Australian Children's Commissioner

RATIFYING OPCAT IN THE CONTEXT OF YOUTH DETENTION

To: **Australian Human Rights Children's Commissioner**
Email: **kids@humanrights.gov.au**
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Contact:
Clara Bradley, Lawyer, Legal Policy
T: (03) 9607 9374
E: cbradley@liv.asn.au
W: www.liv.asn.auwww.liv.asn.au

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INTRODUCTION

The Law Institute of Victoria (LIV) is Victoria's peak body for lawyers and those who work with them in the legal sector. This submission has been prepared by members of the LIV Criminal Law Section and the Administrative Law and Human Rights Section. Our members have a long history of contributing to, shaping and developing effective legislation in various areas of the criminal justice system, and have undertaken extensive past advocacy relating to youth justice in Victoria.

The LIV initiated a working group made up of representatives from various stakeholders, including Jesuit Social Services (JSS), Youthlaw and the Human Rights Law Centre.

This submission is informed by the diverse experience of our members and the working group who work directly with the children and young people that this submission concerns.

RATIFICATION OF OPCAT

Australia signed the Optional Protocol to the Convention against Torture (OPCAT) on 19 May 2009 but has not yet ratified the agreement. Ratifying OPCAT will bring to operational life the United Nations Convention against Torture and other forms of Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). UNCAT and OPCAT prohibits the use of torture but also have a broader application.

Article 16(1) of UNCAT states:

> Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Whilst Australian law already prohibits all forms of torture, ratification of OPCAT would recognise the importance of supporting and strengthening the measures already in place and enhance Australia's commitment to the UNCAT's values and protections. This applies especially to the independent monitoring, oversight and investigation of the treatment of children and young people in detention in Australia. Monitoring places of detention would "achieve a more national and comprehensive approach with a greater ability to identify gaps and issues – particularly to individual Australian jurisdictions."[1]

There is extensive support for the ratification of OPCAT. The Joint Standing Committee on Treaties (JSCOT), a bipartisan committee of Federal Parliament, considered OPCAT ratification and unanimously recommended it. Support for the ratification of OPCAT is widespread. The Australian Human Rights Council (AHRC) and the Law Council of Australia (LCA) have both recommended ratifying OPCAT.[2] In a letter to Attorney-General George Brandis in 2014, 64 diverse bodies argued for the ratification of OPCAT.[3]

In 2012, the Attorney-General's Department found that Australia would benefit from adopting the treaty by demonstrating leadership on human rights issues.[4] The government also believes it is in Australia's national interest to promote adherence to international human rights standards. Ratification would maintain Australia's leadership on human rights outcomes and credibility in calling on other countries to adhere to internationally accepted standards. Australia's existing

[1] Joint Standing Committee on Treaties (JSCOT), *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on 18 December 2002,* Report 125:Treaties Tabled on 7 and 28 February 2012, <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_committees?url=jsct/28february2012/report.htm>

[2] Law Council of Australia (LCA), *Optional Protocol to the Convention Against Torture,* Joint Standing Committee on Treaties, Submission no. 20, 28 February 2012; Richard Harding and Neil Morgan, Australian Human Rights Commission, 'Implementing the Optional Protocol to the Convention Against Torture: Options for Australia', 2008, <https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/implementing-optional-protocol-convention-against-torture>

[3] Civil Liberties Australia, 'Sixty Four Bodies Urge Ratifying of OPCAT' 2014, <http://www.cla.asn.au/News/64-bodies-urge-ratifying-of-opcat/>

[4] Australian Human Rights Commission, *Consideration of Australia's ratification of the Optional Protocol to the Convention against Torture* (29 March 2012).

systems are comparatively strong. It has nothing to fear and much to gain by being open to international scrutiny and building and maintaining domestic arrangements that are exemplars of effective human rights enforcement.[5]

Ratification and implementation will “improve outcomes for detainees in Australia by providing a more integrated and internationally recognised oversight mechanism."[6] As highlighted throughout this submission, a sophisticated oversight mechanism will ensure that the legislative protections for children and young people detained in Victoria's Youth Justice Centres (YJC), and other places where children experience restrictions on their liberty, are adhered to. Ratifying OPCAT provides a valuable opportunity to create a regulatory system that supports a therapeutic approach to youth justice and would enable organisations involved in detention management and oversight to share best practices in managing the children and young people in their care.

[5] Mr Greg Manning, First Assistant Secretary, International Law and Human Rights Division, Attorney-General’s Department, *Committee Hansard,* 7 May 2012, p. 15.
[6] Joint Standing Committee on Treaties (JSCOT), *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on 18 December 2002,* Report 125:Treaties Tabled on 7 and 28 February 2012, 6.8
<http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_committees?url=jsct/28february2012/report.htm>

National Preventative Mechanisms

If Australia ratifies OPCAT, it must commit itself to establishing National Preventative Mechanism(s) (NPM) and must permit the United Nations Subcommittee on the Prevention of Torture (SPT) to visit any place of detention.[7]

At a minimum, a NPM must have the powers to:

- Regularly examine the treatment of detainees
- Make recommendations to authorities to improve the treatment and conditions of detainees and to prevent torture and other ill-treatment, and
- Submit proposals and observations concerning existing or draft legislation.

OPCAT Article 20 requires that States must ensure a NPM has the power to:

- Access all places of detention
- Speak to detainees and others in private
- Choose freely which places to visit and which people to talk to
- Access information on the treatment and conditions of detainees, and
- Access information about detainees and places of detention.

A NPM must be independent of government, of the bodies that are being visited. This requires that it is structurally independent, operationally independent and avoid conflicts of interest in its personnel. OPCAT Art.18 (2) requires that a NPM have required capabilities and professional knowledge; gender balance and adequate representation of ethnic and minority groups; and take into consideration the relevant norms of the UN. This is particularly important for Australia's Aboriginal and Torres Strait Islander children and young people who are overrepresented in Youth Justice Centres and residential care facilities. The LIV strongly recommends that Aboriginal and Torres Strait Islander people are given significant opportunity to provide input into all critical stages of implementation to ensure NPM's are culturally informed and responsive to the needs of these children.

The NPM model can be unitary or mixed, and variants of these models have been adopted in other federal states. A multifaceted approach to NPMs could also be adopted in Australia, for example by using existing State based monitoring bodies such as the Western Australian Office of Inspector of Custodial Services established under the *Prisons Act 1981* (WA), and considering broadening the mandate and increasing the resources of the Australian Human Rights Commission so that it might play a coordinating role.[8]

[7] Professor Richard Harding, Neil Morgan, "Implementing the Optional Protocol to the Convention against Torture: Options for Australia" (2008).
[8] Law Council of Australia (LCA), *Optional Protocol to the Convention Against Torture,* Joint Standing Committee on Treaties, Submission no. 20, 28 February 2012.

VICTORIA'S OVERSIGHT SYSTEM

At the request of the National Children's Commissioner, this submission outlines the Victorian oversight system as it specifically relates to children and young people. In particular, it outlines the various monitoring mechanisms of correctional and care facilities in which children are placed. The analysis focuses on children and young people placed in:

- Youth Justice Centres
- adult prisons
- inclusive and special schools, home schools and other educational settings
- residential care services
- psychiatric facilities
- police cells, and
- immigration detention

Based on this review, the LIV believes that in Victoria there are very few agencies that function in an OPCAT-compliant way.

