



Australian
Human Rights
Commission

Children's Rights Report 2016

NATIONAL CHILDREN'S COMMISSIONER



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Front cover: *Remorse* is an original artwork by a young person detained in a youth justice centre. The artist stated about his work: "Anyone can take any meaning to it as it speaks for itself".

Back cover: *Mixed Emotions* is an original artwork by a young person detained in a youth justice centre. The artist stated about his work: "It's abstract self-expression about my feelings in here. Frustrated, happy, sad, confused, helpless ... and surrender. The different colours in the painting reflect these feelings. I stood on the table to do the artwork – to let my feelings out through the splashing of the paint and folding of the paper".



**Australian
Human Rights
Commission**

17 October 2016

Senator the Hon George Brandis QC
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney

Children's Rights Report 2016

I am pleased to present to you the Children's Rights Report 2016, in accordance with section 46MB of the *Australian Human Rights Commission Act 1986* (Cth) (the Act). The Act requires that I submit a report relating to the enjoyment and exercise of human rights by children in Australia on an annual basis.

This report covers the period from 1 July 2015 to 30 June 2016.

Chapter 1 reports on the work I have undertaken throughout the past year to promote discussion and awareness of matters relating to the human rights of children and young people in Australia. It also discusses the progress of the recommendations that I made in previous Children's Rights Reports between 2013 and 2015.

Chapter 2 reports on how children's rights have been considered in legislation and court proceedings.

Chapter 3 reports on my work on the Optional Protocol to the Convention against Torture (OPCAT) and how it relates to children and young people who are detained in youth justice centres or adult facilities. Ratification of the OPCAT, and its subsequent implementation, would be a significant step towards protecting the human rights of people in all forms of detention in Australia.

Chapter 4 reports on the views of children and young people residing in the detention facilities that I visited as part of my work this year. A key principle of the *Convention on the Rights of the Child* is that the views of children and young people are taken into account in decisions that are likely to affect their lives. This is especially important for children in vulnerable situations. It is vital that we give those children and young people an opportunity to share their views and experiences of detention and to voice their opinions on how their needs can better be met.

I look forward to discussing the report with you.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Megan Mitchell'.

Megan Mitchell
National Children's Commissioner

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About the

National Children's Commissioner

Legislation establishing the position of National Children's Commissioner was passed by the federal Parliament on 25 June 2012.

Ms Megan Mitchell was appointed as the inaugural National Children's Commissioner on 25 February 2013 and commenced in the role on 25 March 2013.

Section 46MB of the *Australian Human Rights Commission Act 1986* (Cth) (the Act) describes the functions that are to be performed by the National Children's Commissioner. Under the Act, the National Children's Commissioner is specifically required to:

- submit a report to the Minister as soon as practicable after 30 June in each year. This report must deal with matters, relating to the enjoyment and exercise of human rights by children in Australia, as the National Children's Commissioner considers appropriate; and may include recommendations that the Commissioner considers appropriate as to the action that should be taken to ensure the enjoyment and exercise of human rights by children in Australia
- promote discussion and awareness of matters relating to the human rights of children in Australia
- undertake research, or educational or other programs, for the purpose of promoting respect for the human rights of children in Australia, and promoting the enjoyment and exercise of human rights by children in Australia

- examine existing and proposed Commonwealth enactments for the purpose of ascertaining whether they recognise and protect the human rights of children in Australia, and to report to the Minister the results of any such examination.

In performing these functions, the National Children's Commissioner may give particular attention to children who are at risk or vulnerable. Under the Act, the National Children's Commissioner is able to compel the production of documents and information held by the Commonwealth.

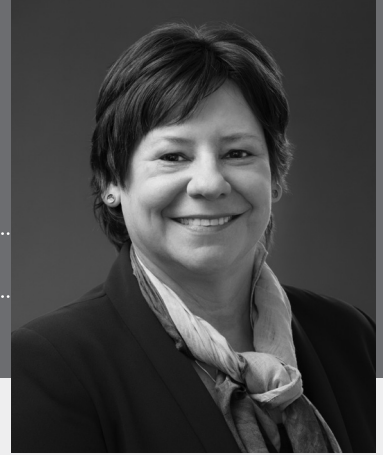
The United Nations *Convention on the Rights of the Child* underpins the work of the National Children's Commissioner. In addition to having regard to the *Convention on the Rights of the Child*, the National Children's Commissioner must have regard to a range of human rights instruments:

- Universal Declaration of Human Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- International Covenant on Economic, Social and Cultural Rights
- International Covenant on Civil and Political Rights
- Convention on the Elimination of All Forms of Discrimination Against Women
- Convention on the Rights of Persons with Disabilities

and such other instruments relating to human rights considered relevant.

Megan Mitchell

National Children's Commissioner



All Australian states and territories have Children's Commissioners and/or Guardians and/or Advocates. The legislative functions of these roles differ between jurisdictions. Some have a broad focus, which include all children, whereas others have specified responsibilities relating to children who are at risk or who are vulnerable. Their primary focus is on issues concerning children within their individual jurisdictions. The National Children's Commissioner works collaboratively with the state and territory Children's Commissioners, Guardians and Advocates through the Australian Children's Commissioners and Guardians Group.

Previous roles and qualifications

Commissioner Mitchell has extensive experience working with children from all types of backgrounds, including practical expertise in child protection, juvenile justice, and children's services. Previous roles include, NSW Commissioner for Children and Young People, Executive Director of the ACT Office for Children, Youth and Family Support, Executive Director for Out-of-Home Care in the NSW Department of Community Services, and CEO of the Australian Council of Social Service.

Commissioner Mitchell has qualifications in social policy, psychology and education: a Bachelor of Arts from the University of Sydney (1979), a Diploma of Education from the Sydney Teachers College (1980), a Master of Arts (Psychology) from the University of Sydney (1982), and a Master of Arts (Social Policy) from the University of York (1989).

For information on the work of the National Children's Commissioner, please visit: <http://www.humanrights.gov.au/our-work/childrens-rights>.

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Crinkling NEWS

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Thirteen-year-old, Jack Hamill, *Crinkling* journalist, interviews the National Children's Commissioner, Megan Mitchell.

Overview

I am pleased to present my fourth annual Children's Rights Report as the National Children's Commissioner. This report details how I have fulfilled my statutory functions, outlined in Section 46MB of the *Australian Human Rights Commission Act 1986* (Cth) (the Act) during the 2015-16 period.

During the course of my term, I have continued to monitor Australia's progress in meeting our responsibilities to children and young people under international law. My work and advocacy is inspired and guided by the *Convention on the Rights of the Child*. This articulates all the basic conditions children and young people require to thrive and flourish.

This report sets out significant advances in understanding and implementing the necessary prerequisites for ensuring children's rights are respected and upheld. I also outline areas where more needs to be done, and refer to the major strands of advocacy and research activity I have undertaken throughout the year.

Following on from my major examination last year, I have continued to advocate for a national focus on the distinct impacts of family and domestic violence on children. I am pleased to note that this report outlines positive progress on this front. The challenge is to keep this momentum going.

The primary focus for this year's report is an investigation into the oversight of youth justice detention in Australia. This was a particularly timely initiative given the shocking allegations of the abuse of children and young people in detention in the Northern Territory and Queensland that emerged earlier in the year.

As children's rights are increasingly recognised in legislation, programs and practice, working *with*, rather than *for*, children and young people becomes a normal part of doing business. This is particularly evident in the *National Framework for Protecting Australia's Children (2009-2020)* where ongoing consultation with children and young people has now been embedded in its development, implementation and evaluation.

In my role, I come across many people in the community, in government and in the non-government sector, who are committed to championing the rights and welfare of children and young people and supporting the work that I do. This makes me extremely optimistic for the future of Australia's children and young people, and our ability to fulfil the promises we have made to them in the CRC.

But most of all, my optimism comes from engaging with children and young people themselves. As I travel across this big country of ours, children and young people continue to impress me with their insights, energy and enthusiasm to be involved in their communities.

The children and young people I have met who understand their rights are empowered and safeguarded by this knowledge, and develop a strong sense of respect for the rights of others.

This goes as much for children and young people living on the coast or in heart of the desert, for children and young people in detention and for those in out of home care, for children and young people who have just arrived on our shores, and for those whose families have been here for many generations. They all count, they all have a contribution to make, and they all have rights.

Finally, I must acknowledge the hard and tireless work of the staff of the Australian Human Rights Commission who have supported me in all the activities undertaken over the year, and who were instrumental in delivering this report.

Chapter 1: Advocacy for Children's Rights in Australia

Chapter 1 examines the work I have undertaken throughout the past year to promote discussion and awareness of matters relating to the human rights of children and young people in Australia. This work is reported against the five themes which emerged from my consultations with children and young people when I started my term in 2013. It also discusses the encouraging progress made in relation to recommendations made in my previous Children's Rights Reports.

Chapter 2: Child Rights in legislation and court proceedings

Chapter 2 reports on the consideration of child rights in the development or refinement of federal laws and related policies. In particular, I review the comments and analyses of the Joint Parliamentary Committee on Human Rights on how children's rights were taken into account in Statements of Compatibility with Human Rights, which accompany Bills introduced to Parliament in the reporting period. I also include a summary of the position of the Australian Human Rights Commission set out in submissions made in relation to these Bills.

Chapter 3: Oversight of youth justice in Australia: Implementing OPCAT

The focus of this chapter is to take stock of the readiness of youth justice processes for the implementation of the OPCAT. This includes a review of current oversight, complaints and reporting arrangements across the jurisdictions, an analysis of their adequacy in meeting the OPCAT requirements, and identification of opportunities for improvements nationally over time. Information gathered for this examination was derived from formal requests to relevant state and territory departments; a series of expert roundtables; submissions from non-government bodies and oversight agencies; and consultations with young detainees in each jurisdiction.

Chapter 4: The voices and experiences of children and young people in the justice system

Chapter 4 outlines the findings of workshops and surveys of children and young people residing in detention facilities visited as part of this year's work. Children and young people were asked about their knowledge of monitoring and oversight mechanisms; people and processes; their understanding of their rights in detention; and their views about their treatment and the conditions in which they were living.

Support Services

If you are feeling distressed, are worried about someone, or would like someone to talk to, please contact:

- Kids Helpline on 1800 55 1800 or www.kidshelp.com.au
- Headspace on 1800 650 890
- Lifeline on 13 11 14 or www.lifeline.org
- 1800 RESPECT on 1800 732 732 or www.1800respect.org.au
- MensLine Australia on 1300 78 99 78 or www.mensline.org.au
- Police and ambulance services on 000

Recommendations

Recommendation 1:	That the Australian Government ratify OPCAT as soon as possible. Further, that at the time of ratification the Government issues a standing invitation to the UN Subcommittee on the Prevention of Torture.
Recommendation 2:	That all jurisdictions commence stocktakes of how their existing systems of monitoring and inspection meet the criteria laid out in the OPCAT, and amend their legislative frameworks accordingly.
Recommendation 3:	That the Australian Institute of Health and Welfare (AIHW) and the Australasian Juvenile Justice Administrators (AJJA) work together in 2017 to develop a reporting framework to meet OPCAT requirements over time.
Recommendation 4:	That the Australian Institute of Health and Welfare (AIHW) and the Australasian Juvenile Justice Administrators (AJJA) work together in 2017 to generate additional publically available data on characteristics of detainees, their treatment and conditions.
Recommendation 5:	That the Productivity Commission, the Australian Institute of Health and Welfare (AIHW) and the Australasian Juvenile Justice Administrators (AJJA) work together in 2017 to progress the collection of 'outcome' based data for children and young people in the youth justice system.
Recommendation 6:	That the Australian Government commissions research which explores the processes and contexts that support children and young people's appreciation of their rights and responsibilities in institutional settings.
Recommendation 7:	That Australia withdraws its reservation under article 37(c) of the <i>Convention on the Rights of the Child</i> on the obligation to separate children from adults in prison.
Recommendation 8:	That the Australian Government commissions research which investigates the pathways, experiences and needs of young people aged 18-25 years in the prison system.
Recommendation 9:	That the age of criminal responsibility should be raised from 10 years to 12 years in the first instance, with preservation of <i>doli incapax</i> .
Recommendation 10:	That the Australian Government ratifies the <i>Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure</i> (OPCP).

Recommendation 11:

That the Council of Australian Governments resource a national strategy to reduce the over-representation of Aboriginal and Torres Strait Islander children and adults in detention under the Close the Gap Framework, including:

- a) Strategies to address underlying social and economic causes of children and young people coming into contact with the criminal justice system.
- b) Establishing justice targets and strategies aimed at significantly reducing the number of Aboriginal and Torres Strait Islander children and young people in detention.
- c) Developing a commitment to working in genuine partnership with Aboriginal and Torres Strait Islander communities, leaders and representative bodies.
- d) Investing sufficient resources to ensure practical implementation.

Recommendation 12:

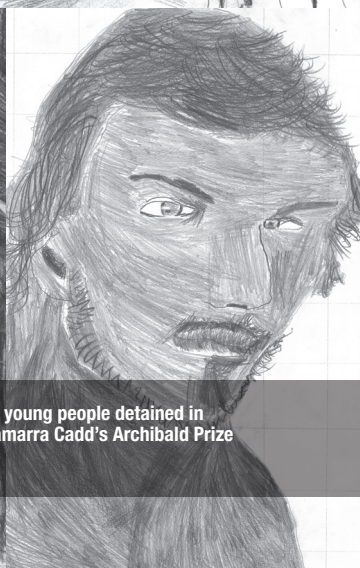
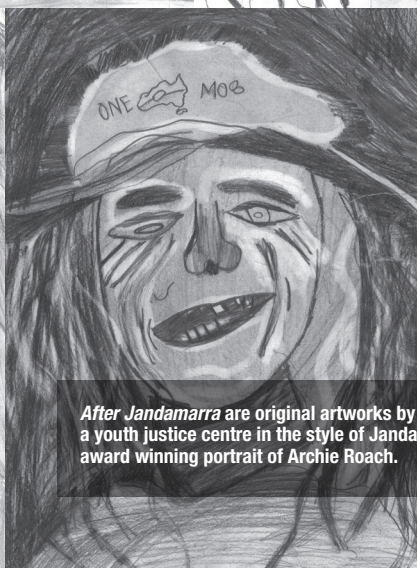
That mandatory sentencing for children and young people should be discontinued in all jurisdictions that are currently using it.

Chapter 1:

Advocacy for children's rights in Australia



Collage of entries into "Ur Tru Colours" Art Competition



After Jandamarra are original artworks by young people detained in a youth justice centre in the style of Jandamarra Cadd's Archibald Prize award winning portrait of Archie Roach.

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1.1 Introduction

This chapter reports on the work I have undertaken in the period 1 July 2015 to 30 June 2016 to promote awareness of and respect for children's rights in Australia.

I also report on the progress of the recommendations made in my 2013, 2014 and 2015 statutory reports to Federal Parliament.

The activities detailed in this chapter are structured according to five key themes that guide my work as National Children's Commissioner.

1. **A right to be heard:** elevating children's voice and participation in decision-making.
2. **Freedom from violence, abuse and neglect:** ensuring safe environments and respect for the dignity of the child.
3. **The opportunity to thrive:** safeguarding the health and wellbeing of all children in Australia, particularly those who are most vulnerable.
4. **Engaged citizenship:** promoting civic engagement and active citizenship through education and awareness-raising.
5. **Action and accountability:** monitoring progress of Australia's commitments to protect the wellbeing and rights of children.

These themes arose from the national listening tour (*the Big Banter*) I conducted at the beginning of my term in 2013. The consultations with children and young people and their advocates identified the main issues affecting children and young people in Australia and have shaped the strategic direction of my work to date.

I continue to engage with children and young people and other key stakeholders in the work that I do. My speaking engagements for this year are detailed in Appendix 1, my meetings with stakeholders are listed in Appendix 2, and my memberships of advisory groups and ambassadorships are provided in Appendix 3.

1.2 A right to be heard

In my work as National Children's Commissioner, one of my main objectives is to ensure that children and young people's ideas and opinions are sought and taken into account in decision-making processes.

The right for children and young people to be heard is set out in article 12 of the *Convention on the Rights of the Child* (the CRC),¹ and is considered to be one of the four central principles of the CRC.² This means that it is a right that underpins the interpretation and implementation of all other rights.

The United Nations Committee on the Rights of the Child has stated that 'article 12 is connected to all other articles of the CRC, which cannot be fully implemented if the child is not respected as a subject with her or his own views'.³

A key aspect of my work involves regular consultations with children and young people and ongoing advocacy for the inclusion of children and young people's perspectives in decisions and processes that affect them.

1.2.1 The National Framework for Protecting Australia's Children

The *National Framework for Protecting Australia's Children* (the National Framework) is a national policy initiative established in 2009, bringing together the Commonwealth, state and territory governments and non-government organisations in a sustained commitment to improving the safety and wellbeing of Australia's children.

From the beginning of my involvement in the National Framework, I have advocated for the inclusion of children and young people's voices in its development and implementation, along with others such as Families Australia and the CREATE Foundation.

The National Framework is implemented through three-year action plans, spanning from 2009 to 2020. Last year, I worked in partnership with the Department of Social Services and the CREATE Foundation to facilitate two roundtables with young people to assist in the development of the National Framework's Third Action Plan for 2015-2018.

To support the implementation of the Third Action Plan, the Department of Social Services has agreed to a further 18 consultations with children and young people in every state and territory. Working in partnership with the CREATE Foundation, I will be helping to organise and facilitate these consultations. The consultations will involve a series of focus groups with vulnerable groups of children and young people to gain their insights about how strategies related to the Third Action Plan can be improved, implemented and evaluated.

I would like to thank the officials at the Department of Social Services for demonstrating strong leadership in this area by embedding consultations with children and young people as a core element of the National Framework.

One outcome under the National Framework has been the development of *National Standards for Out-of-Home Care* (the National Standards). The 13 National Standards are designed to improve the quality of care provided to children and young people in the out-of-home care system. It is intended that progress towards these National Standards will be measured in part through an annual national survey of children in out-of-home care, ensuring children's perspectives are a formal part of the evaluation process.

A pilot version of this survey was carried out last year. Encouragingly, the results revealed that, of the 2,083 children surveyed, 91% of children reported feeling both safe and settled in their current placements.⁴

67% of the respondents reported that they were usually allowed to have a say in what happens to them, and that people usually listen to what they say. However, over a quarter of respondents (26%) reported that people did not usually explain decisions made about them.⁵

While the reported level of satisfaction within placements is encouraging, these findings highlight that more needs to be done to uphold the rights of children and young people in out-of-home care so that their opinions are heard and that they have access to relevant information.

This survey is an important example of gathering the views of children and young people to evaluate the effectiveness of services targeted at them.

I look forward to the ongoing development of the survey and examining future findings in coming years.

1.2.2 Creating child-safe institutions

Children and young people are particularly vulnerable within institutional settings. In 2012, the Australian Government established the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) to investigate the sexual abuse of children within private, public and non-government institutions. The Royal Commission is due to submit a report of the results of its inquiry, and its recommendations, to the Governor-General in December 2017.

The investigations of the Royal Commission have highlighted the many ways institutional systems and structures have historically been inadequate in protecting children and young people from unsafe individuals and situations.

In part this can be attributed to the systemic failure to understand the necessary conditions for building child-safe organisations and the lack of genuine commitment to adopting a child rights approach in the management of these organisations. This includes, most importantly, the right of children and young people to be listened to and have their views respected and acted on.

In August last year, I launched the *Taking Us Seriously* report,⁶ which contained the preliminary findings of the Children's Safety Study. The study was commissioned by the Royal Commission to better understand how children perceive safety within institutional contexts.

The *Taking Us Seriously* report provides important insights into the views of children and young people on safety in organisational settings and what they require to be safe and also feel safe.

The report found that children and young people want to have greater involvement in developing, implementing and evaluating child-safe practices.⁷

Children and young people perceive that adults tend to minimise or dismiss their concerns without properly listening to them. For example, one young person said:

Lots of adults don't care enough about kids and this stuff is going to keep happening. Until they see us as having good ideas and believe us [when things go wrong] nothing will change.⁸

Children and young people explicitly pointed to the importance of having their voices heard.

It's important that young people have an opportunity to talk about this stuff but it has to be done safely so, you know, it doesn't make life worse for them ... But I think that even though adults are scared to talk about this stuff because it is uncomfortable, it has to be done if things are going to change.⁹

I think that adults think they know what kids need to be safe but I don't think that they do. They base it on what they remember from when they were kids and the world is different now. So they need to talk to kids and find out what it means to them.¹⁰

As a final phase to this project, the Institute of Child Protection Studies, the Australian Catholic University, Griffith University and the Queensland University of Technology worked in partnership to survey 1,480 children and young people aged 10–18 about their views on safety in institutions.

The results are contained in the report: *Our Safety Counts: Children and Young People's Perceptions of Safety and Institutional Responses to their Safety Concerns*, which was released in September 2016.¹¹

In the report children and young people identified that the most influential characteristic in determining how safe they felt within an institution was the extent to which adults paid attention when they raised a concern or worry.¹²

In April this year, as part of my ongoing involvement in supporting the work of the Royal Commission, I participated in a three-day roundtable on 'making institutions child safe'. The roundtable explored the possibility of developing consistent child-safe standards for institutions and scoped how these could be applied nationally.

A nationally consistent approach to child safety must aim to build cultures and systems that ensure a focus on the rights and needs of all children and young people within organisational settings. This will be a strong focus of my work going forward.

1.2.3 Supporting the health of children and young people in rural and remote areas

Article 24 of the *Convention on the Rights of the Child* focuses on a child's right to the highest attainable standard of health.¹³

When Australia last reported to the Committee on the Rights of the Child as part of its periodic reporting obligations, the Committee took notice of the health disparities between different groups of Australian children and young people, particularly, the lower health status of children and young people living in rural and remote areas, and Aboriginal and Torres Strait Islander children.¹⁴

The Committee recommended that Australia take measures to ensure all children have the same access to and quality of health services, and that special attention is given to children living in remote areas and Aboriginal and Torres Strait Islander children.¹⁵

My work on intentional self-harm, with or without suicidal intent, in children and young people in 2014 showed that children and young people in rural and remote areas are significantly more likely to die due to intentional self-harm than by other external causes, compared to children and young people in metropolitan areas.¹⁶

Numerous submissions to my 2014 examination highlighted the lack of available support services in rural and remote communities, and noted that the services that do exist do not necessarily reflect the needs or wants of these communities.¹⁷

In order to ensure that children and young people in rural and remote communities have access to the highest attainable standard of health, it is essential that health service providers engage and consult with the children and young people they seek to help.

This year I had the pleasure of being involved in the National Rural Health Alliance's conference: *Caring for Country Kids* in Darwin. As part of this, I co-facilitated a workshop with Dr Tim Moore, Senior Research Fellow at the Australian Catholic University, with a number of local children and young people.

In this workshop, children and young people were asked to think about what a healthy community would look like and what would need to happen for an unhealthy community to become a healthy one. Their responses included:

What does a 'healthy community' look like?

- [A healthy community] means you can have lots of opportunities and can have a kickstart in reaching your dreams
- Safe environments. Don't have to worry about violence, drugs, alcohol, things that make you feel scared
- Enough healthy food and fresh water.

What would need to happen for an unhealthy community to become a healthy one?

- Make sure that there are lots of safe schools for a good education (it's good to learn and it's good that school is a safe place for those kids who don't have anywhere else that's safe)
- Domestic violence is stopped so no kid is unsafe
- Give people more support because there's lots of people who hurt themselves, are depressed or suicide. There's not enough around
- Make sure that every kid has someone they trust they can talk to.

These responses illustrate children and young people's understanding of the broader issues within their communities and the specific responses they need in order to be healthy and safe.

1.2.4 The voices of children and young people in the youth justice system

This year I conducted workshops with nearly 100 children and young people detained in youth justice centres and adult detention facilities. I also asked them to complete a survey about their experiences. This was part of my work on how the ratification of the *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* could assist in monitoring the wellbeing of children and young people who are detained. I report on this in detail in Chapter 4 of this report.

I also invited children and young people in youth justice centres and adult correctional facilities to express their views through an art competition. The artworks submitted are featured throughout this report.

1.3 Freedom from violence, abuse and neglect

This year marks the beginning of the implementation of the United Nation's *2030 Agenda for Sustainable Development*,¹⁸ which builds on the work of the Millennium Development Goals.

The 2030 Agenda addresses violence against children and young people as a crosscutting concern and includes a specific target to end all forms of violence against children and young people.¹⁹

For the first time, the right of children and young people to live free from violence and fear is recognised as a priority on the international development agenda and forms part of the vision of human development for all countries and for all regions.

The responsibility to protect children and young people from all forms of violence, abuse and neglect is set out under article 19 of the *Convention on the Rights of the Child*,²⁰ and guides my agenda as National Children's Commissioner.

In 2014, I examined the issue of intentional self-harm, with or without suicidal intent, in children and young people under 18 years of age. In 2015, I investigated the impact of family and domestic violence on children and young people. These examinations highlighted that certain vulnerable groups, including Aboriginal and Torres Strait Islander children and young people, those in out-of-home care, those with disability, those who are sexually diverse, transgender, gender diverse and intersex, those from culturally and linguistically diverse backgrounds, and those living in rural and remote areas continue to experience disproportionately high levels of violence and disadvantage.

I report on the direct responses to the recommendations that I made in my 2014 and 2015 reports in section 1.7 of this chapter.

More detailed examples of my continued advocacy regarding suicide and self-harm, and family and domestic violence, include:

1.3.1 Intentional self-harm, with or without suicidal intent, in Aboriginal and Torres Strait Islander children and young people

In my *Children's Rights Report 2014*, I highlighted how Aboriginal and Torres Strait Islander children and young people are disproportionately affected by intentional self-harm and suicidal behaviour.²¹

Data provided to me by the Australian Bureau of Statistics in 2014 revealed that Aboriginal and Torres Strait Islander children and young people accounted for 28.1% of all the recorded deaths in children and young people under 18 years of age due to intentional self-harm.²²

The recommendations in my 2014 report highlighted the need for further research into the multiple interrelated risk factors and intervention strategies for Aboriginal and Torres Strait Islander children and young people.

Since 2015, I have acted as a member of the National Advisory Committee for the *Aboriginal and Torres Strait Islander Suicide Prevention Evaluation Project (ATSISPEP)*. This project was established to evaluate suicide prevention programs operating in Aboriginal and Torres Strait Islander communities and to develop an evidence base for best practice in Aboriginal and Torres Strait Islander suicide prevention. ATSISPEP provided a final report to the Minister for Indigenous Affairs in September 2016, which details promising practices, recommendations for improvements to existing services and programs, and research and evaluation priorities.

I also sought to raise awareness of this issue at the international and national level. I presented at the 2016 International Congress on Child Abuse and Neglect in Canada and also at the 2016 National Suicide Prevention Conference, where I highlighted the need to incorporate awareness of culture and context in suicide prevention.

1.3.2 The impact of family and domestic violence on children and young people

Since the release of my 2015 report in December of last year, there have been a number of significant policy developments at national, state and territory levels towards developing a more coordinated and comprehensive approach to addressing family and domestic violence in Australia. I would like to highlight these developments.

One of the overarching findings from my 2015 report was the lack of coherent public policy approaches to children and young people affected by family and domestic violence.²³ In my report, I called for greater consideration of the unique and significant impacts that family and domestic violence has on children in national, state and territory plans, policies and practices.

The Advisory Panel on Reducing Violence against Women and their Children presented their final report to the Council of Australian Governments (COAG) in April 2016. This report acknowledged that the needs and wellbeing of children and young people should be considered across all areas of action in government responses to violence against women.²⁴

I especially welcome Action Area 3 of the panel's report, which states that children and young people should be recognised as victims of violence against women in their own right, and recommends that the views and experiences of children and young people be taken into account during the scoping, design, and evaluation of services.²⁵

In September 2015, in response to the initial advice of COAG's Advisory Panel on Reducing Violence against Women and their Children, the Commonwealth Government announced \$100 million for a Women's Safety Package.²⁶

This funding supports the work being undertaken as part of the *National Plan to Reduce Violence against Women and their Children* (the National Plan) and is in addition to the Commonwealth Government's \$100 million investment in the Second Action Plan of the National Plan.²⁷ COAG has also agreed to undertake a national educational campaign for reducing family and domestic violence.²⁸

It is encouraging that a number of states and territories have also made significant commitments to address the impact of family and domestic violence on children and young people.

I will continue to emphasise the importance of understanding children's experiences of family and domestic violence as separate and distinctive, and not just as part of an adult situation.

1.3.2.1 Educating children and young people about respectful relationships

Another key finding in my 2015 report was the lack of education programs for children and young people in schools that adequately addressed family and domestic violence.²⁹

In September 2015, Commonwealth, state and territory Education Ministers strengthened the position of 'respectful relationships' within the Australian Curriculum, with specific content in the Health and Physical Education learning area and through the personal and social capability across all learning areas.³⁰

Additionally, the Commonwealth Government committed funding of \$5 million to expand the Safe Schools website to include resources for teachers, parents and students on respectful relationships, as a longer-term measure to change the attitudes of children and young people to violence.³¹

Recently, governments in New South Wales (NSW), the Australian Capital Territory (ACT) and Queensland have announced the inclusion of respectful relationships education into their secondary school curriculums.

In August 2015, the Tasmanian Government announced funding of \$355,000 for the delivery of respectful relationships education in all Tasmanian schools, from Kindergarten to Year 12, as part of the Tasmanian curriculum.³²

In April 2016, the Victorian Government announced an investment of \$21.8 million to strengthen respectful relationships education within the state curriculum, from Kindergarten through to Year 10.³³

Victoria has also announced that it will extend its respectful relationships program into early childhood education, with up to 4,000 early childhood educators to benefit from professional learning focused on how to build and develop respectful relationships aligned with the Victorian Early Learning and Development Framework and the National Quality Standards.

I look forward to the implementation and evaluation of these programs.

1.3.2.2 Children affected by family and domestic violence who are involved with the family law system

As part of my work as National Children's Commissioner, I have advocated for improvements to the family law system to allow the increased participation of children and young people in family law matters.

The issue of children's exposure to family and domestic violence in the context of the family law system was consistently raised throughout my examination in 2015.

Key concerns about the family law system included:

- lack of understanding and inappropriate responses to family and domestic violence by those working in the family law system
- a conflict between the right of parental contact and the rights and best interests of the child
- court decisions which do not yet fully reflect the amendments to the Family Law Act in 2012
- the inappropriate use of mediation for some families.³⁴

In 2015, the Australian Institute of Family Studies completed a project evaluating the effects of the 2012 amendments to the Family Law Act, which included greater consideration of children's safety and exposure to family violence and abuse.³⁵ The evaluation examined how these reforms have affected court decisions and outcomes for families.

The results of this evaluation suggested an increased focus on screening for family violence and child abuse concerns across the system, particularly among lawyers and the courts.³⁶ However, at this stage, parents do not appear to perceive that their concerns in these areas, especially safety concerns, are being dealt with more appropriately as a result of the reforms.³⁷ The report suggests that it may be too early to see significant practice change as a result of the reforms.³⁸

In 2016, as a result of strong advocacy to ensure the experiences of children involved with the family law system are understood and their voices heard, the Australian Institute of Family Studies has been commissioned by the Federal Attorney-General's Department to undertake the research project: *Children and young people in separated families: family law system experiences and needs*.³⁹

This project is designed to build on the existing research on separated families to develop a better understanding of the experiences of children and young people after the separation of their parents, and the extent to which their needs are being met by the family law system.⁴⁰

The project will address a significant gap in knowledge by gathering information directly from children and young people themselves. The project will involve interviews with children and young people between 10 and 17 years of age.

This research should provide powerful evidence about where reform is most needed to deliver on children's rights. The Attorney-General has indicated that any future efforts to improve the experience of women and their children in family law cases will be informed by the findings of this and related studies.⁴¹

During 2015, I welcomed the launch of new resources on the Independent Children's Lawyers' website to support children and young people in understanding the family court systems and the role of Independent Children's Lawyers.⁴² Resources such as these play an important role in assisting children and young people to navigate this complex system.

1.4 Opportunity to thrive

The opportunity to thrive involves promoting the health and wellbeing of all children and young people in Australia and, in particular, addressing the unequal life opportunities that exist for vulnerable groups of children and young people.

Children who experience poverty, marginalisation and discrimination are particularly vulnerable to abuses of their rights. In my work, I pay particular attention to promoting the rights of these children.

1.4.1 Identity documents for children and young people in out-of-home care

Foster and kinship carers often experience difficulties in obtaining timely access to identity documents, for children and young people in their care.

This can mean that children and young people in out-of-home care do not receive timely treatment for health conditions, have difficulties enrolling in school, miss out on school excursions, sporting and cultural opportunities, and families may be prevented from taking overseas holidays together.

Information provided to me by the South Australian Council for the Care of Children, the CREATE Foundation, and a number of state and territory Children's Commissioners has highlighted that Aboriginal and Torres Strait Islander children and young people can face particular difficulties in obtaining proof of identity.⁴³

This has both immediate and long term negative impacts on childfree and young people and the opportunities they can access.

This kind of differential treatment raises significant human rights issues for children, including: the right to be recognised as Australian citizens,⁴⁴ the right to access health services and income support,⁴⁵ and discriminatory treatment by the state as Guardian.⁴⁶ It also significantly impacts on children's sense of identity and belonging and the quality of their relationships with carers.

This issue needs to be addressed at all levels of government. State and territory governments who have parental responsibility in child protection cases, often do not prioritise the early sourcing of identity documents. They may also lack effective relationships with state and territory birth registrars and with federal departments; including the Department of Immigration and Border Protection for granting citizenship; Department of Health for issuing passports; and Department of Foreign Affairs and Trade (DFAT).

Differing advice regarding the issue of obtaining identity documents has been received from different federal departmental agencies.

For example, a letter from the Minister for Immigration and Border Protection suggested that in some cases:

a Proof of Aboriginality document is not evidence of the holder's Australian citizenship as it is issued for a different purpose and without the issuers having had access to relevant material. Similarly, a confirmation letter from a government agency that states the relevant state or territory government Minister who is or was the legal guardian of a child, would also be given weight as evidence of a child's identity but would not be sufficient to establish that the child is an Australian citizen.⁴⁷

However, correspondence from the Department of Social Services noted that:

DFAT has confirmed that the APO [the Australian Passport Office] will accept a letter on official letterhead from a Community Elder, a Community Leader, a Community Council, a Church Mission, an associate Aboriginal or Torres Strait Islander body or a government body as evidence to support a passport application for an Aboriginal or Torres Strait Islander person.⁴⁸

Based on this information, it remains unclear as to exactly what evidence, and in what form, is required to establish citizenship or obtain a passport for Aboriginal and Torres Strait Islander children and young people.

In 2016, I wrote to the Minister for Social Services, seeking advice and clarification about current requirements and arrangements and suggesting particular areas for reform.⁴⁹ Other jurisdictions have also sought advice from federal and state ministers.

I am pleased to report that this issue is now under active consideration by the *National Framework for Protecting Australia's Children*, which is to establish a working group to address this issue. I look forward to monitoring progress in this important area.

1.4.2 Creating safe digital environments for children and young people

Throughout the reporting period for this report, I have engaged in debates about the creation of safe online spaces for children and young people in a number of ways.

In April 2016, I led the work on the submission that the Australian Human Rights Commission made to the Senate Standing Committee on Environment and Communications' inquiry into harm being done to Australian children through access to pornography on the Internet.⁵⁰

It is clear that the proliferation of new Information and Communication Technologies (ICTs), and use of these technologies by children and young people, has increased the risk that children and young people may be exposed to harmful content online, including pornography. Children and young people may come across this content inadvertently, or deliberately seek it out. Research indicates that children's and young people's attitudes and behaviour may be influenced by viewing pornography.⁵¹

At the same time, there appears to be only limited empirical evidence that viewing pornography causes children and young people to engage in coercive, aggressive or violent sexual behaviour and further research is recommended in the Australian context.

A human rights-based approach to protection from harm online requires the balancing of rights, with the children and young people themselves being included in discussions about appropriate protective measures.

Current regulatory responses, such as the removal of prohibited content under the Online Content Scheme, and the requirement that Internet Service Providers (ISPs) offer information and make available (at cost) filters that parents can install, can help prevent some exposure.

However, the key to effective protection of children and young people from the adverse impact of viewing pornographic content is education. This includes information and education about safety online, critical discussion of pornography as part of age-appropriate education about sex and healthy and respectful relationships, and human rights education. A package of educative measures covering these areas has the potential to significantly empower children and young people and their families, and provide them with the tools to minimise both the exposure to and the impact of pornographic online content.

I have continued to engage with a range of stakeholders concerned with reducing online risks for children and young people through my membership of the Online Safety Consultative Working Group, chaired by the Office of the Children's E-Safety Commissioner.

This year I also became a member of the Child Cybersex Crime Research Project Advisory Board, to provide guidance on the development and implementation of recommendations which will be included in their upcoming report: *Behind the Screen: Online Child Exploitation in Australia*.

This report brings together data and statistics previously unavailable to the public; provides expert commentary drawn from interviews with representatives from leading law enforcement and non-government agencies; and draws on primary and secondary research to provide a comprehensive summary of Australia's legal response to the issue of online child exploitation.

Lastly, I have continued my long standing involvement in research by the University of Sydney into children and sexting. The 'sexting problem' is frequently raised with me by adults and young people in my role as National Children's Commissioner. Adults are worried about the risks associated with children's exploitation and exposure to explicit images in the context of an unregulated digital world. Young people are concerned that what they understand to be private choices and associations are over-policed.

It is clear that there is a disparity between adults and children and young people's perspectives in this space. The negative risks associated with sexting have been well documented. However, for the growing teen, we need to remember that taking risks is a fundamental part of their development and often experienced positively.

Ongoing research on this topic which directly involves the views and perspectives of children and young people is important, especially in regard to the criminalisation of behaviour in this context. As such, I welcome the publication of research on sexting and Australian teenagers published in 2015, based on the views and experiences of 2,243 children and young people.⁵²

1.4.3 Supporting children and young people dealing with grief and loss

Last year, I was fortunate to be involved in the launching of updated grief and loss resources for children, through the not-for-profit organisation, Good Grief.

The *Seasons for Growth* program was first developed in 1996 with funding provided through the Mary MacKillop Foundation. The program has five levels based on developmentally appropriate discussions and activities. This is its third edition and in 2015 almost 15,000 children and young people participated in the program worldwide.⁵³

Seasons for Growth assists children and young people in normalising their experiences of grief, increasing protective factors and minimising risk factors through a person-centred learning approach where children and young people 'become aware of their own strengths and resources, and decide on their own solutions'.⁵⁴

1.4.4 Supporting improved outcomes for Aboriginal and Torres Strait Islander children and young people

In Australia, Aboriginal and Torres Strait Islander children and young people continue to face greater barriers to accessing their rights than their non-Indigenous peers and consistently experience lower levels of health, education, and socio-economic status.⁵⁵

A corollary of this is that Aboriginal and Torres Strait Islander children and young people are significantly overrepresented in the justice system.⁵⁶

As part of my advocacy to support improved outcomes for Aboriginal and Torres Strait Islander children and young people, this year I have promoted the positive outcomes of the Justice Reinvestment campaign in NSW and also the NSW Youth Koori Court.

Justice Reinvestment

In May 2013, I joined the Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, as a Justice Reinvestment Champion for the Just Reinvest NSW campaign.

Justice reinvestment is a data driven, place-based approach to reduce offending and imprisonment and increase community safety. Justice reinvestment is about re-orienting investment from costly tertiary services like prisons, police and child protection systems and into prevention and diversionary focused actions, services and programs in communities. These supports can range from help for new and expectant parents, investment in infant health assessments and early childhood education, through to youth mentoring and conferencing.

The principles of the justice reinvestment approach embrace localism, community control and better cooperation between services on the ground.

Since 2009, justice reinvestment has been the subject of recommendations in a number of reports. Notably, the Australian Government indicated support for justice reinvestment in response to the *Doing Time-Time for Doing* report on youth offending.⁵⁷

Work to date has focused primarily on the NSW community of Bourke, which has a large Aboriginal community and high rates of crime and imprisonment. Children and young people comprise a significant proportion of the population, and are responsible for significant amount of offending.⁵⁸ As such, the needs and trajectories of the young people in the town are a major focus of the project.

The Bourke Aboriginal community has been working with Just Reinvest NSW since 2012 to establish justice reinvestment, through the Maranguka initiative. Maranguka (which means caring for others) is a grass roots coalition of local Aboriginal Bourke residents who want to see positive change in their community.

The first phase has been concerned with engaging community members and assembling critical data across key domains, for example: school attendance, suspensions and attainment; type, place and times of offending activity; and information about child protection reports. Another element of this phase has been to understand and map the community needs in Bourke. This phase is now complete and planning is underway to trial and implement the supports and infrastructure required to meet those needs.

Since 2013, I have visited Bourke on a number of occasions, to consult with townspeople, Maranguka, and the children and young people of Bourke. Much of this activity has occurred with the Aboriginal and Torres Strait Islander Social Justice Commissioner.

In August and September this year, I again visited Bourke Primary School and Bourke Secondary School. I met with students to discuss their involvement in the justice reinvestment initiatives and to seek their ideas about how to keep children and young people constructively engaged in school, community life, training and employment.

NSW Youth Koori Court

In addition to preventative community-based schemes that divert Aboriginal and Torres Strait Islander children and young people from entering into the youth justice system, alternative approaches are also required for those who are already in the system.

In 2015, the NSW Youth Koori Court commenced as a pilot program specifically for Aboriginal and Torres Strait Islander young people in the youth justice system, operating out of the Parramatta Children's Court.⁵⁹

The Youth Koori Court is a diversionary sentencing program that involves a holistic approach that includes the participation of services to help support young people with their identified issues. The inclusion of the young person's family is a pivotal component in the Youth Koori Court process, as is the involvement of Aboriginal Elders who provide the important cultural connection for the young person, as well as providing appropriate cultural advice to the court.

The Youth Koori Court has the same powers as the Children's Court of NSW, but is less formal, and provides the young person an opportunity to talk about the issues facing them. During the court's process, an action and support plan is developed which sets out how services will support the young person. It also details ways that the young person can address the various risk factors affecting their lives, for example: accessing stable accommodation, addressing health, drug or alcohol issues and increasing attendance at school.

In the short time that the Youth Koori Court has been operating, there have been promising signs for the young people participating, including an increase in court attendance and a reduction in the number of breaches of bail. One positive example is provided below:

Case Study: Jack*

Jack was removed from the care of his parents at the age of two years, and formally ordered into the care of the Minister at the age of three. He remained in the care of the state up until 18 years of age, a total of 16 years. Jack experienced chronic homelessness for 8 years, leaving his care placements from the age of 11, and self-placing with relatives and friends. Due to this instability, Jack disengaged from school, became dependent on alcohol and had intensive contact with the police for low-level offending related to his social and financial disadvantage (for example, train fines and shoplifting).

Jack also had been affected by the passing of two immediate family members (including his mother), resulting in ongoing loss and grief for which he has received no appropriate cultural or clinical support. This unaddressed loss and grief has exacerbated his drug and alcohol dependency and mental health needs.

The Youth Koori Court process

Jack's Youth Action and Support Plan identified a number of risk factors, including:

- his risk of ongoing homelessness (he was homeless at the time when Youth Koori Court proceedings commenced)
- his issues with alcohol and other drugs, which stemmed in part from grief issues as a result of his mum's death
- lack of participation in the leaving care process as a young person in out-of-home care
- lack of preparation transitioning him out of care.

Jack had also developed significant trust issues with agencies, particularly NSW Family and Community Services, which has severely limited his capacity to engage with and be linked to other support and services.

Since Jack's engagement with the Youth Koori Court, the following outcomes have been achieved:

- no further criminal offending or contact with police
- funding sourced for an external agency to provide intensive casework support for Jack, particularly for his issues with alcohol and other drugs
- development of a leaving care plan relevant to Jack's circumstances (including costs for setting up a new home and driving lessons)
- assistance with progressing Jack's application for victim's compensation
- permanent housing sourced for Jack (including ongoing support through a youth service)
- aftercare support provided to Jack as he left care through the NSW Aboriginal State-Wide Aftercare Service
- fines and consumer debts amounting to \$13,000 written off.

**Name has been changed to protect confidentiality.*

1.5 Engaged citizenship

Promoting engaged civics and citizenship through education and awareness raising is one of my core functions as National Children's Commissioner. I achieve this through presentations at conferences, forums and other public engagements and my advocacy on children's rights issues in the media.

I also support the work of the Australian Human Rights Commission to promote awareness of and respect for children's rights, through the development and distribution of human rights education resources for children and young people.

1.5.1 Encouraging human rights education in schools

Learning about fundamental human rights and freedoms, such as those contained in the *Convention on the Rights of the Child*, is an important means of equipping children and young people with knowledge and skills to claim their rights and bring about positive change in their lives and their communities.

The Australian Human Rights Commission seeks to ensure children and young people are empowered to apply human rights in everyday life through its 'Human Rights Education in Schools' program.

As part of this program, this year the Australian Human Rights Commission developed *An Introduction to Human Rights and Responsibilities*, an interactive website designed to give primary school students in Years 5 and 6 a foundation in international human rights principles. The website includes accompanying lesson plans for teachers and is linked to the Australian Curriculum areas of Humanities and Social Sciences (HASS) and Health and Physical Education. I launched these resources at the Australian College of Educators' national conference in September this year.

The benefits and value of human rights education is not limited in application to school-aged children. Efforts to inform children of their rights should begin at a young age.

In 2014-15, I worked in partnership with Early Childhood Australia to develop guidelines to assist early childhood educators in supporting children's rights in their professional practice. This is outlined in *Supporting young children's rights: Statement of intent (2015-2018)*.⁶⁰

In 2016, the Australian Human Rights Commission developed its first series of early childhood educational resources. This series of resources, called *Building Belonging*, focuses on encouraging respect for cultural diversity and addressing racial prejudice in early childhood education and care settings. The series includes an educator guide, information sheets and lesson plans for educators, and a song and picture book for children aged 3-5 years. I launched these resources at the Early Childhood Australia national conference in October this year.

1.5.2 Participation of children and young people in the media

Children and young people, like all groups in society, have the right to see themselves and their perspectives represented in the media. They also have the right, under article 17 of the *Convention on the Rights of the Child*, to access 'information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral wellbeing and physical and mental health'.⁶¹ This right was the focus of National Children's Week 2016.

In order for children and young people to have access to this information, the mass media has a responsibility to disseminate information of social and cultural benefit to them.⁶²

This year, I participated in the launch of Australia's only online and hardcopy national newspaper for children and young people, *Crinkling News*. *Crinkling News* aims to educate children and young people aged 7 to 14 and encourage their participation in the community and world around them. Children are encouraged to contribute to the newspaper with stories, reviews, opinion pieces and photographs.

I welcome this important initiative to allow children and young people to contribute their stories and opinions to Australia's media landscape.

1.6 Action and accountability

Throughout the year, I have promoted action to protect the wellbeing and rights of children and young people through participation in key government and non-government forums, appearances at and submissions to inquiries, and ongoing advocacy to improve the monitoring of child wellbeing in Australia.

Additionally, I continue to advocate for the development of accessible and child-friendly complaint mechanisms that allow children and young people to seek redress if their rights have been contravened.

An example of a complaint service that allows children and young people to claim their rights is the Australian Human Rights Commission's Investigation and Conciliation Service.

Under Australia's federal anti-discrimination and human rights legislation, the Australian Human Rights Commission can investigate and conciliate complaints of discrimination, harassment and bullying based on a person's sex, disability, age and race. The Commission can also investigate and conciliate complaints alleging sexual harassment, racial hatred and breaches of human rights by the Commonwealth, including the rights set out under the *Convention on the Rights of the Child*.

Complaints handled by the Australian Human Rights Commission involving children and young people

In the 2015-16 reporting year, the Investigation and Conciliation Service at the Australian Human Rights Commission received **143 complaints** involving children (that is: complaints by a child, or on behalf of a child, or raising an issue concerning a child). This represents around 7% of all complaints received during this period.

The main area of complaint involving children was **complaints alleging disability discrimination in the provision of education**.

The following is an example of a complaint of disability discrimination in education that was conciliated by the Investigation and Conciliation Service:

The complainant's son has a medical condition that requires him to use a tracheostomy tube. The complainant claimed her son's public primary school had a policy preventing teachers from undertaking training to assist her son should his tracheostomy tube become loose or blocked.

On being notified of the complaint the department responsible for operating the school agreed to participate in conciliation.

The complaint was resolved with an agreement that a health care plan would be developed to address the complainant's son's medical needs. The plan would include provision of training to staff to enable them to replace the tracheostomy tube when required.

1.6.1 Monitoring the wellbeing of children in Australia

Since beginning in my role it has been clear to me that there are significant gaps in our accountability to children and young people in terms of our capacity to monitor and report on child wellbeing.

This was evident in my examinations into intentional self-harm, with or without suicidal intent, and children's exposure to family and domestic violence.⁶³

There are many other areas where Australia lacks a sound evidence base from which to assess whether it is meeting its obligations to children under the *Convention on the Rights of the Child*.⁶⁴

These areas include information on children and young people's educational outcomes, physical and mental health, prevalence of disability, participation and civic engagement, and safety and wellbeing. It is also difficult to obtain data which can be disaggregated between different age ranges and cultural and socio-economic backgrounds.

This hampers our ability to understand when and how best to intervene in ways that will support all children to thrive.

To this end, I have lent my support to a number of research and measurement projects designed to assess child wellbeing at individual, community, state and national levels.

Two particular initiatives have progressed in 2016 which have great potential to contribute to improved monitoring of outcomes for Australian children and young people in the middle years of childhood.

The middle years are a particularly critical period of childhood, both in terms of brain development and significant life transitions. Despite this, there is currently relatively little research and policy focus on this age group.

Rumble's Quest

Rumble's Quest is a new wellbeing measure for children aged 5-12 years, which was produced this year by the RealWell not-for-profit enterprise in conjunction with Griffith University.⁶⁵

Rumble's Quest is an interactive video game that provides children with an opportunity to report their own feelings and sense of wellbeing in relation to their experiences at school, at home, and in their peer group.

Assessing children's levels of social and emotional wellbeing in their middle years assists policy-makers, educators and communities to plan and evaluate strategies to support children's learning and positive development and identify and respond to the needs of children who are vulnerable or at risk of poor outcomes.

The Australian Child Wellbeing Project

The Australian Child Wellbeing Project is a national child-centred study conducted by researchers at the Flinders University of South Australia, the University of New South Wales, and the Australian Council for Educational Research.⁶⁶

The project involved in-depth discussions with over 100 young people, and a national survey of over 5,400 children and young people aged 8-14 years, with a focus on children's wellbeing during their middle years. Notably, children and young people's views and opinions were used to inform the survey design and evaluation.

The final report of the project, released in February 2016, found that children in the middle years have had relatively little attention from policy-makers and practitioners, other than in the areas of academic performance.⁶⁷ This is despite the fact that this is a time when young people undergo significant changes, through their rapid physical and mental development and their transition from primary to secondary school.

The report found that vulnerable and marginalised young people within the 8-14 year age cohort experienced low wellbeing, and were more likely to report health complaints, being bullied, and low levels of school engagement.⁶⁸

The project provides important insight into understanding child wellbeing in the middle years and information to assist in the development of effective services for young people's healthy development.

1.6.2 Submissions

One of the ways I ensure that the rights of children are considered in policy development is by making submissions to government and other inquiries.

In this reporting period, the Australian Human Rights Commission made 10 submissions which included consideration of children's rights:

- *Inquiry into the Counter-Terrorism Legislation Amendment Bill (No.1) 2015*, Submission to the Parliamentary Joint Committee on Intelligence and Security, (9 December 2015)⁶⁹
- *Inquiry into Family Law Amendment (Financial Agreements and Other Measures) Bill 2015*, Submission to the Senate Legal and Constitutional Affairs Legislation Committee (23 December 2015)⁷⁰
- *Inquiry into Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Bill 2015*, Submission to the Senate Education and Employment Legislation Committee (2 February 2016)⁷¹
- *Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements*, Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs (17 February 2016)⁷²
- *Joint General Comment on the Human Rights of Children in the Context of International Migration*, Submission to the United Nations Committee on the Rights of the Child and Committee on the Rights of Migrant Workers (29 February 2016)⁷³
- *Inquiry into Human Trafficking*, Submission to the Parliamentary Joint Committee on Law Enforcement (4 March 2016)⁷⁴
- *Inquiry into Domestic Violence and Gender Inequality*, Submission to the Senate Finance and Public Administration Committee (4 April 2016)⁷⁵
- *Inquiry into harm being done to Australian children through access to pornography on the Internet*, Submission to the Senate Environment and Communications References Committee (16 April 2016)⁷⁶
- *Inquiry into Aboriginal Youth Suicides*, Submission to the Legislative Assembly Standing Committee on Education and Health, Parliament of Western Australia (10 May 2016)⁷⁷
- *Inquiry into Indefinite detention of people with cognitive and psychiatric impairment in Australia*, Submission to the Senate Community Affairs References Committee (10 May 2016).⁷⁸

1.7 Progress towards Children's Rights Report Recommendations

Each year I review the progress of recommendations contained in my annual Children's Rights Reports. An overview of the progress and developments in relation to these recommendations is contained in the following sub-sections. It should be noted that responses to the 2015 recommendations were requested at a time of a national election. As a result, a number of the responses were provided by departmental agencies instead of federal ministers.

1.7.1 Recommendations made in the *Children's Rights Report 2015*

Business and children's rights

Recommendation 1

The Australian Government provides guidance to business and industry on how it can better respect and support children's rights.

Recommendation 2

The Australian Government resources the Australian Human Rights Commission to undertake research on the relationship between business and children's rights in the Australian context, particularly in relation to high risk areas such as the online consumer environment.

Progress of Recommendations 1 and 2

In 2016, I collaborated with the **Department of Industry, Innovation and Science** to develop new content on children's rights for business.gov.au, an online government resource for the business sector.

The new content provides information for businesses on ways in which their operations can have an impact on children's rights, including privacy, contract terms and conditions, workplace health and safety, employees with caring responsibility, and advertising and marketing to children.

I welcome this important focus on children's rights in this government resource and look forward to the publication of this new information on the business.gov.au website later this year.

In 2017, I will be exploring opportunities to develop resources for businesses, focussed on children's rights in employment.

Recommendation 3

The Annual Progress Reports of the National Plan to Reduce Violence against Women and their Children should detail how all jurisdictions are working towards implementing the Australian Bureau of Statistics National Data Collection and Reporting Framework.

The **Department of Social Services** reported to me that this year they are in the process of reinstating the National Data Improvement Working Group, with representatives from each state and territory, to support the ongoing implementation of the National Data Collection and Reporting Framework (DCRF).

The DCRF is the first step towards building a stronger evidence base for more accurate and reliable statistical outputs. The DCRF is a broad level conceptual map that provides a systematic way of organising data about experiences of family and domestic violence for statistical measurement. It also provides specification and standard for key data items for both data collection and reporting purposes.

The Department will use this working group to test the possibility of jurisdictions providing regular reports on their progress in implementing the DCRF. The department also noted some states, such as Victoria, are developing a family violence data framework and making improvements to their Family Violence Database.

Recommendation 4

Data about a child's experience as a victim of family and domestic violence should be recorded as a separate entry in the Australian Bureau of Statistics National Data Collection and Reporting Framework, and not just part of an adult entry.

The **Australian Bureau of Statistics (ABS)** informed me that the National Data Collection and Reporting Framework (DCRF) is a dynamic document and this provides the ABS with the ability to review the content periodically. The National Centre for Crime and Justice Statistics (NCCJS) has responsibility for the DCRF and it will consider this recommendation as part of a review process in 2017.

ABS also noted that this does not preclude organisations using the DCRF from creating a separate entry for a child where appropriate and that the NCCJS would be happy to assist organisations in developing this concept.

Recommendation 5

Data about lesbian, gay, bisexual, transgender and intersex status should be recorded in the Australian Bureau of Statistics National Data Collection and Reporting Framework.

The **Australian Bureau of Statistics (ABS)** told me that their population, social, and economic statistics are undergoing a significant transformation process. As part of this, the ABS is looking to enhance its statistical capability by undertaking a major re-design of current statistical collections, methodologies, products and services in order to deliver a more sustainable statistical program that extract greater value from all available data, to produce modern statistical solutions.

This initiative is expected to have many benefits for data users by allowing for more comprehensive and integrated data, greater targeted data collection (particularly relevant for key population groups of interest) and responsiveness to user needs. The Personal Safety Survey will be included under this transformation (see Recommendation 6).

Part of this transformation process is consulting with key data user groups around their statistical needs in terms of quality and content. This is expected to occur later in 2016 and early 2017. I hope to engage with this process in relation to data needs concerning children and young people.

Recommendation 6

The Annual Progress Reports of the National Plan to Reduce Violence against Women and their Children should detail how the Australian Bureau of Statistics Personal Safety Survey is working towards surveying adequate sampling sizes across vulnerable groups.

The **Department of Social Services** indicated to me that work is already underway to improve data on violence against vulnerable groups. On 7 August 2015, the Minister for Social Services announced funding of \$160,000 for the Diversity Data project. The project, undertaken by Australia's National Research Organisation for Women's Safety (ANROWS), reviewed existing knowledge about how women from culturally and linguistically diverse backgrounds, Aboriginal and Torres Strait Islander women and women with disability experience violence, identified key gaps in data and considered options to improve data collection for these groups in the future. This information will be used to improve data on vulnerable groups.

Recommendation 7

Support for the Australian Longitudinal Study on Women's Health (ALSWH) project by the Australian Government Department of Health is extended after 30 June 2016 and support for the Mothers and their Children's Health (MatCH) project by the Australian Government Department of Health is also extended after its National Health and Medical Research Council grant expires in 2017.

The **Department of Health** has funded the ALSWH since it was first established in 1995. The study assesses the physical and mental health of over 58,000 women around Australia and follows three original cohorts of women born in the years 1921-26, 1946-51 and 1973-78 and a new young cohort of women born in the years 1989-95. The study collects information on the health of women, the social, behavioural and economic determinants of health, use of health related services, psychosocial factors and lifestyle choices around family and workforce participation. The current round of funding will conclude on 30 June 2017. The Department of Health indicated that future funding of the ALSWH will be a decision for the Commonwealth Government.

Associate Professor Deborah Loxton, Deputy Director of the ALSWH, informed me that since completion of the *Children's Rights Report 2015*, the ALSWH has continued to collect data and report findings to the Australian Government Department of Health.

In May 2016, ALSWH celebrated its 20th year by hosting *Reaping the Benefits: Australian Longitudinal Study on Women's Health Inaugural Scientific Meeting* at the Hunter Medical Research Institute. The meeting demonstrated how researchers, government and women are 'reaping the benefits' of the study. Over 40 academic papers have been published using ALSWH data so far in 2016. The 2016 major report has been presented to the Department of Health and will be released later this year.

Data collection for the fourth survey of the 1989-95 cohort and the eighth survey of the 1946-51 cohort are underway. The fifth survey of the 1989-95 cohort will be pilot tested in 2016 and rolled out in 2017. Data from these surveys will be available in 2017.

ALSWH continues to collect data on women's experiences of abuse. Several analyses of these data are underway. However, the scope of the analyses is limited by available resources. In the future, it could be useful for ALSWH data to be pooled with that of other studies, such as the Longitudinal Study of Australian Children, to examine the more complex associations between family violence and outcomes across the life course.

The pilot phase of the Mothers and their Children's Health (MatCH) project has been completed and the main phase of the project commenced in August 2016. Data from the MatCH project is expected to be available in 2017. The MatCH project is currently funded by a grant from the National Health and Medical Research Council (NHMRC). Funding for this project currently expires in 2017.

Recommendation 8

Support for the 'Improving the developmental outcomes of Northern Territory children: a data linkage study to inform policy and practice in health, family services and education' currently being conducted in the Northern Territory by Menzies School of Health Research is provided by the Australian Government Department of Social Services after its National Health and Medical Research Council grant expires in 2017.

The **Department of Social Services** indicated that it will consider future funding of the project closer to the expiry date of the grant and in the context of the *National Framework for Protecting Australia's Children*, and that this process will take into account the National Children's Commissioner's support for the continuation of this work.

Professor Sven Silburn, from the Menzies School of Health Research, told me the record matching and processes required for the first data extraction and linkage of perinatal health, early child development, child protection, and school attendance and achievement, were completed by May 2016. This enabled the data cleaning and preparation of the combined datasets to be completed by July 2016.

The project research team is now analysing the data and preparing a set of 'research-to-practice' monographs tailored to the information needs of policy-makers, service providers and the informed lay reader. These monographs will describe how early life health factors and local socio-demographic circumstances are related to four child outcomes of high policy concern in the Northern Territory, including: early childhood development and readiness for school learning, school attendance, literacy and numeracy at ages 8, 10, 12 and 14 years, children's involvement with the child protection system, and youth involvement with the youth justice system.

The next stage of the overall research program involves updating the currently linked datasets and linking new information from other administrative datasets. These new datasets include information on children's ear-heath and hearing assessments, their attendances at primary health care services, and the 'Healthy Kids under 5' child health and development checks. Application has also been made to the Police Fire and Emergency Services ethics committee to link selected data items from the Northern Territory police data system.

Once all the necessary ethics and data custodian approvals have been secured for this second and expanded data extraction, the South Australian and Northern Territory data integration authority (SA-NT DataLink) will be able to proceed with the record matching and de-identification processes so that the anonymous linkage keys can be supplied to each of the data custodians of the various datasets by December 2016. This should enable them to extract the relevant data items and supply these in de-identified format to the research team at the Menzies School. The data manager will then be able to merge these using the anonymous linkage keys supplied by SA-NT DataLink. This means that the second stage of data analysis should commence in early 2017.

This is providing a rich source of well-contextualised information regarding the living circumstances and needs of children and families across the Northern Territory. Importantly, the data infrastructure and linkage methodology established for the study has also developed an efficient and secure means for the service data on this 20 year Northern Territory birth cohort being updated on an annual basis. This will become increasingly important for evaluating the population-level impact of policy and services over time – particularly those focused on closing the gap between the life outcomes of Indigenous and non-Indigenous children. I look forward to reporting on these findings in future reports.

Recommendation 9

The Council of Australian Governments (COAG) prioritises the development of a child-focused policy framework for responses to family and domestic violence.

The **Advisory Panel on Reducing Violence against Women and their Children** presented their final report to COAG in April 2016. The need to consider children and young people more fully in federal, state and territory government responses to violence against women was a cross-cutting issue in all areas of action outlined in the report.

A focus on children and young people was also specifically outlined in Recommendation 3.1 of the report, which stated:

All Commonwealth, state and territory governments should, when collecting data and carrying out research on violence against women and their children, recognise that children and young people are victims of violence against women in their own right.

Governments should:

- ensure data collected on violence against women includes information on children and young people and their experiences as direct and indirect victims of violence; where appropriate, specific data on diverse groups of children and young people should be collected
- ensure the views and experiences of children and young people are taken into account in the scoping, design and evaluation of services and programmes, where appropriate.⁷⁹

Recommendation 10

A review of the criteria for entry into the Magellan program should be undertaken by the Family Court of Australia or another appropriate entity.

Regard should be given to the findings and recommendations of the Victorian Royal Commission into Family Violence and also the Family Law Council Inquiry into families with complex needs and the intersection of the family law and child protection systems.

The Honourable Diana Bryant AO, Chief Justice of the Family Law Court of Australia, informed me that no review of the criteria for entry into the Magellan program occurred in 2015-16. She indicated that such a review should be funded by the Australian Government. Extensive consultation would be required due to the significant resourcing implications for stakeholders.

Recommendation 11

The Australian Bureau of Statistics Personal Safety Survey (PSS) should extend its collection of information from men and women aged 18 years and over about their experiences of abuse from the ages of 0-15 years to the ages of 0-17 years.

The **Australian Bureau of Statistics (ABS)** indicated that the PSS collects information on the nature and extent of violence, however there are no generally agreed or accepted standard of defining what constitutes violence. In developing the concepts and definitions used in the survey, the ABS has been advised by a Survey Advisory Group, which included members with legal and crime research backgrounds.

The PSS currently collects information from women and men aged 18 years and over about their experience of violence since the age of 15. It also collects some information from the same respondents about their first experiences of sexual and physical abuse before the age of 15. Data are captured about men and women who experienced physical and sexual assault at the ages of 15, 16 and 17, however it is collected as part of the violence module.

Any proposed change to the definition of child abuse for the purpose of the data collection in the PSS would need to be considered for the 2020 iteration of the PSS. This could be added to the agenda for discussion by the Survey Advisory Group as this would result in a conceptual and definitional change to the abuse before the age of 15 module and would have broad impacts to be considered for the key prevalence estimates for violence experiences since the age of 15, due to overlaps in age. I will consult with the ABS and the National Centre for Crime and Justice Statistics (NCCJS) to discuss this further.

Recommendation 12

The Australian Bureau of Statistics prioritises working with state and territory jurisdictions to achieve national consistency in the coding of offender relationships to child victims.

Australian Bureau of Statistics (ABS) informed me that it had been working with jurisdictions relating to the coding and dissemination of relationship of offender to victim (ROV) data and, as such, has a well-established standard and classification for use in the recorded crime administrative data collections.

ROV data are currently published in *Recorded Crime, Victims, Australia (cat. no. 4510.0)* which uses data extracted from state and territory police systems. The ABS liaises with jurisdictions to ensure the quality and comparability of ROV data and that it is fit for purpose. The *Recorded Crime Victims* publication disseminates ROV data.

Recommendation 13

Options for data collection on screening for family and domestic violence during pregnancy through the National Perinatal Data Collection are progressed by the Australian Institute of Health and Welfare (AIHW).

The **Department of Health** explained to me that since 2011 the AIHW, as part of the National Maternal Data Development Project (NMDDP), has been exploring options for data collection of domestic violence screening in pregnancy. The NMDDP aims to enhance the collection of nationally consistent data in the National Perinatal Data Collection (NPDC) and identified domestic violence as a high priority item for data development in Stage 1 of the NMDDP.

Details of the NMDDP priority information needs were outlined in the report *Foundations for enhanced maternity data collection and reporting in Australia: National maternity data development project – Stage 1*. This work also aligns with the National Maternity Services Plan which has identified screening for domestic violence as a key data gap. The National Maternity Services Plan specified under action item 2.3.3 that Australian governments investigate, implement, expand and evaluate evidence based maternity care models for at-risk women, including women who experience domestic violence.

As part of Stage 2 of the NMDDP, the AIHW has continued to work on ensuring that this data is collected in a standardised way nationally. The data development process has involved a literature review, investigation of current approaches in Australia, a discussion paper, a national workshop and consultation with a working party. AIHW provided a summary of these processes in the report *Screening for domestic violence during pregnancy: options for future reporting in the National Perinatal Data Collection*. This report, published on 18 August 2015, discusses barriers to and opportunities for data collection through the NPDC which includes data about every woman who gives birth in Australia.

Under Stage 3 of the NMDDP, it is proposed to collect data on three possible indicators:

- an indicator to capture whether screening was conducted
- an indicator to capture whether family and domestic violence was disclosed
- an item to capture whether additional follow-up was indicated if family and domestic violence is disclosed.

The **Australian Institute of Health and Welfare (AIHW)** indicated to me that it is actively working with jurisdictions to pilot test data items to inform indicators on screening for family and domestic violence during pregnancy, disclosure of violence, and referral. It will then seek agreement from the National Perinatal Data Development Committee (NPDDC) to progress data items for inclusion in the NPDC. Provided there is agreement from the NPDDC it is anticipated that these data items will be added to the NPDC in 2016-17.

AIHW also told me that it was leading a project under the auspices of the Department of the Prime Minister and Cabinet to develop a specification for a national reporting capability across the family, domestic and sexual violence domain. This reporting would draw on existing data sources at the Commonwealth and state and territory level. Such a reporting capability would require new funding for the AIHW.

Recommendation 14

The Australian Government Department of Social Services support the work of Professor Arabena and the Indigenous Health Equity Unit at the University of Melbourne to progress the early intervention research agenda under the First 1000 Days initiative.

The **Department of Social Services** told me that in developing the Third Action Plan under the National Framework for Protecting Australia's Children, it engaged with Professor Arabena about potential linkages with her work.

The Department indicated that it had given Professor Arabena initial feedback on her First 1000 Days proposal and provided her with \$150,000 to undertake a pilot of a survey of Indigenous tenants of public housing in the Whittlesea Shire of Victoria. The survey will cover a broad range of issues of interest to a coalition of project partners. One of the streams of the survey will be participants' views on their aspirations as parents, aspirations for their children and their understanding of the influence parenting has on the wellbeing of their children, especially during the first 1000 days from conception.

Professor Arabena told me she has partnered with Aboriginal Housing Victoria and is utilising the \$150,000 to:

1. understand the housing stock requirements of people for the future
2. pilot a preconception and baseline survey tool for the First 1000 Days and
3. initiate a process that engages services at a household level – when and where they are needed – facilitated through and by families. The household levelled survey will generate a household levelled plan.

