 1981, to approximately 60% in 2008.<sup>46</sup> In 2011-2015, 41% of young people in detention in Western Australia were held on remand; this figure stood even greater at 84% in Queensland.<sup>47</sup> Aboriginal children are overrepresented in rates of custodial remand,<sup>48</sup> being 23 times more likely to be held in detention prior to sentencing than non-Indigenous young people between June 2013 and June 2014.<sup>49</sup>

In light of this, bail legislation also has important consequences for ensuring that detention remains a last resort and children’s specific needs are accounted for. Juvenile Justice NSW credited funding for support staff in courts to facilitate the provision of bail as an important factor for the decline of young people held on remand by 34% (from 434 on a daily average to 286) between 2009-10 and 2014-15.<sup>50</sup> Alternatively, Victoria witnessed a 37% increase of young people on remand in 2014-15 with the introduction of changes to the *Bail Act 1977* in late 2013 making breach of a bail condition an offence.<sup>51</sup> The addition of s 3B to the Act earlier this year has since acknowledged the need to treat children differently with respect to bail by delineating factors a court must take into account when dealing with children. The impact of these amendments for rates of young people on remand in Victoria remains to be seen.

#### **d. Juvenile Justice Centres**

In detention, children must be treated with humanity and with respect for their dignity, and in a manner that responds to their age-specific needs.<sup>52</sup> Earlier this year the Australian Children’s Commissioners and Guardians (‘ACCG’), a coalition of Australian independent child commissioners, guardians and child advocates, published a report highlighting areas of concern for protection of young people’s rights in youth detention facilities Australia-wide.<sup>53</sup> Some of their suggestions for law reform arising out of their report are included in this section.

#### Discipline

Article 37(a) of the CROC protects children in detention from ‘torture or other cruel, inhuman or degrading treatment or punishment’, and prohibits a sentence of capital punishment or life

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<sup>45</sup>Kelly Richards and Lauren Renshaw, *Bail and Remand for Young People in Australia: A National Research Project* (2013) Australian Institute of Criminology

<[http://www.aic.gov.au/publications/current%20series/rpp/121-140/rpp125/05\\_introduction.html](http://www.aic.gov.au/publications/current%20series/rpp/121-140/rpp125/05_introduction.html)>

<sup>46</sup> Ibid.

<sup>47</sup> Australian Children’s Commissioners and Guardians, above n 7, 8.

<sup>48</sup> Kelly Richards and Lauren Renshaw, *Bail and Remand for Young People in Australia: A National Research Project* (2013) Australian Institute of Criminology

<[http://www.aic.gov.au/publications/current%20series/rpp/121-140/rpp125/05\\_introduction.html](http://www.aic.gov.au/publications/current%20series/rpp/121-140/rpp125/05_introduction.html)>15.

<sup>49</sup> Amnesty International, above n 5.

<sup>50</sup> Australian Children’s Commissioners and Guardians, above n 7, 8.

<sup>51</sup> Victorian Council of Social Service, Submission to State Government of Victoria State Budget process, 52.

<sup>52</sup> CROC art 37(c).

<sup>53</sup> Australian Children’s Commissioners and Guardians, above n 7.

imprisonment without possibility of release. Corporal punishment is prohibited across all youth detention centres in Australia. Beyond that however, prohibitions on other punishments are not consistent between states and territories.<sup>54</sup>

Broadly, disciplinary sanctions within detention centres may include warnings or cautions, restrictions on activities (such as leisure or sport) or increased chores and duties.<sup>55</sup> The Northern Territory has the least number of expressly prohibited punishments. Those punishments are, 'striking, shaking or other form of physical violence',<sup>56</sup> 'enforced dosing with a medicine, drug or other substance',<sup>57</sup> 'compulsion to remain in a constrained or fatiguing position',<sup>58</sup> or 'use of approved restraints to restrict normal movement.'<sup>59</sup>