This submission aims to:

- assist the AHRC to gain an understanding of the Victorian context in which children and young people are detained or held in closed environments
- outline the oversight bodies or processes that exist to monitor children and young peoples' treatment in, and the conditions of, their detention, and
- set out the mechanisms Victoria would require in order to comply with NPM requirements under OPCAT.

Discussion Point One: 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?

Youth Justice Centres

In Victoria there is limited oversight of Youth Justice Centres (YJCs). The Ombudsman has jurisdiction to investigate matters at YJCs,[9] but is not resourced to undertake regular ongoing visits.[10] The Ombudsman reportedly visits each YJC in Victoria every six months; however officers of the Ombudsman are not permitted to speak to children under 16 years of age. The only other regular independent oversight of YJCs is conducted by the Commissioner for Children and Young People (CCYP) Independent Youth Visitor Program (IYVP).

The IYVP is made up of volunteers coordinated by a CCYP staff member. Visitors and the staff member attend at YJCs and observe the environment, speak to the young people and listen to any concerns that they have about their treatment, including their access to education, hygiene and safety. Independent Visitors attend Parkville Youth Justice Centre Precinct on a monthly basis and the YJCs know in advance when the Independent Visitors will be attending. After each visit, they meet with the General Manager of the Centre to discuss their observations and provide feedback on any complaints made by the young people. Within seven days of each visit, the Independent Visitor is required to provide a written report to the Principal Commissioner.

OPCAT requires the NPM must have:

- visits-based jurisdiction.[11]
- access to data as to the number of detainees and the detailed categories and places of detention, as well as all information relating to the treatment of those persons as well as their conditions of detention.[12]
- free and unfettered access to those places it wishes to visit at any given time.[13]
- the right to have private interviews with both detainees and 'persons whom the NPM believes may supply relevant information'.[14]
- the freedom to choose which places it wishes to visit at any given time.[15]
- the right not to be sabotaged or undermined by victimisation or the fear of victimisation'[16] ie: for prison guards not to treat a detainee badly because they reported to the NPM.

[9] *Ombudsman Act 1973* (Vic), 16A.
[10] OPCAT Roundtable held on 18 May 2016, Melbourne (A representative from the Victorian Ombudsman Office noted that the Ombudsman does not have sufficient resources to under regular feedback).
[11] OPCAT, art 4(1) and 19(1).
[12] OPCAT art 20(1), (2).
[13] OPCAT art 20(3).
[14] OPCAT, art 20 (4).
[15] OPCAT, art 20(5).
[16] OPCAT, art 21.

- expert staff that have the required capabilities and professional knowledge. Staff should also adequately represent gender, ethnic and minority groups.[17]
- Government Department representation on an NPM in an advisory capacity only.[18]

In February this year, the CCYP was granted new oversight powers under the *Children, Youth and Families Act 2005* (CYF Act) in order to strengthen transparency and oversight of Victoria's child protection and youth justice system. The new law will require the Department of Health and Human Services (DHHS) to provide the CCYP with reports of serious incidents involving a child or young person in out-of-home care, detained in a youth justice facility or in a youth justice residential centre. Incidents include allegations of physical and sexual assault, illness and accidental injuries requiring hospitalisation, and serious behavioural issues that impact on client or others' safety.

While the LIV welcomes this legislative change, the power conferred on the CCYP is not sufficient in itself to confer NMP duties on CCYP. The current oversight system, the IYVP, is clearly very beneficial and important for the young people detained at YJCs. However, it is not adequate in terms of satisfying OPCAT's requirements for a NPM. There is no formal external reporting or investigation, and the visits occur by agreement of the Centre's management. There are no resources provided or legislative authority for the CCYP to conduct an own-motion investigation or compel entry. It is also not clear that the IYVP operates effectively to ensure that the young detainees are not victimised by the YJC's staff if they ever ask to speak privately with the Independent Visitor from the IYVP.

There is a clear opportunity to better monitor quality and complaints and explore other avenues to support young people to raise and articulate their concerns. The experience of Jesuit Social Services at Perry House, a four bedroom residential service for young people with an Intellectual Disability who have had experience with the criminal justice system, indicates that oversight by Community Visitors delivered by the Office of the Public Advocate helps ensure accountability for good practice and drive holistic, person-centred practice. Community Visitors arrive unannounced and observe, ask questions, talk to residents and review documents, resulting in a report for DHHS.

Victoria could align youth justice complaint mechanisms with complaint mechanisms in the disability sector. This approach is supported by the significant numbers of children and young people who have lower level cognitive functioning or a diagnosed intellectual disability and are incarcerated. This approach ensures that an independent third party (e.g. Office of the Senior Practitioner (Disability)) oversees the management of restrictive intervention practices used by service providers and any compulsory medical treatment administered to the young people. This could include any significant modification of behaviour support plans such as changes to medication regimes or the use of restraints and isolation/solitary confinement.

Children in Adult Prison

The CYF Act permits the transfer of children aged 16 years and over to adult prison, subject to review by the Youth Parole Board.[19] Following the report of a 16 year old Aboriginal boy being

[17] OPCAT art 18(2).
[18] Principles relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights (Paris Principles) (Composition and Guarantees of Independence and Pluralism), art 1(e).

transferred from Parkville Youth Justice Precinct to Port Philip Prison, and held in solitary confinement for a number of months, the Victorian Ombudsman made further enquiries which identified 24 other instances since 2007 where children have been transferred to adult prisons. In 2013, the Ombudsman commenced an own-motion investigation pursuant to section 16A of the *Ombudsman Act 1973* in relation to the transfer of children from the youth justice system to the adult prison system ("The Ombudsman report into Children in Adult Prison").[20]

The Ombudsman report into Children in Adult Prisons focused on three young offenders who were transferred from the youth justice system to the Charlotte Management Unit[21] at Port Philip Prison. After an attempted escape the three offenders were locked in their cells for 23 hours per day. They were in handcuffs during their one hour of isolated exercise per day. These children were given a V1 violence rating (highest risk of violence) and remained in solitary confinement for between 84-99 days. They had meals in their cells and had no access to education or programs while in solitary confinement.[22]

In 2013, the Victoria Equal Opportunity and Human Rights Commission (VEOHRC) undertook a review of Corrections Victoria and Youth Justice under Section 41(c) of the *Charter of Human Rights and Responsibilities Act 2006* (the Charter) regarding the transfer of children into adult prisons. The Commission's review advised that the use of solitary confinement for long periods of time has been found to be degrading treatment. In the case of children, it may not be necessary for the young person to be in solitary confinement for long periods to breach this right. As a principle, solitary confinement should not be used for prisoners under 18 years old.[23]

The monitoring body responsible for overseeing the treatment of young people over the age of 18 years in adult prisons is the Office of Correctional Services Review (OCSR). The OCSR is a business unit within the Department of Justice & Regulation (DJR) and oversees the adult corrections system. The Secretary of DJR is responsible for both Corrections Victoria and the agency responsible for monitoring it, the OCSR. [24] In the LIV's view this inherent conflict significantly limits the effectiveness of OCSR as an oversight body of Corrections Victoria. In addition, reports made by OCSR to Corrections Victoria are not made public, and do not generally involve a consultation process.