Recommendations 15 and 16

The next ANROWS (Australia's National Research Organisation for Women's Safety) Research Program should include research into sibling violence.

The next ANROWS Research Program should include research into female children aged 15 to 17 years affected by family and domestic violence.

ANROWS informed me that it had not considered the inclusion of these, or any other topics, in any future Research Program as at July 2016.

ANROWS's current focus is on translating evidence from the current Research Program to policy and practice, and the establishment of a Perpetrator Interventions Research Stream, funded by the Commonwealth Government to support the implementation of National Outcome Standards for Perpetrator Interventions announced by the Council of Australian Governments (COAG) in December 2015.

In the coming months, and in consultation with government funders and key stakeholders in the violence against women field, ANROWS will consider further research priorities.

1.7.2 Recommendations made in the *Children's Rights Report 2014*

Recommendation 1

Establish a national research agenda for children and young people engaging in non-suicidal self-harm and suicidal behaviour through the new National Strategic Framework for Child and Youth Health. This should be supported by the National Centre for Excellence in Youth Mental Health (Orygen).

The **Department of Health** provided me with information about its *Healthy, Safe and Thriving: National Strategic Framework for Child and Youth Health* (The Framework), which was released in August 2015. The Framework identifies the key strategic priorities to improve health and wellbeing outcomes for children and young people in Australia for the next ten years. The Framework is the overarching policy that draws together other frameworks and policies that relate to youth and child health. This includes supporting the mental health needs of children and young people.

The **National Centre for Excellence in Youth Mental Health (Orygen)** continues its work in the area through its suicide prevention research program. The program comprises a number of discrete projects that together seek to examine the efficacy, safety and acceptability of interventions specifically designed for at-risk young people. It also has a strong focus on informing and evaluating national, and state-based, suicide prevention policy.

The **National Centre for Excellence in Youth Mental Health (Orygen)** informed me that it published *Looking the Other Way: Young people and self-harm* in 2016. This report explores the prevalence of self-harm among young people, the impact of self-harm on young people, their families and the broader community, experiences of help-seeking, and the available evidence for effective interventions.

The report contained a number of recommendations through which governments, the health and mental health sector and the broader community can respond. These include:

- Improve the response to self-harm in front-line health services, schools and clinical settings by developing: standards of care which focus on compassionate and helpful responses in professional health settings, and guidelines for school staff.
- Develop national data collection and monitoring systems of self-harm presentations in hospitals to better understand prevalence and the impact of interventions and post-discharge care.
- Address the stigma and misunderstandings about self-harm through developing resources for the community in partnership with young people with a lived experience of self-harm, and their families.
- Respond to the gaps in research and policy on this issue and build the evidence base regarding effective interventions of self-harm, including among high-risk groups of young people.
- Trial an early intervention response in community based mental health settings for young people at risk of, or engaging in, self-harm.

Recommendation 2a

Strengthen and develop surveillance of intentional self-harm, with or without suicidal intent, through the Australian Government funding an annual report on deaths due to intentional self-harm involving children and young people aged 0-17 years using the agreement reached between the Australian Bureau of Statistics; the Registrars of Births, Deaths and Marriages; and state and territory coroners on the dissemination of unit record data.

Important work is being conducted by the **National Committee for Standardised Reporting on Suicide (NCSRS)** which is seeking to develop a National Minimum Data Set (NMDS) for suicide.

This work is being led by Suicide Prevention Australia, with the Australian Bureau of Statistics, the Australian Institute of Health and Welfare and the National Coronial Information System providing guidance and support.

The NCSRS brings together stakeholders involved in the collection, analysis and reporting of suicide information, enabling a system-wide approach to data enhancement.

I welcome the efforts of the NCSRS to develop the NMDS, as a positive step towards strengthening and developing data collection around suicide.

Recommendation 2c

Strengthen and develop surveillance of intentional self-harm, with or without suicidal intent, through the Australian and New Zealand Child Death Review and Prevention Group continuing its work in relation to the development of a national child death database, in conjunction with the Australian Institute of Health and Welfare, and providing an annual progress report.

At its 2015 and 2016 national meetings, the **Australian and New Zealand Child Death Review and Prevention Group (ANZCDRPG)** continued discussions about the best ways to monitor, compare and analyse information nationally about child deaths. It continues to work through the legislative complexities associated with sharing data across jurisdictions and the practicalities of effectively comparing different data sets. The Australian Institute for Health and Welfare continues to provide expert advice to the group.

In response to the request for information about ANZCDRPG's activities, the following information was provided:

The Australian and New Zealand Child Death Review and Prevention Group held its annual national meeting in April 2016. Representatives from each State and Territory and New Zealand whose job it is to collect and analyse information about all child deaths in their jurisdiction attended this meeting. After considering the ways in which children and young people can get 'lost' when families repeatedly cross state borders the group agreed that early and efficient identification may help to ensure the safety of these children and young people. In 2016-17, with the support of the National Children's Commissioner, the group will seek to provide input about improvements to the ways in which national, state and territory agencies share information about children.⁸⁰

Recommendation 3a

Collect national data on children and young people who die due to intentional self-harm through the use of the standardised National Police Form, in all jurisdictions, by 2015. This should include an electronic transfer to the National Coronial Information System. A plan to monitor the outcomes of all jurisdictions using the standardised National Police Form should be developed, and the possibility of incorporating a range of demographic, psychosocial and psychiatric information specific to children and young people should be investigated.

The **National Coronial Information System (NCIS)** has continued to be involved in facilitating and encouraging adoption of the National Police Form for Reporting a Death to a Coroner, by all Australian jurisdictions.

The jurisdictions which are using a version of this national form as at 30 June 2016 are the Australian Capital Territory, New South Wales, Queensland and Tasmania.

The NCIS has made recent enquiries (and in some cases held preliminary discussions with coronial and police representatives) about adoption of the police form in Victoria and Western Australia. The NCIS will continue to liaise with jurisdictions which are not yet using this national form to encourage and support its adoption.

The NCIS will also actively investigate automatic transfer of information into the NCIS from the jurisdictions which are using an electronic version of the national police form during the 2016-17 year.

Suicide Prevention Australia indicated to me that progress on this has been very slow due to no resource support available to facilitate action on this area across all eight jurisdictions. However, it reported that with the support of the Queensland State Coroner and State Police Commissioner, staff at the Coroner's Court in Queensland will lead the development of a standard form including assessing the acceptance of incorporating a range of demographic, psychosocial and psychiatric information specific to children and young people.

Recommendation 3b

Collect national data on children and young people who die due to intentional self-harm through the Standing Council on Law, Crime and Community Safety putting the issue of standardisation of coronial legislation and/or coronial systems on its agenda. Standardisation should require that where all state and territory coroners find a death under investigation to be caused by an action of the deceased, the coroner must make a further finding of intent, based on the evidence, to clarify whether the deceased intended to take the action which caused his or her death; the deceased lacked capacity to recognise that his or her action would cause his or her death but death was a reasonably foreseeable consequence of the action; or it is not clear from the evidence whether the deceased intended to cause his or her death.

The **National Coronial Information System (NCIS)** informed me that in November 2015, the Standing Council on Law, Crime and Community Safety (LCCSC) considered the issue of standardisation of coronial legislation surrounding determinations of intent. The LCCSC recommended that coronial legislation should be standardised to require coroners to record the circumstances of death, and whether the deceased intended to end their life, within their written findings.

The determination at the November 2015 LCCSC meeting was to refer the recommendations from the report to the NCIS, in order for the NCIS to consult with jurisdictions about the proposed legislation changes. The NCIS is required to provide a report back to the LCCSC about the outcome of these consultations in November 2016.

Suicide Prevention Australia indicated to me that after the report is published, the next stage of development will be governed by the response from States' Attorneys-General in regard to the proposed plan.

1.7.3 Recommendations made in the *Children's Rights Report 2013*

Recommendation 5

The Australian Government establishes relevant data holdings and analytics covering all the key domains of children's rights outlined in the *Convention on the Rights of the Child*, including comparable data across jurisdictions, which the National Children's Commissioner can use to monitor the enjoyment and exercise of human rights by children in Australia.

The **Department of Social Services** indicated that data collection bodies have been working together to improve consistency, and the Attorney-General's Department will follow up with relevant departments and data collection agencies when it formally responds to the United Nations Committee on the Rights of the Child in January 2018. The Department of Social Services stated that it will continue to work with the Attorney-General's Department on improving data holdings in relation to children's rights.

The **Australian Bureau of Statistics** told me that it would be happy to advise on the development of any indicators for the monitoring of the enjoyment and exercise of human rights by children in Australia, particularly around the availability of data relevant to this topic.

The **Australian Institute for Health and Wellbeing (AIHW)** told me that the Australian Government establishes relevant data holdings and analytics covering all the key domains of children's rights outlined in the *Convention on the Rights of the Child*, including comparable data across jurisdictions, which can be used to monitor the enjoyment and exercise of human rights by children in Australia.

The AIHW continues to work with other data collection agencies to improve the consistency, range and timeliness of data relevant to our legislative remit in the areas of health and welfare.

The **Department of Health** informed me that it has provided funding to the AIHW to develop and report on Headline Indicators for children's health, development and wellbeing (Children's Headline Indicators). The Children's Headline Indicators are a set of 19 indicators endorsed by the Australian Health Ministers Conference, Community and Disability Services Ministers' Conference and the Australian Education, Early Childhood Development and Youth Affairs Senior Officials Committee.

The Children's Headline Indicators are designed to focus policy attention on identified priority areas for children aged 0-12 years, with a focus on different groups of children (for example, Aboriginal and Torres Strait Islander children and children living in rural and remote areas). The Children's Headline Indicators do not include indicators which are outside the remit of the Department of Health and the Department of Education and Training.

I will continue to look for opportunities to work with others to build a more comprehensive picture of children's and young people's rights and wellbeing in the Australian context.

Since my 2013 report, I have recommended that the Australian Government accedes to the *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure* (OPCP) and ratifies the *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT).

I will discuss this further in Chapter 3 of this report.

- 1 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 12.
- 2 Committee on the Rights of the Child, *General Comment No. 5 on General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44)*, UN Doc CRC/C/GC/2003/5 (November 2003) [12].
- 3 Committee on the Rights of the Child, *General Comment No. 12 on The right of the child to be heard*, UN Doc CRC/C/GC/12 (July 2009), [68].
- 4 Australian Institute of Health and Welfare, *The views of children and young people in out-of-home care: overview of indicator results from a pilot national survey 2015* (2016) 6 <<http://www.aihw.gov.au/publication-detail/?id=60129554600>>.
- 5 Australian Institute of Health and Welfare, *The views of children and young people in out-of-home care: overview of indicator results from a pilot national survey 2015* (2016) 7 <<http://www.aihw.gov.au/publication-detail/?id=60129554600>>.
- 6 Tim Moore et al, Institute of Child Protection Studies, *Taking Us Seriously: Children and young people talk about safety and institutional responses to their safety concerns* (2015) <<http://www.childabuseroyalcommission.gov.au/policy-and-research/our-research/published-research/taking-us-seriously>>.
- 7 Tim Moore et al, Institute of Child Protection Studies, *Taking Us Seriously: Children and young people talk about safety and institutional responses to their safety concerns* (2015) 68 <<http://www.childabuseroyalcommission.gov.au/policy-and-research/our-research/published-research/taking-us-seriously>>.
- 8 Tim Moore et al, Institute of Child Protection Studies, *Taking Us Seriously: Children and young people talk about safety and institutional responses to their safety concerns* (2015) 68 <<http://www.childabuseroyalcommission.gov.au/policy-and-research/our-research/published-research/taking-us-seriously>>.
- 9 Tim Moore et al, Institute of Child Protection Studies, *Taking Us Seriously: Children and young people talk about safety and institutional responses to their safety concerns* (2015) 20 <<http://www.childabuseroyalcommission.gov.au/policy-and-research/our-research/published-research/taking-us-seriously>>.
- 10 Tim Moore et al, Institute of Child Protection Studies, *Taking Us Seriously: Children and young people talk about safety and institutional responses to their safety concerns* (2015) 29 <<http://www.childabuseroyalcommission.gov.au/policy-and-research/our-research/published-research/taking-us-seriously>>.
- 11 Tim Moore et al, Institute of Child Protection Studies, *Our safety counts: Children and young people's perceptions of safety and institutional responses to their safety concerns* (2016) 8 <<http://www.childabuseroyalcommission.gov.au/policy-and-research/our-research/published-research/our-safety-counts>>.
- 12 Tim Moore et al, Institute of Child Protection Studies, *Our safety counts: Children and young people's perceptions of safety and institutional responses to their safety concerns* (2016) 8 <<http://www.childabuseroyalcommission.gov.au/policy-and-research/our-research/published-research/our-safety-counts>>.
- 13 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 24.
- 14 Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Australia*, 60th sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012) [59].
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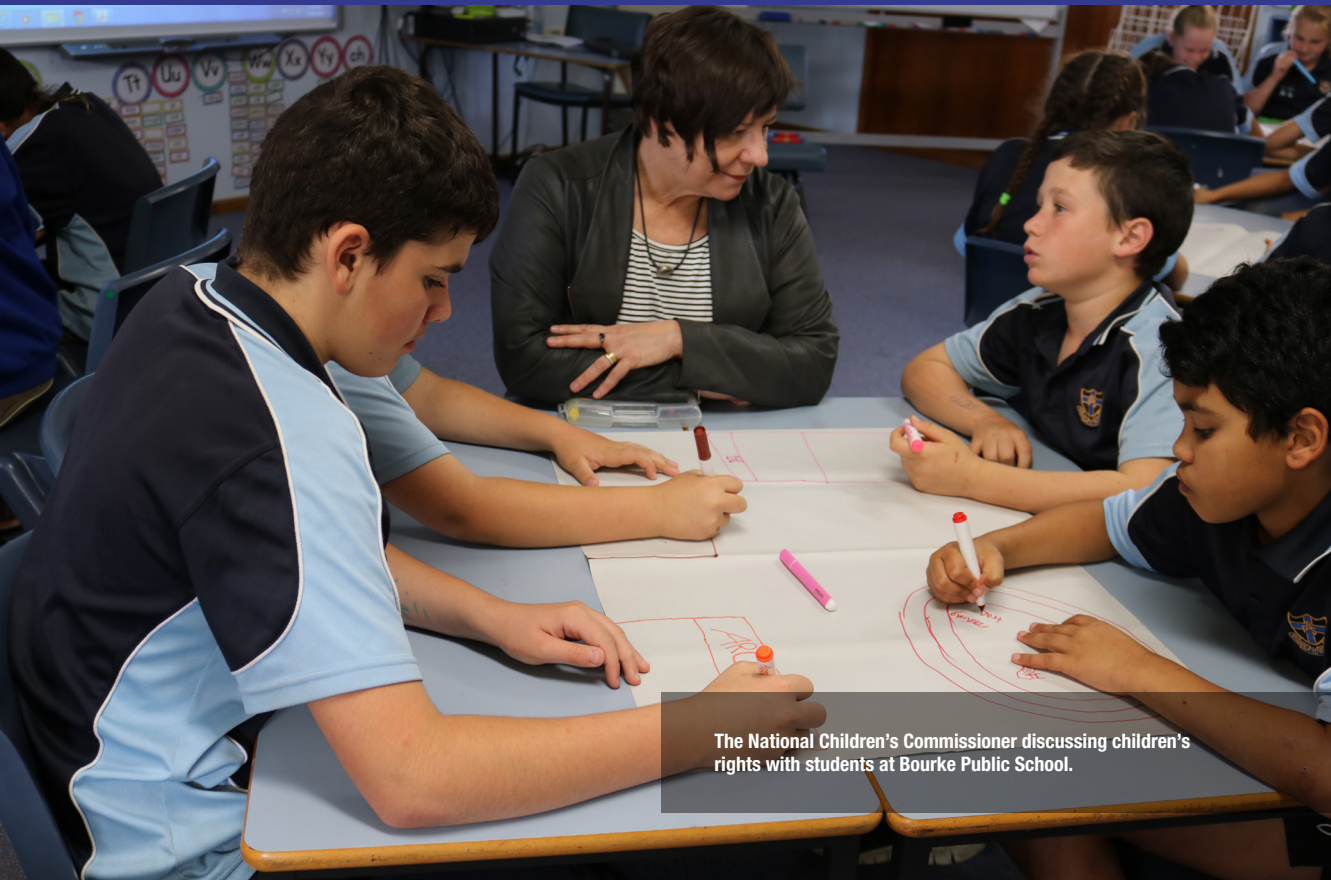
Celebrating the launch of CRC 25:
Australian Child Rights Progress Report.

Chapter 2:

Child rights in legislation and court proceedings



An original artwork by a young person detained in a youth justice centre. The artist stated about his work: "I wanted to paint a 'fresh' mask. It's a colourful disguise".



The National Children's Commissioner discussing children's rights with students at Bourke Public School.

Chapter 2: Child rights in legislation and court proceedings

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This chapter considers Bills with significance for the rights of children that were introduced to the Australian Parliament during the reporting period of 1 July 2015 to 30 June 2016. It looks at how the Parliamentary Joint Committee on Human Rights (PJCHR) has examined the child rights compatibility of this legislation and the scrutiny provided by various parliamentary committees and inquiries, including through the submissions of the Australian Human Rights Commission.

During the reporting period, the Parliament was dissolved due to the 2016 federal election. All Bills which had not been passed lapsed as a result.¹ At the time of writing, we await to see whether some of these bills will be revived in the new Parliament.

This chapter also describes how the Australian Human Rights Commission (the Commission) has promoted the human rights of children involved in international and domestic surrogacy arrangements through:

- the Commission's intervention in a Family Court of Western Australia case: *Farnell & Anor and Chanbua* [2016] FCWA 17
- the Commission's submissions to the House of Representatives Standing Committee on Social Policy and Legal Affairs inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements.

2.1 Consideration of child rights by the Parliamentary Joint Committee on Human Rights

The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) requires that all Bills introduced to the Australian Parliament contain a Statement of Compatibility with Human Rights (Statement of Compatibility) and are examined by the PJCHR for human rights compatibility.² This Act and the work of the Joint Committee for Human Rights function as a significant safeguard mechanism within the Australian Parliamentary system.

The Statement of Compatibility is included in the Explanatory Memorandum of a Bill. Explanatory Memoranda accompany every Bill introduced to the Australian Parliament and help explain the objectives and operation of the amendments proposed in each Bill.

For the purposes of the Statements of Compatibility and the PJCHR, human rights are defined as the rights and freedoms contained in the seven core human rights treaties to which Australia is a party, including the *Convention on the Rights of the Child* (the CRC).³

The PJCHR considers Statements of Compatibility when analysing the compatibility of Bills with Australia's human rights obligations. Where the PJCHR reports that a Bill limits a human right, and the Statement of Compatibility does not include a reasoned and evidence-based assessment, the PJCHR may seek additional and further information about the Bill's compatibility from the relevant Minister.⁴

Reports by the PJCHR are tabled in both Houses of Parliament and can be found on its website.⁵

2.2 Bills engaging the *Convention on the Rights of the Child*

During my reporting period of 1 July 2015 to 30 June 2016, the passage of Bills through the Parliament was interrupted by prorogation of Parliament and the dissolution of both Houses of Parliament prior to the 2016 federal election.

Consequently, when Parliament sat again after prorogation, some Bills that lapsed at prorogation were restored to the Notice Paper and either passed both Houses of Parliament or lapsed at the dissolution of both Houses of Parliament on 9 May 2016.

2.2.1 Bills that passed both Houses of Parliament

2.2.1.1 Australian Citizenship Amendment (Allegiance to Australia) Bill 2015

The Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) was introduced by the Minister for Immigration and Border Protection to the House of Representatives on 24 June 2015.

The Bill proposed to amend the *Australian Citizenship Act 2007* (Cth) to provide explicit powers for the cessation of Australian citizenship where a dual citizen engages in terrorism-related conduct.

There were three significant aspects of this Bill that engaged the rights of children under the CRC.

First, the Bill inserted a new **section 33AA** of the *Australian Citizenship Act 2007* (Cth) which provides that a person aged 14 years and over, who is a national or citizen of a country other than Australia, renounces their Australian citizenship if the person engages in specified terrorism-related conduct.⁶

Second, the Bill inserted a new **section 35A** of the *Australian Citizenship Act 2007* (Cth) which provides that the Minister for Immigration and Border Protection may determine in writing that a person ceases to be an Australian citizen if:

- the person has been convicted of specified terrorist-related offences
- the person has been sentenced to a period of imprisonment of at least six years, or periods of imprisonment that total at least six years
- the person is a national or a citizen of a country other than Australia
- the Minister is satisfied that the conduct of the person to which the conviction or convictions relate 'demonstrates that the person repudiated their allegiance to Australia'
- the Minister is satisfied that it is not in the public interest for the person to remain a citizen of Australia.⁷

As the age of criminal responsibility in Australia is 10 years, this provision could apply to children and young people. The Minister must have the best interests of the child as a primary consideration when considering if it is in the public interest for a person under the age of 18 years to remain an Australian citizen.⁸

Finally, the Bill also amended **section 35** of the *Australian Citizenship Act 2007* (Cth) to provide that a person aged 14 years or older, who is a national or citizen of a country other than Australia, ceases to be an Australian citizen if the person serves in the armed forces of a country at war with Australia or fights for, or is in the service of, a declared terrorist organisation and the person's service or fighting occurs outside of Australia.⁹

A child whose Australian citizenship ceases under sections 33AA, 35, or 35A cannot resume Australian citizenship.¹⁰

On 24 June 2015, the Bill was referred to the Parliamentary Joint Committee on Intelligence and Security (PJCIS). In September 2015, the PJCIS reported to Parliament with 27 recommendations,¹¹ all of which were accepted by the Australian Government. Significant amendments were made to the Bill, including:

- sections 33AA and 35 only applying to children aged 14 years and over
- the exclusion of sections 33AA, 35 and 35A from the operation of section 36 of the *Australian Citizenship Act 2007* (Cth), which enables the Minister to revoke the citizenship of a child where the parent's citizenship has previously been revoked.

The Australian Human Rights Commission (the Commission) made a submission to the PJCIS inquiry and gave evidence at two public hearings in August 2015. The Commission recommended that the original Bill not be passed¹² and made a number of recommendations on how the Bill should be amended, including:

- loss of citizenship should only occur following a relevant criminal conviction
- loss of citizenship should not be automatic and any decision or mechanism to deprive a person of citizenship should take into account the particular circumstances of the person and their conduct
- loss of citizenship resulting from terrorist activities should only be possible in the most exceptional cases, for offences commensurate with serving in the armed forces of a state at war with the Commonwealth
- loss of citizenship by conduct should not be possible in the case of children.¹³

Although some of the Commission's concerns about the Bill were addressed by the amendments incorporating the recommendations of the PJCIS, those listed above remain relevant to the final Bill.

In August 2015, the PJCHR analysed the original Bill and expressed concerns about its compatibility with Australia's obligation to consider the best interests of the child (article 3 of the CRC), its limitations on the right to nationality (articles 7 and 8 of the CRC) and the right of the child to be heard in judicial and administrative proceedings (article 12 of the CRC). The PJCHR sought advice from the Minister of Immigration and Border Protection regarding whether the proposed measures were aimed at achieving a legitimate objective, are rational, and are reasonable and proportionate.¹⁴

In March 2016, the PJCHR reported that it had received a response from the Minister on 11 January 2016, after the Bill had passed both Houses of Parliament on 3 December 2015. Despite the amendments to the Bill to incorporate the recommendations of the PJCIS, the PJCHR continued to have concerns about the compatibility of the final Bill with Australia's human rights obligations.

The PJCHR highlighted that, unlike sections 33AA and 35, no age limit is specified in relation to section 35A and that the minimum age of criminal responsibility is 10 years, giving rise to the possibility of children aged 10 to 14 years being convicted of the terrorist offences specified in that section and automatically losing their Australian citizenship.¹⁵

The PJCHR also highlighted that the procedure for automatic loss of citizenship does not provide for consideration of whether the loss of citizenship would be in the best interests of the child in each child's particular circumstances.¹⁶ The PJCHR concluded that the loss of citizenship provisions are incompatible with Australia's obligations under articles 3, 8 and 12 of the CRC.¹⁷

2.2.1.2 Social Services Legislation Amendment (No Jab, No Pay) Bill 2015

The Social Services Legislation Amendment (No Jab, No Pay) Bill 2015 (Cth) was introduced to the House of Representatives on 16 September 2015.

The Bill amended the *A New Tax System (Family Assistance) Act 1999* (Cth) to narrow the exemptions to the immunisation requirements that apply to the payment of the Child Care Benefit, the Child Care Rebate or the Family Tax Benefit Part A supplement.¹⁸ A child meets the immunisation requirements if he or she has been immunised in accordance with the standard vaccination or catch-up vaccination schedule.¹⁹ The Bill removed the conscientious objector exemption to these requirements.²⁰ It also removed the power of the Minister to determine by legislative instrument that certain classes of persons are exempt from, or meet, those requirements.²¹ An exemption may apply for medical reasons, specifically where a general practitioner certifies that vaccinating the child would be medically contraindicated or unnecessary due to natural immunity or because the child is participating in a vaccine study.²² The child will be taken to have met the immunisation requirements where the vaccine is unavailable.²³

The Bill also extended the immunisation requirements to all children and young people. Previously the vaccination status of a child was only checked at the ages of one, two and five (for the Family Tax Benefit Part A supplement) and up to the age of seven (for child care payments).²⁴ On 17 September 2015, the Senate referred the Bill to the Senate Community Affairs Legislation Committee for inquiry and report. On 11 November 2015, the Committee released its final report, recommending that the Bill be passed and that an initial review be undertaken after 12 months with a full evaluation of the Bill's impact and effectiveness to be undertaken after three years.²⁵ The Senate Community Affairs Legislation Committee noted concerns raised during the inquiry about the measures infringing on the rights of children to access early childhood education and child care services, but concluded that the measures are 'necessary and fairly outweighed by the rights of all members of the community to health and that vaccination is a critical and important health measure'.²⁶

In October 2015, the PJCHR commented that the removal of the conscientious objector exemption engages and limits the right to freedom of thought, conscience and religion. The PJCHR considered that the objective of the Bill to encourage parents to immunise their children is a legitimate objective but sought advice from the Minister for Social Services on whether the proposed measures are rationally connected to that objective and are reasonable and proportionate.²⁷

In April 2016, the PJCHR concluded that the measures in the Bill are compatible with international human rights law. The PJCHR noted the advice of the Minister for Social Services that the conscientious objector exemption has led to an increase of objectors and that its removal would likely improve vaccination rates.²⁸

The PJCHR did not consider whether the Bill engages any rights under the CRC, however the Statement of Compatibility for the Bill argued that it promotes the right of children to enjoy the highest attainable standard of health (article 24).²⁹

The Bill passed both Houses of Parliament on 23 November 2015.

2.2.1.3 Health Legislation Amendment (eHealth) Bill 2015

The Health Legislation Amendment (eHealth) Bill 2015 (Cth) was introduced to the House of Representatives on 17 September 2015.

The Bill introduced a trial of an opt out model of the My Health Record system in certain locations. Children's health records will be automatically uploaded to the system, except in situations where an authorised representative opts out or where the child has shown they should not have an authorised representative and opts out themselves.³⁰ An authorised representative is required to give effect to the will and preferences of the child, unless to do so would pose a serious risk to the child's personal and social wellbeing.³¹

A person may cancel their My Health Record if they do not opt out before the record is created. However, the information in the record is retained. Cancellation only ensures that no entity can access that information.³²

On 15 October 2015, the Senate referred the Bill to the Senate Community Affairs Legislation Committee for inquiry and report. On 9 November 2015, the Committee recommended that the Bill be passed and recommended that the Department of Health consider recommendations by the Office of the Australian Information Commissioner regarding privacy in developing a public awareness campaign regarding the opt out trial.³³

In October 2015, the PJCHR commented that the automatic upload of children's health records to the My Health Record system engages and both promotes and limits the rights of the child.³⁴ In particular, the PJCHR was concerned that the automatic upload of children's health records limits the child's right to privacy (article 16 of the CRC) and that increased use of the My Health Record:

may be regarded as a desirable or convenient outcome but may not address an area of public or social concern that is pressing and substantial enough to warrant limiting the rights of the child.³⁵

In December 2015, following advice from the Minister for Health, the members of the PJCHR could not reach consensus on the compatibility of the Bill with the CRC.³⁶

Some members considered that the measures are justifiable as the Bill seeks to improve health outcomes for children. Others recommended that in order to avoid an unjustifiable limitation of the rights of the child, the process for a child to take control of their health records should be set out in legislation and that children's health records should not be automatically uploaded to My Health Record.³⁷ The Bill passed both Houses of Parliament on 12 November 2015.

Update on the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015

In my 2015 report, I considered the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 (Cth), which, among other amendments, proposed to expand the definition of forced marriage and increase the penalties for forced marriages.

On 16 June 2015, the Senate Legal and Constitutional Affairs Committee reported on the Bill and recommended that the Bill be passed.³⁸ The Australian Human Rights Commission made a submission to this inquiry, supporting the measures contained in the Bill relating to the expanded definition of forced marriages as it would increase the protections against forced marriage for children and persons with disability.³⁹

On 10 November 2015, the Bill, including the expanded definition of forced marriage, passed both Houses of Parliament. The amendments in the Bill commenced when the Bill received Royal Assent on 26 November 2015.

2.2.2 Bills that lapsed at the prorogation or dissolution of Parliament

2.2.2.1 Migration and Maritime Powers Amendment Bill (No. 1) 2015

The Migration and Maritime Powers Amendment Bill (No. 1) 2015 (Cth) was introduced to the House of Representatives on 16 September 2015.

The Bill proposed, among other amendments, that in situations where unlawful non-citizens are in the process of being removed from Australia, and happen to be returned to Australia before that process is complete, they will be allowed to return without a visa. A person, including a child, would be taken to have never left Australia's migration zone, ensuring that any bar on them making certain visa applications continues to apply.⁴⁰ The Bill also sought to clarify that any person who has been refused a protection visa after an application was made on their behalf, for example because they were a minor at the time of the application, cannot make a further protection visa application.⁴¹

The Bill also sought to make amendments to the Minister's power to cancel visas on character grounds, which the PJCHR considered would 'widen the circumstances in which a person may be subject to immigration detention, visa cancellation and potential refoulement'.⁴²

On 17 September 2015, the Senate referred the Bill to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report. On 10 November, the Committee released its final report, recommending that the Bill be passed, subject to clarifying the Explanatory Memorandum regarding the operation of retrospective provisions and the safeguards around the impact of these provisions on people with cognitive impairment.⁴³ The Australian Greens provided a dissenting report that recommended the Bill be rejected.⁴⁴

In February 2016, the PJCHR concluded that the measures were incompatible with Australia's obligation to consider the best interests of the child (article 3 of the CRC).⁴⁵ The PJCHR also concluded that the bar on a person making a further application for protection following an unsuccessful application that was lodged on their behalf was incompatible with Australia's non-refoulement obligations and with the right of the child to be heard in judicial and administrative proceedings (article 12 of the CRC).⁴⁶

The Bill lapsed at prorogation on 15 April 2016.

2.2.2.2 Migration Amendment (Mandatory Reporting) Bill 2015

The Migration Amendment (Mandatory Reporting) Bill 2015 (Cth) was sponsored by the Hon Richard Marles MP and introduced to the House of Representatives on 12 October 2015.

The Bill proposed to amend the *Migration Act 1958* (Cth) to mandate the reporting of child abuse in onshore and offshore immigration detention facilities.⁴⁷ In November 2015, the PJCHR concluded that the Bill promotes or contains justifiable limitations on human rights (or both) and, therefore, did not require additional comment.⁴⁸

The Bill lapsed at prorogation on 15 April 2016.

2.2.2.3 Counter-Terrorism Legislation Amendment Bill (No. 1) 2015

The Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 (Cth) was introduced to the Senate on 12 November 2015.

The Bill proposed, among other amendments, to amend the *Criminal Code* to allow for control orders to be applied to young people from the age of 14 years.⁴⁹ The Bill also provided for the court issuing an interim control order to appoint an advocate to act on behalf of a young person aged 14 to 17 years in any proceedings relating to the confirmation of the control order and any variation to or revocation of the confirmed order.⁵⁰

The court-appointed advocate would not be the child's legal representative and would not be obligated to act on the child's instructions. However, they would be required to suggest to the court a course of action that is in the best interests of the child and ensure any views of the child in relation to the control order are fully presented to the court. The child remains entitled to have their own independent legal representation.⁵¹ On 12 November 2015, the Senate referred the Bill to the PJCIS for inquiry and report. The Committee's final report was released on 15 February 2016 and recommended that the Bill be amended to, among other things, expressly provide that a young person has a right to legal representation in control order proceedings and to remove the role of the court-appointed advocate.⁵² The Australian Human Rights Commission made a submission to the PJCIS inquiry and gave evidence at a public hearing on 14 December 2015. The Commission recommended that:

- the amendments proposed for control orders, including lowering the age limit to 14 years, not be passed without a full review of the control order regime
- that court-appointed advocates should be appointed prior to the issuing of a control order in relation to a person under the age of 18 years
- a child should also be provided with legal representation in all control order proceedings
- the best interests of the child should be a primary consideration at all stages of control order proceedings
- a court-appointed advocate should have relevant expertise in working with children and child development, and the obligations, prohibitions and restrictions imposed by a control order in relation to a person under the age of 18 years should constitute the least interference with the child's liberty, privacy or freedom of movement that is necessary in all the circumstances.⁵³

In December 2015, the PJCHR expressed concern that expanding the control order regime to young people aged 14 and 15 years could be incompatible with Australia's obligation to consider the best interests of the child (article 3 of the CRC).⁵⁴ The PJCHR was also concerned that the provisions for the court-appointed advocate limit the right of the child to be heard in judicial and administrative proceedings (article 12 of the CRC).⁵⁵ The PJCHR sought advice from the Attorney-General on whether the proposed measures were aimed at achieving a legitimate objective, are rational, and are reasonable and proportionate.⁵⁶

In March 2016, the PJCHR reported that its members were not able to reach a consensus on whether the expansion of the control order regime is compatible with international human rights law.⁵⁷ However, the PJCHR gave in principle support to the recommendations made by the PJCIS that the Bill be amended to remove the role of the court-appointed advocate and provide that a young person has a right to legal representation.⁵⁸

The Bill lapsed at prorogation on 17 April 2016.

2.2.2.4 Privacy Amendment (Protecting Children from Paparazzi) Bill 2015

The Privacy Amendment (Protecting Children from Paparazzi) Bill 2015 (Cth) was sponsored by the Hon Bob Katter MP and introduced to the House of Representatives on 23 November 2015.

The Bill proposed to amend the *Privacy Act 1988* (Cth) to create a new criminal offence where a person interferes with the privacy of a person under the age of 16 years by actually or attempting to record the child's image or voice by lying in wait for the child without the consent of the child's parent or guardian. The conduct must:

- be because of the job, vocation, occupation or profession of a parent, step-parent, grandparent, carer or guardian of the child
- cause, or be likely to cause, a reasonable person in the position of the child, alarm, torment, terror or emotional distress.⁵⁹

In December 2015, the PJCHR expressed concern about the Bill's potential limitation of the right to freedom of expression and that the offence could prohibit conduct that is merely irritating and could be applied to members of the public.⁶⁰ The PJCHR sought advice from the Hon Bob Katter MP on whether the proposed measures were aimed at achieving a legitimate objective, are rational, and are reasonable and proportionate.⁶¹

The Bill lapsed at prorogation on 15 April 2016.

2.2.2.5 Family Law Amendment (Financial Agreements and Other Measures) Bill 2015

The Family Law Amendment (Financial Agreements and Other Measures) Bill 2015 (Cth) was introduced to the Senate on 25 November 2015.

The Bill proposed, among other amendments, to amend the *Family Law Act 1975* (Cth) to provide that the Family Court may only set aside binding financial agreements between former spouses in 'circumstances that are of an exceptional nature and relate to the care, welfare and development of the child'.⁶² Currently, the Family Court may set aside a financial agreement where the court is satisfied a material change in circumstances relating to the care, welfare and development of a child has occurred that would result in the child, or a party to the agreement with caring responsibility for the child, suffering hardship if the agreement is not set aside.⁶³ The Bill also creates a new offence where a person lawfully takes a child outside Australia and retains the child abroad.⁶⁴

On 3 December 2015, the Senate referred the Bill to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report. The Committee released its final report on 24 February 2016 and recommended that the Senate pass the Bill.⁶⁵

The Australian Labor Party and the Australian Greens each provided dissenting reports. The Australian Labor Party recommended removing Schedule 1 of the Bill concerning binding financial agreements.⁶⁶ The Australian Greens recommended that the Bill be amended to create a framework for binding financial agreements that better addresses concerns raised by stakeholders, including the prevalence of financial abuse against victims of family and domestic violence.⁶⁷

The Australian Human Rights Commission made a submission to the Senate inquiry and appeared before the Committee. The submission highlighted my investigation into the impact of family and domestic violence on children and the resulting recommendations of the *Children's Rights Report 2015*, including that the Family Court's Magellan program be expanded beyond cases involving allegations of serious physical and sexual abuse against children to include broader definitions of abuse and family and domestic violence.⁶⁸

In February 2016, the PJCHR concluded that the Bill is compatible with the obligation to consider the best interests of the child, in part due to the safeguard that both parties to a binding financial agreement are required to obtain independent legal advice on their rights under such an agreement.⁶⁹

The Bill lapsed at prorogation but was restored to the Notice Paper on 2 May 2016. The Bill lapsed at dissolution on 9 May 2016.

2.2.2.6 Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Bill 2015

The Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Bill 2015 (Cth) was introduced to the House of Representatives on 2 December 2015.

The Bill proposed to introduce a new Child Care Subsidy, a single means-tested subsidy that replaces current child care payments; and an Additional Child Care Subsidy, which supplements the Child Care Subsidy to improve accessibility for eligible, disadvantaged or vulnerable families.⁷⁰

On 3 December 2015, the Bill was referred to the Senate Education and Employment Legislation Committee for inquiry and report. The Committee's final report was released on 4 April 2016 and recommended that the Senate pass the Bill.⁷¹

Both the Australian Labor Party and the Australian Greens provided dissenting reports. Both parties recommended amendments to the Bill to ensure that people working low hours and in casual work would not be disadvantaged by the changes and to ensure that the Additional Child Care Subsidy provides for the needs of all vulnerable children.⁷²

The Australian Human Rights Commission made a submission to the Senate inquiry, recommending that:

- the Bill be amended to ensure that all eligible families are able to access at least two days (24 hours) of early childhood education and care services
- simplification or expansion of the activity test to ensure that vulnerable families and people with insecure work are adequately provided for in the new scheme
- robust assessment of the impact of the new measures is undertaken before the Bill is passed and after it is implemented.⁷³

In February 2016, the PJCHR noted that this Bill continues arrangements introduced by the Social Service Legislation Amendment (No Jab, No Pay) Bill 2015 (Cth) that link the payment of Child Care Subsidy and Additional Child Care Subsidy to the immunisation requirements in the *A New Tax System (Family Assistance) Act 1999* (Cth). The PJCHR referred to its previous comments on those measures (see above).⁷⁴

The Bill lapsed at prorogation on 15 April 2016.

2.2.2.7 Migration Amendment (Free the Children) Bill 2016

The Migration Amendment (Free the Children) Bill 2016 (Cth) was sponsored by Senator the Hon Sarah Hanson-Young and introduced to the Senate on 2 March 2016.

The Bill proposed to amend the *Migration Act 1958* (Cth) to ensure that children are not held in immigration detention facilities but are instead placed in community residential housing with their immediate family members or guardians.⁷⁵

The Bill also proposed to ensure that the Minister could not affect the transfer of a child to a country that intends to detain them and requires the immediate return to Australia of any child currently held in immigration detention in a regional processing country.⁷⁶

In addition, the Bill sought to insert explicit reference to article 37 of the CRC, which provides that no child shall be deprived of their liberty unlawfully or arbitrarily, and that the detention of a child is a measure of last resort.⁷⁷

In March 2016, the PJCHR concluded that the Bill did not raise human rights concerns and, therefore, did not require additional comment.⁷⁸

The Bill lapsed at prorogation but was restored to the Notice Paper on 19 April 2016. It lapsed again at dissolution on 9 May 2016.

2.3 Surrogacy

2.3.1 The Australian Human Rights Commission's intervention in *Farnell & Anor and Chanbua* [2016] FCWA 17

On 14 April 2016, the Family Court of Western Australia (the Court) delivered its decision in the matter of *Farnell & Anor and Chanbua* [2016] FCWA 17.

The case concerned the circumstances of twins Pipah and Nareubet born through an international surrogacy arrangement in Thailand. Nareubet is usually known by the name Gammy. Following the birth of the twins in December 2013, their intended parents David Farnell and Wenyu Li returned to Australia with Pipah, while Gammy remained in Thailand in the care of the twin's surrogate mother, Pattaramon Chanbua.

In circumstances where Mr Farnell had been convicted of child sex offences against young girls, the issue was whether it was in Pipah's best interests to live with her surrogate mother or to continue living with her intended parents.

The factual circumstances of the case were further complicated by allegations by Mrs Chanbua that Mr Farnell and Ms Li had decided that they did not want Gammy after learning he had Down syndrome, and they had attempted to gain access to money in a trust established for Gammy to fund the proceedings.

The case involved complex legal issues concerning the legislative framework applicable to findings regarding Pipah's parentage, as well as the process for determining what orders were in Pipah's best interests.

The Australian Human Rights Commission (the Commission) has a function to intervene, with the leave of the court and subject to any conditions imposed by the court, in proceedings involving issues of human rights or discrimination.⁷⁹

The Commission was invited by the Family Court of Western Australia to make application for leave to intervene in this matter. Given the importance of the human rights issues arising in the matter and the fact it was the first such matter to come before the Family Court of Western Australia, the Commission decided to make such application and was granted leave. The Commission made submissions that focused on the human rights of Pipah and Gammy.

The following principles from the CRC were raised and were considered by the Court to offer guidance in resolving the issues in this case:

- the best interests of the child shall be a primary consideration in all actions concerning children (article 3)
- the right of a child to be registered immediately after birth, the right from birth to a name, the right to acquire nationality, and, as far as possible, the right to know and be cared for by his or her parents (article 7)
- the right of a child to preserve his or her identity (article 8)
- the right of a child not to be separated from his or her parents against their will, except where competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary and in the best interests of the child (article 9)
- no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence (article 16)
- the right of a child to be protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardians or any other person who has the care of the child (article 19).⁸⁰

The Court considered that it would not be possible to protect all of Pipah's rights as the circumstances of the case meant that the protection of some rights could only be achieved at the expense of other rights.⁸¹

In evaluating Pipah's best interests, the Court found that Mr Farnell and Ms Li had not abandoned Gammy⁸² and did not seek access to a trust fund managed by a charity for Gammy, consisting of donations from members of the public.⁸³

The Court decided that Pipah should continue to live with Mr Farnell and Ms Li and for them to have equal shared parental responsibility.⁸⁴

In reaching this decision, the Court stressed that there were only two options available and that this decision was the 'least unsatisfactory'.⁸⁵ In reaching this decision, the Court primarily took into account the length of time Pipah has lived with Mr Farnell and Ms Li, the nature of the relationships she has developed with them and their extended family and friends, and the quality of the care she is receiving.⁸⁶

The Court noted that 'it is a matter of grave concern to leave any child in the home of a convicted sex offender' but accepted the expert evidence that the risk of harm to Pipah was low and that measures would be put in place to ensure her safety.⁸⁷ To do this, the Court imposed conditions in the orders made that, among other measures, provided for the ongoing involvement of the WA Department for Child Protection and Family Support with the family.⁸⁸

The Court also found that it would be in Pipah's best interests to change her surname to Farnell as this is the name used by the man she regards as her father and is sometimes used by the woman she regards as her mother.⁸⁹

Further orders were made by the Court regarding contact between the Farnells and Mrs Chanbua, including that they keep each other informed of their contact details and that the Farnells send Mrs Chanbua copies of Pipah's artwork and/or schoolwork three times per year after she commences kindergarten and engage Pipah in the celebration of important Buddhist festivals.⁹⁰

2.3.1.1 Australian Human Rights Commission submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements

The case of Pipah and Gammy demonstrates a number of the child rights issues that can arise in international surrogacy arrangements.

During the reporting period of 1 July 2015 to 30 June 2016, one of my advocacy priorities has been to improve the protection of the rights of children born as a result of both domestic and international surrogacy arrangements.

On 2 December 2015, the Attorney-General, Senator the Hon George Brandis QC asked the House of Representatives Standing Committee on Social Policy and Legal Affairs to inquire and report on the regulatory and legislative aspects of international and domestic surrogacy arrangements.

The Australian Human Rights Commission made a submission to this inquiry and I gave evidence at a public hearing on 17 March 2016.

The Commission's submission highlighted the scope of the human rights issues that may arise in international surrogacy arrangements including:

- the trafficking of children born as a result of international surrogacy arrangements and prospective surrogate mothers
- parent-child relationships not being recognised, negatively impacting on a child's rights to citizenship, a passport, medical treatment, inheritance and child support
- children being put at risk of harm
- children not being able to obtain information about their origins
- the ability of prospective surrogate mothers to make a free and informed decision.⁹¹

In Australia, each state and territory has specific laws relating to surrogacy, with different requirements about who can enter a surrogacy arrangement and the necessary preconditions for an arrangement. In every Australian jurisdiction, only 'altruistic' surrogacy is permitted, meaning the surrogate mother cannot financially profit from the arrangement. In contrast, almost every international surrogacy arrangement will be a commercial arrangement.

The Committee released its final report on 4 May 2016. The Committee's first recommendation was that commercial surrogacy remain illegal in Australia.⁹²

The Committee also adopted the Commission's recommended guiding principles for changes to surrogacy laws, namely:

- the best interests of the child are protected (including the child's safety and wellbeing and the child's right to know about his or her origins)
- the surrogate mother is able to make a free and informed decision about whether to act as a surrogate
- sufficient regulatory protections are in place to protect the surrogate mother from exploitation
- there is legal clarity about the parent-child relationships that result from the arrangement.⁹³

The Committee further recommended that the Australian Law Reform Commission (ALRC) consider the development of a model law that facilitates altruistic surrogacy in Australia and that, within six months of receiving the ALRC report, the Attorney-General ask the Council of Australian Governments (COAG) to commit to the development of national uniform legislation.⁹⁴ This is consistent with the Commission's recommendation that the states and territories renew efforts to achieve national consistency between surrogacy laws to increase certainty for people considering surrogacy.⁹⁵

The Committee made a number of recommendations concerning issues that the ALRC should consider the development of a model law that reflected recommendations made by the Commission, specifically:

- the need for state and territory laws to be non-discriminatory in relation to gender, marital status and sexual orientation
- the need for background checks for parties to surrogacy arrangements
- the process by which parental responsibility is transferred
- the need for a closed register of surrogates and intended parents, to be administered by a government body.⁹⁶

The Committee also asked the ALRC to consider other issues, including the need for adequate reimbursement for the surrogate mother for the legal, medical and other expenses incurred as a consequence of surrogacy, and the detail to be included on birth certificates.⁹⁷

2.4 Conclusion

The scrutiny provided by the PJCHR and other Parliamentary committees offer an important mechanism for improving our understanding of legislation and its implications in terms of human rights.

Over this reporting period, a number of Bills raised concerns about or promoted the rights of children in Australia. By focussing on the processes that allow the rights of children to be considered in Australia's parliamentary and court processes, I hope to increase our understanding of the rights of children, and how they can be upheld and better protected.

- 1 Damon Muller, 'So you've been prorogued – Common questions answered', *FlagPost*, Parliamentary Library, 23 March 2016. At <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2016/March/Proroguing_Parliament> (viewed 17 August 2016).
- 2 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ss 7(a), 8(1)-(5).
- 3 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 3(1)(a)-(g).
- 4 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Guidance Note 1 – Drafting Statements of Compatibility* (2014) 4 <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources>.
- 5 Parliament of Australia, *Parliamentary Joint Committee on Human Rights Committee: Scrutiny reports*. At <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports> (viewed 17 August 2016).
- 6 *Australian Citizenship Act 2007* (Cth) s 33AA.
- 7 *Australian Citizenship Act 2007* (Cth) s 35A.
- 8 *Australian Citizenship Act 2007* (Cth) s 35A(1)(e)(iv).
- 9 *Australian Citizenship Act 2007* (Cth) s 35.
- 10 *Australian Citizenship Act 2007* (Cth) s 36A.
- 11 Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015) <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Citizenship_Bill/Report>.
- 12 Australian Human Rights Commission, Submission No 13 to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, 16 July 2015, recommendation 1 <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Citizenship_Bill/Submissions>.
- 13 Australian Human Rights Commission, Submission No 13 to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, 16 July 2015, recommendations 2(a)-(c), (f) <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Citizenship_Bill/Submissions>.
- 14 Parliamentary Joint Committee on Human Rights, *Twenty-fifth report of the 44th Parliament* (2015) 39, 43-44 <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports>.
- 15 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (2016) 77 <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports>.
- 16 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (2016) 79 <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports>.
- 17 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (2016) 83 <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports>.
- 18 Explanatory Memorandum, Social Services Legislation Amendment (No Jab, No Pay) Bill 2015 (Cth) 2.
- 19 *A New Tax System (Family Assistance) Act 1999* (Cth) s 3 (definition of 'immunised').
- 20 Social Services Legislation Amendment (No Jab, No Pay) Bill 2015 (Cth) sch 1 items 3, 4; Explanatory Memorandum, Social Services Legislation Amendment (No Jab, No Pay) Bill 2015 (Cth) 2.
- 21 Social Services Legislation Amendment (No Jab, No Pay) Bill 2015 (Cth) sch 1, items 4, 5; Explanatory Memorandum, Social Services Legislation Amendment (No Jab, No Pay) Bill 2015 (Cth) 2, 5.
- 22 *A New Tax System (Family Assistance) Act 1999* (Cth) s 6(3); Explanatory Memorandum, Social Services Legislation Amendment (No Jab, No Pay) Bill 2015 (Cth) 3-4.
- 23 *A New Tax System (Family Assistance) Act 1999* (Cth) s 6(4); Explanatory Memorandum, Social Services Legislation Amendment (No Jab, No Pay) Bill 2015 (Cth) 3-4.
- 24 *A New Tax System (Family Assistance) Act 1999* (Cth) ss 42(1)(c), 44(2), 45(2), 61B(3)(a); Explanatory Memorandum Social Services Legislation Amendment (No Jab, No Pay) Bill 2015 (Cth) 1.
- 25 Senate Community Affairs Legislation Committee, *Social Services Legislation Amendment (No Jab, No Pay) Bill 2015 [Provisions]* (2015) recommendations 1 and 5 <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/No_Jab_No_Pay/Report>.
- 26 Senate Community Affairs Legislation Committee, *Social Services Legislation Amendment (No Jab, No Pay) Bill 2015 [Provisions]* (2015) 27 <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/No_Jab_No_Pay/Report>.
- 27 Parliamentary Joint Committee on Human Rights, *Twenty-ninth report of the 44th Parliament* (2015) 33 <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports>.
- 28 Parliamentary Joint Committee on Human Rights, *Thirty-seventh report of the 44th Parliament* (2016) 68-69 <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports>.
- 29 Explanatory Memorandum (Statement of Compatibility with Human Rights), Social Services Legislation Amendment (No Jab, No Pay) Bill 2015 (Cth) 13-14.
- 30 Explanatory Memorandum (Statement of Compatibility with Human Rights), Health Legislation Amendment (eHealth) Bill 2015 (Cth) 36.
- 31 *My Health Records Act 2012* (Cth) s 7A.
- 32 Explanatory Memorandum, Health Legislation Amendment (eHealth) Bill 2015 (Cth) 95.

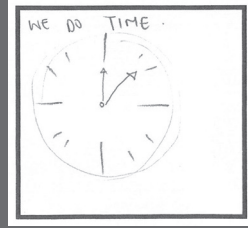
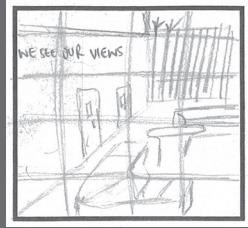
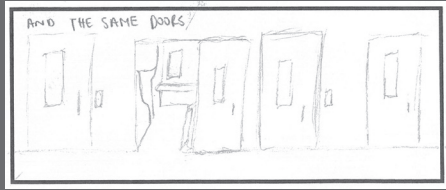
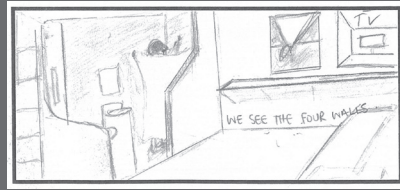
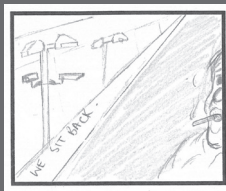
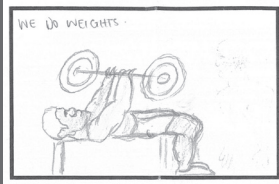
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- 34 Parliamentary Joint Committee on Human Rights, *Twenty-ninth report of the 44th Parliament* (2015) 14 <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports>.
- 35 Parliamentary Joint Committee on Human Rights, *Twenty-ninth report of the 44th Parliament* (2015) 15 <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports>.
- 36 Parliamentary Joint Committee on Human Rights, *Thirty-second Report of the 44th Parliament* (2015) 77 <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports>.
- 37 Parliamentary Joint Committee on Human Rights, *Thirty-second Report of the 44th Parliament* (2015) 77 <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports>.
- 38 Senate Legal and Constitutional Affairs Legislation Committee, *Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 [Provisions]* (2015) recommendation 1 <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Power_and_Offences_Bill/Report>.
- 39 Australian Human Rights Commission, Submission No 4 to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Crimes Legislation Amendment (Powers Offences and Other Measures) Bill 2015*, 16 April 2015, 3 <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Power_and_Offences_Bill/Submissions>.
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Chapter 3:

Oversight of youth justice in Australia: implementing OPCAT



Doing time is an original artwork by a young person detained in a youth justice centre. The artist stated about his work: "how life is inside".

Chapter 3: Oversight of youth justice in Australia: implementing OPCAT

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3.1 Introduction

In July 2016, Australians were confronted by shocking CCTV footage of children being mistreated in the Don Dale Youth Detention Centre in Darwin. Footage and stories from other facilities, including Cleveland in Queensland, have since followed.

The incidents have led to broad public discussions about the standards of care for children in juvenile detention, the use of restraints and force, and the existence of adequate complaints and monitoring processes.

Many in the Australian community have asked: why is this happening in 21st century Australia? Given it was known about by public officials, with at least one published report detailing the incidents, why was nothing done?

Australia has made commitments to improve the standards of oversight and monitoring of places of detention across Australia – including juvenile detention facilities.

On 19 May 2009, we signed an international human rights treaty that requires the government to put into place new and more extensive oversight mechanisms in order to prevent torture, as well as cruel, inhuman and degrading treatment in places of detention and closed environments.

That treaty is the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment* (OPCAT).¹

Countries sign treaties to indicate their support for them. They must then take a second step of ratifying the treaty and implementing it through domestic law to bring it into legal effect. There is sometimes a short delay between signing and ratifying so that the country can take steps to change its laws and practices so it is compliant with the obligations it is taking on.

It has now been 7 years since Australia signed the OPCAT and we continue to wait for ratification.

Ratification of the OPCAT would introduce to Australia a greater level of transparency and accountability for how people are treated in detention facilities. It is intended to be a collaborative process whereby the Commonwealth, states and territories work together to embed better scrutiny processes and better practice for the treatment of people. It is preventative in focus – the emphasis is on proactively working towards preventing mistreatment from occurring in the first place.

The Australian Human Rights Commission has been deeply concerned at the delay in ratification of the OPCAT. We can only wonder whether incidents such as occurred at the Don Dale Youth Detention Centre would have been prevented or at least exposed in a more timely manner, had the oversight mechanisms of the OPCAT been in place.

In 2012, the Joint Standing Committee On Treaties of the federal Parliament recommended that the federal Parliament ratify the OPCAT.²

In my inaugural statutory report to Parliament in 2013, I specifically recommended that Australia ratify the OPCAT.

In 2014, in its response to my recommendation, the federal Government indicated to me that it had not yet formed a formal position on the ratification of the OPCAT. It echoed this response in 2015.

Most recently, at the United Nations Human Rights Council's Universal Periodic Review (UPR) of Australia on 9 November 2015, a number of countries recommended that Australia ratify the OPCAT. The federal Coalition Government responded to the UPR in March 2016 and indicated that it was 'actively considering' ratification.³

Ratification of the OPCAT is now seen as imminent.

The next few years will likely see the introduction of new oversight and coordination processes to meet the obligations in the treaty.

As National Children's Commissioner, I want to make sure that the unique experiences and needs of children and young people in youth justice are factored in as we move to the ratification and implementation of the OPCAT.

This chapter and Chapter 4 of this report present the findings of my work over this past year on youth justice issues.

The focus of this chapter is to assess the readiness of youth justice processes for the implementation of the OPCAT. This includes a stocktake of current oversight, complaints and reporting arrangements across the jurisdictions, an analysis of their adequacy in meeting the OPCAT requirements, and identification of opportunities for improvements nationally over time. Information gathered for this examination was derived from formal requests to relevant state and territory departments; a series of expert roundtables; publicly available reports; submissions from non-government bodies and oversight agencies; and consultations with young detainees in each jurisdiction.

Ultimately, the OPCAT will require improvements to oversight mechanisms and accountability processes relating to juvenile justice. The incidents that have begun to come to light since the Don Dale footage was released make this clear.

We are, however, starting from a relatively high standard (compared internationally) and where many of the required elements are in place. There are good practices in different states and territories that could be adopted by other states and territories.

What the OPCAT brings to these issues is a different conversation from the one that exists now. It is about a more open, transparent conversation within and among governments about what we need to improve, and how we are best to achieve it.

This report contributes to this new dialogue by identifying the best practices and identifying where challenges remain, and the technical assistance required going forward.

3.2 Methodology for this report

Over the past year I conducted an extensive consultation process to identify the issues to ensure all jurisdictions are 'OPCAT-ready'.

I received 27 written submissions from government and non-government organisations, conducted eight roundtables with 153 participants, conducted eight workshops with 74 children and young people in youth justice centres and one workshop with 20 young people in an adult correctional facility. 93 children and young people also completed a survey. Other than Western Australia, all jurisdictions provided me with information on key issues.

I asked oversight agencies, and non-government organisations with particular expertise in either the OPCAT or youth justice, to provide me with information about oversight, complaints and monitoring mechanisms for children and young people detained in youth justice centres. A number of organisations and individuals also approached me about making submissions. These were all accepted. A list of submissions can be found in Appendix 4. They can be viewed in full online at www.humanrights.gov.au/publications/childrens-rights-report-2016.

During 2016, eight roundtables were held with experts in either the OPCAT or youth justice, or both, in all capital cities across Australia. The then Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr Mick Gooda, co-chaired the Brisbane roundtable. I thank him for his generous contribution.

The roundtables were divided into two parts. The first focused on the general requirements of the OPCAT in the domestic and international context. The second part focused specifically on youth justice and the OPCAT. I sincerely thank all those who came to my roundtables and provided their views and input.

I would like to acknowledge the contribution of the Attorney-General's Department in attending the roundtables and in its engagement this year. I also thank DLA Piper who hosted our roundtables in the ACT, Queensland, Victoria, and Western Australia, and transcribed the discussions that took place at a number of the roundtables.

I am particularly grateful to the children and young people who attended my workshops and who completed the surveys.

3.3 What is the *Optional Protocol to the Convention against Torture* (OPCAT)?

The OPCAT is an optional protocol to the ***Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (CAT)***.⁴ Australia is a party to the CAT.⁵

The purpose of an optional protocol is to assist in the implementation of part or all of a treaty. Optional Protocols to human rights treaties are treaties in their own right, to which countries that are party to the main treaty can commit.

CAT entered into force on 26 June 1987 and was ratified by Australia on 8 August 1989. It prohibits torture and other acts of cruel, inhuman and degrading treatment or punishment.

Australia has obligations under the CAT to monitor and prevent all acts of cruel, inhuman or degrading treatment that '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'.⁶

Under CAT, Australia is obliged to:

- prevent torture
- prevent other acts of cruel, inhuman or degrading treatment or punishment
- ensure that education and information regarding the prohibition against torture and other cruel, inhuman or degrading treatment or punishment are fully included in the training of all people involved in the arrest, custody, interrogation, detention or imprisonment of any individual
- regularly review interrogation rules, instructions, methods and practices to prevent torture.

The OPCAT, in its effect, ‘brings to operational life’ the CAT.⁷ The OPCAT does not establish further substantive obligations, but aims to establish a mechanism to assist states to observe article 2(1) and 16 of the CAT, which require states to prevent torture and ill treatment.⁸ In this way the OPCAT does not impose additional obligations as States are already bound to all the relevant obligations under the CAT.

Whilst my focus has been on detention in the youth justice context, this is only one aspect of the OPCAT. More broadly, detention or closed environments are defined as:

any place where persons are or may be deprived of their liberty by means of placement in a public or private setting in which a person is not permitted to leave at will by order of any judicial, administrative or other order, or by any other lawful authority relevant to the project’s goals.⁹

In Australia, places of detention and closed environments could include:

- prisons
- youth justice centres
- police lock-ups and police stations
- involuntary placement in psychiatric units
- immigration detention centres
- detention facilities under military jurisdiction
- court custody centres / holding cells
- transport vehicles for prisoners or juvenile detainees or arrestees or any other person journeying to or from a place of detention
- places where persons are held under applicable laws against terrorism before being transferred to prison jurisdiction
- transit zones and health quarantine areas at international airports
- facilities where people are detained by national intelligence services
- secure care facilities for children and young people in statutory out-of-home care
- aged care homes and hostels where restrictions are placed on the movement of residents for their own safety.

To prevent torture and ill treatment, the OPCAT sets out a monitoring system comprised of two complementary and independent expert bodies at the international and national level:

- **The Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT):** A United Nations body established under the OPCAT. By ratifying the treaty Australia would be allowing it to conduct visits to any place of detention within Australia.
- **A National Preventive Mechanism (NPM):** This is a body, or series of bodies, that monitor any place of detention within Australia. They would be quasi-independent agencies of governments in Australia and would take on the main role of monitoring and standards development.

3.3.1 Subcommittee on the Prevention of Torture (SPT)

The SPT is a United Nations body of twenty-five international experts. Its mandate requires it to visit places of detention; advise and assist the national bodies (NPMs); make recommendations on torture prevention and ill treatment to States; and cooperate with UN, international, regional and national bodies for the prevention of torture and ill treatment.¹⁰

Under the OPCAT, Australia would undertake to allow the SPT to access places of detention as chosen by the SPT as part of a regular program of visits. Access by the SPT is facilitated through the NPM, and the SPT is encouraged to work with the NPM.

The SPT is restricted to communicating its reports and recommendations on detention visits confidentially to the Australian Government.

3.3.2 National Preventive Mechanism (NPM)

Ratifying the OPCAT will require Australia to create, or designate, one or several NPMs to prevent torture and other forms of cruel, inhuman or degrading treatment.¹¹

The role of the NPM is to conduct regular visits and monitor the treatment of people in detention.

To be an NPM, a body must meet the requirements of Part IV, articles 17 to 23, of the OPCAT.

A NPM must have the following elements:

- functional independence and independence of their personnel (article 18(1))
- experts with required capabilities and professional knowledge, gender balance and adequate representation of ethnic and minority groups in the country (article 18(2))
- necessary resources for functioning (article 18(3))
- a mandate to undertake regular preventive visits (article 19(a))
- the power to make recommendations (article 19(b))
- authorities must examine recommendations and enter into dialogue with the NPM on implementation measures (article 22)
- power to submit proposals and observations concerning existing or proposed legislation (article 19(c))
- access to information concerning the number of people detained and places of detention (article 20(a))
- access to information on treatment and conditions of people in detention (article 20(b))
- access to places of detention (article 20(c))
- the right to conduct private interviews with detained people and others (article 20(d))
- liberty to choose places visited and people interviewed (article 20(e))
- appropriate privileges and immunities (article 21(1)), including by ensuring confidential information shall be privileged (article 21(2))
- annual reports of the NPMs distributed by the State (article 23).

NPMs can take different forms. Countries that have already ratified the OPCAT have chosen various models depending on their own particular circumstances. For example, some countries designate a single NPM while others use multiple NPMs that divide inspection responsibilities.

Upon ratifying the OPCAT, Australia will be required to designate or establish a NPM at the national level within the time frame of one year.¹² Australia may consider invoking article 24 of the OPCAT, which allows postponing implementation of obligations in relation to either the NPM and/or the SPT for a maximum of three years. Australia would likely seek this extension of time upon ratifying the OPCAT.

The primary work of inspections and oversight will be done by the NPM, not the SPT.

3.4 What other human rights standards exist for children in juvenile detention?

Other human rights treaties also provide for standards of treatment of children and young people in youth justice detention settings: particularly the *Convention on the Rights of the Child (CRC)* and the *International Covenant on Civil and Political Rights (ICCPR)*. Various UN rules and guidelines have also been agreed to assist in interpreting the provisions of these treaties.¹³

Article 37 of the CRC safeguards the rights of children and young people in contact with the youth justice system. It sets out the right of children and young people to be protected from torture and other cruel, inhuman and degrading treatment, and provides conditions for the arrest, detention and imprisonment of children.¹⁴

Article 37(a) of the CRC provides **that no child or young person shall be subjected to torture, or other cruel, inhuman or degrading treatment or punishment.**

The Committee on the Rights of the Child has indicated that in implementing this obligation:

- domestic legislation must prohibit and criminalise torture and other cruel, inhuman and degrading treatment
- claims must be investigated and if warranted prosecuted¹⁵
- states must undertake systematic training for all professionals who work with children and young people.¹⁶

General Comment 10 of the Committee on the Rights of the Child **prohibits all corporal punishment** as a form of cruel, inhuman or degrading treatment¹⁷ as does rule 17.3 of the Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules).¹⁸

General Comment 10 provides that **disciplinary measures must be consistent with upholding the inherent dignity of the child or young person.**¹⁹ Restraint or the use of force is permitted only in strict circumstances. For example:

when the child poses an imminent threat of injury to him or herself or others, and only when all other means of control have been exhausted.²⁰

The use of restraints must be managed by a medical and/or psychological professional, and cannot be used as punishment. All staff must be trained on the standards and punished for violations.²¹

The Rules for the Protection of Juveniles Deprived of their Liberty (JDL Rules or Havana Rules)²² also **prohibit the use of force and restraint, except in exceptional cases** where other methods have failed.²³ Where used, **they should not cause humiliation; and only be used restrictively for the shortest period of time.**²⁴ The JDL rules further provide that personnel must not carry and use weapons in any facility used to detain children and young people.²⁵

Rule 67 of the JDL Rules prohibits cruel, inhuman or degrading treatment including corporal punishment, placement in a dark cell, closed or solitary confinement or any punishment compromising mental or physical health.²⁶

Article 37(b) of the CRC provides that **no child or young person shall be deprived of his or her liberty unlawfully or arbitrarily.** It explicitly provides that deprivation of liberty, including arrest, detention and imprisonment, should be used only as a measure of last resort and for the shortest appropriate period of time, so that the child's or young person's right to development is fully respected and ensured.²⁷

A child's or young person's right to be detained only as a measure of last resort for the shortest period of time is also protected by the Beijing Rules (rule 13.1) and the JDL Rules (rules 1 and 2). The JDL Rules provide that deprivation of liberty should be used only in 'exceptional cases'.²⁸

In General Comment 10, the Committee on the Rights of the Child **identified the use of pre-trial detention as being in violation** of article 37 (b).²⁹ The Committee on the Rights of the Child maintains that to realise the obligation to detain children as a last resort, there must be an effective package of alternatives available, which are used in a structured way to reduce the use of pre-trial detention.³⁰

The Committee has expanded on possible alternatives, including probation, community service, suspended sentences, and mediation.³¹ It argues that laws should include conditions to determine whether children and young people are kept in pre-trial detention, limitations on the duration of pre-trial detention and provisions for review.³²

Article 37(c) provides that **every child or young person deprived of liberty shall be treated with humanity and respect** for the inherent dignity of the human person, and **in a manner that is consistent with their developmental age**. Article 10(3) of the *International Covenant on Civil and Political Rights* (ICCPR) also requires that children and young people are 'accorded treatment appropriate to their age and legal status'.

Rule 28 of the JDL rules provides that the detention of children and young people:

should only take place under conditions that take full account of their particular needs, status and special requirements according to their age, personality, sex and type of offence, as well as mental and physical health.

Article 37(c) of the CRC provides that **detained children and young people should be separated from adults**, unless it is not in the child's or young person's interest to do so. The Committee on the Rights of the Child argues that the exception to this obligation must be interpreted narrowly.³³

In General Comment 10, the Committee on the Rights of the Child explains that this obligation is based on evidence that placement of children and young people in adult jails compromises their basic safety, and their ability to remain free of crime and reintegrate into society.³⁴ The obligation requires separate facilities for children and young people, with child focused staff, personnel, policies and practices.³⁵

It also maintains that a young person, detained in a youth justice facility, who turns 18 should be able to stay there if it is in the best interests of that young person and not contrary to the interests of other children and young people in the facility.