Expressly prohibited punishments in other states include:

- denial of food or drink,<sup>60</sup>
- denial of visitors,<sup>61</sup>
- denial of communication including reading or writing letters or making or receiving telephone calls (subject to confinement),<sup>62</sup>
- treatment that would damage the child's psychological and emotional wellbeing,<sup>63</sup>
- acts that are cruel, inhuman, degrading or intended to humiliate,<sup>64</sup>
- exclusion from cultural or educational programs,<sup>65</sup>
- isolation,<sup>66</sup>
- deprivation of clothing or other essential items,<sup>67</sup>
- deprivation of sleep,<sup>68</sup> or
- the adoption of discriminatory treatment.<sup>69</sup>

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<sup>54</sup> Ibid 26.

<sup>55</sup> Ibid 26.

<sup>56</sup> *Youth Justice Act* (NT) s (3)(a).

<sup>57</sup> Ibid s (3)(b).

<sup>58</sup> Ibid s (3)(c).

<sup>59</sup> Ibid s (3)(d).

<sup>60</sup> *Children (Detention Centres) Act 1987* (NSW) s 22(1)(d).

<sup>61</sup> *Youth Justice Regulation 2003* (Qld) reg 17(d).

<sup>62</sup> *Children (Detention Centres) Act 1987* (NSW) s 22(1)(e); *Youth Justice Regulation 2003* (Qld) reg 17(e), (f).

<sup>63</sup> *Children (Detention Centres) Act 1987* (NSW) s 22(1)(f); *Youth Justice Regulation 2003* (Qld) reg 17(c); *Youth Justice Act 1997* (Tas) s 132(e).

<sup>64</sup> *Children (Detention Centres) Act 1987* (NSW) s 22(1)(g); *Family and Community Services Regulations 2009* (SA) reg 7(c), (g); *Youth Justice Act 1997* (Tas) s 132(d).

<sup>65</sup> *Youth Justice Regulation 2003* (Qld) reg 17(g); *Children, Youth and Families Act 2005* s 487(d)

<sup>66</sup> *Family and Community Services Regulations 2009* (SA) reg 7(b); *Youth Justice Act 1997* (Tas) s 132(a); *Children, Youth and Families Act 2005* (Vic) s 487(a).

<sup>67</sup> *Family and Community Services Regulations 2009* (SA) reg 7(d).

<sup>68</sup> *Family and Community Services Regulations 2009* (SA) reg 7(e)

<sup>69</sup> *Children, Youth and Families Act 2005* s 487(f); *Youth Justice Act 1997* (Tas) s 132 (f).

Only in exceptional circumstances, under Article 37(c) of the CROC, should children be deprived of their right to maintain contact with their family. Under Rule 67 of the Havana Rules, denial of contact with family 'should be prohibited for any purpose.' The Northern Territory is the only jurisdiction in Australia that permits the placing of restrictions on a child's contact with their friends and family as a form of punishment, with policy restricting a child's contact with immediate family 'up to one phone call a week'.<sup>70</sup>

Rule 67 of the Havana Rules expressly prohibits closed or solitary confinement as a form of punishment. Only in Western Australia is confinement expressly permissible for punitive purposes.<sup>71</sup> However, the ACCG suggests that confinement and segregation are used generally across states and territories, albeit inconsistently.<sup>72</sup> For instance, maintenance of 'good order' and 'security' of the centre are used as justifications for confinement in Western Australian, Northern Territory and South Australian legislation.<sup>73</sup> A child can be isolated by the superintendent for up to 24 hours in the Northern Territory,<sup>74</sup> compared to 3 hours in New South Wales (without further Secretary approval),<sup>75</sup> and 2 in Queensland.<sup>76</sup>

