

Optional Protocol to the Convention against Torture in the context of Youth Justice Detention Centres

**National Children's Commissioner
Australian Human Rights Commission**

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Acknowledgement

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Executive Summary

1. The Law Council of Australia is pleased to participate in the Australian Human Rights Commission's (**AHRC**) inquiry into how the special needs and interests of children and young people under the age of 18 in youth justice detention centres could be considered and monitored by a National Preventative Mechanism (**NPM**) under the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**).
2. The inquiry seeks to examine the current oversight, complaints and monitoring mechanisms relating to the treatment and rights of children and young people in detention, and how the ratification of OPCAT and the establishment of a NPM would benefit children and young people in detention.
3. The Commission's inquiry also raises the issue of the age of criminal responsibility in Australian jurisdictions, which is currently 10 years of age, in light of recommendations of the Committee on the Rights of the Child (**CRC**) that 12 should be the minimum.
4. As part of the inquiry, the National Children's Commissioner has conducted a Roundtable in each State and Territory with key stakeholders, including Law Council representatives in Sydney, Canberra and Melbourne. Some of the Law Council Constituent Bodies also attended Roundtables across Australia.
5. The Law Council's submission is limited to responding to the following questions:
 - a. 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?
 - b. How could the ratification of OPCAT and the establishment of a NPM benefit children and young people in detention?
 - c. The *Convention on the Rights of the Child* (**CROC**) does not specify what the minimum age of criminal responsibility should be. However the CRC recommends 12 years of age should be the minimum. The CRC has noted Australia's non-compliance with this standard and it has recommended Australia raise its minimum age of criminal responsibility. What is your view on this?
6. This submission is structured to address the three questions above and makes five key recommendations in relation to the inquiry:
 - a. The findings of the Special Rapporteur on Torture, the CRC and as a result of Australia's Second Cycle of the Universal Periodic Review be considered as a means of improving the administration of juvenile justice within Australia;
 - b. Australia should ratify the Third Optional Protocol, the *Optional Protocol to the Convention on the Rights of the Child on a communications procedure*, to create an incentive to develop proper domestic institutions for dealing with claims by children of rights violations under the CROC;
 - c. Australia should immediately ratify OPCAT and ensure compliance within three years in order to preserve the rights of children in detention and to provide children with greater protection under domestic law;
 - d. Consideration should be given to implementing a range of initiatives as outlined in this submission within each state and territory to ensure the effectiveness of oversight, complaint and monitoring mechanisms; and
 - e. The age of criminal responsibility in Australia should be increased from 10 to 12 years of age, with the preservation of *doli incapax*.

The Current Situation in Youth Justice Detention Centres

7. This section outlines concerns about the current situation in youth justice detention centres in Australia, discusses the current oversight, complaints and monitoring mechanisms and the adequacy of such mechanisms, and makes recommendations for improvement.

Concerns over Australian youth justice centres

8. A number of concerns have been raised about the treatment of children in youth justice detention centres at both the domestic and international level. For example, in September 2015, the Northern Territory Children's Commissioner released a report¹ detailing cruel, inhuman and degrading treatment inside the former Don Dale youth detention facility, including the use of prolonged solitary confinement; the use of dogs and tear gas; and restraint practices such as hooding and cuffing of young people. Concerns may also arise where children are inappropriately transferred to adult prisons.²
9. In 2010, the Victorian Ombudsman conducted an investigation into conditions at the Melbourne Youth Justice Precinct. The report identified unacceptable conditions at both the Justice Centre and the neighbouring Residential Centre, and the Ombudsman noted that the poor conditions reflected non-compliance with human rights principles and presented many safety issues for both staff and detainees.³ The report also noted that the Department of Human Services (responsible for the administration of youth justice in Victoria) had failed to meet its statutory obligations and human rights principles, and that as a minimum, the Youth Justice Precinct required inspection and oversight by an external body.
10. Concerns such as these highlight the need for careful consideration of the administration of juvenile justice in Australia. They also demonstrate a need for robust oversight, complaints and monitoring systems in Australia's youth justice detention centres.

Administration of juvenile justice

11. The Law Council notes the recommendations of three different international bodies to improve the administration of juvenile justice generally or within Australia. The Law Council commends the findings of these bodies to the National Children's Commissioner for consideration.

Special Rapporteur on Torture

12. The March 2015 *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, by Juan E. Méndez (the **Special**

¹ Office of the Children's Commissioner Northern Territory, *Own Initiative Investigation Report Services Provided by the Department of Correctional Services at the Don Dale Youth Detention Centre* (August 2015).

² Amnesty International, *A brighter tomorrow: Keeping indigenous kids in the community and out of detention in Australia* (2015) 5.

³ Ombudsman Victoria, *Whistleblowers Protection Act 2001 Investigation into conditions at the Melbourne Youth Justice Precinct* (October 2010) 7.