The Beijing Rules reinforce that children and young people who are placed in detention should be kept separate from adults.³⁶

Articles 10(2)(b) and 10(3) of the ICCPR,³⁷ as well as rule 8(d) of the Standard Minimum Rules for the Treatment of Prisoners, also create an obligation to separate detained children and young people from adults.

General Comment No 9 of the Human Rights Committee, interpreting article 10 of the ICCPR, refers to this as an 'unconditional requirement' of the covenant, and states that:

deviation from States Parties' obligations under subparagraph 2(b) cannot be justified by any consideration whatsoever.³⁸

General Comment No 21 reiterates this obligation as a 'mandatory' requirement. General Comment No 21 also calls for States to report on their measures to resolve cases involving children and young people as speedily as possible.³⁹

The ICCPR requires that accused persons are to be segregated from convicted persons and treated appropriate to their status as unconvicted, subject to exceptions. Rule 8(b) of the Standard Minimum Rules for the Treatment of Prisoners reinforces this obligation. Rule 17 of the JDL Rules provides that untried detainees should be separated from those who have been convicted.

Rule 29 of the JDL Rules provides that children and adults who are members of the same family do not need to be separated.⁴⁰ It also stipulates that children and young people can be detained with adults, where part of a special programme shown to benefit children and subject to controlled conditions.

Australia entered a reservation under article 37(c) of the CRC when it ratified the CRC, stating:

the obligation to separate children from adults in prison is accepted only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia. Australia, therefore, ratifies the Convention to the extent that it is unable to comply with the obligation imposed by Article 37(c).⁴¹

The Committee on the Rights of the Child has recommended that Australia withdraw this reservation. It considered Australia's reservation to be unnecessary, given that the CRC provides for children and young people to be detained with adults where it is in the child's or young person's best interests, and protects the child's and young person's rights to maintain contact with family.⁴²

Article 37(c) of the CRC also provides that **a child or young person deprived of their liberty shall have the right to maintain contact with his or her family** through correspondence and visits, except in exceptional circumstances.

This protection interacts with article 16 of the CRC, which protects a child's and young person's right to family and correspondence. The Committee on the Rights of the Child in General Comment No 10 provides that children should be detained in facilities as close as possible to their family to realise this right, and that exceptional circumstances that may limit this conduct should be non-discretionary and set out in law.⁴³ General Comment No 10 calls for promotion of opportunities for children and young people to visit their home and family.⁴⁴

Article 9(4) of the CRC further provides that where a child or young person is detained, a State must on request, provide the parents or appropriate family member with information regarding the whereabouts of the child or young person, unless it is detrimental to the child's or young person's wellbeing.

A child's or young person's right to be in contact with their family is also protected by the Beijing Rules. Rule 26.5 provides that parents or guardians have the right of access in the interest and wellbeing of the child or young person who is detained.⁴⁵

The Human Rights Committee provides that allowing detained children and young people contact with relatives is a way that States can meet the obligation in article 10(3) of the ICCPR to treat children and young people in a way 'appropriate to their age and legal status'.⁴⁶

General Comment No 10 highlights the right of children and young people to maintain contact with the community and the outside world, providing that staff in youth justice facilities should:

promote and facilitate frequent contacts of the child with the wider community, including communications with his/her family, friends and other persons or representatives of reputable outside organizations.⁴⁷

The JDL Rules also emphasise the right of children and young people to maintain contact with the wider community and the outside world, beyond their family. Children and young people should have adequate communication with the outside world, and have a right to receive visits and communicate with others through writing or telephone.⁴⁸

The *Guidelines for Action on Children in the Criminal Justice System* (Vienna Guidelines) accentuate the importance of easy access by relatives and those with a legitimate interest in the child or young person, unless access is not in the best interests of the child or young person.⁴⁹

Article 37(d) of the CRC provides that detained children and young people shall have **access to legal assistance and the right to challenge the legality of their detention**.

The JDL Rules require that detained children and young people should be informed of their rights and obligations in a way that they understand, and should be helped to understand all matters as are necessary to enable them to understand their rights and obligations during detention.⁵⁰ In General Comment No 10, the Committee on the Rights of the Child stipulates that **independent inspectors should be empowered** to conduct regular and unannounced inspections.⁵¹ Inspectors should speak with children and young people confidentially as part of their process.⁵²

The JDL Rules provide detailed standards for inspections. Inspectors should be authorised; have unrestricted access to all staff and children/young people in the facility and have access to all records; and submit reports. Medical officers should participate in inspections.⁵³ The Guidelines for Action also reinforce the need for detained children and young people to have the ability to communicate with monitoring bodies.⁵⁴

In its concluding observations on Australia's report to the Committee on the Rights of the Child in 2012, the Committee recommended Australia 'establish an accessible and effective mechanism for investigating and addressing cases of abuse at its youth detention centres'.⁵⁵

General Comment 10 on the CRC and the JDL Rules set out **a child's or young person's right to make complaints or requests while in correctional detention**.⁵⁶ Children in correctional detention have the right to make complaints or requests to the central administration, judicial authority, independent authority,⁵⁷ or facility director.⁵⁸ There should be an independent office or ombudsman to handle complaints received by detained children.⁵⁹ Children should have access and awareness of complaint mechanisms⁶⁰ and have a right to request assistance in order to make a complaint.⁶¹

Article 12 of the CRC supports the right of children and young people to express their views freely in all matters affecting them, including by making complaints.

In assessing how youth justice systems in Australia currently comply with the OPCAT, I also refer to these complementary human rights standards.

3.5 OPCAT: general observations

This section discusses issues relating to the implementation of the OPCAT in Australia that are not specific to youth justice. The next section then discusses specific implications in youth justice settings.

3.5.1 Support for Australia's ratification of the OPCAT

At my roundtables and in the submissions that I received, there was overwhelming support for Australia to ratify the OPCAT.

This support is consistent with a letter sent to the Attorney-General, Senator the Honourable George Brandis QC, in 2014, where 64 organisations argued for the ratification of the OPCAT.⁶² A copy of this letter is included in Appendix 6.

Examples of support for the OPCAT in some of the submissions I received are below.

The **Law Council of Australia**:

considers that Australia must ratify OPCAT, and should then ensure full compliance within three years.⁶³

The **Northern Territory Legal Aid Commission**:

We support the ratification of the OPCAT and we believe that it will enable inspections to be taken place across all detention centres and accordingly ensure consistency and accountability in terms of practice and treatment of all juvenile detainees across all jurisdictions in Australia. Further, the ratification will encourage more prompt and adequate responses from state and territory governments should there be any reports of maltreatment arising out of the inspections from the United Nations Subcommittee. In our view this will certainly provide a more comprehensive monitoring mechanism.⁶⁴

The **Law Society of NSW**:

supports ratification and implementation of OPCAT, establishment of an NPM and the appointment of suitable bodies to conduct inspections of all places of detention.⁶⁵

Public Interest Advocacy Centre (PIAC):

PIAC has supported the ratification of OPCAT for a considerable period of time and looks forward to seeing its ratification in due course.⁶⁶

Griffith University (Professor Ross Homel, Professor Stuart Kinner and Ms Rebecca Wallis):

We support the ratification of OPCAT, and recognise the benefits of establishing an independent National Preventative Mechanism (NPM)... ratification of OPCAT, and the establishment of an NPM, will be of significant benefit to people held in all places of detention.⁶⁷

The **University of NSW** (Professor Chris Cunneen, Professor Eileen Baldry, Emeritus Professor David Brown, Mel Schwartz, Associate Professor Leanne Dowse and Sophie Russell):

strongly supports Australia's ratification of the protocol.⁶⁸

Monash University Law Faculty (Associate Professor Bronwyn Naylor):

Ratification of OPCAT is important for ensuring a comprehensive regime of monitoring of places of detention in Australia. However we should not wait for ratification to begin work on this project: the current review should drive improvements across jurisdictions to maximise the protection of young people against torture and cruel, inhuman or degrading treatment anywhere young people are held in correctional custody.⁶⁹

Amnesty International Australia:

has called for the Australian government to immediately ratify the OPCAT and to create a National Preventive Mechanism (NPM). Amnesty has also called for both the NPM and the UN's Subcommittee on the Prevention of Torture access to all places where people are deprived of their liberty, including youth detention centres.⁷⁰

The North Australian Aboriginal Justice Agency (NAAJA) and the Central Australian Aboriginal Legal Aid Service (CAALAS):

In the Northern Territory it is clear that the current oversight, complaints and monitoring mechanisms in relation to youth in detention are not adequate to ensure respect for and adherence to minimum human rights standards. Through the ratification of OPCAT and establishment of a NPM we may be closer to remedying the current system.⁷¹

Criminal Lawyers Association of the Northern Territory (CLANT):

There is in our view a pressing need for effective, continuous, independent and strong oversight into the detention of young people in the Northern Territory. Attempts to provide this have to date been depressingly unsuccessful. What is required is a system of oversight backed by Northern Territory, Commonwealth and international law, together with the associated institutional framework, which can best, and perhaps only, be achieved by ratifying OPCAT.⁷²

We strongly support the urgent ratification by Australia of the Optional Protocol to the Convention Against Torture (OPCAT).⁷³

The Victorian Commission for Children and Young People:

While there has been increasing recognition in Victoria of the importance of independent monitoring of youth justice centres, ratification of OPCAT and the establishment of an NPM would ensure these mechanisms are not diminished in future, provide guidance on how current systems could be strengthened and create opportunities for establishing strong benchmarks and best practice standards which could then be applied nationally. It would also ensure more consistent monitoring across Australian jurisdictions and across different places of detention.⁷⁴

The Ombudsman in Queensland:

Should OPCAT be ratified by the Australian Government, I look forward to engaging in discussions about an appropriate oversight regime in Queensland. I believe that the current jurisdiction and powers on my office place it very well to contribute to the effective oversight of places of detention for children and adults and to do so efficiently and effectively as part of a national framework.⁷⁵

The **Queensland Family and Child Commission** told me that it supports:

- ratification of OPCAT and the establishment of a NPM to benefit children and young people in detention facilities
- independent and impartial visiting mechanism to complement existing local independent systems of oversight, complaints and monitoring mechanisms
- aligning local independent monitoring, oversight and complaints with international standards
- increasing unity and coordination of advocacy issues for children and young people in detention facilities.⁷⁶

The **Commissioner of Children and Young People** in Western Australia:

It is essential that Australia ratifies and implements OPCAT to safeguard vulnerable young people and protect them from harm. It is also vital for the best interests of the child and the safety of the community, that young people who are identified as vulnerable to the youth justice system, receive adequate supports to maintain wellbeing and to have their basic needs met. A robust external monitoring mechanism will make sure that all young people experience a sense of fairness, are treated with respect and are given ample opportunities to improve their lives.⁷⁷

The submission made by **Rebecca Wallis, Stuart Kinner and Ross Homel of Griffith University**:

Oversight mechanisms are very important and their utility should not be underestimated. An NPM would help ensure that problems facing young people in detention, and their physical and social-emotional wellbeing, are appropriately scrutinised; a process that would help to ensure against negligence and abuse. We argue, moreover, that an NPM should take the opportunity to be more than simply a compliance mechanism. At its broadest, a system which maximises children's potential and agency, where detention is an option of last resort in every context (not just for the imposition of punishment), would consider processes that support children's wellbeing and healthy development as an integral part of the achievement of CROC and OPCAT objectives. An NPM could promote transparency, cross-institutional and cross-jurisdictional knowledge-sharing and best practice, and investment in research to explore system performance and to promote rights in systemic and effective ways. At the same time, this must be supported by an ongoing commitment to research and investigation to ensure that values are understood in practice as well as in theory, and the NPM apparatus must be appropriately resourced to ensure that it can operate in an independent and robust manner. This amounts to a commitment to build the prevention support and translation systems that will be critical to the healthy functioning of an NPM.⁷⁸

3.5.2 Government support for OPCAT ratification

I am heartened by the attitudes of many government departments towards the ratification of the OPCAT. For example:

The **ACT Department of Community Services** stated that:

As a human rights compliant jurisdiction, the ACT Government supports the OPCAT and its implementation in relation to young people in detention.⁷⁹

Juvenile Justice New South Wales informed me that:

Juvenile Justice NSW is supportive of the existing oversight bodies to conduct visits and monitor juvenile custodial centres as part of a National Preventative Mechanism (NPM) under OPCAT. The existing oversight bodies are well placed to deliver a designated NPM given their knowledge and expertise of Juvenile Justice and its operations.⁸⁰

The **South Australian Department for Communities and Social Inclusion** indicated that it was:
confident in its readiness to consult with the relevant bodies regarding OPCAT requirements.⁸¹

The submission by **Youth Justice, Department of Health and Human Services, Victoria** stated that:

A National Preventive Mechanism could be a useful check and balance process, which would support Victoria in ensuring recommendations from recent Victorian reports regarding the youth justice system are successfully implemented and upheld.⁸²

In 2012, Mr Greg Manning, (the then) First Assistant Secretary, International Law and Human Rights Division, of the federal Attorney-General's Department told the Joint Standing Committee on Treaties:

The ratification of the optional protocol provides the basis for improved domestic monitoring in Australia and would maintain and support Australia's views on the abhorrence of torture and other cruel, inhuman or degrading treatment or punishment. It is consistent with Australia's values...to support and sustain positive actions on human rights.⁸³

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 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.⁸⁴

3.5.3 The use of the term 'torture' in the OPCAT

At some of my roundtables and in some submissions, the use of the term 'torture' was identified as creating confusion about the role and purpose of the OPCAT in an Australian setting.

The optional protocol has a broader focus than torture; it also refers to other cruel, inhuman or degrading treatment or punishment.⁸⁵

The submission provided to me by the **Law Institute of Victoria** stated:

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.⁸⁶

Emeritus Professor Richard Harding pointed out to me:

It is unfortunate that OPCAT is always referred to in its shorthand form, emphasising "torture". Torture necessarily involves intention by the agency. This does not occur in Australia. To suggest that it does, as ratification of OPCAT may seem to imply, understandably raises the hackles of State and Territory agencies that are doing their best in difficult circumstances.⁸⁷

Participants at my roundtables agreed that Australia should be focused on the **prevention of cruel, inhuman or degrading treatment or punishment** aspect of the OPCAT.

They reasoned that even countries, like Australia, with sophisticated governance against torture, and robust legal and criminal justice frameworks, still face risks of cruel, inhuman or degrading treatment and would benefit from the implementation of the OPCAT.

The alleged conditions and events occurring at the Alice Springs Youth Detention Centre and the Don Dale Youth Detention Centre in the Northern Territory between 2010 and 2014, involving extended periods of solitary confinement, excessive force, stripping, and the use of tear gas, illustrate this. As do the alleged conditions and events which have occurred in youth justice centres in Queensland and brought to light in August 2016.

These are just some of the examples of why we need the OPCAT monitoring processes to be implemented as a priority. The monitoring processes in the OPCAT would be able to identify where abuses were happening and also prevent such abuses from occurring in the first instance.

As suggested in a joint submission from Professor Chris Cunneen, Professor Eileen Baldry, Emeritus Professor David Brown, Mel Schwartz, Associate Professor Leanne Dowse and Sophie Russell from the **University of NSW**:

The current oversight, reporting and monitoring mechanisms in place across Australia have been unable to prevent various breaches of the rights of juveniles in detention indicating that the current system is inadequate.⁸⁸

3.5.4 Preconditions for ratification: ‘progressive realisation’?

Since Australia signed the OPCAT, governments have focused, albeit intermittently, on how jurisdictions can comply with the OPCAT requirements. There has been some reluctance to ratify before all jurisdictions can comply in full. In practice, this has meant a significant delay as the Commonwealth, states and territories try to reach agreement on compliance.

At my roundtables, the issue of **progressive realisation** was consistently raised as a desirable approach. In practical terms, this means that the obligations would be taken on with an understanding that steps will be taken progressively to ensure that there is appropriate coverage and arrangements in place, with a targeted plan for how full coverage would be achieved. It enables jurisdictions to learn from initial implementation activities and share practices and experiences between jurisdictions in order to make the task as efficient as possible.

Technically, the OPCAT does not provide for progressive realisation in the same way that the *Convention on the Rights of Persons with Disabilities* or the *International Covenant on Economic, Social and Cultural Rights* does.

However, the capacity under article 24 of the OPCAT to postpone implementation by three years and then a further two years after ratification supports the progressive realisation approach. It is clearly envisaged that countries will take time to bring their jurisdictions into full compliance with the OPCAT mechanisms.

In practice, countries like Germany have ratified the OPCAT on the basis of progressive realisation. Germany consists of a federal government and 16 Lander (states). Germany ratified to the extent that some of its Land complied and those that did not would be progressively working towards compliance. A number of participants at my roundtables advocated for Australia adopting a progressive realisation approach.

Some also suggested that the OPCAT in Australia could initially be applied to a restricted number of places of detention with progressive inclusion of all other places of detention.

Emeritus Professor Richard Harding told me:

There are five major areas that could be prioritised in the Commonwealth led strategy. These are: prisons; juvenile detention centres; police lock-ups; closed psychiatric institutions; and immigration detention centres. An emerging category of “secure juvenile welfare centres”, though not numerous, would also merit consideration for priority inclusion.

It is true that areas such as old people’s homes arguably could fall within OPCAT. Also, other criminal justice related places of detention, such as court custodial centres and prisoner transportation vehicles fall within OPCAT. However, in ratifying OPCAT the Commonwealth could lawfully set priorities for the NPMs.⁸⁹

UNICEF Australia disagreed with this view:

An interpretation of the provisions, which seeks to narrow the application of the NPM would, in the view of UNICEF Australia, be contrary to the objective of the treaty.⁹⁰

The Commission notes that once the NPM is in place it would operate in a manner that would ensure dialogue with all jurisdictions about progress in implementation. It would also have some level of public reporting about the adequacy of efforts by each jurisdiction.

The NPM should encourage each jurisdiction to prioritise key issues requiring action and for each jurisdiction to also ensure that it is able to publicly justify why those issues have been prioritised over other issues. If implementation is advanced with such a framework in place, it would be unnecessary to prescribe those places of detention where the OPCAT requirements do and do not apply in the initial years.

3.5.5 Enabling monitoring visits from the Subcommittee on the Prevention of Torture (SPT)

Since 2009, when Australia signed the OPCAT, consideration has been given as to the best way for visits of the SPT to be authorised. Initially, it was decided by governments that visits should be authorised through mirror legislation being passed in all Australian jurisdictions.

Several years were spent drafting this legislation and having it introduced to some state and territory parliaments. In 2012, an inter-jurisdictional working group led by NSW and overseen by the Standing Council of Law and Justice developed model legislation to authorise potential visits of the SPT.⁹¹ Bills were introduced in Tasmania, the Northern Territory and the ACT.⁹² No Bills were considered.

In the Commission’s view, such an approach is unnecessary. It is standard practice for Australia (through the Commonwealth) to offer a standing invitation for all special procedures of the United Nations to visit upon request. Indeed, there are approximately four special rapporteurs visiting Australia in 2016-17 on the basis of the existing standing invitation.

Having undertaken necessary consultations with the states and territories, the Commission is of the view that the government could swiftly ensure such an open invitation is provided in relation to the OPCAT (once it is ratified). This would result in instant compliance with the first element of the OPCAT and remove the unnecessary and complex task of passing legislation in every Australian jurisdiction.

In the past, there has been concern that SPT monitoring visits to Australia would be intrusive and unnecessary given Australia’s human rights record.

There are now 81 countries that have ratified the OPCAT. Since the commencement of the SPT in 2007, it has conducted 49 visits with three further visits planned for Kazakhstan, Mozambique and Mexico later in 2016. It is unlikely that the SPT would visit Australia frequently. For example, I note that the United Kingdom was one of the first states to ratify the OPCAT in 2003 and is yet to receive a SPT visit.

Emeritus Professor Richard Harding suggested in his submission to me that:

It is highly unlikely that relatively developed States would receive an inspection visit more than once every ten years or so – hardly an intrusion. And when they do visit, they typically can only visit eight or ten institutions because of time constraints. Spread across the whole of Australia, this is hardly intrusive.⁹³

UNICEF Australia pointed out in its submission to me that:

One strength of the OPCAT model is that the SPT works on the basis of “constructive dialogue and collaboration rather than condemnation”. Working in collaboration with national authorities, such a model offers the benefit of proactive implementation and problem resolution, as opposed to a more confrontational model, which could otherwise exist.⁹⁴

3.5.6 The model for the NPM

At my roundtables and in submissions, there was discussion about the designation of NPM(s) and the different types of NPM models that Australia could adopt.

The NPM model must cover all places of detention within the jurisdiction of the country. In Australia, places of detention can occur under Commonwealth or state and territory jurisdictions. The model chosen for the NPM will need to address these jurisdictional issues. Commonly, other countries have designated several inspection agencies within the NPM, sometimes based on thematic areas and other times on jurisdictional grounds.

The SPT argues for the legislative establishment of the NPM:

The mandate and powers of the NPM should be clearly and specifically established in national legislation as constitutional or legislative text. The broad definition of places of deprivation of liberty as per OPCAT shall be reflected in that text.⁹⁵

The Commonwealth Parliament possesses constitutional authority under the external affairs power to enact legislation to fulfil its international obligations pursuant to ratification.⁹⁶ However, it is commonly understood that the Australian NPM will be a hybrid model in which Commonwealth legislation provides for a federal coordinating body and each state and territory identifies its own coordinating mechanism and inspection frameworks that cover all types of detention and closed environments within their jurisdiction.

Broadly, there are two main options for Australia’s federal coordinating NPM that have been considered since 2009.

One is the Commonwealth Ombudsman, on the basis of its existing mandate in receiving complaints and conducting some inspections of places of detention.

Another is that the Australian Human Rights Commission be the designated national co-ordinating body. This would recognise the Commission's similar experience in complaint handling and inspection of detention settings, while also building on the Commission's expertise (through specialist commissioners) on a wide range of areas that are relevant to the OPCAT – such as Indigenous rights, people with disability, older Australians, people from culturally and linguistically diverse backgrounds and children. It also recognises the Commission's role in the human rights jurisdiction, and its relationship with international human rights bodies.

Whichever option is chosen, the NPM could:

- provide technical assistance and training about human rights standards and their implementation
- foster information exchange on good practice between jurisdictions
- promote consistency in standards in relation to conditions and oversight
- coordinate the production of regular reports on the protection of human rights in detention environments across Australia
- undertake research on thematic issues of common concern and challenge to each jurisdiction: for example, guidance on seclusion and restraint practices
- facilitate the relationship with the SPT and facilitate visits.

Different views on the model were presented in submissions to me. The **Law Council of Australia** stated:

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.⁹⁷

UNICEF Australia's submission stated:

The SPT has recommended that "NPMs should complement rather than replace existing systems of oversight..." and the desirability of the NPM knowing and applying a human rights based approach. Accordingly, a mixed model of state and territory-based or sector-based mechanisms overseen by the Australian Human Rights Commission (AHRC) would be the preferred NPM model in Australia.⁹⁸

The submission by the **Law Institute of Victoria** pointed out:

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.⁹⁹

The submission made by the **Law Faculty at Monash University** (Associate Professor Bronwyn Naylor) argued:

Assuming Australia adopts the approach taken in most other countries of designating existing bodies as NPMs, a mixed hybrid model would be required which includes federal and state bodies, across the various sectors of detention, liaising with a national co-ordinating NPM. Either the AHRC or the Commonwealth Ombudsman would be the likely national NPM.¹⁰⁰

In terms of the suitability of the Commonwealth Ombudsman to undertake the role of the national NPM, the submission from the **Law Faculty at Monash University** made the further point that:

The principal function of an Ombudsman, and the basis of its funding, is most broadly investigating the decisions and conduct of government bodies – government departments, statutory bodies and employees of local government. It is therefore not primarily a monitoring body for places of detention; further it is significant that an Ombudsman operates principally on receipt of complaints.¹⁰¹

Emeritus Professor Richard Harding reasoned:

The Commonwealth agency that should carry this responsibility is the Australian Human Rights Commission. The Commonwealth Ombudsman is a complaints-based agency, and there is no benefit in distracting it from this role, which is rather different from *prevention*. Of course, as a high-level accountability agency, one would expect that it would, formally or informally, have some useful contact with the Australian Human Rights Commission in this respect.¹⁰²

The Human Rights Law Centre told me that complaints-based systems are not sufficient:

The system of periodic and follow-up visits required by OPCAT recognises that a comprehensive system of inspection and investigation is required *in addition to* a complaints-based system in order to adequately protect the human rights of persons deprived of their liberty. This is the case for two key reasons:

- first, complaints-based systems are, typically, reactive and ill-adapted to identifying and responding to systemic human rights issues; and
- second, in many situations of detention, there is a significant power imbalance between the detaining authority and detainees. This is amplified in the context of children and young people. As a result, detainees who have been the subject of ill-treatment may be reluctant to make complaints about their treatment. This is particularly the case where there is no independent body to which such complaints may be made.¹⁰³

The submission made by Ms Rebecca Wallis, Professor Stuart Kinner and Professor Ross Homel of **Griffith University** suggested:

that the process for forming an NPM in Australia could be greatly enriched by embracing an Interactive Systems Framework, and by keeping in mind the need for and distinction between the delivery, support, and translation systems as well as the interdependencies of these systems.¹⁰⁴

Essentially, visits by the SPT and the role of NPM(s) are aimed at the **prevention of cruel, inhuman or degrading treatment or punishment** as opposed to dealing with complaints after they have happened.

3.6 OPCAT and juvenile detention in Australia: a stocktake

One of the initial tasks that the newly established National Preventive Mechanism (NPM) will need to undertake is a stocktake of all places of detention in Australia and their compliance with the requirements set out in the OPCAT.

This chapter is illustrative of the complexity that the NPM will face in undertaking that task in relation to each of the detention settings in Australian law.

As the **Law Council of Australia** pointed out to me in their submission:

The administration of juvenile justice, including oversight, complaint and monitoring mechanisms, is governed by various pieces of legislation in each state and territory in addition to policy and guidance documents... Oversight, complaint and monitoring mechanisms differ in each jurisdiction, and can include advisory groups, official visitors, children's commissioners, independent statutory bodies, government public advocates, and ombudsmen.¹⁰⁵

Emeritus Professor Richard Harding told me:

In 2008 my colleague, Professor Neil Morgan, and I attempted to make an inventory of all groups or agencies that purportedly had some role in monitoring standards in the principal places of detention in Australia. It turned out to be a near impossible task, as the role of intra-Departmental groups was often unclear and their responsibilities and status ambiguous. What was apparent, however, was that there was confusion and overlap in many bureaucracies, with their various performance indicator monitoring systems and the like. Many people seemed to be involved in these activities, with very little focus as to their achievements and outcomes.¹⁰⁶

Based on the consultations and submissions process I have undertaken this year, I have examined the legislative requirements across all jurisdictions in relation to youth detention to establish: their existing levels of compliance with the OPCAT; how they document and monitor the use of force and methods of restraint; solitary confinement and isolation; critical incidents; searches; and complaints.

A detailed mapping of the legislation and relevant authorities in each jurisdiction is provided in Appendix 7 of this report.

The written responses provided by all jurisdictions are provided at www.humanrights.gov.au/publications/childrens-rights-report-2016. All jurisdictions except Western Australia provided written responses. Western Australia declined to respond on the basis of continuing discussions between the Commonwealth and states and territories on the ratification of the OPCAT.¹⁰⁷ Not all jurisdictions provided written responses to all the questions asked. Some asked for parts of their submissions not to be published on the basis of maintaining security.

I supplemented the information provided to me by the state and territory governments with material supplied by oversight bodies in their submissions, non-government organisations, research, relevant material from primary and secondary legislation, and issues raised at my roundtables.

There is a vast amount of information relevant to youth justice. Great care has been taken to include relevant information and to provide a comprehensive stocktake. However, it may be that some information has been inadvertently omitted. In addition to this, some states and territories have very recently made legislative changes or are changing legislation. Further, a Royal Commission is occurring in the Northern Territory and an inquiry is underway in Queensland.

3.6.1 The 'OPCAT challenge': shifting from a reactive to preventive focus

The mapping of legislation and relevant authorities in Appendix 7 tells us that:

- Across the jurisdictions, there has been considerable work undertaken in recent times to improve oversight and monitoring mechanisms for children and young people who are detained.
- Some jurisdictions are more developed than others.
- The mechanisms utilised by these jurisdictions could be used to guide the work occurring in jurisdictions with less protections.

I am encouraged by some of the mechanisms that currently exist across the states and territories. I agree with the view provided to me by the **Human Rights Law Centre** in its submission:

Australia already possesses a relatively comprehensive complaints-based system for persons in detention. Actors in this system include the court system, the Australian Human Rights Commission, state and territory commissions, the Commonwealth Ombudsman, state and territory ombudsmen, anti-discrimination boards, health services commissioners and so on. **This system responds to instances of ill treatment in detention.**

However, mechanisms to prevent ill treatment in places of detention throughout Australia are not as well developed. Where detention inspectorates do exist they often lack proper independence, or proper breadth of power. They are often agencies that form part of, or are answerable to, the government departments that are responsible for the administration of the relevant places of detention...

An additional concern with existing mechanisms is that their findings are often not published... This has undermined the transparency, credibility and effectiveness of these agencies.

The system of investigation and inspection required by the OPCAT will complement and strengthen Australia's existing mechanisms. A complaints-based system alone is manifestly inadequate – particularly when it comes to children and young people who are unlikely to have the capacity or confidence to complain.¹⁰⁸

As **Emeritus Professor Richard Harding** pointed out to me:

The point of OPCAT inspections is that they should be routine and preventive, not simply a response to crisis.¹⁰⁹

I am heartened to see that jurisdictions, like Western Australia and New South Wales, have already established monitoring mechanisms that are leading practices on meeting the requirements of the OPCAT.

Jurisdictions like Tasmania and South Australia have recently passed legislation that will strengthen their monitoring mechanisms and increase their likelihood of becoming OPCAT compliant.

The ACT and Victoria have Human Rights Acts; *Human Rights Act 2004* (ACT) and *Charter of Human Rights and Responsibilities Act 2006* (Victoria). Under that legislation, it is unlawful for a public authority to act in a way that is incompatible with a human right, or to fail to give proper consideration to a relevant human right in decision-making.¹¹⁰ These 'human rights jurisdictions' have the capacity to use that legislation as a base from which to scrutinise human rights compliance generally, including with the CAT.

Some jurisdictions rely on internal government scrutiny where government departments only:

carry out these functions, reporting internally and working very much at the behest of the Departmental management.¹¹¹

The submission made by the **Law Council of Australia** told me that:

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)'.¹¹²

All jurisdictions have some gaps that must be addressed as they move towards compliance with the NPM criteria. It is therefore critical that any reforms undertaken occur in conjunction with an assessment of existing systems against the requirements of the OPCAT for the NPM.

I have noticed that some jurisdictions have multiple government departments and statutory bodies with responsibilities in the youth justice context. Often, these departments and bodies appear somewhat uncoordinated in their approach. This is concerning because it indicates, that in some jurisdictions, there is no overall mechanism acting in the best interests of children and young people who are in detention.

The **Law Society of NSW** made specific comment on the number of agencies involved in oversight in NSW, stating that:

The existence of multiple oversight mechanisms, while each of importance in their own right, can result in a lack of clarity as to the extent of the protection mechanisms afforded. This is particularly so as it relates to the appropriate method of escalation of issues relating to the treatment of young people in detention and any constriction of their rights.¹¹³

This illustrates another potential benefit that will hopefully arise once OPCAT implementation begins: an opportunity to rationalise and clarify the roles of existing authorities within each jurisdiction.

In considering the readiness of different Australian jurisdictions to implement the requirements of the OPCAT I have primarily focused on:

- the functional independence of the arrangements
- the independence and expertise of the personnel involved
- the necessary resources for functioning
- their mandate to undertake regular preventive visits
- the power to make recommendations that authorities must examine and enter into dialogue about
- the power to submit proposals and observations concerning existing or proposed legislation
- the right to access information concerning the number of children and young people detained and places of detention
- the right to access to information on treatment and conditions of children and young people in detention
- access to places of detention
- the right to conduct private interviews with detained children and young people and others
- their ability to choose places visited and children and young people interviewed
- appropriate privileges and immunities
- confidential information being privileged
- annual reporting requirements of NPMs.

While jurisdictions in Australia meet some of these criteria, no jurisdiction meets all of them. The purpose of the analysis here is to identify the key challenges moving forward and to identify ways that different jurisdictions can learn from initiatives and practices in other states and territories.

3.6.2 Key challenges for juvenile justice in being 'OPCAT ready'

3.6.2.1 Functional independence

The OPCAT requires that inspecting bodies should be functionally independent from the facilities that they inspect, including all agencies with responsibility for those facilities.

The following examples of legislative provisions are drawn from across Australian jurisdictions. They identify different elements of ensuring functional independence:

- Functions may be exercised on the Inspector's own initiative, as well as in response to a reference or request by Parliament, other independent officials (such as Ombudsman or Police Integrity Commission), or any public authority or public official (for example NSW Inspector of Custodial Services¹¹⁴)
- Inspectors are appointed for fixed terms of employment, with clearly defined dismissal processes (for example Tasmanian Custodial Inspector¹¹⁵)
- Accountability to Parliament including reporting (for example NSW Inspector of Custodial Services¹¹⁶).

The United Nation's Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment's *Guidelines on national preventive mechanisms* provides that 'the operational independence of the NPM should be guaranteed'¹¹⁷ and 'the NPM should enjoy complete financial and operational autonomy when carrying out its functions under the Optional Protocol'.¹¹⁸

Additionally, the *Guidelines on national preventive mechanisms* state that:

the relevant legislation should specify the period of office of the member/s of the NPM and any grounds for their dismissal. Periods of office, which may be renewable, should be sufficient to foster the independent functioning of the NPM'.¹¹⁹

The process for the selection and appointment of members of the NPM should be open, transparent and inclusive and involve a wide range of stakeholders, including civil society.¹²⁰

The jurisdictions across Australia vary in the degree of independence held by their monitoring and oversight departments.

While all jurisdictions have at least one body with a high degree of independence, those bodies are not always established with a specific mandate to routinely inspect and monitor places of detention and their functions.

Western Australia and **NSW** have established independent inspectors of custodial services. Both have a high level of statutory independence, with provisions establishing appropriate appointment processes and with appropriate powers and protections for officeholders.

Both inspectors are located within the same ministerial portfolio as the departments responsible for the places of detention being monitored. It is standard practice in our system of government for agencies to have their accountability, reporting and financial mechanisms streamed through a portfolio. It is only problematic if the inspecting bodies are directed in the performance of their functions by the Minister or department, require their permission to undertake activities or are otherwise constrained in the exercise of powers.

In the case of NSW, the *Annual Report 2014-2015* of the NSW Inspector of Custodial Services raised concerns about its current governance arrangements, stating:

When the ICS was established in October 2013 it sat within the Department of Attorney-General and Justice for administrative and budget purposes. Following restructures, the ICS was integrated into the administrative and financial arrangements of the Department of Justice. This substantially enlarged department now includes Corrective Services NSW and Juvenile Justice NSW, the agencies covered by the legislative inspection mandate.

This is in contrast to other inspection and oversight bodies in NSW who sit within the Department of Premier and Cabinet for administrative purposes to ensure structural and financial independence from the agencies, which they inspect.

The Inspector considers that the real and perceived independence of this office, which is critical to its credibility with stakeholders, and the intent of Parliament of NSW, is compromised by these governance arrangements.¹²¹

The parliaments of **South Australia** and **Tasmania** have recently passed legislation to establish independent statutory positions with the express function of monitoring places of detention.

It is expected that the Guardian for Children and Young People in South Australia will also be appointed as the Training Centre Visitor.¹²² The Training Centre Visitor has the express function of monitoring youth justice centres in that state.

In the case of the Tasmanian Custodial Inspector, it appears that it will be attached to the Office of the Ombudsman Tasmania and the Ombudsman may be appointed Inspector.¹²³ Neither South Australia nor Tasmania had appointed the relevant statutory officer at the time of writing.

These two new statutory agencies appear to have a high level of statutory independence with the required mandates to inspect places in which children and young people are detained.

The remaining four jurisdictions have varied arrangements. All have Ombudsman offices with a high level of independence. In particular, they appear to have protections and immunities for the officeholders and staff.

However, Ombudsman mandates and practices tend to have a complaints focus and, in most jurisdictions, currently lack the oversight and monitoring approach required of an NPM.

The **Victorian** and **ACT** Ombudsman positions have broad remits because they have the mandate to consider administrative acts, which may have breached the human rights legislation in each of those jurisdictions. However, the Victorian Ombudsman stated that this broad mandate is little known or used at the moment.¹²⁴

Victoria and **Queensland** have detailed inspection regimes run from within internal government departments. However, the lack of independence from the departments responsible for administering the detention of children and young people means these arrangements would not fully meet the requirements under the OPCAT.

In addition to independent Ombudsman positions, most states and territories have independent statutory positions of commissioners for children and young people. Many lack the legislative mandate to regularly visit and inspect juvenile justice detention centres. Mostly they focus on children and young people who are in out-of-home care due to child protection concerns, though they may also visit juvenile justice settings.

The **Northern Territory** relies upon its Ombudsman and Children's Commissioner for independent oversight. Both bodies have the necessary level of independence. However, neither body has a specific mandate to visit and inspect juvenile justice centres.

The Northern Territory Children's Commissioner has done significant reporting on the conditions and treatment of children and young people in detention. For example, in 2014, the Commissioner initiated an own-initiative investigation into services provided to young people by the Department of Correctional Services at the Don Dale Youth Detention Centre.

The Commissioner decided to initiate the investigation after a professional stakeholder raised concerns about the welfare of five young people, in particular the alleged indefinite nature of their confinement and the unhygienic living conditions of the Behaviour Management Unit.¹²⁵ The investigation focussed on events that occurred at the Behaviour Management Unit in Don Dale between 4 and 21 August 2014, including the use of tear gas on six young people.¹²⁶

Additionally, Official Visitors in the Northern Territory have a mandate to inquire into the treatment and behaviour of, and the conditions for, detainees in the detention centre'.¹²⁷ Official Visitors must visit their appointed youth detention centre at least once a month for which they receive payment.¹²⁸ However, the Minister appoints Official Visitors.¹²⁹ Further, the powers of the Official Visitors in relation to their mandate to visit detention centres are not sufficient for OPCAT-compliant independence, for example they are subject to conditions that the Commissioner for Corrections considers appropriate in their visiting of detention centres.¹³⁰

3.6.2.2 The independence and expertise of the personnel involved

Examples in Australian law of provisions that ensure the independence of personnel working at inspection bodies, and which ensure appropriate expertise, include:

- Provisions which set out required expertise for people to be eligible for appointment to an inspection role (for example NT Children's Commissioner¹³¹)
- Provisions which ensure diversity and plurality among the membership of inspection bodies (for example NT Youth Justice Advisory Committee¹³²)
- Provisions which prevent conflict of interest in appointment processes and appointments themselves (for example NSW Inspector of Custodial Services¹³³)
- Offences for hindering or obstructing the Inspector, failing to comply with the Inspector, and making false statements or misleading the Inspector (for example NSW Inspector of Custodial Services¹³⁴)
- The Inspector and staff are protected from liability for acts done or omitted to be done in good faith under the legislation (for example Tasmanian Custodial Inspector¹³⁵).

Few jurisdictions make legislative provision regarding the expertise required of appointments to relevant bodies, the staff of those bodies and experts used.

The legislation establishing the **Victorian Commission for Children and Young People** states that ‘the Minister must not recommend a person for appointment under subsection (1) unless the Minister is satisfied that the person is qualified for appointment as a Commissioner because of his or her knowledge and experience’.¹³⁶ The legislation establishing the **Western Australian Inspector of Custodial Services** provides that ‘the Governor is to appoint an appropriately qualified person to the office of Inspector’.¹³⁷ The new **South Australian** legislation does not include any reference to qualifications or expertise regarding eligibility of a person for appointment as Training Centre Visitor.¹³⁸ The **Northern Territory Children’s Commissioner** must have ‘qualifications or experience relating to the Commissioner’s functions’ and be ‘committed to the objects of [the legislation] and the underlying principles’.¹³⁹

Additionally, few jurisdictions make legislative provision regarding a gender balance or representation for ethnic minorities. In the context of the overrepresentation of Aboriginal and Torres Strait Islander children and young people in juvenile justice centres across Australia, representation of Aboriginal and Torres Strait Islander people in an NPM is particularly important.

The **Northern Territory** has a Youth Justice Advisory Committee (YJAC) provided for in legislation.¹⁴⁰ The YJAC gives advice and information to the Minister for Correctional Services on the administration of the Northern Territory’s youth justice system. The legislation provides that membership of the Committee should reflect the composition of the community at large and so far as practicable should include:

- an equal number of men and women
- at least two Aboriginal members
- at least one member who is under the age of 25 years at the time of their appointment
- at least one former detainee
- an Official Visitor
- one member residing in Alice Springs and one member residing in a remote community at the time of appointment.¹⁴¹

However, the mandate of the Youth Justice Advisory Committee does not include regular visits, it has no express power of entry into youth justice detention centres and members are appointed by the Minister for Correctional Services.¹⁴²

The legislation establishing the **Victorian Commission for Children and Young People** provides for an ‘additional Commissioner’ to be appointed.¹⁴³ The first additional commissioner – the Commissioner for Aboriginal Children and Young People – was appointed in 2013.¹⁴⁴ However the legislation does not specify the need for representation of Aboriginal and Torres Strait Islander people in such appointments.

Most jurisdictions have Official Visitor programs either to supplement the official inspectors or as part of regular visiting regimes. Some of these positions are voluntary, for example in Victoria and Western Australia. Some are legislated positions within independent agencies, for example in Queensland. In the Northern Territory, the Minister appoints Official Visitors.¹⁴⁵ Their visits are subject to conditions that the Commissioner for Corrections considers appropriate.¹⁴⁶

Where positions are held voluntarily or by insecure employment, it is arguable that either the expertise and qualifications of the position-holders is likely to be insufficient or the independence of the individuals might be threatened.

The legislation providing for the Public Guardian to appoint Community Visitors in **Queensland** states that a person is eligible for appointment only if the Public Guardian considers the person has the knowledge, experience or skills needed to perform the functions of a Community Visitor.¹⁴⁷ The Public Guardian also informed me that community visitors ‘come from a diverse range of backgrounds; some have qualifications and professional skills, including psychology, teaching and social work, while others have extensive experience in human services’.¹⁴⁸ However, the Queensland Community Visitors are ‘casual contract employees’,¹⁴⁹ which could make their employment insecure.

Some jurisdictions make provision to ensure against conflicts of interest. For example, the **Western Australian** legislation establishing the Inspector of Custodial Services provides that a person who has, in the last three years, been a member of the Parliament of the Commonwealth or any State or Territory cannot be appointed as Inspector.¹⁵⁰ The legislation establishing the NSW Inspector of Custodial Services provides that:

The following persons are not eligible to be appointed as Inspector or to act in that office:

- (a) a person who is a member of the Legislative Council or of the Legislative Assembly or is a member of a House of Parliament or legislature of another State or Territory or of the Commonwealth,
- (b) a person who is, or has been within the previous 3 years, employed as a custodial centre staff member,
- (c) a person who is to any extent responsible for the management of, or who is employed at or in connection with, a custodial centre,
- (d) a person who has, or who has had, any interest in an agreement under Part 12 (Engagement of contractors) of the *Crimes (Administration of Sentences) Act 1999*.¹⁵¹

Protections for officeholders and staff are found in most legislation establishing Ombudsman offices and children’s commissioners. The custodial inspectors have varying degrees of protections. Neither the **NSW Inspector of Custodial Services** nor his or her staff is subject to ‘liability, claim or demand’ for anything ‘done or omitted to be done’ if it was ‘in good faith’ for the purpose of executing the Inspector’s functions.¹⁵² Some legislation adds to such provisions that actions instead lie against the state, for example the new **Tasmanian** legislation.¹⁵³ In **Western Australia**, the crown is also relieved of any liability that it might otherwise have had for an action done in good faith in the performance of functions under the *Inspector of Custodial Services Act 2003 (WA)*.¹⁵⁴

In the case of most Ombudsman and Inspector positions, it is an **offence to obstruct or hinder** the officeholder or their staff in the performance of their functions; or to fail to comply with a requirement of the officeholder or their staff; or to mislead them.¹⁵⁵ Penalties vary: in **NSW** such offences are punishable by fines of 50 penalty units or 12 months imprisonment;¹⁵⁶ in **Tasmania** by 50 penalty units;¹⁵⁷ in **Western Australia** the penalty for hindering or resisting the Inspector or staff is \$20,000;¹⁵⁸ a person who hinders a person in the performance of a function under the *Youth Justice Administration Act 2016 (SA)*, including a Training Centre Visitor, commits an offence punishable by a fine of \$2,500.¹⁵⁹

3.6.2.3 The necessary resources for functioning

Article 18(3) of the OPCAT provides that an NPM must be provided with the necessary resources to function.

Government agencies and non-government organisations commonly expressed concerns about ensuring that inspectorates have sufficient funding to maintain a routine program of inspections and follow up, and to ensure appropriate expertise.

Lack of resourcing can compromise the capacity of relevant agencies to fulfil monitoring functions effectively. Resourcing can also impact on the functional independence of monitoring and oversight bodies.

There are a variety of ways in which aspects of resourcing can impact performance of an otherwise independent agency's functions. For example, delays in appointing a new Inspector to a position left vacant, as recently happened in NSW, can impact on the capacity of that office to fulfil legislative functions such as completing mandated inspections.¹⁶⁰

The need for adequate resourcing was raised consistently at roundtables and in some submissions.

The **Law Society of New South Wales** told me that it:

recognises that budget restrictions at both a State and Territory, and Federal, level can have an impact on resourcing. It is, however, important to note that children and young people have a positive right (which is absolute) to such support, regardless of the State's ability to fund the programs which underpin it.¹⁶¹

In the **NSW Inspector of Custodial Services Annual Report 2014-2015**, concerns were raised about the extent to which the Inspector would be able to meet its statutory obligations given its current resourcing:

The previous year has clarified the three streams of work for the office: inspection of correctional and juvenile centres, monitoring the uptake of recommendations, and the Official Visitor program. While the Official Visitor program receives discrete funding, the first two streams are funded together. The office has not yet completed an inspection cycle, which would include the monitoring of recommendations made in reports. This monitoring would involve site visits to centres in order to verify the reported progress against recommendations.

With the current staffing and budget resources, the office will be unlikely to meet its legislative obligations. This constraint will impinge on the ability of the ICS to measure the level of implementation of its recommendations.¹⁶²

The Inspector noted there were only five staff (including the Inspector) in the Inspector's office. In June 2015, a request was made for an extra position of research assistant.

Each year, the NSW Joint Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission publishes a review of annual reports of oversight agencies. In the 2016 report, the NSW Joint Committee commented on the resourcing of the Inspector of Custodial Services, noting how few staff the office has and that due to its recent establishment it is difficult to know whether the resources are sufficient to fulfil its statutory functions, including inspecting all juvenile justice centres at least every 3 years. The NSW Joint Committee stated that it will 'continue to monitor whether there is a need for additional funding and staff to enable the Inspectorate to meet its legislative obligations'.¹⁶³

The **Tasmanian Custodial Inspector** will be attached to the Office of the Ombudsman and will provide independent external scrutiny of prisons and youth detention centre services.¹⁶⁴ The **Department of Health and Human Services** in Tasmania told me:

Despite the Custodial Inspectorate providing significant new oversight across detention facilities, the Department of Health and Human Services does not believe that the Custodial Inspector Legislation will make Tasmania OPCAT ready. The Department of Justice have advised that if the Protocol is ratified this would mean that a number of areas would need to be considered in relation to the legislation, for example, the current Bill only covers the main prisons and Ashley Youth Detention Centre (AYDC), under OPCAT it will need to cover Police holding cells and remand centres, it will also need to cover any other area where a person could be secured, for example, transport. This is likely to significantly broaden the scope of the Inspectorate and will require additional funding; currently the Inspectorate will operate out of the Office of the Ombudsman with one Band 7 FTE and one Band 5 FTE.¹⁶⁵

The **Guardian for Children and Young People in South Australia** argued in her submission to me that additional resources are needed:

To achieve effective monitoring, reflective of the provisions under the new *Youth Justice Administration Act 2016* (SA) additional resources, in particular staff, are required to at least:

- provide a greater presence in the AYTC to build relationships, promote the rights and responsibilities of detained children and young people, and provide greater access to advocacy for residents. Currently GCYP Advocates visit residents once every two months but are only able to visit two of the seven units on each occasion.
- implement an education program for both residents and staff about rights and responsibilities of detained children and young people.
- increase frequency of formal visits to the AYTC to conduct regular audits of performance in key operational areas and report on performance. Due to limited capacity, GCYP selected to prioritise improvements for safety.
- Inquire into systemic reform associated with quality of care, treatment and control of residents and the management of the training centre.
- provide advice to the Minister on the quality of treatment and care of children and young people who are detained and on systemic reform necessary to improve the quality.¹⁶⁶

The new legislation in **South Australia** provides that the Minister must deliver the Training Centre Visitor with the staff and other resources that the Visitor may reasonably need for exercising her or his functions.¹⁶⁷ The Department's submission did not comment on whether additional resources will accompany the new legislation to assist with its implementation.

The existing legislation establishing the Guardian for Children and Young People in South Australia requires that the Minister 'provide the Guardian with the staff and other resources that the Guardian reasonably needs for carrying out the Guardian's functions'.¹⁶⁸ The Guardian for Children and Young People advised that currently, as a result of limited resources, visits are not frequent enough¹⁶⁹ and its current monitoring focuses on the physical, mental and emotional safety of residents.¹⁷⁰

The **Law Institute of Victoria** pointed out it did not want to see a new body created to be the Victorian NPM. It thought that expanding the role and legislative power for either the Victorian Ombudsman or the Victorian Children and Young People Commissioner to carry out the independent monitoring would be more appropriate. However, it stated that if this were to happen:

greater resourcing is required within the existing structures of review/monitoring/complaints/investigation bodies to carry out this extended task.¹⁷¹

The legislation establishing the **Victorian Commission for Children and Young People** states that the Commission may conduct an inquiry relating to a health service, human service or school in relation to a vulnerable child or young person if 'the Commission...considers that the inquiry can be conducted within the resources of the Commission'.¹⁷²

The **Victorian Commission for Children and Young People** indicated that it supports the establishment of an NPM with the resources required to meet the best interests of the children and young people.¹⁷³

The **Victorian Ombudsman** advised that, in practice, the Ombudsman visits detention centres routinely, however this function is not expressly in the Ombudsman Act, nor is it separately funded.¹⁷⁴

The **Queensland Family and Child Commission** told me that it supports:

the greater resourcing of services to enable more regular, targeted and effective independent and impartial monitoring, support and services to children and young people in detention facilities, particularly resourcing of support for Aboriginal and Torres Strait Islander children and young people.¹⁷⁵

The submission made to me by **NAAJA and CAALAS** highlights that, where complaints have been made to both the Official Visitors and the **Northern Territory Children's Commissioner**, 'there is often little action because of resourcing issues'.¹⁷⁶

The *Annual Report 2014-15* of the **Office of the Children's Commissioner of the Northern Territory** highlighted:

Quite often these investigations are complex and substantial resources are required to conduct them. A single complex investigation can require many months of investigation and the involvement of multiple staff members.¹⁷⁷

3.6.2.4 Access to places of detention and the children and young people detained

The OPCAT requires the following elements for preventive mechanisms:

- Access to places of detention (article 20(c)).
- The right to conduct private interviews with detained people and others (article 20(d)).
- Liberty to choose places visited and people interviewed (article 20(e)).
- Confidential information shall be privileged (article 21(2)).
- Protections from sanctions or prejudice for individuals or organisations communicating with an NPM (article 21(1)).

The following are some examples of legislative provisions from across the country in this regard:

- Functions enable the body to routinely inspect and monitor places of detention, including a requirement to visit, such as every three years (for example WA Inspector of Custodial Services¹⁷⁸) and the power to access any detention centre at any time with any assistants and equipment (for example WA Inspector of Custodial Services¹⁷⁹)
- It is an offence to hinder a person exercising the powers of access (for example NSW Inspector of Custodial Services¹⁸⁰)
- Jurisdiction extends to police holding cells (for example NT Ombudsman¹⁸¹), access to vehicles used to transport people detained (for example Tasmanian Custodial Inspector¹⁸²), and court holding cells (for example WA¹⁸³), and includes the mandate to inspect adult facilities if any children are held there (for example Queensland Community Visitors¹⁸⁴)
- There is unfettered access to the people in detention centres (for example WA Inspector of Custodial Services¹⁸⁵)
- There is an express provision that there is no requirement to give notice of inspections (for example WA Inspector of Custodial Services¹⁸⁶)
- There is an express requirement that an inspector is provided privacy to conduct interviews with people detained and staff (for example Tasmanian Custodial Inspector¹⁸⁷)
- Information received is confidential (for example NSW Inspector of Custodial Services¹⁸⁸) and privileged (for example Tasmanian Custodial Inspector¹⁸⁹)
- There are protections against recriminations for people who have complained or provided information (for example NSW Inspector of Custodial Services,¹⁹⁰ ACT Human Rights Commission,¹⁹¹ Queensland Ombudsman¹⁹²)
- Officials *and* those making complaints or providing information to the Commission are protected from civil and criminal liability for acts done honestly and without recklessness (for example ACT Human Rights Commission¹⁹³).

The United Nation's Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment's *Guidelines on national preventive mechanisms* states that 'the visiting mandate of the NPM should extend to all places of deprivation of liberty, as set out in article 4 of the Optional Protocol'.¹⁹⁴ Article 4 is as follows:

Article 4

1. Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.
2. For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.

In the context of the detention of children and young people in the youth justice system, these requirements mean that **the inspection mandate of the relevant monitoring bodies should extend to places like police cells and lock-ups, court holding cells, and vehicles used to transport people in the juvenile justice system.**

Additionally, the capacity to usefully visit and speak to people detained is influenced by a number of factors including: the degree of privacy afforded to interviews and meetings in detention centres; the extent to which the confidentiality of information provided by people detained is protected, for example whether it is privileged in court proceedings; and the types of protections offered to individuals providing the information, for example immunity from civil and/or criminal liability, and offences with sufficient penalties for any disadvantage suffered by people or organisations providing information.

Most jurisdictions in Australia have a list of people who are empowered to visit juvenile justice detention centres at any time, including people like judges and magistrates and sometimes members of parliament. However, because these people do not have any formal or substantive role in the monitoring and oversight of juvenile justice detention centres, I do not consider them further in this section.

Most jurisdictions appear to have at least one body involved in the monitoring and oversight of juvenile justice detention centres in some way, with appropriate legislative powers to access youth justice centres and the children and young people detained in them. This includes not only mandated visits, for example, every 3 years, but also the power to access at any time.

Few relevant bodies have legislation that specifically provides that the officeholder must be given access to detainees and staff within centres, at the discretion of the officeholder. One example is that the NSW Custodial Inspector may require staff to attend before the Inspector to answer questions, and is entitled to be given access to detainees to communicate with them.¹⁹⁵ Another is the new Tasmanian Custodial Inspector who is empowered to have access to a prisoner or detainee at all reasonable times and staff of a custodial centre ‘must allow the inspector to conduct an interview with a prisoner or detainee, out of the hearing of any other person’.¹⁹⁶

No jurisdiction has an independent body with a mandate to inspect *all* places of detention where children and young people might be held. In particular, in most jurisdictions, the relevant bodies cannot inspect police cells or vehicles used to transport people detained.

For example, **Western Australia’s Inspector of Custodial Services** has the same access to court custody centres and lock-ups, and persons, vehicles and information relating to court custody centres and lock-ups as it does to detention centres.¹⁹⁷ However, the definition of ‘lock-up’ excludes those run by the Police and therefore very few of over-100 lock-ups across WA are within the jurisdiction of the Inspector. Both the Inspector and the Commissioner for Children and Young People have noted this gap in oversight powers.¹⁹⁸

The **NSW Inspector of Custodial Services’** mandate includes access to correctional centres, youth justice centres, transitional centres, court cell complexes and inmate and detainee transport fleets. However, the access powers do not include any police station or court cell complex that is not managed by Corrective Services NSW or Juvenile Justice¹⁹⁹ or any function of, or service provided by, the NSW Police Force, the Serious Offenders Review Council, the Serious Young Offenders Review Panel or the State Parole Authority.²⁰⁰

The newly legislated **Tasmanian Custodial Inspector** will specifically have the power to visit and examine any custodial centre and any vehicle, equipment, container or other thing in a custodial centre, at any time.²⁰¹ The Inspector will also be empowered to enter and examine any equipment or container outside a custodial centre used in connection with a custodial centre, and any vehicle used to transport prisoners or detainees, at any time.²⁰²

However, the recently passed legislation defines ‘custodial centre’ as a prison within the meaning of the Corrections Act 1997; and a detention centre, but it specifically ‘does not include any police station or court cell complex’.²⁰³

In the lead up to the new legislation passing the Tasmanian Parliament, the **Tasmanian Department of Health and Human Services** acknowledged the need to expand the Inspector's mandate in this regard in order to comply with the OPCAT:

Despite the Custodial Inspectorate providing significant new oversight across detention facilities, the Department of Health and Human Services does not believe that the Custodial Inspector Legislation will make Tasmania OPCAT ready. The Department of Justice have advised that if the Protocol is ratified this would mean that a number of areas would need to be considered in relation to the legislation, for example, the current Bill only covers the main prisons and Ashley Youth Detention Centre (AYDC), under OPCAT it will need to cover Police holding cells and remand centres, it will also need to cover any other area where a person could be secured, for example, transport.²⁰⁴

South Australia's newly legislated Training Centre Visitor does not have a mandated visiting schedule but does have the power to visit at any time.²⁰⁵ The new legislation is specifically regarding the inspection of Training Centres and does not cover other places where children and young people may be held in custody, for example court cells, police cells and transport vehicles.

The new South Australian legislation provides that when visiting a Training Centre, the Training Centre Visitor must give the manager reasonable notice of the impending visit unless the visit is for reasons the Training Centre Visitor considers 'exceptional'.²⁰⁶ If a manager of a training centre refuses at any time to allow the Visitor to visit the centre because of any genuine concerns the manager may have in connection with the safety of the Visitor (whether related to a security risk, a health related risk or some other reason), the manager must, as soon as reasonably practicable, provide the Visitor with written advice as to why entry to the centre was refused.²⁰⁷

Currently, the Memorandum of Administrative Arrangement which authorises the **Guardian of Children and Young People South Australia (GYCP)** to conduct visits to Training Centres states that the Guardian will 'provide the Youth Training Centre General Manager with reasonable prior notice of the intention to visit the Centre and/or gather information or investigate a matter. For announced monitoring visits, GCYP will negotiate a suitable date for the visit: four weeks prior'.²⁰⁸

The four jurisdictions without specific inspectors have varying arrangements.

Ombudsman positions do have legislated powers to access places of detention however these powers are generally in the context of an investigation or inquiry, not simply routine visits.²⁰⁹ The **Queensland Ombudsman** has the power to access places of detention in the context of an investigation, but is expressly required to give 'reasonable notice'.²¹⁰

The *Ombudsman Act 2009* (NT) establishing the **Northern Territory Ombudsman** defines a public authority (regarding which the Ombudsman has jurisdiction to investigate) as including the Police Force.²¹¹ The objects of the legislation make it clear that conduct of police officers is included in the mandate of the Ombudsman.²¹²

The **Victorian Ombudsman** advised that, in practice, the Ombudsman visits detention centres routinely, however, this function is not expressly in the Ombudsman Act, nor is it separately funded.²¹³ Staff of the Ombudsman aim to visit Parkville and Malmsbury every six months.²¹⁴ The Victorian Police are exempt from the Ombudsman's jurisdiction,²¹⁵ meaning that police cells could not be the subject of an inquiry or investigation and therefore the Ombudsman does not have the power to access police cells.

In practice, most visits to juvenile justice detention centres in Victoria are carried out by Independent Visitors as part of the program administered by the Commissioner for Children and Young People.

The Independent Visitors are volunteers who make monthly inspection visits to detention centres and undertake fortnightly exit interview questionnaires.²¹⁶ The Independent Visitors do not have legislated powers and the Law Institute of Victoria commented that the youth justice centres know in advance when the Independent Visitors will be visiting.²¹⁷ Further, the Law Institute of Victoria pointed out that the Independent Visitor Program 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.²¹⁸ In particular, children being held in police cells are not visited as part of the program.

In the **ACT**, Official Visitors may, at any reasonable time, enter a visitable place, including a youth justice detention centre,²¹⁹ following a complaint or at the Official Visitor's own initiative.²²⁰ Visits may be scheduled or ad hoc.²²¹ This includes visits without giving notice where the Official Visitor reasonably believes it would compromise a complaint investigation to do so.²²² The *Official Visitor (Children and Young People Services) Visit and Complaint Guidelines 2015 (No.3)* provides that an Official Visitor must visit Bimberi Youth Justice Centre at least 12 times per annum (once a month).²²³

Neither independent body involved in monitoring juvenile detention in the ACT – the ACT Commissioner for Children and Young People or the Public Advocate (in practice, the same person) – have the express legislative function and accompanying powers regarding access to Bimberi Youth Justice Centre.

However, in practice, the person fulfilling the dual role does visit Bimberi regularly: every month and upon request. Further, the Public Advocate is required to inspect the register of searches and use of force at Bimberi at least once every 3 months.²²⁴

Most bodies which do not have the specific power to enter facilities at any time do have broad incidental powers to do what is necessary or expedient to fulfil their functions. For example, the **Northern Territory Children's Commissioner** arguably has the power to enter juvenile justice detention centres based on the incidental power 'to perform the Commissioner's functions'²²⁵ in combination with the functions themselves.

In the **Northern Territory**, Official Visitors have a mandate under the *Youth Justice Act 2005 (NT)* to regularly monitor and report on youth detention centres in the NT.²²⁶ Official Visitors 'must inquire into the treatment and behaviour of, and the conditions for, detainees in the detention centre'.²²⁷ An Official Visitor must visit their appointed youth detention centre at least once a month.²²⁸ The powers to visit are limited by a provision that an Official Visitor may attend the detention centre at a reasonable time, subject to the conditions the Commissioner considers appropriate.²²⁹

In **Queensland**, the legislated monitoring and inspection responsibility lies within government: the Chief Executive of the Department of Communities, Child Safety and Disability Service is legislatively required to inspect each detention centre at least once every 3 months.²³⁰ This monitoring and inspection responsibility has been delegated to the Youth Detention Inspectorate.²³¹ However, the Public Guardian also administers a Community Visitor Program, referred to above. The Department of Justice and Attorney-General advises that community visitors make weekly visits to youth detention centres.²³²

Under section 67 of the *Public Guardian Act 2014 (Qld)*, Community Visitors have the power to enter youth detention centres and adult corrective services facilities without notice, inspect the site, and require staff members to answer questions and produce documents.²³³ However, this power is subject to any direction or procedure given or made by the Chief Executive of Corrective Services to 'facilitate the effective and efficient management of corrective services'.²³⁴

The **Queensland Department of Justice and Attorney-General** advised that Community Visitors make weekly visits to youth detention centres.²³⁵

The **Queensland Office of the Public Guardian** advised in its submission to me that young people remain visitable while they are residing at a visitable site until they are 18 years old,²³⁶ and that this means a ‘visitable site’ ‘may include an adult corrective services facility where a 17 year old may be detained’.²³⁷

In addition to the power to enter, some jurisdictions’ relevant bodies are given an express legislative provision stating that notice of an inspection is not required.

For example, other than notice to a chief judicial officer regarding an inspection of a court custody centre, the **WA Inspector of Custodial Services** is not required to give notice to anyone of the intention to perform any of the Inspector’s functions.²³⁸

Few agencies across jurisdictions specifically provide that the relevant independent officeholder must be given access to any and/or all children and young people, at the discretion of the officeholder (subject only to the consent of the children and young people themselves). The new **Tasmanian Custodial Inspector** will have the express power to obtain access to, and communicate with, persons detained.²³⁹ The *Inspector of Custodial Services Act 2003 (WA)* expressly provides for the Inspector to have ‘free and unfettered access to...a detainee in a detention centre’.²⁴⁰ NSW Official Visitors may ‘confer privately with any person who is resident, employed or detained at the detention centre’.²⁴¹

The **Law Institute of Victoria** commented in its submission to me that there are restrictions on which children and young people the Ombudsman may speak to on visits to youth justice detention centres. The submission advised that the Ombudsman is not permitted to speak to children under 16 years of age.²⁴² This point was also raised by the Ombudsman’s office in the roundtable in Victoria. This may be a reference to section 18B of the *Ombudsman Act 1973*, which provides that a witness summons is only effective if directed to a person over 16 years.

An additional requirement of OPCAT compliant NPMs is that the legislation of the independent bodies also expressly protects those people and organisations communicating with the relevant body, for example to complain or provide information. These protections include providing for the confidentiality and privileged status of information received by the agency, immunity from criminal and civil liability for those providing information in good faith, and protections from sanctions, recriminations or victimisation. These protections are in addition to the protections required for the officeholders and staff in order to be fully independent.

Under the legislation establishing the **Northern Territory Children’s Commissioner**, confidentiality of information is protected: it is an offence to disclose information obtained in the course of performing functions under the legislation.²⁴³

The legislation establishing the **WA Inspector of Custodial Services** addresses confidentiality of information obtained by the Inspector in the course of performing the Inspector’s functions. It is an offence punishable by a fine and 2 years imprisonment to disclose such information other than:

- a) for the purposes of the performance of a function of the Inspector; or
- b) for the purposes of any proceedings for perjury or for an offence under this Act; or
- c) as authorised by section 44, 45 or 46; or
- d) in other circumstances prescribed by the regulations.²⁴⁴

Additionally, the *Inspector of Custodial Services Act 2003 (WA)* provides that documents sent to the Inspector (or staff) or by the Inspector (or staff) in the course of or for the purposes of the performance of the Inspector’s functions and that were prepared specifically for the purposes of the performance of the function, are privileged (other than for proceedings for perjury or for an offence under this Act).²⁴⁵

Information received by the **Tasmanian Custodial Inspector** is privileged: section 23(5) provides that a person who is or has been the Inspector or an officer of the Inspector must not be compelled in court (or in another forum authorised to examine evidence) to disclose information that was acquired in his or her official capacity, and disclosed or obtained under the *Custodial Inspector Bill 2016* (Tas).

The legislation establishing the **South Australian Training Centre Visitor** provides that individual cases disclosed to the Training Centre Visitor or a member of staff are confidential and not liable to disclosure under the *Freedom of Information Act 1991* (SA).²⁴⁶ It also provides that a person may not (on threat of a fine of \$10,000) disclose information relating to a youth or resident of a training centre obtained in the administration or enforcement of the legislation with the following exceptions:

- a) as required or authorised by this Act or any other Act or law; or
- b) as reasonably required in connection with the administration or enforcement of this Act or any other prescribed Act; or
- c) if, in the opinion of the Chief Executive, it is necessary to disclose the information in order to avert a serious risk to public safety; or
- d) for the purposes of legal proceedings arising out of the administration or enforcement of this Act; or
- e) to a government agency or instrumentality of this State, the Commonwealth or another State or Territory of the Commonwealth for the purposes of the proper performance of its functions; or
- f) with the consent of the youth or resident to whom the information relates.²⁴⁷

The various Ombudsman offices generally have some or all of these relevant protections.

The legislation establishing the **Ombudsman Queensland** provides that a document created for the purposes of an Ombudsman investigation and given to the Ombudsman under an investigation requirement is not admissible in evidence against a person in civil or criminal proceedings.²⁴⁸

The legislation establishing the **WA Ombudsman** addresses confidentiality.²⁴⁹ It also protects a person who complains to the Ombudsman or who provides information (or who has exercised a power or performed a duty under the legislation) from victimisation.²⁵⁰ It is an offence punishable by \$8000 or 2 years imprisonment to:

- a) prejudice, or threaten to prejudice, the safety or career of; or
- b) intimidate or harass, or threaten to intimidate or harass; or
- c) do any act that is, or is likely to be, to the detriment of, another person because the other person —
- d) has made or will or may in the future make a complaint under this Act; or
- e) has provided, is providing or will or may in the future provide information in the course of, or for the purpose of, an investigation under this Act; or
- f) has exercised a power conferred by this Act on the other person or has performed a duty imposed by this Act on the other person or is exercising or performing, or will or may in the future exercise or perform, any such power or duty.