Evidently, there remains considerable divergence in the disciplinary punishments permissible (at least expressly) under legislation. A more comprehensive list of prohibited punishments and more consistent regulation of disciplinary measures are desirable to better protect children in detention nationwide from infringements of their rights under the CAT and CROC, regulate staff discretion when making decisions on use of discipline, and ensure greater accountability in the administration of juvenile justice centres.<sup>77</sup>

#### Gaps between law, policy and practice

The ACCG's report surveys states and territories' legislation and policy overseeing juvenile justice. Many of its recommendations point to practical areas, such as insufficient staffing, employee training and funding, which may give rise to human rights concerns in detention facilities. As a result, addressing human rights violations in juvenile justice may not be within the scope of law reform alone. This is illustrated through laws regulating use of force and restraint.

Rule 64 of the Havana Rules permits use of restraint only in 'exceptional cases' only as 'explicitly authorized and specified by law and regulation' once 'all other control methods have been exhausted and failed.' Use of mechanical restraints is permitted across all states and territories, in limited circumstances.<sup>78</sup> The ACCG noted the phrase 'last resort' is often used across legislation and

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<sup>70</sup> Australian Children's Commissioners and Guardians, above n 7, 26, 29.

<sup>71</sup> *Young Offenders Regulations 1994* (WA) Regulation 74.

<sup>72</sup> Australian Children's Commissioners and Guardians, above n 7, 64.

<sup>73</sup> *Youth Justice Act* (NT) s 153(5); *Family and Community Services Regulations 2009* (SA) reg 9.

<sup>74</sup> *Youth Justice Act* (NT) s 153(5).

<sup>75</sup> *Children (Detention Centres) Act 1987* (NSW) s 19(1)(b)

<sup>76</sup> Australian Children's Commissioners and Guardians, above n 7, 64-5.

<sup>77</sup> *Ibid*, 26.

<sup>78</sup> *Ibid* 38.

policy, though 'it is not always clear when this applies to mechanical restraints and it does not appear to be a uniformly understood phrase.'<sup>79</sup>

Queensland exemplifies how this legal terminology can be problematic in its practical implementation. Detention centre staff may only use force if they reasonably believe there are no other options for protection of others at the centre.<sup>80</sup> If they opt to do so, they 'must not use more force than is reasonably necessary.'<sup>81</sup> In 2012, an investigation into use of force in Queensland youth detention identified proportionality of force as a systemic issue. It recommended that reviews of staff training programs consider guidance on the behavior and physical characteristics of young people prior to use of force, justifications for use of force, the technique and amount of force to be used when determining the level of force to apply in a given situation, and debriefing a young person after force has been used on them.<sup>82</sup>

Concerns have also arisen about staffing in juvenile justice centres in the Northern Territory. The ACCG reported that staff at Northern Territory youth detention facilities 'almost unanimously stated that they do not have sufficient training to fulfill their role at the detention centre.'<sup>83</sup> Amnesty International has also reported concerns regarding poor living conditions in Northern Territory youth detention centres:

'Amnesty International heard concerns about the Alice Springs Youth Detention Centre, where young people are only separated from the adult prisoners by an opaque fence (previously only a wire fence). Given the lack of visitor space, young people have to be taken to the visiting block at the adult prison to speak with visitors and are handcuffed on their way to and from the visiting block.'<sup>84</sup>

The ACCG found that neither the Northern Territory nor South Australia provide legislation nor policy for consultation with medical staff in relation to use of force or restraint.<sup>85</sup> Further, they found the Northern Territory does not provide training for officers in de-escalation techniques (as an alternative to resorting to use of restraint).<sup>86</sup> Adequate staffing, training and funding are therefore important supplements to law reform to ensure children's rights are protected in detention.

#### **e. Separation of Adults and Children in Detention**

All Australian states and territories currently have youth-only juvenile detention centres.<sup>87</sup> The development of a separate justice system for young people has been justified on account of

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<sup>79</sup> Ibid.

<sup>80</sup> *Youth Justice Regulation 2003* (Qld) reg 17(6).