Rapporteur),⁴ detailed international standards and obligations in respect of detaining young people and children in conflict with the law, including:

- Requiring a minimum age of criminal responsibility that reflects when a child has adequate mental capacity and moral competence to be punished for crimes;
- State Parties having an international obligation to put in place a dedicated legal system and law enforcement processes for children, rather than subjecting children to adult systems;
- A prohibition on the imposition of the death penalty on children and life sentences without the possibility of release;
- Detention or imprisonment of children should only be used as a measure of last resort, in exceptional circumstances, for the shortest possible period of time and only if it is in the best interests of the child;
- The imposition of solitary confinement, of any duration, on children constitutes cruel, inhuman or degrading treatment or punishment or even torture; and
- Any form of corporal punishment is contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.⁵

Committee on the Rights of the Child

13. Australia signed the CROC on 22 August 1990 and ratified it on 17 December 1990. The CROC does not create new rights for children, but rather, it incorporates the civil, political, economic, social and cultural rights that are recognised in the *Universal Declaration on Human Rights*, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic and Social and Cultural Rights* and sets out the specific ways in which States must ensure these rights for children and young people, demonstrating that children and young people need special protection because of the particular vulnerabilities associated with their age.
14. The CROC has three Optional Protocols, and Australia is party to the first two.⁶ The Third Optional Protocol, the *Optional Protocol to the Convention on the Rights of the Child on a communications procedure*, was opened for signature on 19 December 2011 and entered into force on 14 April 2014. It has not been signed or ratified by Australia. The Third Optional Protocol provides redress mechanisms for violations of rights that are articulated in the CROC and its First and Second Optional Protocols through an individual communication procedure, an Inter-State complaints procedure, and an inquiry procedure.
15. The Law Council has consistently advocated for Australia's ratification of the Third Optional Protocol.⁷ It considers that ratifying the Third Optional Protocol will create an incentive to develop proper domestic institutions for dealing with claims by children of

⁴ Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez (5 March 2015) A/HRC/28/68

⁵ Ibid at [34]-[49]

⁶ The *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in Armed Conflict*, opened for signature 25 May 2000, GA Res 54/263, (entered into force on 12 February 2002) was signed by Australia on 21 October 2002 and ratified on 26 September 2006. The Second Optional Protocol, the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, opened for signature 25 May 2000, GA Res 54/263, (entered into force on 18 January 2002). It was signed by Australia on 18 December 2001 and ratified on 8 January 2007.

⁷ See for example, Law Council of Australia, Submission to the Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention*, 30 May 2014, available at:

http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2834_-_Submission_to_National_Inquiry_into_Children_in_Immigration_Detention_2014.pdf.

rights violations under the CROC, as domestic remedies would need to be exhausted before a complaint is made under the Third Optional Protocol.

16. Although the CRC cannot consider individual communications alleging that Australia has violated the CROC or its first two Optional Protocols to which Australia is party (due to the fact it has not signed or ratified the third Optional Protocol), Australia must submit regular reports to the CRC on how the rights articulated in the CROC are being implemented.⁸ The CRC examines each State report and addresses its concerns and recommendations to the State party in the form of Concluding Observations.
17. Australia's most recent report to the CRC was in 2009, with the CRC handing down its Concluding Observations in 2012. While the CRC welcomed the People of Australia – Australia's Multicultural Policy and the National Anti-Racism Partnership and Strategy, the CRC expressed concern over five issues in respect of non-discrimination, including:

*The serious and widespread discrimination faced by Aboriginal and Torres Strait Islander children, including in terms of provision of and accessibility to basic services and significant overrepresentation in the criminal justice system and in out-of-home care...*⁹

18. In respect of the administration of juvenile justice, the CRC recommended Australia:

...bring the juvenile justice system fully in line with the Convention, in particular articles 37, 39 and 40, and with other relevant standards, including the Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), the Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules), the Vienna Guidelines for Action on Children in the Criminal Justice System; and the Committee's general comment No. 10 (2007) on the rights of the child in juvenile justice. Furthermore, the Committee reiterates its previous recommendations to:

- (a) Consider raising the minimum age of criminal responsibility to an internationally acceptable level (CRC/C/15/Add.268, para. 74(a));*
- (b) Deal with children with mental illnesses and/or intellectual deficiencies who are in conflict with the law without resorting to judicial proceedings (CRC/C/15/Add.268, para. 74(d));*
- (c) Take measures with a view to abrogating mandatory sentencing in the criminal law system of Western Australia (CRC/C/15/Add.268, para. 74(f)); and, consider refraining from the enactment of a similar law in its state of Victoria;*
- (d) Remove children who are 17 years old from the adult justice system in Queensland (CRC/C/15/Add.268, para. 74(g));*
- (e) Allocate the necessary human, technical and financial resources for ensuring that all child offenders are held in separate correctional centres;*

⁸ States must submit an initial report two years after acceding to the Convention and then periodic reports every five years.

⁹ Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention*, 60th sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012) [29(a)].

(f) *Expediently establish an accessible and effective mechanism for investigating and addressing cases of abuse at its youth detention centres.*¹⁰

19. The Law Council contacted the Attorney-General's Department (**AGD**) to inquire whether the Government has, or is in the process of, responding to these recommendations in the CRC's Concluding Observations. AGD advised that these are State and Territory issues, and that it is not in a position to respond to the recommendations at this stage, but will address them in its next report to the CRC. Australia must submit its next (combined fifth and sixth periodic) reports to the CRC by 15 January 2018.

The Universal Periodic Review

20. In addition to the criticism Australia has received from the CRC, the Law Council notes that several recommendations were made in respect of the ratification of OPCAT and juvenile justice in Australia's Second Cycle of the Universal Periodic Review, which took place in November 2015.