A person complaining to the **Ombudsman NSW** or assisting the Ombudsman NSW is protected from recriminations (any violence, punishment, damage, loss or disadvantage, or loss or disadvantage in employment). Such recriminations constitute an offence punishable by up to 5 years imprisonment.²⁵¹

The legislation establishing the **Guardian for Children and Young People in South Australia** provides for offences and penalties for intimidating or threatening a person with the intention of persuading them to fail to cooperate with the Guardian; and treating a person unfavourably on the grounds that they cooperated with or provided information to the Guardian. The penalty for either offence is a maximum fine of \$10,000.²⁵²

The *Human Rights Commission Act 2005 (ACT)* also protects against victimisation, making it an offence punishable by a fine and/or 6 months imprisonment to cause or threaten to cause a detriment to a person because the person has done (or is believed to be intending to do) the following: made a complaint under the Act; or given information or documents to a person exercising a function under the Act; or given information or documents or answered a question as required under the Act.²⁵³

It is also an offence to threaten or intimidate a person with the intention of causing the other person not to make a complaint or withdraw a complaint to the ACT Human Rights Commission.²⁵⁴

In **Queensland**, the *Ombudsman Act 2001 (Qld)* also provides protection from recriminations: a person must not cause, threaten to cause, or attempt or conspire to cause or induce someone else to cause, detriment to the relevant person because, or substantially because, the relevant person gave the information or a document to the Ombudsman Queensland. Doing so is punishable by a fine.²⁵⁵

The **WA Ombudsman**, staff and complainants are protected from liability in relation to complaints and investigations made or undertaken in good faith.²⁵⁶

The **Ombudsman NSW** and its officers have immunity from civil or criminal proceedings for anything done for the purpose of the Act in good faith.²⁵⁷

The *Children's Commissioner Act 2013 (NT)* protects complainants and people giving information to the **Northern Territory Children's Commissioner** in good faith from civil and criminal liability.²⁵⁸

The **Tasmanian Custodial Inspector** and those giving information to the **Tasmanian Custodial Inspector** are protected from liability for actions done in good faith.²⁵⁹

Many Ombudsman offices are given the powers and protections of royal commissions under that jurisdiction's relevant legislation. For example, for the purposes of inquiries held as part of an investigation, the **Ombudsman NSW** has the powers, authorities, protections and immunities conferred on a commissioner under the *Royal Commissions Act 1923 (NSW)*.²⁶⁰ However not all people and organisations giving information to the Ombudsman NSW are afforded the same protections. The **Tasmanian Ombudsman** has the same immunities as a Commissioner under the *Commissions of Inquiry Act 1995 (Tas)* and those giving evidence have the same protections and immunities as those officials under that legislation.²⁶¹

The **Ombudsman Victoria** told me in its submission that:

In conducting an investigation, I have the powers of a Royal Commission, including the ability to summons documents and witnesses, take sworn evidence, enter the premises of an authority and inspect anything therein. I understand that such powers would be necessary for a NPM to meet the requirements of the OPCAT. In the context of youth justice detention, my investigation powers allow me:

- » unfettered access to all categories and places of detention
- » access to data relating to the number and location of detainees and all information about their treatment as well as their conditions of detention
- » private interviews with detainees and other persons who I believe can supply relevant information
- » to prepare and publish reports of inspections.²⁶²

An emerging issue is to ensure that contractors in detention settings are subject to the same requirements as government operators for access and cooperation with inspecting bodies.

In 2014, the **WA Inspector of Custodial Services** reported on Court Custody Centres. That report addressed the Perth Children's Court, commenting that at the time of inspection, the custody centre at the courthouse was the only custody centre not contracted out to a private company. At the time of the inspection, it was being run well and the Inspector made the following comment about the staff (youth custodial officers):

The professional manner in which the YCOs went about their job and the considerate way they interacted with detainees demonstrated that they understood the 'business' and enjoyed working with young people.

The Inspector went on to express concern that due to staff shortages elsewhere in the youth justice system, those positions were now contracted to Serco staff and it would be important to monitor their performance through contract management processes to ensure the same high standards.²⁶³

The WA Inspector of Custodial Services also reports on contractual arrangements between the WA Government and private providers of custodial services, such as G4S and Serco.²⁶⁴

The **South Australian Department for Communities and Social Inclusion** advised that transport of adult and young people subject to criminal proceedings and/or justice mandates is contracted out. The Department for Correctional Services manages the contract on behalf of the South Australia Police, Courts Administration Authority, SA Health, and SA Department for Communities and Social Inclusion (Youth Justice). The contract includes the following requirements to safeguard children and young people:

- Young people are to be transported and held separately to adults
- Contractor staff have current working with children screening checks
- Contractor staff must be conscious of the unique needs of young people in their custody
- Monitoring provisions included in the contract:
 - » Incident reporting
 - » Periodic reporting
 - » Regular performance review by an established Agencies' Coordinating Committee (comprised of representatives from each of the five agencies receiving services under the contract).²⁶⁵

The Department of Correctional Services, South Australia, states in its *Annual Report 2014-15* that 'Prisoner Movement and In-Court Management Services (administered by DCS on behalf of participating agencies) – the five-year contract with G4S commenced in August 2009, was extended by 18 months, and now expires in January 2016. A review of the contract specifications was completed in March 2015'.²⁶⁶

A copy of an undated contract between the Government of South Australia and the State Courts Administration Council and G4S Custodial Services Pty Ltd is available online.²⁶⁷ However, the 20 schedules are not included and schedule 3 contains the periodic reports required to be provided by G4S to the SA Government. The available contract does not mention use of force or restraint. Public reporting regarding detainee transport was not located.

3.6.2.5 Power to make recommendations that will be considered

The OPCAT requires the following criteria be met by preventive mechanisms:

- ability to make recommendations (article 19(b))
- ability to submit proposals and observations concerning existing or proposed legislation (article 19(c))
- authorities must examine recommendations and enter into dialogue with the NPM on implementation measures (article 22).

Each relevant body in each jurisdiction in Australia, if not expressly then impliedly and certainly in practice, generally meets the first two criteria.

Some examples of existing legislative provisions include:

- Reports 'may include recommendations for any changes to any written law, draft law, policy, practice or procedure, or for the taking of other action, that the Commissioner considers appropriate to safeguard and promote the wellbeing of children and young people' (WA Commissioner for Children and Young People²⁶⁸)
- The Inspector must give the Minister a draft of each report intended for Parliament and give the Minister a reasonable opportunity to make submissions on the draft report. The Inspector is not bound to amend a report in light of any submissions made by the Minister (NSW Inspector of Custodial Services²⁶⁹)
- The Ombudsman may request a response from the authority within a specified time, with the steps proposed to give effect to the recommendation or if no steps are proposed, the reasons why. If the Ombudsman does not consider that appropriate steps have been taken he or she may send to the Premier a copy of the report, the recommendations and a copy of relevant comments. The inspecting body may lay before Parliament reports on such a matter as he or she thinks fit (Ombudsman WA²⁷⁰)
- Where the Ombudsman is not satisfied that sufficient steps have been taken, the Ombudsman may make a report to Parliament, and the responsible Minister must make a statement to Parliament in response to the report within 12 sitting days (NSW Ombudsman²⁷¹)
- The annual report to Parliament must include an evaluation of the response of relevant authorities to the recommendations of the Inspector (Tasmanian Custodial Inspector²⁷²).

The OPCAT requires that authorities appropriately consider the recommendations of an NPM and engage with the NPM on implementation. Article 22 goes to how governments receive and act upon reports and recommendations regarding the conditions and treatment of those deprived of their liberty.

The United Nation's Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) states that an NPM 'should ensure that it has the capacity to and does engage in a meaningful process of dialogue with the State concerning the implementation of its recommendations. It should also actively seek to follow-up on the implementation of any recommendations which the SPT has made in relation to the country in question, liaising with the SPT when doing so'.²⁷³

The legislation establishing some of the relevant bodies in some jurisdictions includes provision to encourage engagement by government and to require at least a response from government to recommendations. However, many of the bodies involved in monitoring and oversight of juvenile detention across Australia do not require engagement and response by government and in particular, do not require a public response.

It is relatively standard for most government reporting obligations not to be accompanied by a legislative provision for reports to be formally responded to. At the federal level, the closest to such a requirement is a protocol that the government seeks to respond to parliamentary committee reports within a designated time frame.

It is arguable that situations involving reporting on allegations of torture, cruel, inhuman or degrading treatment should be treated differently and have more formalised requirements for reporting on the government's response and implementation. This is due to the serious and state-sanctioned nature of the matters reported on.

Existing provisions across Australia are discussed below:

Western Australia's Inspector of Custodial Services has the express power to make recommendations to the Minister in relation to mandatory inspections, occasional inspections or reviews.²⁷⁴ The Minister may prepare a response but is not required to.²⁷⁵

The reports of the Inspector are comprehensive and include thematic reviews. Reports contain recommendations as well as follow-ups on previous recommendations and the responses from relevant government departments and private organisations where relevant.

The legislation establishing the **Ombudsman WA** contains provision for encouraging response and dialogue between the Ombudsman and relevant authorities regarding recommendations. The Ombudsman WA has the express power to make recommendations.²⁷⁶ Further, after completing an investigation, the Ombudsman may make recommendations to the appropriate authority and send a copy to the responsible Minister.²⁷⁷

The Ombudsman may request a response from the authority within a specified time, with the steps proposed to give effect to the recommendation (or if no such steps are proposed, the reasons therefor). If the Ombudsman does not consider that appropriate steps have been taken he or she may send to the Premier a copy of the report, the recommendations and a copy of relevant comments. The Ombudsman may lay before Parliament reports on such a matter as he or she thinks fit.²⁷⁸

The legislation establishing the **Commissioner for Children and Young People in Western Australia** specifically provides that reports 'may include recommendations for any changes to any written law, draft law, policy, practice or procedure, or for the taking of other action, that the Commissioner considers appropriate to safeguard and promote the wellbeing of children and young people'.²⁷⁹ Any person or body subject to 'adverse matters' in a report is entitled to the opportunity to make representations to the Commissioner concerning those matters before the Commissioner reports.²⁸⁰

There are also provisions which encourage dialogue with the relevant Minister regarding findings in a report: Ministers must be given and may comment on a draft of a report; and a report must include a copy of any comments made by the Minister in this regard. However, the Commissioner is not required to make changes as a result of the Minister's comments or recommended consultations.²⁸¹

The **NSW Inspector of Custodial Services** must report on each inspection, examination or review undertaken, and may report on any relevant matter if it is in the public interest, and these reports may include advice or recommendations.²⁸² The Inspector must give the Minister a draft of each report to Parliament and give the Minister a reasonable opportunity to make submissions on the draft report.²⁸³ The Inspector is not bound to amend a report in light of any submissions made by the Minister.²⁸⁴

The NSW Inspector of Custodial Services publishes annual reports and other inspection and thematic reports, as well as the government responses, on its website.

The **NSW Ombudsman** also has legislative power to request of a relevant public authority that it notify the Ombudsman of action taken or proposed to be taken in response to a report.²⁸⁵ Where the Ombudsman is not satisfied that sufficient steps have been taken, the Ombudsman may make a report to Parliament, and the responsible Minister must make a statement to Parliament in response to the report within 12 sitting days.²⁸⁶

The new **Tasmanian Custodial Inspector** will have amongst its functions: to include in any report advice or recommendations as the Inspector thinks fit.²⁸⁷ The legislation also provides that at any time after providing a report to a Minister the Inspector may table the report in Parliament thereby making it public.²⁸⁸ A Minister may prepare a response to a report from the Inspector.²⁸⁹

The new legislation contains provisions to facilitate engagement of government regarding recommendations: the Inspector may request a responsible Secretary to notify the Inspector within a specified time of steps taken or proposed to be taken to give effect to recommendations of the Inspector; or if no steps have been or are proposed to be taken, the reasons for that lack of action.²⁹⁰ If no appropriate steps have been taken within a reasonable time, the Inspector may send the Premier and responsible Minister a copy of the recommendations and comments by the responsible Secretary.²⁹¹

Reporting requirements include that the annual report to Parliament must include an evaluation of the response of relevant authorities to the recommendations of the Inspector. The legislation also requires that the annual reports include any recommendations for changes to the laws or administration of the state that the Inspector considers should be made.²⁹²

3.6.2.6 Access to information, including about treatment and conditions

The OPCAT requires that National Preventive Mechanisms have:

- access to information concerning the number of children and young people detained and places of detention (Article 20(a))
- access to information on treatment and condition of people in detention (Article 20(b)).

In most jurisdictions, there is at least one body with sufficient powers to access information regarding the treatment and conditions of young people in detention although this is usually not part of routine oversight processes.

At present, there is insufficient legislative requirements for jurisdictions to maintain registers logging the use of force, isolation or restraint.

Examples of existing legislative provisions for independent bodies to access information include:

- the express power to access all documents in the possession of the Department in relation to a detention centre or to a detainee (for example WA Inspector of Custodial Services²⁹³)
- the right to access all records of any custodial centre, and requirement for staff to supply information and produce documents (for example NSW Inspector of Custodial Services²⁹⁴)
- requirements for the independent body to be notified when a young person is segregated for more than 24 hours (for example NSW Ombudsman²⁹⁵)
- requirement for the government to report all adverse incidents involving children in juvenile justice to a relevant body (for example Victorian Commission for Children and Young People²⁹⁶)
- government is not entitled to prevent or obstruct records or evidence being given for the purpose of an inspection even if that was to be allowed in a legal proceeding before a court (for example Tasmanian Custodial Inspector²⁹⁷)
- a youth justice centre or other relevant government or non-government organisation will be obliged to provide information relevant to the exercise of the office-holder's functions (for example SA Training Centre Visitor²⁹⁸)
- power to require any staff member or person who provides services to people in custody to supply information, produce documents, and to attend and answer questions before the Inspector (for example Tasmanian Custodial Inspector²⁹⁹)
- legislation provides relevant offences for failing to comply with requests and provide assistance to the Inspector (for example NSW Inspector of Custodial Services³⁰⁰)
- conditions and treatment, including prohibited or limited types of treatment and punishment, are addressed in the primary legislation and it is an offence to punish a detainee in such a way (for example NSW Inspector of Custodial Services³⁰¹)
- there are protections against recriminations for people who have complained or provided information to the oversight body (for example NSW Inspector of Custodial Services,³⁰² ACT Human Rights Commission,³⁰³ Queensland Ombudsman³⁰⁴)
- the types of restraints which can be used are in primary legislation or regulations which Parliament can scrutinise (for example ACT³⁰⁵).

Examples of other requirements:

- All uses of force, restraint, isolation, critical incidents and complaints are required by the primary legislation to be the subject of reporting; details of what should be included in the reporting should be in the primary or subordinate legislation which parliament can scrutinise.
- There is a specified degree of public reporting on the records required by the legislation.
- The records or registers are available for review by external agencies involved in the monitoring and oversight of the detention of children and young people and this availability is required by legislation.

In most jurisdictions, there is at least one body with sufficient powers to access information regarding the treatment and conditions of young people in detention. However, in relation to those agencies which are not dedicated inspectors, those powers are often in the context of an inquiry or an investigation of a complaint, rather than as a part of routine oversight.

It appears from the submissions and public reporting of oversight agencies that they do not routinely use these powers to request the information on treatment and conditions of children and young people in detention.

Many of the agencies involved in monitoring and oversight of the detention of children and young people have broad incidental powers to do all things necessary or convenient in connection with their functions. If their functions can be construed as requiring access to information, then they arguably have the required powers.

For example, the **Northern Territory Children's Commissioner** 'has the powers necessary to perform the Commissioner's functions'.³⁰⁶ The Commissioner's functions include monitoring the ways service providers respond to the Commissioner's reports and dealing with complaints about required services.³⁰⁷ Access to information is arguably necessary to fulfil these functions.

In the case of **WA, NSW, SA** and **Tasmania**, their mechanisms all have express powers to access information, in addition to broad incidental powers.

Western Australia's Inspector of Custodial Services has the express power, in relation to inspections and reviews, to access all documents in the possession of the Department in relation to a detention centre or to a detainee.³⁰⁸ The same power exists in relation to court custody centres, lock-ups and persons and vehicles,³⁰⁹ however this is limited in the same way as access to those places is limited by the definition, as discussed in section 3.6.2 (iv) on access to places of detention.

The **NSW Inspector of Custodial Service** has the right to access all records of any custodial centre, and may require staff to supply information and produce documents.³¹⁰

The new **Tasmanian Custodial Inspector** will have the following comprehensive powers relevant to access to information:

- Full access to all documents relating to any custodial centre or persons detained and to obtain information from any person in any manner that the Inspector thinks appropriate.³¹¹
- Government is not entitled to prevent or obstruct records or evidence being given for the purpose of an inspection even if that was to be allowed in a legal proceeding before a court.³¹²
- To require any staff member or person who provides services to people in custody to supply information, produce documents, and to attend and answer questions before the Inspector.³¹³

The new Training Centre Visitor in South Australia will have the express power to request, and a youth justice centre or other relevant government or non-government organisation will be obliged to provide, information relevant to the exercise of the Visitor's functions.³¹⁴

Currently, the **SA Guardian for Children and Young People** and the Special Advocate from that office visit Training Centres twice a year specifically to review records and report on conditions.³¹⁵ Additional authorisation regarding access to information, are contained in the Memorandum of Understanding between the Guardian and the Youth Justice Directorate of the Department for Communities and Social Inclusion.³¹⁶ It provides that Youth Justice will:

1. Make available to the Office of the Guardian for Children and Young People (GCYP) information relating to a child or young person in detention or who has recently been in detention, or children as a group;
2. Respond as soon as possible to requests for information, which may be by phone or email, and within two working days unless there are extenuating circumstances;
3. At the commencement of an announced visit by GCYP, provide all information that has been requested in advance of the visit unless there are extenuating circumstances;
4. The General Manager of Adelaide Youth Training Centre will be present at the announced visit to answer questions and hold preliminary discussion on issues;

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5. Staff of the Youth Training Centre will agree to cooperate with the GCYP by complying with any reasonable request of the Guardian whilst on the site, including ensuring that facilities are available at the time of the visit and providing support to the Guardian where necessary;
 6. Managers will respond within two working days to questions that arise from monitoring visits unless there are extenuating circumstances;
 7. Provide statistical data as requested by the Guardian and relevant to the Guardian's functions; and
 8. Any person who the Guardian believes is capable of providing information or producing a document that may be relevant to the performance of the Guardian's functions must provide that information in the manner specified in the *Children's Protection Act 1993* (SA) (Section 52CA Use and obtaining of information) and others must not obstruct (Division 4 Offences, Sections 52EG, 52EH, 52EI and 52EJ).

Ombudsman offices tend to have sufficiently wide powers to enable access to information, but often only in the context of an investigation or complaint.

For example, the **ACT Ombudsman** or a person authorised by the Ombudsman may, for the purposes of an investigation under the *Ombudsman Act 1989* (ACT), at any reasonable time of the day, enter any place occupied by an agency, and may inspect any documents at the premises.³¹⁷

The **Ombudsman Tasmania** may conduct an investigation in any manner he or she thinks appropriate and may obtain information from any persons in any manner he or she thinks appropriate.³¹⁸ For the purposes of an investigation, the Ombudsman has the same powers as a commission of inquiry (essentially a royal commission) under the *Commissions of Inquiry Act 1995* (Tas),³¹⁹ including the right to apply to a magistrate for a warrant to enter premises and seize documents.³²⁰

The **Queensland Ombudsman** may require a person, within a stated reasonable time, to provide an oral or written statement of information of a stated type, or a document or all documents of a stated type, or other thing relevant to the investigation.³²¹ The Ombudsman may also require a person to attend before the Ombudsman at a stated reasonable place and time to provide information or documents or answer questions.³²² These powers are in the context of an investigation.³²³

For the purposes of an investigation, the Queensland Ombudsman may also, on the giving of reasonable notice to the principal officers of an agency and at a reasonable time:

- enter and inspect a place occupied by that agency
- take into the place persons, equipment and materials reasonably required for the investigation
- take extracts from or copy documents
- require an officer of the agency to assist with the above.³²⁴

The Department of Justice and Attorney-General states that the Queensland Ombudsman receives 'regular proactive audits for each youth detention centre and the quarterly inspection reports by the Youth Detention Inspectorate and the Operational Inspector.'³²⁵ The Ombudsman does not appear to report publicly on this information.

The **Ombudsman NT** may investigate administrative action and in the context of an investigation has the powers to enter and inspect premises occupied by a public authority, access or copy documents located at the premises and require staff to give reasonable help in accessing information documents.³²⁶

The same limitation on powers to access information (that is, that they are in the context of an investigation or complaint rather than routine monitoring) is the case for many of the children's commissioners. For example, in considering complaints, the ACT Human Rights Commission (in which the Commissioner for Children and Young People and the Public Advocate positions are based) can compel information, and it is an offence to not provide the required information.³²⁷

Similarly, for the purposes of an inquiry, the **Victorian Commission for Children and Young People** has the power to access information in relation to any person or service that is the subject of the inquiry, and other information, documents or records held by relevant Departments, including the Department of Justice.³²⁸

In relation to satisfying the OPCAT criteria in this regard, the Victorian Commission for Children and Young People believes additional powers would be needed, including:

- an explicit right of access to youth justice centres
- a right to be provided with data and information about the way in which youth justice services are operating
- the capacity to monitor and inspect all places of detention for children and young people.³²⁹

Other positions such as Official Visitors also sometimes have powers to access information. For example, under section 15(2) of the *Official Visitor Act 2008* (ACT), Official Visitors in the **ACT** may, when at a visitable place, inspect any records kept under the legislation. Further, an operating entity for a visitable place such as Bimberi must give an Official Visitor any reasonable assistance that the Official Visitor asks for to exercise their functions.³³⁰ This might include access to documents and records. It is an offence for a person in charge of an operating entity to fail to provide assistance to the Official Visitor without reasonable excuse.³³¹ Official Visitors make regular visits to Bimberi which would allow them to exercise the power to access documents and registers held at Bimberi.

Community Visitors, within the **Office of the Public Guardian, Queensland**, have the power to enter youth detention centres and adult corrective services facilities without notice, inspect the site, and require staff members to answer questions and produce documents.³³²

The powers are limited by several provisions. It is reasonable for a person not to comply with a requirement for staff to answer questions and produce documents if compliance 'might tend to incriminate the person' or could 'reasonably be expected to prejudice the security or good order of the facility or centre'.³³³

If the site is a youth detention centre, the exercise of the powers of Community Visitors under section 67 of the *Public Guardian Act 2014* (Qld) is subject to 'any direction or procedure given or made by' the Chief Executive of Youth Justice Services for the 'security and management of detention centres and the safe custody and wellbeing of children detained'.³³⁴

In Appendix 7, I detail each jurisdiction's arrangements regarding the monitoring and recording of conditions of detention and treatment of children and young people in detention. This includes the degree to which these arrangements are addressed in legislation, regulations and/or policy (so far as I have been able to establish), and the degree to which those records are independently monitored.

I also note the degree to which they are made public: though the OPCAT does not specifically require that the records regarding treatment and conditions of children and young people are publicly available, public accountability is key to the preventative purpose of the OPCAT. Best practice would therefore require public reporting of at least some details of registers regarding use of force, restraint and segregation. This reporting could be contained in an annual report or in other reporting.

Records and reporting on use of force, segregation, restraint, critical incidents and other significant matters

Each jurisdiction to varying degrees, keeps records and registers of the use of force, restraint, isolation, searches, and critical incidents. Each has varying levels of access to these records, but broadly speaking, few are required to be provided to external bodies and fewer are made publicly available. It appears from publicly available information and information provided by the respective governments and other submissions, that most of this information in the form of registers is also not routinely requested by the relevant bodies even when the powers to do so exist.

It seems to me that no jurisdiction has tackled this reporting systematically to ensure that:

- All types of prohibited or limited treatment and punishment discussed in this section are addressed in the primary legislation.
- All uses of force, restraint, isolation, critical incidents and complaints are the subject of reporting.
- This reporting is required by primary or secondary legislation which parliament has a chance to scrutinise, including some detail regarding what information must be recorded.
- The records or registers are available for review by external agencies involved in the monitoring and oversight of the detention of children and young people and that this availability is required by the legislation.
- There is some degree of public reporting on the records.

Some jurisdictions have legislative provisions regarding prohibited treatment but do not require registers be kept regarding the use of force, isolation or restraint.

Some jurisdictions require registers or other written records of some types of treatment but not other types.

Some jurisdictions do not legislatively require registers but maintain them as a matter of policy. Some have a mixture of legislatively required and policy-based registers.

Where a register is required, the details of what the register should contain may or may not be prescribed in legislation or regulations.

There are few legislative provisions across the country which require reporting to be referred to external agencies for review.

In **NSW**, the Regulations require that Juvenile Justice notify the Ombudsman when a young person is segregated for more than 24 hours.³³⁵ In practice, the Ombudsman is also advised of any 'separation' for more than 24 hours. The Ombudsman *NSW Annual Report 2014-2015* states:

Several years ago, the head of Juvenile Justice agreed with us that a similar notification [to that required to be provided regarding segregation] should be made whenever a young person is kept separate or confined without contact with other detainees for more than 24 hours. This gives us a clear overall picture of the amount of time young people may spend on their own and helps us to ensure that they are given appropriate support and ways to occupy themselves. We use this information to provide feedback to the centre managers and senior management at Juvenile Justice, and give the community assurance that young people are not being isolated unnecessarily or for extended periods.³³⁶

These incidences are reported in the NSW Ombudsman's annual report: the numbers are broken down by juvenile justice centre; in total there were 99 segregation notices and 114 separation notices in that year.³³⁷

Recent legislative amendments in **Victoria** now require the government to report all adverse incidents involving children in juvenile justice to the **Commission for Children and Young People**.³³⁸

60A Disclosure of information by Secretary

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

The Commission advised that if it holds significant concerns about services provided to a child, or treatment of that child, it will initiate an inquiry under section 37(1) of the *Commission for Children and Young People Act*.³³⁹

The Victorian Department of Health and Human Services publicly reported that there were 34 Category 1 incidents in 2014-15 in the youth justice precincts of Malmsbury and Parkville. This is broken down to 22 assaults and 12 'other incident types'.³⁴⁰

There does not appear to be any legislative requirement that that reporting be made public though it may be included in the Commission's annual reporting. At the time of writing, the Commission was yet to publish an annual report since the amendments came into force.

While welcoming the legislative change requiring the Department to disclose serious incidents involving children, the Law Institute of Victoria commented that 'the power conferred on the CCYP is not sufficient in itself to confer NPM duties on CCYP'.³⁴¹

Also in Victoria, under Victorian Government policy, the **Victorian Commission for Children and Young People (and Victorian Legal Aid or Victorian Aboriginal Legal Services)** must also be notified when a 16 or 17 year old is sentenced or transferred to an adult prison.³⁴² The Commission noted in its submission that, to its knowledge, no child under 18 has been transferred from youth justice to the adult system since 2012.³⁴³

In the **ACT**, as discussed below, the legislation requires that the registers on the use of force, searches or seizures be made available for inspection by any judge, magistrate, Official Visitor, commissioner under the *Human Rights Commission Act 2005* (ACT), Ombudsman, and person prescribed by regulation.³⁴⁴ The register of any segregation must be available for inspection by a judge, magistrate, Official Visitors, a commissioner exercising a function under the *Human Rights Commission Act 2005* and the ACT Ombudsman.³⁴⁵

Further, the Public Advocate must inspect the registers of search, seizure and use of force at least once every 3 months.³⁴⁶ Also, the Public Advocate is aware of all uses of segregation: if the director-general gives a segregation direction, he or she must prepare a notice of the direction, including reasons, and give it to the Public Advocate as soon as practicable.³⁴⁷

In **WA**, there is no mention in the primary legislation of a register or written record or register of use of force or restraints. However, the *Youth Offenders Regulations 1995* (WA) have some requirements for recording use of force, restraint, solitary confinement, searches and complaints, including the need for written reports regarding any use of force or restraint,³⁴⁸ searches,³⁴⁹ and confinement.³⁵⁰

There does not appear to be any requirement to make these registers accessible to external bodies or to report publicly on them, nor does there appear to be any public reporting on them in practice.

In the **ACT**, the primary legislation addresses the use of force, restraint and strip searches, and includes the requirement for a register and details of what must be in that register.³⁵¹

The Director-General must make a policy or procedure covering the circumstances in which, and by whom, force may be used, the kinds of force that may be used and the use of restraints.³⁵² The Director-General is responsible for ensuring that he or she receives from officers' monthly reports summarising the incidents involving the use of force (including restraint) in relation to a young detainee.³⁵³

The legislation provides what details must be included in the register. For a search, the register must include the name of the young detainee searched, the reason for the search, when and where the search was conducted, the name of each person present during the search, any reasons for the youth detention officer involved not being of the same sex, as required, details of anything seized, details of any force used and why, and anything else prescribed by regulations.³⁵⁴

For an incident involving the use of force, the register must include the details of each incident including the circumstance, the decision to use force and the force used.³⁵⁵

The legislation also provides for external oversight of the registers: registers must be available for inspection by any judge, magistrate, Official Visitor, commissioner under the *Human Rights Commission Act 2005* (ACT), Ombudsman, and person prescribed by regulation. Further, the Public Advocate must inspect the register at least once every 3 months.³⁵⁶

As a matter of departmental policy, all reportable incidents are recorded and internally reviewed, but critical/reportable incidents are not addressed in the legislation.³⁵⁷

In **Tasmania**, legislation requires that a register be kept regarding uses of isolation, but does not require a register for uses of force, restraint, critical incidents, searches and complaints; however, such registers are kept as a matter of policy.³⁵⁸

Section 133(6) of the *Youth Justice Act 1997* (Tas) requires that a register is kept of all instances of isolation. That section does not specify what 'particulars' must be included in that register. The Department of Health and Human Services advised that the register includes the date of the incident, the young person's name and date of birth, the type of any force used and the location on the young person's body to which force was applied, and by whom the force and/or use of isolation was authorised.³⁵⁹

The registers in Tasmania undergo internal oversight only.³⁶⁰

South Australia's new legislation will include the requirement (currently in regulations)³⁶¹ that if force is used against a resident, each employee involved must provide a written report to the centre manager, with prescribed details including the reasons. A written account by the resident must also be kept with the staff accounts.³⁶²

As with use of force, the Regulations currently address use of isolation, and this will be on the face of the new legislation:³⁶³ the manager of a training centre must ensure that a record is made of any use of isolation, with prescribed details including the reason for it to be recorded, any medical concerns relating to the resident and the 'management plan' for the resident for the period during which the resident was detained; residents must also provide (either themselves or by a nominated person), an account of the incident leading to the use of a detention room.³⁶⁴

These provisions in the new primary legislation will include additional requirements: that any use of a 'safe room' requires that the manager of the training centre be informed as soon as practicable; additional reporting requirements regarding the regular observations of a resident in a safe room; that a resident is examined as soon as practicable by a health professional; if the resident belongs to a cultural or linguistic minority a cultural advisor must be informed of the detention; an action plan must be prepared to manage the resident in the period immediately following the resident's release from the safe room.³⁶⁵

The **SA Department for Communities and Social Inclusion** advised that the use of force and isolation reports are recorded on a searchable electronic case management system.³⁶⁶ This information is available to the Guardian and will be made available to the Training Centre Visitor but is not publicly available.³⁶⁷ However, it is not an express requirement of the new Act or the current Regulations that this information be provided to the Guardian or the Training Centre Visitor. Nor is there any requirement for public reporting.

The current Regulations address searches of a resident of a Training Centre but do not require a record be kept. However, the Department for Communities and Social Inclusion advised that a register of all unclothed searches is maintained by the training centre Security Services Supervisor.³⁶⁸

The provisions regarding searches, on the face of the new legislation, include the additional protection that 'the resident may not be required to be completely naked at any time during the search'.³⁶⁹

Further, the new legislation requires that a record be kept of any search of a semi-naked resident, including the name of the resident, date of the search, reason for the search and name of staff.³⁷⁰

The records of semi-naked searches are not required by the new legislation to be available to any external body or be reported on publicly.

Information on critical incidents is not addressed by the existing legislation or regulations, nor will it be included in the new legislation. The Department for Communities and Social Inclusion advised that there are internal reporting policies regarding critical incidents.³⁷¹ The Department told me that critical incidents are allocated a category depending on severity and reviewed by the General Manager; they are managed in line with *Managing Critical Client Incidents Policy and Guidelines*.³⁷²

The Youth Justice Critical Incident Review Committee conducts internal reviews of critical incidents and makes recommendations to the Director for systemic, policy or procedural responses; the Department investigates and acts on all allegations of abuse and/or neglect. The Department Chief Executive and Minister for Communities and Social Inclusion are provided with weekly update reports on any open critical client incident cases and the Department Executive Leadership Team is provided with a monthly summary report.³⁷³

Under the **Victorian** legislation, a period of isolation must be approved by the Secretary of the Department and a person placed in isolation must be closely supervised and observed at intervals of no longer than 15 minutes; but there is no maximum time period prescribed.³⁷⁴

The legislation requires that the officer in charge ensure that the 'prescribed particulars' of every use of isolation are recorded in a register.³⁷⁵ The particulars of use of isolation to be recorded in the register are found in the Regulations.³⁷⁶

Not all uses of isolation have to be reported: the *Children, Youth and Families Act 2005* (VIC) also allows the use of isolation 'in the interests of the security of the centre' without the reporting requirements.³⁷⁷

The Victorian Department of Health and Human Services advised that the youth justice custodial practice manual prescribes a specified and escalating authorisation level, dependent on the length of isolation of a young person and whether the young person identifies as Aboriginal. The following details were provided:

Non Aboriginal young people

The lowest level of authorisation is the Unit Manager or Duty Manager, who can authorise an isolation period of up to two hours. All young people in isolation are placed on observation. Non-Aboriginal young people who are placed in isolation must be on a minimum of close observation (every five minutes).

Aboriginal young people

Any isolation of an Aboriginal young person must be authorised at a minimum by the precinct's General Manager, Operations Manager or Senior Manager On Call. Any Aboriginal young person placed in isolation must be under 'constant observation' (staff within arm's length at all times to ensure safety). An Aboriginal Cultural Support worker must be informed as soon as is logistically possible about an Aboriginal young person being placed in isolation.³⁷⁸

The Law Institute of Victoria commended the legislative provisions in relation to the limited allowable use of isolation, saying that they 'reflect best practice of a therapeutic approach to rehabilitation'. That submission added that 'an OPCAT-compliant NPM will positively impact compliance of these protective provisions'.³⁷⁹

Under the Victorian Regulations, all unclothed searches must be recorded in a register, and the Regulations also prescribe the required information.³⁸⁰

Use of force and restraint do not require registers. Neither of the required registers are made public in any way or overseen by an external agency. However, adverse incidents must be reported to the Commissioner for Children and Young People.

In **NSW**, the legislation requires that a centre manager must keep a record of any segregation and must forward a copy to the detainee and the Secretary within 24 hours of the segregation.³⁸¹

The *Children (Detention Centres) Regulation 2015* (NSW) requires that the record kept regarding segregation under section 19(3) of the primary legislation must include specific information, including the reason for segregation.³⁸²

Uses of force and restraint in NSW must be reported in writing by the officer to the centre manager as soon as practicable after the use of force. Details of the use of force, including the reasons for it, must be included.³⁸³ However, there is no 'register' and there appears to be no public reporting.

In **Queensland**, regulations require that the Chief Executive makes a record of uses of reasonable force,³⁸⁴ separations of children in a locked room,³⁸⁵ use of approved restraints to restrain a child,³⁸⁶ all searches involving the removal of clothes and body searches, and searches which do not involve the removal of clothes but for which reasonable force was used.³⁸⁷ The *Youth Justice Regulation 2003* (Qld) does not specify the particulars of what the record on uses of reasonable force must include but does make specific provision regarding the information required on the other records.

None of these records are required to be available to any external body and there is no requirement for public reporting.

In the **Northern Territory**, the primary legislation makes provision regarding the use of force, isolation, restraint and searches allowed in juvenile detention centres in the NT, and the Regulations provide some further detail.

Regarding the requirements to maintain registers: there is no requirement to maintain a register of uses of force; recent legislation introduced a requirement for the Superintendent to keep a register of the use of approved restraints.³⁸⁸ The Regulations require the Superintendent to keep a journal recording the isolation of a detainee and the details of that period of isolation.³⁸⁹

The journal must include the date and time the detainee was isolated and released; the name of the detainee; the reason for their isolation; the time the on-call person in charge was notified and the name of that person; staff observations taken at intervals not exceeding 15 minutes and the name of the staff member; the date and time of exercise periods and ablutions; details of approval by the Commission for isolation exceeding 24 hours.³⁹⁰

Complaints processes vary substantially among jurisdictions – some are included within the legislation of an independent body; some are entirely internal. Publicly available information regarding complaints is also variable.

In **NSW**, the Regulations require that complaints registers are maintained by the Secretary, the centre manager of each centre, and the Manager of Court Logistics, Classification and Placement, in relation to complaints made respectively to each.³⁹¹ The information to be recorded in the complaints registers is prescribed and further details may be prescribed in complaints guidelines.³⁹²

These registers must be available for inspection by the NSW Ombudsman, and the register kept by the centre managers must be available for inspection by the Official Visitor and the Inspector of Custodial Services.³⁹³

In **WA**, neither the primary legislation nor regulations address complaints. The Youth Custodial Rules on the Department of Corrective Services website state that ‘the Superintendent or their delegate shall keep a record of all complaints’.³⁹⁴ Additionally, section 40 of the *Inspector of Custodial Services Act 2003* (WA) provides that an independent detention centre visitor must record any complaint made to the visitor by, or on behalf of a detainee and report that complaint to the Inspector of Custodial Services.

In **Tasmania**, the *Youth Justice Act 1997* (Tas) provides for an internal complaints mechanism in some detail. Section 137 states that a detainee, a member of a detainee’s family or a guardian may complain to the Secretary of the Department of Health and Human Services about a matter that affects or is connected with a detainee. Further, section 129(1)(d) states that a detainee is entitled to complain to the Secretary or the Ombudsman about the standard of care, accommodation or treatment he or she is receiving in the detention centre. Information about the internal complaints process can be found on the Department’s website.³⁹⁵

After receiving a complaint, the Secretary must provide written notice to the complainant and the detainee detailing the complaint and how it will be dealt with.³⁹⁶

The submission by the **Tasmanian Department of Health and Human Services** advised that:

All complaints made to the Secretary, DHHS will be directed to the Centre Manager, Ashley Youth Detention Centre. These complaints may include, but are not limited to, complaints about breaches of Centre processes and procedures, administrative issues and/or behaviour issues of young people or staff.

As the delegate of the Secretary, the Director, Services to Young People will be informed of the complaint by the Centre Manager, AYDC.³⁹⁷

The Department told me that in 2014/2015, four complaints were made through the Secretary and that all of these complaints were investigated and resolved. However, no information is publicly reported.³⁹⁸

Most jurisdictions do not report on complaints publicly or do not provide a useful breakdown. Many Ombudsman's annual reporting also does not include sufficiently useful breakdowns of complaints, for example by centre, or by type of complaint.

A further area of inconsistency is the range of legislative provisions regarding the allowable types of restraints.

In **New South Wales**, the *Children (Detention Centres) Regulation 2012* (NSW) addresses use of force and restraint, providing that 'instruments of restraint' specifically includes handcuffs, ankle cuffs, flexi cuffs, restraining belts, riot shields and such other articles, or classes of articles, as are declared by the Secretary, by order published in the Gazette, to be instruments of restraint.³⁹⁹ Types of restraints that may lawfully be used are therefore publicly available.

In the **ACT**, restraints allowed are addressed in the primary legislation and include body contact, handcuffs, restraint jackets and other restraining devices, and anything else prescribed by regulation.⁴⁰⁰

In several jurisdictions, the types of restraints permissible are not scrutinised by parliament, and they are not required to be made public.

In **Victoria** it appears that neither the legislation nor regulations address the use of restraint. The Department of Health and Human Services Victoria advised that the use of mechanical restraint in Victoria is limited to handcuffs only. Handcuffs may only be used by staff specifically trained in their use and must only be used to avoid immediate and significant harm to a young person or others. Handcuffs must only be used for the minimum amount of time and must be removed prior to the young person being secured in isolation or their bedroom.⁴⁰¹

In **Queensland**, the Chief Executive must make a record of approved restraints⁴⁰² however this record is not subject to parliamentary scrutiny of any kind and is not required to be made publicly available.

The **Northern Territory** recently amended its legislation to expand the types of restraints that may be used and the circumstances in which they were able to be used. Previously, the *Youth Justice Act 2005* (NT) provided that the Superintendent may approve the use of 'handcuffs or a similar device':

- to 'restrain normal movement' when detainees were escorted outside the detention centre, or
- to restrain a detainee in an emergency where temporary restraint would protect the detainee from self-harm or protect the safety of another person.⁴⁰³

Under the new legislation, the types of restraints allowed are no longer set out on the face of the primary legislation and are instead to be 'approved' by the Commissioner of Correctional Services⁴⁰⁴ under the new Section 151AB.

It does not appear that this 'approval' is done by way of regulations or any other kind of subordinate legislation, with any parliamentary or any other oversight, or that a list needs to be publicly available, or available to any external body.

Accompanying these amendments was the introduction of the requirement for a register of the use of approved restraints.⁴⁰⁵ Further, the Department of Correctional Services established the Youth Detention Restraint Practice Advisory Committee. The Department of Correctional Services told me that the Advisory Committee will:

provide specialist advice and guidance to the Commissioner of Correctional Services with regards to restraint practices in youth detention, including the development and assessment of operational procedures and training for staff.⁴⁰⁶

In late July 2016, following the ABC Four Corners story on the treatment of young people detained in Don Dale Youth Detention Centre, the Northern Territory Government announced that the use of spit hoods and restraint chairs on youth detainees would be suspended until the completion of a review.⁴⁰⁷

It is worth noting that the legislation permitting the use of approved restraints did not commence until 1 August 2016⁴⁰⁸ and that previously, only 'handcuffs or a similar device' were permitted by the *Youth Justice Act 2005* (NT).

For further detail please see Appendix 7.

3.6.2.7 Annual reports and other public reporting

The OPCAT requires that the annual reports of an NPM be published publicly and disseminated (article 23).

The OPCAT does not specifically require other reporting to be made public, however given the importance of transparency to the preventative focus of the OPCAT, public reporting of substantive information on treatment and conditions is important.

Examples of existing legislative provisions regarding annual reporting and other public reporting include:

- Any directions from the Minister to the Inspector, and any reasons for the Inspector deciding not to comply with such directions, must be included in the Inspector's annual report to Parliament (WA Inspector of Custodial Services).⁴⁰⁹
- Official Visitors must report the number and kind of complaints made, and action taken, to the Minister every quarter and the Minister must provide an annual report on the complaints received by the Official Visitor to the Parliament (Official Visitor ACT).⁴¹⁰
- The Inspector's annual report to parliament must include the following:
 - a) a description of the Inspector's activities during that year in relation to each of the Inspector's principal functions
 - b) an evaluation of the response of relevant authorities to the recommendations of the Inspector
 - c) any recommendations for changes in the laws of the State, or for administrative action, that the Inspector considers should be made as a result of the exercise of the Inspector's functions (NSW Inspector of Custodial Services).⁴¹¹

The United Nation's Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) has said that:

The State should publish and widely disseminate the Annual Reports of the NPM. It should also ensure that it is presented to, and discussed in, by the national legislative assembly, or Parliament. The Annual Reports of the NPM should also be transmitted to the SPT which will arrange for their publication on its website.⁴¹²

The OPCAT does not specifically require other reporting to be made public.

However, the preventative impact of the OPCAT is related to the transparency and accountability of reporting on the conditions and treatment of people in detention, which means the quality of the content of annual reports is relevant and their public accessibility is also important.

Generally, across jurisdictions, there is little in the way of detail in the legislative requirements for annual reporting that is relevant to the treatment and conditions in youth justice detention centres.

A number of jurisdictions provide some reporting on treatment and conditions to external agencies and some have internal reporting arrangements. This is not always legislatively required or reported on publicly. However, they provide a basis for the development of more comprehensive reporting systems.

For a preventative impact, reporting must contain relevant, useful information and be publicly available.

All agencies involved in monitoring and oversight of places in which children and young people are detained publish their annual reports online and they are easily accessible to the public. However, the degree of useful information contained in these reports varies substantially.

In some cases, very little or nothing can be gleaned from annual reports regarding the conditions and treatment of children and young people in detention.

Some jurisdictions have more detailed requirements in the legislation regarding what an annual report must include than others. Most simply require that an annual report regarding the performance of the functions of the officeholder be provided to the respective parliament.

The **NSW Inspector of Custodial Services** annual report must include the following:

- (a) a description of the Inspector's activities during that year in relation to each of the Inspector's principal functions
- (b) an evaluation of the response of relevant authorities to the recommendations of the Inspector
- (c) any recommendations for changes in the laws of the State, or for administrative action, that the Inspector considers should be made as a result of the exercise of the Inspector's functions.⁴¹³

A similar provision is included in the newly passed **Tasmanian** legislation, the **Custodial Inspector Bill 2016 (Tas)**.⁴¹⁴

Few annual reports or other legislatively required public reports are expressly required to include information regarding treatment and conditions, for example registers of use of segregation, or complaints.

Generally, it appears that the few independent bodies that do receive relevant information on the treatment and the conditions of children and young people in detention tend not to publicly report on it.

For example, the **Queensland Department of Justice and Attorney-General** advised me that there is quarterly reporting to the **Public Guardian** regarding alleged instances of harm, potential breaches of principles 3, 15, 19 and 20 of the youth justice principles and the results of any investigation into these matters.⁴¹⁵ However, the Public Guardian does not appear to report publicly on this information.

The **Guardian** and the **Senior Advocate from the Office of the Guardian for Children and Young People South Australia** visit youth justice centres twice a year to review records and report on conditions.⁴¹⁶ The Guardian reported in its most recent annual report that 'the records are reviewed twice a year and a more comprehensive written report is provided to the Director of Youth Justice'.⁴¹⁷ This comprehensive reporting regarding the records does not appear to be made public.

The **ACT Official Visitors** must report the number and kind of complaints made, and action taken, to the Minister every quarter and the Minister must provide an annual report on the complaints received by the Official Visitor to the ACT Parliament.⁴¹⁸ To access those annual reports on complaints received by Official Visitors, a member of the public must request it from the ACT Legislative Assembly. They are not available online. The reporting available online is limited to that included in the Department of Community Services' Annual Report. It does not include the numbers or types of complaints made by detainees to Official Visitors.

3.7 Conclusion

This research has sought to identify the existing status of monitoring and oversight provisions in each Australian jurisdiction in readiness for ratification of the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment* (OPCAT).

It has been very timely to focus on this topic given the recent disclosures of the alleged ill treatment experienced by children and young people detained in youth justice centres in the Northern Territory and Queensland. I also hope that it will be of assistance to the Royal Commission into the Protection and Detention of Children in the Northern Territory, which is due to report by 31 March 2017, to the inquiry currently underway in Queensland, and to the considerations of the Council of Australian Governments.

The OPCAT provides a positive framework to better safeguard the rights of children and young people. While jurisdictions meet a number of the NPM criteria, no jurisdiction currently meets all of them.

The stocktake undertaken in relation to youth justice detention demonstrates the type of approach that each jurisdiction will need to take in relation to different detention settings, to ensure that they comply with the OPCAT.

Full compliance with the OPCAT requirement across all jurisdictions is not immediately feasible. However, using the OPCAT as the basis for best practice provides the means by which continuous improvement can be undertaken.

I urge the Australian Government to ratify the OPCAT as soon as possible.

I also urge states and territories to commence detailed consideration of how well they are placed to comply with the OPCAT.

The benefit of the OPCAT is that it provides a reflective process to consider how governments comply with human rights obligations in the administration of places of detention and other closed environments.

It should be remembered that obligations relating to standards of treatment have been long accepted by Australian governments – going back to our ratification of the ICCPR, CAT, CRC and other treaties over the past thirty years.

The OPCAT does not create these obligations – they already exist, and all Australian jurisdictions are already bound by them. What the OPCAT creates is greater accountability and transparency for them.

I hope that my work in the OPCAT and youth justice context in 2016 contributes to the positive development and wellbeing of children and young people and assists in ensuring that their human rights and best interests are the clear focus of the national discussion currently underway.

As Emeritus Professor Richard Harding told me:

The delay in ratifying OPCAT has gone on long enough. It has been a missed opportunity within Australia, as well as a source of some embarrassment internationally. All the dilemmas and challenges are now well understood, so there is no further rational basis for delay.⁴¹⁹

Recommendation 1: That the Australian Government ratify the OPCAT as soon as possible. Further, that at the time of ratification, the Government issue a standing invitation to the UN Subcommittee on the Prevention of Torture.

Recommendation 2: That all jurisdictions review how their existing systems of monitoring and inspection meet the criteria laid out in the OPCAT, and amend their legislative frameworks accordingly.

- 1 Joint Standing Committee on Treaties, Parliament of Australia, *Report 125: Review into Treaties tabled on 7 and 28 February 2012* (2012) 52.
- 2 Joint Standing Committee on Treaties, Parliament of Australia, *Report 125: Review into Treaties tabled on 7 and 28 February 2012* (2012) 52.
- 3 Human Rights Council, *Report of the Working Group on the Universal Periodic Review — Australia — Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, 31st sess, Agenda Item 6, UN Doc A/HRC/31/14/Add.1 (29 February 2016) [5].
- 4 *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
- 5 *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
- 6 *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 1.
- 7 Richard Harding and Neil Morgan, *Implementing the Optional Protocol to the Convention against Torture: Options for Australia* (2008) 6 [2.2] <<https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/implementing-optional-protocol-convention-against-torture>>.
- 8 Commission on Human Rights, *Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 49th sess, Agenda Item 10(d), UN Doc E/CN.4/1993/28 (2 December 1992) 7 [30].
- 9 B Naylor, J Debeljak and A Mackay, 'Implementing human rights in closed environments' (2014) 31 *Law in Context* 1.
- 10 *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) art 11.
- 11 *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) art 3.
- 12 *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) art 17.
- 13 The following instruments are internationally recognised standards for the treatment of children and young people detained in youth justice facilities and provide guidance on how Australia's binding treaty obligations can be met:
 - *Rules for the Protection of Juveniles Deprived of their Liberty* (JDL Rules or Havana Rules), GA Res 45/113, 45th sess, 68th plen mtg, UN Doc A/RES/45/113 (14 December 1990).
 - *Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing Rules), GA Res 40/33, 40th sess, 96th plen mtg UN Doc A/RES/40/33 (29 November 1985).
 - *Guidelines for Action on Children in the Criminal Justice System* (Vienna Guidelines), ESC Res 1997/30, 36th plen mtg (21 July 1997).
 - *Guidelines for the Prevention of Juvenile Delinquency* (Riyadh Guidelines), GA Res 45/112, 45th sess, 68th plen mtg (14 December 1990).
- 14 UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (3rd ed, 2007) 602 <http://www.unicef.org/publications/index_43110.html>.
- 15 Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Philippines*, 39th sess, CRC/C/15/Add.259 (21 September 2005) paras 38–9.
- 16 Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Uzbekistan*, 42nd sess, CRC/C/UZB/CO/2 (2 June 2006) paras 36–7.
- 17 Committee on the Rights of the Child, *General Comment No 10: Children's rights in juvenile justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) para 71.
- 18 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33, 40th sess, 96th plen mtg UN Doc A/RES/40/33 (29 November 1985). *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33, 40th sess, 96th plen mtg UN Doc A/RES/40/33 (29 November 1985).
- 19 Committee on the Rights of the Child, *General Comment No 10: Children's rights in juvenile justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) para 89.
- 20 Committee on the Rights of the Child, *General Comment No 10: Children's rights in juvenile justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) para 89.
- 21 Committee on the Rights of the Child, *General Comment No 10: Children's rights in juvenile justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) para 89.
- 22 *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, GA Res 45/113, 45th sess, 68th plen mtg, UN Doc A/RES/45/113 (14 December 1990).
- 23 *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, GA Res 45/113, 45th sess, 68th plen mtg, UN Doc A/RES/45/113 (14 December 1990) rules 63 and 64.
- 24 *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, GA Res 45/113, 45th sess, 68th plen mtg, UN Doc A/RES/45/113 (14 December 1990) rule 64.
- 25 *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, GA Res 45/113, 45th sess, 68th plen mtg, UN Doc A/RES/45/113 (14 December 1990) rule 65.

- 26 *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, GA Res 45/113, 45th sess, 68th plen mtg, UN Doc A/RES/45/113 (14 December 1990) rule 67.
- 27 Committee on the Rights of the Child, *General Comment No 10: Children's rights in juvenile justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007), para 11.
- 28 *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, GA Res 45/113, 45th sess, 68th plen mtg, UN Doc A/RES/45/113 (14 December 1990) rule 2.
- 29 Committee on the Rights of the Child, *General Comment No 10: Children's rights in juvenile justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) para 80.
- 30 Committee on the Rights of the Child, *General comment No 10: Children's rights in juvenile justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) para 80.
- 31 Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Latvia*, 42nd sess, UN Doc CRC/C/LVA/CO/2 (28 June 2006) para 62(d).
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- 37 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
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- 43 Committee on the Rights of the Child, *General Comment No 10: Children's rights in juvenile justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) para 87.
- 44 Committee on the Rights of the Child, *General Comment No 10: Children's rights in juvenile justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) para 89.
- 45 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, GA Res 40/33 40th sess, 96th plen mtg, UN Doc A/RES/40/33 (29 November 1985) rule 26.5.
- 46 Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 44th sess (10 April 1992) para 13.
- 47 Committee on the Rights of the Child, *General Comment No 10: Children's rights in juvenile justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) para 89.
- 48 *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, GA Res 45/113, 45th sess, 68th plen mtg, UN Doc A/RES/45/113 (14 December 1990) rules 59 and 60.
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- 50 *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, GA Res 45/113, 45th sess, 68th plen mtg, UN Doc A/RES/45/113 (14 December 1990) rule 25.
- 51 Committee on the Rights of the Child, *General Comment No 10: Children's rights in juvenile justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) para 89; *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, GA Res 45/113, 45th sess, 68th plen mtg, UN Doc A/RES/45/113 (14 December 1990) rule 72.
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- 61 *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, GA Res 45/113, 45th sess, 68th plen mtg, UN Doc A/RES/45/113 (14 December 1990) rule 78.
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- 65 The Law Society of NSW, Submission No 11 to Australian Human Rights Commission, *National Children's Commissioner's examination into OPCAT and Youth Justice*, 30 May 2016, 1.
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NAPCAN

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children and young people to each other, CREATE a their commu

EMPOWER

children and young people to build self-esteem, self-esteem, that enable voice

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Create launch of Paint it Purple during Child Protection Week in 2016.

Chapter 4:

The voices and
experiences of
children and
young people
in detention



"In Captivity" is an original artwork by a young person detained in a youth justice centre. The artist stated about his work: "This was a guided art piece that I painted using a foam roller, stencil and acrylic paint and brushes. Using the ideas of colour to reflect feelings in the black shape (whale) represent himself (I had been learning about Tilikum, the Orca that was kept in captivity at Sea World and eventually following years of trauma killed his trainer)".

Chapter 4: The voices and experiences of children and young people in detention

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A key principle of the *Convention on the Rights of the Child* (CRC) is that the views of children and young people are taken into account in decisions that are likely to affect their lives.

Respect for the views of children and young people is one of the four guiding principles of the CRC, as stated in article 12:

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.¹

This is especially important for children in vulnerable situations, like those involved in the youth justice system. It is vital that we give those children and young people an opportunity to share their views and experiences of detention and to voice their opinions on how their needs can be met.

In the course of my work during 2016, I conducted eight workshops with 74 children and young people who were detained in youth justice centres. I also held a workshop with 20 young people, aged 17 years, who were detained in an adult correctional facility in Queensland.

All workshops included an educative session about children's rights. The workshops asked children and young people to identify conditions, which impacted positively on their wellbeing and also those that had a detrimental effect. As part of the workshops, the children and young people completed individual surveys.

To further amplify the voices of children and young people, I ran an art competition open to any young person in detention. We asked that the art generated reflect how they feel, what they need or what they wish for. Examples can be seen throughout this report.

I also considered three further issues which impact on Australia's compliance with the CRC:

- Children and young people under the age of 18 years being held in adult correctional facilities. In my inaugural 2013 statutory report, I recommended that Australia withdraw its reservation under article 37(c) of the CRC on the obligation to separate children from adults in prison.
- The age of criminal responsibility in Australia.
- The *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure* (the third Optional Protocol).

4.1 Who is in youth detention in Australia?

On an average day in 2014-15, almost 900 (16%) of all the children and young people who were in contact with the youth justice system were in detention. More than half (54%) of those children and young people in detention were not sentenced, and were awaiting the outcome of their legal matter or sentencing.²

Indigenous children and young people aged 10–17 were about 24 times as likely as non-Indigenous children and young people to be detained on an average day.³ The overrepresentation of Indigenous children and young people was consistently raised in submissions made to me and at roundtables.

In the 5-year period to 2014-15, there was a decrease in the overall rate of juveniles in detention from 4 to 3 per 10,000.⁴ However for Indigenous children and young people, there has been an increase in their level of overrepresentation.⁵ In part, this can be attributed to the decreases in the rates for non-Indigenous children and young people being detained.⁶

During 2014-15, the rates of over-representation of Indigenous children and young people were as follows:

- twice as likely to be detained in a youth justice centre compared with non-Indigenous children and young people in Tasmania
- 13 times more likely in Victoria
- 14 times more likely in Australian Capital Territory (ACT)
- 17 times more likely New South Wales (NSW)
- 18 times more likely in Queensland
- 20 times more likely in South Australia
- 21 times more likely in the Northern Territory
- 27 times more likely in Western Australia.⁷

The data on children and young people in detention during 2014-2015 by age, sex and Indigenous status shows that Indigenous male children aged between 10 and 12 are significantly more likely to be detained in youth justice centres than non-Indigenous children.

Children and young people in detention during the year by age, sex and Indigenous status in 2014–15:⁸

Sex	Indigenous status	10–11	12	13	14	15	16	17	10–17	18+	Aust. incl. WA & NT
Male	Indigenous	32	86	179	282	399	459	384	1,821	114	1,935
	Non-Indigenous	10	41	103	185	344	480	491	1,654	294	1,948
	Not stated	–	2	2	8	6	17	10	45	1	46
	Total	42	129	284	475	749	956	885	3,520	409	3,929
Female	Indigenous	2	15	45	102	93	88	52	397	11	408
	Non-Indigenous	2	6	32	59	95	89	71	354	19	373
	Not stated	–	–	–	1	2	2	4	9	1	10
	Total	4	21	77	162	190	179	127	760	31	791
Total	Indigenous	34	101	224	384	492	547	436	2,218	125	2,343
	Non-Indigenous	12	47	135	244	439	569	563	2,009	313	2,322
	Not stated	–	2	2	9	8	19	14	54	2	56
	Total	46	150	361	637	939	1,135	1,013	4,281	440	4,721

According to the Australian Bureau of Statistics (ABS), in 2015, 65 young people under the age of 18 years were held in adult correctional facilities. Most of these appear to be located in Queensland with a small number imprisoned in the Northern Territory. Most were males and 50 per cent were Indigenous.⁹

Apart from very basic demographic information, there is limited available data about the characteristics of children and young people in detention.

For example, **Children and Young People with Disability Australia (CYDA)** note that:

At present there is no national data on the number of children with disability who have contact with the criminal justice system. Further, there is a wide disparity in results among smaller scale research on prevalence of children with disability in youth justice detention. Research suggests that children and young people with cognitive disability are overrepresented in the criminal justice system.

Further, any estimates of the proportion of children with disability in youth justice detention may be an underrepresentation. CYDA is aware that many children with disability are not recognised due to not having a formal diagnosis or not personally identifying as having a disability. Moreover, at times the knowledge and expertise is not available to identify if a child has disability.¹⁰

The **Children's Commissioner in Western Australia** drew my attention to research conducted in the remote Aboriginal community of Fitzroy Valley which:

revealed that one in eight babies born between 2001 and 2003 were diagnosed with foetal alcohol spectrum disorder (FASD)...Several FASD symptoms are seen to influence offending behaviour; these include criminogenic characteristics like impulsivity, inappropriate sexual behaviour, lack of understanding consequences and high levels of suggestibility, compounded by environmental factors such as low socioeconomic status, unstable family-life and substance misuse. FASD sufferers are almost certainly predisposed to being in trouble with the law and consequently being detained in youth justice facilities.¹¹

4.1.1 Need for better data collection and research

I approached the Australian Institute of Health and Welfare (AIHW), the Australian Government Productivity Commission, the Australian Bureau of Statistics (ABS) and the National Centre for Longitudinal Data and asked them to provide me with details of the types of data that they collect. Their responses to me are provided on the following pages.

The Australian Institute of Health and Welfare (AIHW) told me:

The AIHW's collection and reporting of youth justice supervision data is funded by the state and territory departments responsible for youth justice. This work program is governed by an agreement between the Australasian Juvenile Justice Administrators (AJJA) and AIHW.

The AIHW collects data on all young people under youth justice supervision in Australia, with data available from 2000-01 to 2014-15. These data are provided on an annual basis to the AIHW by the state and territory departments responsible for youth justice, and include all young people supervised by youth justice agencies in the community, as well as those in detention. These data are administrative unit record level, and include information on the young people's socio-demographic characteristics along with characteristics of their youth justice supervision. Western Australia and the Northern Territory do not provide fully compliant unit record data to the AIHW; rather, non-standard unit record data are provided instead.

The AIHW holds data on the date of birth, age, sex, state and suburb of last residence of the young person, and the type, length, and number of supervision orders, including periods in detention.

The AIHW undertakes a detailed validation of the data supplied, including the use of our "Validata" system, an online data receipt and validation tool which picks up anomalies and unlikely occurrences in supplied data. Once validated, the data are analysed and released in a range of statistical outputs through the year. There are four routine reports that are produced from this data set. These reports (including detailed supplementary tables) are published on the AIHW website (www.aihw.gov.au/publications/youth-justice). The four routine reports are: Youth Justice in Australia, Youth detention population in Australia, Young people returning to sentenced youth justice supervision, Young people in child protection and under youth justice supervision.

Previous 'special topics' bulletins have also been published by the AIHW using these data: Pathways through youth justice supervision (2014), Young people aged 10-14 in the youth justice system (2013), Girls and young women in the juvenile justice system (2012), Indigenous young people in the juvenile justice system (2012).

These data are able to contribute to reporting on young people's wellbeing, by highlighting issues such as repeated contact with youth justice supervision and the length of time spent in detention. With some restrictions, these data can also be linked to other AIHW datasets, to assess the overlap with other sectors and outcomes for young people leaving detention (e.g. child protection system, hospital and other health care and specialist homelessness services).

Our data collection currently lacks data items that would enable reporting on some aspects of the OPCAT, such as the recording and resolution of detainee complaints and the frequency and nature of critical incidents. Such data items could potentially be included in the data set and in AIHW's national reporting. However, the inclusion of these data items would need to be endorsed by AJJA and would require work to secure agreement across jurisdictions on a set of nationally consistent definitions.

The AIHW is planning to undertake a feasibility study into the collation and reporting of national data on the health of young people under youth justice supervision. The long-term aim of this work is to secure resources for the reporting of these statistics in a manner similar to the AIHW's reporting on adult prisoner health (i.e. The health of Australia's prisoners series of reports). These developments may also encompass some data items relevant to the Commission's OPCAT reporting work.

The AIHW would welcome the further discussion on options for collaboration to support OPCAT reporting.¹²

The **Australian Government Productivity Commission** informed me:

The Report on Government Services (RoGS) and the Overcoming Indigenous Disadvantage Report (OID), prepared by the Productivity Commission for the Commonwealth-State Steering Committee for the Review of Government Service Provision, both report data on children and young people detained in juvenile justice centres. This program is in its 22nd year, and is in effect authorised by the Council of Australian Governments (COAG).

All the juvenile justice data we collect is reported publically. The RoGS and OID are available at <http://www.pc.gov.au/about/core-functions/performance-monitoring>.

The Youth justice services chapter of RoGS (chapter 16) reports indicators on detention-based youth justice supervision including:

- the daily average proportions of youth justice clients supervised in detention centres
- deaths and assaults in custody
- escapes and absconds from unescorted leave
- self harm and attempted suicide in custody.

The imprisonment and juvenile detention headline indicator of OID (Section 4.12) reports the daily average rate of detention of young people with a focus on reporting on Indigenous Australians.

The data contribute to monitoring the performance and outcomes of services for children and young people in contact with the juvenile justice system. The RoGS indicators are reported against a performance indicator framework providing information on the equity, efficiency and effectiveness, and distinguishing the outputs (for example, absconds from unescorted leave, case plans prepared and completion of community-based orders) and outcomes (for example, education and employment readiness and repeat offending) of youth justice services. The performance indicator framework is based on a set of shared government objectives agreed by the Steering Committee. The OID indicator is reported against the OID framework as a headline indicator. Headline indicators have been selected by the Steering Committee to represent significant high-level outcomes requiring whole-of-government action over the long term before significant progress can be seen.

Much of the RoGS and OID juvenile justice data are sourced from the Juvenile Justice National Minimum Data set maintained by the Australian Institute of Health and Welfare (AIHW). The AIHW collects, collates and validates the data from states and territories. Questions on data collection complexities would be best addressed to the AIHW. Data are for young people under supervision aged 10-17 years. Additional RoGS data are sourced directly from states and territories. There are some data collection complexities with these data as noted in the Data Quality Information on the PC website.

There are no data on children and young people in adult detention facilities in either RoGS or OID. All data in RoGS and OID are for those aged 18 years or over, with the exception of Queensland, which includes those aged 17 years or over but are not separately identified in the data.¹³

The Australian Bureau of Statistics (ABS)

The ABS provided me with its data for the most recent Prisoner Census (as at 30 June 2015) by Indigenous status, legal status, aggregate sentence length and expected time to serve. This data relates to children and young people in adult facilities.

Prisoners in Australia aged 17 years or less	
Characteristics	N
Indigenous status	
Aboriginal and Torres Strait Islander	34
Non-Indigenous	31
Legal status	
Sentenced	22
Un-sentenced	42
Aggregate sentence length of sentenced prisoners	
Periodic detention	0
Under 3 months	0
3 and under 6 months	5
6 and under 12 months	0
1 and under 2 years	9
2 and under 5 years	3
5 years and over	0
Life	0
Other	0
<i>Total sentenced prisoners</i>	22
Mean aggregate sentence (years)	1.2
Median aggregate sentence (years)	1.2
Expected time to serve of sentenced prisoners	
Periodic detention	0
Under 3 months	6
3 & under 6 months	8
6 & under 12 months	3
1 year & over	0
Life	0
Other	0
<i>Total sentenced prisoners</i>	22
Mean expected time to serve (years)	0.6
Median expected time to serve (years)	0.5
Total prisoners aged 17 years or less	65

ABS publication **4517.0 – Prisoners in Australia, 2015**, which presents information from the National Prisoner Census on prisoners held in custody in Australian adult prisons, shows that where offences were disaggregated by most serious offence/charge,¹⁴ 19 were acts intended to cause injury; 4 were sexual assaults and related offences; 4 were dangerous or negligent acts endangering persons; 13 were robbery, extortion and related offences; 21 were unlawful entry with intent; 4 were theft and related offences; 4 were offences against justice procedures, government security and operations.¹⁵

The National Centre for Longitudinal Data

The National Centre for Longitudinal Data administers *Growing Up in Australia: The Longitudinal Study of Australian Children* (LSAC) and *Footprints in Time: The Longitudinal Study of Indigenous Children* (LSIC).

The LSAC has followed the development of 10,000 children, young people and families from all parts of Australia since 2004. The LSAC items regarding contact with the judicial system has been collected since wave 6 (2014). The children and young people in the Study are now between 15 and 16 years of age.

The LSIC study began in 2008 and includes two groups of Aboriginal and/or Torres Strait Islander children who were aged 6 to 18 months (B cohort) and 3½ – 5 years (K cohort). This means these children are now between 7 and 13 years old. Items on contact with the judicial system will be included in the survey in 2016 (Wave 10) for the first time.

Data on contact with the judicial system from Wave 6 LSAC (14-15 year olds in 2014)

In the last 12 months have you?	Once	Twice	More often
	N (%)		
Been told to 'move on', or been warned or cautioned, by police	151 (4.3)	42 (1.2)	25 (.7)
Been required to attend a youth justice conference	25 (.7)	4 (.1)	4 (.1)
Been charged with an offence by the police	31 (.9)	7 (.2)	2 (.1)
Appeared in court as a defendant	20 (.6)	2 (.1)	2 (.1)
Been convicted of an offence	27 (.8)	2 (.1)	1 (0)
Been detained in a youth detention centre on remand (without being sentenced)	8 (.2)	2 (.1)	
Been detained in a youth detention centre or youth justice centre after sentencing	8 (.2)	2 (.1)	

Two additional items have been added for Wave 7 LSAC:

- Been on community-based supervision without being sentenced (e.g. supervised or conditional bail, home-detention bail)
- Been on community-based supervision after sentencing (e.g. home detention, probation, suspended detention, community service orders and parole or supervised release).