<sup>81</sup> *Youth Justice Regulation 2003* (Qld) reg 17(7)(a).

<sup>82</sup> **Systemic** Monitoring and Review Program, *Child Guardian Report: Investigation into the Use of Force in Queensland Youth Detention Centres* (2012) Commission for Children and Young People and Child Guardian <[http://apo.org.au/files/Resource/ccypcg\\_use-of-force-investigation-report\\_2012.pdf](http://apo.org.au/files/Resource/ccypcg_use-of-force-investigation-report_2012.pdf)>

<sup>83</sup> Australian Children's Commissioners and Guardians, above n 7, 73.

<sup>84</sup> Amnesty International, above n 5.

<[http://www.amnesty.org.au/images/uploads/aus/A\\_brighter\\_future\\_National\\_report.pdf](http://www.amnesty.org.au/images/uploads/aus/A_brighter_future_National_report.pdf)>

<sup>85</sup> Australian Children's Commissioners and Guardians, above n 7, 42, 43.

<sup>86</sup> Ibid 41.

<sup>87</sup> Australian Institute of Health and Welfare, *Youth Justice Remand and Detention Centres* (2016) *Australian Government* <<http://www.aihw.gov.au/youth-justice/remand-and-detention-centres/>>

developmental differences between children and adults,<sup>88</sup> alleviating stigmatisation,<sup>89</sup> and promoting youth-centred rehabilitation programs.<sup>90</sup> Research on the effects of placing children in adult prisons has indicated it is unsafe, with increased risk of physical and sexual violence.<sup>91</sup> It has also been associated with negative effects on social and health factors,<sup>92</sup> and increased risk of reoffending.<sup>93</sup>

However, Australia has made a reservation to Article 10(2)(b) and (3) of the ICCPR, which provide for the separation of young accused persons and juvenile offenders from adults in detention and their treatment 'appropriate to their age and legal status'.<sup>94</sup> This obligation was accepted by Australia 'only to the extent that such segregation is considered by the responsible authorities to be beneficial to the juveniles or adults concerned.'<sup>95</sup> Australia also has not ratified a similar provision in Article 37(c) of the CRC, justified with reference geographical factors including the distance between detention centres and children's families and community:

'the obligation to separate children from adults in prison is accepted only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia.'<sup>96</sup>

The UNCRC has considered this reservation to be 'unnecessary' given Article 37(c) makes separation from adults necessary unless in the best interests of the child to do so.<sup>97</sup> Notwithstanding this, as 17-year-olds in Queensland continue to be included in the adult criminal justice system, they continue also to be placed in adult prisons if convicted. At present, there are approximately 50 17-year-olds in Queensland's adult prisons.<sup>98</sup> A positive development is that, on 15 September 2016, the Palaszczuk Government introduced the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons)*

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<sup>88</sup> Karen Hess, Christine Hess Orthmann and John Paul Wright, *Juvenile Justice: Sixth Edition* (Wadsworth, 2<sup>nd</sup> ed, 2013) xvi.

<sup>89</sup> Gus Martin, *Juvenile Justice: Process and Systems* (Sage Publications, 1<sup>st</sup> ed, 2005) 9.

<sup>90</sup> Ibid.

<sup>91</sup> Kimberly Dodson and John Whitehead, 'Juvenile Justice Ethical Issues: How Should We Treat Juveniles?' in Michael Braswell, Belinda McCarthy and Bernard McCarthy (eds), *Justice, Crime and Ethics* (Elsevier, 8<sup>th</sup> ed, 2015) 349, 356.

<sup>92</sup> Terry Hutchinson, 'Being Seventeen in Queensland: A Human Rights Perspective on Sentencing in Queensland' [2007] 32(2) *Alternative Law Journal* 81.