The inadequacies of OCSR as a review body over Corrections matters were highlighted in the Ombudsman report into Children in Prison:

- Corrections Victoria had some influence over the terminology used by the OSCR in its report on children and young people in adult prisons. Further, Corrections Victoria initially only accepted five of the thirteen recommendations made by the OSCR. After the OSCR amended several recommendations, Corrections Victoria accepted 10 of the 13 recommendations.

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[19] *Children Youth and Family Act* 2005, s 467.
[20] Ombudsman Report, Investigation into Children Transferred from the Youth Justice System ("*Ombudsman Report into Children in Adult Prisons*"), December 2012.
[21] The Charlotte Management Unit separates prisoners from other prisoners for management, protection or security reasons, pending investigation for an alleged offence.
[22] *Ombudsman Report into Children in Adult Prisons*, 39.
[23] Victorian Equal Opportunity and Human Rights Commission, 2013 Report on the Operation of the Charter of Human Rights and Responsibilities, (2013) 20.
[24] *Ombudsman Report into Children in Adult Prisons*, 40.

- The OSCR is somewhat limited in the recommendations it can make as officers are mindful of Corrections Victoria's resourcing issues.
- OSCR has also advised that it is unable to intervene in operational matters. An OSCR officer has said that "recommendations that require resourcing are always going to be viewed with some difficulty by Corrections Victoria. Again it gets back to the OSCR and Corrections Victoria serve the same master at the end of it all… we are quite restricted in what we can and cannot do".[25]

Following the Ombudsman report into Children in Prison, the LIV made a submission to the then Attorney General Robert Clark, recommending that legislative amendments be made to the CYF Act to provide CCYP with the necessary oversight powers to enable the Commissioner to conduct mandatory investigation and review of any case where the Youth Parole Board has recommended that a young person be transferred to adult prison.

The LIV has been advised that since the Ombudsman's report there have been no children under the age of 18 held in adult prisons.[26] Corrections Victoria and Youth Justice, DHHS have introduced a number of processes that assist in monitoring the placement of young people into the adult system.[27] These reforms include:

1. The Manager, Sentence Management Unit Operation must advise the Principal Commissioner for Children and Young People of any prisoners under the age of 18 entering the prison system. The Aboriginal Commissioner for Children and Young People must be notified if the prisoner is Aboriginal.

2. The Commissioner must now approve all classification decisions of prisoners under the age of 18 years, via the High Risk Management Advisory Panel which has responsibility to agree on management and placement for under 18 years.

3. The Assistant Commissioner, Sentence Management Branch must approve the placement of prisoners over the age of 18 being transferred from YJC, and their management plans.

4. There is now a requirement for DHHS to consult with the Office of the Senior Practitioner, Disability (if the child is subject to a protection order), the Youth Justice Senior Practice Advisor and a requirement to meet with Sentence Management Operations, Corrections Victoria to consider how the young person will be accommodated in adult prison.

5. Following reception, a case conference is convened including Youth Justice, Sentence Management Unit, Disability, Youth and Ageing Corrections Victoria, and relevant prison staff to discuss transition and detailed management of the prisoner.

6. The Youth Offenders Transfer Review Group (including Youth Parole Board, Corrections Victoria, Adult Parole Board, Children's Commissioner and Sentence Management Unit) meet regularly to review the welfare, placement and management of young people under 21 years transferred into the adult system.[28]

While these monitoring processes have been welcomed, the legislative power remains to allow for the transfer of children into adult prisons. In the LIV's submission, this power must be amended to prohibit such transfers from occurring in future. Further, the remit of the above processes does not

[25] *Ombudsman Report into Children in Adult Prisons*, 40
[26] Sue Pennicuik, http://greens.org.au/q-801-young-people-adult-prisons (12 August 2015)
[27] Youthlaw, Victorian Ombudsman, Investigation into the Rehabilitation & Reintegration of Prisoners in Victoria, 17 December 2014, 1.
[28] Youthlaw, Victorian Ombudsman, Investigation into the Rehabilitation & Reintegration of Prisoners in Victoria, 17 December 2014.

extend to 18 to 21 year olds receiving a sentence in an adult prison, rather than a sentence to Youth Training Centre (dual track) or to any 22 to 25 year old prisoners. The above changes do not also address the inherent conflict in OSCR carrying out oversight and investigation into the welfare of children and young people in prison, while being a part of Corrections in DJR. The LIV believes OCSR processes are manifestly inadequate as an OPCAT-compliant NPM.

18-25 Years: People in Management Units and Solitary Confinement

While there are currently no young people under the age of 18 in adult prisons, as of April 2016 there were 738 18-25 year olds in adult prisons.[29] The preferred placement for young male prisoners aged up to 25 years old is Penhyn Unit at Port Phillip facility. Penhyn is maximum security and has capacity for 35 inmates. However, Penhyn suffers from serious overcrowding, and not all under-25 year old men are able to be placed there. To be eligible for Penhyn a young person must be assessed as vulnerable, have a minimal history of prior incarceration in adult prisons, and display a willingness to abide by the unit's rules.[30]

LIV members report that young people between the ages of 18-25 who are not eligible to enter the Penhyn Unit are imprisoned in the adult system. They are either placed with older prisoners in adult units, where they are at very high risk of being assaulted, or they are subject to extra restrictions in the form of solitary confinement (for their own protection) known as "management". In management, few young people are able to access youth-specific support services. LIV members with clients in this situation have advised that being held in management entails being in lockdown for up to 23 hours a day, with little access to programs or activities.

One LIV member reported that she represented two clients' who were involved in a riot in Metropolitan Remand Centre in 2012. The two young men were 18 and 19 years old at the time of the riot. They were both transferred to Barwon Prison, a high security facility, and held in 'management' because of their vulnerability and their offences. The 19 year old was put into lockdown for 23 hours a day and remained there for a year and a half after the riot. The 18 year old was placed in a similar form of solitary confinement for 17 months. The member reported that one of them described that he was starting to confuse what was reality and what was not, because his reality was so confined.

All five young men involved in the riot were sentenced to serve additional months upon their existing sentences. When sentencing each young man, County Court Judge Frank Gucciardo criticised the use of solitary confinement on young prisoners, saying: "I can see it serving no worthy purpose except to punish and degrade, an intent which after a period of time borders on the cruel and inhumane. Our criminal justice system must be better than that."[31] Judge Gucciardo's warnings were disregarded and the young men were placed back into solitary confinement after the hearing.