21. The following recommendations were made in respect of juvenile justice:

136.113 Reduce the rate of family separation of indigenous peoples caused, among others, by the removal of babies and children from their families and the imprisonment of juveniles and adults (Paraguay);

...

136.172 Bring the Australian juvenile justice system in conformity with international standards, including removing minors from the adult justice system and ensuring their rehabilitation (Lithuania);

136.173 Reform the juvenile justice system in conformity with the international standards and increase the protection of children involved in penal proceedings (Poland);

136.174 Abolish the mandatory minimum sentencing of juvenile offenders (Czech Republic);

136.175 Improve conditions in youth detention facilities, including through ensuring independent and effective investigation of all allegations of human rights violations therein (Czech Republic);

136.176 Develop alternatives to the mandatory sentencing laws placing children as young as 10 years of age in juvenile detention centres (Denmark);

136.177 Abolish the sentencing of children to life in prison (Lithuania);

136.178 Raise the age of criminal responsibility to 18 years as recommended by the Committee on the Rights of the Child (Iceland); and

136.179 Raise the age of the criminal responsibility in accordance with general comment No. 10 of the Committee on the Rights of Child (Uruguay).¹¹

¹⁰ Ibid [84]

¹¹ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, 31st sess, UN Doc A/HRC/31/14 (13 January 2015).

Recommendations:

- **The findings of the Special Rapporteur on Torture, the CRC and as a result of Australia's Second Cycle of the Universal Periodic Review be considered as a means of improving the administration of juvenile justice within Australia.**
- **Australia should ratify the Third Optional Protocol, the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, to create an incentive to develop proper domestic institutions for dealing with claims by children of rights violations under the CROC.**

Oversight, complaints and monitoring mechanisms

22. National Quality of Care Standards and Design Guidelines for Juvenile Justice Facilities in Australia and New Zealand were developed for the juvenile detention system by the Australasian Juvenile Justice Administrators (**AJJA**) and endorsed by all States and Territories in 1996.¹²
23. The AJJA have since developed Juvenile Justice Standards 2009,¹³ which are broadly used by Australian jurisdictions to assess the quality of youth justice services and programs, as well as Principles of Youth Justice in Australia, in partnership with the Australian Institute of Criminology.¹⁴ The Principles were endorsed by all Australian jurisdictions in October 2014.¹⁵
24. The administration of juvenile justice, including oversight, complaint and monitoring mechanisms, is governed by various pieces of legislation in each state and territory¹⁶ in addition to policy and guidance documents. For example, the NSW Government introduced the Juvenile Justice Continuous Improvement Quality Assurance Framework (**the Framework**) in 2008¹⁷. The Framework is underpinned by legislation, namely subsection 7(3) of the *Children (Detention Centres) Act 1987* (NSW), which mandates inspection of detention centres followed by a report on a number of issues including the physical, psychological and emotional well being of detainees.
25. Oversight, complaint and monitoring mechanisms differ in each jurisdiction, and can include advisory groups,¹⁸ official visitors¹⁹, children's commissioners,²⁰ independent statutory bodies,²¹ government public advocates,²² and ombudsmen²³.

¹² Australian Law Reform Commission, 'Seen and heard: priority for children in the legal process', Report No 84 (1997).

¹³ Australasian Juvenile Justice Administrators, [Juvenile Justice Standards 2009](#) (2009).

¹⁴ Australasian Juvenile Justice Administrators, [Principles of Youth Justice in Australia](#) (2014).

¹⁵ Australasian Juvenile Justice Administrators <<http://sharepoint.ajja.org.au/Home/default.aspx>>

¹⁶ For example, the following legislation would be applicable in NSW: *Bail Act 2013* (NSW); *Children (Community Service Orders) Act 1987* (NSW); *Children (Criminal Proceedings) Act 1987* (NSW); *Children (Detention Centres) Act 1987* (NSW); *Children (Interstate Transfer of Offenders) Act 1988* (NSW); *Young Offenders Act 1997* (NSW). For a full list of Youth justice related legislation see: <http://www.aihw.gov.au/youth-justice/legislation/>.

¹⁷ The AJJA Juvenile Justice Standards 2009 were adopted and incorporated into the Framework in 2009 and the Framework is also underpinned by the new AJJA Principles of Youth Justice in Australia 2014: NSW Government, [Juvenile Justice Centres Continuous Improvement Quality Assurance Framework Policy](#) (October 2014).

¹⁸ The Ashley Youth Detention Centre has an advisory group which meets regularly and receives compliance reports on service standards: Noetic Solutions, *Review of Effective Practice in Juvenile Justice* (2010) 17.

¹⁹ For example, the independent prison visitor scheme in Victoria allows volunteers to provide the Minister for Corrections with independent objective advice on the operations of the prison they visit through the regular

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26. The Law Society of South Australia (**LSSA**), considers that the best existing oversight mechanism and standards in Australia is the Western Australian Office of the Inspector of Custodial Services, established by the *Inspector of Custodial Services Act 2003* (WA), and the 'Inspector's Inspection standards for Aboriginal prisoners (2008)' and 'Code of inspection standards for young people in detention (2010)'.