<sup>93</sup> Kimberly Dodson and John Whitehead, 'Juvenile Justice Ethical Issues: How Should We Treat Juveniles?' in Michael Braswell, Belinda McCarthy and Bernard McCarthy (eds), *Justice, Crime and Ethics* (Elsevier, 8<sup>th</sup> ed, 2015) 349, 354

<sup>94</sup> ICCPR art 10(3).

<sup>95</sup> United Nations, *Multilateral Treaties Deposited with the Secretary-General* (United Nations Publication, 2009) 206.

<sup>96</sup> United Nations, *Multilateral Treaties Deposited with the Secretary-General* (United Nations Publication, 2005) 308.

<sup>97</sup> Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention*, 60<sup>th</sup> sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012) [9].

<sup>98</sup> Anastacia Palaszczuk, Yvette D'Ath and Bill Byrne, '17-year-olds to be Moved to Youth Justice' (Media Release, 7 September 2016) <<http://statements.qld.gov.au/Statement/2016/9/7/17yearolds-to-be-moved-to-youth-justice>>

*Amendment Bill 2016* to Queensland's State Parliament.<sup>99</sup> The purpose of the Bill is to remove 17-year-olds from adult prisons in Queensland. It is due to be debated later this year.

Young people still face the possibility of being placed in adult prisons in other states where the maximum age of criminal responsibility is 18. In Victoria, young people aged 16 years and older may be directed by the Youth Parole Board, on application of the Secretary of the Department of Human Services, to be transferred to an adult prison, based on factors such as young person's behavior, age and maturity.<sup>100</sup> Two children were transferred to prison under this power between 1 July 2014 and 30 June 2015;<sup>101</sup> four children between 1 July 2013 to 30 June 2014; and ten children between 1 July 2012 and 30 June 2013.<sup>102</sup> The Law Institute of Victoria has recommended this provision be amended in order to comply with UN standards by requiring 'paramount consideration to the best interests of the child' in such transfers.<sup>103</sup> In 2013 the Victorian Ombudsman recommended the removal of s 467 altogether.<sup>104</sup>

Of further concern is the potential for powers of transfer to be exercised without court review. In June 2015, John Elferink, the Northern Territory's Minister for Correctional Services at the time, attempted to introduce legislation allowing young offenders to be transferred to adult prisons without court approval.<sup>105</sup> Though ultimately unsuccessful, it demonstrates willingness to dispense with separation of powers, in so doing undermining accountability of government for children under its care. It would also limit scope for consideration of children's best interests in the juvenile justice system.

#### **f. Transparency and Accountability**

There are two important optional UN protocols directed towards independent review of detention facilities and complaints mechanisms for youth in detention respectively. Australia has not ratified either protocol.

##### *Inspection of Detention Centres: OPCAT*

Firstly, Australia has signed but not ratified the OPCAT. The OPCAT provides for the establishment of preventative mechanisms to access and review places where young people are deprived of their liberty, including in detention centres. These preventative mechanisms include regular visits to

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<sup>99</sup> Gail Burke, *New Youth Justice Bill to Move 17yos out of Adult Jails Introduced to Queensland Parliament* (15 September 2016) ABC News <<http://www.abc.net.au/news/2016-09-15/new-youth-justice-bill-introduced-to-qld-parliament/7849364>>

<sup>100</sup> *Children, Youth and Families Act 2005* (Vic) s 467(2)(a), (b).

<sup>101</sup> Victorian Government, *Youth Parole Board Annual Report 2014-15* (2015) vii.

<sup>102</sup> Victorian Government, *Youth Parole Board and Youth Residential Board Victoria Annual Report 2013-14* (2014) 12.

<sup>103</sup> Law Institute of Victoria, *Youth Transfers to Adult Prisons* (10 February 2014) <[https://www.liv.asn.au/pdf/for-lawyers/practice-sections/criminal/20140205\\_final- submission\\_youth-transfers-to-adul.aspx](https://www.liv.asn.au/pdf/for-lawyers/practice-sections/criminal/20140205_final_submission_youth-transfers-to-adul.aspx)> 9.