The LIV believes that this practice can have a devastating, and perhaps permanent, effect on the mental health of these young people. In the LIV's view, this cohort is very vulnerable due to their

[29] Corrections Victoria, *Monthly prisoner and offender statistics* (13 May 2016) Corrections, Prisons & Parole http://www.corrections.vic.gov.au/utility/publications+manuals+and+statistics/monthly+prisoner+and+offender+statistics
[30] Determining a Prisoner's Placement - Sentencing Management Manual (21/01/2014), 9-10.
[31] Australian Broadcasting Corporation, 'Young men back in 'cruel and inhumane' solitary confinement', *AM Program*, 7 March 2014 (Simon Lauder) http://www.abc.net.au/am/content/2014/s3958630.htm

age. Brain development science suggests that most people do not reach full maturity until the age 25. The prison system needs to take into account the effect that developmental maturity can have on their behaviour and recognise the vulnerability of young offenders in terms of environment, social, individual, and health related issues.[32]

The LIV submits that the use of solitary confinement on young people in this way may amount to cruel or inhumane treatment or punishment. In the LIV's view, practices like these should be subject to investigation by an independent monitoring body with powers to enter prisons to inspect them regularly, without requiring permission or cooperation, to obtain documents, conduct interviews with prisoners and make findings and recommendations independent of political or other pressures such as is envisaged under the OPCAT's NPM process.

Young people 18-25 years: Police Cells

The LIV is concerned about the lack of oversight and independent monitoring of young people held in police cells on remand. Victoria is currently facing a crisis of high imprisonment rates and has insufficient infrastructure to meet the need. This has resulted in overcrowding of police cells. In the 2014 Victorian Ombudsman's report *Investigation into deaths and harm in custody*,[33] the Ombudsman found that overcrowding had resulted in police cells designed for overnight or shorter stays being used as de-facto prisons to hold at times in excess of 350 detainees.

Overcrowding presents many issues, including the inability to segregate people:

> [D]ifferent types of detainees have to share cells when they would otherwise be kept separate, for example, young from old, intoxicated persons from others…It impacts negatively on the safety and security of the detainees, often creating unnecessary tension and management issues.[34]

At a 2006 conference *Conditions for Persons in Custody and the Role of the Victorian Ombudsman*, John R Taylor, Deputy Ombudsman Victoria, noted that:

> While Victoria Police are accountable for the welfare of detainees in its watch houses and officers have a duty of care for these persons, there is currently no independent scrutiny of conditions and access to basic services and amenities, nor are they monitored internally in any systematic way. While Victoria Police has established policies and procedures for holding persons in custody, the Ombudsman's Report on Conditions and overcrowding in police cells (May, 2002) showed that detainees in police cells experience inadequate conditions, have limited access to services and amenities and that there is non-compliance with many basic custodial standards.[35]

According to the *Investigation into Deaths and Harm in Custody*:

> Critical incidents and deaths which occur in police cells are subject to independent scrutiny and oversight by the Independent Broad-based Anti-corruption Commission (IBAC). Deaths in police custody are investigated, on behalf of the Coroner, by the Homicide Squad, overseen by Victoria

[32] Youthlaw, Victorian Ombudsman, *Investigation into the Rehabilitation & Reintegration of Prisoners in Victoria,* 17 December 2014, p1.
[33] Ombudsman Report, *Investigation into Deaths and Harm in Custody,* March 2014.
[34] Ibid, 10.
[35] John R Taylor, 'Conditions for Persons in Custody and the Role of the Victorian Ombudsman' (Paper presented at the Australian and New Zealand Society of Criminology 19th Annual Conference, Hobart, 7-9 February 2006)

Police's Professional Standards Command Unit. The IBAC can independently review and monitor such investigations for any emerging issues which may require public reporting.[36]

Young people under 18 years: Police Cells

Under the CYF Act, a child may only be remanded for up to 21 days before being brought to court.[37] The AFP has National Guideline on persons in custody and police custodial facilities[38] specifying that if it is necessary to keep a child or young person in any custodial facility they must be lodged separately from other persons. This requirement is reflected in the CYF Act.[39] However, this requirement raises the same concerns discussed above on the conditions and treatment of young persons held in Management Units in prisons.

The Jesuit Social Services' 2013 report, *Thinking Outside: Alternatives to Remand for Children* (Thinking Outside) [40] noted that children subject to remand, particularly for long periods of time, are among the most at risk within the youth justice system, as measured by the Victorian Offenders Need Inventory for Young people. Despite Victoria's having the lowest rates of children on remand in Australia, *Thinking Outside* concluded that some children are still experiencing remand unnecessarily. *Thinking Outside* found 80 per cent of arrests happened outside of business hours when access to support services is most limited. Twice as many after-hours weekend (40 per cent) as weekday (21 per cent) remand admissions are for one to three days. For weekend admissions, this means a child is remanded on a Saturday or Sunday by a Bail Justice then released on Monday at the next court sitting.

The IYVP does not extend to supervision, oversight or inspection in relation to children or young people held on remand in a facility that is not a youth justice precinct. The National Interest Analysis in 2012 identified that there are, "in Australia many mechanisms in place for oversight and inspection of places of detention… however there are "some gaps in monitoring- the key area of significance being detention in police detention facilities."[41]

The Ombudsman is empowered under the *Ombudsman Act 1973* with the investigation of individual complaints by prisoners about conditions and treatment while in custody, and in addition, may investigate systemic issues or specific concerns. Complainants are also able to make a complaint to the Chief Commissioner of Police, which may be referred to IBAC if it involves serious misconduct. However, there does not seem to be the same level of scrutiny or independent monitoring of police custody as there is of youth detention centres and young people in adult prisons. Regular Independent Visitor visits or monitoring of police cells or vehicles was not mentioned in our consultations with stakeholders. The LIV is concerned that there do not appear to be effective, appropriate or independent oversight of police custody.

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[36] Victorian Ombudsman, *Investigation into deaths and harm in custody*, March 2014, [590].
[37] *Bail Act* s 13(1AA).
[38] Australian Federal Police, *Information Publication Scheme,* https://www.afp.gov.au/sites/default/files/PDF/IPS/AFP%20National%20Guide%20on%20Persons%20in%20Custody%20and%20Police%20Custodial%20Facilities%20and%20People%20in%20Custody%2010MAY2012.pdf
[39] *Children Youth and Families Act* s 347.
[40] Jesuit Social Services, *Thinking Outside: Alternatives to Remand for Children* (2013) <http://jss.org.au/wp-content/uploads/2015/10/Thinking_Outside_Research_Report_-Final_amend_15052013.pdf>
41 National Interest Analysis [2012] ATNIA 6, *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* done at New York on 18 December 2002 [2009] ATNIF 10.

Residential Care Services

LIV members have raised concern for children and young people in residential care units in Victoria. Unlike children in YJCs, children in residential care have not been sentenced or charged for a criminal offence. Yet unfortunately the restrictive environment for children held in residential care is not dissimilar to YJCs.

In August 2015, the CCYP released a report, *"…as a good parent would…"*, into the adequacy of the provision of residential care services to Victorian children and young people who have been subject to sexual abuse or sexual exploitation whilst residing in residential care (the Inquiry). The Inquiry confirmed reports of alleged sexual abuse and sexual exploitation in residential care of children as young as seven. The Inquiry reported the use of surveillance cameras in bedrooms and disproportionate reprisals for bad behaviour.[42] Children in residential care are particularly vulnerable to being exposed to the criminal justice system as their bad behaviour triggers a different response to children that live in the family home. For example, rather than being grounded, a child in residential care can face with explaining their actions to a police officer, with the potential of facing criminal charges for more serious behaviour.