Inadequacy of mechanisms

27. The Queensland Law Society (**QLS**), considers that the major inadequacies in relation to complaint mechanisms for children in detention are poor understanding of their legal rights, and the inability of lawyers to access children who have a complaint relating to their treatment while in detention. In the experience of some practitioners, children who have a complaint about their treatment in detention centres become discouraged from pursuing the complaint if they cannot access independent legal advice in a timely manner.
28. Based on some legal practitioners' discussions with community visitors to youth detention centres, children in detention have a very poor understanding of the complaints mechanisms, including how to make a complaint and what happens after a complaint is made.
29. Furthermore, the Law Society of New South Wales (**LSNSW**) observes that children and young people often have a very limited understanding of their rights while in detention and require substantial assistance to assert their rights, as they are unable to do so on their own. The LSNSW considers that it is the responsibility of those who care for the child, including detention centres, to assist a child or young person in asserting their rights. The Law Council understands that the LSNSW has made a separate submission to this inquiry.
30. Based on anecdotal accounts from the QLS, staff in detention centres in Queensland are given little training on the rights of children under CROC, and instead their training focusses on restraint and security measures. Inadequate training of staff may lead to poor promotion and safeguarding of children's rights by staff, and may impact on a young persons understanding of their human rights and the oversight, complaints or monitoring mechanisms.
31. The LSNSW considers current oversight mechanisms in NSW are inadequate – there is a need for greater consistency and transparency in the way that the multiple existing oversight mechanisms operate. Furthermore, the LSNSW considers that, in order to ensure compliance with OPCAT, implementation of the rights under OPCAT must be

observation of prison routines and activities as well as the referral and reporting of any issues or concerns: see <<http://www.corrections.vic.gov.au/utility/volunteering/independent+prison+visitor+scheme.shtml>>

²⁰ Submission from the Central Australian Aboriginal Legal Aid Service, the North Australian Aboriginal Justice Agency and the Northern Territory Legal Aid Commission, *Review of Youth Detention in the Northern Territory* (2014) 13.

²¹ For example, the WA Inspector of Custodial Services provides accountability to the corrections system and assurance to the community through the inspection and review of custodial services, with publically available reports tabled in Parliament: see <<http://www.oics.wa.gov.au/about-oics/roles-responsibilities/>>

²² For example, the Public Advocate of the ACT (PA ACT) advocates on behalf of children and young people involved with the Territory's Community Youth Justice systems, particularly if the children and young people are detained Bimberi Youth Detention Centre. An advocate of the PA ACT visits young people in detention on the request of a young person or on a regular basis. Young people detained in Bimberi can also contact the PA ACT by telephone to discuss their individual concerns. The PA ACT also has statutory functions of compliance in relation Bimberi Youth Detention Centre as outlined in the *Children and Young People Act 2008* (ACT): <http://www.publicadvocate.act.gov.au/children_young_people>

²³ For example, in NSW, serious complaints - such as allegations of assault by staff or serious maladministration, can be immediately referred to the NSW Ombudsman: see <<https://www.ombo.nsw.gov.au/what-we-do/our-work/custodial-services/juvenile-justice>>

monitored across all forms of detention, such as police cells, remand centres and court cells.

32. Another of the Law Council's Constituent Bodies, the Law Institute of Victoria (**LIV**), observes that there is little oversight of Youth Justice Centres (**YJC**). Although the Ombudsman has jurisdiction to investigate matters in YJCs,²⁴ it is not resourced to undertake regular ongoing visits. The LIV observes that the only regular oversight of YJC is conducted by the Independent Youth Visitor Program of the Commissioner for Children and Young People (**CCYP**), which is supported by a group of volunteers. The LIV notes that in February 2016, the CCYP was granted new oversight powers under the *Children, Youth and Families Act 2005* (Vic) in order to strengthen transparency and oversight of Victoria's child protection and youth justice system.

How current mechanisms can be improved

33. Inadequacies in relation to oversight, complaint, and monitoring mechanisms in youth detention in Australia may be remedied through ratification of OPCAT and the establishment of a NPM (benefits discussed below).
34. Apart from ratification of OPCAT, there are many initiatives which could be implemented within each state and territory to ensure the effectiveness of their oversight, complaint and monitoring mechanisms. The QLS considers that the following initiatives may remedy inadequacies in the mechanisms:
35. Providing detainees with an information sheet detailing the visits conducted by various Departments and agencies;
36. Providing detainees and their families or guardians with an information sheet, drafted in a child friendly manner, on the rights of children in detention under OPCAT;
- a. Providing information to stakeholders in the community about the rights of children in detention under OPCAT, possibly through publication on relevant websites;
 - b. Greater staffing at detention centres to ensure increased availability of scheduled legal visits with detainees and an enhanced ability for lawyers to call through to detention centres and schedule appointments with detainees; and
 - c. Reserving the 'visits area' in youth detention centres for the use of visiting legal practitioners, rather than for internal personnel, case workers and medical staff interactions.
37. Greater Legal Aid resourcing for children in detention centres is also required to allow duty lawyers to increase the number of funded visits to children in detention, thereby ensuring that children in detention have better access to legal representation to enforce their rights.
38. The LSNSW considers that greater resourcing is needed to allow for inspections of places of detention every 3-6 months, or 12 months at a minimum, and spot checks without notice.
39. Good practice in relation to the promotion and safeguarding of children's rights in detention facilities may include:
- a. Giving all new child detainees an information session in orientation that details what rights children have under OPCAT and how they can access assistance in

²⁴ *Ombudsman Act 1973* (Vic) at s 16A.