<sup>104</sup> Victorian Ombudsman, *Investigation into Children Transferred from the Youth Justice System to the Adult Prison System* (2013) <[http://www.parliament.vic.gov.au/file\\_uploads/OV\\_Tabling\\_copy\\_report\\_6cJgmMNb.PDF](http://www.parliament.vic.gov.au/file_uploads/OV_Tabling_copy_report_6cJgmMNb.PDF)> 5.

<sup>105</sup> James Oaten and Katherine Gregory, *Law Change Could See NT Youth Offenders Sent to Adult Prison* (16 June 2015) ABC News <<http://www.abc.net.au/news/2015-06-16/nt-youth-offenders-could-be-sent-to-adult-prison/6550178>>

detention centres by a national body or bodies established by the State Party and the UN Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In doing so, it seeks to protect detained persons from violations of the CAT.

Inspection of juvenile justice facilities are currently administered by the states and territories. Their laws vary on frequency of inspection: at any time,<sup>106</sup> at any reasonable time,<sup>107</sup> at least once every 3 months,<sup>108</sup> or mandatorily at least once every 3 years.<sup>109</sup> They also diverge on the appointment and qualifications of those who conduct the inspections, which may include the Ombudsman's office, visitors appointed by the Minister,<sup>110</sup> justices of the Children's Court,<sup>111</sup> the chief executive of the detention centre,<sup>112</sup> or a custodial inspector appointed by the Governor.<sup>113</sup>

However, there is currently no national mechanism in Australia to investigate conditions in detention. In March 2006, the United Nations Human Rights Committee ('UNHRC') held that Australia was in violation of articles 10 and 24 of the CROC in the case of *Brough v Australia*.<sup>114</sup> Corey Brough, an Aboriginal man with a mild intellectual disability, was 17 years old when he was transferred to and detained in an adult correctional centre in New South Wales. The UNHRC commented on Australia's failure to fulfill their obligation of treating juveniles in detention in a way appropriate to their age and legal status:

'In the circumstances, the author's extended confinement to an isolated cell without any possibility of communication, combined with his exposure to artificial light for prolonged periods and the removal of his clothes and blanket, was not commensurate with his status as a juvenile person in a particularly vulnerable position because of his disability and his status as an Aboriginal. As a consequence, the hardship of the imprisonment was manifestly incompatible with his condition, as demonstrated by his inclination to inflict self-harm and his suicide attempt.'<sup>115</sup>

The UNHRC declared that Mr Brough was entitled to compensation, and 'that Australia has a responsibility to ensure that similar violations did not occur in the future.'<sup>116</sup> UNICEF noted in a submission regarding OPCAT, 'had a NPM [National Preventive Mechanism] existed, the experiences of Mr Brough could potentially have been prevented.'<sup>117</sup>

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<sup>106</sup> *Young Offenders Act 1994* (WA) s 169; *Custodial Inspector Act 2016* (Tas) s 6(1)(b).

<sup>107</sup> *Children (Detention Centres) Act 1987* (NSW) s 8A(4)(a); *Young Offenders Act 1994* (WA) s 169; *Youth Justice Act* s 168(1).

<sup>108</sup> *Youth Justice Act 1992* (Qld) s 263(4).

<sup>109</sup> *Custodial Inspector Act 2016* (Tas) s 6(1)(a).

<sup>110</sup> *Children (Detention Centres) Act 1987* (NSW) s 8A; *Youth Justice Act* (NT) s 168(1); *Young Offenders Act 1994* (WA) s 166(1); *Inspector of Custodial Services Act 2003* (WA) s 41(1).

<sup>111</sup> *Young Offenders Act 1994* (WA) s 169(b).

<sup>112</sup> *Youth Justice Act 1992* s 263(4).