The Inquiry concluded that DHHS does not adequately monitor or enforce compliance with the required practice standards and called for urgent redevelopment of residential care facilities, making nine key recommendations. CCYP recommended that DHHS:

- establish an independent advocate to support children in residential care; and
- establish an independent visitor program to every residential care unit.

In the LIV's view, restrictive environments where young people live should be subject to independent monitoring and investigation in the light of the young person's rights under the Charter as well as under the OPCAT. Currently, monitoring mechanisms of residential care facilities is inadequate and does not comply with NPM requirements.

Immigration detention

The LIV notes that while the scope of this submission is limited to children and young people in youth detention centres, in the context of detention and ratifying OPCAT children and young people detained in immigration detention onshore and offshore must be considered.

Ratifying OPCAT and establishing a national oversight mechanism for immigration detention facilities will enshrine Australia's obligations to protect vulnerable individuals from torture and other cruel and inhuman treatment or punishment to help prevent further future harm, and require Australia to be bound to comply with our obligations under international law.

There are currently several bodies that conduct independent oversight of Australia's immigration detention facilities. The two primary bodies are the AHRC and the Commonwealth Ombudsman. Visits to immigration detention centres are also conducted by the Australian Red Cross and

[42] Commission for Children and Young People, Legislative Assembly, "…as a good parent would…" Inquiry into the adequacy of the provision of residential care services to Victorian children and young people who have been subject to sexual abuse or sexual exploitation whilst residing in residential care, 18 August 2015,103 ("*the Inquiry*").

Amnesty International Australia, UN human rights agencies including the United Nations High Commissioner for Refugees (UNHCR) and a range of civil society groups and individuals.

The monitoring of immigration detention facilities has been "largely ad hoc and, in some cases, lacking in transparency."[43]

Some of the major deficiencies with the current oversight bodies are:

1. A lack of financial resources to engage in systematic monitoring by organisations independent of the government.

2. Reliance on the Government and its contracted managers to gain access to sites of detention.

3. A further barrier or territorial sovereignty for bodies seeking access to sites of detention on Nauru and Manus Island.

4. Confidentiality conditions that inhibit some forms of monitoring.[44]

Financial resources are a major restricting factor on monitoring and oversight bodies. Many immigration detention centres are located in remote parts of the Australian mainland, or offshore on Nauru and Manus Island. Travel costs alone make monitoring difficult.

In addition, the LIV has been informed recently by one of its stakeholders that resourcing issues with one of the major oversight bodies is affecting its ability to effectively carry out the reviewing and monitoring role even in detention centres on the Australian mainland.

The Commonwealth Ombudsman is required under ss 486N and 486O of the *Migration Act 1958* (Cth) to assess the "appropriateness of the arrangements for the detention of a person who has been in detention for two years or more."[45] Despite its mandate to inspect immigration detention centres, the Ombudsman has not had the resources necessary to conduct regular inspection visits of immigration detention centres. Its work has been largely 'complaints driven' and has not been able to fulfil its role as a comprehensive systematic monitoring body.[46]

Recommendations of the AHRC are not binding, but they are useful in shedding light on detention conditions and highlighting concerns that should be addressed. AHRC Human Rights Commissioners have consistently raised concerns about the impacts of detention following these visits and called for an end to mandatory detention.[47] But the expansion of the immigration detention network over the past four years and the lack of adequate resources to continue to visit all sites of detention have resulted in a reduction in the AHRC's monitoring role.

[43] Caroline Fleay, 'The Limitations of Monitoring Immigration Detention in Australia' (2015) 21(1) *Australian Journal of Human Rights*, 26.
[44] Ibid 26.
[45] Commonwealth Ombudsman, *Inquiry into the Circumstances of the Vivian Alvarez Matter*, 6 October 2005.
[46] Richard Harding, *Proposal for Australia to Ratify OPCAT: Submission to the Join Standing Committees on Treaties* 28 February.
[47] See e.g., Australian Human Rights and Equal Opportunity Commission, *A Last Resort? National Inquiry into Children in Immigration Detention* (2004); Australian Human Rights and Equal Opportunity Commission, *Curtin: Observations from Visit to Curtin Immigration Detention Centre and Key Concerns across the Detention Network* (31 March 2013).

The 2015 Moss Review into conditions in the Nauru processing centre found multiple incidents of sexual and physical abuse, which in many instances were going unreported.[48] The Australian Human Rights Commission (AHRC) released a report last year detailing self-harm by children in immigration detention.[49]

Juan Méndez, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment, reported in 2015 that Australia in its immigration detention centres had failed to comply with its obligation "under international customary law, to investigate, prosecute and punish all acts of torture and other cruel, inhuman or degrading treatment or punishment, as codified, inter alia, in the Convention Against Torture (CAT)."[50]

Méndez stated that by failing to provide adequate detention conditions, end the practice of children in detention and put an end to escalating violence and tension, Australia had violated the right of asylum seekers, including children, to be free from torture or cruel, inhuman or degrading treatment, as provided for by Articles 1 and 16 of the CAT.[51]

At a time when the number of incidents of self-harm in immigration detention is increasing, the LIV is of the view that increasing the capacity for independent oversight bodies to properly monitor the conditions and trends is extremely important.

Seclusion and restraint

Disability services

Under the *Disability Act 2006* (Vic) section 140 (use of restraint and seclusion), restrictive practices are lawful if certain necessary conditions are met.

A 2009 report commissioned by the Office of the Senior Practitioner, DHS Victoria, Physical restraint in disability services: Current practices, contemporary concerns, and future directions,[52] outlines the types of restraint and makes a series of recommendations in relation to the use of restraint and seclusion in disability services.[53]

Although the report does not give particular examples of use of restraint on children with disabilities in schools and psychiatric facilities in particular, it does say:

> …with respect to physical restraint, given the known risk of harm to persons with disability and of known risk of death, the following recommendations are made:
>
> - Prone (face down) or 'hobble (hog) tying' restraint must not be used.
>
> - Physical or mechanical restraint that inhibits the respiratory and/or digestive system must not be used.

[48] See, Review into recent allegations *relating to conditions and circumstances at the Regional Processing Centre in* Nauru (Moss Report), (6 February 2015) https://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/review-conditions-circumstances-nauru.pdf
[49] Australian Human Rights Commission, *The Health and Well-being of Children in Immigration Detention*, 16-18 October 2015.
[50] *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez*, 28th session, Agenda item 3, UN Doc A/HRC/28/68 (6 March 2015), [25].
[51] Ibid, [31].
[52] Physical restraint in disability services: Current practices, contemporary concerns, and future directions <http://www.dhs.vic.gov.au/__data/assets/pdf_file/0010/607708/osp_physcialrestraintindisabilityservicescurrentpractices_300309.pdf>
[53] Ibid, 8-10.

- Physical or mechanical restraint that involves compliance through the infliction of pain, hyperextension of joints, and pressure on the chest or joints must not be used.

- 'Takedown' techniques in which the individual is not supported and/or that allows for free fall as the individual goes to the floor must not be used.

- An individual's physical condition must be evaluated throughout the restraint in order to minimise the potential of individual harm or injury.