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- pursuing complaints. Such information should be presented in a child friendly manner either as an information sheet or a video presentation;
- b. Providing more training to detention centre staff on the rights of children under CROC; and
 - c. Displaying the rights of the child under CROC in the 'visits area' of detention centres to inform detainees, their families and staff who frequent these areas.
40. The LSNSW considers that the fundamental rights outlined by the CROC, in particular Article 37,²⁵ should be recognised and implemented throughout Australia as setting minimum legal and moral standards for the protection of children's rights. The LSNSW considers that, in New South Wales, generally speaking, detention centre staff have a strong understanding of children's rights. However, in some circumstances the existence of competing priorities means that programs are developed and approved which do not demonstrate that a full understanding of those rights. The LSNSW understands that there have been instances where young people have been subject to long periods of isolation in detention.
41. In its submission, the LSNSW also cites the example of the Alexander Maconochie Centre²⁶ in the ACT and oversight mechanisms in Norway as good practice for safeguarding human rights in detention centres. For example, the system in Norway allows people in detention to submit complaints without censorship and to request investigation of credible allegations of inhumane conditions.

Recommendation:

- **Consideration should be given to implementing a range of initiatives, as outlined in this submission, within each state and territory to ensure the effectiveness of oversight, complaint and monitoring mechanisms.**

Benefits of Ratification of OPCAT and the establishment of a NPM

The Optional Protocol to the Convention against Torture

42. Australia signed OPCAT on 19 May 2009 but has not yet ratified the protocol. The Law Council understands, through its attendance at the AHRC's Roundtables in Sydney, Canberra and Melbourne, that ratification of OPCAT is currently under consideration by the Commonwealth Government, and that the Commonwealth Government is actively engaging with State and Territory Governments in respect of this issue.
43. The Law Council has consistently stated its support for the ratification of OPCAT,²⁷ which would allow independent domestic and international monitoring of immigration detention facilities.

²⁵ Article 37 provides: 'The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time'.

²⁶ The Alexander Maconochie Centre emphasises rehabilitation, compliance with Human Rights principles and adherence to the Healthy Prison Concept: see <http://cs.act.gov.au/custodial_operations>.

²⁷ See for example the following: Law Council of Australia, submission to Joint Standing Committee on Treaties, *Inquiry into the Optional Protocol to the Convention Against Torture*, 30 March 2012, available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2628%20->

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44. In its 2012 submission to the Joint Standing Committee on Treaties, the Law Council outlined several benefits to ratifying the OPCAT: preventing cruel, inhuman and degrading treatment in all places of detention in Australia; improving conditions of detention in Australia in line with human rights standards, including preventing Aboriginal deaths in custody; enhancing Australia's compliance with the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* and other international human rights treaties; enhancing accountability, transparency and coordination between agencies and organisations responsible for managing and monitoring places of detention; and effective risk management and potential cost savings.²⁸
45. The key features of the OPCAT are that it establishes a two-tiered prevention mechanism: the United Nations Subcommittee on the Prevention of Torture (the Subcommittee), and an NPM. The Law Council notes that implementing OPCAT would require Australia to establish an independent NPM and identify suitable bodies to conduct inspections of all places of detention. These mechanisms will be discussed further below.
46. Unlike certain treaties, OPCAT does not contemplate progressive realisation – there is capacity for a three year delay for implementation after ratification, with a further extension of 2 years by the Subcommittee. If Australia were to ratify OPCAT, but fails to comply with OPCAT following its ratification, it will be in breach of its international human rights obligations.

The OPCAT machinery

47. Key features of the OPCAT are that it establishes a two-tiered prevention mechanism: the Subcommittee, and an NPM.
48. The Subcommittee is an independent committee of international experts with a mandate to regularly²⁹ carry out country missions to monitor all places of detention within that country.³⁰ The Subcommittee also has a role in relation to NPMs: it advises and assists State Parties with the establishment of NPMs; maintains direct and confidential contact with NPMs, where necessary, assisting them with strengthening their capacities; advises NPMs on how to strengthen the protection of victims; and makes recommendations to State Parties about strengthening the capacity and mandate of NPMs.³¹ The State Party bears several obligations concerning the ability of the Subcommittee to comply with its mandate, including.³²

[%20Optional%20Protocol%20to%20the%20Convention%20against%20Torture.pdf](#); Law Council of Australia, submission to Attorney General's Department, *Optional Protocol to the UN Convention Against Torture*, 1 July 2008; Law Council of Australia, 'Shadow Report to Australia's Common Core Document', Report to the United Nations Human Rights Committee, 29 August 2008, available at:

http://www2.ohchr.org/english/bodies/hrc/docs/ngos/LCA_Australia95.pdf; Law Council of Australia, Submission to the Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention*, 30 May 2014, available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2834 - Submission to National Inquiry into Children in Immigration Detention 2014.pdf>.

²⁹ *Optional Protocol to the Convention against Torture*, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) ('OPCAT'), art 13.

²⁹ *Optional Protocol to the Convention against Torture*, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) ('OPCAT'), art 13.

³⁰ *Ibid*, art 11(1)(a).

³¹ *Ibid*, art 11(1)(b).

³² *Ibid*, art 12.