<sup>113</sup> *Custodial Inspector Act 2016* (Tas) ss 5, 6(1)(a).

<sup>114</sup> Human Rights Committee, *Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights: Communication No. 1184/2003*, 86<sup>th</sup> sess, UN Doc CPR/C/86/D/1184/2003 (13-31 March 2006) ('*Brough v Australia*').

<sup>115</sup> *Brough v Australia*, UN Doc CPR/C/86/D/1184/2003 [9.4].

<sup>116</sup> Ray Jackson, Samantha Joseph, Charmaine Smith, 'Brough Justice: Australia Condemned for Human Rights Abuses' (2006) 6(23) *Indigenous Law Bulletin* 5.

<sup>117</sup> UNICEF Australia, Submission to the National Children's Commissioner, Australian Human Rights Commission, 30 May 2016, 31.

The Australian Government has recently indicated it is 'actively considering OPCAT' and consulting with states and territories on its implementation.<sup>118</sup> Ratification of OPCAT would be in the interests of consistency of treatment of Australian children in detention, and the transparency and accountability of Australia's commitment to its human rights obligations under the CAT and other treaties. Ratification would also serve as an important preventative mechanism against human rights abuses, especially in areas of the law where custodial officers and other detention staff are afforded discretion. Notwithstanding the mechanisms already in place for review of detention centres, it is suggested that ratification of OPCAT might address some overlooked gaps in monitoring, 'the key area of significance being detention in police detention facilities.'<sup>119</sup> For example, in 2010, the New Zealand Human Rights Commission highlighted the value of OPCAT for 'identifying issues and situations that are otherwise overlooked, and in providing authoritative assessments of whether new developments and specific initiatives will meet the international standards for safe and humane detention.'<sup>120</sup> Similarly, the United Kingdom has found as a result of OPCAT, 'increased cooperation and coordination among the existing oversight bodies that form their mechanism, including identifying areas of duplication, and setting out the possibilities for cooperative reviews.'<sup>121</sup>

### Complaints Procedure: OP3

Secondly, Australia has neither signed nor ratified the OP3, adopted by the UN General Assembly in 2011. The OP3 is designed to provide a redress mechanism for any violations of the CROC through three procedures. Two of those procedures are designed to allow individuals, groups and States (as against other States) to submit complaints alleging violations of the CROC. The third procedure permits the CROC Committee, 'upon receipt of reliable information, to initiate inquiries into grave or systemic violations by a State party of any of the rights contained in the CROC or its Optional Protocols.'<sup>122</sup> Compared to the OPCAT, the OP3 requires fewer obligations with regards to implementing national institutional infrastructure for its implementation outside of updating relevant laws and policies where necessary.<sup>123</sup>

All Australian states and territories have regulatory mechanisms and bodies established for the investigation, review and reporting of complaints by young people in detention. These include

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<sup>118</sup> Ibid.

<sup>119</sup> *National Interest Analysis* [2012] ATNIA 6 [9].

<sup>120</sup> Human Rights Commission (New Zealand), *Monitoring Places of Detention: Annual Report of Activities under the Optional Protocol to the Convention against Torture (OPCAT)* (2010) <<http://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/NewZealandAnnualReport2010.pdf>> 3.

<sup>121</sup> Australian Human Rights Commission, *Consideration of Australia's ratification of the Optional Protocol to the Convention against Torture* (29 March 2012) <<http://www.humanrights.gov.au/consideration-australia-s-ratification-optional-protocol-convention-against-torture>> [36].

<sup>122</sup> Law Council of Australia, *Third Optional Protocol to the Convention on the Rights of the Child* (10 April 2012) <<https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2613%20-%20Third%20Optional%20Protocol%20to%20Convention%20on%20the%20Rights%20of%20the%20Child.pdf>> [3].