Currently, LSAC has items that record whether someone in the family has been arrested, in jail or had problems with the police. This can be a study child, primary carer, someone who lives in the house or someone (close family) who doesn't live in the house. It can be disaggregated by who was involved, but not by type of interaction, e.g. jail or arrest or just problems with the police. Results have been fairly consistent over time.

2008	2009	2010	2011	2012	2013	2014
25%	22%	25%	24%	23%	23%	19%

LSIC also has items about trust, which includes trust of police (Wave 8 data). In response to whether Police in their local area can be trusted, 10% of respondents strongly agreed; 50% agreed; 20% neither agreed nor disagreed; 15% disagreed and 5% strongly disagreed.

AIHW and ABS primarily collect demographic data. For example, as part of the Juvenile Justice National Minimum Data set, AIHW collects:

- characteristics of children and young people under juvenile supervision
- age
- sex
- Indigenous status
- age at first supervision
- supervised orders
- order start and end dates
- end reason
- order type
- suburb/town/locality name
- postcode
- state/territory
- detention periods
- detention type.

It is essential for us to know the numbers of children and young people who are detained in youth justice facilities, their sex, age, Indigenous status, why they are detained and for how long they are detained.

It would also be highly desirable to broaden the collection of this data to include, for example, information about children and young people with disability, those from culturally and linguistically diverse backgrounds, and children and young people who are lesbian, gay, bisexual, transgender and intersex.

I am encouraged that the AIHW is able to link its youth justice data with its other datasets, including child protection systems, hospital and other health care and specialist homelessness services. I also welcome that the AIHW is planning to undertake a feasibility study into the collation and reporting of national data on the health of young people under youth justice supervision.

While the AIHW recognises that it presently lacks data items that would enable reporting on aspects of the OPCAT, it is positive that it acknowledges that additional data items could potentially be included in the data set and in the AIHW's national reporting. Particular items relate to type and nature of complaints, use of force and critical incidents, which go directly to human rights issues. I acknowledge that for additional data of this kind, the AIHW has indicated that the inclusion of data items would need to be endorsed by AJJA and would require work to secure agreement across jurisdictions on a set of nationally consistent definitions.

Recommendation 3

That the Australian Institute of Health and Welfare (AIHW) and the Australasian Juvenile Justice Administrators (AJJA) work together in 2017 to develop a reporting framework to meet OPCAT requirements over time.

Recommendation 4

The Australian Institute of Health and Welfare (AIHW) and the Australasian Juvenile Justice Administrators (AJJA) work together in 2017 to generate additional publically available data on characteristics of detainees, their treatment and conditions.

Whilst it is critical that demographic data is collected, at best, it provides a rudimentary picture of what is happening.

The annual Report on Government Services (RoGS) provides information on the equity, effectiveness and efficiency of government services in Australia. It also promotes public accountability.¹⁶ The youth justice services chapter (chapter 16) of the RoGS reports on the performance of governments in providing youth justice services.

The identified objectives for youth justice services are:

Youth justice services aim to contribute to a reduction in the frequency and severity of youth offending, recognise the rights of victims and promote community safety. Youth justice services seek to achieve these aims by:

- assisting young people to address their offending behaviour and take responsibility for the effect their behaviour has on victims and the wider community
- enabling the interests and views of victims to be heard
- contributing to the diversion of young offenders to alternative services
- recognising the importance of the families and communities of young offenders, particularly Aboriginal and Torres Strait Islander communities, in the provision of services and programs
- providing services that are designed to rehabilitate young offenders and reintegrate them into their community.¹⁷

RoGS has a performance indicator framework that provides information on equity, efficiency and effectiveness, and distinguishes the outputs and outcomes of youth justice services.

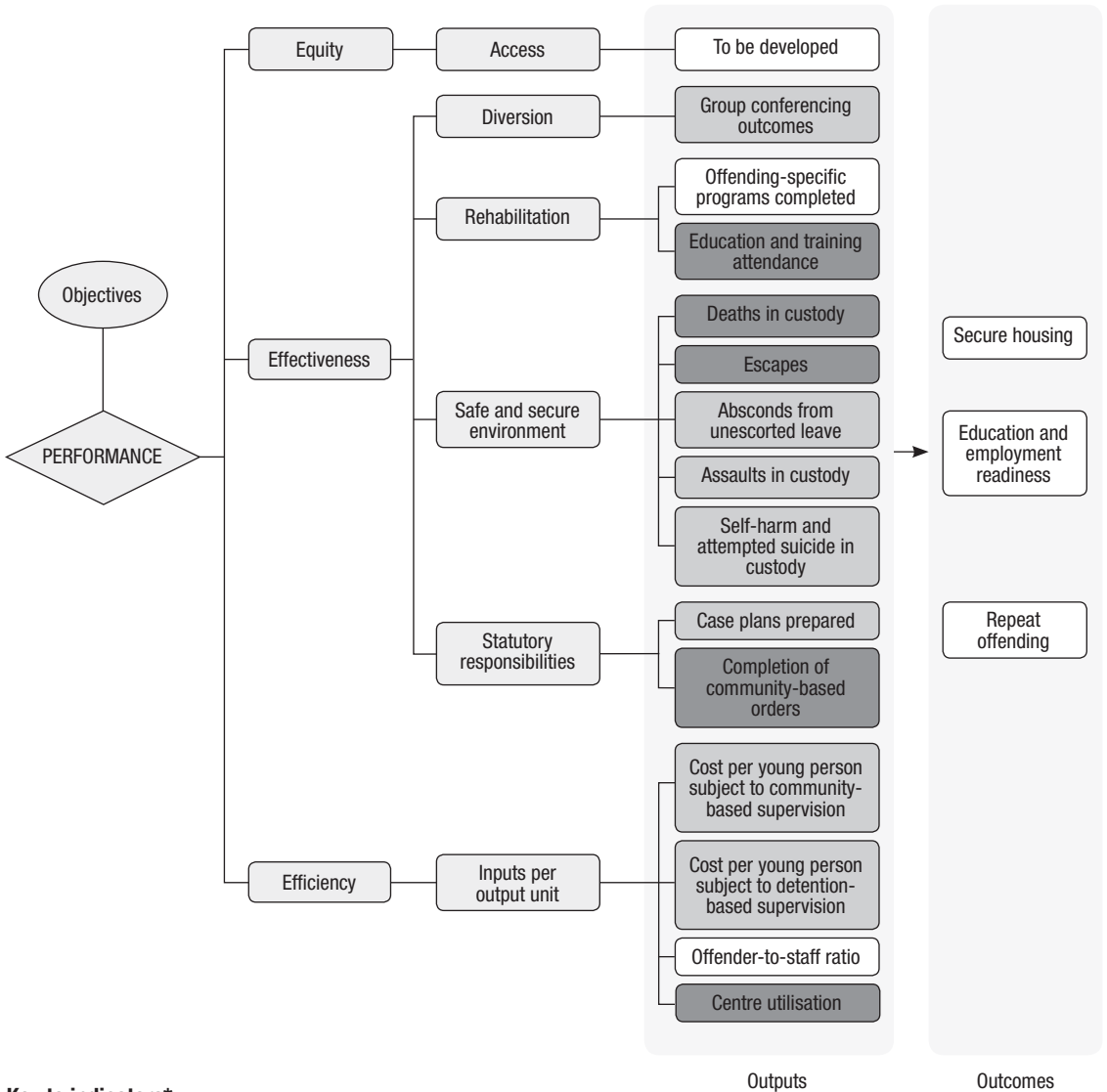
The performance indicator framework shows data, which are complete and comparable in the 2016 Report.¹⁸ See figure 1.

At this point in time, RoGS has complete and comparable data for education and training attendance, deaths in custody, and escapes. It has partial data for absconding from unescorted leave, assaults in custody, self-harm and attempted suicide in custody, and case-plans prepared.

The Steering Committee for the Review of Government Service Provision (SCRGSP) notes that:

While the aim is to focus on outcomes, outcomes are often difficult to measure. The Report therefore includes measures of outputs (which are often easier to measure), where there is a relationship between those outputs and desired outcomes, and that the measures of outputs are, in part, proxies for measures of outcomes.¹⁹

Figure 1: RoGS youth justice services performance indicator framework²⁰



Key to indicators*

- Text Most recent data for all measures are comparable and complete
- Text Most recent data for at least one measure are comparable and complete
- Text Most recent data for all measures are either not comparable and/or not complete
- Text No data reported and/or no measures yet developed

* A description of the comparability and completeness of each measure is provided in indicator interpretation boxes within the chapter.

Examination of the performance indicator framework shows limited collection of outcome data.²¹

Children and young people in detention told me that they wanted to achieve formal qualifications from their schooling. See section 4.2.2.2. Measuring this and their employment readiness is essential in promoting the best interests of children and young people.

NSW Juvenile Justice publically provided some of this type of information in its *2014-2015 Year in Review*.²² For example:

Enrolment in education	2013 ¹	2014 ¹	2015 ²
Total Education and Training Units enrolments	1,791	1,642	833
TAFE enrolments	998	660	253
Awarded Record of School Achievement (ROSA)	68	89	N/A
Enrolments in the Record of School Achievement (ROSA)	N/A	N/A	152
Awarded year 11 Record of Achievement (ROA)	35	69	N/A
Year 11 single subject completions	91	25	N/A
Year 11 single subject enrolments	N/A	N/A	215
Year 12 single subject completions	84	59	N/A
Year 12 single subject enrolments	N/A	N/A	2
Enrolments in the Higher School Certificate	N/A	N/A	7
Higher School Certificate completions	8	3	N/A

Notes:

- 1 Figures for complete school year January to December.
- 2 Figures for young people enrolled in courses up to 30 June 2015. Completion figures not available until school year completed.

Similarly, while it is important to know the numbers of children and young people who have case plans prepared, it is critical to know the outcomes of these case plans. That is, the impact they have on recidivism.

Clearly, there is much work to do in terms of reporting the outcomes for children and young people detained in youth justice centres.

It is positive that contact with the judicial system is now being collected as part of the LSAC and LSIC work. Access to this information in conjunction with the rest of the data collected will contribute to building a comprehensive picture of the lives of children and young people in the future.

Recommendation 5

The Productivity Commission, the Australian Institute of Health and Welfare (AIHW) and the Australasian Juvenile Justice Administrators (AJJA) work together in 2017 to progress the collection of 'outcome' based data for children and young people in the youth justice system.

4.2 What did children and young people in detention tell me?

As noted earlier, during 2016, I conducted nine workshops with 94 children and young people detained in youth justice centres and an adult correctional facility.

The children and young people were asked about their knowledge of their rights and their perspectives on their treatment and living conditions.

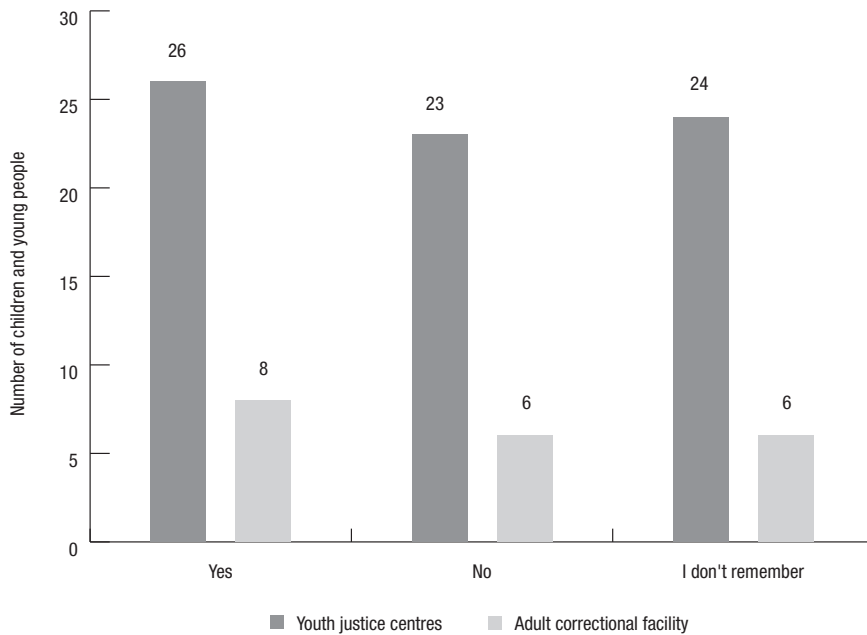
All children and young people completed individual surveys.

4.2.1 Rights that children and young people identified as being important to them

When asked about their rights, children and young people were quick to identify that they had lost their right to physical freedom in the sense that they could not leave the youth justice centres or adult correctional facility of their own volition.

The first question in the written survey asked the children and young people if they were told about their rights when they were first admitted to either a youth justice centre or adult correctional facility. 73 children and young people in youth justice centres responded to this question. All 20 young people in the adult correctional facility responded to this question. Specific details are provided in figure 2.

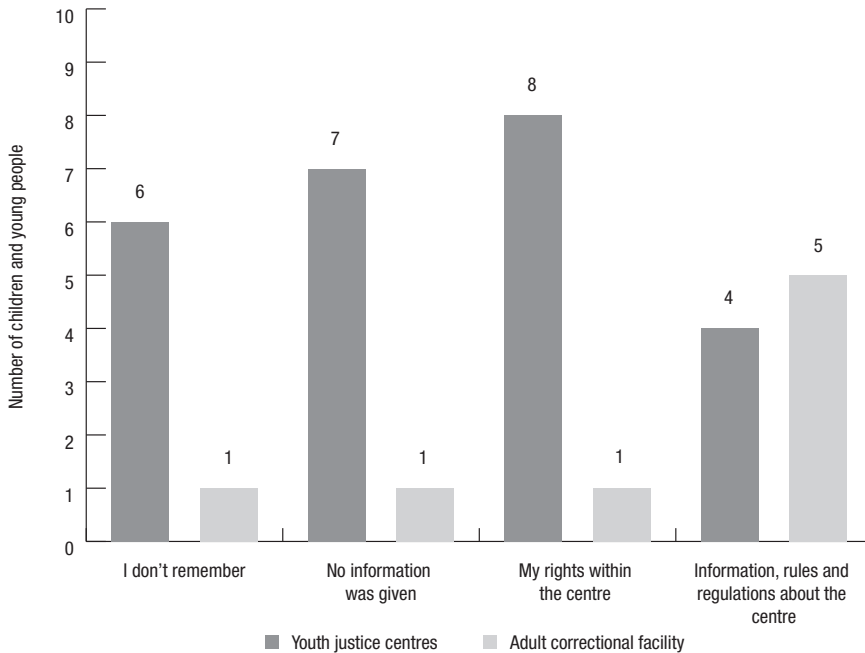
Figure 2: When you arrived at the centre, did you receive information about your rights?



64% of children and young people in youth justice centres stated that they were not told about their rights or did not remember being told about their rights when they arrived at the youth justice centre. 60% of young people in the adult facility stated that they were not told about their rights or did not remember being told about their rights when they arrived at the facility.

When asked about the type of information given to them, a total of 39 children and young people responded across both youth justice and adult facilities. Specific details are provided in figure 3.

Figure 3: What type of information was given to you?



Of the 25 respondents in youth justice centres, 52% indicated that they did not remember if they were provided with any information or no information was given. 32% of the 25 respondents indicated that the information given to them was about their rights within the centre. This was predominately about their rights to phone calls and contact with their family. 16% of the 25 respondents indicated that the information provided to them was about rules and regulations.

Of the eight respondents in the adult facility, 63% indicated that they were mainly informed about the rules and regulations of the adult facility.

A 17-year-old male in Queensland told me:

[Told] nothing at all...Staff treat us like adults and expect us to know our rights – which we do not.

Of those who indicated that they had received information, they stated that they had accessed information through:

- information booklets
- a DVD developed by the youth justice centre
- staff at the facilities
- other children and young people.

It was brought to my attention that information booklets were not always the most efficient way to provide information because many of the children and young people did not have sufficient literacy skills to be able to read them. DVDs appeared to be a popular option, especially when readily available on the screens in their units or rooms.

The submission provided to me by the **North Australian Aboriginal Justice Agency (NAAJA)** and the **Central Australian Aboriginal Legal Aid Service (CAALAS)** stated:

NAAJA has confirmed that there is no up to date 'Induction Manual' provided to any youth on first entry into detention. We have been told by Corrections that the previous manual is under review and during the review period (unknown time frame) each youth has been given a verbal induction with a briefing as to the rules of the centre, their rights and obligations incumbent on each. However, there has been no disclosure as to what is actually told to each youth, and no way of assessing whether or not on each occasion the information given complies with that required by s 150 of the *Youth Justice Act 2005 (NT)*. It does not appear that there is any independent record of what if any information a youth actually receives on admission.²³

Participants at the roundtable in Darwin on 31 May 2016 also raised the issue that the Don Dale Youth Detention Centre did not have, at that time, a written induction manual.

It was clear from the educative part of the workshop that most children and young people were unaware of their rights. Their lack of awareness about their rights was also reinforced to me in a number of submissions.

The submission made to me by the **North Australian Aboriginal Justice Agency (NAAJA)** and the **Central Australian Aboriginal Legal Aid Service (CAALAS)** pointed out:

It is clear from our dealings with these youths over the years that many had little understanding of their rights within detention and any recourse for complaint...

NAAJA has repeatedly been told by clients that they are not given much if any information about their rights within the detention centre and often they have to make enquiries from other youth as to the practice and procedure within the centre. Despite repeatedly asking youths if they are given a formal induction and a set of guidelines regarding rules and behaviour not a single youth has stated that this has happened. Many youth for whom English is not their first language have not been given this information with the assistance of an interpreter.²⁴

The submission by the **Queensland Office of the Public Guardian** told me:

in some cases it appears that young people are not well informed of their rights when detained and how to enforce their rights.²⁵

The submission by the **Law Council of Australia** reported that:

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.²⁶

The **Commissioner for Children in Tasmania** told me that:

In my experience, young people in detention have little understanding of their human rights, and of how these rights are to be protected whilst they are in detention.²⁷

Amnesty International Australia emphasised to me that:

It is imperative that children and young people in detention are aware of their human rights; it is also absolutely fundamental that children and young people are aware of their legal rights within any one jurisdiction, and that these rights are protected.²⁸

The submission made by **Rebecca Wallis, Stuart Kinner and Ross Homel of Griffith University** pointed out:

The extent to which children experience and understand the current oversight, complaints, and monitoring mechanisms in place is unclear, given the paucity of independent research on this issue. The same comment applies to children's understanding of their human rights. Studies done on children's understanding of their rights in other contexts would suggest that providing children with information may not, in itself, foster full comprehension not sufficient without further processes and contexts that support an on-going conversation with children about their rights, and to ensure that rights protection is embedded into culture.²⁹

Recommendation 6

The Australian Government commissions research which explores the processes and contexts that support children and young people's appreciation of their rights and responsibilities in institutional settings.

Following on from the educative session about children's rights, children and young people identified the rights that were most important to them in detention. The following rights from the *Convention on the Rights of the Child* were identified:

- Right to have a say and to be heard (article 12)
- Right to freedom of speech (article 13)
- Right to education (articles 28, 29 and 31)
- Right to safety (article 19)
- Right to health (article 24)
- Right to be treated fairly (article 37)
- Right to have contact with family and friends (article 9)
- Right to make a complaint (articles 12 and 13)
- Right to healthy food (article 27)
- Right to respect (articles 37 and 40)
- Right to freedom of religion (articles 14 and 30).

The rights identified by children and young people were consistent across the youth justice centres and the adult correctional facility.

In a number of workshops, a few children and young people advised me that they knew they had rights. However, they indicated that when they raised this with staff, their behaviour was often deemed to be challenging.

4.2.2 Conditions that children and young people identified as having an impact on their wellbeing whilst being detained

In the workshops, children and young people were asked to identify conditions, which impacted positively on their wellbeing, and also those that had a detrimental effect.

Across the jurisdictions, children and young people detained in youth justice centres and those in the adult facility identified **common conditions**. These included:

4.2.2.1 Contact with loved ones

The importance of contact with family members and friends was consistently raised across all jurisdictions. Children and young people wanted increased contact with family and friends, including longer visits and fewer restrictions on lengths of and numbers of phone calls.

One young person told me that his father had travelled for six hours to visit him and he was only allowed to visit with him for 45 minutes.

Another told me that he is only allowed to have six photographs of his family and friends in his 'cell'. The number of photographs allowed appears to be linked to the points and rewards system.

Children and young people also wanted improved facilities for when their families came to visit them, including cleanliness and the capacity to be able to offer them refreshments.

In some jurisdictions, the use of Skype has been introduced to facilitate increased family contact and connectedness with home communities. This is a very encouraging development.

4.2.2.2 Education and purposeful activities

Children and young people consistently raised the importance of access to education and purposeful activities with me.

They requested more choices in terms of available learning programs, and for learning programs to result in formal qualifications that they can use to gain employment or engage in further training when they are discharged.

Some advised that the learning programs provided to them are not sufficient for them to easily re-enter mainstream schools when they are discharged. The academic content is not commensurate with the content provided in mainstream schools and if, or when, they return to mainstream schools, they do not have the requisite knowledge.

They also wished to be appropriately assessed so that their placements in learning programs were proportionate to their existing skills and knowledge. They pointed out the value of one-on-one teaching at 'their own pace' where their literacy and numeracy skills were significantly behind chronological peers.

The **Law Society of New South Wales** pointed out to me:

Contact should be made with schools attended by the child or young person prior to entering a custodial setting. Regular liaison between the detention centre and the school is key in order to facilitate consistency in approach to that child or young person's education. The school should also be approached regarding summarising the progress made while in custody and a structure implemented which ensures the child or young person is able to integrate easily back into their school upon release.³⁰

The availability of educational resources, including computers and access to the internet, were raised as needs that should be addressed.

The right to education is protected by article 28 of the CRC. General Comment 10 of the Committee on the Rights of the Child stipulates that every detained child and young person of compulsory school age has the right to education, which should prepare the child and young person for his or her return to their community.³¹ It also advocates for vocational training. Rules 38 to 42 of the *Rules for the Protection of Juveniles Deprived of their Liberty* (JDL Rules or Havana Rules) reinforce this. Rule 40 provides that the achievements of children and young people should not reveal where their achievements were attained. Rule 41 provides that facilities where children and young people are detained should provide access to adequate libraries.

Children and young people also emphasised the importance of access to recreational and leisure activities. They recognised the value of occupying their time with purposeful things to do. They positively rated opportunities to participate in mainstream community recreational and leisure programs, and to have high profile sports people as visiting mentors.

Article 31 of the CRC provides children and young people with the right to leisure, play and recreational activities appropriate to their age, and free participation in cultural life and the arts, as core aspects of their healthy development. The JDL Rules reinforce this right, emphasising children and young people in detention should have time for daily free exercise in the open air. Recreational and physical training, space, and equipment should also be provided, as well as access to leisure activities such as arts and crafts.³² While most centres we visited were well equipped and had a range of programs in place, this was not the case (at the time of writing) in relation to the 17 year olds in the adult correctional facility, nor in the Don Dale Youth Detention Centre.

4.2.2.3 Contact with professional services

Children and young people emphasised their need for increased access and contact with caseworkers, official visitors, ombudsman and legal representatives. At the same time, some children and young people did not know the names of the visitors or have an established relationship with them. This was attributed to the infrequency of their visits and in some instances, the number of different visitors.

They also indicated that they would like more use of Audio Visual Link facilities (AVL) to the courts. AVL is a form of video conferencing using cameras and television screens, which allows two-way communication. This was mainly raised by children and young people who had to travel long distances in transport vehicles for brief court appearances, for example: a mention hearing. Others also suggested that it could mean that they did not have to spend extended periods of time in the court cells.

In NSW, during 2014-15, 52.27% of all court matters were held by AVL, rising from 33.6% in 2009-10.³³

4.2.2.4 Health

Children and young people told me that access to health services was essential. These services included dentists, physiotherapists, optometrists, and child and adolescent mental health services. However, many young people felt that the system of health requests was overly complex and slow.

One young person told me:

I have been waiting patiently about the health services, it took 2 ½ months to get something to happen about my feet and I feel it a breach of my human rights.

General Comment 10 and the JDL Rules stipulate that detained children and young people have the right to be examined when admitted to the detention facility, and shall receive adequate medical care, provided by community services where possible.

On the whole, at the centres we visited there was reasonably good access to doctors, nurses, dentists, counsellors and other health professionals. Many young people who come into detention have missed routine vaccinations and health checks throughout their childhood. Their time in detention provides a significant opportunity to 'catch up' on health assessments and ensure that they have access to ongoing health services on release.

4.2.2.5 Respect

Children and young people told me that they wanted to be treated respectfully. Respectful interactions with staff were especially important to them.

When asked to explain the characteristics of a good staff member, they described staff who greeted them and used their name; listened to them and allowed them to have a say; were respectful; shared a joke with them; were fair; had a 'give and take' attitude; responded to their needs; used good manners; and did not retaliate against them.

Children and young people described poor staff members as being disrespectful, non-responsive, rude and controlling. They also talked about the negative impacts of an authoritarian culture; of being treated unfairly; of not being listened to; and not having their complaints acted on.

Additionally, they raised the damaging effects of the use of collective punishment; body searches; the use of physical force; segregation; and isolation.

One young person told me that 'using force is not good. [It] increases anger'. Another young person told me that being in isolation made him 'sad and depressed' and another said that being handcuffed and left in the high security area made him feel 'like an animal'.

In one centre, children are required to wear a certain coloured shirt if they are deemed to be 'high risk' and placed in long periods of confinement in a 'secure' area. The young people suggested that this fuels a feeling of being a target and entrenches aggressive attitudes among the workers towards them.

It appears that the various points and rewards systems used across the jurisdictions impact on the way that children and young people perceive that they are respected. In my survey, children and young people were asked whether they thought that the points or rewards system used in their youth justice centre / adult correctional facility was fair.

71 children and young people in youth justice centres responded to this question. Of these, 42% (30) said yes, 44% (31) said no and 14% (10) indicated that they were unsure.

20 young people in the adult correctional facility responded to this question. Of these, 65% (13) said yes, 20% (4) said no and 15% (3) indicated that they were unsure.

Children and young people were asked why they perceived the system to be unfair. Their responses focused on the discretion given to staff in allocating the points and rewards. Some children and young people perceived staff to allocate points in arbitrary and inconsistent ways. Responses showed frustration and feelings of being 'ripped off' by the system.

One young person told me:

They take points for the smallest things like, didn't tuck shirt in before you get to the door etc.

Another told me:

Some staff, they can change the points if they don't like us.

Concerns were raised at my roundtables and also in submissions about the quality and training of staff. For example, the **University of NSW** (Professor Chris Cunneen, Professor Eileen Baldry, Emeritus Professor David Brown, Mel Schwartz, Associate Professor Leanne Dowse and Sophie Russell) pointed out that:

In general the staff we interviewed for the Comparative Youth Penalty Project indicated some broad knowledge of children's rights. A significant limitation is that while there was broad recognition of rights, there was a gap in knowledge and understanding as to how those rights might be reflected in day-to-day operational practices.³⁴

The **South Australian Office of the Guardian for Children and Young People** indicated that:

Based on monitoring and advocacy it seems that there is a misconception amongst some staff that upholding the rights of residents means that residents are absolved of accompanying responsibilities. This has a significant impact on staff willingness and capacity to promote rights within the custodial environment.³⁵

The **North Australian Aboriginal Justice Agency (NAAJA)** and the **Central Australian Aboriginal Legal Aid Service (CAALAS)** told me it held real concern:

as to what understanding current staff operating with the detention centres have in relation to Australia's international obligation and commitment to promote and protect the human rights of youth. Whilst one can see signs affixed to the reception area of the Don Dale detention centre depicting the *Convention on the Rights of the Child*, there appears to be little understanding on the ground as to its application to those within the centre. This would seem evident when consideration is given to the number of reported instances of breaches committed by staff within the detention centres, specifically as to the use of isolation and spit hoods as behavioural management tools.³⁶

The quality of recruitment and training of staff is essential to embedding practices that safeguard children and young people's rights to positive development and achievement of wellbeing.³⁷

It was raised at my roundtables and also in submissions that some jurisdictions have implemented, or are in the process of implementing, a trauma informed approach to the care and treatment of children and young people detained in youth justice centres.

The submission I received from the **Victorian Department of Health and Human Services** stated that:

Many young people under youth justice supervision have experienced trauma. For young people who are in custody, past traumatic experiences may emerge as difficulty in managing interpersonal relationships, including disruptive or violent behaviours.

Victorian youth justice custodial services are actively working towards increasing the focus on trauma informed, positive practices with young people and subsequently avoiding a reliance on the use of restrictive practices. Key to a trauma informed model is ensuring staff are trained and supervised to understand how young people's experience of trauma in childhood impacts on their behaviour in custody.³⁸

Queensland is currently implementing a model of trauma-informed practice and is also reviewing the current framework for rewards and consequences in youth detention centres. This could have some significant implications for future behaviour management practices in Queensland.³⁹

My consultation with **The Healing Foundation** revealed that much of their work was focussed around the importance of recognising and understanding trauma, including historical and intergenerational trauma, and its impact on individuals, families and communities.

In some youth justice centres, Youth Advisory or Leadership Groups have been established. In most cases, these groups include children and young people, staff and management. These groups meet regularly to discuss issues of concern and ways to improve the conditions of the youth justice centres. Where these groups existed, it appeared that the relationships between children and young people, staff and management were more positive, mutually respectful and constructive. Such opportunities also develop the skills and capabilities of children and young people in meaningful ways, providing and modelling non-aggressive ways to resolve issues and problems.

4.2.2.6 Religious and spiritual life

Some children and young people told me that acknowledgement and respect for their religious beliefs was often overlooked and not prioritised in youth justice centres. For example, the dietary and prayer needs of Muslim children and young people.

Article 14 of the CRC protects the right of the child to religion. The JDL Rules provide that children and young people have the right to receive visits from practitioners and regular services should be held if there are a sufficient number of children and young people of a particular religion.⁴⁰

4.2.2.7 Nutrition

Children and young people described the importance of access to fresh and to healthy food. Many stated that they would like to be able to participate in the preparation of their food.

Some could do this as a special activity at weekends but mostly the food was served to them.

At one youth justice centre, I was told that the food was prepared at an adult correctional facility and transported to the youth justice centre.

4.2.2.8 Well maintained facilities

Properly maintained facilities, including clean rooms, units and decent mattresses were identified by children and young people as contributing positively to their wellbeing.

Some described current facilities as having broken vents, mouldy showers, old mattresses, and rusting toilets.

Having heating and cooling facilities appropriate to the climate was also acknowledged as critical, especially in jurisdictions where temperatures can be very high.

One 17-year-old in the Northern Territory told me:

Sometimes it gets really hot in the rooms and the fans we get are not keeping us cool.

4.2.2.9 Basic toiletries and personal care needs

Children and young people talked about their need to access basic toiletries including regular-sized bars of soap, decent toilet paper, shampoo and conditioner, moisturiser and deodorant. They indicated that some of these items were linked to points and rewards systems and access to them was dependent on their behaviour.

They also raised the issue of restricted access to personal grooming supplies, including razors, hair clippers, and nail clippers. Again, access appeared to be linked to points and rewards systems.

4.2.2.10 Clothing and shoes

Most children and young people wore clothing and shoes provided to them by either the youth justice centre or the adult correctional facility. The issue of ill-fitting shoes was raised in most jurisdictions, as was the quality of the shoes.

The colour of the uniforms was also raised with me. As noted earlier, in one youth justice centre, the colours of the shirts identified the security classification of the children and young people.

Children and young people indicated that they would like to be able to wear their own clothes sometimes. They particularly mentioned that they would like to be able to wear their own underwear and socks.

4.2.3 Making complaints

In the survey, I asked children and young people about their knowledge of complaint making processes; who they would turn to if they had a problem; if they felt listened to when they had a problem; whether they felt that their problems were usually fixed; and how safe they felt in the youth justice centre / adult correctional facility.

92% (67) of children and young people in youth justice centres and 85% (17) of young people in adult correctional facilities indicated that they knew who they could complain to if they were unhappy with the way that they were being treated. See figure 4. Of the 67 children and young people in youth justice centres who indicated that they knew who they could complain to, 63 identified at least one person who they could approach, with some children and young people identifying more than one person. The most common response was the ombudsman, followed by managers in the centres. See figure 5.

Figure 4: Do you know who you can complain to if you are unhappy with the way you are being treated?

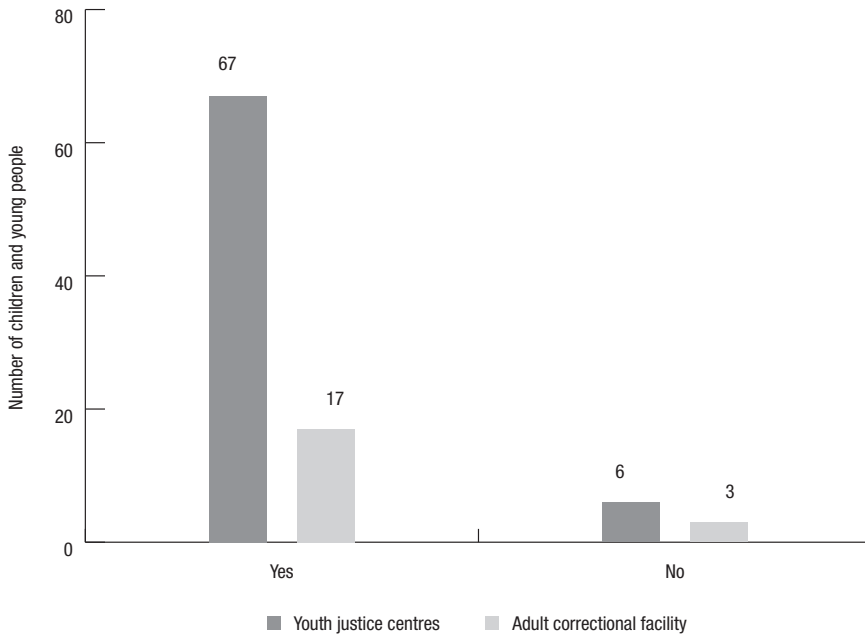
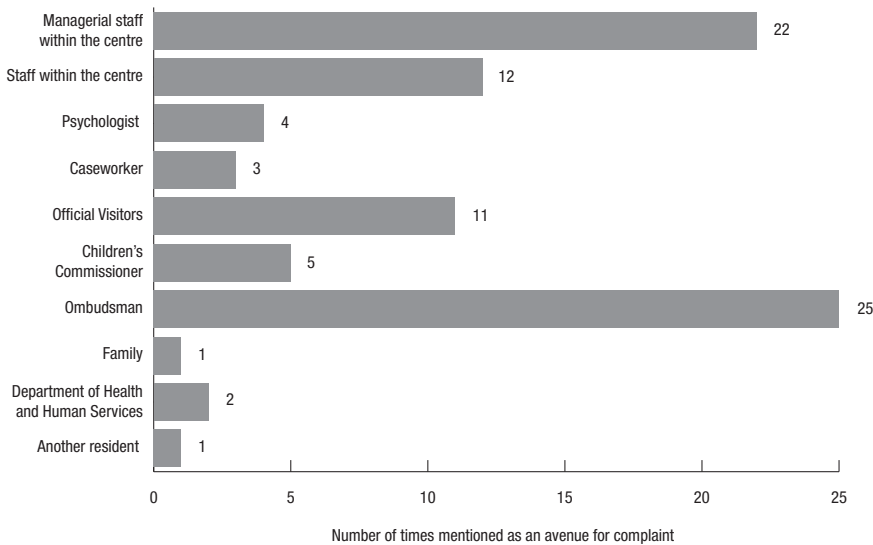


Figure 5: Who can you complain to if you are unhappy with how you are being treated? Responses from the youth justice centre.



Conditions children and young people in detention identified as being important to their wellbeing

We need some more programs in school and unit. More cooking. – NSW

Respect – Because we aren't all bad people just cos we are locked up, so if they show respect we will. – NSW

School at [my] own pace. – WA

Seeing the case manager, a lot. – ACT

School which gives you qualifications. – WA

Good teachers who help and test you beforehand to see where you are at and work at different levels. – SA

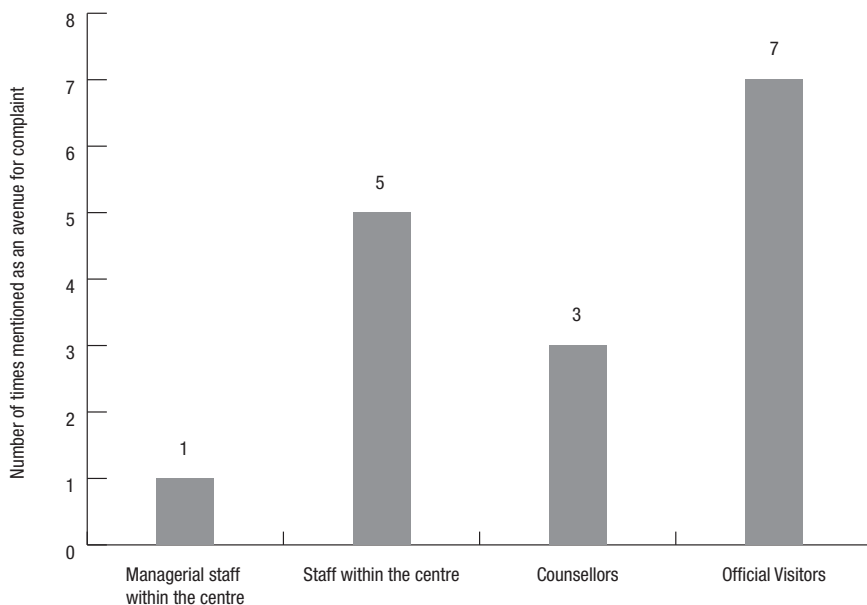
Family, to be able to talk to family, have them visit. – SA

Can't be locked in room all the time, e.g. not enough staff so locked down (23 hours), anxious, angry. – SA

Freedom of religion: I had to go through a lot of shit for the centre to recognise my conversion to Islam. – NSW

17 young people detained in the adult correctional facility indicated that they knew who they could make a complaint to. See figure 6.

Figure 6: Who can you complain to if you are unhappy with how you are being treated? Responses from the adult correctional facility.



These findings are consistent with those published in the report *Views of Young People in Detention Centres: Queensland 2011*. 109 out of a total population of 119 young people responded to the survey across both Queensland’s youth justice centres.⁴¹ The report showed that 87% of children and young people in detention in Queensland knew how to make a complaint and were able to identify at least one person who they could make their complaint to.⁴²

When I asked children and young people about what would worry them or stop them from making a complaint, 89% (65) of the children and young people in youth justice facilities responded. 46% (30) indicated that nothing would stop them from making a complaint.

Examination of some of the other 35 responses showed that:

- 20% (7) believed that making a complaint was a waste of time and that their complaint would not be followed up on
- 11% (4) feared negative consequences as a result of complaining
- 40% (14) feared staff would target, punish, or treat them differently if they made a complaint
- 11% (4) feared being seen as a ‘snitch’, felt scared or threatened.

90% (18) of young people in the adult facility responded to this question. 44% (8) indicated that nothing would stop them from making a complaint. The remaining 56% (12) indicated that they felt that their complaint would not be followed up on; they would not be believed; they would be targeted or punished by staff for making the complaint; they would be seen as a 'snitch'; or feared retaliation from other young people.

Children and young people in youth justice centres were also asked how often they felt listened to when they had a problem. 71 children and young people responded to this question. 6% (4) said always; 66% (47) said sometimes; 15% (11) claimed that they never felt listened to when they had a problem; 4% (3) indicated that they couldn't remember; and 8% (6) said that they had never had a problem.

When asked if they felt that their problem was usually fixed: 4% (3) answered always; 69% (49) said sometimes; 20% (14) answered never; one young person indicated that he could not remember; and 6% (4) responded that they had never had a problem.

All 20 young people from the adult correctional facility responded to this question. One young person indicated that he always felt listened to when he had a problem; 30% (6) indicated they sometimes felt listened to; 15% (3) claimed they never felt listened to when they had a problem; one young person did not remember; and 45% (9) indicated that they had never had a problem.

When asked if they felt their problem was usually fixed, no one responded 'always'; 35% (7) indicated that their problems were sometimes fixed; 15% (3) claimed that their problems were never fixed; one indicated that he could not remember and 45% (9) of young people claimed to have never had a problem.

4.2.4 Feeling safe

73 children and young people in youth justice centres and 20 young people in the adult correctional facility responded to the survey question about whether they had ever felt unsafe while in detention.

12% (9) children and young people in youth justice centres answered yes; 73% (53) of children and young people in youth justice centres said no; and 15% (11) were unsure.

Of the nine children and young people who said that they had felt unsafe, six provided reasons. Two indicated that they had felt unsafe because they did not believe that they could rely on staff at the centre; two indicated that fear and conflict with other children and young people made them feel unsafe; one said he felt unsafe because of unfair decisions, and the other felt unsafe because he felt ripped off. Young people at one centre raised concerns about the rough and close nature of the 'pat downs' they received going to and from their units.

When young people in the adult correctional facility were asked the same questions, 25% (5) said they had felt unsafe; 65% (13) indicated that they had not felt unsafe; and 10% (2) were unsure.

All five young people, who indicated that they had felt unsafe, provided reasons for this. These included:

- physical assault by staff
- sexual assault by another inmate
- other young people knowing the details of their charges
- natural to be fearful
- feeling the system was corrupt.

4.2.5 Key concerns provided to me by children and young people

I asked children and young people to identify conditions, which impacted positively on their wellbeing and also those that had a detrimental effect. The conditions that they described matched the rights that they had identified as being important to them in the educative part of the workshop.

Again, these conditions are mainly consistent with those identified in the submission made to me by the **Queensland Office of the Public Guardian**.⁴³ During 2014-15, its community visitors provided 100 reports from visits to 17 year olds in adult corrective service facilities and recorded 174 issues arising from these visits. The most common issues recorded were in relation to:

- programs and services (37%) – provision of education, recreation and legal services
- contact (26%) – improved means and opportunity to communicate with family members, legal representatives and other persons
- transition into the community (11%) – planning for the future, including how to manage finances and find accommodation.

The conditions that children and young people identified as important to them were commensurate with their rights under the *Convention on the Rights of the Child* and all its supporting instruments, including:

- Rules for the Protection of Juveniles Deprived of their Liberty (JDL Rules or Havana Rules)⁴⁴
- Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)⁴⁵
- Guidelines for Action on Children in the Criminal Justice System (Vienna Guidelines)⁴⁶
- Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines).⁴⁷

My workshops with children and young people in detention provided them with an opportunity to speak and be heard on issues affecting them. It is crucial that they are made aware of their rights whilst detained so that they are better equipped to know what standards of care they can expect and what they are entitled to.

While the majority of children and young people indicated that they knew who to make a complaint to, it appears that more than half of them do not make complaints. Their main reasons for not making complaints include lack of follow up, and fear of retribution from staff and other children and young people.

The submission made to me by the **Queensland Family and Child Commission**⁴⁸ cited the report on the *Views of Young People in Detention Centres – Queensland 2011*.⁴⁹ In this report, the reasons that the young people in the Queensland provided for not making a complaint were consistent with those provided by the children and young people who I met with. 55% of the young people reported that they would not proceed with a complaint because they did not believe that their complaint would be taken seriously; 30% thought that they would lose privileges or be treated differently; 20% thought that they could get into trouble from staff.

The role of staff appears to be central in the decision-making processes used by children and young people when deciding if they will make a complaint.

Summary:

64% of children and young people in youth justice centres and 60% of young people in the adult facility were either not told about their rights or did not remember being told about their rights when they arrived at the centre.

Conditions identified by children and young people as impacting on their wellbeing while in detention were consistent across the jurisdictions and commensurate with their entitlements under the *Convention on the Rights of the Child*. These included contact with loved ones; education and purposeful activities; contact with professional services; access to health services; respect; access to religious and spiritual life; good nutrition; well-maintained facilities; and access to basic toiletries, clothing and shoes.

While the majority of children and young people indicated that they knew who to make a complaint to if they had a problem, survey results indicated that more than half do not make complaints. Their main reasons for not making complaints include:

- belief that making a complaint is a waste of time
- belief that their complaint will not be followed up on
- fear of negative consequences
- fear that staff would target, punish, or treat them differently if they made a complaint
- fear of being seen as a 'snitch'
- feeling or being threatened
- fear of retribution from staff or other children and young people.

The majority of children and young people across youth justice centres and the adult correctional facility indicated that they had never felt unsafe. However, some children and young people indicated that they were unsure about their feelings of safety and some indicated that they felt unsafe. Some of the reasons children and young people gave for feeling unsafe while in detention included:

- not trusting that they can rely on staff
- conflict with other children and young people
- fear of other children and young people
- unfair decisions and being ripped off
- physical or sexual assault
- feeling the system is corrupt.

The voices of children and young people in detention

If the complaint is about someone criticising you, the complaint will be seen a snitching comment in their eyes so it's safer to keep it to yourself – QLD

Coming here has made me hate the government and police more – QLD

Because they can rip us off just because they can, it's on their personal opinion – NSW

Because they expect too much – QLD

Nothing happens when you make a complaint anyway – TAS

When you first come in you can't buy certain things. Takes 3 months for shoes. Need a watch. Been here for 18 months still don't know the time – ACT

We get marked down so easily for stupid reasons – QLD

The staff will target me – NSW

[You have to] work up to get shoes / shampoo / conditioner / moisturising cream. These should be given to you. Not a privilege – ACT

I've been treated unfairly and I want to get it fixed cos its affecting me, and food and lunch should be better fresh not soggy – NT

I want to go home – NSW

4.3 Complying with the principles of the *Convention on the Rights of the Child*

4.3.1 Children and young people under the age of 18 years being held in adult correctional facilities

When Australia ratified the *Convention on the Rights of the Child* (CRC), it entered a reservation under article 37(c). The obligation under article 37(c) to separate children from adults in prison was accepted only to the extent that such imprisonment was considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia.

In all states and territories in Australia, regardless of geography and demography, young people aged 17 years can be held in adult prisons.

Each state and territory has legislation that allows children and young people to be detained in adult facilities under certain circumstances.

DLA Piper assisted with the research on children and young people under the age of 18 who were being held in adult correctional facilities in Australia for this section of the report.

A schedule of consolidated research is provided at Appendix 8. This schedule sets out the research of relevant legislative provisions in relation to each jurisdiction.

A summary of this consolidated research is provided in sections 4.3.1.2. Information provided to me in submissions and roundtables is included in section 3.5.4.3.

4.3.1.1 How many children and young people are held in adult facilities across the eight jurisdictions in Australia?

As at 30 June 2015, the number of children and young people under the age of 18 held in adult facilities in Australia were:⁵⁰

Jurisdiction	No of children held in adult facilities
Australian Capital Territory	Nil
New South Wales	Nil
Northern Territory	3
Queensland	58
South Australia	Nil
Tasmania	Nil
Victoria	Nil
Western Australia	Nil

4.3.1.2 Legislative right to detain children and young people in adult facilities and relevant legislative safeguards

(a) Australian Capital Territory

The *Children and Young People Act 2008* (ACT) defines ‘child’ as a person under 12 years of age (s 11) and a ‘young person’ as a person who is 12 years or older but is not yet an adult (s 12). Section 95 defines ‘young detainee’ and up to 21 years of age can be considered a ‘young detainee’.

Pursuant to section 166(2)(a) of the *Children and Young People Act 2008* (ACT), in placing a young detainee, the director-general must ensure that ‘a young detainee who is under 18 years old is not placed with an adult’. This is reinforced by section 20(1) of the *Human Rights Act 2004* (ACT), which states that ‘an accused child must be segregated from adults’. A number of ‘Children and Young People Policy and Procedures’ made pursuant to section 143 of the *Children and Young People Act 2008* recognise section 20, ‘the obligation that an accused child must be segregated from accused adults’, under the *Human Rights Act 2004* (ACT).

Despite the above, section 166(3) of the *Children and Young People Act 2008* (ACT) contains an exception and states ‘Subsection (2) does not apply if the director-general believes on reasonable grounds that another placement will be in the best interests of all affected detainees’. This is inconsistent with section 20(1) of the *Human Rights Act 2004* (ACT).

The legislative safeguards that exist relate to the factors that must be considered in making a decision where to place a young detainee. The detainment of a young person in an adult facility must be in his/her ‘best interests’ (s 166(3), *Children and Young People Act 2008* (ACT)). This is emphasised by section 8(1), which states that a decision-maker who is making a decision in relation to a particular child or young person ‘must regard the best interests of the child or young person as the paramount consideration’. Further, section 166(4) provides that the director-general must consider:

- the needs and special requirements of the young detainee because of the young detainee’s age, sex, emotional or psychological state, physical health, cultural background, vulnerability or any other relevant matter (s 166(4)(a))
- the desirability of the care provided to a young detainee being suited to the particular needs of the young detainee in order to protect the young detainee’s physical and emotional wellbeing (s 166(4)(c)).

In addition, the rights and protections that apply to young detainees generally (as set out in the *Children and Young People Act 2008* (ACT)) will apply regardless of whether the young detainee is detained in a youth detention facility or an adult facility.

Section 20 of the *Human Rights Act 2004* (ACT) sets out various safeguards that apply to children in the criminal process, including ‘a convicted child must be treated in a way that is appropriate for a person of the child’s age who has been convicted’ (s 20(4)).

The Department of Community Services informed me that no child/young person under 18 years had been placed in an adult facility between 2014 and 2016.⁵¹

(b) New South Wales

There are four ways that a child may be held in an adult facility under NSW legislation: if he/she commits an indictable offence; if he/she is subject to a detention order for an indictable offence and commits a detention centre offence; on remand; or on transfer.

The *Children (Criminal Proceedings) Act 1987* (NSW) defines ‘child’ as a person who is under the age of 18 years (s 3(1)).

Pursuant to section 16, Division 4 of Part 2 of the *Children (Criminal Proceedings) Act 1987* (NSW) applies to a person who: (a) has pleaded guilty to an indictable offence in, or has been found guilty or convicted of an indictable offence by, a court other than the Children’s Court; (b) was a child when the offence was committed; and (c) was under the age of 21 years when charged before the court with the offence. Under that division, a child who commits a serious children’s indictable offence (which is defined in s 3(1), *Children (Criminal Proceedings) Act 1987* (NSW)) is to be ‘dealt with according to law’ (s 17, *Children (Criminal Proceedings) Act 1987* (NSW)). Similarly, a child who commits an indictable offence (but not a serious child’s indictable offence) may be dealt with ‘according to the law’ or in accordance with Division 4 of Part 3 and the Court must have regard to various matters in deciding how the child is to be dealt with (s 18, *Children (Criminal Proceedings) Act 1987* (NSW)). In those circumstances, the Children’s Court does not have jurisdiction and the child will be dealt with ‘according to the law’ in a superior court.

Under section 28B(2) of the *Children (Detention Centres) Act 1987* (NSW), the Children’s Court may order that a person to whom section 28B applies be committed to a correction centre (i.e. an adult facility) in certain circumstances. This section applies to a person of or above the age of 16 years who is subject to a detention order for an indictable offence and who commits a detention centre offence (as defined in s 28C) while a detainee.

In relation to a child on remand, pursuant to section 9(1) of the *Children (Detention Centres) Act 1987* (NSW), he/she is to be detained in a detention centre (being a juvenile detention centre), except as otherwise provided in that Act. A child on remand may be detained in a police station until his/her first court appearance, but only if it is impracticable for him/her to be detained in a detention centre during that period (s 9(3)). In those circumstances, the child ‘shall, so far as is reasonably practicable, be detained separately from any adults detained there’ (s 9(4)).

Further, pursuant to section 28A, a child over the age of 16 years who is charged with an indictable offence (or a child over the age of 16 years who is subject to a detention order relating to an indictable offence and is charged with a detention centre offence or an indictable offence), a court may remand him/her to a correction centre (i.e. an adult facility) pending the commencement of the hearing if certain conditions are met, including the court being of the opinion that he/she is not a suitable person for detention in a detention centre.

In relation to legislative safeguards in place for children held in adult detention facilities in NSW, orders made under sections 28A or 28B of the *Children (Detention Centres) Act 1987* (NSW), must be approved by the Minister (including monthly reviews in respect of orders under s 28B).

The court must consider certain factors outlined in section 28E of the *Children (Detention Centres) Act 1987* (NSW) when deciding whether a child should be held in an adult facility. In addition, under section 41C of the *Crimes (Administration of Sentences) Act 1999* (NSW), a recommendation to transfer a juvenile inmate from a juvenile correction centre to an adult correctional centre may only be made if the Commissioner or Review Council is satisfied that one of the conditions set out in that section has been met.

Only one young person under the age of 18 years has been transferred to an adult detention facility in NSW since 2014. The submission by NSW Juvenile Justice provided a case study of this:⁵²

NSW case study

In September 2015, a juvenile detainee aged 17 years and 10 months was transferred from a juvenile justice centre to an adult correctional centre. The detainee was serving two separate control orders. Whilst in custody, the detainee committed offences of affray and malicious damage.

Juvenile Justice made an application to the court for the detainee to be bail refused and remanded to an adult correctional centre under s28A(2) and (3) of the *Children (Detention Centres) Act 1987*. This section and subsections of the Act provides that a court may remand a person under the age of 18 years, on the application of the Director General, to a correctional centre subject to the following requirement:

2(c) the court is of the opinion that the child is not a suitable person for detention in a detention centre.

Section 28E determines the matters to be taken into account in deciding whether a person is suitable for detention in a detention centre. The young person had an extensive history of violent behaviour in custody, escape custody (both Police and Juvenile Justice) and involvement in numerous security breaches, both planned and advantageous.

The detainee had submitted a request to transfer to an adult correctional centre on his eighteenth birthday.

The court ruled that the young person was not suitable for detention in a juvenile justice detention centre in accordance with the following subsections of s28E:

- 1(a) the nature of the offences the detainee was charged
- 1(b) the likelihood of danger to the community should he escape from a detention centre
- 1(c) the likelihood of danger to staff or detainees if he is detained at the detention centre concerned
- 1(d) his previous behaviour indicates that the detainee is likely to create a serious management problem in a detention centre
- 1(e) suitable accommodation is available in a correctional centre

(c) Northern Territory

The relevant legislation is the *Youth Justice Act 2005* (NT), which defines 'youth' as a person who is under 18 years of age and it can include a person who committed an offence as a youth but has since turned 18 (s 6).

Section 82 of the *Youth Justice Act 2005* (NT) sets out the powers of the Supreme Court in sentencing youths. It provides that if a youth found guilty of an offence before the Supreme Court, the Court may order that he/she be imprisoned for a period not exceeding the period of imprisonment for which that offence would be punishable if committed by an adult (s 82(1)(b)). A youth, found guilty of murder, may be sentenced by the Supreme Court to life imprisonment, or a shorter period of detention or imprisonment, as the Court considers appropriate (s 82(3)).

Under section 83, if the Court finds a charge against a youth proven, it may order, among other things, that the youth serve a term of detention or imprisonment (s 83(1)(l)). There are maximum terms of detention or imprisonment that may be ordered for youths depending on their age (s 83(2)).

In relation to children on remand, under section 65(2) of the *Youth Justice Act 2005* (NT), a youth over the age of 15 may be remanded in a custodial correction facility (i.e. an adult facility), as ordered by the Court. The youth must not, except with his/her consent, be remanded in custody for a period of more than 15 days unless he/she is committed for trial in the Supreme Court (s 65(3)).

Section 154 of the *Youth Justice Act 2005* (NT) allows the temporary accommodation of youth detainees in custodial correctional facilities (i.e. adult facilities) and applies if the superintendent of a detention centre considers it necessary to accommodate a detainee at a custodial correction facility (s 154(1)). The maximum period for the temporary accommodation at the custodial correction facility is 72 hours (s 154(2)), although that period can be extended to 10 days (s 154(3)). Detainees under the age of 15 years must not be accommodated in a custodial correction facility unless there is no practical alternative (s 154(6)).

Section 164 of the *Youth Justice Act 2005* (NT) provides for the transfer of youths who turn 18 years of age while in a detention centre to an adult facility. It provides that a detainee who turns 18 years of age while serving a sentence of detention, or on remand in custody, in a detention centre, must be transferred to a custodial correctional facility to serve the remainder of the sentence or period of remand (s 164(1)). However, the Commissioner may direct that this section 164(1) does not apply in relation to a youth in limited circumstances (s 164(4)).

The primary safeguards are contained in the principles set out in section 4 of the *Youth Justice Act 2005* (NT), including that: 'a youth should only be kept in custody for an offence (whether on arrest, in remand or under sentence) as a last resort and for the shortest appropriate period of time' (s 4(c)).

Further, section 26 of the *Youth Justice Act 2005* (NT) sets out safeguards in relation to transferring a youth to/from court (i.e. he/she must be kept apart from other persons who are not youths, so far as is reasonably practicable).

The Northern Territory Department of Correctional Services indicated in its response to my request for information that it had transferred young people to adult facilities between 2014 and 2016 but did not stipulate the number of transfers that it had made. It indicated that it had done so for the safety and security of the youth detention facility and the safety of staff and other detainees.⁵³

(d) Queensland

In marked contrast to the other states and territories, there are 58-60 children held in adult detention facilities in Queensland. This is primarily because the relevant Queensland legislation defines 'child' as a person under the age of 17 (Schedule 4, *Youth Justice Act 1992* (Qld)), rather than a person under the age of 18.

Pursuant to section 18(2) of the *Corrective Services Act 2006* (Qld), 'a prisoner who is under 18 years must be kept apart from other prisoners who are 18 years or older unless it is in the prisoner's best interests not to be kept apart'. Therefore, although there is a legislative safeguard to separate prisoners under the age of 18 years from adults, there is an exception to the safeguard where it is in the prisoner's 'best interests' not to be kept apart.

In Queensland, when a detainee is 18 and he/she is liable to serve a remaining period of 6 months or more, he/she must be transferred to an adult facility (ss 276B-276F, *Youth Justice Act 1992* (Qld)).

It is important to note that the Queensland legislation changed recently, with amendments receiving assent on 27 June 2016. Previous to these amendments, when a child detainee turned 17, he/she was transferred to an adult facility if he/she had more than six months of his/her sentence remaining. The recent amendments ended the automatic transfer of 17 year olds to adult correctional facilities and have been flagged by the Queensland Government as a sign that they are committed to moving away from treating 17 year olds as adults for the purposes of the criminal justice system.

On 7 September 2016, the Palaszczuk Government in Queensland announced that 17 year olds will no longer be placed in adult correctional facilities and a Bill was introduced to Parliament to that effect in September 2016. I very much welcome this proposed change. I understand that the necessary legislative changes will occur over the coming 12 months. I will report on its progress in my 2017 statutory report.

(e) South Australia

Pursuant to the *Young Offenders Act 1993* (SA), a charge of an offence against a youth may be laid before the Magistrates Court (rather than the Youth Court) if the charge is for a major indictable offence and the Department of Public Prosecution is of the opinion that the youth poses an appreciable risk to the safety of the community and should be dealt with in the same way as an adult (s 16).

In various situations where a youth is charged before the Youth Court as set out in section 17(3) of the *Young Offenders Act 1993* (SA), the Youth Court will deal with the charge in the same way as the Magistrate deals with a charge of a summary offence and has the same powers as the Magistrates Court. These situations include:

- the charge is for an offence of homicide, or an offence consisting of an attempt to commit, or assault with intent to commit homicide (s 17(3)(a));
- the charge is for an indictable offence and the youth, after obtaining independent legal advice, asks to be dealt with in the same way as an adult (s 17(3)(b));
- the Youth Court or Supreme Court determines, on the application of the prosecutor, that the youth should be dealt with in the same way as an adult because of the gravity of the offence, or because the offence is part of a pattern of repeated offending, in which case the Court may commit the youth for trial or sentence to the Supreme Court or District Court (s 17(3)(c)).

However, sections set out limitations on the power of the Youth Court to sentence a youth to imprisonment. Section 23(1) provides that, subject to subsection (6), the Youth Court cannot sentence a youth to imprisonment.

Pursuant to section 29 of the *Young Offenders Act 1993* (SA), where a youth committed to the Supreme Court or District Court who is found guilty, or who is committed to the Supreme Court or District Court for sentence, that court may deal with the youth as an adult (s 29(1)(a)). If the youth is found guilty of a lesser offence than the one on which he/she was committed for trial, the court cannot deal with him/her as if he/she was an adult unless the offence is an indictable (but not minor indictable) offence and the court is satisfied that the youth should be dealt with as if he/she were an adult because of the gravity of the offence (s 29(2)).

A youth who is found guilty of murder must be sentenced to imprisonment for life and must be dealt with as an adult (s 29(4), *Young Offenders Act 1993* (SA)).

Section 36 of the *Young Offenders Act 1993* (SA) states that ‘a youth who has been dealt with as an adult and sentenced to imprisonment will serve that sentence in a training centre’, subject to any contrary direction by the sentencing court (s 36(1)). When such a person turns 18, the sentencing court must review his or her sentence and either direct that the sentence continues to be served in a training centre or he or she be transferred to a prison.

The South Australian Department for Communities and Social Inclusion informed me that two young people under the age of 18 years were transferred from Adelaide Youth Training Centre to an adult facility between 2014 and 2016. Both were male and over 17 years at the time of transfer. In one of the cases the young person was involved in a number of violent incidents, which included assaults against other residents and staff, and displayed an escalating pattern of violent behaviour. In the second matter the young person was involved in repeated escape attempts and persistently inciting others to attempt to escape. In both cases, an application was made by the Chief Executive of the Department for Communities and Social Inclusion to the Judge of the Youth Court under section 63(4) of the *Young Offenders Act 1993*.⁵⁴

(f) Tasmania

Under the *Youth Justice Act 1997* (Tas), children cannot be imprisoned, because if a youth is found guilty of an offence and sentenced to imprisonment, the reference to imprisonment is taken to be a reference to detention (s 46(1)).

However, children convicted of ‘prescribed offences’ are tried in the Supreme Court, which has the discretion to sentence the child under the *Youth Justice Act 1997* (Tas) or the *Sentencing Act 1997* (Tas), which allows for imprisonment. Prescribed offences include murder, manslaughter and rape (s 3, *Youth Justice Act 1997* (Tas)).

Pursuant to section 25(3) of the *Youth Justice Act 1997* (Tas), if a youth less than 19 years old is detained in a prison, the person in charge of the prison ‘must take such steps as are reasonably practicable to keep the youth from coming into contact with any adult detained in that place’.

There are various general principles of youth justice that are to be taken into account in sentencing youths, including the following: detaining a youth in custody should only be used as a last resort and should only be for as short a time as is necessary (s 5(1)(g), *Youth Justice Act 1997* (Tas)). Further, the Court must ensure that the matter of the rehabilitation of the youth is given more weight than any other individual matter in weighing up the matters to take into account in determining what orders to make (s 47(3A)).

The Tasmanian Department of Health and Human Services reported the last time it had transferred a young person to an adult centre was in 2011. This was a young female aged 17.5 years. All options had been exhausted and the transfer occurred through a memorandum of understanding with Risdon Prison. In the period 2014-16, two young people over 18 years were transferred from a youth justice centre to an adult centre.⁵⁵

(g) Victoria

In Victoria, there are four ways in which a child could be detained in an adult detention facility: a transfer from a youth justice centre, a sentence by the Supreme or County Court, a breach of parole where the child was released to adult parole and remand from an adult facility.

The *Children, Youth and Families Act 2005* (Vic) is the primary legislation relevant to the sentencing of children in Victoria. Under that Act, the Criminal Division of the Children's Court has jurisdiction to hear all charges against children, except for offences resulting in death or attempted murder, which must be prosecuted and sentenced pursuant to the *Sentencing Act 1991* (Vic). The Children's Court has no jurisdiction to sentence a child to detention in an adult facility. Instead, children ordered to serve a custodial sentence must be detained in a youth residential centre (if aged 10 to 15 – s 410(1)) or a youth justice centre (if aged 15 to 21 – s 412(1)) rather than an adult prison. In addition, children serving custodial sentences under the *Children, Youth and Families Act 2005* (Vic) cannot be detained for more than one year in the case of an offender detained in a youth residential centre (s 411(1)), or two years in the case of an offender detained in a youth justice centre (s 413(2)). This is the case even if multiple offences have been committed.

As stated above, offences resulting in death or attempted murder must be prosecuted and sentenced pursuant to the *Sentencing Act 1991* (Vic). There is nothing in the *Sentencing Act 1991* that prevents higher courts from making an order that a child offender serve a custodial sentence in an adult prison. However, Victorian courts have acknowledged that the detention of children in adult facilities is only to be imposed on a child in 'exceptional circumstances' (*R v Mills* [1998] 4 VR 235, Batt JA).

The *Children, Youth and Families Act 2005* (Vic) allows the Youth Parole Board to transfer children under the age of 18 to adult facilities in certain circumstances (ss 464, 474, 475). Under section 464, the Youth Parole Board may direct a person aged 16 years or more who is detained in a youth justice centre to be transferred to a prison to serve the unexpired portion of the period of his or her detention as imprisonment, provided that certain conditions are met as set out in section 464(2). Under section 468, a person over 16 who is sentenced to detention in a youth justice centre may apply to be transferred to a prison to serve the unexpired portion of the period of his or her detention as imprisonment.

In relation to legislative safeguards, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) states that children on remand should be separated from adults (s 23). Further, s 17(2) states that 'every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.' Public bodies are required to give proper consideration to the provisions of this Charter when making decisions.

Further, the *Children, Youth and Families Act 2005* (Vic) empowers the Adult Parole Board to transfer a young offender to a Youth Justice Centre or a Youth Residential Centre (ss 471-472).

The *Sentence Management Manual* (the Manual) is a policy document developed by Corrections Victoria, which gives consideration to the *Corrections Act 1986* (Vic), the *Corrections Regulations 2009* (Vic), the *Charter of Human Rights and Responsibilities Act 2006* (Vic), among others, in relation to the management of prisoners in adult detention facilities in Victoria. The Manual recognises that children in adult prisons have special needs. The Manual acknowledges that additional international law and Charter provisions must be considered with respect to children.

The submission by the **Law Institute of Victoria (LIV)** informed me that Corrections Victoria and Youth Justice (Department of Health and Human Services) have introduced a number of processes that assist in monitoring the placement of young people into the adult system. 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 Youth Justice Centres (YJC), and their management plans.
- 4) There is now a requirement for Department of Health and Human Services (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.

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...The above changes do not also address the inherent conflict in the Office of Correctional Services Review (OSCR) carrying out oversight and investigation into the welfare of children and young people in prison, while being a part of Corrections in the Department of Justice & Regulation (DJR). The LIV believes OCSR processes are manifestly inadequate as an OPCAT-compliant NPM.⁵⁶

The **Victorian Commission for Children and Young People** notes that to its knowledge, no child under 18 has been transferred from youth justice to the adult system since 2012.⁵⁷

(h) Western Australia

Section 7 of the *Young Offenders Act 1994 (WA)* sets out general principles relating to juvenile justice and provides that: ‘detention of a young person in custody, if required, is to be in a facility that is suitable for a young person and at which the young person is not exposed to contact with any adult detained in the facility, although a young person who has reached the age of 16 years may be held in a prison for adults but is not to share living quarters with an adult prisoner’ (s 7(i)).

Pursuant to section 178 of the *Young Offenders Act 1994 (WA)*, a young offender who is 16 years or older who is serving a sentence of detention in a detention centre may be transferred to a prison under the *Prisons Act 1981 (WA)* to serve the un-served portion of the sentence in a prison, provided that certain conditions are met as set out in section 178(4) (including the offender’s behaviour causing a significant risk to the safety or welfare of other people).

In relation to legislative safeguards, section 120 of the *Young Offenders Act 1994 (WA)* provides that ‘the court cannot impose any custodial sentence unless it is satisfied that there is no other appropriate way for it to dispose of the matter’ (s 120(1)) and, in those circumstances, the court must give written reasons as to why it considers there is no other appropriate way for it to dispose of the matter (s 120(2)).

4.3.1.3 Views provided to me at roundtables and in submissions about the placement or transfer of children and young people under the age of 18 years to adult correctional facilities

I am encouraged that most jurisdictions are not placing those under 18 years in adult detention facilities and on the rare occasions where it does occur, there are generally safeguards in place.

I also welcome the recent changes in Queensland, which now means that 17 year olds will not be automatically transferred to an adult facility and that 17 year olds will not be placed in adult correctional facilities in the future.

There was overwhelming support at my roundtables and in submissions not to place those under 18 years of age in adult detention facilities. For example:

The **Queensland Family and Child Commission (QFCC)** submission informed me that it will:

continue to advocate for the removal of 17 year olds from adult correctional facilities and transition them into the youth justice system.⁵⁸

UNICEF Australia also emphasised its concern about under 18 year olds being placed in adult correctional facilities.⁵⁹ As did **Rebecca Wallis, Stuart Kinner and Ross Homel from Griffith University:**

these children are not provided with the same protections as those who benefit from the safeguards created by adherence to the principles underpinning the *Youth Justice Act (Qld)*.⁶⁰

The Queensland Legal Service indicated through the **Law Council of Australia:**

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.⁶¹

The **Queensland Office of the Public Guardian** told me about:

a 17 year old in an adult corrective services facility known to the OPG was previously held in the Mareeba and Cairns police watch-houses; the young person incurred five additional charges while in the Mareeba watch-house and attempted suicide three times while in the Cairns watch-house.⁶²

Recommendation 7

Australia withdraws its reservation under article 37(c) of the *Convention on the Rights of the Child* on the obligation to separate children from adults in prison.