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- a. To receive the Subcommittee in their territory and grant it access to the places of detention as defined in Article 4³³ of OPCAT;
 - b. To provide all relevant information the Subcommittee may request to evaluate the needs and measures that should be adopted to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;
 - c. To encourage and facilitate contacts between the Subcommittee and the NPMs; and
 - d. To examine the recommendations of the Subcommittee and enter into dialogue with it on possible implementation measures.
49. The obligations on State Parties under the OPCAT also extend to providing unrestricted access to the Subcommittee, including conducting private interviews, and choosing the people that will be interviewed.³⁴
50. Within one year of ratification of the OPCAT, State parties are obliged to establish an NPM, or series of NPMs.³⁵ The NPM is independent to government, and should, at a minimum, be granted the following powers:
- a. To regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in Article 4, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment;
 - b. To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations; and
 - c. To submit proposals and observations concerning existing or draft legislation.³⁶
51. The Law Council notes the AHRC's 2008 research on the implementation of the OPCAT, including into the most appropriate model of NPM.³⁷ There were several recommendations arising from that research, including that Australia should adopt a 'mixed' model for its NPM in which responsibility is shared between the States, the Territories and the Commonwealth, but there must be:
- a. A national coordinating NPM; and
 - b. A single coordinating agency within each State and Territory;³⁸ and, that the AHRC should be designated as the national coordinating NPM.³⁹
52. In its 2012 submission to the Joint Standing Committee on Treaties regarding the ratification of the OPCAT, the Law Council considered, in accordance with the AHRC's 2008 recommendations, that the monitoring mechanisms in OPCAT should build upon and coordinate the existing monitoring mechanisms that operate in respect of certain

³³ 'Any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority'.

³⁴ OPCAT, art 14.

³⁵ Ibid, art 17.

³⁶ Ibid, art 19.

³⁷ Professors Richard Harding and Neil Morgan, Centre for Law and Public Policy, The University of Western Australia, 'Implementing the Optional Protocol to the Convention against Torture : Options for Australia' (2008), available at: http://www.hreoc.gov.au/human_rights/publications/opcat/index.html#1

³⁸ Ibid 4: Recommendation 2.

³⁹ Ibid: Recommendation 3.

detention facilities around the country to apply to all places of detention, including immigration detention, police cells and mental health facilities.⁴⁰

53. The Law Council has consistently made representations to Government in respect of its non-compliance with treaty obligations and Australia's position on the interpretation of its treaty obligations by United Nations Committees. Most recently, the Law Council corresponded with the Attorney-General in respect of Australia's responses to the views of the United Nations Human Rights Committee, the body of independent experts that monitors implementation of the *International Covenant on Civil and Political Rights* by State Parties.
54. Through its attendance at the Roundtables, the Law Council notes the possibility of Australia implementing the following NPM models:
- a. Single NPM – a single, national NPM would duplicate existing monitoring of detention, for example, that undertaken by the AHRC and Commonwealth Ombudsman, and through the establishment of a new, independent NPM, would therefore impose an unnecessary economic burden; or
 - b. Mixed NPM – national coordination role of State and Territory NPMs through existing bodies, such as the AHRC or Commonwealth Ombudsman. There are three proposed models:
 - i. Jurisdictional model – States and Territories each have an NPM and a National NPM is established to coordinate. This works well in other federated States, such as Germany. However, there would likely be duplication of monitoring in Australia owing to the existing mechanisms;
 - i. Thematic model – monitoring is restricted to the mandate of each designated institution. This model tends to be used in non-federated countries, such as New Zealand,⁴¹ and is unlikely to work in Australia; or
 - ii. Mixed-hybrid model – States and Territories would determine how to best monitor detention, and a national body will coordinate. This would allow States and Territories to leverage off existing expertise and processes.
55. The Law Council considers that the mixed-hybrid model is the ideal model for Australia's system of federation. In addition to providing States and Territories with the necessary power to administer their NPMs, this would also be the most cost effective; would allow for the easy collection of data for reporting under OPCAT; would allow sharing of information, such as best practice, across State and Territory NPMs through the national coordinating NPM; and, would build upon existing expertise. For example, the LSSA has observed that, following the introduction of new legislation, the Department of Communities and Social Inclusion are already moving toward implementing OPCAT through the use of the official visitor.⁴² The functions of the

⁴⁰ See for example: Law Council of Australia, submission to Joint Standing Committee on Treaties, *Inquiry into the Optional to the Convention Against Torture*, 30 March 2012, 28, available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2628%20-%20Optional%20Protocol%20to%20the%20Convention%20against%20Torture.pdf>.

⁴¹ New Zealand designated five existing institutions as its NPM through the *Crime of Torture Amendment Act 2006* (NZ). The New Zealand Human Rights Commission acts as NPM coordinator: Each designated institution has a specific thematic mandate under the OPCAT, for example, the Office of the Ombudsman has the mandate to visit prisons, immigration detention facilities, health and disability places of detention, and, overlapping with the Office of the Children's Commissioner, youth justice residences .

⁴² The *Youth Justice Administration Bill 2016* (SA) supports contemporary practices in managing young people who offend, and the administration of youth justice in South Australia. Part 3 of the Act establishes the Training Centre Visitor. Part 4 of the Act provides that the Minister may establish such training centres and other facilities and programs as the Minister thinks necessary or desirable for the care, rehabilitation, detention, training or treatment of youths.

visitor include acting as an advocate for the residents of a training centre to promote proper resolution of issues relating to the care, treatment or control of the residents.⁴³

56. Furthermore, the Law Council considers that Australia must ratify OPCAT, and should then ensure full compliance within three years.