<sup>123</sup> Law Council of Australia, *Third Optional Protocol to the Convention on the Rights of the Child* (10 April 2012) <<https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2613%20-%20Third%20Optional%20Protocol%20to%20Convention%20on%20the%20Rights%20of%20the%20Child.pdf>> [15]-[16].

federal and state children’s commissioners and guardians,<sup>124</sup> the Ombudsman, visitor schemes (in New South Wales and Queensland),<sup>125</sup> and the Office of the Inspector of Custodial Services (Western Australia and New South Wales).<sup>126</sup>

Australia has also signed and ratified similar complaints provisions in:

- The *ICCPR*, through its First Optional Protocol;
- The *Convention on the Elimination of All Forms of Racial Discrimination*, via Article 14; and
- The *CAT*, via Article 22.

These treaties may overlap with grounds for a claim under the CROC. However, OP3 is still an important mechanism worth ratifying in order for protection specific to the needs of young people in juvenile detention facilities to ensure they are treated in accordance with the CROC.

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<sup>124</sup> Australian Institute of Family Studies, *Children’s Commissioners and Guardians* (May 2015) Australian Government <<https://aifs.gov.au/cfca/publications/childrens-commissioners-and-guardians>>

<sup>125</sup> *Youth Justice Act 1992* (Qld) s 277; *Children (Detention Centres) Act 1987* (NSW) s 8A; *Children (Detention Centres) Regulations 2015* (NSW) reg 28(a).

<sup>126</sup> *Inspector of Custodial Services Act 2003* (WA) s 19; *Children (Detention Centres) Regulations 2015* (NSW) reg 28(c).

#### 4. Conclusion

This report has listed various civil liberties and human rights concerns in Australia's juvenile justice framework. They include:

- Setting the minimum age for criminal responsibility below 12 years old,
- Setting the maximum age for criminal responsibility for young people below 18 years old in Queensland,
- Mandatory sentencing in Western Australia,
- Bail legislation and rates of custodial remand,
- Inconsistent prohibitions on punishments between states and territories,
- Imprisonment of young people with adults,
- Staffing concerns at juvenile detention centres, and
- Accountability mechanisms overseeing juvenile detention centres.

A Royal Commission has now been established to investigate the treatment of young people in detention in the Northern Territory and make recommendations that may be of use to other states and territories.<sup>127</sup> The Commission is due to report by 31 March 2017. Law reform and ratification of remaining provisions in the CROC and CAT, as well as the OPCAT and OP3, would be important steps to ensure better compliance with Australia's human rights obligations. The introduction of a national human rights bill could also further entrench the importance of preserving the liberties and fundamental human rights of young people in detention.

However, effective implementation of the law is also dependent on practical considerations such as adequate government funding, improved staff training and broader social and educational initiatives aimed at prevention and rehabilitation. The Vienna guidelines in particular consider communication between a variety of legal and social institutions as necessary not only to protect children in the juvenile justice system, but to divert them from it in the first place. As Guideline 41 states, 'one of the obvious tenets in juvenile delinquency prevention and juvenile justice is that long-term change is brought about not only when symptoms are treated but also when root causes are addressed.'<sup>128</sup>

The overrepresentation of young Aboriginal people in juvenile justice facilities in Australia increases the likelihood that legal issues explored in this report will disproportionately affect Aboriginal communities, and will only continue to without prompt action. Engagement with Aboriginal and Torres Strait Islander communities, guided additionally by the rights and principles contained in the UN Declaration on the Rights of Indigenous Peoples, will also be important to break the cycle of child detention and adult incarceration rates for those communities with scope to improve welfare, health and educational outcomes in the process.

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<sup>127</sup> Malcolm Turnbull and George Brandis, 'Royal Commission into the Child Protection and Youth Detention Systems of the Northern Territory' (Media Release, 28 July 2016) < <https://www.pm.gov.au/media/2016-07-28/royal-commission-child-protection-and-youth-detention-systems-northern-territory> >

<sup>128</sup> *Vienna Guidelines* guideline 41.