- Physical restraint must not exceed 30 minutes within any two-hour time period.

- An individual must immediately be released from physical restraint when they no longer present a danger to self or others.

- Support staff must monitor the individual for signs of distress throughout the restraint process and for a period of time (up to two hours) following the application of a restraint.

- Observations that must be conducted and recorded include vital clinical indicators such as pulse, respiration and temperature.

The report notes:

> [T]hat the most recent Australian public enquiry focusing on the needs of persons with disability subject to restraint and seclusion has been that conducted in Queensland by Justice Carter QC (2006). The Carter Report includes documentation concerning 312 people with complex and challenging behaviour identified as currently receiving supported either directly provided by or funded in the non-government sector by Disability Services Queensland (DSQ), and whose challenging behaviour was either being managed by the use of restrictive practices or was at risk of requiring restrictive practices. However, the Carter report does not report figures indicating rates of injury or death as a consequence of the use of restraint or seclusion.

In the LIV's view, it is clear that psychiatric and mental health facilities lack appropriate independent oversight and monitoring of a kind that would satisfy the requirements of a NPM.

Children with disabilities in schools

There is a large amount of evidence that seclusion and restraint practices are being used on children with disabilities in schools. However, there is less formal legislative oversight of these practices, compared to the use of seclusion and restraint in other contexts.

At the Roundtable meeting convened by the National Children's Commissioner in May 2016[54] in which the LIV participated, concerns were raised by some stakeholders about the use of restrictive practices on children in special schools, and some examples were provided indicating severe infringements on children's' rights. The LIV's Disability Law Committee has been concerned about these issues for some time, and has discussed the Australian and international context of restraint and seclusion in schools.

In a 2013 Position Statement: Restrictive Interventions in Educational Settings, the Office of the Public Advocate notes that:

[54] OPCAT Roundtable with Australian Children's Commissioner held on 18 May 2016, Melbourne.

> In Victoria, the use of restrictive interventions in disability residential settings is regulated through the Disability Act 2006. There are limits on how and when restrictive interventions can be used, there are reporting requirements, procedural safeguards and an independent body, the Office of the Senior Practitioner, which monitors the use of restrictive interventions. But in Victorian educational settings, there is a lack of legislative or policy guidance around the use of restrictive interventions. There is no independent oversight or monitoring of the use of seclusion and restraint and there is no legal requirement for a teacher or school in Victoria to report the use of restrictive interventions, other than in the case of the use of 'physical force'.[55]

VEOHRC's Report *Held Back: the experiences of students with disabilities in Victorian schools* includes some data on the incidence of the use of restraint and seclusion in schools.[56] This supports anecdotal evidence published by Children with Disability Australia, which writes that 'reports of aversive and abusive behaviour management practices (viewed by particular schools as appropriate for students with a disability) have been made over many years by students with disability, family members, advocacy groups and legal bodies'.[57]

Australia's Universal Periodic Review 2015 NGO Coalition Factsheet noted that "[t]here is significant concern about the use of restrictive practices in both 'special' and mainstream schools, with reports across Australia that children are being tied to chairs, locked in isolation rooms, being physically restrained and penned in outside areas under the guise of 'behaviour management' policies and practice." [58]

Regulation 15 of the *Education and Training Reform Regulations* 2007 authorises staff to 'take any reasonable action that is immediately required to restrain a student of the school from acts or behaviour dangerous to the member of staff, the student, or any other person.'[59] However, Departmental policy states that:

> Physical restraint has been associated with injury and increased trauma to the student and the staff member responsible for the physical restraint. School staff may only use physical restraint on a student when it is immediately required to protect the safety of the student or any other person, noting that:
>
> - for physical restraint to be immediately required there should be no less restrictive action that could be taken to avert the danger in the circumstances
> - staff should use the minimum force needed to protect against the danger of harm
> - staff should apply the physical restraint for the minimum duration required and remove it once the danger has passed
>
> As with physical restraint, seclusion should only be used when it is immediately required to protect the safety of the student or any other person, as permitted by Regulation 15.[60]

In 2015, the Victorian Government appointed a new Principal Practice Leader (Education) reporting to the Senior Practitioner (Disability) in DHHS. The Principal Practice Leader works with DHHS to develop best practice guidelines and oversees the use of seclusion and restraint in

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[55] Office of the Public Advocate, Position Statement: Restrictive Interventions in Educational Settings, March 2013.
[56] Victorian Equal Opportunity and Human Rights Commission, *Held Back: The Experience of Students with Disabilities in Victorian Schools,* (September 2012),109
[57] Children with Disability Australia, *Enabling and Protecting: Proactive approaches to addressing the abuse and neglect of children and young people with disability*, 13.
[58] People with Disability, *Universal Periodic Review* <http://www.pwd.org.au/issues/periodicreview.html>
[59] *Education and Training Reform Regulations 2007* r 15.

[60] Department of Education and Training, School Policy Advisory Guide, Governance, Safety Response, Restraint of Student at http://www.education.vic.gov.au/school/principals/spag/governance/Pages/restraint.aspx

Victorian Government schools.[61] DHHS also issued new guidelines for schools, *Responding to Violent and Dangerous Student Behaviours of Concern*. The guidelines provide detailed policy guidance on the use of seclusion and restraint on students. The guidelines also require all instances of seclusion and restraint to be reported by teachers to principals, and set out steps the principal must follow after an incident is reported.

The LIV remains concerned about the continued use of seclusion and restraint on children and young people with disabilities in schools in Victoria. While teachers are required to report the use of restrictive practices to principals, there is no mandatory requirement for principals to report to a Departmental authority, e.g. the Principal Practice Leader, or an independent body. This indicates a significant gap in the protection of children and young peoples' rights in a detention-like setting.

In the LIV's view, the use of restrictive practices such as the unplanned use of medications, physical, mechanical and special restraints on children and young people in inclusive and special schools, home schools and other educational settings, even taking into account the reporting and policy guidelines now in place in Victoria, may comply with the definition of torture under Article 1 of the CAT:

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity […]

For this reason, the use of restrictive practices needs to be effectively monitored and oversighted by an independent body, over and above the role of the Principal Practice Leader. Similar to the LIV's submissions above in relation to young people in adult prison, an oversight and reporting framework that is not independent and which reports to the same Department that is responsible for the actions being reported, is not adequate in terms of OPCAT-compliance.

Psychiatric and mental health facilities

Most psychiatric units in hospitals where people are held pursuant to the *Mental Health Act 2014* (Vic) (MHA) use seclusion.[62] On average about five per cent of admissions will have an episode of seclusion, which can range between 15 minutes to three days. The use of seclusion varies between states, but it appears to be highest in Victoria and the Northern Territory.[63]

Under the MHA, seclusion and bodily restraint is referred to as "restrictive intervention". Seclusion means the sole confinement of a person to a room or any other enclosed space from which it is not within the control of the person confined to leave. The MHA sets out the circumstances under which restrictive intervention may be used:

> Section 105: When may a restrictive intervention be used?