Recommendation:

- **Australia should immediately ratify OPCAT and ensure compliance within three years.**

Age of Criminal Responsibility

57. Children are not held to be criminally responsible for their actions until they have reached a certain age. The age of criminal responsibility in Australia is 10 under federal law,⁴⁴ and in all states and territories,⁴⁵ despite the CRC having concluded that 12 is the lowest internationally acceptable minimum age of criminal responsibility.⁴⁶

58. In its Concluding Observations in 2005 the CRC said that the age of criminal responsibility in Australia is 'too low',⁴⁷ and recommended raising it to 12.⁴⁸ This recommendation was reiterated in 2012.⁴⁹

59. Under federal law, a child aged between 10 and 14 years can only be liable for an offence if the child knows that their conduct is wrong, and that question is one of fact for the prosecution to prove.⁵⁰

60. This presumption is also enshrined in common law, operating in all Australian jurisdictions and known as the principle of *doli incapax*. This common law principle presumes that a child under 14 does not know that his or her conduct is wrong unless the contrary is proved.⁵¹ In 1997 the Australian Law Reform Commission report, 'Seen and heard: priority for children in the legal process' recommended that the principle of *doli incapax* should be established by legislation in all jurisdictions to apply to children under 14.⁵²

61. The CRC have acknowledged the common law doctrine of *doli incapax*,⁵³ noting that children between 10 and 14 in Australia are assumed to be criminally responsible only if they have the required maturity to realise the consequences of their actions. However, the Committee also noted:

⁴³ At s 14(1)(d).

⁴⁴ Section 4M of the *Crimes Act 1914* (Cth).

⁴⁵ Australian Institute of Criminology, 'The age of criminal responsibility', Crime facts info no. 106, ISSN 1445-7288 Canberra (2005).

⁴⁶ Committee on the Rights of the Child, General Comment No. 10: Children's rights in juvenile justice, (2007) [32].

⁴⁷ Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention*, 40th sess, UN Doc CRC/C/15/Add.26820 (20 October 2005) [73].

⁴⁸ *Ibid*, [73-74].

⁴⁹ Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention*, 60th sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012) [84].

⁵⁰ *Crimes Act 1914* (Cth) s4N.

⁵¹ Australian Law Reform Commission, *Seen and heard: priority for children in the legal process*, Report No 84 (1997) [18.17].

⁵² *Ibid*, Recommendation 195.

⁵³ *Doli incapax* 'means a presumption that a child is "incapable of crime" under legislation or common law: see Australian Institute of Criminology, 'The age of criminal responsibility', Crime facts info no. 106, ISSN 1445-7288, Canberra (2005).

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.⁵⁴

62. One of the Law Council's Constituent Bodies, the Victorian Bar, submits that the current system should be amended to reflect the advances in understanding of child cognitive and conative development⁵⁵. Raising the age of criminal responsibility to 12 years of age would further Australia's commitments to fostering the best interests of the child as signatories of CROC. The LIV also supports this position.
63. The Victorian Bar has noted that at 10 years of age, most children are in grade 3-4 of primary school. They are still building the basic foundations for learning, and their capacity for higher order decision making is not developed even in optimal situations, let alone in situations of social and emotional distress or pressure.
64. Recent research by Jesuit Social Services, which looked at the rates and types of offending committed by 10-14 year olds, their circumstances, and incarceration rates, noted the disproportionate representation of children known to or involved with Child Protection who are charged with offending and/or remanded.⁵⁶ The report revealed that for children being held in remand in 2010-2011, aged 12 or under, all were known to or involved with Child Protection.⁵⁷
65. The Victorian Bar considers that evidence suggests that children in the 10-14 age group who come to the attention of the criminal law are predominantly from the most vulnerable families in our community.⁵⁸, and that the earlier a child enters the formal criminal justice system, the worse the outcomes are for that child, and consequently, the community.
66. Further, Victorian Bar has identified that research has also shown that diverting young children away from the criminal law system has the most beneficial results in terms of reducing recidivism,⁵⁹ and it follows that society benefits more from keeping young children away from the criminal law system than putting them into it.
67. Raising the minimum age of criminal responsibility should not however be used to justify the removal of the doctrine of *doli incapax*. This doctrine's importance lies in ameliorating the full though blunt force of the law from having detrimental consequences for cognitively and emotionally immature children. It recognises that the path to adulthood is a transitional one. Raising the minimum age and retaining *doli incapax* would work in a complementary way to protect the most vulnerable children.
68. Raising the age of criminal responsibility should not impact the role of the child's voice in Child Protection proceedings. Whilst the two systems intertwine, there is a vast difference between a child's views being heard by the Court when making orders

⁵⁴ Committee on the Rights of the Child, General Comment No. 10 (2007) 'Children's rights in juvenile justice' 30.

⁵⁵ George Urbas has noted, in a paper title '*The Age of Criminal Responsibility*' for the Australian Institute of Criminology, that a substantial body of psychological research has assessed children's development in 'cognitive' (Piaget 1955), 'moral' (Kohlberg 1969) and 'conative' or impulsive/automotive (Holland 1983) terms (see Morash 1981; Dalby 1985).