4.3.1.4 Concern about high numbers of 18-25 year olds in adult correctional facilities

An issue that has concerned me throughout my work this year has been the high numbers of 18-25 year olds in prison. My concern was confirmed by the submission made to me by the **Law Institute of Victoria (LIV)**:

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. 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.

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.⁶³

I question the extent to which initiatives such as 'Learn or Earn' and related policies designed to keep children in school longer, may be impacting on these high numbers. Under 'Learn or Earn', young people aged 15-24 who have not finished Year 12 must be in education or training to receive income support payments.

I agree with the view of the **Australian Youth Affairs Coalition**, which argues that:

The Learn or Earn initiative – to engage young people in education or employment – is a positive goal but cannot work without a recognition that unmet individual needs act as barriers to young people's engagement in learning and employment. The Learn or Earn approach will fail for those who are most disadvantaged unless it can address the complex needs and circumstances of this vulnerable group of young people.⁶⁴

A study completed by the **Australian Youth Affairs Coalition** found that:

Young people who struggled the most to engage in learning or earning were facing the most serious and significant barriers to engagement– often leaving both home and school to escape violence, leaving school as a result of bullying and harassment from other students, mental ill-health and social problems, chronically low self-confidence and a lack of family support.⁶⁵

The **Australian Youth Affairs Coalition** suggests that:

An integrated and well-funded youth service system that offers young people intensive, tailored; flexible and long-term provision of support via a caring, relationship-based approach is critical to address the complex and unique barriers to engagement that marginalised young people face.⁶⁶

Surveys over recent years have consistently found that around 10% of eligible young people are neither earning or learning. National data shows that 10% of young people aged 15-24 were not in employment, education or training in 2005 and also 2014.⁶⁷ According to the 2011 census, Indigenous youth; youth who do not speak English as a first language; youth who require assistance with activities such as movement, self-care, and communication; as well as those in regional and remote areas are over represented in this group when compared with their representation in the total population of 15-24 year olds.

This is an area that warrants further investigation and research, especially given that young people's brains continue to develop up until at least 25 years of age. However, I am encouraged that the third action plan for the *National Framework for Protecting Australia's Children (2009-2020)* is targeting mentoring, education and employment strategies for at risk young people (including care leavers) through the Commonwealth Government's recently announced *Youth Employment Strategy* and related initiatives outlined in the 2016 budget.

Recommendation 8

The Australian Government commissions research which investigates the pathways, experiences and needs of young people aged 18-25 years in the prison system.

Summary

Each state and territory has legislation that allows children and young people to be detained in adult facilities under certain circumstances. However, most jurisdictions do not place those under 18 years in adult detention facilities, and on the rare occasions where it does occur, there are some safeguards in place.

As at 30 June 2015, 58-60 children and young people under the age of 18 were being held in adult facilities in Queensland, and an additional 3 were being held in adult facilities in the Northern Territory.⁶⁸

However, recent changes in the legislation in Queensland means that 17 year olds will no longer be automatically transferred to an adult facility.

Young people aged 18-25 appear to be especially vulnerable to entering the prison system. Research is required to understand the pathways and experiences of these young people, as well as the possible impact of government policies on their trajectory.

4.3.2 Age of criminal responsibility

King & Wood Mallesons assisted with the research relating to the age of criminal responsibility in Australia.

Article 40 sets out the rights of children and young people who have allegedly committed a crime, been accused of a crime or found guilty of committing a crime. It protects the right of children and young people to a fair trial.

Article 40(1) provides that laws cannot retrospectively apply to children's and young people's actions.

Article 40(2) provides the following procedural guarantees for children and young people who have allegedly committed a crime, been accused of a crime, or found guilty of a crime:

- the presumption of innocence
- the right to be informed of charges against them and to have assistance in preparing and presenting his or her defence
- the right to have the matter determined by a judicial body according to law, in the presence of legal or other assistance
- the right not to be compelled to give evidence or confess and the right to examine witnesses
- the right of appeal
- the right to access an interpreter
- the right to privacy during the proceedings.

This is consistent with the protections articulated in article 14 of the *International Covenant on Civil and Political Rights*.

Article 40(3)(a) of the CRC requires States to set a minimum age of criminal responsibility, below which children and young people shall be presumed to be incapable of infringing the penal law. This entails a specified age below which children and young people cannot be formally charged and held responsible for their actions under criminal law, even if they commit an offence.⁶⁹

The CRC itself does not specify the minimum age of criminal responsibility. However the Committee on the Rights of the Child recommends 12 years of age should be the absolute minimum age.⁷⁰

The Beijing Rules stipulate that the determined age should recognise emotional, mental and intellectual maturity.⁷¹

The Committee on the Rights of the Child has noted Australia's non-compliance with this standard, as our current minimum age is set at 10 years, and recommended Australia raise its minimum age of criminal responsibility.⁷²

Article 40(4) of the CRC provides that alternatives to detention should be made available; including guidance and supervision orders; counselling; probation; foster care; and education and vocational training programs.

4.3.2.1 Current Australian legal landscape

(a) The age of criminal responsibility

In each Australian state and territory, the law provides a conclusive presumption that a child under 10 years of age cannot commit an offence on the basis that they are not criminally responsible for that offence.⁷³

The minimum age of criminal responsibility in Australia is comparatively low compared with other countries. For example, the minimum age is 12 years in Canada and the Netherlands; 13 years in France; 14 years in Austria, Germany, Italy, and many Eastern European countries; 15 years in Denmark, Finland, Iceland, Norway and Sweden; 16 years in Portugal, and 18 years in Belgium and Luxembourg.⁷⁴

An international study of 90 countries revealed that 68 per cent had a minimum criminal responsibility age of 12 years or higher, with the most common minimum age of criminal responsibility being 14 years.⁷⁵

The minimum age in Australia is intended to be mitigated by the principle of *doli incapax*, which assumes that children aged 10 to 14 years are ‘criminally incapable’ unless proven otherwise.⁷⁶

The wisdom of protecting children against the full rigour of the criminal law is beyond argument, the difficulty lies in determining when and under what circumstances the protection should be removed.⁷⁷

The submission provided to me by the **Australian Red Cross** acknowledged:

that determining the age of criminal responsibility involves complex legal, social, psychological and humanitarian considerations.⁷⁸

(b) *Doli incapax*

Some Australian jurisdictions have expressly legislated to provide for the presumption of *doli incapax* while others, for example, New South Wales, Victoria and South Australia use the common law presumption, which is on the same terms.⁷⁹

The principle of *doli incapax*⁸⁰ refers to age range between 10 and 14 years, during which the law recognises a rebuttable presumption that a child is not criminally responsible. Whether this is the case is a question of fact, which is to be disproved, or rebutted, by the prosecution through leading evidence that the child ‘knows’ that his or her conduct is ‘wrong’,⁸¹ or that which he or she ‘ought not to do or make’.⁸²

To rebut the presumption, it must be shown that the child knew that what he/she was doing was ‘seriously wrong’ as opposed to being merely ‘naughty or mischievous’.⁸³

The standard is that of the ‘ordinary man’, such that it must be proved that the child ‘knew it was wrong according to the ordinary principles of reasonable men’.⁸⁴

The strength of the presumption, and the level of evidence required, depends on how close the child is to 10 or 14.⁸⁵ As an element of the prosecution’s case,⁸⁶ this must be proved ‘beyond reasonable doubt’ and the evidence must be clear and positive.⁸⁷

Finally, it is not sufficient to provide evidence merely of the commission of the act, ‘however horrifying or obviously wrong it may be’.⁸⁸ Rather it must be separately proved, among other things, ‘by the circumstances attending the act, the manner in which it was done, and evidence as to the nature and disposition of the child concerned’.⁸⁹

It was reinforced to me in submissions and also at my roundtables that while it is desirable that the age of criminal responsibility be raised, the principle of *doli incapax* must be retained. For example:

The **Law Council of Australia** told me that:

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 CRC.⁹⁰

The **Human Rights Law Centre** argued that:

The minimum age of criminal responsibility should be raised from 10 to 12 years with a system of graduated criminal responsibility through the maintenance of the principle of *doli incapax* for young people aged 12-14 years.⁹¹

4.3.2.2 Raising the minimum age of criminal responsibility in Australia

The Committee on the Rights of the Child considers that 12 years of age is the lowest internationally acceptable age for criminal responsibility. It encourages raising the age to 14 or 16 years.⁹²

The Committee on the Rights of the Child has recommended Australia raise its minimum age of criminal responsibility.

In October 2015, to commemorate International Children's Week, Jesuit Social Services, on behalf of 34 other organisations wrote to the Attorneys-General in each jurisdiction urging them to:

Reform the law in each of your jurisdictions to increase the age of criminal responsibility to 12 years... we also urge the maintenance of the *doli incapax* transitional protection for children as they develop the necessary cognitive skills, and extension of this protection to children under 15 years.⁹³

The letter and a list of the organisations is provided at Appendix 9.

Reasons for raising the age of criminal responsibility include that:

- Many children involved in the criminal justice system come from disadvantaged backgrounds and have complex needs that are better addressed outside the criminal justice system.⁹⁴
- It would help to decrease the rate of overrepresentation of Indigenous children in prison.⁹⁵ In 2014-15, Indigenous 10 and 11 year olds made up 74 per cent of all 10 and 11 year olds in detention in Australia (34 out of 46).⁹⁶
- Research into brain development is inconsistent with the current age of criminal responsibility of 10 years. 10 and 11 year olds have not developed the requisite level of maturity to form the necessary intent for full criminal responsibility. For example:

The maturation of the prefrontal cortex occurs gradually over adolescence and is near completion by 18 years. This protracted development occurs alongside greater reactivity of the socioemotional systems of the brain and a general increase in dopaminergic activity associated with heightened sensitivity to reward. This creates a window of potential vulnerability in the early to mid-adolescent period during which the likelihood of impulsivity, sensation-seeking and risk-taking behaviours is raised.⁹⁷

- Children under the age of 12 years lack the capacity to properly engage in the criminal justice system, resulting in a propensity to accept a plea bargain, give false confessions or fail to keep track of court proceedings.⁹⁸
- Studies have shown that the younger children are when they encounter the justice system, the more likely they are to reoffend. The Australian Institute of Health and Welfare identified that children who were first subject to supervision under the youth justice system due to offending between 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).⁹⁹
- It will bring Australia in line with its obligations under the *Convention on the Rights of the Child*.

These reasons were echoed in many of the submissions made to me and also in discussions held at my roundtables.

UNICEF Australia submits that:

all measures that can address underlying causative factors of children coming into conflict with the law and otherwise divert children away from judicial processes should be fully utilised. In Australia, this should include raising the minimum age of criminal responsibility to 12 years or higher.¹⁰⁰

The **Human Rights Law Centre** suggests that:

The complex needs of this vulnerable cohort of children and young people should be addressed through developmentally appropriate early intervention and prevention programs, rather than through criminal justice intervention.¹⁰¹

The **Law Society of New South Wales** argues:

The Law Society does not support the current age of responsibility. Research into brain development and a child's rights perspective is inconsistent with an age of criminal responsibility of ten years old. The Law Society fails to see how a primary school aged child has the capacity to form the necessary intent. The Law Society submits that the age of responsibility should be a minimum of 13 years (when the child is in high school rather than primary school).¹⁰²

The Commissioner for Aboriginal Children and Young People at the **Victorian Commission for Children and Young People** reports that:

the low age of criminal responsibility has a significant adverse impact on Aboriginal children and young people.¹⁰³

Amnesty International Australia maintains that:

10 and 11 year olds have not developed to the requisite level of maturity to be held criminally responsible, and legislation in Australia is out of step with international standards. It is worth noting the disproportionate impact the low age of criminal responsibility has on Indigenous children than their non-Indigenous peers.¹⁰⁴

The **Public Interest Advocacy Centre (PIAC)** told me that:

The age of criminal responsibility presents 'a primary point at which the Indigenous youth can be kept out of this system'. Raising the age of criminal responsibility would assist in reducing the over-representation of Aboriginal and Torres Strait Islander children in custody.¹⁰⁵

The **South Australian Council of Social Service** indicated that it was particularly concerned about the growth in numbers of children aged 10-12 years being admitted to youth justice centres in South Australia.¹⁰⁶

The submission by the Law Faculty at **Monash University** (Associate Professor Bronwyn Naylor) endorses:

the recommendation that the age of criminal responsibility be raised to 12 years as a starting point and consider raising it beyond 12 years in due course.¹⁰⁷

The **North Australian Aboriginal Justice Agency (NAAJA)** and the **Central Australian Aboriginal Legal Aid Service (CAALAS)** stated:

The current minimum age of criminal responsibility in Australia is out of touch with international law, and evidence about children's brain development clearly demonstrates that children under 12 years lack the necessary capacities for full criminal responsibility.¹⁰⁸

Recommendation 9

The age of criminal responsibility should be raised from 10 years to 12 years in the first instance, with preservation of *doli incapax*.

Ages of criminal responsibility in Canada, Ireland, Scotland and Luxembourg

Canada, Scotland and Ireland have similar socioeconomic profiles but their approach to childhood criminal responsibility demonstrates the difficulties in balancing the competing tensions faced by the legislature when dealing with the vexed question of criminal responsibility and children.¹⁰⁹

Canada has raised the minimum age from 10 to 12, however, as part of the 'balance', it has removed the rebuttable presumption of *doli incapax* for those aged 12 and 13. In effect, the changes have reduced the protection available to young people contrary to the recommendations of the Committee on the Rights of the Child.¹¹⁰

In contrast, **Ireland** has both raised the minimum age to 12 and retained the rebuttable presumption of *doli incapax* for ages 12 to 14.¹¹¹

In **Scotland** the age of criminal responsibility has remained at 8, however the age at which a child can be prosecuted is 12. If a child under 12 is behaving in such a way that they are at risk or vulnerable, for example, assaulting others or stealing, they may be referred to a social worker and ultimately a children's hearing which can make a decision about how to help the child and their family. The gap between the minimum of age of criminal liability and the minimum age of prosecution means that criminal offences committed between the age of 8 and 12 may be included on a child's criminal record even though a prosecution may not occur.¹¹² Additionally, youth under 16 cannot be prosecuted except on instruction of the Lord Advocate.¹¹³ Therefore, the prosecution of children under 16 years of age is very rare in Scotland and most young people are dealt with through the civil Children's Hearing System.

Luxembourg does not have the concept of *doli incapax* and has set the age of criminal responsibility at 18. Child suspects or offenders are not considered as offenders but as children in need of protection and help and the formal criminal law does not apply.

Despite this, in limited circumstances a youth aged 16-18 may, by way of an order by a 'youth judge', be transferred to formal criminal jurisdictions where it is decided that protection or education measures are not appropriate.¹¹⁴

Summary

The Committee on the Rights of the Child has recommended Australia raise its minimum age of criminal responsibility. This will bring Australia in line with its obligations under the *Convention on the Rights of the Child*.¹¹⁵

In each Australian state and territory, the age of criminal responsibility is 10 years,¹¹⁶ which in comparison to other countries is low. An international study of 90 countries revealed that 68 per cent had a minimum criminal responsibility age of 12 years or higher, with the most common minimum age of criminal responsibility being 14 years.¹¹⁷

Reasons for raising the age of criminal responsibility include:

- the complex needs of many children involved in the criminal justice system are better addressed outside the criminal justice system¹¹⁸
- it could help to decrease the rate of overrepresentation of Indigenous children in prison¹¹⁹
- research into brain development is inconsistent with the current age of criminal responsibility of 10 years¹²⁰
- children under the age of 12 lack the capacity to properly engage in the criminal justice system¹²¹
- studies have shown that the younger children are when they encounter the justice system, the more likely they are to reoffend.¹²²

In Australia, the minimum age is intended to be mitigated by the principle of *doli incapax*, which assumes that children aged 10 to 14 years are 'criminally incapable' unless proven otherwise.¹²³

Submissions and participants at my roundtables stated that while the age of criminal responsibility should be raised, the principle of *doli incapax* must be retained.

4.3.3 Optional Protocol to the *Convention on the Rights of the Child* on a Communications Procedure (the third Optional Protocol)

The third Optional Protocol was raised at some of my roundtables and also in some of the submissions made to me about OPCAT and youth justice.

The third Optional Protocol provides that individual children can submit complaints to the Committee on the Rights of the Child about specific violations of their rights under the CRC, the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (OPSC); and the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (OPAC).

The initial public consultation on the third Optional Protocol by the Australian Government ended on 10 April 2012. There were 19 submissions made and these mainly supported ratification. The Australian Human Rights Commission first wrote to the Australian Government in support of the third Optional Protocol in April 2012. The Committee on the Rights of the Child also encouraged Australia, in its Concluding Observations in 2012, to accede to the third Optional Protocol.

In my 2013 report to Parliament I recommended that Australia ratify the *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure* (the third Optional Protocol). When I followed up on the progress of this recommendation in 2014 and 2015, the Australian Government informed me that it had not yet formed a position on the third Optional Protocol.

Ratification of the third Optional Protocol would provide new protections for children. It would mean that children's rights are given a similar level of accountability that exists for adults, such as those under the *International Covenant on Civil and Political Rights* (ICCPR), *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW), *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), *Convention on the Elimination of Racial Discrimination* (CERD) and the *Convention on the Rights of People with Disabilities* (CRPD).

It would also establish the means for children to make complaints about breaches of their rights across the whole spectrum of rights under the CRC. Children cannot currently complain under the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), as Australia is not a party to its communication mechanism.

Before a child or their representative could make a complaint to the Committee on the Rights of the Child under the third Optional Protocol, he or she would be required to have exhausted domestic remedies that are available. This is one of the main implications of ratification, in that it would ensure that children have improved access to domestic complaints systems and processes.

In its submission to me, **UNICEF Australia** recommended that:

the Australian Commonwealth Government ratify the Optional Protocol to the *Convention on the Rights of the Child* on a Communications Procedure.¹²⁴

The **Law Council of Australia** made a similar recommendation:

ratifying the Third Optional Protocol will create an incentive to develop proper domestic institutions for dealing with claims by children of rights violations under the CRC, as domestic remedies would need to be exhausted before a complaint is made under the Third Optional Protocol.¹²⁵

Ratification of the third Optional Protocol at the same time as ratifying the OPCAT would be eminently sensible given their mutual compatibility.¹²⁶

Recommendation 10

That the Australian Government signs and ratifies *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure* (OPCP).

Summary

The third Optional Protocol on the *Convention on the Rights of the Child* provides that individual children can submit complaints to the Committee on the Rights of the Child about specific violations of their rights.

Ratification of the third Optional Protocol would provide new protections for children and would mean that children's rights are given a similar level of accountability that exists for other rights, such as those under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).

It would also establish the means for children to make complaints about breaches of their rights across the whole spectrum of rights under the CRC after exhausting the domestic remedies available.

The Committee on the Rights of the Child encouraged Australia, in its Concluding Observations in 2012, to accede to the third Optional Protocol.

4.4 Conclusion

My primary work this year has been to examine how the special needs and interests of children and young people under the age of 18 in youth justice detention centres, and those under 18 years detained in adult detention facilities, could be considered and monitored under the *Optional Protocol to the Convention against Torture* (OPCAT).¹²⁷

It has also included an overview of the human rights protections that currently exist for children and young people; consideration of the conditions that permit children and young people under 18 years to be detained in adult correctional facilities; and an examination of the current age of criminal responsibility in Australia. I also examined national data currently being collected on these children and young people, the potential for expanded data items, and the need for it to become more outcome focused.

My work this year has been particularly timely given that in July 2016, Australians were confronted by shocking CCTV footage of children being mistreated in the Don Dale Youth Detention Centre in Darwin. Footage and stories from other facilities, including Cleveland in Queensland, have since followed. I hope that my work will be of assistance to the Royal Commission into the Detention and Protection of Children in the Northern Territory which is due to report by 31 March 2017, to the inquiry currently underway in Queensland, and to the considerations of the Council of Australian Governments in this area.

The OPCAT provides a positive framework to better safeguard the rights of children and young people who are detained. While many jurisdictions already meet some of the National Preventive Mechanism (NPM) criteria, no jurisdiction meets all of the NPM criteria. Using the OPCAT as the basis for best practice provides the means by which continuous improvement can be undertaken overtime. I recommend that the Australian Government ratify the OPCAT as soon as possible.

The significant **overrepresentation of Indigenous children and young people in youth justice detention** must be a particular priority if we are to give all Australian children the best possible start in life.

In its submission to me, **UNICEF Australia** recommended that:

the Council of Australian Governments resource a national strategy to reduce the over-representation of Aboriginal and Torres Strait Islander children and adults in detention under the Close the Gap Framework, including:

- a. Strategies to address underlying social and economic causes of children and young people coming into contact with the criminal justice system.
- b. Establishing justice targets and strategies aimed at significantly reducing the number of Aboriginal and Torres Strait Islander children and young people in detention.
- c. Developing a commitment to working in genuine partnership with Aboriginal and Torres Strait Islander communities, leaders and representative bodies.
- d. Investing sufficient resources to ensure practical implementation.¹²⁸

I support this recommendation and have included it in my recommendations for 2016.

I also advocate that justice reinvestment be considered as a strategy for addressing the underlying social and economic causes of children and young people coming into contact with the youth justice system.

Concerns about mandatory sentencing and its conflicting interaction with the human rights of children and young people was also raised with me at roundtables and in submissions. For example, the **Western Australian Commissioner for Children and Young People** told me that:

WA's mandatory minimum sentencing laws arguably contribute to the comparatively high rates of detention and the over-representation of young Aboriginal people in Banksia Hill. Some offences in WA...mandates a young person to a custodial sentence under the Criminal Code Act 1913 (WA)... This overrides and contradicts both the Young Offenders Act 1994 (WA) and the CRC that require a custodial sentence to be used only as a final option and for the shortest possible time.¹²⁹

I recommend that mandatory sentencing for children and young people should be discontinued in jurisdictions currently using it.

I hope that my work in the context of youth justice in 2016 contributes to the positive development and wellbeing of children and young people and assists to ensure that their human rights and best interests are the clear focus of national discussions.

I look forward to reporting on the progress of recommendations in my next statutory report to the federal Parliament about the human rights of children and young people in Australia.

Recommendation 11

That the Council of Australian Governments resource a national strategy to reduce the over-representation of Aboriginal and Torres Strait Islander children and adults in detention under the Close the Gap Framework, including:

- a) Strategies to address underlying social and economic causes of children and young people coming into contact with the criminal justice system.
- b) Establishing justice targets and strategies aimed at significantly reducing the number of Aboriginal and Torres Strait Islander children and young people in detention.
- c) Developing a commitment to working in genuine partnership with Aboriginal and Torres Strait Islander communities, leaders and representative bodies
- d) Investing sufficient resources to ensure practical implementation.

Recommendation 12

Mandatory sentencing for children and young people should be discontinued in all jurisdictions that are currently using it.

4.5 Acknowledgments

I sincerely thank the following people and organisations for their support and contribution to my work:

- The former Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr Mick Gooda.
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- The federal Department of Social Services who hosted my roundtable in Adelaide.
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-
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 - The Australian Institute of Health and Welfare.
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 - Everyone who took the time to attend my roundtables and make written submissions (see Appendix 4 and 5).
 - Young people detained in youth justice centres and those detained in the adult facility who participated in workshops and completed a survey, and/or submitted a piece of art to my competition.

4.6 Recommendations

Recommendation 1: That the Australian Government ratify OPCAT as soon as possible. Further, that at the time of ratification the Government issues a standing invitation to the UN Subcommittee on the Prevention of Torture.

Recommendation 2: That all jurisdictions commence stocktakes of how their existing systems of monitoring and inspection meet the criteria laid out in the OPCAT, and amend their legislative frameworks accordingly.

Recommendation 3: That the Australian Institute of Health and Welfare (AIHW) and the Australasian Juvenile Justice Administrators (AJJA) work together in 2017 to develop a reporting framework to meet OPCAT requirements over time.

Recommendation 4: That the Australian Institute of Health and Welfare (AIHW) and the Australasian Juvenile Justice Administrators (AJJA) work together in 2017 to generate additional publically available data on characteristics of detainees, their treatment and conditions.

Recommendation 5: That the Productivity Commission, the Australian Institute of Health and Welfare (AIHW) and the Australasian Juvenile Justice Administrators (AJJA) work together in 2017 to progress the collection of 'outcome' based data for children and young people in the youth justice system.

Recommendation 6: That the Australian Government commissions research which explores the processes and contexts that support children and young people's appreciation of their rights and responsibilities in institutional settings.

Recommendation 7: That Australia withdraws its reservation under article 37(c) of the *Convention on the Rights of the Child* on the obligation to separate children from adults in prison.

Recommendation 8: That the Australian Government commissions research which investigates the pathways, experiences and needs of young people aged 18-25 years in the prison system.

Recommendation 9: That the age of criminal responsibility should be raised from 10 years to 12 years in the first instance, with preservation of *doli incapax*.

Recommendation 10: That the Australian Government ratifies the *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure* (OPCP).

Recommendation 11: That the Council of Australian Governments resource a national strategy to reduce the over-representation of Aboriginal and Torres Strait Islander children and adults in detention under the Close the Gap Framework, including:

- a) Strategies to address underlying social and economic causes of children and young people coming into contact with the criminal justice system.
- b) Establishing justice targets and strategies aimed at significantly reducing the number of Aboriginal and Torres Strait Islander children and young people in detention.
- c) Developing a commitment to working in genuine partnership with Aboriginal and Torres Strait Islander communities, leaders and representative bodies.
- d) Investing sufficient resources to ensure practical implementation.

Recommendation 12: That mandatory sentencing for children and young people should be discontinued in all jurisdictions that are currently using it.

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A selection of photos from the OPCAT and youth justice roundtables held throughout Australia in 2016.

Appendix 1: Speaking engagements

Date	Engagement	Location
06.07.2015	2015/16 UNICEF Young Ambassador Training	Sydney, NSW
21.07.2016	Community Reference Group, Royal Children's Hospital Melbourne	Melbourne, VIC
28.07.2015	National Suicide Prevention Conference	Canberra, ACT
30.07.2015	Launch of Women with Disabilities Australia Youth Network	Sydney, NSW
06.08.2015	The 2015 Beyond Tomorrow Conference (Early Childhood Management Services)	Melbourne, VIC
17.08.2015	Launch of the <i>Taking Us Seriously</i> Report (Institute of Child Protection Studies, Australian Catholic University)	Canberra, ACT
18.08.2015	Launch of LegalAid's <i>Best for Kids</i> resource	Sydney, NSW
25.08.2015	Australian Catholic University Blackfriars Lecture	Canberra, ACT
08.09.2015	National Association for Prevention of Child Abuse and Neglect Child Protection Week Breakfast	Hobart, TAS
11.09.2015	Red Cross NSW Child Protection Week Professional Development Seminar	Sydney, NSW
15.09.2015	2015 SNAICC National Conference	Perth, WA
01.10.2015	Good Grief Conference	Sydney, NSW
02.10.2015	CREATE Foundation Biannual Conference	Brisbane, QLD
28.10.2015	BestChance Forum	Melbourne, VIC
29.10.2015	Early Childhood Conference	Sydney, NSW
16.11.2015	Hunter Institute of Mental Health Forum	Mereweather, NSW
17.11.2015	Children and Youth Research Centre Symposium	Brisbane, QLD
20.11.2015	Rights of the Child Consumer Conference	Sydney, NSW
26.11.2015	Highwater Theatre <i>Anchoring the Wind...Because I Matter</i> Opening Night	Wodonga, VIC
03.12.2015	SCEGGS Darlinghurst Speech Night	Sydney, NSW
07.12.2015	Launch of the <i>Children's Rights Report 2015</i>	Sydney, NSW
08.12.2015	SACOSS Child Protection Symposium	Adelaide, SA

Date	Engagement	Location
25.02.2016	ANROWS Inaugural National Research Conference on Violence against Women and their Children	Melbourne, VIC
25.02.2016	National Child Wellbeing Symposium	Canberra, ACT
16.03.2016	WA Educational Leaders Forum	Perth, WA
13.04.2016	Launch of Youth Homelessness Matters Day	Sydney, NSW
17.04.2016	Caring for Country Kids Conference	Alice Springs, NT
20.04.2016	Launch of Crinkling newspaper	Sydney, NSW
27.04.2016	The Women's Club – Justice and Democracy Circle Meeting	Sydney, NSW
10.06.2016	RightsTalk – Launch of the Australian Child Right's Progress Report	AHRC, Sydney, NSW

Appendix 2: Face to face meetings and teleconferences about issues affecting children and young people in Australia

Date	Meeting	Location
08.07.2015	The Hon Chief Justice Diana Bryant AO and His Honour Chief Judge John Pascoe AO CVO	AHRC, NSW
08.07.2015	Lara Purdy, Family Policy & Programmes Branch Manager and Flora Carapellucci, Children's Policy Branch Manager, Department of Social Services	AHRC NSW
08.07.2015	National Forum for Protecting Australia's Children	AHRC, NSW
09.07.2015	Rosie Batty, 2015 Australian of the Year	AHRC, NSW
15.07.2015	Chris Tanti, Chief Executive Officer, Headspace	AHRC, NSW
16.07.2015	Jennifer Evans, National Project Lead Child Protection, Australian Red Cross	AHRC, NSW
21.07.2015	Kristy McKellar, Advocate	Melbourne, VIC
23.07.2015	Alastair MacGibbon, E-Safety Commissioner	AHRC, NSW
23.07.2015	Online Safety Consultative Working Group	Sydney, NSW
23.07.2015	National Forum for Protecting Australia's Children	AHRC, NSW
27.07.2015	Roslyn Baxter, Families Group Manager, Department of Social Services	Canberra, ACT
28.07.2015	Australian Council of Human Rights Agencies (ACHRA)	Hobart, TAS
30.07.2015	Professor Carla Rinaldi, Reggio Emilia International	Adelaide, SA
31.07.2015	Fiona Arney, Director, Australian Centre for Child Protection, University of South Australia	Adelaide, SA
06.08.2015	Paul Linossier, Chief Executive Officer, OurWatch	Melbourne, VIC
06.08.2015	Professor Cathy Humphries, University of Melbourne	Melbourne, VIC
19.08.2015	Tom Corrie, Chief Executive Officer and Michelle Emeleus, Principal Solicitor, Queensland Indigenous Family Violence Legal Service	AHRC, NSW
21.08.2015	Department of Immigration and Border Protection Roundtable	AHRC, NSW
24.08.2015	Aboriginal and Torres Strait Islander Suicide Prevention Evaluation Project (ATSISPEP) Committee Meeting	Canberra, ACT
25.08.2015	Brian Babington, Chief Executive Officer, Families Australia	Canberra, ACT
25.08.2015	Dr Diane Jackson, Chief Executive Officer, ARACY	Canberra, ACT
28.08.2015	Mick Gooda, Social Justice Commissioner, Australian Human Rights Commissioner; Department of Social Services; SNAICC	AHRC, NSW
01.09.2015	National Forum for Protecting Australia's Children	Melbourne, VIC

Date	Meeting	Location
02.09.2015	Senator Zed Seselja, Senator for Australian Capital Territory	Canberra, ACT
07.09.2015	The Hon Chief Justice Diana Bryant AO and His Honour Chief Judge John Pascoe AO CVO	AHRC, NSW
09.09.2015	Dr Rae Kaspiw, Senior Research Fellow, Australian Institute of Family Studies	AHRC, NSW
09.09.2015	Roslyn Baxter, Families Group Manager, Department of Social Services	AHRC, NSW
16.09.2015	Associate Professor Roz Walker, Principal Research Fellow, Centre for Research Excellence in Aboriginal Health and Wellbeing and Telethon Institute	Perth, WA
16.09.2015	Professor Pat Dudgeon, School of Indigenous Studies and Professor Jill Milroy, Poche Centre for Indigenous Health, University of Western Australia	Perth, WA
16.09.2015	Ross Wortham, Regional Manager Perth, Save the Children	Perth, WA
22.09.2015	Jan McClelland and Associates Pty Ltd and Gina Andrews, Acting Team Leader, Policy and Research, Royal Commission into Institutional Responses to Child Sexual Abuse	AHRC, NSW
22.09.2015	Professor Anne Graham, Foundation Director, Centre for Children and Young People, Southern Cross University	AHRC, NSW
02.10.2015	Senator Claire Moore, Senator for Queensland	Brisbane, QLD
07.10.2015	Aboriginal and Torres Strait Islander Suicide Prevention Evaluation Project (ATSISPEP) Committee Meeting	Canberra, ACT
12.10.2015	AHRC Early Childhood Project Reference Group meeting	AHRC, NSW
15.10.2015	Association of Children's Welfare Agencies (ACWA) Annual General Meeting	Sydney, NSW
16.10.2015	Anne Hollonds, Director, Australian Institute of Family Studies	Melbourne, VIC
19.10.2015	The Hon Richard Marles MP, Shadow Minister for Immigration and Border Protection (ALP)	Canberra, ACT
19.10.2015	Paul Jelfs, General Manager, Population & Social Statistics Division and Mellissa Gare, Director, Social, Household Surveys Branch, Australian Bureau of Statistics	Canberra, ACT
20.10.2015	Dr Susan Cochrane, Advisor, Office of the Attorney-General	Canberra ACT
26.10.2015	Centre of Research Excellence in Suicide Prevention (CRESP)	AHRC, NSW

Appendix 2: Face to face meetings and teleconferences about issues affecting children and young people in Australia

Date	Meeting	Location
02.11.2015	Flora Carapellucci, Children’s Policy Branch Manager, Department of Social Services and Professor Anne Graham, Foundation Director, Centre for Children and Young People, Southern Cross University	AHRC, NSW
04.11.2015	Tarina Russell, Policy and Research Officer, Royal Commission into Institutional Responses in Child Sexual Abuse	AHRC,NSW
13.11.2015	Australian Council of Human Rights Agencies (ACHRA)	AHRC, NSW
16.11.2015	Anne Hollonds, Director, Australian Institute of Family Studies (AIFS)	AHRC, NSW
16.11.2015	Professor Elizabeth Handsley, Flinders Law School, Flinders University and Barbara Biggins, Honorary Chief Executive officer, Australian Council on Children and the Media (ACMA)	AHRC, NSW
18.11.2015	Cheryl Vardon, Principal Commissioner, Queensland Family and Child Commission	Brisbane, QLD
23.11.2015	Anne Hollonds, Director, Australian Institute of Family Studies (AIFS); Dr Susan Cochrane, Advisor, Office of the Attorney-General; and Tamsyn Harvey, Assistant Secretary, Attorney-General’s Department	Canberra, ACT
24.11.2015	Senator Carol Brown, Senator for Tasmania	Canberra, ACT
25.11.2015	The Hon Kelly O’Dwyer MP, Minister for Small Business	Canberra, ACT
25.11.2015	Australian Children Commissioner and Guardians (ACCG)	Canberra, ACT
01.12.2015	Online Safety Consultative Working Group (OSCWG)	Sydney, NSW
04.12.2015	National Forum for Protecting Australia’s Children	Melbourne, VIC
17.12.2015	Naomi Bailey, National Manager, Partnerships and Special Projects, 1800 RESPECT	Sydney, NSW
17.12.2015	Noelle Hudson, National Policy and Advocacy Manager, CREATE Foundation	AHRC, NSW
22.12.2015	Sam Page, Chief Executive Officer, Early Childhood Australia	AHRC, NSW
12.01.2016	COAG Advisory Council on Reducing Violence against Women and their Children	AHRC, NSW
13.01.2016	Alastair MacGibbon, E-Safety Commissioner	AHRC, NSW
14.01.2016	Saffron Howden, Founder, Crinkling Newspaper	AHRC, NSW
15.01.2016	Carol J Vale, Murawin Indigenous Consultancy	AHRC, NSW
20.01.2016	Anne Hollonds, Director, Australian Institute of Family Studies	Melbourne, VIC

Date	Meeting	Location
20.01.2016	Sandie de Wolf, Chief Executive Officer, Berry Street	Melbourne, VIC
21.01.2016	Ron Mell, Chief Executive Officer, YMCA Australia	Melbourne, VIC
21.01.2016	Elizabeth Mildwater, Director of Australian Programs, Save The Children Australia	Melbourne, VIC
21.01.2016	Kate Jenkins, Victorian Equal Opportunity and Human Rights Commissioner	Melbourne, VIC
22.01.2016	Fay Robinson, Consultant with the Luke Batty Foundation	AHRC, NSW
28.01.2016	Stephanie Gottlib, Chief Executive Officer, Children with Disabilities Australia	AHRC, NSW
02.02.2016	Nicole Breeze, Director Policy & Advocacy and Tara Broughan, Advocacy Manager, UNICEF Australia	AHRC, NSW
03.02.2016	James Smith, CEO Edentiti and Geoff Stockton, Managing Director, The PRM Group	AHRC, NSW
05.02.2016	Gail Erskine, President, Children's Book Council of Australia NSW Branch	AHRC, NSW
09.02.2016	Dr Mark Collis, Executive Director, ACT Office for Children, Youth & Family Support	Canberra, ACT
09.02.2016	Andrew Kettle, Acting Director; Mark Cooper-Stanbury, Head of Disability Information Development; Fadwa Al-Yaman, Head of Indigenous and Children's Group at Australian Institute of Health and Wellbeing	Canberra, ACT
09.02.2016	Gordon Gregory, Chief Executive Officer, National Rural Health Alliance	Canberra, ACT
09.02.2016	Senator the Hon Jacinta Collins, Labor Senator for Victoria	Canberra, ACT
10.02.2016	Paul Pfitzer, Acting Assistant Secretary, Human Rights Policy Branch, Attorney-General's Department	Canberra, ACT
12.02.2016	Colin Neave, Commonwealth Ombudsman	Canberra, ACT
15.02.2016	Naomi Bailey, National Manager, Partnerships and Special Projects, 1800 RESPECT	AHRC, NSW
16.02.2016	Sheila Pham, Project Manager and Cath Keenan, Executive Director Sydney Story Factory	AHRC, NSW
16.02.2016	Dr Ulysses Chioatto, Executive Director and Maria Maxwell, Director, SSAMM Management Consulting	AHRC, NSW
16.02.2016	Amanda Nobbs-Carcuro, Acting Executive Director, Youth Justice Division, NT Department of Correctional Services	AHRC, NSW

Appendix 2: Face to face meetings and teleconferences about issues affecting children and young people in Australia

Date	Meeting	Location
16.02.2016	Tom Leeming, Executive Director, Community and Human Services, Department of Premier and Cabinet	AHRC, NSW
18.02.2016	Assoc Prof Gerry Redmond, School of Social and Policy Studies, Flinders University, Australian Child Wellbeing Project	AHRC, NSW
18.02.2016	David Herbert, Director, Practice, Program and Design, Queensland Youth Justice	AHRC, NSW
22.02.2016	Heather Thompson, Assistant Director, Youth Justice Disability Forensics Unit, Victoria Department of Health and Human Services	AHRC, NSW
22.02.2016	Sue Barr, Director, Youth Justice, SA Department of Communities and Social Inclusion	AHRC, NSW
26.02.2016	Dr David Curl and Kathryn Barrett, Advisory Council, Family Law Reform Coalition	AHRC, NSW
26.02.2016	Salli Cohen, Chair, Australasian Juvenile Justice Association	AHRC, NSW
29.02.2016	Australian Council of Human Rights Agencies	AHRC, NSW
29.02.2016	All-China Women's Federation	AHRC, NSW
04.03.2016	Kevin Cocks AM, Queensland Anti-Discrimination Commissioner	Brisbane, QLD
04.03.2016	Professor Ross Homel AO PhD, Foundation Professor of Criminology and Criminal Justice, Griffith Criminology Institute, Griffith University	Brisbane, QLD
04.03.2016	Cheryl Vardon, Principal Commissioner, Queensland Family and Child Commission	Brisbane, QLD
04.03.2016	Tracy Adams, CEO and John Dalglish, Head of Strategy and Research, yourtown	Brisbane, QLD
08.03.2016	Mary Jo McVeigh, Chief Executive Officer, and Emmanuel Kassiotis, Director, Cara Care	Sydney, NSW
08.03.2016	Associate Professor Bronwyn Naylor and Associate Professor Julie Debeljak, Monash University Faculty of Law	AHRC, NSW
10.03.2016	Mark Morrissey, Children's Commissioner, and Annie McLean, Senior Policy Consultant, Commissioner for Children and Young People Tasmania	AHRC, NSW
11.03.2016	Philippa Collin, Senior Research Fellow, Young and Well Cooperative Research Centre and Professor Ariadne Vromen, University of Sydney	AHRC, NSW
14.03.2016	Noelle Hudson, National Policy & Advocacy Manager, CREATE	AHRC, NSW

Date	Meeting	Location
14.03.2016	The Hon David Elliott MP, NSW Minister for Corrections	AHRC, NSW
17.03.2016	Alastair MacGibbon, E-Safety Commissioner	Canberra, ACT
17.03.2016	Senator Glenn Lazarus, Senator for Queensland	Canberra, ACT
17.03.2016	Terri Butler MP, Federal Member for Griffith	Canberra, ACT
18.03.2016	Tamsyn Harvey, Assistant Secretary, Family Law Unit, Attorney-General's Department	AHRC, NSW
18.03.2016	Laura Bennetts-Kneebone, Assistant Director, National Centre for Longitudinal Data	AHRC, NSW
21.03.2016	National Forum for Protecting Australia's Children	Melbourne, VIC
22.03.2016	Paul Pfitzner, Acting Assistant Secretary, Human Rights Policy Branch, Attorney-General's Department	AHRC, NSW
22.03.2016	Denise Hanley, Acting Executive Director, Juvenile Justice NSW	AHRC, NSW
22.03.2016	Richard Short, Chief Storyteller, Sydney Story Factory	AHRC, NSW
23.03.2016	Professor Anna Stewart, Head of School, School of Criminology and Criminal Justice, Griffith University	AHRC, NSW
01.04.2016	Sally Richards, National Director, Safe Schools Coalition	AHRC, NSW
01.04.2016	Colleen Gwynne, NT Children's Commissioner	AHRC, NSW
04.04.2016	Representatives from the National Centre for Longitudinal Data	AHRC, NSW
06.04.2016	Kirsty Nowlan, Executive Director, Social Policy and Advocacy, Benevolent Society	AHRC, NSW
06.04.2016	Nicole Breeze, Director Policy and Advocacy at UNICEF Australia and Nicole Mackey, Head of PR and Media, UNICEF Australia	AHRC, NSW
06.04.2016	Tony Kemp, Deputy Secretary, Children & Youth Services, Department of Health and Human Services	AHRC, NSW
08.04.2016	Australian And New Zealand Child Death Review and Prevention Group	Adelaide, SA
11.04.2016	Benevolent Society Policy Roundtable on Child Poverty	Sydney, NSW
15.04.2016	Online Safety Consultative Working Group	Sydney, NSW
20.04.2016	Rick Willis, Director, Network Four; Andrew Blode, CEO, Jack & Robert Smorgon Families Foundation; Ian Allen, Trustee, the Pratt Foundation, and Katherine Levi, Director, Katherine Levi & Associates	AHRC, NSW
20.04.2016	Ron Mell, CEO, YMCA	AHRC, NSW

Appendix 2: Face to face meetings and teleconferences about issues affecting children and young people in Australia

Date	Meeting	Location
21.04.2016	Royal Commission into Institutional Responses into Child Sexual Abuse private roundtable	Sydney, NSW
22.04.2016	Cameron Haig, National Coordinator, and Corinne Lindsell, Program Officer, Safe Churches	AHRC, NSW
22.04.2016	Colleen Gwynne, NT Children's Commissioner	AHRC, NSW
02.05.2016	Bourke JR Steering Committee	Sydney, NSW
09.05.2016	Dean Barton-Smith, CEO, Deaf Children Australia	AHRC, NSW
09.05.2016	Jennifer Evans, National Lead Child Protection, Australian and International Programs, Australian Red Cross and Robyn Monro Miller, CEO, Network of Community Activities	AHRC, NSW
10.05.2016	National Forum for Protecting Australia's Children – Third Action Plan Sector roundtable	Brisbane, QLD
12.05.2016	The Hon Jacquie Petrusma MP, Tasmania Minister for Human Services, Minister for Women	Hobart, TAS
16.05.2016	Andrew Walter, Assistant Secretary, Civil Law Unit, Attorney-General's Department	AHRC, NSW
17.05.2016	Professor Leah Bromfield, Professorial Fellow, Australian Institute of Family Studies and Kate McGuinness, Team Leader, Policy & Research; Mailin Suchting, Manager, Policy; Tarina Russell, Principal Policy Officer; Lara Scott, Team Leader, CSO, Royal Commission into Institutional Responses to Child Sex Abuse	AHRC, NSW
25.05.2016	Australian Children's Commissioners and Guardians	Brisbane, QLD
26.05.2016	Australian Children's Commissioners and Guardians	Brisbane, QLD
27.05.2016	Department of Social Services and Australia New Zealand Child Death Review and Prevention Group	AHRC, NSW
27.05.2016	Nicole Mayo, Chief Operating Officer, Crimtrac	AHRC, NSW
27.05.2016	Emma Sydenham, Deputy CEO, SNAICC and Lisa Hillan, Director Programs and Knowledge Creation, Healing Foundation	AHRC, NSW
02.06.2016	Jen Sainsbury, Interim National Program Director for Safe Schools Coalition	AHRC, NSW
03.06.2016	Cross Sector Leadership Table for the Maranguka Justice Reinvestment Project	Dubbo, NSW
10.06.2016	Katie Kiss, Indigenous Consulting Senior Manager and Georgina Richters, Indigenous Consulting Director, PWC	AHRC, NSW

Date	Meeting	Location
17.06.2016	Norma Williams, Program Manager, Family Relationship Centre, Queensland	AHRC, NSW
20.06.2016	Flora Carapellucci, Branch Manager, Children's Policy Branch, and Melek Byrne, Care Policy and Evidence Director, Department of Social Services	AHRC, NSW
20.06.2016	Salli Cohen, Executive Director, Social Policy Coordination Division, NT Department of the Chief Minister	AHRC, NSW
21.06.2016	Jenny Buckland, CEO, Australian Children's Television Foundation	AHRC, NSW
21.06.2016	Australian Council of Social Service	AHRC, NSW
22.06.2016	Ray Edge, WA Banksia Hill Juvenile Detention Centre	AHRC, NSW
29.06.2016	Sue Thompson, Convenor and Mike Cross, Project Worker, Australian Children's Contact Services	AHRC, NSW

Appendix 3: Memberships of advisory groups and ambassadorships

- National Forum for Protecting Australia's Children
- Children's Week National Ambassador, 2016
- National Advisory Committee for the Aboriginal and Torres Strait Islander Suicide Prevention Evaluation Project (ATSISPEP)
- Centre of Research Excellence in Suicide Prevention (CRESP)
- Online Safety Consultative Working Group
- Child Cybersex Crime Research Project Steering Group
- Australian Children's Commissioners and Guardians
- National Families Week Ambassador, 2016
- Bourke Justice Reinvestment Strategic Advisory Group, since May 2014
- Justice Reinvestment Champion, since May 2013
- Advisory Group to the Preventing Anxiety and Victimization through education (PAVe) Project, since December 2013
- Foster and Kinship Care Spokesperson, since 2013
- Centre for Excellence for Indigenous Thriving Futures Advisory Board
- NSW Children's Book Council Patron
- Anti-Slavery Australia: Behind the Screen: Online Child Exploitation in Australia Advisory Board
- Advisory Committee on Chinese Social Policy within the Social Policy Research Centre at the University of NSW, since 2014.

Appendix 4: Submissions made to the National Children's Commissioner about OPCAT and youth justice in Australia

Submission	Date	Location
1	10.05.2016	Professor Ross Homel, Professor Stuart Kinner, Ms Rebecca Wallis – Griffith University
2	16.05.2016	Mr Phil Clarke, Queensland Ombudsman
3	25.05.2016	Public Interest Advocacy Centre
4	27.05.2016	Law Council of Australia
5	27.05.2016	Office of the Guardian for Children and Young People, South Australia
6	30.05.2016	Northern Territory Legal Aid Commission
7	30.05.2016	Professor Michael Levy AM
8	30.05.2016	University of New South Wales: the Comparative Youth Penalty Project (CYPP), Australians with Mental Health Disorders and Cognitive Disabilities in the Criminal Justice System Project (AMHDCC)
9	30.05.2016	Queensland Family and Child Commission
10	30.05.2016	SACOSS
11	30.05.2016	The Law Society of New South Wales
12	30.05.2016	Mr John Lawrence SC
13	30.05.2016	UNICEF Australia
14	30.05.2016	WA Commissioner for Children and Young People
15	30.05.2016	Criminal Lawyers Association of the Northern Territory
16	31.05.2016	Commissioner for Children and Young People, Tasmania
17	01.06.2016	Amnesty International Australia
18	02.06.2016	Dr Bronwyn Naylor, Monash University
19	07.06.2016	Australian Red Cross
20	10.06.2016	Children and Young People with Disability Australia
21	15.06.2016	Law Institute Victoria
22	17.06.2016	North Australian Aboriginal Justice Agency (NAAJA) and the Central Australian Aboriginal Legal Aid Service (CAALAS)

Appendix 4: Submissions made to the National Children’s Commissioner about OPCAT and youth justice in Australia

Submission	Date	Location
23	20.06.2016	QLD Office of the Public Guardian
24	23.06.2016	Professor Richard Harding, Adjunct – University of Western Australia
25	24.06.2016	Victorian Ombudsman
26	24.06.2016	Human Rights Law Centre
27	11.07.2016	Victorian Commission for Children and Young People

Appendix 5: National Roundtables held by the National Children’s Commissioner about OPCAT and youth justice in Australia

Roundtable Attendees

New South Wales Roundtable in Sydney on 19 April 2016

- Paul Pfitzner, Commonwealth Attorney-General’s Department
- Andrew Symonds, Commonwealth Attorney-General’s Department
- Sue Duncombe, Magistrate, Children’s Court of New South Wales
- Luke Freudenstein, Superintendent, NSW Police
- John McKenzie, Commissioner, Office of the Legal Services Commissioner
- Dave Trudinger, Principal Policy Officer, NSW Department of Premier and Cabinet
- Catherine Allen, Team Leader, Royal Commission into Institutional Response to Child Sexual Abuse
- Steve Wilson, NSW Department of Justice
- Denise Hanley, Acting Executive Director of Juvenile Justice, NSW Department of Justice
- Patricia Wild, Acting Coordinator, Ministerial and Parliamentary Services, NSW Department of Justice
- Elena Torday, Acting Director, NSW Department of Justice
- Phillipa Evans, Senior Project Officer (Practice), NSW Department of Justice
- Katya Issa, Operations Manager Adolescent Mental Health and Drug & Alcohol Programs, Justice Health & Forensic Mental Health Network
- Rob Ferguson, Acting Superintendent, Cobham Juvenile Justice Centre, Werrington
- Stephen Gilligan, Superintendent, Frank Baxter Juvenile Justice Centre, Kariong
- Peta Lowe, Superintendent, Juniperina Juvenile Justice Centre, Lidcombe
- Paula Mitchell, Acting Superintendent, Orana Juvenile Justice Centre, Dubbo
- Michael Vita, Superintendent, Reiby Juvenile Justice Centre, Airds
- Daniel Addison, Superintendent, Riverina Juvenile Justice Centre, Wagga
- Fiona Rafter, Inspector of Custodial Services, NSW Inspector of Custodial Services
- Lynn Davie, Official Visitor Co-ordinator, NSW Inspector of Custodial Services
- Jennifer Aigus, Manager, Custodial Services, Ombudsman NSW
- Associate Professor Brian Stout, University of Western Sydney
- Professor Chris Cunneen, University of New South Wales
- Associate Professor Leanne Dowse, Associate Professor, Chair in Intellectual Disability Behaviour Support, University of New South Wales
- Nicole Breeze, Director of Policy and Advocacy, UNICEF Australia
- Allison Elliott, Legal and Research Advisor, UNICEF Australia
- Therese Sands, Co-Chief Executive Officer, People with Disability
- Emily Mitchell, Senior Policy Officer, Public Interest Advocacy Centre Ltd
- Pauline Wright, National Criminal Law Committee, Law Society of NSW

Roundtable Attendees

New South Wales Roundtable in Sydney on 19 April 2016 (continued)

- Nicky Wilson, Royal Commission into Institutional Response to Child Sexual Abuse
- Rowan Savage, NSW Department of Premier and Cabinet
- Jenny Barga, University of Technology Sydney
- Courtney Adamson, DLA Piper
- Dolapo Oshin, DLA Piper

Australian Capital Territory Roundtable in Canberra on 29 April 2016

- Paul Pfitzner, Commonwealth Attorney-General's Department
- Dr Sue Packer AM, Steering Committee Member, Australian Child & Adolescent Trauma, Loss & Grief Network, ANU College of Medicine, Biology & Environment
- Chief Magistrate Lorraine Walker, ACT Magistrates Court
- Tina Brendas, Senior Manager, Business Support, Office for Children, Youth and Family Support Community Services Directorate
- Sarah Anderson, Policy Manager, Human Services, Office for Children, Youth & Family Support
- Commander Andrea Quinn, Deputy Chief Police Officer, Australian Capital Territory Police
- Raphaela Thynne, Commonwealth Attorney-General's Department
- Greg Corben, Senior Manager, Bimberi Youth Justice Centre, Canberra
- Narelle Hargreaves OAM, Official Visitor for Disability Services and Official Visitor for Children and Young People
- Richard Glenn, Deputy Ombudsman, Commonwealth Ombudsman
- Gabrielle McKinnon, Acting Commissioner, ACT Human Rights Commission
- David Braddock, Head of Child Welfare and Prisoner Health, Australian Institute of Health and Welfare
- Nicola Knackstredt, Law Council of Australia
- Rebecca Griffiths, Law Council of Australia
- Sam Salvaneschi, Senior Legal Policy Officer, Mental Health, Justice Health and Alcohol & Drug Services, ACT Health
- Brodie Williams, DLA Piper
- Alice Bolt, DLA Piper
- Jessica Nemaric, Associate to Chief Magistrate Walker, ACT Magistrates Court

Roundtable Attendees

Queensland Roundtable in Brisbane on 4 May 2016

- Raphaela Thynne, Commonwealth Attorney-General's Department
- Peter Cantwell, Assistant Ombudsman, Queensland Ombudsman
- Rebecca Wallis, PhD Candidate, School of Criminology and Criminal Justice, Griffith University
- Lauren Dolzeal, Intergovernmental Relations, Strategy and Engagement Division, Queensland Department of the Premier and Cabinet
- Maea Buhre, Intergovernmental Relations, Strategy and Engagement Division, Queensland Department of the Premier and Cabinet
- Rachael Harris, Youth Justice Practice, Program and Design, Queensland Department of Justice and Attorney-General
- Lazaro Herrera, Youth Justice, Program and Design, Queensland Department of Justice and Attorney-General
- Associate Professor Terry Hutchinson, School of Law, Queensland University of Technology
- Andrea Lauchs, Assistant Commissioner, Advocacy, Policy and Sector Development, Queensland Family and Child Commission
- Tania Dunn, Manager, Advocacy, Policy and Sector Development, Queensland Family and Child Commission
- Professor Ross Homel AO, Foundation Professor of Criminology and Criminal Justice, Griffith University
- Glen Knights, Executive Director, Brisbane Youth Detention Centre, Queensland Department of Justice and Attorney-General
- Julia Duffy, Acting Public Guardian, Office of the Public Guardian
- Marion Byrne, Manager Policy, Office of the Public Guardian
- Deputy Chief Magistrate Leanne O'Shea, Children's Court Brisbane
- Sean Harvey, Assistant Director-General, Department of Justice and Attorney-General
- Salote Mataitoga, Legal Officer, Department of Justice and Attorney-General
- Mark Lynch, Department of Justice and Attorney-General
- John Dalglish, Head of Strategy and Research, Yourtown
- Ann-Marie Coleman, DLA Piper
- Jasemine Altinkaya, DLA Piper
- Emilie Barton, DLA Piper

Roundtable Attendees

Tasmanian roundtable in Hobart on 13 May 2016

- Debra Salter, Manager, Policy Development and Research Services, Tasmanian Police
- Samantha Fox, Department of Premier and Cabinet
- Matt Bowditch, Department of Premier and Cabinet
- Pip Shirley, Department of Premier and Cabinet
- Karen Jabbour, Director, Services to Young People, Children & Youth Services, Department of Health and Human Services
- Mark Morrissey, Children's Commissioner, Commissioner for Children and Young People Tasmania
- Annie McLean, Senior Policy Consultant, Commissioner for Children and Young People Tasmania
- Andrew Symonds, Commonwealth Attorney-General's Department
- Richard Connock, Ombudsman Tasmania
- Isabelle Crompton, Policy Consultant, Commissioner for Children and Young People Tasmania
- Lisa Cuatt, State Manager, Save the Children Australia

Victorian roundtable in Melbourne on 18 May 2016

- Ian Lenyon, Director Secure Services, Parkville Youth Justice Precinct
- Associate Professor Bronwyn Naylor, Monash University
- Megan Philpott, Deputy Ombudsman, Victorian Ombudsman
- Megan Wilson, Senior Investigation Officer, Victorian Ombudsman
- James McCann, General Manager, Parkville Youth Justice Precinct
- Ruth Barson, Senior Lawyer, Human Rights Law Centre
- Laura Wilson, Lawyer, Indigenous Rights Unit, Human Rights Law Centre
- Josie Polak, Policy Lawyer, Law Institute Victoria
- Clara Bradley, Senior Policy Lawyer, Law Institute Victoria
- Melinda Walker, Criminal Law Committee Member, Law Institute Victoria
- Raphaela Thynne, Commonwealth Attorney-General's Department
- Lindsay Buckingham, Attorney-General's Department
- Daniel Emeny, General Manager, Malmsbury Youth Justice Centre
- Associate Professor Julie Debeljak, Monash University
- Liana Buchanan, Principal Commissioner, Commission for Children and Young People Victoria
- Simon McDonald, Chief Executive Officer, Children's Court of Victoria
- Murray Robinson, Manager Client Services, Department of Health and Human Services

Roundtable Attendees

Victorian roundtable in Melbourne on 18 May 2016 (continued)

- Julie Edwards, Chief Executive Officer, Jesuit Social Services
- Winnie Bridie, Policy Officer, Children and Young People with Disability Australia
- Emrys Nekvapil, Law Council of Australia
- Jennifer Hyatt, Manager, Statutory and Forensic Oversight, Department of Health and Human Services
- Daniel Clements, General Manager, Jesuit Social Services
- Eloise Hopkinson, DLA Piper
- Tamara Preuss, DLA Piper

South Australian roundtable in Adelaide on 20 May 2016

- Leigh Garrett, Chief Executive Officer, OARS Community Transitions
- Professor Mark Hasley, Australian Research Council Future Fellowship, Flinders Law School, Flinders University
- Magdelena Madden, Principal Consultant, Council for the Care of Children
- Amanda Shaw, Guardian for Children and Young People, South Australia
- Kellie Tilbrook, Attorney-General's Department
- Julie Tsambis, Department of Correctional Services
- Cindy Arthur, Department of Correctional Services
- Dr Aaron Groves, SA Health
- Nancy Rogers, Department for Communities and Social Inclusion
- Superintendent Scott Duval, South Australian Police
- Adam Kilvert, Executive Director, Intergovernmental Relations, Department of Premier and Cabinet
- Helen Connolly, Executive Director, Red Cross SA
- Christopher Charles, Aboriginal Legal Rights Movement Inc.
- Nicholas Patrick, Solicitor, Aboriginal Legal Rights Movement Inc.
- Linda Appelbee, Legal Practitioner, Children and the Law Committee, Law Society of South Australia
- Julienne Murray, Legal Practitioner, Criminal Law Committee, Law Society of South Australia
- Raphaela Thynne, Commonwealth Attorney-General's Department
- Rohan Bennett, Acting Director, Youth Justice, Department for Communities and Social Inclusion
- Jacqui Casey, Department of Correctional Services
- Katherine Hawkins, Manager, Youth Justice Policy & Reporting, Department for Communities and Social Inclusion

Roundtable Attendees

South Australian roundtable in Adelaide on 20 May 2016 (continued)

- Louisa Hackett, Principal Psychologist, Youth Justice Psychology Services, Department for Communities and Social Inclusion
- Emily Strickland, Deputy Ombudsman, South Australian Ombudsman

Northern Territory roundtable in Darwin on 31 May 2016

- Victor Williams, Superintendent, Don Dale Youth Detention Centre
- Rob Steer, Deputy Commissioner, Youth Detention, Department of Correctional Services
- Suzan Cox QC, Director, Northern Territory Legal Aid Commission
- Sheetal Balakrishnan, Barrister and Solicitor, Northern Territory Legal Aid Commission
- Nicola MacCarron, Criminal Lawyers Association of the Northern Territory
- Andrew Symonds, Commonwealth Attorney-General's Office
- Carmel Lohan, Research and Project Officer, The Northern Territory Children's Commissioner
- Colleen Gwynne, Children's Commissioner Northern Territory
- Katherina Vanderlaan, Acting Assistant Commissioner, Northern Territory Police, Fire and Emergency Services
- Tass Liveris, President, Law Society Northern Territory
- Salli Cohen, Executive Director, Youth Justice, Department of Correctional Services and Chair, Australasian Juvenile Justice Administrators
- Amanda Nobbs-Carcuro, Executive Director, Youth Justice Division Department of Correctional Services
- Belinda Mort, Senior Policy Officer, Department of Correctional Services
- Craig Kelly, Northern Territory State Manager, Save the Children Australia
- Bronwyn Thompson, Acting Executive Director, Department of Children and Families
- Luke Twyford, General Manager, Department of Children and Families
- Shahleena Musk, Senior Lawyer, North Australian Aboriginal Justice Agency
- Megan Lawton, Law Society Northern Territory
- John B. Lawrence SC, Barrister Northern Territory

Roundtable Attendees

Western Australian roundtable in Perth on 8 June 2016

- Laura Jackman, Senior Policy Officer, Commissioner for Children and Young People Western Australia
- Alice Barter, Senior Lawyer, Aboriginal Legal Service of Western Australia
- Alex Walters, Lawyer, Aboriginal Legal Service of Western Australia
- Nicole Young, Acting Managing Solicitor, Civil Law and Human Rights Unit, Aboriginal Legal Service of Western Australia
- Andrew Harvey, Deputy Inspector, Office of the Inspector of Custodial Services
- Rebecca Poole, Research and Projects Director, Western Australia Ombudsman
- Andrew Symonds, Commonwealth Attorney-General's Department
- Elizabeth Needham, President, Law Society of Western Australia
- Eamon Rayan, Acting Inspector, Office of the Inspector of Custodial Services
- Kim Travers, Superintendent, Western Australia Police
- Tegan Harrington, Seconded from Corrs Chambers Westgarth, Aboriginal Legal Service of Western Australia
- Emeritus Professor Richard Harding, Honorary Fellow, Faculty of Law, University of Western Australia
- Simone Payne, Royal Commission into Institutional Response to Child Sexual Abuse
- Alexandra Derham, DLA Piper

Appendix 6: Letter to Attorney-General, George Brandis, signed by 64 bodies to ratify the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)

OPEN LETTER TO THE ATTORNEY-GENERAL REGARDING THE OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE

Published September 16, 2014 by Castan Centre

The following is an open letter to the Commonwealth Attorney-General, The Hon. George Brandis QC, signed by 64 organisations including the Castan Centre for Human Rights Law. The letter is dated 15 September 2014.

Dear Attorney,

Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

We, the undersigned organisations, are writing to urge the Australian Government to ratify the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) and implement a National Preventative Mechanism (NPM) without delay.

We welcomed Australia's signing of OPCAT in 2009. Now in ratifying OPCAT the Australian Government will demonstrate, nationally and internationally, its commitment to safeguarding the human rights of people deprived of their liberty in all places of detention, including prisons, police lock ups, juvenile detention centres, immigration detention centres, mental health facilities and forensic disability units.

The aim of OPCAT is to strengthen the protection of persons deprived of their liberty through non-judicial means of a preventative nature. We strongly support this goal and believe that independent monitoring by autonomous bodies under OPCAT will serve to strengthen a culture of human rights within Australian detention facilities.

Since Australia signed OPCAT in 2009, a National Interest Analysis has been conducted and in 2012 the bipartisan Joint Standing Committee on Treaties completed an inquiry into Australia's ratification of OPCAT. We strongly support the recommendation of the Committee that the Australian Government work in collaboration with the States and Territories to ratify OPCAT and implement a NPM as soon as possible.

In supporting the recommendation of the Committee, we point to the importance of the accountability mechanism provided by the Subcommittee on Prevention of Torture (SPT). The Committee identified that the SPT has proven to be a valuable and successful mechanism in exercising oversight and providing support for State Parties as they implement OPCAT.

Ratification of OPCAT would provide the opportunity for the SPT to lend its expertise to Federal, State and Territory jurisdictions in aligning existing mechanisms to meet the requirements of OPCAT, particularly the establishment and implementation of a NPM. Australian jurisdictions have monitoring bodies already in existence and ratification of OPCAT would allow cooperation with the SPT to modify these institutions under guidance to form a NPM.

The Australian Government has stated its intention to postpone the implementation of a NPM. We do not support this intention as delayed implementation of a NPM would render Australia's ratification of OPCAT symbolic rather than effective, potentially compromising Australia's stated commitment to human rights.

In light of the consultative processes already undertaken by the Australian Government and the initiation of a collaborative approach between the Federal, State and Territory Governments to reform existing inspection bodies, there exist no reasonable obstacles to Australia's immediate ratification of OPCAT and the implementation of a NPM.

OPCAT, the SPT and the NPM bodies safeguard the human rights of people in custodial settings and provide independent oversight of places of detention. The transparency and accountability offered by OPCAT and its mechanisms provide Australia with the opportunity to act as regional and global model for best practice on human rights in places of detention.

In the lead up to Australia's review before the UN Committee against Torture in Geneva in 2014, we call on the Australian Federal, State and Territory Governments to commit to ratifying OPCAT in full and implementing a NPM without delay.

Yours sincerely,

The undersigned organisations

Act for Peace
ActionAid
Afghan Australian Development Organisation
Amnesty International
ANTaR
Association for the Prevention of Torture
Association for Services to Torture and Trauma Survivors
Asylum Seekers Centre
Asylum Seeker Resource Centre
Australian Churches Refugee Taskforce
Australian Council for International Development
(representing over 140 member organisations)
Australian Lawyers Alliance
Australian Lawyers for Human Rights
Australian Tamil Congress
Castan Centre for Human Rights Law
Centre for Peace and Conflict Studies
Children with Disability Australia
ChilOut
Civil Liberties Australia
Companion House Assisting Survivors of Torture and Trauma
Consumers Health Forum of Australia
Disability Discrimination Legal Service
Domestic Violence Legal Workers' Network
Edmund Rice Centre
Equality Rights Alliance (representing 62 member organisations)
Federation of Community Legal Centres Victoria
Forum of Australian Services for Survivors of Torture and Trauma
Foundation House
Human Rights Law Centre
Human Rights Watch
Hunter Community Legal Centre
Islamic Relief Australia
Jesuit Refugee Service
Kingsford Legal Centre
Mahboba's Promise
Medical Association for Prevention of War
Melaleuca Refugee Centre Torture and Trauma Survivors Service
of the Northern Territory Inc
Mental Health Carers ARAFMI Australia
National Association of Community Legal Centres
National Child Rights Taskforce
National Children's and Youth Law Centre
National Congress of Australia's First Peoples
Oxfam Australia
People with Disability Australia
Phoenix Centre Support Service for Survivors of Torture and
Trauma
Public Health Association of Australia
Public Interest Advocacy Centre Ltd
Queensland Advocacy Incorporated
Queensland Program of Assistance to Survivors of Torture and
Trauma
Refugee Council of Australia
Save the Children
SCALES Community Legal Centre
Service for the Treatment and Rehabilitation of Torture and
Trauma Survivors
Settlement Council of Australia
Sisters Inside
Survivors of Torture and Trauma Assistance and Rehabilitation
Service Inc
TEAR Australia
UN Association of Australia
Uniting Church in Australia Assembly
Women's Electoral Lobby
Women's Law Centre
Women's Legal Services Australia
Women with Disabilities Australia
YWCA Australia

Copy to:

Mr Simon Corbell MP, ACT Attorney-General
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Hon Johan Wessel Elferink MLA, NT Attorney-General
Hon Jarrod Bleijie MP, QLD Attorney-General
Mr Jon Rau MP, SA Attorney-General
Ms Vanessa Goodwin MLC, TAS Attorney-General
Hon Robert Clark MP, VIC Attorney-General
Hon Michael Mischin MLC, WA Attorney-General

Appendix 7: Youth justice detention oversight and monitoring arrangements across jurisdictions

Western Australia and New South Wales, have already established monitoring frameworks that provide them with the foundations to become OPCAT compliant.