[61] *Principle Practice Leader (Education)*, http://www.education.vic.gov.au/about/department/Pages/seniorpractitioner.aspx, Victoria Government.
[62] Australian Broadcasting Corporation, 'Seclusion and restraint: why are they still used in acute mental health care?' *Radio National* May 2014 (Ellen Fanning) http://www.abc.net.au/radionational/programs/lifematters/seclusion-and-restraint3a-why-are-they-still-used-in-acute-men/5421568
[63] Ibid.

A restrictive intervention may only be used on a person receiving mental health services in a designated mental health service after all reasonable and less restrictive options have been tried or considered and have been found to be unsuitable.

Section 110: When may seclusion be used?

A person receiving mental health services in a designated mental health service may be kept in seclusion if seclusion is necessary to prevent imminent and serious harm to the person or to another person.

Section 113: When may a bodily restraint be used?

A bodily restraint may be used on a person receiving mental health services in a designated mental health service if the bodily restraint is necessary—

(a) to prevent imminent and serious harm to the person or to another person; or

(b) to administer treatment or medical treatment to the person.

Further, where a person is authorised under the MHA to be taken to or from a designated mental health service, or any other place, bodily restraint or sedation may be used in accordance with s350 of the MHA.

There are added protections, including that the use of restrictive intervention must be reported to chief psychiatrist,[64] and the use of restraint and seclusion must be authorised (restraint can be used in urgent matters),[65] and monitored.[66]

When the use of a restrictive intervention on a person receiving mental health services in a designated mental health service is authorised or approved, services are under an obligation to ensure that the person's needs are met and the person's dignity is protected by the provision of appropriate facilities and supplies.[67] An authorised psychiatrist must take reasonable steps to notify a nominated person, a guardian, carer, parent (if the person is under the age of 16) as soon as practicable after the restrictive intervention has been used.[68]

The Victorian Government policy has identified seclusion and restraint as a highly intrusive practice that can result in post-traumatic stress disorder, and acknowledges that these practices have been linked to patient deaths.[69]

Several reports have noted the use of restrictive practices in Australia and Victoria:

- In the Australian Law Reform Commission report, *Restrictive practices in Australia*,[70] people with a disability who display 'challenging behaviour' or 'behaviours of concern' may be subjected to restrictive practices in a variety of contexts, including: supported

[64] *Mental Health Act 2014* (VIC) s 108.
[65] *Mental Health Act 2014* (VIC) s 111, 114.
[66] *Mental Health Act 2014* (VIC) s 112, 116.
[67] *Mental Health Act 2014* (VIC) s16.
[68] Mental Health Act 2014 (VIC) s 107.
[69] Australian Government Department of Health 2005, 'National safety priorities in mental health: A national plan for reducing harm.' Canberra.
[70] Australian Law Reform Commission, *Restrictive Practices*, available at <https://www.alrc.gov.au/publications/8-restrictive-practices/restrictive-practices-australia>

accommodation and group homes; residential aged care facilities; mental health facilities; hospitals; prisons; and schools.[71]

- The United Nations Committee on the Rights of Persons with Disabilities (UNCRPD) has stated that it: "is concerned that persons with disabilities, particularly those with intellectual impairment or psychosocial disability, are subjected to unregulated behaviour modification or restrictive practices such as chemical, mechanical and physical restraints and seclusion, in various environments, including schools, mental health facilities and hospitals."[72]
- In the Office of the Public Advocate's 2013 Position Statement, *Seclusion and restraint in mental health facilities*, OPA notes that: "According to the most recent report of the Office of the Chief Psychiatrist, Victoria had 4,265 episodes of seclusion in its mental health facilities in 2011-2012. This constitutes 12% of patients experiencing at least one episode of seclusion. A quarter of the episodes of seclusion lasted for between four and 12 hours."[73]

During the same period, there were 593 episodes of mechanical restraint, the average duration of which was just over six hours. While the overall number of restraint episodes is down from previous years, the overall percentage of patients subject to restraint has not changed and the percentage of people experiencing periods of restraint lasting over 12 hours has increased.[74]

The report, *Use of Restrictive Practices during Admitted Patient Care*,[75] compared rates of seclusion and restraint as between the states and territories, and found that in respect of frequency and duration of seclusion events (collected for the first time in 2013–14), Victoria reported the longest average seclusion duration with an average of 8.0 hours per seclusion event.

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

In April 2016 the Australian Children's Commissioners and Guardians (ACCG), a coalition of independent child commissioners, guardians and advocates from around Australia, released the report *Human Rights Standards in Youth Detention Facilities in Australia: the Use of Restraint,*

[71] See, e.g., Office of the Public Advocate (Qld), Submission 05; Office of the Public Advocate (Vic), Submission 06; Public Interest Advocacy Centre, Submission 41; Central Australian Legal Aid Service, Submission 48; Children with Disability Australia, Submission 68; National Association of Community Legal Centres and Others, Submission 78. See also Victorian Law Reform Commission, Guardianship, Final Report No 24 (2012) 318.
[72] Cited in the Australia Law Reform Commission Discussion Paper, 22 May 2014, *Equality, Capacity and Disability in Commonwealth Laws*, Ch. 8, 'Restrictive Practices in Australia', at https://www.alrc.gov.au/publications/8-restrictive-practices/restrictive-practices-australia
[73] Office of the Public Advocate's 2013 Position Statement, *Seclusion and restraint in mental health facilities* http://www.publicadvocate.vic.gov.au/our-services/publications-forms/38-seclusion-and-restraint-in-mental-health-facilities?path=
[74] Victorian Department of Health, Chief Psychiatrist's Annual Report 2011-2012.
[75] Mental Health Services Australia, *Use of restrictive practices during admitted patent care* <https://mhsa.aihw.gov.au/services/admitted-patient/restrictive-practices/> Australian Institute of Health and Welfare.

Disciplinary Regimes and other Specified Practices (ACCG report).[76] The ACCG report acknowledges Victoria as a model of overall best practice in youth justice.

The CYF Act expressly prohibits the use of isolation in YJC unless it is necessary to prevent a young person from harming themselves or others, damaging property or trying to escape.[77] The CYF Act specifies that isolation must not be used as a form of punishment. If isolation is used, certain processes and procedures are in place to obtain authorisation. Young people in isolation must be on a minimum of close observation (every five minutes) and all isolation must be recorded in a dedicated isolation register. Additional authorisation must be sought in order to cease one episode of isolation and commence a new one. The LIV commends the legislative protections in place that reflect the best practice of a therapeutic approach to rehabilitation. As noted above, an OPCAT-compliant NPM will positively impact compliance of these protective provisions.

The ACCG report further acknowledges Victoria as an example of overall best practice in providing youth justice services, noting Victoria's 2010 youth justice reform that places emphasis on diversion for young offenders; better rehabilitation of high-risk offenders; and expanded pre-release, transition and post-release support programs for young people in custody.[78]

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

The LIV has been informed by service providers that children and young people are advised of their rights in youth detention centres through education programs, posters and staff advice. Groups such as PLEA[79] deliver educational sessions on a voluntary basis. They are also informed when independent visitors from CCYP or the Ombudsman attend YJCs.

Young people in adult prisons have access to the Ombudsman to make a complaint through a free telephone call, and are also visited by the volunteers in the Independent Visitors programs. Phone calls to the Ombudsman are not monitored and staff do not listen to these calls. Letters to and from the Ombudsman are strictly confidential, and must be opened and read only by the young person concerned.