⁵⁶ Jesuit Social Services, *Thinking Outside: Alternatives to Remand for Children* (2013).

⁵⁷ *Ibid*, 61.

⁵⁸ For example, according to a Victorian study, as many as 78% of children who experienced remand at 10-12 years of age in 2012, had child protection involvement: Jesuit Social Services, *Thinking Outside – Alternatives to remand for children – Summary Report* (2013) 13.

⁵⁹ For example, the 2010 Australian Institute of Criminology paper on *Police diversion of young offenders and indigenous over-representation* notes that findings from several studies indicate that young people who are diverted through cautioning or conferencing are less likely to have re-contact with the criminal justice system than are young people who have a court appearance (Cunningham 2007; Dennison, Stewart & Hurren 2006; Hayes & Daly 2004; Stewart et al. 2007; Vignaendra & Fitzgerald 2006).

about their family and living situation, where the Court determines the weight to be given to those views; and imposing criminal responsibility on a child who is not cognitively or emotionally developed enough to bear the responsibility for his or her actions.

69. The LIV has also noted that the *Children, Youth and Families Act 2005* (Vic) permits the transfer of children 16 and over to adult prison, subject to review by the Youth Parole Board.⁶⁰ The LIV notes that while there are currently no young people under the age of 18 in adult prisons, the percentage of 18-25 year olds in adult prisons are increasing. The LIV's membership has observed that young people between the ages of 18-25 who are not eligible to enter the Penhyn Unit, or where there is not capacity are either put with older prisoners where they are at high risk of being assaulted, or placed in 'management' because of their vulnerability with few detainees able to access youth specific support services and restrictive conditions over movement within detention.
70. As the Special Rapporteur has observed:

*[d]etaining children and adults together will inevitably result in negative consequences for the children, who are five times as likely to be subjected to a substantiated incident of sexual violence, and are also much more likely to witness or experience other forms of violence, including physical harm by facility staff members. They are also more likely to commit suicide or engage in other forms of self-harm when housed in adult – rather than juvenile – facilities. Research also shows that imprisoning children with adults can result in increased recidivism and negative long-term consequences for children, their families and communities.*⁶¹

Impact on Indigenous Children

71. The QLS has noted that in Queensland, the majority of children aged 10-13 years, in detention, are of indigenous descent, which has significant impacts on indigenous communities overall. The QLS has expressed concern with the unacceptably high rates of indigenous young people being held in remand in Queensland youth detention centres, and have noted that there is a need to lift the age at which a child reaches adulthood for the purpose of the criminal law from 17 to 18 years of age in Queensland, to place it in line with other States and Territories.
72. The Law Council is supportive of efforts to reduce these unacceptably high rates, including by:
- a. Increasing funding for bail and diversionary programs for indigenous youth; and
 - b. Appointing of complaints officers to hear and act upon the complaints of indigenous prisoners⁶²
73. The LSSA has observed that in that State, in relation to high Indigenous youth incarceration rates, there is also concern over medical procedures on reception into detention and the receipt of all psychiatric reports by doctors.

⁶⁰ At s 467.

⁶¹ Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez*, UN Doc A/HRC/28/68 (5 March 2015) [43]

⁶² Royal Commission into Aboriginal Deaths in Custody, *National Report*, vol 4 AGPS Canberra 1991, rec 176.

Recommendation:

- **The age of criminal responsibility in Australia should be increased from 10 to 12 years of age, with the preservation of *doli incapax***

Conclusion

74. The Law Council thanks the National Children’s Commissioner for the opportunity to have participated in the AHRC’s Roundtables as part of its inquiry.
75. Children and young people in youth detention facilities need special protection because of the particular vulnerabilities associated with their age. They may, for example, be particularly vulnerable to potential negative impacts of detention, which can include stigmatisation and recidivism.⁶³ High levels of mental illness may also compound their vulnerability.⁶⁴
76. Careful consideration of the administration of juvenile justice in Australia is therefore required to ensure that our systems are consistent with the rule of law and human rights obligations. The findings of the Special Rapporteur on Torture, the CRC and as a result of Australia’s Second Cycle of the Universal Periodic Review should be considered as a means of improving the administration of juvenile justice within Australia. Australia should also ratify the Third Optional Protocol, the *Optional Protocol to the Convention on the Rights of the Child on a communications procedure*, to create an incentive to develop proper domestic institutions for dealing with claims by children of rights violations under the CROC.
77. Robust oversight, complaints and monitoring mechanisms in Australia’s youth justice detention centres are also essential. Australia should immediately ratify OPCAT and ensure compliance within three years in order to preserve the rights of children in detention and to provide children with greater protection under domestic law. In addition, there are a range of initiatives (as outlined in this submission) which may improve the effectiveness of oversight, complaint and monitoring mechanisms within each state and territory.
78. The age of criminal responsibility in Australia should also be increased from 10 to 12 years of age, with the preservation of *doli incapax*, to foster the best interests of the child as a signatory of CROC.

⁶³ WA Commissioner for Children and Young People, *The State of Western Australia’s Children and Young People – Edition Two* (July 2014) 297.

⁶⁴ *Ibid.*

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2016 Executive as at 1 January 2016 are:

- Mr S. Stuart Clark AM, President
- Ms Fiona McLeod SC, President-Elect
- Mr Morry Bailes, Treasurer
- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.