Jurisdictions, like Tasmania and South Australia, have recently passed legislation or intend to pass legislation that will strengthen their monitoring frameworks and increase their likelihood of becoming OPCAT compliant.

Victoria and the ACT have Human Rights Acts, *Human Rights Act 2004* (ACT) and *Charter of Human Rights and Responsibilities Act 2006* (Victoria). Under that legislation, it is unlawful for a public authority to act in a way that is incompatible with a human right, or to fail to give proper consideration to a relevant human right in decision-making.

1.1 Western Australia (WA)

The Youth Justice Services division of the Department of Corrective Services is responsible for young people in custody in Western Australia. Banksia Hill Juvenile Detention Centre is the only youth justice centre in Western Australia.

The *Young Offenders Act 1994* (WA) and *Young Offenders Regulations 1995* (WA) govern the running of youth detention centres in WA. In addition, the Department operates according to the *Youth Justice Framework 2015-2018* which is accessible on its website.¹

The following bodies are involved in the monitoring and oversight, including complaints, of youth justice detention centres in Western Australia:

- WA Inspector of Custodial Services
- Independent Detention Centre Visitors
- Ombudsman Western Australia
- WA Commissioner for Children and Young People.

In addition, the *Young Offenders Act 1994* (WA) provides that a judge or magistrate of the Children's Court or a justice of the peace authorised by a judge or magistrate of the Children's court may enter and examine a detention centre at any time.² However, they do not have a mandated role in regularly monitoring youth justice detention centres.

In addition to the other monitoring and complaints bodies, the Auditor General WA has a role in scrutinising public sector agencies and reporting on the use of public resources, including conducting performance audits on the effectiveness and efficiency of public sector programs and activities.³ The Auditor General's role has resulted in reporting relevant to the conditions of juvenile justice detention facilities. For example, the Auditor General reported on the redevelopment of Banksia Hill Detention Centre in 2013,⁴ and in 2008, tabled a *The Juvenile Justice System: Dealing with Young People under the Young Offenders Act 1994: Performance Examination*.⁵

1.1.1 The Inspector of Custodial Services WA

The Inspector of Custodial Services Western Australia is an independent statutory body that inspects both adult and youth justice facilities in WA.

The Office of the Inspector of Custodial Services was established by the *Prisons Amendment Act 1999* (WA). It was subsequently established as a government department in 2000 under the *Public Sector Management Act 1994* (WA). The *Inspector of Custodial Services Act 2003* (WA) extended the jurisdiction to include juvenile justice custodial facilities. The Inspector's powers were further enhanced by the *Inspector of Custodial Services Amendment Act 2011* (WA) to allow the Inspector to undertake reviews of individual prisoners moving through the custodial system. Additionally, the Inspector was provided with the power to issue a *Show Cause Notice* on the Chief Executive Officer of the Department of Corrective Services.

The WA Governor appoints an 'appropriately qualified' person⁶ to be the WA Inspector. The length of the appointment is for seven years with the possibility for reappointment for one or more terms.⁷ The Inspector can only be removed from office by the Governor for misbehaviour, incompetence, incapacity or bankruptcy.⁸

A person who has, in the last three years, been a member of the Parliament of the Commonwealth or any State or Territory cannot be appointed as Inspector.⁹

The WA Inspector of Custodial Services shares a Minister with the Department of Corrective Services.

The Inspector is not subject to direction by the Minister other than as specified in the legislation.¹⁰ For example, section 17 of the *Inspector of Custodial Services Act 2003* (WA) sets out the types of directions that the Minister may give to the Inspector. Any directions given must be included in the Inspector's annual report to parliament. If the Inspector refuses to comply with such directions he or she must provide the reasons in writing and also include them in the annual report.¹¹

The Inspector uses the *Code of Inspection Standards for Young People in Detention* and the *Inspection standards for Aboriginal prisoners* to guide inspections of youth justice facilities.¹²

At least once every three years the Inspector must inspect every prison, detention centre, court custody centre and lock-up in WA.¹³ The Inspector must prepare a report on findings in relation to each inspection.¹⁴

The Inspector reports directly to Parliament.¹⁵

The definition of 'lock-up' excludes those run by the Police.¹⁶ Both the Inspector and the Commissioner for Children and Young People have noted this gap in external oversight.¹⁷

Additionally, the Inspector of Custodial Services may conduct occasional visits at any other time and on any number of occasions,¹⁸ and can also conduct reviews of custodial services.¹⁹ Review reports may be formally tabled in Parliament, making them public, at the Inspector's discretion.²⁰

In practice, the Office of the Inspector conducts 'liaison visits' to all facilities within its jurisdiction at least three times per year as part of a 'continuous inspection' model.²¹

Other than notice to a chief judicial officer regarding an inspection of a court custody centre, the Inspector is not required to give notice to anyone of the intention to perform any of the Inspector's functions.²²

In relation to inspections and reviews, the WA Inspector of Custodial Services has the express **power** to access all documents in the possession of the Department in relation to a detention centre or to a detainee.²³

For the purpose of an inspection or review, the Inspector may, at any time and with any assistants and equipment, have free and unfettered **access** to detention centres, detainees in detention centres, persons whose work is concerned with a detention centre, vehicles used to transport detainees, detainees in such vehicles, persons whose work is concerned with such vehicles, all documents in the possession of the Department in relation to a detention centre or a custodial service or to a detainee.²⁴

The Inspector of Custodial Services has the same access to court custody centres and lock-ups, and persons, vehicles and information relating to court custody centres and lock-ups as it does to detention centres.²⁵

The Inspector also has the broad incidental **power** to do 'all things necessary or convenient' in connection with the performance of the Inspector's functions.²⁶

It is an **offence** to hinder or resist a person exercising the Inspector's powers of access.²⁷

It is an **offence** punishable by a fine and 2 years imprisonment to disclose such information other than for the purposes of the performance of a function of the Inspector (with exceptions).²⁸

Disclosure is allowed as part of consultation with the Corruption and Crime Commission, the Director of Public Prosecutions or the Ombudsman, to refer matters relevant to the functions of those respective bodies, and if the Inspector thinks it is in the public interest or the interests of any person to do so.²⁹

The legislation also provides that documents sent to the Inspector or by the Inspector in the course of or for the purposes of the performance of the Inspector's functions and that were prepared specifically for the purposes of the performance of the function, are **privileged**.³⁰

The Minister is entitled to have access to information in the possession of the Inspector.³¹ The Inspector must comply with a request for information unless the Inspector considers it is not in the public interest to provide the information.³²

The Inspector must provide an **annual report** to Parliament and the Minister on the performance of the Inspector's functions.³³ The legislation requires that any directions given by the Minister to conduct an inspection or review, and any reasons for not following those directions are included in the annual report, as well as a list of places inspected, those to be inspected in the following financial year, and any details of a show cause notice, if the Inspector considers it appropriate.³⁴

The Inspector may at any time **report** to the Minister on any matter relating to occasional inspections or reviews of custodial services and provide advice and **recommendations** in relation to the matter.³⁵

The reports of the Inspector are comprehensive and include thematic reviews. Reports contain recommendations as well as follow up on previous recommendations; and responses from government departments and private organisations where relevant.³⁶ The Inspector reports on contractual arrangements between the WA Government and private providers of custodial services, such as G4S and Serco.³⁷

1.1.2 Detention Centre Visitors

The Minister, having regard to the advice of the Inspector, may appoint independent detention centre visitors.³⁸ The role of the visitor is voluntary and involves talking to detainees and staff about their concerns or issues regarding the facility.

An independent detention centre visitor may enter and examine a detention centre at any time.³⁹

The visitor must provide the Inspector with a written report after each visit.⁴⁰

The Office of the Inspector's *Annual Report 2014-15* reports that the annual target for independent visitors reports was 150. In 2014-15 a total of 165 reports were submitted to the Inspector and referred to the Department.⁴¹

Section 40 of the *Inspector of Custodial Services Act 2003 (WA)* provides that an independent detention centre visitor must record any complaint made to the visitor by, or on behalf of, a detainee and report that complaint to the Inspector of Custodial Services.

The Inspector may refer a complaint or grievance concerning an individual to the Parliamentary Commissioner for Administrative Investigations (Ombudsman WA) or any other government agency. It is not a function of the Inspector to deal with complaints other than to inform the complainant about the role of the Inspector or 'deal with the matter in the context of an inspection of a place or a review of a custodial service'.⁴²

1.1.3 Ombudsman Western Australia

The Ombudsman Western Australia (technically the Parliamentary Commissioner for Administrative Investigations) is an independent statutory office that can receive and investigate complaints about the administrative decision-making and practices of the public sector, local government and universities.⁴³ This includes Banksia Hill Detention Centre and adult detention facilities.

The WA Governor appoints the Ombudsman WA.⁴⁴ The Governor may be 'guided' by 'Rules of Parliament' agreed upon by both Houses of Parliament.⁴⁵ The Ombudsman WA is appointed for five years and can only be removed by the Governor after both Houses of Parliament agree to that removal. Reasons for removing the Ombudsman WA include incompetence, bankruptcy or misconduct.⁴⁶

The Ombudsman WA has the power to initiate an investigation of his or her 'own motion'.⁴⁷

For the purposes of an investigation under the *Parliamentary Commissioner Act 1971 (WA)*, the Ombudsman WA may **enter and inspect** any premises occupied or used by any department or authority to which the Act applies;⁴⁸ and also has the **powers**, rights and privileges of a Royal Commission.⁴⁹ This includes the power to compel information. It is an offence to obstruct or mislead the Ombudsman.⁵⁰

The Ombudsman WA, staff and complainants are **protected** from liability in relation to complaints and investigations made or undertaken in good faith.⁵¹

Confidentiality protections apply to correspondence between the Ombudsman WA and persons in custody; this includes the provision that it is an offence for officers within a custodial facility not to respect that confidentiality.⁵²

There are also **victimisation** provisions protecting a person who makes a complaint and making it an offence to victimise a person for making a complaint or providing information to the Ombudsman.⁵³

After completing an investigation, the Ombudsman WA may make **recommendations** to the appropriate authority and send a copy to the responsible Minister. The Ombudsman WA may request a response from the authority within a specified time, with the steps proposed to give effect to the recommendation; or if no such steps are proposed, the reasons for not proposing such steps. If the Ombudsman WA does not consider that appropriate steps have been taken he or she may send to the Premier a copy of the report, the recommendations and a copy of relevant comments. The Ombudsman WA may lay reports before Parliament on such matters as he or she thinks fit.⁵⁴

The Ombudsman must provide an **annual report** to Parliament⁵⁵ and may also, at any time, report to Parliament 'on any matter arising in connection with the exercise of his functions'.⁵⁶ The annual reports contain basic information about complaints received during the year.

There are a number of 'thematic' reviews published on the Ombudsman WA website. It does not appear that the Ombudsman WA has published any recent reports specifically relating to youth justice detention centres.⁵⁷

The Ombudsman WA attends Banksia Hill Detention Centre to meet with juvenile detainees to take complaints.⁵⁸

In 2014-15, the Ombudsman WA received 276 complaints about corrective services. This was 28% of all complaints that it received. These numbers were not broken down any further, so is not clear what proportion of them were from Banksia Hill Detention Centre.⁵⁹

1.1.4 Commissioner for Children and Young People

The Commissioner for Children and Young People Western Australia is an independent body that reports directly to Parliament under the *Commissioner for Children and Young People Act 2006 (WA)*.

The WA Governor, on the recommendation of the Premier, appoints the Commissioner for Children and Young People WA.⁶⁰ The legislation requires the Premier to advertise throughout Australia and consult with the leader of any political party with at least 2 members in either House of Parliament. It also provides that 'children and young people must be involved in the selection process'.⁶¹ Appointments are for five years and a person appointed is eligible for reappointment once.⁶²

Only the Governor may remove the Commissioner after the agreement of both Houses of Parliament, on the grounds of incompetency, bankruptcy or misconduct.⁶³

A joint standing committee of the WA parliament oversees the work of the Commissioner.⁶⁴ The Joint Standing Committee on the Commissioner for Children and Young People is tasked with monitoring, reviewing and reporting to Parliament on the exercise of the functions of the Commissioner, and examining annual and other reports of the Commissioner.⁶⁵

The Commissioner for Children and Young People WA is responsible for advocating for children and young people, as well as monitoring complaints by children and young people about government agencies, and the way in which government agencies investigate or otherwise deal with such complaints.⁶⁶

Under the legislation, the Commissioner for Children and Young People WA must give priority to, and have special regard to, the interests and needs of:

- Aboriginal children and young people and Torres Strait Islander children and young people.
- Children and young people who are vulnerable or disadvantaged for any reason.⁶⁷

The Commissioner does not generally have the **power** to enter juvenile justice detention centres. However, for the purposes of a ‘special inquiry’ into a matter affecting the wellbeing of children and young people, the Commissioner or a person authorised by the Commissioner may enter and inspect any place either with the consent of the owner or occupier of the place, or with a warrant from a magistrate.⁶⁸ Other powers of the Commissioner for the purposes of a special inquiry include the power to require attendance of a person and a person to answer any question, including under oath, and the production of documents.⁶⁹

The Commissioner for Children and Young People WA does not investigate or otherwise deal with individual complaints made by, or relating to, children or young people.⁷⁰

A person giving information to a special inquiry of the Commissioner in good faith is **protected** from liability.⁷¹ A person who has acted in good faith in the performance of a function under the legislation is also protected.⁷²

Giving false information to the Commissioner during a special inquiry is an **offence** punishable by a fine of \$12,000 and imprisonment for 12 months.⁷³ The same punishment applies for interrupting or obstructing the conduct of a special inquiry.⁷⁴

The Commissioner for Children and Young People WA is required to provide an **annual report** to Parliament,⁷⁵ and a report on the findings of any special inquiry.⁷⁶

Additionally, the Commissioner may also report on any inquiry, review or research conducted, or any other matter arising in the performance of the Commissioner’s functions.⁷⁷ All reports must be laid before Parliament.⁷⁸

The legislation specifically provides that reports ‘may include **recommendations** for any changes to any written law, draft law, policy, practice or procedure, or for the taking of other action, that the Commissioner considers appropriate to safeguard and promote the wellbeing of children and young people’.⁷⁹

The Minister must be given and may comment on a draft of a report; and a report must include a copy of any comments made by the Minister in this regard. However the Commissioner is not required to make changes as a result of the Minister’s comments or recommended consultations.⁸⁰

The Commissioner has published a range of reports and papers regarding the youth justice system.⁸¹ For example, in 2013, the Commissioner made a submission to the Inspector of Custodial Services regarding an incident that occurred at Banksia Hill in January 2013.⁸² That submission outlined the Commissioner’s advocacy for children and young people and noted that the Commissioner is yet to receive a detailed response to her concerns about the wellbeing of children and young people.⁸³

In 2014, the Commissioner reported on the state of WA’s children and young people, and included rates of children and young people in detention.⁸⁴ The Commissioner reported that ‘WA’s rate of detention for young people has consistently exceeded all other states and territories, with the exception of the Northern Territory’.⁸⁵

1.1.5 Access to information on treatment and conditions

The previous sections included the legislative functions and powers of each body to access information, including information on numbers of children and young people detained and information about the conditions and treatment of those children and young people.

This section outlines WA's arrangements regarding the monitoring and recording of conditions of detention and treatment of children and young people in detention. It includes the degree to which these arrangements are addressed in legislation, regulations and/or policy (so far as I have been able to establish), and the degree to which those records are independently monitored.

1.1.5.1 Use of force and restraint

The *Youth Offenders Act 1994 (WA)* makes provision in relation to the use of force and the use of restraint.

Section 11C addresses the **use of force**, providing that 'a custodial officer is authorised to use no more than prescribed force in the management, control and security of a facility or detention centre' and that 'a custodial officer must not use force on a young offender unless that force is used in the prescribed circumstances'.

Section 11D addresses the **use of restraints**:

- (1) The chief executive officer, or a superintendent, may authorise and direct the restraint of a young offender where in his or her opinion such restraint is necessary:
 - (a) to prevent the young offender injuring himself or herself, or any other person; or
 - (b) upon considering advice from a medical practitioner, on medical grounds; or
 - (c) to prevent the escape of a young offender during his or her movement to or from a facility or detention centre, or during his or her temporary absence from a facility or detention centre.

Additionally, section 11D(2) restricts the use of restraint involving medication on medical grounds, requiring that it be approved by a medical practitioner first.

Section 11D(3) requires that, if restraint is used in relation to a young offender for a continuing period of more than 24 hours, the use and the circumstances must be **reported** as soon as practicable to the chief executive officer by the superintendent.

There is no mention in the primary legislation of a register or written record or register of use of force or use of restraints. However, the *Youth Offenders Regulations 1995 (WA)* make some requirements for recording use of force, restraint, solitary confinement, searches and complaints.

The regulations provide that 'if prescribed force or another similar physical restraint is used on a detainee, whether in prescribed circumstances or not, the detainee must be examined by the medical staff as soon as is practicable after the incident' and that:

- a member of the medical staff who conducts the examination must ensure that a written report of the examination is prepared and forwarded to the superintendent
- the superintendent must ensure that photographs are taken immediately of any injury sustained either by the detainee or staff
- a written report of any incident involving the use of prescribed force or another similar physical restraint must be provided to the superintendent by the staff member involved with respect to each detainee.⁸⁶

The regulations define ‘prescribed force’ as the minimum required to control a detainee’s behaviour in the circumstances and requires that the use of a type of hold must have been authorised by the superintendent.⁸⁷

There does not appear to be any requirement to make the registers on use of force and use of restraint accessible to external bodies or to report publicly on them, nor does there appear to be any public reporting on them in practice.

1.1.5.2 Searches

The regulations provide that each officer taking a role in a **strip search** of a detainee in a youth justice detention centre must provide a written report of the search to the superintendent.⁸⁸

There does not appear to be any requirement to make the reports of strip searches accessible to external bodies or to report publicly on them, nor does there appear to be any public reporting on them in practice.

1.1.5.3 Isolation/confinement

Regarding **confinement**, the regulations make separate provisions for detainees who have committed a ‘detainee offence’ and those who are being confined ‘as a way of maintaining good government, good order or security’.⁸⁹

Regarding both, a superintendent must make and **maintain a record** of an order to confine a detainee and the room used for confinement must be assessed by the superintendent to be of an appropriate size and sufficiently ventilated and lit that the detainee can be confined without injury to health.⁹⁰

Regarding the confinement of a detainee who has committed a ‘detainee offence’, the regulations require that a detainee placed in confinement must be subject to continuous monitoring for the first 30 minutes of that confinement and after that, to regular monitoring in accordance with ‘a written management regime that has been endorsed by the superintendent’.⁹¹ A detainee confined for a detainee offence is entitled to fresh air, exercise and staff company for a period of at least 30 minutes every 3 hours during unlock hours.⁹²

Regarding confinement ‘as a way of maintaining good government, good order or security’, a superintendent must inform the detainee of the reason for confinement.⁹³ A detainee whose confinement is for 12 hours or longer is entitled to at least one hour of exercise each 6 hours during unlock hours.⁹⁴

Regarding recording confinements, the regulations refer to administrative rules and instructions, stating that ‘the confinement of a detainee is subject to the usual regimen of searches, checks, observation, notification, record-keeping, reporting and other requirements that are imposed under administrative rules and instructions’.⁹⁵ Further, a detainee confined for good government, order or security ‘must be subject to the regimen of searches, checks, observation, notification and other requirements (if any) set out in juvenile custodial rules made for this purpose and approved by the chief executive officer’.⁹⁶

Youth Custodial Rules are on the Department of Corrective Services website.⁹⁷ They do not appear to include rules on registers regarding confinement.

There does not appear to be any requirement to make the records of orders to confine a detainee accessible to external bodies or to report publicly on them, nor does there appear to be any public reporting on them in practice.

1.1.5.4 Internal complaints

Neither the legislation nor the regulations address complaints. The Youth Custodial Rules on the Department of Corrective Services website state that ‘the Superintendent or their delegate shall keep a **record of all complaints**’.⁹⁸

In the Inspector of Custodial Services 2015 report of the visit to Banksia Hill, the Inspector included discussion of complaint mechanisms. It noted that Youth Custodial Rule 203 and Standing Order 21 ‘govern the process by which young people in detention may make complaints about matters affecting them during their time in custody’. The Standing Orders do not appear to be available online. The Inspector reported that although records must be kept of complaints, there was little evidence that the rules in this regard were followed. The Inspector recommended that there be an officer available at a time each day to accept requests from detainees and assist detainees in making complaints, as there are in the adult facilities.⁹⁹

The Inspector also commented that the low level of complaints during periods of considerable disruption (20 complaints in the years 2012-13 and 2013-14) was ‘very concerning’.¹⁰⁰ The Inspector noted an apparent lack of knowledge about the internal complaints system and/or a lack of confidence in that system. The Inspector recommended that better information be displayed and provided to the young people.¹⁰¹

1.1.5.5 Reporting on contracts

The WA Inspector of Custodial Services also reports on contractual arrangements between the WA Government and private providers of custodial services, such as G4S and Serco.¹⁰²

1.2 New South Wales (NSW)

The NSW Department of Justice is responsible for the detention of children and young people under the juvenile justice portfolio in NSW.

There are seven juvenile justice centres in NSW: Acmena (Grafton), Cobham (St Marys), Frank Baxter (Kariong), Orana (Dubbo), Reiby (Airds) and Riverina (Wagga Wagga).

The legislation governing the detention of children and young people in NSW includes the *Children (Detention Centres) Act 1987* (NSW), the *Young Offenders Act 1997* (NSW), and regulations include the *Children (Detention Centres) Regulation 2010* (NSW).

The following bodies are involved in the monitoring and oversight, including complaints, of youth justice detention centres in NSW:

- Inspector of Custodial Services
- Official Visitors
- NSW Ombudsman

In addition to this, any Judge of the Supreme Court or District Court, any Magistrate and any member of the Children’s Court may inspect any detention centre at any time.¹⁰³ However, they do not have a mandated role in regularly monitoring youth justice detention centres.

1.2.1 The NSW Inspector of Custodial Services

The NSW Inspector of Custodial Services is the legislated inspector of adult correctional facilities and juvenile justice centres in NSW. It also oversees the Official Visitor programs in both adult and juvenile justice facilities.

The Governor of NSW appoints the Inspector.¹⁰⁴ This occurs after the Minister for Corrections recommends an appointment to the NSW Joint Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission constituted under the *Ombudsman Act 1974* (NSW), and the recommendation is accepted.¹⁰⁵ Appointments are for 5 years; a person can be reappointed however they cannot hold the office for more than 10 years.¹⁰⁶

The Inspector reports to Parliament.¹⁰⁷

The Parliamentary Joint Committee on the Office of the Ombudsman, the Police Integrity Commission and the Crime Commission is tasked with examining all of the NSW Inspector's reports to Parliament and reporting to both Houses on matters arising in those reports.¹⁰⁸ The Joint Committee's reports and the Government responses are published on the Parliament's website.¹⁰⁹ This oversight function does not include any involvement in decisions of the Inspector to investigate or not to investigate complaints or to reconsider the findings, recommendations, determinations or other decisions of the Inspector.¹¹⁰

The legislation includes provisions regarding the appointment to guard against **conflicts** of interest. The following people are not eligible for appointment as Inspector: a member of parliament, or someone who has been a member of parliament in the previous 3 years, a person 'who is to any extent responsible for the management of, or who is employed at or in connection with, a custodial centre', and a person who has or has had any contractual interest regarding the management of correctional centres.¹¹¹

For financial and administrative purposes, the Inspector sits within the same Government department responsible for Corrective Services and Juvenile Justice. In the Inspector's *Annual Report 2014-2015* concerns were raised about these governance arrangements:

When the ICS was established in October 2013 it sat within the Department of Attorney General and Justice for administrative and budget purposes. Following restructures, the ICS was integrated into the administrative and financial arrangements of the Department of Justice. This substantially enlarged department now includes Corrective Services NSW and Juvenile Justice NSW, the agencies covered by the legislative inspection mandate.

This is in contrast to other inspection and oversight bodies in NSW who sit within the Department of Premier and Cabinet for administrative purposes to ensure structural and financial independence from the agencies, which they inspect.

The Inspector considers that the real and perceived independence of this office, which is critical to its credibility with stakeholders, and the intent of Parliament of NSW, is compromised by these governance arrangements.¹¹²

In relation to youth justice, the **functions** of the Inspector include: to inspect each juvenile justice centre at least every 3 years, to examine and review any custodial service at any time, to report to Parliament on each inspection, examination or review, and on any relevant matter if it is in the public interest, to include advice or recommendations in such reports, and to oversee the Official Visitor programs.¹¹³

The Inspector does not deal with individual complaints. These are referred to the relevant agency, for example, the Ombudsman NSW.¹¹⁴ Individual issues are assessed to determine if they relate to systemic failings only.

The Inspector's functions may be exercised on the Inspector's own initiative, at the request of the Minister, or in response to a reference by the NSW Joint Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission, or any public authority or public official.¹¹⁵

In the exercise of the NSW Inspector of Custodial Service's functions, the Inspector has the **power** to visit and examine any custodial centre at any time.¹¹⁶

There are some limitations on access to police cells and police transport. The mandate of the Inspector of Custodial Services includes access to correctional centres, youth justice centres, transitional centres, court cell complexes and inmate and detainee transport fleets. However, the mandate of the Inspector does not include police stations or court cell complexes that are not managed by Corrective Services NSW or Juvenile Justice¹¹⁷ or any function of, or service provided by, the NSW Police Force, the Serious Offenders Review Council, the Serious Young Offenders Review Panel or the State Parole Authority.¹¹⁸

The Inspector also has the right to **access all records** of any custodial centre, may require staff to supply information and produce documents, may require staff to attend before the Inspector to answer questions, and is entitled to be given access to detainees to communicate with them.¹¹⁹

The Inspector also has a broad incidental **power** to 'do all things necessary to be done for or in connection with, or reasonably incidental to, the exercise of the Inspector's functions'.¹²⁰

The legislation creates **offences** for obstructing the Inspector, failing to comply with the Inspector, and making false statements or misleading the Inspector. The penalty is a fine of 50 penalty units or 12 months imprisonment or both.¹²¹

The Inspector and staff are protected from **liability** for acts done or omitted in good faith under the legislation.¹²²

The legislation also protects complainants against '**detrimental action**' for providing information in good faith to the Inspector. Detrimental action includes: injury, damage or loss; intimidation or harassment; discrimination, disadvantage or adverse treatment in relation to employment; dismissal from or prejudice in employment; and disciplinary proceedings.¹²³

Information obtained as part of the Inspector's functions must be **confidential** except for specified circumstances.¹²⁴

The *Inspector of Custodial Services Act 2012* (NSW) makes specific provision on the way in which the Inspector works with other relevant agencies, including the Ombudsman.¹²⁵ Information sharing between the Inspector and the Ombudsman is specifically provided for in the legislation.¹²⁶

In 2014, the NSW Inspector of Custodial Services and the Ombudsman NSW entered into a Memorandum of Understanding.¹²⁷ The Memorandum provides that the Inspector and the Ombudsman are to meet quarterly to 'discuss issues of common interest'. It also provides for information exchange between the two agencies. The Inspector undertakes to provide the Ombudsman with an inspection schedule and the Ombudsman undertakes to provide a complaints summary to the Inspector.¹²⁸ The Ombudsman also undertakes to inform the Inspector of the outcome of complaints referred by the Inspector.¹²⁹

The Inspector must provide the Minister with a draft of each report to Parliament to be made by the Inspector and give a reasonable opportunity for the Minister to make submissions. The Inspector is not bound to amend a report in light of any submissions made regarding the draft, but the Inspector must consider any submissions and include a statement in the final report that submissions were made in relation to the draft report.¹³⁰

The Inspector is required to provide an **annual report** to the NSW Parliament which must include a description of the Inspector's activities in relation to the Inspector's principal functions, an evaluation of the response of relevant authorities to the recommendations of the Inspector, and any recommendations for legislative or administrative changes.¹³¹

The Inspector must report to Parliament on each inspection, examination or review.¹³² The Inspector may also report to Parliament on any matter relating to the Inspector's functions if the Inspector considers that such a report is in the interest of any person or in the public interest.¹³³

The Inspector can also be required to report to parliament on a relevant matter on request of the Minister.¹³⁴

In any report to Parliament, the Inspector may include a recommendation that the report be made public immediately, even if the Parliament is not in session.¹³⁵

The Inspector publishes annual reports and other inspection and thematic reports, as well as the government responses, on its website. In 2014-15, the Inspector completed two thematic inspections. One of these pertained to youth justice. The Inspector examined family and community connections in youth justice centres.¹³⁶ The Inspector's report and the response of Juvenile Justice NSW to the Inspector's recommendations is published on the Inspector's website.

The Inspector must give the Minister a draft of each report to Parliament and give the Minister a reasonable opportunity to make submissions on the draft report.¹³⁷ The Inspector is not bound to amend a report in light of any submissions made by the Minister.¹³⁸

With respect to youth justice centres, the Inspector's 2014-2015 Annual Report reported that there had been two inspections to youth justice centres, six liaison visits to youth justice centres, one report relating to youth justice centres, and that 59% of recommendations from that report were accepted. The centres inspected and visited are named.¹³⁹

The Inspector of Custodial Services has produced inspection standards for juvenile justice custodial services in NSW. The standards are based on international and domestic instruments and provide a framework for assessing conduct within NSW youth justice centres and are available online.¹⁴⁰

1.2.2 Official Visitor Program

The Inspector of Custodial Services also oversees the **Official Visitor program** conducted under the *Children (Detention Centres) Act 1987* (NSW).¹⁴¹ Juvenile Justice NSW previously managed the program.¹⁴² The Inspector is to advise, train and assist Official Visitors in the exercise of their statutory functions.¹⁴³

Official visitors are community representatives appointed by the Minister for Justice.¹⁴⁴ Appointments are for 2 years and an Official Visitor can be reappointed.¹⁴⁵

An official visitor may:

- enter and inspect a detention centre at any reasonable time
- confer privately with any person who is resident, employed or detained at the detention centre
- furnish to the Minister and the Inspector of Custodial Services advice or reports on any matters relating to the conduct of the detention centre
- exercise any other functions prescribed by the regulations.¹⁴⁶

Official visitors generally visit their allocated youth justice centres once a fortnight. Official visitors for youth justice facilities provide a combined report to the Minister and the Inspector for Custodial Services every 6 months.¹⁴⁷

In 2014-15, Official Visitors reported making 1394 visits to 40 correctional facilities and residents raised 6563 matters with Official Visitors which were recorded as complaints. The types of complaints were listed but not broken down by number in the NSW Department of Justice Annual Report.¹⁴⁸ The Department's Annual Report does not separately report the number of Official Visitor visits or complaints in relation to Juvenile Justice.

1.2.3 Ombudsman NSW

The **Ombudsman NSW** is a statutory office, independent of the government and accountable to the public through the NSW Parliament.

The Ombudsman is appointed in the same way as the Inspector of Custodial Services and can only be removed from office by the NSW Governor 'upon the address of both Houses of Parliament'.¹⁴⁹ The Ombudsman NSW is appointed for seven-year periods and can be reappointed.¹⁵⁰

The Ombudsman NSW functions primarily as a complaints handling body, taking complaints regarding the conduct of public authorities.¹⁵¹ Additionally, the Ombudsman can conduct an investigation on conduct about which a complaint could be made, even if a complaint has not been made.¹⁵²

In relation to an investigation, the Ombudsman NSW has the **power** to access information and may at any time (a) enter and inspect any premises occupied or used by a public authority as a public authority, and (b) inspect any document or anything on the premises.¹⁵³ The Ombudsman cannot exercise those powers if it appears that a person has a ground of privilege to rely on in a court to resist the inspection of the premises or document.¹⁵⁴

The Ombudsman NSW may require a public authority to provide information and documents for the purposes of an investigation.¹⁵⁵

For the purposes of inquiries held as part of an investigation, the Ombudsman NSW has the powers, authorities, protections and immunities conferred on a commissioner under the *Royal Commissions Act 1923* (NSW), including to summons a witness.¹⁵⁶

It is an **offence** to obstruct the Ombudsman, to fail to comply with a requirement of the Ombudsman or to mislead the Ombudsman.¹⁵⁷

Correspondence between a person in detention and the Ombudsman must be facilitated and remain **confidential**.¹⁵⁸ Further, the Ombudsman (and staff) shall not disclose any information obtained in the course of the functions of the Ombudsman without the consent of the person (or head of the public authority) who gave that information.¹⁵⁹

There are also **confidentiality** provisions regarding evidence before or documents given to the Joint Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission (constituted under the *Ombudsman Act 1974* (NSW)).¹⁶⁰

A person complaining to the Ombudsman or assisting the Ombudsman is protected from **recriminations** (any violence, punishment, damage, loss or disadvantage, or loss or disadvantage in employment). Such recriminations constitute an offence punishable by up to 5 years imprisonment.¹⁶¹

The Ombudsman NSW and its officers have **immunity** from civil or criminal proceedings for anything done for the purpose of the Act in good faith.¹⁶²

The Ombudsman must **report** on an investigation, including reasons, if that investigation finds that the conduct investigated is:

- against the law
- unreasonable, unjust, oppressive or improperly discriminatory
- in accordance with a law which may be unreasonable, unjust, oppressive or improperly discriminatory
- based on improper motives, irrelevant grounds or considerations
- based on a mistake of law or fact, conduct for which reasons should be given but are not given
- otherwise wrong.¹⁶³

The report may include **recommendations** about what the public authority should do to rectify the conduct, that any law or practice should be changed, that compensation should be paid, or any other action.¹⁶⁴

Such a report must be given to the responsible Minister, the head of the relevant public authority, and where the public authority is a public service employee, to the Department of Premier and Cabinet. If requested by the Ombudsman, the person must notify the Ombudsman of action taken or proposed in response to a report.¹⁶⁵ Where the Ombudsman is not satisfied with the steps taken, the Ombudsman may report to Parliament, and the responsible Minister must make a statement to Parliament in response.¹⁶⁶

The Ombudsman NSW Annual Report 2014-2015 states:

We receive two types of complaints when we visit centres – those about common, day-to-day issues that come up every time we visit, and the complaints we would be unlikely to receive if we did not visit.¹⁶⁷

In 2014-2015, the custodial services unit recorded 33 visits to correctional and youth justice centres across NSW. From the reporting, it is not clear how many of these visits were to youth justice centres.¹⁶⁸

With respect to youth justice, in 2014-2015 the Ombudsman received 54 formal complaints and notifications, and 186 informal complaints and notifications.

In the Annual Report 2014-2015, the numbers of formal and informal complaints from each youth justice centre are provided. Each youth justice centre is named.¹⁶⁹ Additionally, the report details the reasons why complaints were finalised in each category. Categories include assessment only, preliminary or informal investigation, and formal investigation.¹⁷⁰

The Ombudsman NSW also receives notifications about segregations and separations of children and young people in youth justice centres lasting for 24 hours or more. This is required by the *Children (Detention Centres) Regulation 2010* (NSW).¹⁷¹ These incidences are reported in its annual report, broken down by centre. In 2014-15 there were a total of 99 segregation notifications and 114 separation notifications.¹⁷²

1.2.4 Access to information on treatment and conditions

The previous sections included the legislative functions and powers of each body to access information, including information on numbers of children and young people detained and information about the conditions and treatment of those children and young people.

This section outlines NSW's arrangements regarding the monitoring and recording of conditions of detention and treatment of children and young people in detention. It includes the degree to which these arrangements are addressed in legislation, regulations and/or policy (so far as I have been able to establish), and the degree to which those records are independently monitored.

The primary legislation governing the detention of children and young people in NSW, the *Children (Detention Centres) Act 1987* (NSW), requires that each juvenile detention centre be inspected at least every year by a juvenile justice officer appointed by the Secretary. That officer must give a report of the inspection to the Secretary as soon as practicable.¹⁷³ The regulations specify what must be included in these reports, including the wellbeing of detainees and the conditions of the premises.¹⁷⁴ These reports do not appear to be publicly available.

Provisions in the legislation regarding conditions and complaints include:

- The Secretary of the Department must ensure that adequate arrangements exist: a) to maintain the physical, psychological and emotional wellbeing of detainees; b) to promote the social, cultural and educational development of detainees; c) to maintain discipline and good order among detainees; and d) to facilitate the proper control and management of detention centres.¹⁷⁵
- There is a list of **prohibited punishments** in the primary legislation, including 'treatment of a kind that is cruel, inhuman or degrading'. It is an offence, punishable by up to 12 months imprisonment to punish a detainee in one of these ways.¹⁷⁶

Section 32A of the *Children (Detention Centres) Act 1987* (NSW) provides that regulations may be made regarding a range of relevant conditions. These include: visits, phone calls, correspondence, the observance of religious rites, education, healthcare, circumstances in which detainees may be confined to their rooms, the review of separation directions under section 16(3), the circumstances in which a **body search** may be conducted and the procedures for conducting a body search, circumstances in which **force may be used** against a detainee and the keeping of records in this regard, the equipment that may be used to **restrain** a detainee and the circumstances in which and maximum periods for which this may happen, and the procedures for and facilities to be provided to enable a detainee **complaint** to the centre manager or any other person or body.¹⁷⁷

It does not appear that the regulations make provision regarding body searches.

1.2.4.1 Segregation and separations

The primary legislation limits the use of segregation to protect the safety of the detainee or other people, and segregation specifically may not be used for punishment.¹⁷⁸ Conditions are put on the use of segregation regarding the nature, duration (not longer than 3 hours without the approval of the Secretary), conditions of the environment, things to do, and visibility of the detainee to staff.¹⁷⁹ Segregation must not be used unless the centre manager is satisfied that there is no practicable alternative to protect the safety of the detainee or others.¹⁸⁰

The legislation specifically provides for punishment, including allowing the use of ‘exclusion from or **confinement** to, a place for a period’ not exceeding 12 hours, or 24 hours for detainees over 16 years. If confinement is used, the detainee must be provided with means of ‘usefully occupying’ him or herself, the physical environment of the place of confinement must be no less favourable than the other places of the detention centre, and the detainee must always be visible to staff.¹⁸¹

The centre manager must keep a **record of any segregation** and must forward a copy to the detainee and the Secretary within 24 hours of the segregation.¹⁸²

It is unclear what the reporting requirements are around ‘confinement’ under section 21 of the *Children (Detention Centres) Act 1987* (NSW).

The *Children (Detention Centres) Regulation 2015* (NSW) requires that the record kept regarding segregation under section 19(3) of the primary legislation must include specific information, including the reason for segregation.¹⁸³

As noted above, the Regulations also require that Juvenile Justice notify the Ombudsman when a young person is segregated for more than 24 hours.¹⁸⁴

In addition to segregation figures, the Department also advises the Ombudsman of ‘separations’.¹⁸⁵ The Ombudsman NSW *Annual Report 2014-2015* states:

Several years ago, the head of Juvenile Justice agreed with us that a similar notification [to that required to be provided regarding segregation] should be made whenever a young person is kept separate or confined without contact with other detainees for more than 24 hours. This gives us a clear overall picture of the amount of time young people may spend on their own and helps us to ensure that they are given appropriate support and ways to occupy themselves. We use this information to provide feedback to the centre managers and senior management at Juvenile Justice, and give the community assurance that young people are not being isolated unnecessarily or for extended periods.¹⁸⁶

These incidences are reported in the Ombudsman’s annual report, broken down by centre.¹⁸⁷ In 2014-15 there were a total of 99 segregation notifications and 114 separation notifications.¹⁸⁸

1.2.4.2 Use of force and restraint

The regulations define ‘force’ as including the use of instruments of restraint.¹⁸⁹

‘Instruments of restraint’ specifically includes handcuffs, ankle cuffs, flexi cuffs, restraining belts, riot shields and such other articles, or classes of articles, as are declared by the Secretary, by order published in the Gazette, to be instruments of restraint.¹⁹⁰

The regulations specify the reasons why an officer may use force against a detainee and include: to prevent a detainee from harming himself or herself or others or damaging property; to prevent a detainee escaping; to search a detainee if the detainee refuses to be searched; to seize any dangerous article or substance; to prevent or quell a riot or disturbance; to move a detainee who refuses to move from one location to another in accordance with an order, if the officer first gives a warning.¹⁹¹

A juvenile justice officer must use no more force than is reasonably necessary.¹⁹²

Any use of force must be reported on in writing by the officer to the centre manager as soon as practicable after the use of force. Details of the use of force, including the reasons for it, must be included.¹⁹³ There appears to be no external scrutiny of or public reporting on the use of force and restraints.

1.2.4.3 Internal complaints

Complaints are also addressed in the Regulations.¹⁹⁴ Complaints can be made to a centre manager or any other juvenile justice officer, or the Secretary or any other employee of the Department.¹⁹⁵

Detainees must be assisted to make a complaint and confidentiality is protected: an envelope purporting to contain a complaint must not be opened or read by anyone other than the addressee.¹⁹⁶

The process for making a complaint about juvenile justice is on the Department's website, as is the Juvenile Justice Client Complaints Policy.¹⁹⁷ The complaints process starts with the juvenile justice centre unit manager. If the young person is not happy with how the complaint was dealt with, he or she can write to the relevant Regional Director and after that, the Executive Director of Juvenile Justice in the Department of Justice.

The Department's website goes on to provide details of how to make an external complaint: it lists the Ombudsman's contact details and those of the Attorney General and Minister for Justice.¹⁹⁸

The Complaints Policy specifies that allegations of abuse must be dealt with in accordance with the Client Protection Policy, not the Complaints Policy.¹⁹⁹ It specifies that, in accordance with the Client Protection Policy, complaints about abuse/physical or sexual assault must be reported to the police.²⁰⁰

The Complaints Policy also requires that all complaints are recorded on the Client Information Management System.

If a detainee is not satisfied with the decision in relation to a complaint, he or she can apply to the referee's supervisor²⁰¹ or the Secretary of the Department for a review.²⁰²

A **complaints register** must be kept by the Secretary, the centre manager of each centre, and the Manager, Court Logistics, Classification and Placement, in relation to complaints made respectively to each of them.²⁰³

These registers must be available for inspection by the NSW Ombudsman, and the register kept by the centre managers must be available for inspection by the Official Visitor and the Inspector of Custodial Services.²⁰⁴

The information to be recorded in the complaints registers is prescribed and further details may be prescribed in complaints guidelines.²⁰⁵

The Secretary may issue complaints guidelines as to how complaints and applications for the review of decisions should be dealt with. Complaints guidelines are to be available for inspection by detainees and visitors.²⁰⁶

The NSW Department of Justice Annual Report also reports on the number of complaints it receives. In 2014-15, there were a total of 55 complaints received by Juvenile Justice. 56 percent of these complaints were resolved within 48 hours and 44 percent were resolved within three weeks.²⁰⁷ The Annual Report also breaks down the complaints by type of complaint, for example against staff or about food.²⁰⁸ The Department's *Annual Report 2014-15* also reported on matters received by the Commissioner of Corrective Services from the NSW Ombudsman²⁰⁹ however it does not refer to the NSW Ombudsman in the context of juvenile justice.

1.3 Tasmania

The Department of Health and Human Services is responsible for the detention of children and young people involved in the criminal justice system, under the portfolio of Youth Justice Services. The legislation governing the detention of children and young people is the *Youth Justice Act 1997* (Tas).

There is one youth justice centre in Tasmania – Ashley Youth Detention Centre.

Currently, there is no established independent oversight body for youth justice centres in Tasmania. However the Tasmanian Parliament has recently passed the *Custodial Inspector Bill 2016* (Tas) and the position of Inspector will be recruited for soon.²¹⁰

There are existing complaints mechanisms which allow for complaints to be made to the Tasmanian Ombudsman, an independent statutory body.²¹¹ The Tasmanian Commissioner for Children and Young People is also actively engaged with the detention centre and its clients.

1.3.1 Tasmanian Custodial Inspector

The *Custodial Inspector Bill 2016* (Tas) passed through Parliament on 25 August 2016 and establishes the Tasmanian Custodial Inspector.

The Inspector will be attached to the Office of the Ombudsman and will provide independent external scrutiny of prisons and youth detention centre services.²¹² Schedule 1 item 2 of the new legislation provides that a person may hold office as Inspector in conjunction with the office of Ombudsman.

The new legislation provides for an independent statutory officer, to be appointed by the Governor,²¹³ for a maximum term of 5 years.²¹⁴ The Inspector may only be removed from office by the Governor, on addresses from both Houses of Parliament.²¹⁵ The Governor may remove the Commissioner from office only for one of the prescribed reasons including bankruptcy, conviction of a serious offence, incompetency or misconduct.²¹⁶

The new Tasmanian Custodial Inspector will have amongst its **functions**, to:

- report to the responsible Minister or Parliament on inspections (mandatory inspections every 3 years and additional occasional inspections at any time)
- report to the responsible Minister or Parliament on any issue or general matter in the interest of any person or the public interest
- provide an annual report to Parliament
- include in any report advice or recommendations as the Inspector thinks fit.²¹⁷

The Tasmanian Custodial Inspector will specifically have the **power** to visit and examine any custodial centre and any vehicle, equipment, container or other thing in a custodial centre, at any time. The Inspector will also be empowered to enter and examine any equipment or container outside a custodial centre used in connection with a custodial centre, and any vehicle used to transport prisoners or detainees, at any time.²¹⁸

The legislation defines ‘custodial centre’ as including ‘a prison within the meaning of the *Corrections Act 1997*’ and ‘a detention centre’, but it specifically ‘does not include any police station or court cell complex’.²¹⁹

The Inspector is not required to give **notice of a visit**, but the legislation provides that the Inspector may publish a schedule of the dates at which he or she intends to carry out mandatory inspections or occasional inspections and reviews.²²⁰

The new Tasmanian Custodial Inspector will also have the following relevant **powers**:

- full access to all documents relating to any custodial centre or persons detained and to obtain information from any person in any manner that the Inspector thinks appropriate.²²¹
- government is not entitled to prevent or obstruct records or evidence being given for the purpose of an inspection even if that was to be allowed in a legal proceeding before a court.²²²
- to require any staff member or person who provides services to people in custody to supply information, produce documents, and to attend and answer questions before the Inspector.²²³

The Inspector will also have the broad incidental **power** to do all things necessary or convenient to be done in connection with the performance and exercise of his or her functions and powers under this Act.²²⁴

Staff of a custodial centre ‘must allow the inspector to conduct an interview with a prisoner or detainee, out of the hearing of any other person’ and must respect the **confidentiality** of correspondence between detainees and the Inspector.²²⁵

The new legislation makes it an **offence** to obstruct, resist or threaten the Inspector, to refuse to comply with a requirement of the Inspector, or to make false statements or mislead the Inspector.²²⁶

Those giving information to the Inspector (and the Inspector) will be protected from **liability** for actions done in good faith.²²⁷

Information received by the Inspector will be **privileged**. Section 23(5) provides that a person who is or has been the Inspector or an officer of the Inspector must not be compelled in court (or in another forum authorised to examine evidence) to disclose information that was acquired in his or her official capacity, and disclosed or obtained under the *Custodial Inspector Act 2016* (Tas).

The legislation provides that at any time after providing a report to a Minister, the Inspector may table the report in Parliament thereby making it public.²²⁸ A Minister *may* prepare a response to a report from the Inspector.²²⁹

The Inspector may request a responsible Secretary to notify the Inspector within a specified time of steps taken or proposed to be taken to give effect to recommendations of the Inspector; or if no steps have been or are proposed to be taken, the reasons for that lack of action.²³⁰ If no appropriate steps have been taken within a reasonable time, the Inspector may send the Premier and responsible Minister a copy of the recommendations and comments by the responsible Secretary.²³¹

The Inspector will be required to table an **annual report** in Parliament. The legislation requires that the annual reports include a description of the Inspector’s activities, an evaluation of the response of relevant authorities to the recommendations of the Inspector, and any **recommendations** for changes to the laws or administration of the state that the Inspector considers should be made.²³²

1.3.2 Ombudsman Tasmania

The Ombudsman Tasmania is an independent statutory officer appointed by the Governor for five years.²³³ The Ombudsman reports to Parliament.²³⁴ The Ombudsman can only be removed by the Governor with agreement from both Houses of Parliament for reasons such as incompetency, bankruptcy, conviction of a crime or misconduct.²³⁵

The *Youth Justice Act 1997* (Tas) provides that a detainee is entitled to complain to the Ombudsman about the standard of care, accommodation or treatment he or she is receiving in the detention centre.²³⁶

The Ombudsman Tasmania can carry out an investigation on his or her own motion, or on a complaint or reference by the Governor or Parliament.²³⁷

The Ombudsman Tasmania may conduct an investigation in any manner he or she thinks appropriate and may obtain information from any persons in any manner he or she thinks appropriate.²³⁸

For the purposes of an investigation, the Ombudsman Tasmania may, at any reasonable time, enter any premises occupied or used by a public authority and inspect the premises.²³⁹ For the purposes of an investigation, the Ombudsman has the same **powers** as a commission of inquiry (essentially a royal commission) under the *Commissions of Inquiry Act 1995* (Tas),²⁴⁰ including the right to apply to a magistrate for a warrant to enter premises and seize documents.²⁴¹

The Ombudsman has the same **immunities** as a Commissioner under the *Commissions of Inquiry Act 1995* (Tas) and those giving evidence have the same protections and immunities as those under that legislation.²⁴² The Ombudsman or an officer is not liable to any civil or criminal proceedings for any act done under the legislation unless it was done in bad faith.²⁴³

It is an **offence** to obstruct or resist the Ombudsman, to fail to comply with the Ombudsman or give false information to the Ombudsman.²⁴⁴

The *Right to Information Act 2009* (Tas) does not apply to information in the possession of the Ombudsman if the information relates to a complaint, preliminary inquiries, an investigation, conciliation, report or recommendation made under the legislation.²⁴⁵

In investigations relating to a reference, the Ombudsman must report to the Governor or Parliament. The Governor must table the reports before Parliament, thereby making them public.²⁴⁶

The legislation includes provision for the Ombudsman to **request a response** from the relevant authority and Minister regarding recommendations made in relation to an investigation. Where the Ombudsman does not consider that appropriate steps have been taken within a reasonable time, he or she may send to the Premier and responsible Minister a copy of the report, recommendations and comments from the relevant authority.²⁴⁷ Where a report, recommendation or comments has been sent to the Premier the Ombudsman may lay a report on the relevant matter before Parliament.²⁴⁸

The Ombudsman must provide Parliament with an annual report²⁴⁹ and may publish in whatever way he or she thinks fit any other report when he or she considers it in the public interest.²⁵⁰

In 2014-15, the Tasmanian Ombudsman reported that the office received one complaint from a detainee of Ashley Youth Detention Centre. The Annual Report noted that this was 'significantly less' than in previous years, perhaps due to the reduction in the number of youth detainees.²⁵¹

1.3.3 Commissioner for Children and Young People Tasmania

The Commissioner for Children and Young People Tasmania is an independent statutory officer, appointed by the Governor,²⁵² for a maximum period of five years.²⁵³ The Commissioner reports to the Minister and the Secretary.²⁵⁴ The Governor may remove the Commissioner from office only for one of the prescribed reasons including bankruptcy, conviction of a serious offence, incompetency or misconduct.²⁵⁵

The legislation provides that ‘in performing his or her function, the Commissioner must act independently, impartially and in the public interest’.²⁵⁶

The Commissioner’s **functions** include acting as an advocate for detainees as defined under the *Youth Justice Act 1997* (Tas) including seeking information about, and facilitating access by the detainee to support services appropriate to the needs of the detainee; and assessing, in the Commissioner’s opinion, the physical and emotional wellbeing of the detainee.²⁵⁷

The functions of the Commissioner for Children and Young People Tasmania also include (among others) to:

- research, investigate and influence policy development into matters relating to children and young people
- promote and monitor the wellbeing of children and young people
- assist in ensuring the State satisfies its national and international obligations in respect of children and young people.²⁵⁸

The Commissioner for Children and Young People Tasmania has broad **powers** do all things necessary or convenient in connection with the performance of his or her functions, including the power to require the provision of information and the production of documents.²⁵⁹

The express powers of the Commissioner include the power to:

- investigate and make recommendations regarding the systems, policies and practices of organisations, government or non-government, that provide services that affect children and young people²⁶⁰
- investigate and make recommendations regarding the effects of any legislation, proposed legislation, documents, government policies or practices or procedures, or any other matters relating to the wellbeing of children or young people²⁶¹
- advise and make recommendations, in relation to the rights and wellbeing of children and young people, to Ministers, State authorities and other organisations.²⁶²

The Commissioner for Children and Young People does not have an express power to visit the youth detention centre. However the Commissioner does regularly visit Ashley Youth Detention Centre and meets with children and young people in private.²⁶³ The Department of Health and Human Services’ response also stated that the Commissioner has been granted access to all areas of Ashley Youth Detention Centre.²⁶⁴

The *Commissioner for Children and Young People Act 2016* (Tas) requires those engaged in the performance of the Commissioner’s functions to keep information **confidential**,²⁶⁵ however information provided to the Commissioner is not **privileged** under that Act.

It is an **offence** to obstruct the performance of functions under the *Commissioner for Children and Young People Act 2016* (Tas).²⁶⁶

The Commissioner must provide an **annual report** to the Minister and Secretary on the performance of the powers, and the exercise of the functions, of the Commissioner that year, and the Commissioner must cause a copy of that annual report to be laid before Parliament.²⁶⁷

Reports other than the Commissioner's annual report, including reports into investigations, reviews, research or any other matter arising in the performance of the Commissioner's functions, must be provided to the Minister and the Commissioner may lay a copy of the report before Parliament.²⁶⁸ Further, the Commissioner must provide a draft of the report of an investigation, review or research, or any other matter, to the Minister.²⁶⁹ Where the Commissioner has provided a draft report to the Minister on the investigation or review, the Minister may provide the Commissioner with written comments or feedback or make a written request that the Commissioner consult on the draft report with a specific person.²⁷⁰ If the Minister requests, the Commissioner must include a copy of any such comments or written request in the Commissioner's final report.²⁷¹

1.3.4 Access to information on treatment and conditions

The previous sections included the legislative functions and powers of each body to access information, including information on numbers of children and young people detained and information about the conditions and treatment of those children and young people.

This section outlines Tasmania's arrangements regarding the monitoring and recording of conditions of detention and treatment of children and young people in detention. It includes the degree to which these arrangements are addressed in legislation, regulations and/or policy (so far as I have been able to establish), and the degree to which those records are independently monitored.

The *Youth Justice Act 1992* (Tas) prohibits certain treatment of detainees in youth justice centres, including the use of force other than in specified circumstances, as well as corporal punishment, the use of any form of psychological pressure intended to intimidate or humiliate the detainee, the use of any form of physical or emotional abuse, and the adoption of any kind of discriminatory treatment.²⁷²

The legislation also makes more detailed provision regarding use of force, isolation, and complaints. There is no mention of restraints in the legislation.

In addition to the use of force and isolation registers discussed below, registers of critical incidents, searches and complaints are kept but are not required under legislation.²⁷³

Registers undergo internal oversight only, and there does not appear to be any requirement to provide information contained in them to oversight bodies or that they be made public. However complaints may be referred to the Ombudsman.²⁷⁴

1.3.4.1 Use of force

Use of force is prohibited under section 132 of the *Youth Justice Act 1997* (Tas) unless it is reasonable and:

- (i) is necessary to prevent the detainee from harming himself or herself or anyone else; or
- (ii) is necessary to prevent the detainee from damaging property; or
- (iii) is necessary for the security of the centre; or
- (iv) is otherwise authorised by or under this or any other Act or at common law.²⁷⁵

The Department of Health and Human Services Tasmania advises that a **register is kept of all instances when force or restraint** is used, though this is not required by the legislation. The register includes the date of the incident, the young person's name and date of birth, the type of force used, the location on the young person's body to which force was applied, and by whom the force was authorised.²⁷⁶

At present, it does not appear that this information is made public or made available to any external body.

1.3.4.2 Isolation

Use of isolation as punishment is prohibited.²⁷⁷ However, the legislation permits the use of isolation on the authorisation of a detention centre manager in prescribed circumstances: if a detainee's behaviour presents an immediate threat to his or her safety or the safety of any other person or to property; and all other reasonable steps have been taken to prevent the detainee from harming himself or herself or any other person or from damaging property but have been unsuccessful; or in the interests of the security of the centre.²⁷⁸

The legislation also references the Secretary of the Department's instructions regarding the management, control, organisation and security of detention centres: the use of isolation must not contravene those instructions.²⁷⁹ Such instructions were unable to be sourced online.

Section 133(6) of the *Youth Justice Act 1997* (Tas) requires that a **register is kept of all instances of isolation**. The section does not specify what 'particulars' must be included in that register. The Department advised that the register includes the date of the incident, the young person's name and date of birth, the type of any force used and the location on the young person's body to which force was applied, and by whom the force and/or use of isolation was authorised.²⁸⁰

1.3.4.3 Internal complaints

The *Youth Justice Act 1997* (Tas) provides for an internal complaints mechanism: a detainee, a member of a detainee's family or a guardian may complain to the Secretary of the Department of Health and Human Services about a matter that affects or is connected with a detainee.²⁸¹ Further, a detainee is entitled to complain to the Secretary or the Ombudsman about the standard of care, accommodation or treatment he or she is receiving in the detention centre.²⁸²

After receiving a complaint, the Secretary must provide written notice to the complainant and the detainee detailing the complaint and how it will be dealt with.²⁸³ The Secretary does not deal with a complaint if the Secretary believes it is 'trivial or made only to cause annoyance'.²⁸⁴

The submission by the Department of Health and Human Services (DHHS) advised that:

All complaints made to the Secretary, DHHS will be directed to the Centre Manager, Ashley Youth Detention Centre [AYDC]. These complaints may include, but are not limited to, complaints about breaches of Centre processes and procedures, administrative issues and/or behaviour issues of young people or staff.

As the delegate of the Secretary, the Director, Services to Young People will be informed of the complaint by the Centre Manager, AYDC.²⁸⁵

I was advised that, in 2014-2015, four complaints were made through the Secretary. All of these complaints were investigated and resolved. No information is publicly reported.²⁸⁶

1.4 South Australia

The SA Department for Communities and Social Inclusion is responsible for the detention of children and young people within the Juvenile Justice portfolio in South Australia.

The legislation governing the detention of children and young people in SA will be the *Youth Justice Administration Act 2016* (SA) when it is proclaimed, in conjunction with the *Young Offenders Act 1993* (SA). Currently it is the *Young Offenders Act 1993* (SA), the *Family and Community Services Act 1972* (SA) and *Family and Community Services Regulations 2009*.

There is one youth justice centre in South Australia – the Adelaide Youth Training Centre. It has two campuses. The Jonal Drive campus which accommodates boys aged 10-14 years and the Goldsborough Road campus which accommodates all females and males aged 15 years and over.

Until the new legislation is proclaimed, there is no legislated inspection or oversight body in South Australia for its youth justice centre.

Currently, the SA Guardian for Children and Young People and the Ombudsman SA have roles in regularly monitoring or accepting complaints from children and young people in the Training Centre.

The *Youth Justice Administration Act 2016* (SA) provides that the following people may visit a training centre:

- Members of Parliament
- judges
- the Training Centre Visitor
- the South Australian Guardian for Children and Young Persons
- any other person authorised in writing by the Minister.²⁸⁷

However, Members of Parliament and judges do not (and will not, under the new legislation) have a regular monitoring and reporting role.

At the time of writing, South Australian Government was consulting on draft legislation to establish a South Australian Children's Commissioner.²⁸⁸ It appears that the Bill, if passed, would also include the functions and powers of the Guardian for Children and Young Persons and therefore may make changes in that regard.²⁸⁹

1.4.1 Training Centre Visitor

On 10 March 2016, the South Australian Parliament passed the *Youth Justice Administration Act 2016* (SA).²⁹⁰ This provides for the role of the Training Centre Visitor, who will have a legislated inspection and oversight mandate.²⁹¹ The *Youth Justice Administration Act 2016* (SA) is expected to commence in late 2016 when the accompanying regulations have been developed.²⁹²

The Training Centre Visitor is to be appointed by the Governor. The person appointed 'may be the Guardian for Children and Young Persons'.²⁹³ The Guardian currently fulfils a monitoring role in practice and it appears that this new legislation may be used to give the Guardian a statutory mandate.

The Training Centre Visitor 'must act independently, impartially and in the public interest'; the Minister cannot control how the Visitor exercises their statutory functions and cannot give any direction regarding the content of the Visitor's reports.²⁹⁴

If the person appointed is not the Guardian, the appointment will be for a maximum of 5 years. If the person is the Guardian, the appointment will be for as long as the person is the Guardian.²⁹⁵

The Training Centre Visitor's **functions** include:

- conduct visits to, and inspections of, Training Centres
- promote the best interests of training centre residents
- act as an advocate for the training centre residents to promote the proper resolution of issues relating to the care, treatment or control of the residents
- inquire into, and provide advice to the Minister in relation to any systemic reform required to improve the quality of care, treatment or control of training centre residents or the management of a training centre
- inquire into and investigate any matter referred by the Minister.²⁹⁶

The new legislation specifically relates to the inspection of Training Centres and does not appear to cover other places where children and young people may be held in custody, for example court cells, police cells and transport vehicles.

The Training Centre Visitor will have the **power** to conduct visits to and inspections of Training Centres in SA.²⁹⁷ A visit to a training centre may be made by the Visitor, on the Visitor's own initiative or at the request of a resident of the centre, at any reasonable time of the day, and be of such length, as the Visitor thinks appropriate.²⁹⁸

The legislation does not contain a mandatory visiting requirement.

Regarding access to youth justice centres, the new legislation provides that the Training Centre Visitor may:

- (a) so far as practicable, inspect all parts of the centre used for or relevant to the custody of youths; and
- (b) so far as practicable, make any necessary inquiries about the care, treatment and control of each resident of the centre; and
- (c) take any other action required to exercise the Visitor's functions.²⁹⁹

When visiting a Training Centre, the Training Centre Visitor must give the manager **reasonable notice** of the impending visit unless the visit is for reasons the Training Centre Visitor considers 'exceptional'.³⁰⁰ If a manager of a training centre refuses at any time to allow the Visitor to visit the centre because of any genuine concerns the manager may have in connection with the safety of the Visitor (whether related to a security risk, a health related risk or some other reason), the manager must, as soon as reasonably practicable, provide the Visitor with written advice as to why entry to the centre was refused.³⁰¹

The Training Centre Visitor also has the **powers** necessary or expedient for, or incidental to, the exercise of the Visitor's functions.³⁰²

It will be an **offence** to hinder any person in the execution, performance or discharge of a power, function or duty under the *Youth Justice Administration Act 2016* (SA).³⁰³

There are no specific provisions in the new legislation regarding **protections** and **immunities** for the Training Centre Visitor or those giving information to the Training Centre Visitor.

The legislation provides that information about individual cases disclosed to the Training Centre Visitor or a member of staff are **confidential** and not liable to disclosure under the *Freedom of Information Act 1991* (SA).³⁰⁴ It also provides that a person may not (on threat of a fine of \$10,000) disclose information relating to a youth or resident of a training centre obtained in the administration or enforcement of the legislation with the following exceptions:

- (a) as required or authorised by this Act or any other Act or law; or
- (b) as reasonably required in connection with the administration or enforcement of this Act or any other prescribed Act; or
- (c) if, in the opinion of the Chief Executive, it is necessary to disclose the information in order to avert a serious risk to public safety; or
- (d) for the purposes of legal proceedings arising out of the administration or enforcement of this Act; or
- (e) to a government agency or instrumentality of this State, the Commonwealth or another State or Territory of the Commonwealth for the purposes of the proper performance of its functions; or
- (f) with the consent of the youth or resident to whom the information relates.³⁰⁵

The legislation requires that the Training Centre Visitor report annually and at any other time to the Minister regarding the Visitor's functions, and that the Minister must table those reports in Parliament, thereby making them public.³⁰⁶ The legislation does not make provision to enable the Training Centre Visitor to require a response from the Minister.

1.4.2 Guardian for Children and Young People in South Australia

The SA Guardian for Children and Young People acts as an advocate for the interests of children and young people under the guardianship, or in the custody, of the Minister for Education and Child Development, and is 'a monitor of their circumstances'.³⁰⁷

The Act provides that the Guardian must act independently, impartially and in the public interest; and that the Minister cannot control how the Guardian is to exercise the Guardian's statutory functions and powers and cannot give any direction with respect to the content of any report.³⁰⁸

The SA Guardian was established by amendment to the *Children's Protection Act 1993* (SA) in 2006.³⁰⁹ The Guardian is appointed by the Governor for a maximum of 5 years and is eligible for re-appointment.³¹⁰ The office becomes vacant if the Guardian is convicted of a serious offence, becomes bankrupt, becomes incapable of carrying out the duties of office,³¹¹ or is removed by the Governor on presentation of an address from both Houses of Parliament for incompetence or misbehaviour.³¹²

The submission made by the Guardian for Children and Young People in South Australia explained that the Guardian's current monitoring role is in place via a memorandum of understanding between the Guardian for Children and Young People and the SA Government:

The Minister for Education and Child Development delegates to the Minister for Communities and Social Inclusion certain powers to refer matters to the Guardian for investigation and report. A **memorandum of agreement** specifies what functions the Guardian will have within the Minister for Communities and Social Inclusion areas of responsibility. This enables the Guardian for Children and Young People (GCYP) to investigate and report on circumstances in the Adelaide Youth Training Centre (AYTC).³¹³

The Memorandum of Understanding was signed in 2013. However the SA Office of the Guardian advised that it has had a formal role in monitoring of youth justice detention facilities since 2006 'and informal visits to residents since 2008'.³¹⁴

The Guardian has statutory functions and powers in relation to children who are under the guardianship or in the custody of the Minister.³¹⁵

The Guardian's relevant statutory **functions** include:

- promote the best interests and act as an advocate for the interests of children in the custody of the Minister
- monitor the circumstances of children in the custody of the Minister
- provide advice to the Minister on the quality of the provision of care for children in the custody of the Minister and on whether the children's needs are being met
- inquire into, and provide advice to the Minister in relation to, systemic reform necessary to improve the quality of care provided for children in alternative care
- investigate and report to the Minister on matters referred to the Guardian by the Minister.³¹⁶

The Guardian's **powers** include the 'powers necessary or expedient for, or incidental to, the performance of the Guardian's functions'.³¹⁷

Specific legislative **powers** include the power to require the provision of information or the attendance of a person to provide information; and there is a maximum penalty of \$5000 for not complying.³¹⁸

Additional authorisation regarding visits to Training Centres and access to information are contained in the Memorandum of Administrative Arrangement between the Guardian and the Youth Justice Directorate of the Department for Communities and Social Inclusion.³¹⁹ It provides that the Guardian for Children and Young People will do the following:

- 1) Provide the Youth Training Centre General Manager with reasonable prior notice of the intention to visit the Centre and/or gather information or investigate a matter. For announced monitoring visits, GCYP will negotiate a suitable date for the visit, four weeks prior. If the General Manager is unavailable, contact will be made with the Accommodation Manager or Supervisor;
- 2) Where possible, GCYP will visit the Youth Training Centre to discuss the matter or view documents or electronic records on site;
- 3) Feedback following monitoring visits will be provided within three weeks in writing to the Director Youth Justice and General Manager; and
- 4) Requests for data, additional to the regular (annual) data reports, will be made in writing to the Director Youth Justice.

The Memorandum provides that Youth Justice will:

- 1) Make available to the Office of the Guardian for Children and Young People (GCYP) information relating to a child or young person in detention or who has recently been in detention, or children as a group;
- 2) Respond as soon as possible to requests for information, which may be by phone or email, and within two working days unless there are extenuating circumstances;
- 3) At the commencement of an announced visit by GCYP, provide all information that has been requested in advance of the visit unless there are extenuating circumstances;
- 4) The General Manager of Adelaide Youth Training Centre will be present at the announced visit to answer questions and hold preliminary discussion on issues;

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- 5) Staff of the Youth Training Centre will agree to cooperate with the GCYP by complying with any reasonable request of the Guardian whilst on the site, including ensuring that facilities are available at the time of the visit and providing support to the Guardian where necessary;
 - 6) Managers will respond within two working days to questions that arise from monitoring visits unless there are extenuating circumstances;
 - 7) Provide statistical data as requested by the Guardian and relevant to the Guardian's functions; and
 - 8) Any person who the Guardian believes is capable of providing information or producing a document that may be relevant to the performance of the Guardian's functions must provide that information in the manner specified in the Children's Protection Act 1993 (Section 52CA Use and obtaining of information) and others must not obstruct (Division 4 Offences, Sections 52EG, 52EH, 52EI and 52EJ).