However, it is difficult to know whether young people in YJCs or adult prisons understand the different processes through which they may complain about their rights being infringed, given the complexities in the different mechanisms for oversight, investigation, monitoring and complaints handling, and the fact that these mechanisms do not all have legislative authority to conduct investigations, or are not independent bodies and do not make public reports. Our members report that the centre managers are often thought to be the only port of call for detainee complaints, and they have almost complete discretion to determine the outcome of complaints.

[76] 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).
[77] *Children, Youth and Families Act 2005* (VIC) s488.
[78] 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), 20.
[79] Prison Legal Education and Assistance Project (PLEA) http://pleaproject.org.au/about-us/.

Some practitioners report that children in detention, in general, have a very poor understanding of the complaints mechanisms, including how to make a complaint and what happens after a complaint is made. According to LIV members, young offenders who wish to make a complaint about their treatment in detention facilities are frequently told they should write a letter to the Ombudsman. Putting a complaint in writing is an unrealistic expectation of many young offenders, as many are illiterate or have other acute mental health problems.

The LIV is not aware of whether young people in residential care, in police cells, in schools where seclusion and restraint is used, or in immigration detention, are informed of and understand the oversight mechanisms available or their rights to make complaints. The lack of information in this area is of itself concerning.

Discussion Point Six: 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)?

The LIV is of the view that the ratification of OPCAT would have broad benefits for the rights of all people held in restrictive environments in Australia. Ratification would ensure that there is regular, independent examination of the treatment of persons deprived of their liberty in places of detention and the conditions in those places. Regular examination would strengthen protection against torture, cruel, inhuman or degrading treatment or punishment. It would also include reporting recommendations to authorities with the aim of improving treatment and conditions according to international norms, including the CAT and the Convention on the Rights of the Child.

Given the ad hoc and irregular nature of independent monitoring of places of detention at present, as outlined above, and the lack of obligation to comply with international standards set out in Conventions that Australia has signed but not yet fully ratified, the LIV believes that ratification would have enormous benefits in protecting the rights of children and young people in detention environments.

Discussion Point Seven: 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?

Based on the National Children's Commissioner's Roundtable discussion in May 2016 and consultations with various stakeholders as well as LIV members, the LIV considers that greater resources are required to operate monitoring and complaint handling of YJCs in Victoria. In particular:

- The independent visitors program should be expanded. Consideration should be given to a paid visitors program rather than relying on volunteers, to ensure continuity and adequate remuneration and to attract persons with appropriate qualifications.

- The independent prisoner visitors scheme for adult prisoners is currently run by the Corrections Safety Services Review under the Department of Justice. The Youth Justice independent visitors scheme is run by the Office of Children and Young Persons. Both are connected to the same departments that administer the detention of prisoners, and both require reporting back to the responsible Ministers. While LIV recognises the merits and benefits in these schemes, we note that neither are independent of the departments, nor do they allow for full disclosure in public reports.
- Independent visitors should be overseen by an independent committee made up of professional members from different disciplines (e.g. human services, legal, independent (from Corrections)). This committee would be similar to the Mental Health Tribunal.
- The LIV is not in favour of creating a new body to conduct the role of an NPM. The LIV instead considers that an expanded role and legislative power for either the Victoria Ombudsman or the Victorian Children and Young People Commissioner to carry out the independent monitoring is appropriate. In addition greater resourcing is required within the existing structures of review/monitoring/complaints/investigation bodies to carry out this extended task.
- The CCYP has expertise in children's' and youth rights development and rights issues, while the Ombudsman has specific complaints and investigations expertise. Both of these sets of expertise would be required to carry out the role. The LIV considers that either of these bodies may be suitable to conduct monitoring, complaints handling and own motion investigations into the detention of children and young people, so long as it were provided appropriate legislative power and access, staff with specific expertise, and resources to perform the functions fully.
- These bodies both operate independently. However, both have some restrictions on public reporting which would need to be considered in order to comply with the requirements of a NPM. The independent body would need to be empowered to enter and access all centres, and report publicly without being fettered.

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

The LIV has long advocated for increasing the age of criminal responsibility in Victoria to 12 years old. The UN has ruled that the minimum age of criminal responsibility should be 12 years on the grounds that children below the age of 12 have not yet reached the necessary developmental

stages in “emotional, mental and intellectual maturity” to be held responsible for criminal behaviour.[80] An international study of 90 countries revealed that 68 per cent had a minimum criminal age of 12 or higher, and the most common minimum age was 14 years.[81]

Research undertaken by Jesuit Social Services indicates that the causes of offending in young children are strongly linked to their environment and its impact on their development. For instance, 78 per cent of children aged 10-12 years who had contact with the criminal justice system in 2010 were known to child protection.[82]

Psychologists, criminologists and child offending experts all claim that children under the age of 14 have rarely developed the social, emotional and intellectual maturity necessary for criminal responsibility. Their underdevelopment means that they lack understanding about the severity of their actions, are prone to impulsivity and sensation-seeking, lack an ability to control their behaviour and are particularly vulnerable to peer influence.[83] Further, children under the age of 12 lack the capacity to properly engage in the justice system, resulting in a propensity to accept a plea offer, give false confessions or fail to keep track of court proceedings.[84]

Studies have shown that the younger children are when they encounter the justice system, the more likely they are re-offend, thus demonstrating the ineffectiveness of the justice system to rehabilitate young offenders. The Australian Institute of Health and Welfare identified that children who were first subject to supervision under the Youth Justice system due to offending at 10-14 years old were more likely to experience all types of supervision in their later teens (33% compared to 8% for those first supervised at older ages).[85]

[80] UNGA, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985), UN Doc A/RES/40/33, Rule and Commentary 4.1.
[81] Hazel, N 2008, ‘Cross-national comparison of youth justice’, Youth Justice Board for England and Wales, United Kingdom. Available at: http://dera.ioe.ac.uk/7996/1/Cross_ national_final.pdf
[82] Jesuit Social Services, *Thinking Outside: Alternatives to remand for children,* (2013) Available at: http:// www.jss.org.au/files/Docs/policy-and-advocacy/ publications/Thinking_Outside_Research_Report_-Final_ amend_15052013.pdf
[83] Farmer, E ‘The age of criminal responsibility: developmental science and human rights perspectives’, Journal of Children’s Services, 6 (2) (2011), 86-95.
[84] Ibid.
[85] Australian Institute of Health and Welfare 2013, *Young people aged 10–14 in the youth justice system 2011–2012*, AIHW, Canberra. Available at: http://www.aihw.gov.au/publication-detail/?id=60129543944

CONCLUSION

The responsibility to preserve the rights of young people who come in contact with either protective services or correctional services, lies with those who provide and oversee their care.

For all of the reasons outlined in this submission, the LIV strongly supports the Law Council of Australia's submission that Australia should immediately ratify OPCAT and ensure compliance within three years.

Further the LIV maintains its position, in agreement with the LCA and other bodies, that the age of criminal responsibility in Australia should be increased from 10 to 12 years of age, with the preservation of *doli incapax.*