There are **penalties** for intimidating or obstructing a person in relation to their cooperation with the Guardian, and for **treating a person unfavourably** on the ground that they cooperated with the Guardian.³²⁰

The legislation also requires that the Minister 'provide the Guardian with the staff and other **resources** that the Guardian reasonably needs for carrying out the Guardian's functions'.³²¹

Information about individual cases disclosed to the Guardian is to be kept **confidential** and is not liable to disclosure under Freedom of Information legislation.³²²

The Department advised that residents can communicate confidentially with the Guardian as the key complaint handling body for Youth Training Centre residents by requesting that any staff member arrange for a confidential unrecorded telephone call. Also, the Aboriginal Legal Rights Movement Inc. is a free call option in the Adelaide Youth Training Centre telephone system.³²³

The Guardian for Children and Young People in South Australia advised that **resource constraints** prevent an adequate frequency of visits.³²⁴ Advocates from the Office of the Guardian for Children and Young People visit once every two months. At other times, detainees must call the office to request advocacy.³²⁵

The Guardian's Annual Report 2014-15 reports that the Office of the Guardian visited children and young people living in residential care or youth justice detention in 30 announced visits.³²⁶ Advocates from the Office of the Guardian conducted 12 visits to units within the Youth Training Centre and a written report followed each visit.³²⁷

The Guardian and Senior Advocate also visit youth justice centres twice a year to review records and report on conditions.³²⁸ In the Guardian's 2014-15 Annual Report, the Guardian stated:

The records are reviewed twice a year and a more comprehensive written report is provided to the Director of Youth Justice.³²⁹

The more comprehensive reports referred to do not appear to be public.

The Guardian must report annually to the Minister on the performance of the Guardian's statutory functions as well as periodically (as required by the Minister). The Minister must lay a copy of such reports before the Parliament, thereby making it public.³³⁰ The Guardian may also, at any time, prepare a report to the Minister on any matter arising out of the Guardian's functions and the Minister must lay such a report before the Parliament.³³¹

As with the Training Centre Visitor, the Guardian for Children and Young People in South Australia **reports** to the Minister, who must table those reports in Parliament.³³² However, there is no requirement to respond.

In the 2014-15 Annual Report, the Guardian reported that 129 requests for intervention which were within the Guardian's mandate were made; and the Guardian assisted 171 children and reviewed 23 cases.³³³ This was not broken down according to how many of these children were in the youth justice system or in detention.

In its Annual Report 2014-15, the Guardian reported that one of the major issues for advocacy that year was 'improvements in conditions for young people residing in youth training centres and residential care'.³³⁴

The Guardian for Children and Young People advised that since 2006, the Guardian has reviewed, every six months, complaints made by residents and provided feedback to managers about the appropriateness of responses with regards to content action and timeliness.³³⁵ The Guardian does not appear to report on these reviews publicly.

Other reports made to the Minister regarding visits do not appear to be available on the Guardian's website. Searches of tabled papers and petitions on the SA Parliament's website have not revealed any tabled reports from the Guardian for Children and Young People other than annual reports.³³⁶

1.4.3 Ombudsman SA

The Ombudsman SA investigates complaints about South Australian government departments, including the Department for Communities and Social Inclusion and the Youth Training Centres administered by that department.

Children and young people in detention in South Australia are advised to complain to the Ombudsman SA if they are not satisfied with the outcomes of internal complaints or outcomes of complaints to the Guardian for Children and Young People.³³⁷

The Ombudsman SA is an independent officer, appointed by the Governor on a recommendation by resolution of both Houses of Parliament.³³⁸ The Ombudsman's term expires at 65 years of age; the Ombudsman can only otherwise be removed by both Houses of Parliament for prescribed reasons such as bankruptcy or conviction of an indictable offence.³³⁹

The Ombudsman may not, without Ministerial consent, be in paid employment outside of the office of Ombudsman.³⁴⁰ Directions given to the staff of the Ombudsman by the Ombudsman prevail 'over directions given to the employee by the chief executive of the administrative unit of the Public Service in which the employee is employed to the extent of any inconsistency'.³⁴¹

The Ombudsman SA may investigate any administrative act, either on receipt of a complaint or on the Ombudsman's own initiative.³⁴²

A person having the 'care or custody' of another person must not refuse or fail to take all steps necessary to facilitate any communication by that person necessary for, or incidental to, a complaint and to ensure the privacy of that complaint.³⁴³

The Ombudsman SA or a person authorised by the Ombudsman SA may, for the purposes of an investigation, enter and inspect any premises or place occupied by an agency to which the *Ombudsman Act 1972* (SA) applies.³⁴⁴

In investigations, the Ombudsman is able to exercise the **powers** of a Royal Commission under the *Royal Commissions Act 1917* (SA).³⁴⁵

There are **penalties** of up to \$2000 for obstructing or failing to comply with the Ombudsman SA.³⁴⁶

The Ombudsman and Ombudsman's staff are protected from **liability** for anything done in good faith under the *Ombudsman Act 1972* (SA).³⁴⁷

Information held by the Ombudsman SA is **privileged**: except for the purposes of an application under section 28 (determining the Ombudsman's jurisdiction) neither the Ombudsman nor any member of the Ombudsman's staff can be called to give evidence before any court in any judicial proceedings, on a matter coming to his or her notice in the course of exercising powers or functions under this or any other Act.³⁴⁸

Government agencies are not entitled to privilege in respect of the production of documents or the giving of evidence in Ombudsman investigations.³⁴⁹

The Ombudsman SA must provide an **annual report** to the Minister and to both Houses of the Parliament.³⁵⁰ The Ombudsman SA may also publish a report or statement about an investigation if he or she is of the opinion that it is in the public interest to do so.³⁵¹

The Ombudsman SA's Annual Report 2014-15 reported that the Ombudsman received 152 complaints about the Department for Communities and Social Inclusion in that year. The breakdown of these complaints was not sufficient as to determine how many related to youth justice services.³⁵²

The Ombudsman SA's *Annual Report for 2014-2015* included a summary of its investigation into the Department for Communities and Social Inclusion regarding a young person who had been harmed in the youth training centre.³⁵³ This complaint was referred to the Ombudsman SA by the Office of the Guardian for Children and Young People.³⁵⁴ The recommendation made by the Ombudsman SA in relation to this investigation was accepted and implemented by the Department for Communities and Social Inclusion.³⁵⁵

1.4.4 Access to information on treatment and conditions

The previous sections included the legislative functions and powers of each body to access information, including information on numbers of children and young people detained and information about the conditions and treatment of those children and young people.

This section outlines SA's arrangements regarding the monitoring and recording of conditions of detention and treatment of children and young people in detention. It includes the degree to which these arrangements are addressed in legislation, regulations and/or policy (so far as I have been able to establish), and the degree to which those records are independently monitored.

Until the new legislation comes into force, the management, control and supervision of training centres in SA is provided for in the *Family and Community Services Regulations 2009* under the *Family and Community Services Act 1972* (SA). At the time of writing, we had not yet seen the new regulations related to the new legislation.

Many of the provisions in the current regulations will be included in the new primary legislation.

1.4.4.1 Prohibited treatment

Currently, prohibited treatment is included in the regulations.³⁵⁶ The new primary legislation covers prohibited treatment in training centres, including treatment that is cruel, inhuman or degrading.³⁵⁷

1.4.4.2 Use of force

The regulations provide that use of force against a resident of a training centre may only happen in prescribed circumstances, such as to prevent harm to the resident or others; and that if force is used against a resident, each employee involved must provide a written report to the centre manager, with prescribed details including the reasons. A written account by the resident must also be kept with the staff accounts.³⁵⁸

From the time of commencement, these requirements will be on the face of the new primary legislation.³⁵⁹

The SA Department for Communities and Social Inclusion advised that reports of use of force are recorded on a searchable electronic case management system.³⁶⁰ This information is available to the Guardian and will be made available to the training Centre Visitor but is not publicly available.³⁶¹

However, it is not an express requirement of the new legislation or the current regulations that this information be provided to the Guardian or the Training Centre Visitor. Nor is there any requirement for public reporting.

1.4.4.3 Isolation

Currently, the regulations provide that: any use of isolation (a 'detention room') may only happen in prescribed circumstances, such as if the resident is about to harm himself or herself or another person, or to preserve the security of the centre; a resident under 12 years may not be detained in a detention room; residents aged 12-14 years have a maximum of 24 hours in a detention room and residents aged over 15 years have a maximum of 48 hours in a detention room.³⁶²

The manager of a training centre must ensure that a record is made of any use of isolation, with prescribed details including the reason for it to be recorded, any medical concerns relating to the resident and the 'management plan' for the resident for the period during which the resident was detained. Residents must also provide (either themselves or by a nominated person), an account of the incident leading to the use of a detention room.³⁶³

These provisions will be in the new primary legislation, and will include additional requirements: any use of a 'safe room' requires that the manager of the training centre be informed as soon as practicable; additional reporting requirements regarding the regular observations of a resident in a safe room; a resident must be examined as soon as practicable by a health professional; if the resident belongs to a cultural or linguistic minority a cultural advisor must be informed of the detention; an action plan must be prepared to manage the resident in the period immediately following the resident's release from the safe room.³⁶⁴

The reports regarding use of isolation are recorded in a searchable electronic case management system.³⁶⁵ This information is made available to the Guardian for Children and Young People and will be made available to the Training Centre Visitor but is not publicly available.³⁶⁶

It is not an express requirement of the new Act or the current Regulations that this information be provided to the Guardian or the Training Centre Visitor.

1.4.4.4 Searches

The current regulations make provision regarding when a resident's belongings may be searched.³⁶⁷ They also make provision regarding when a resident may be searched and how that should happen, for example that those present during a search when a resident is naked must be of the same sex as the resident.³⁶⁸

There is currently no requirement in the regulations for a record to be kept regarding searches of belongings or body searches of residents. However, the Department for Communities and Social Inclusion advised that a **register of all unclothed searches** is maintained by the Training Centre Security Services Supervisor.³⁶⁹

Provisions regarding searches are contained in the new legislation, including the additional protection that 'the resident may not be required to be completely naked at any time during the search'.³⁷⁰

Further, the new legislation requires that a record be kept of any search of a semi-naked resident, including the name of the resident, date of the search, reason for the search and name of staff.³⁷¹

The records of semi-naked searches are not required by the new legislation to be available to any external body or be reported on publicly.

1.4.4.5 Critical incidents

Critical incidents are not addressed by the existing or new legislation or by the existing regulations. The Department for Communities and Social Inclusion advised that there are internal reporting policies regarding critical incidents.³⁷²

Critical incidents are allocated a category depending on severity and reviewed by the General Manager; they are managed in line with *Managing Critical Client Incidents Policy and Guidelines*. The Youth Justice Critical Incident Review Committee conducts internal reviews of critical incidents and makes recommendations to the Director for systemic, policy or procedural responses; the Department investigates and acts on all allegations of abuse and/or neglect.

The Department Chief Executive and Minister for Communities and Social Inclusion are provided with weekly update reports on any open critical client incident cases and the Department Executive Leadership Team is provided with a monthly summary report.³⁷³

It does not appear that information regarding critical incidents is provided to any external body or reported on publicly.

1.4.4.6 Internal complaints

Internal complaints are not addressed by the existing or new legislation or by the existing regulations. The Department for Communities and Social Inclusion advises that there are internal reporting policies regarding complaints.³⁷⁴

The Department advised that Adelaide Youth Training Centre (AYTC) staff respond to and try to resolve verbal complaints by children and young people at the time they are received. Residents can also complete a 'feedback form' and the next step is a written complaint. All written complaints are logged onto the Department's complaints and feedback management system and electronically allocated to the appropriate staff member to address. Verbal complaints do not appear to be recorded.³⁷⁵

The Department advises that its complaints policy reflects the *Australian/New Zealand Standard: Guidelines for Complaint Management in Organisations* (AS/NZS10002: 2014) and more detailed guidance is available for staff regarding managing the complaints process.

The policy requires an acknowledgement of a complaint within five days and a response within 30 days. Further, 'residents can escalate their complaint if not satisfied with the initial response to a supervisor or more senior AYTC staff member, the Director Youth Justice or DCSI Executive'.³⁷⁶

The Department states that client complaints and feedback data is collated centrally and provided to the DCSI Executive Leadership Team on a quarterly basis for monitoring.³⁷⁷

The Department for Communities and Social Inclusion Annual Report includes limited information about complaints. In 2014-15, the Department reported that 'there were 123 comments/suggestions, 500 staff compliments and 865 complaints recorded'.³⁷⁸ No further breakdown was provided.

In response to my request for information, the Department advised that in 2014-15 there were 179 complaints from residents in the AYTC and 96% of these had a recorded outcome. The most common category of complaint was regarding food.³⁷⁹

The Guardian for Children and Young People advised that as a result of its long-standing dual role of 'advocating for, and monitoring the active voice of children and young people detained in youth justice facilities', a formal complaints process was introduced, which appears to have now been discontinued. This process provided direct, confidential communication between residents and the centres' managers, and at the Guardian's request, complaints were received and responded to by the managers.³⁸⁰ The new sites have seen a different complaint process with responses to complaints now completed by the relevant manager with portfolio responsibility. The Guardian commented that:

feedback from children and young people indicates there have been occasions of dissatisfaction with responses received and consequently, little confidence in the process.³⁸¹

The Guardian advised that since 2006, the Guardian has reviewed, every six months, complaints made by residents and provided feedback to managers about the appropriateness of responses. The Guardian said that in the last two reviews of the Youth Training Centre records of complaints (in September 2015 and April 2016), responses have been broadly appropriate; but that where complaints required further follow up by the relevant manager, the completion or success of these interventions was not included as a record to the complaints.³⁸²

1.4.4.7 Reporting on contracts – detainee transport

The Department for Communities and Social Inclusion advised that transport of adult and young people subject to criminal proceedings and/or justice mandates is contracted out. The Department for Correctional Services (DCS) manages the contract on behalf of the South Australia Police, Courts Administration Authority, SA Health and Department for Communities and Social Inclusion (Youth Justice). The contract includes the following requirements to safeguard children and young people:

- Young people are to be transported and held separately to adults
- Contractor staff have current working with children screening checks
- Contractor staff must be conscious of the unique needs of young people in their custody
- Monitoring provisions included in the contract:
 - » Incident reporting
 - » Periodic reporting

-
- » Regular performance review by an established Agencies' Coordinating Committee (comprising representatives from each of the five agencies receiving services under the contract).³⁸³

A copy of an undated contract between the Government of South Australia and the State Courts Administration Council and G4S Custodial Services Pty Ltd is available online.³⁸⁴ However, the 20 schedules are not included and schedule 3 contains the periodic reports required to be provided by G4S to the SA Government. The available contract does not mention use of force or restraint or critical incidents.

I was unable to find any public reporting regarding detainee transport.

1.5 Australian Capital Territory

The ACT Community Services Directorate (CSD) has responsibility for a range of human services in the ACT, including youth justice. The legislation governing the detention of children and young people is the *Children and Young People Act 2008* (ACT). There is one youth justice centre in the ACT – Bimberi Youth Justice Centre.

The ACT has a Human Rights Act.³⁸⁵ Under the *Human Rights Act 2004* (ACT), it is unlawful for a public authority to act in a way that is incompatible with a human right, or to fail to give proper consideration to a relevant human right in decision-making.³⁸⁶

The *Human Rights Act 2004* (ACT) includes protection of civil and political rights and economic and social rights, including (but not limited to):

- the right to protection from torture and cruel, inhuman or degrading treatment³⁸⁷
- specific protection of the family and children³⁸⁸
- specific protection of children involved in the criminal process³⁸⁹
- the right to liberty and to procedural rights in relation to lawful deprivation of liberty and human treatment when deprived of liberty³⁹⁰
- cultural and other rights of Aboriginal and Torres Strait Islander peoples³⁹¹
- the right to education.³⁹²

If a person claims a public authority has acted inconsistently with a human right, that person can bring a claim for relief of any kind (except damages) in the Supreme Court of the ACT, or can rely on the rights under the *Human Rights Act 2004* (ACT) in other legal proceedings.³⁹³

There is no formal independent oversight mechanism for youth justice centres in the ACT. However, in addition to internal complaints procedures at Bimberi and through the Department of Community Services,³⁹⁴ the following bodies are involved in monitoring and oversight, including complaints, of the youth justice detention centre in the ACT:

- ACT Human Rights Commission (including the ACT Public Advocate and Children and Young People Commissioner)
- Official Visitors
- Ombudsman ACT (also the Commonwealth Ombudsman).

In practice, the ACT Children and Young People Commissioner and Public Advocate combined with the Official Visitors are primarily responsible for exercising powers of oversight and inspection at the youth justice centre.

A range of people are empowered to enter Bimberi. Section 153 of the *Children and Young People Act 2008* (ACT) provides that the following people may, at any reasonable time, enter and inspect a detention place or a place outside a detention place where a detainee is or has been directed to work or participate in an activity:

- a judge
- a magistrate
- a member of the Legislative Assembly
- a commissioner exercising functions under the *Human Rights Commission Act 2005* (ACT)
- the public advocate
- the Ombudsman.

1.5.1 ACT Public Advocate and Children and Young People Commissioner

The **Children and Young People Commissioner, and the Advocate** are separate statutory positions under the *Human Rights Commission Act 2005* (ACT).³⁹⁵ Currently the same person holds both positions.³⁹⁶

The legislation states that the ACT Human Rights Commission is not subject to the direction of anyone else in relation to the exercise of any of its functions under the Act.³⁹⁷ However, the Minister is able to direct the Commission to investigate a matter that could be complained about under the legislation.³⁹⁸

Commissioner appointments (including those of the Children and Young People Commissioner and the Public Advocate) are made by the Executive (that is, the government), for a maximum of five years.³⁹⁹ The Executive may remove a Commissioner or Advocate for contravening a territory law, misbehaviour, bankruptcy, conviction of an offence punishable by imprisonment for at least a year, absence or incapacity.⁴⁰⁰

In considering complaints, the ACT Human Rights Commission can **compel** information, and it is an **offence** to not provide the required information.⁴⁰¹ The ACT Human Rights Commission can also **require a person's** attendance to provide information in relation to a complaint, and it is an **offence** to not attend as required.⁴⁰²

The ACT Human Rights Commission's **functions** include:⁴⁰³

- complaint handling
- encouraging and assisting users and providers of services to improve those services and improve their procedures for dealing with complaints
- identifying, inquiring into and reviewing issues relating to the matters that may be complained about.

Section 40A of the *Human Rights Commission Act 2005* (ACT) provides that a person may complain to the ACT Human Rights Commission about a service for children and young people if:

- the service is not being provided appropriately
- the provider of the service has acted inconsistently with the generally accepted standard of service delivery expected of a provider of the kind of service to which the complaint relates or any other standard prescribed by regulation
- the service is not being provided.

A service for children and young people is defined as a service provided in the ACT specifically for children, young people, both children and young people or their carers. Included among the examples in the *Human Rights Commission Act 2005* (ACT) is a service provided in relation to a detention place.⁴⁰⁴

The specific **functions** of the Children and Young People Commissioner include the exercise of functions for the Commission in relation to services for children and young people.⁴⁰⁵

The specific **functions** of the Public Advocate in relation to children and young people include:⁴⁰⁶

- advocate for the rights of children and young people and in doing so:
 - » foster the provision of services and facilities for children and young people
 - » support the establishment of organisations that support children and young people
 - » promote the protection of children and young people from abuse and exploitation
- investigate concerns from children and young people about services for the protection of children and young people
- investigate matters in relation to which the public advocate has a function
- monitor the provision of services for the protection of children and young people
- deal with entities providing services on behalf of children and young people.

The Public Advocate also has relevant functions under the *Children and Young People Act 2008* (ACT), which requires that:

- the director-general provides the Public Advocate with all notices of a segregation direction⁴⁰⁷
- the register of searches must be available for inspection by any commissioner under the *Human Rights Commission Act 2005* (ACT) (which includes the Children and Young People Commissioner and the Public Advocate) and that the public advocate *must* inspect the register at least once every 3 months.⁴⁰⁸

The ACT Children and Young People Commissioner and Public Advocate visits young people monthly, and upon request.⁴⁰⁹ In 2014-15, before the Public Advocate was included in the Human Rights Commission, the Public Advocate conducted 12 visits to young people in Bimberi Youth Justice Centre⁴¹⁰ and undertook 14 occasions of advocacy for 9 young people in Bimberi.⁴¹¹

The Public Advocate also meets on a bi-monthly basis with the Director of Youth Justice and the youth justice centre management 'to facilitate the resolution of issues and to discuss positive initiatives occurring at Bimberi'.⁴¹²

Information provided to the Commission is **privileged**: it cannot be used in evidence in civil or criminal proceedings other than in relation to offences under the *Human Rights Commission Act 2005* (ACT).⁴¹³ Officials and those making complaints or providing information to the Commission are protected from civil and criminal **liability** for acts done honestly and without recklessness.⁴¹⁴

Further, any information, given honestly and without recklessness, to a commissioner or a member of staff of the commission is not a breach of confidence; or a breach of professional etiquette or ethics; or a breach of a rule of professional conduct.⁴¹⁵

The *Human Rights Commission Act 2005* (ACT) also protects against **victimisation**, making it an offence punishable by a fine and/or 6 months imprisonment to cause or threaten to cause a detriment to a person because the person has done (or is believed to be intending to do) the following: made a complaint under the Act; or given information or documents to a person exercising a function under the Act; or given information or documents or answered a question as required under the Act.⁴¹⁶

It is also an **offence** to threaten or intimidate a person with the intention of causing the other person not to make a complaint or withdraw a complaint to the ACT Human Rights Commission.⁴¹⁷

Among the main objects of the *Human Rights Commission Act 2005* (ACT) is to make **recommendations** to government and non-government agencies on legislation, policies, practices and services that affect vulnerable groups in the community.⁴¹⁸

The Commission is required to provide the Minister with an **Annual Report** about the operation of the Commission under the *Annual Reports (Government Agencies) Act 2004* (ACT) and in accordance with the requirements of the Annual Report Directions.⁴¹⁹ The Minister must cause a copy of the Annual report to be laid before the ACT Legislative Assembly.⁴²⁰ Until the position became a part of the ACT Human Rights Commission, the Public Advocate ACT was also separately required to provide annual reports which were available on its website.⁴²¹

The ACT Human Rights Commission may prepare a report of a Commission-initiated consideration and give it to anyone the Commission considers appropriate.⁴²²

For each inquiry and review that the Commission undertakes under section 14(1)(d) (reports into any matter about which a complaint could be made), the President must report to the Minister and other appropriate entities and advise the Minister and other entities about the relevant matters.⁴²³

The Commission may, on its own initiative, give the Minister a written **report** about any matter of public importance related to the commission, the commission's functions or a matter that may be complained about under this Act. The Minister must present such a report to the Legislative Assembly within six sitting days, thereby making it public.⁴²⁴

In relation to a complaint, the legislation provides that if the Commission is satisfied that the person complained about has acted inconsistently with an applicable standard, the final report may make recommendations to the person. A recommendation in a final report need not be limited to matters raised by the complaint being closed. If a recommendation recommends that action be taken, it must state the reasonable time within which the action should be taken.⁴²⁵

Further, the Commission may give a third party a report, other than a final report, in certain circumstances. Third parties include people such as a Minister, a non-government provider, an employer. The circumstances include: if the Commission considers that the third party has acted inconsistently with an applicable standard or is otherwise failing to adequately do something the third party is required to do; or the report is about matters of public policy, or the report is about matters that the third party has an appropriate interest in; and it is in the public interest to give the report.⁴²⁶

The legislation also includes provision to require a response from 'an entity'. The entity commits an offence if a report recommends that it take action within a stated time and the entity fails to tell the commission in writing about the action taken in relation to the recommendation within 45 days of the end of the stated time or 3 weeks after the entity is given the report, whichever is the later.⁴²⁷

Additionally, if an entity does not comply with a recommendation in a Commission report, or a requirement to provide information, the Commission may, after giving the entity notice and time to respond, publish the name of the entity and details of the entity's failure and/or report the entity to the Minister.⁴²⁸

The 2014-15 Annual Report of the ACT Public Advocate reported that, while attending Bimberi on visits, the Public Advocate inspected the registers concerning 'Use of Force' and Searches'.⁴²⁹ It also reported that in 2014-15, the Public Advocate was advised of five notices of segregation in relation to four young people. The periods of segregation ranged from 7 to 14 days. The total number of days the four young people were segregated was 35 days. Three young people spent seven days each in segregation and one young person spent 14 days in segregation.⁴³⁰ There was no reporting on the reasons for the use of segregation.

1.5.2 Official Visitors

Official Visitors visit and inspect places of detention to ensure that children and young people can raise any concerns they have regarding the care, treatment and living conditions, or the operation of Bimberi. The Official Visitor program is administered through the Department of Community Services.

Official visitors are legislated positions under the *Official Visitor Act 2008* (ACT) and further guidance can be found in the disallowable instrument *Official Visitor (Children and Young People Services) Visit and Complaint Guidelines 2015*.

The Minister appoints Official Visitors⁴³¹ for three years.⁴³² The Minister may only appoint a person if the Minister is satisfied on reasonable grounds that the person has suitable qualifications or experience for the role.⁴³³ A person cannot be appointed if they are a public servant or have a 'relevant interest' for example a financial interest in a visitable place.⁴³⁴ The Minister may end an appointment for misbehaviour or failure to fulfil visiting duties, and must end an appointment for incapacity or if a conflict of interest arises,⁴³⁵ an appointment also ends if the person becomes a public servant.⁴³⁶

Part 4 of the *Official Visitor Act 2012* (ACT) sets out the **functions** of the Official Visitor. In relation to youth justice centres, they include to:

- visit Bimberi, and places outside Bimberi where young detainees are, or have been directed to work or participate in an activity⁴³⁷
- receive and consider complaints from young detainees and others on their behalf⁴³⁸
- be available to talk with young detainees and anyone else who has a concern about an entitled person or a visitable place.⁴³⁹

A young detainee or anyone else may make a complaint to the Official Visitor personally or through someone else about any aspect of the person's accommodation including:

- the conditions of accommodation
- the care or services provided at a visitable place
- the activities available
- how a visitable place is conducted.⁴⁴⁰

An Official Visitor is **protected from civil liability** for anything done honestly and without recklessness in the exercise of the Official Visitor's functions. Any liability which would otherwise attach to an official visitor attaches instead to the Territory.⁴⁴¹

The ACT Official Visitor may, at any reasonable time, enter a 'visitable place', including a youth justice detention centre,⁴⁴² following a complaint or at the official visitor's own initiative.⁴⁴³

A 'visitable place' does not appear to include a vehicle that transports a child or young person.⁴⁴⁴ It is defined as

- (a) a detention place; or
- (b) a place outside a detention place if a detainee is, or has been, directed to work or participate in an activity at the place; or
- (c) a therapeutic protection place; or
- (d) a place of care.⁴⁴⁵

Under section 15(2) of the *Official Visitor Act 2008* (ACT), the official visitor may, when at the visitable place, inspect any records kept under the legislation. Further, an operating entity for a visitable place such as Bimberi must give an Official Visitor any reasonable assistance that the official visitor asks for to exercise their functions.⁴⁴⁶ It is an offence for a person in charge of an operating entity to fail to provide assistance to the Official Visitor without reasonable excuse.⁴⁴⁷

The *Official Visitor (Children and Young People Services) Visit and Complaint Guidelines 2015 (No.3)* provides that an official visitor must visit Bimberi Youth Justice Centre at least 12 times per annum (once a month).⁴⁴⁸

An ACT Official Visitor may make scheduled visits, and may also make ad hoc visits following a complaint or at the Official Visitor's own initiative.⁴⁴⁹ An Official Visitor may visit **without giving notice** where the official visitor reasonably believes it would compromise a complaint investigation to do so.⁴⁵⁰

Official Visitors report to the operational Minister – the Minister for Children and Young People (the Minister).⁴⁵¹ Official Visitors are required to report legislative non-compliance at Bimberi to the Minister, including any aspect of the treatment, living conditions, work or activities of detainees.⁴⁵² The Official Visitor may also report a belief that the detention of a person is not in accordance with the legislation to the relevant director-general, the Public Advocate and the Official Visitors board.⁴⁵³

Official Visitors must also report the number and kind of complaints made, and action taken, to the Minister every quarter.⁴⁵⁴ The Official Visitor may give a copy of a report made to the Minister regarding complaints to the director-general, the Public Advocate and the Official Visitor's board.⁴⁵⁵

The Minister must provide an annual report on the complaints received by the Official Visitor to the ACT Parliament.⁴⁵⁶ That information is therefore publically available. To access that report, a member of the public must request it from the ACT Legislative Assembly – they are not available online. The reporting available online is limited to that included in the Department of Community Services' Annual Report, which does not contain the whole report made to Parliament in this regard. It does not include the numbers or types of complaints made by detainees to Official Visitors.

I was provided with copies of the Department's Annual Reports to the ACT Legislative Assembly regarding complaints received by the Official Visitor for Children and Young People who visited Bimberi.⁴⁵⁷

The *Official Visitor for Children and Young People Annual Report 2013-14* includes the number of visits (25 by the Official Visitor and 24 by the Aboriginal and Torres Strait Islander Official Visitor) but not the number of complaints received. It lists the types of complaints received:

- phone calls – broken phones, phone 'drop-outs', unapproved callers, phone credits
- issuing of clothing and toiletries
- facilities – broken radios, intercoms, heaters and toilets
- access to education and recreation
- application of policies and procedures – issues related to the provision of charge notices
- conflict with staff and other young people – accusations of undue force from staff, accusations of bullying, harassment and unfair treatment and the use of lockdowns.

Regarding complaints of undue force being used, the report states that they were 'reviewed by the Official Visitors and were settled without further action'.⁴⁵⁸

The *Official Visitor for Children and Young People Annual Report 2014-15* reports that the Official Visitor visited Bimberi 27 times and the Aboriginal and Torres Strait Islander Official Visitor visited 25 times.⁴⁵⁹ Again, complaint numbers are not included but a list of types of complaints was included:

- access to education and recreation
- access to professional services, for example dentist, nurse, doctor and psychologist
- application of policies and procedures – application of rules and consequences, application of the behaviour management policy, access to visitors
- conflict with staff and other young people – accusations of inconsistent treatment, accusations of young people’s views not being respected
- phone calls – allocation of phone credits and access to a phone number for the Aboriginal and Torres Strait Islander Official Visitor
- issuing of clothing and toiletries.

Again, the report states that complaints ‘were settled to the satisfaction of the young person and the Official Visitors following the issue being raised by the Official Visitors with Bimberi Management’.⁴⁶⁰

The *Department of Community Services Annual Report 2014-2015* reports that during that year, two official visitors reported to the Minister, including the Children and Young People Official Visitor and the Aboriginal and Torres Strait Islander Official Visitor. It also reports that 52 visits to Bimberi were made by the Official Visitors.⁴⁶¹

1.5.3 ACT Ombudsman

The ACT Ombudsman functions primarily as a complaints handling body, taking complaints regarding the conduct of public authorities. The Ombudsman may also conduct an investigation on conduct about which a complaint could be made, even if a complaint has not been made.

The ACT Ombudsman is a statutory office, independent of the government and accountable to the public through the ACT Parliament.⁴⁶² The legislation specifically provides that ‘the ombudsman has complete discretion in the exercise of the ombudsman’s functions’.⁴⁶³

The ACT Ombudsman or a person authorised by the Ombudsman may, for the purposes of an investigation under the *Ombudsman Act 1989* (ACT), at any reasonable time of the day, **enter any place** occupied by an agency, including the inspection of documents at the premises.⁴⁶⁴

However, the Ombudsman ACT does not appear to make regular visits to Bimberi.

The Ombudsman also has the **power** to require the production of documents or information, and the attendance of a person.⁴⁶⁵ The Ombudsman may examine a person in attendance on oath or affirmation.⁴⁶⁶

Neither the Ombudsman nor a person acting under the Ombudsman’s direction or authority is liable to be sued in relation to an act or omission done under the legislation in good faith.⁴⁶⁷ Nor is a person liable for loss, damage or injury as a result of complaints or information provided in good faith under the *Ombudsman Act 1989* (ACT).⁴⁶⁸

The legislation provides for **confidentiality** of communication between detainees and the Ombudsman: written communication between the Ombudsman and a complainant in custody is to remain sealed.⁴⁶⁹

The legislation also protects the confidentiality of information obtained in the course of a person's role as Ombudsman or an officer of the Ombudsman. Disclosure in breach of this provision is punishable by a fine and/or imprisonment of 6 months.⁴⁷⁰

Further, information acquired by a person as Ombudsman or an officer of the Ombudsman is **privileged** in a court or other proceeding examining evidence.⁴⁷¹

The Ombudsman has the express power to make **recommendations** regarding legislative change.⁴⁷²

The legislation has provision to encourage government agencies to engage with the Ombudsman's recommendations. The Ombudsman must report to the agency concerned and may request that the agency provide particulars of any action it proposes to take regarding the report and recommendations in the report.⁴⁷³ However, the agency 'may give to the Ombudsman such comments concerning the report as it wishes to make'.⁴⁷⁴

The Ombudsman must give a copy of a report of an investigation to the Minister responsible for the agency concerned.⁴⁷⁵ If the Ombudsman considers that 'adequate and appropriate' action is 'not taken within a reasonable time' in response to a recommendation in a report, the Ombudsman may give the report and comments from the agency to the Chief Minister for a written response or directly to the Speaker of the Legislative Assembly.⁴⁷⁶ The Speaker must present the final report to the Legislative Assembly on the first sitting day after receiving the report and the Minister must present a written response to the Legislative Assembly within three months of the report being presented to the Legislative Assembly, thereby making it public.⁴⁷⁷

The Ombudsman may also report 'from time to time' to the Speaker independently of reports regarding investigations.⁴⁷⁸ Like reports regarding investigations, the Speaker must present the final report to the Legislative Assembly on the first sitting day after receiving the report and the Minister must present a written response to the Legislative Assembly within three months of the report being presented to the Legislative Assembly.⁴⁷⁹

The Ombudsman's **Annual Report 2014-2015** provides broad complaints figures, including that there were 18 complaints received in 2014-2015 relating to the Community Services Directorate, within which juvenile justice sits.⁴⁸⁰ No further breakdown regarding those complaints was reported.

1.5.4 Access to information on treatment and conditions

The previous sections included the legislative functions and powers of each body to access information, including information on numbers of children and young people detained and information about the conditions and treatment of those children and young people.

This section outlines ACT's arrangements regarding the monitoring and recording of conditions of detention and treatment of children and young people in detention. It includes the degree to which these arrangements are addressed in legislation, regulations and/or policy (so far as I have been able to establish), and the degree to which those records are independently monitored.

As also discussed in the previous section, the ACT has the *Human Rights Act 2004* (ACT) which includes protection of civil and political rights and economic and social rights, including the right to protection from torture and cruel, inhuman or degrading treatment.⁴⁸¹

Additionally, the *Children and Young People Act 2008* (ACT) specifically addresses the conditions and standards of detention. There are a number of provisions specifying the required standards of living conditions at detention places, for example, food and drink, clothing, sleeping areas, telephone calls, access to open air and exercise.⁴⁸² There are also a number of detailed provisions addressing particular types of treatment of detainees, including use of force, restraint, searches, segregation.

1.5.4.1 Force, restraint and searches

The primary legislation includes provision regarding the use of force, restraint and strip searches, including the requirement for a register and details of what must be in that register. It also provides for external oversight of the register.

The **use of force** must be a last resort.⁴⁸³ The authority to use force is provided for specific circumstances only⁴⁸⁴ and only after the officer gives a clear warning, allows time for the warning to be observed, uses no more force than is necessary and reasonable and uses force in a way that reduces the risk of causing injury.⁴⁸⁵ The Director-General must make a policy or procedure covering the circumstances in which, and by whom, force may be used, the kinds of force that may be used and the use of restraints.⁴⁸⁶ The Director General is responsible for ensuring that he or she receives from officers monthly reports summarising the incidents involving the use of force in relation to a young detainee.⁴⁸⁷

The **use of force** includes the use of restraint.⁴⁸⁸ Restraints allowed include: body contact, handcuffs, restraint jackets and other restraining devices, and anything else prescribed by regulation.⁴⁸⁹

Strip searches must be conducted in a way which provides reasonable privacy for the detainee and is appropriate having regard to the detainee's sexuality and any known impairment, condition or history.⁴⁹⁰

The primary legislation requires the Director-General to keep a **register of any search, seizure or use of force**.⁴⁹¹ The Department advised that, in practice, this is delegated to the Bimberi Senior Manager.⁴⁹²

The legislation provides what details must be included in the register. For a search, the register must include the name of the young detainee searched, the reason for the search, when and where the search was conducted, the name of each person present during the search, any reasons for the youth detention officer involved not being of the same sex, as required, details of anything seized, details of any force used and why, and anything else prescribed by regulations.⁴⁹³

For an incident involving the use of force, the register must include the details of each incident including the circumstance, the decision to use force and the force used.⁴⁹⁴

The primary legislation requires that the registers be available for inspection by any judge, magistrate, official visitor, commissioner under the *Human Rights Commission Act 2005* (ACT), Ombudsman, and person prescribed by regulation.⁴⁹⁵

Further, the Public Advocate must inspect the register at least once every 3 months (s195(6)).⁴⁹⁶

1.5.4.2 Segregation

The primary legislation makes provision regarding the use of segregation. The legislation requires that a register be maintained, including what details are required on that register. It also provides for external oversight of the register.

The Director-General may direct that a young detainee be segregated on grounds of safety and security, protective custody or for health reasons (physical or mental).⁴⁹⁷ Segregation must not be used for punishment or disciplinary purposes.⁴⁹⁸ Segregation is not to affect minimum living conditions.⁴⁹⁹ The Director-General may review a segregation direction at any time and *must* review the direction within 7 days, and within 7 days of the initial review and thereafter at least every 14 days while it remains in force. In reviewing segregation directions, the Director-General must have regard to any advice from a treating doctor.⁵⁰⁰ Unless revoked sooner, a segregation direction ends after 28 days; or if a further segregation direction has been given after review, it ends after 90 days.⁵⁰¹ A detainee may apply to an external reviewer for a review of a segregation direction.⁵⁰² An external reviewer is a magistrate and is appointed by the Minister.⁵⁰³

The Director-General may direct that a young detainee be segregated from other detainees 'by separate confinement in a safe room' for the purpose of preventing an imminent risk of self-harm, but only when the Director-General has tried less restrictive ways of preventing self-harm or considered less restrictive ways but decided they were not appropriate.⁵⁰⁴ The Director-General must have regard to the detainee's age, sex, maturity, cultural identity, physical and mental health and any history of abuse.⁵⁰⁵ Further, the confining of a young detainee under a safe room segregation direction should be done with respect for the detainee's privacy where possible,⁵⁰⁶ and must be reviewed every 2 hours.⁵⁰⁷

The Director-General must keep a **register of any segregation** directions.⁵⁰⁸ The Department advised that in practice, this is delegated to the Bimberi Senior Manager.⁵⁰⁹

The register must include the name of the young detainee subject to the direction, the reason for the direction, the period for which the direction is in effect, details of people notified of the direction under section 207, details of any force used to compel compliance with the direction and why it was used, and details of any feedback provided where a segregation direction has been reviewed under subdivision 6.6.3.5.⁵¹⁰

The register must be available for inspection by a judge, magistrate, official visitors, a commissioner exercising a function under the *Human Rights Commission Act 2005* (ACT) and the ACT Ombudsman.⁵¹¹

Unlike the registers of search, seizure and use of force, there is no requirement that the register be inspected by an external body such as the Public Advocate. However, the Public Advocate is aware of all uses of segregation: if the director-general gives a segregation direction, he or she must prepare a notice of the direction, including reasons, and give it to the Public Advocate as soon as practicable.⁵¹²

The 2014-15 Annual Report of the ACT Public Advocate reported that, while attending Bimberi on visits, the Public Advocate inspected the registers concerning use of force and searches.⁵¹³ It also reported that in 2014-15, the Public Advocate was advised of five notices of segregation in relation to four young people. The periods of segregation ranged from 7 to 14 days. The total number of days the four young people were segregated was 35 days. Three young people spent seven days each in segregation and one young person spent 14 days in segregation.⁵¹⁴ There was no reporting on the reasons for the use of segregation.

1.5.4.3 Critical incidents

There is no legislative provision regarding critical incidents and no legislative requirement that Bimberi maintain a register of critical incidents. Departmental policy requires that all reportable incidents are recorded and internally reviewed.

The Department advised that:

internal policies and procedures require that all reportable incidents that occur in Bimberi are recorded in a critical incident form. Information recorded in the form includes background to the incident, the nature of the incident, the young detainee's view of the incident (if applicable), relevant medical advice (if applicable), parties to the incident, and all actions and decisions taken in response to the incident. Any incident or event that significantly affects (or threatens to affect) the security, operations or the routine of Bimberi; harms or threatens to harm the personal safety of any individual at Bimberi; or involves drugs or violence is considered a reportable incident.⁵¹⁵

The Department advised that the Bimberi Senior Manager is responsible for ensuring reportable incident forms are completed and a quarterly report of all reportable incidents is provided to ACT Government executive staff for internal review.⁵¹⁶

1.5.4.4 Other non-legislative provisions

There are many other relevant policies and procedures regarding conditions and treatment of young detainees in Bimberi available on the Department of Community Services website.⁵¹⁷ These include, among others, notifiable instruments addressing:

- Behaviour management (required under section 297)
- Complaints management (allowed under the general power to make policies and procedures in section 143)
- Designation of safe rooms for segregation (allowed under section 208)
- Discipline (allowed under section 143)
- Escorts for detainee transfers (allowed under section 143)
- Records and reporting, including keeping registers of incidents, segregation, searches and use of force (allowed under section 143)
- Reporting and investigation of allegations of behaviour breaches by detainees (required under section 294)
- Search and seizure (allowed under section 143)
- Segregation (allowed under section 143)
- Use of force (required under section 223(6)(7) to make policy or procedure covering the circumstances and by whom force may be used, the kinds of force that may be used and the use of restraints).

The Notifiable Instrument addressing records and reporting requires that the Senior Manager provide a quarterly summary report to the Executive Director on information contained in the registers, reportable incidents and mandatory reports of threats to security under section 193 of the *Children and Young People Act 2008* (ACT).⁵¹⁸

1.5.4.5 Internal complaints

The process for making an internal complaint about Bimberi Youth Justice Centre can be found on the ACT Department of Community Services' website.⁵¹⁹ Concerns about Bimberi can be raised with the Bimberi Unit Manager. If this does not resolve the concern, a formal internal complaint can be made. Outcomes will be advised within 7 days.

Information about how to raise complaints, internal and external, is in the publication provided to all young people at Bimberi: *A Young Person's Guide to Bimberi Youth Justice Centre*.⁵²⁰

A notifiable instrument, *The Children and Young People (Complaints Management) Policy and Procedures 2015* requires that a database be maintained for all formal complaints made about Bimberi. The database must include details of issues raised by a complainant, staff named in a complaint, complaint outcomes and the time taken to respond to a complaint.

The Department advised that the Bimberi Programs and Services Manager is responsible for database maintenance. A report of database information is provided to the Bimberi Senior Manager on a monthly basis and a quarterly summary report is provided to ACT Government executive staff for internal review.⁵²¹

The Department advised that detailed internal practice guidelines have also been developed to support staff to respond appropriately to complaints and feedback received about Bimberi and its operations. It also advised that 'by mutual agreement, Bimberi and the Commissioner have agreed that five to seven days is a reasonable timeframe for responding to complaints raised'.⁵²²

The Department advised that, in 2014-15, there were five internal complaints received by Bimberi, three from one young person and two from different young people. All complaints were 'resolved to the satisfaction of the young person concerned'. In 2014-15, the Department also received one complaint from a parent of a young detainee at Bimberi. This complaint was later withdrawn by the parent before the OCYFS Complaints Unit had finalised the matter.⁵²³

The Department also advised that of the five complaints received in the last financial year, two related to the behaviour management system, two involved complaints about interaction with staff members and one complaint related to the use of the telephone system and maintenance issues. The complaint received by the Department from a parent was about interactions with a staff member. Details of the complaints are kept on a registrar and are available for viewing by oversight bodies such as the Official Visitor and Commissioner.⁵²⁴

1.6 Victoria

The Department of Human Services is responsible for the statutory supervision of young people in the criminal justice system. The legislation governing the detention of children and young people is the *Children, Youth and Families Act 2005* (Vic). Under that legislation, the Children's Court or adult courts may convict a young person and order that they be detained in a youth residential centre (10–14 year olds)⁵²⁵ or a youth justice centre (15–20 year olds).⁵²⁶

There are two youth justice centres in Victoria, Parkville Youth Justice Precinct and Malmsbury Youth Justice Centre.

Victoria has a human rights act. Under the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* it is unlawful for a public authority, such as the Department of Human Services or a youth justice centre, to act in a way that is incompatible with a human right.⁵²⁷ The human rights provided for expressly in the Charter include (among others):

- protection from torture and cruel, inhuman or degrading treatment⁵²⁸
- protection of families and children⁵²⁹
- the right to liberty and security of person⁵³⁰
- the right to humane treatment when deprived of liberty⁵³¹
- specific provisions relating to children in the criminal process.⁵³²

There is no stand-alone statutory right to seek a remedy for a breach of the Charter. The Ombudsman Victoria has been empowered to investigate whether an administrative action is compatible with a human right in the Charter.⁵³³ Further, a person can seek a remedy for a breach of a right under the Charter in other legal proceedings regarding an act or decision of a public authority.⁵³⁴ Damages are not an available remedy.⁵³⁵

Presently, there is no single independent body responsible for the monitoring and oversight of youth justice centres in Victoria. However, two bodies are involved in the external monitoring, including complaints, of youth justice centres:

- Victorian Commission for Children and Young People, which administers the Independent Visitor Program
- Victorian Ombudsman.

The Law Institute of Victoria commented that additional powers for either body involved in the monitoring and oversight of youth justice centres in Victoria would be needed for compliance with OPCAT. In particular, new powers for either body would have to include express powers to enter and access all centres and to 'report publically without being fettered'.⁵³⁶

1.6.1 Principal Commissioner

The *Commission for Children and Young People Act 2012 (Vic)* establishes the Commission and the position of Principal Commissioner. The objective of the Commission is to promote continuous improvement and innovation in: policies and practices relating to the safety and wellbeing of children and young people generally and in particular those who are vulnerable; and the provision of out-of-home care services for children.⁵³⁷

The Commission is statutorily independent and must act impartially when performing its functions in the best interests of vulnerable children and young people.⁵³⁸

The Governor appoints the Commissioner, on the recommendation of the Minister.⁵³⁹ Commissioners are appointed for 5 years and can be reappointed.⁵⁴⁰ The Governor can only remove the Commissioner on specified grounds such as misconduct or neglect of duty.⁵⁴¹

There is also provision for an additional Commissioner to be appointed on the same terms.⁵⁴² The Commissioner for Aboriginal Children and Young People was appointed in 2013.⁵⁴³

The **functions** of the Commission include, in relation to children and young people detained in youth justice services:

- providing advice to government about policies, practices and the provision of services
- promoting the interests of vulnerable children and young people
- monitoring and reporting to Ministers on the implementation and effectiveness of strategies relating to vulnerable children and young people
- providing advice and recommendations to the Minister about child safety issues, at the request of the Minister
- conducting inquiries into the services provided or omitted.⁵⁴⁴

The legislation defines ‘vulnerable children and young people’ as including a youth justice client.⁵⁴⁵

In its submission to me, the Commission listed the activities, which it undertakes in practice, in fulfilment of these legislative functions:

- coordinating an Independent Visitor Program in youth justice centres
- reviewing all Category One Client Incident Reports for children in youth justice detention
- monitoring decisions to transfer children to adult prisons
- undertaking inquiries which examine services provided to children in youth justice detention
- examining the services provided to Aboriginal children and young people who are clients of both out of home care and youth justice services through an ongoing critical review of a sample of children through Taskforce 1000
- advocating for reform to laws, policies and practices which impact on children in youth justice detention
- promoting new child safe standards which apply to a wide range of services, including youth justice services.⁵⁴⁶

The Commission may conduct an inquiry on its own motion or at the recommendation of the Minister.⁵⁴⁷

The Commission’s inquiry **powers** include the capacity to conduct an inquiry in relation to ‘a matter relating to the safety or wellbeing of a vulnerable child or young person or a group of vulnerable children or young persons’;⁵⁴⁸ such an inquiry must relate to the services provided or omitted to be provided, to or in relation to the vulnerable child or children.⁵⁴⁹ In addition, the Commission may conduct an inquiry relating to a health service, human service or school in relation to a vulnerable child or young person (or group of children or young persons) if the Commission:

- a) identifies a persistent or recurring systemic issue in the provision of those services
- b) considers that a review of those services will assist in the improvement of the provision of those services
- c) and considers that the inquiry can be conducted within the **resources** of the Commission.⁵⁵⁰

The Secretary (of the Department) must ensure that the Commission or an authorised person is provided with any assistance in connection with the reasonable performance of the Commission’s functions that the Commission or the authorised person reasonably requires.⁵⁵¹

For the purposes of an inquiry, the legislation provides the Commission with the **power** to access information in relation to any person or service that is the subject of the inquiry, and other information, documents or records held by relevant Departments, including the Department of Justice.⁵⁵²

There are no express powers of entry into juvenile justice centres as part of the Commission’s powers. The Commission commented that ‘the Commission visits youth justice centres on a regular basis through the Independent Visitor Program and by frequent staff and Commissioner visits’.⁵⁵³

A person who discloses information in good faith as part of a Commission Inquiry is **protected** from liability or relevant professional misconduct provisions.⁵⁵⁴

Recent amendments to the *Children and Young People Act 2012 (Vic)* by the *Children Legislation Amendment Act 2016 (Vic)* added the requirement for the Department to provide the Commissioner with reports of adverse events involving a child in a youth justice centre:

60A Disclosure of information by Secretary

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

The Commission commented in its submission to me that it:

reviews the reports and may request further information about the adverse event described in the report. If the Commission holds significant concerns about services provided to a child, or treatment of that child, the Commission will initiate an inquiry under section 37(1) of the Commission for Children and Young People Act.⁵⁵⁵

It is not clear whether the Commission will report publicly on information received regarding adverse events. However, in its 2014-15 Annual Report, the Commission reported on its request for Category One client incident reports, before the amendments adding section 60A had been made to the legislation. This suggests that the Commission will report on those disclosures under the legislation, but there is no legislative requirement that it do so.

Under Victorian Government policy, the Commission (and Victorian Legal Aid or Victorian Aboriginal Legal Services) must also be notified when a 16 or 17-year-old is sentenced or transferred to an adult prison.⁵⁵⁶ The Commission notes that to its knowledge, no child under 18 has been transferred from youth justice to the adult system since 2012.⁵⁵⁷

The Commission commented that, against the criteria for an NPM, Victoria 'scores well in terms of having a dedicated, specialist, independent body with a broad mandate for monitoring some aspects of youth justice including youth detention' however the jurisdiction 'does not fully enshrine in legislation the full scope of powers and functions expected of an NPM'.⁵⁵⁸ The Commission believes additional powers would be needed for OPCAT compliance, including:

- an explicit right of access to youth justice centres
- a right to be provided with data and information about the way in which youth justice services are operating
- the capacity to monitor and inspect all places of detention for children and young people.⁵⁵⁹

The Commission must give a report of any inquiry to the Minister and the Secretary of the Department.⁵⁶⁰ If a report contains material adverse to a person or service they must be given an opportunity to comment on the material before the report is given to the Minister.⁵⁶¹

In relation to an inquiry on the Commission's own motion (but not an inquiry recommended by the Minister), the Commission may give a copy of the report to the clerk of each House of Parliament, who must lay it before the respective Houses, thereby making it public.⁵⁶² The legislation provides that no information identifying a child or young person should be in a report laid before Parliament.⁵⁶³ The Commission may publish a report provided to Parliament on the internet and such a publication is 'absolutely privileged' as a proceeding of Parliament.⁵⁶⁴

The Commission's 2014-15 Annual Report details some of the issues raised with the Independent Visitors by the young people in Parkville and Malmsbury youth justice centres, including:

- access to health care
- quality of the physical environment
- quality of food
- support for Aboriginal children and young people
- use of isolation, including the length of time spent in isolation and conditions of that type of custody.⁵⁶⁵

The Commission has recently established an *Inquiry into the use of isolation, separation and lockdown in youth justice centres* and, following the review of a Category One Critical Incident Report, an inquiry relating to use of force against a particular young person in a youth justice centre.⁵⁶⁶ Reports currently published on the Commission's website do not appear to have a specific focus on juvenile justice centres.⁵⁶⁷

There are no legislative provisions requiring a response from government to the Commissioner's reports and/or recommendations. Nor is there any provision encouraging dialogue between government and the Commission.

1.6.2 Independent Visitor Program

Since 2012, the Commission for Children and Young People has administered an Independent Visitor Program for youth justice centres.

There is no legislative basis for the Independent Visitor Program for youth justice centres.

In its submission to me, the Commission told me that:

The Commission visits youth justice centres on a regular basis through the Independent Visitor Program and by frequent staff and Commissioner visits.⁵⁶⁸

The Commissioner also indicated to me that staff on site and the Department supported the visits.⁵⁶⁹

The Independent Visitor Program involves a group of volunteers (recruited, screened, trained and supported by the Commission) making monthly inspection visits to detention centres. They also undertake fortnightly exit interview questionnaires.⁵⁷⁰

The Law Institute of Victoria commented to me that the youth justice centres know in advance when the Independent Visitors will be visiting.⁵⁷¹

The Law Institute of Victoria also commented that Independent Visitors should be paid to ensure continuity and to attract people with appropriate qualifications.⁵⁷²

According to the Commission, volunteers are from a range of backgrounds and must have the personal and professional skills to support young people in custody.⁵⁷³ The 2014-15 Annual Report states that 'in recognition of the over-representation of Aboriginal children and young people in youth justice centres and their specific cultural needs, the Commission recruited three Aboriginal visitors'.⁵⁷⁴

Volunteers may talk to any young person in a detention centre. The Commission's website advises that the volunteers role is to provide information and assistance to young people in detention centres. Volunteers also monitor the safety and wellbeing and promote the rights and interests of young people in detention.⁵⁷⁵

After each visit, Independent Visitors discuss their observations with the General Manager of the centre. Within 7 days of each visit, Independent Visitors are required to provide a written report to the Principal Commissioner of the Commission for Children and Young People.⁵⁷⁶

During 2014-15, independent visitors conducted 24 visits to youth justice centres and 276 exit interviews.⁵⁷⁷

The Law Institute of Victoria pointed out that the Independent Visitor Program 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.⁵⁷⁸ In particular, children being held in police cells are not visited as part of the program.

1.6.3 Victorian Ombudsman

The **Victorian Ombudsman** has the role of enquiring into or investigating administrative actions taken by or in a public authority,⁵⁷⁹ and making recommendations for administrative or legislative change.⁵⁸⁰ Its role includes investigating matters at youth justice centres.⁵⁸¹

The Ombudsman is an independent officer of the Victorian Parliament, reporting to the Parliament. The Ombudsman's independence is constitutional, provided for in the *Constitution Act 1975 (Vic)*.⁵⁸²

The Ombudsman is appointed by the Governor in Council for a period of 10 years and cannot be reappointed.⁵⁸³ The Ombudsman cannot be removed from office except for specified reasons, and both houses of Parliament must approve the removal.⁵⁸⁴

Bodies exempt from the Ombudsman's jurisdiction include the Victoria Police⁵⁸⁵ meaning that police cells could not be the subject of an enquiry or investigation and therefore the Ombudsman does not have the power to access police cells.

The Ombudsman advised that in practice, the Ombudsman visits detention centres routinely, however 'this function is not expressly in the Ombudsman Act, nor is it separately funded'.⁵⁸⁶ Staff of the Ombudsman aim to visit Parkville and Malmsbury once every six months.⁵⁸⁷

The **functions** of the Ombudsman include the power to enquire into or investigate whether any administrative action is incompatible with a human right set out in the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*.⁵⁸⁸ The Ombudsman's power in this regard is a very broad, substantive power. The Ombudsman notes that the Charter and the Ombudsman's role in relation to it is not widely known or understood by the public.⁵⁸⁹

In relation to enquiries and investigations, the Victorian Ombudsman has the **power** of entry and inspection of any premises occupied or used by an authority to which the *Ombudsman Act 1973 (Vic)* applies,⁵⁹⁰ and the power to summon witnesses and documents – specifically, the powers of a Royal Commission.⁵⁹¹

The Law Institute of Victoria commented that the Ombudsman is not permitted to speak to children under 16 years of age.⁵⁹² This may be a reference to section 18B of the *Ombudsman Act 1973 (Vic)* which provides that a witness summons is only effective if directed to a person over 16 years.

It is an **offence** to hinder or resist, or fail to comply with, or mislead the Ombudsman in the exercise of powers under the legislation.⁵⁹³

The Ombudsman and officers of the Ombudsman are **protected** from liability for acts done in pursuance of the legislation unless in bad faith.⁵⁹⁴

Information acquired by the Ombudsman or an officer must not be disclosed (with exceptions).⁵⁹⁵

There are unmonitored telephone lines to the Ombudsman in all Victorian places of detention.⁵⁹⁶ Written correspondence between the Ombudsman and a person in custody must be forwarded unopened.⁵⁹⁷

The Ombudsman Victoria commented in its submission to me that once new legislation comes into effect⁵⁹⁸ the Ombudsman will be able to share information with the Commission for Children and Young People which is not currently allowed. The Ombudsman believes this will enable the two offices to operate more effectively in the area of juvenile justice.⁵⁹⁹

In relation to an investigation, the Ombudsman has the express power to make **recommendations** including recommendations regarding legislative change.⁶⁰⁰

The Ombudsman is required to make an annual report to Parliament on the performance of the Ombudsman's functions.⁶⁰¹ The Ombudsman may also, at any time, make a report to Parliament on any matter arising in connection with the performance of the Ombudsman's functions.⁶⁰²

The **reporting** requirements regarding an investigation provide for engagement with relevant authorities and Ministers regarding recommendations.⁶⁰³ The Ombudsman can request a relevant officer or Minister notify the Ombudsman within a certain time period of steps taken in response to recommendations.⁶⁰⁴ Further, the legislation provides for action if the Ombudsman considers that no appropriate steps have been taken within a reasonable time of the making of a report or recommendations. If, after considering the comments (if any) made by or on behalf of the principal officer or responsible Minister or Mayor, the Ombudsman considers the steps have not been appropriate, the Ombudsman may send a copy of the report and recommendations to the Governor in Council. Once a copy of any report and recommendations, together with any comments, has been sent to the Governor in Council, the Ombudsman may make a report to Parliament – which is thereby public – on any matter regarding the report and recommendations.⁶⁰⁵

The Ombudsman also advised that to ensure accountability, the Ombudsman's office also reports on authorities' implementation of recommendations.⁶⁰⁶

1.6.4 Access to information on treatment and conditions

The previous sections included the legislative functions and powers of each body to access information, including information on numbers of children and young people detained and information about the conditions and treatment of those children and young people.

This section outlines Victoria's arrangements regarding the monitoring and recording of conditions of detention and treatment of children and young people in detention. It includes the degree to which these arrangements are addressed in legislation, regulations and/or policy (so far as I have been able to establish), and the degree to which those records are independently monitored.

The *Charter on Human Rights and Responsibilities 2006* (Vic) applies to all public authorities including youth justice centres, providing an overarching requirement for government to comply with international human rights standards, including the prohibition against torture, and cruel, inhuman and degrading treatment.⁶⁰⁷

The *Children, Youth and Families Act 2005* (Vic) requires that younger children be kept separate from older children in the youth justice system.

The legislation also requires that children and young people on remand be kept separate from those serving detention orders (with specific exceptions) and those on remand who are under 15 years of age must be held separately from those on remand who are 15 years or over.⁶⁰⁸

The legislation provides a range of conditions to which children and young people in juvenile justice detention are entitled, including to:⁶⁰⁹

- have their developmental needs catered for
- receive visits
- have reasonable efforts made to meet medical, religious and cultural needs
- receive information on the rules of the centre and their rights and responsibilities, and those of the centre staff
- be advised of their entitlements under these provisions.

The Secretary must report to the Minister at least once a year on the extent of compliance with these entitlements.⁶¹⁰ This reporting does not appear to be public.

Section 487 of the *Children, Youth and Families Act 2005* (Vic) provides a list of prohibited actions, including:

- (a) the use of isolation as a punishment;
- (b) the use of physical force unless it is reasonable and—
 - i. is necessary to prevent the person or child from harming himself or herself or anyone else or from damaging property; or
 - ii. is necessary for the security of the centre or police gaol; or
 - iii. is otherwise authorised by or under this or any other Act or at common law;
- (c) the administering of corporal punishment, that is, any action which inflicts, or is intended to inflict, physical pain or discomfort on the person or child as a punishment;
- (d) the use of any form of psychological pressure intended to intimidate or humiliate the person or child;
- (e) the use of any form of physical or emotional abuse;
- (f) the adoption of any kind of discriminatory treatment.

1.6.4.1 Isolation

Section 488 specifically allows the use of isolation, on the authorisation of the officer in charge of Victorian Youth Justice Custodial Services in the Department, to prevent ‘an immediate threat to his or her safety or the safety of any other person or to property’ and only if ‘all other reasonable steps have been taken to prevent the person from harming himself or herself or any other person or from damaging property’.

Reasonable force may be used to place a person in isolation.⁶¹¹

The period of isolation must be approved by the Secretary of the Department and a person placed in isolation must be closely supervised and observed at intervals of no longer than 15 minutes; but there is no maximum time period prescribed.⁶¹²

The Department of Health and Human Services Victoria advised that the youth justice custodial practice manual prescribes a specified and escalating authorisation level, dependent on the length of isolation of a young person and whether the young person identifies as Aboriginal. The following details were provided:

Non Aboriginal young people

The lowest level of authorisation is the Unit Manager or Duty Manager, who can authorise an isolation period of up to two hours. All young people in isolation are placed on observation. Non-Aboriginal young people who are placed in isolation must be on a minimum of close observation (every five minutes).

Aboriginal young people

Any isolation of an Aboriginal young person must be authorised at a minimum by the precinct's General Manager, Operations Manager or Senior Manager On Call. Any Aboriginal young person placed in isolation must be under 'constant observation' (staff within arm's length at all times to ensure safety). An Aboriginal Cultural Support worker must be informed as soon as is logistically possible about an Aboriginal young person being placed in isolation.⁶¹³

The legislation states that it is the responsibility of the officer in charge to ensure that the 'prescribed particulars' of every use of isolation are recorded in a **register**.⁶¹⁴ The details to be recorded in the register when there is use of isolation are in Regulation 31 of the *Children, Youth and Families Regulations 2007* (Vic) and include:

- (a) name of the person isolated;
- (b) the time and date isolation commenced;
- (c) the reason why the person was isolated;
- (d) the authorising officer's name and position;
- (e) the frequency of staff supervision and observation;
- (f) the time and date of release from isolation.

Not all uses of isolation have to be reported: section 488 of the *Children, Youth and Families Act 2005* (Vic) also allows the use of isolation 'in the interests of the security of the centre' without the reporting requirements.⁶¹⁵

There is no requirement to make this register available to any external body, nor to report on it publicly. It does not appear that there is, in practice, any public reporting on the register of use of isolation.

1.6.4.2 Restraint

It appears that neither the legislation nor regulations address the use of restraint.

The Department of Health and Human Services Victoria provided detail on the internal policies regarding the use of restraint in juvenile justice precincts:

The youth justice custodial practice manual specifies that restraint can only be used when all other less restrictive strategies have failed and there is an immediate risk of significant harm. Restraining young people for lack of compliance with staff instruction alone is prohibited. An immediate danger is one that would cause significant harm and that can be predicted to occur within a short space of time unless an intervention occurs to prevent it.

The “Use of restraint” procedure stipulates that:

- only the amount of force to bring about a safe resolution is used
- only authorised restraint techniques are used
- the young person who has been restrained is safe and any ill effects are managed, and
- a transparent review process is followed to ensure that we are accountable in our management of young people.

Wherever possible, restraints are to be conducted by at least two staff with one staff member being responsible for communicating with the young person during the restraint and for monitoring their health and wellbeing during the restraint and ensuring any adverse outcomes are documented accordingly. This staff member must stay as close to the young person as is physically safe, in order to monitor their wellbeing and alert other staff if there are any concerns. If this staff member notices any of the following physical signs related to the client, they must immediately alert the other staff and adapt or cease the restraint if it is safe to do so⁶¹⁶.

The practice manual also acknowledges that there are some young people with particular vulnerabilities ‘that increase the potential for restraint to be traumatic’. The practice manual therefore specifies that staff need to exercise an even higher level of caution when considering the use of restraint with the following groups:

- young Aboriginal people
- young women
- very young people (10-14 years)
- young people with intellectual disability or diagnosed mental health conditions
- young people with compromised physical health and pregnant young women
- young people with known histories of abuse.⁶¹⁷

The Department of Health and Human Services Victoria advised that the use of mechanical restraint in Victoria is limited to handcuffs only. Handcuffs may only be used by staff specifically trained in their use and must only be used to avoid immediate and significant harm to a young person or others. Handcuffs must only be used for the minimum amount of time and must be removed prior to the young person being secured in isolation or their bedroom.⁶¹⁸ These limitations regarding the use of restraint are not in the primary legislation or the regulations.

The Department of Health and Human Services Victoria advised that Secure Services – the branch within the Department of Health and Human Services which oversees youth justice precincts – recently proposed a process whereby each restraint occurring in custody will be ‘independently reviewed’ in a two tier process: every restraint receives a standard review and any restraint with further negative consequence (such as an injury or a complaint) will progress to a higher level of review overseen by the Secure Services Principle Practice Leader.⁶¹⁹

It does not appear that any external body reviews the use of restraints, nor does there appear to be any public reporting in this regard.

1.6.4.3 Searches

The legislation and regulations also prescribe requirements for conducting searches, including that a search is not conducted by more officers than reasonably necessary to ensure the safety of the officers and the person being searched; and that unclothed searches must be conducted with respect for the detainee’s privacy.⁶²⁰

Under the regulations, all **unclothed searches** must be recorded in a **register**, including the following information:

- the name of the detainee
- name of the person in charge who caused the search to be conducted
- the reason for the search
- the date and time of the search
- the name and gender of all officers present during the search
- details of any article or thing seized during the search.⁶²¹

It does not appear that information from this register is made public in any way, for example the number of unclothed searches a year, detainee age and reason for the search.

1.6.4.4 Internal complaints

The legislation specifies the internal and external complaints processes. Children and young people detained in remand centres, youth justice centres or youth residential centres are entitled to complain to the Secretary or the Ombudsman about the standard of care, accommodation or treatment they are receiving in the centre.⁶²²

The guide for making a complaint to the Department of Health and Human Services can be found on the Department's website.⁶²³

The Department also advised that an 'independent process' is followed to analyse any incident involving an alleged assault of a young person by a staff member, adding that 'the focus is on the effectiveness of the support provided to the client post incident'.⁶²⁴

1.6.4.5 Adverse incidents

The Department of Health and Human Services has a publically available *Critical client incident management instruction*.⁶²⁵ It provides that an incident report is required for 'all critical incidents occurring at the service or during service delivery that involve and/or impact upon clients'.⁶²⁶ Considerations regarding whether an incident is reportable include:

- Was the young person hurt in the incident? To what extent?
- Is the young person still at risk?
- Do you have to change your service delivery substantially as a result?⁶²⁷

Youth justice custodial services (Malmsbury Youth Justice Centre and Parkville Youth Justice Centre) are required to report all category 1 and 2 incidents.⁶²⁸ The incident categorisation table is also available on the Department's website.⁶²⁹

The Department of Health and Human Services reports that there were 34 category 1 incidents in 2014-15 in Malmsbury and Parkville Youth Justice Centres. This is broken down to 22 assaults and 12 'other incident types'.⁶³⁰

Recent legislative amendments now require the government to report all **adverse events** involving children in juvenile justice to the Commission for Children and Young People, Victoria.⁶³¹

60A Disclosure of information by Secretary

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

The Commission commented in its submission that the Commission 'reviews the reports and may request further information about the adverse event described in the report. If the Commission holds significant concerns about services provided to a child, or treatment of that child, the Commission will initiate an inquiry under section 37(1) of the *Commission for Children and Young People Act 2012* (Vic)'.⁶³²

There does not appear to be any requirement that that reporting be made public though it may be included in the Commission's annual reporting. The Commission is yet to publish an annual report since the amendments came into force.

1.6.4.6 Transfers to adult prison

Under Victorian Government policy, the Victorian Commission for Children and Young People (and Victorian Legal Aid or Victorian Aboriginal Legal Services) must also be notified when a 16 or 17-year-old is sentenced or transferred to an adult prison.⁶³³ The Commission noted in its submission that, to its knowledge, no child under 18 has been transferred from youth justice to the adult system since 2012.⁶³⁴

1.7 Queensland

In Queensland, young people who have or have allegedly committed criminal offences are detained pursuant to the *Youth Justice Act 1992* (Qld). The *Youth Justice Regulation 2016* (Qld) further provides for the operation of youth justice centres in the Northern Territory.

There are two youth justice centres in Queensland – Brisbane Youth Detention Centre and Cleveland Youth Detention Centre in Townsville.

These youth justice centres are managed by the Department of Justice and Attorney-General, which is the responsibility of the Attorney-General and Minister for Justice.

Currently, there is no single independent body responsible for monitoring youth justice centres in Queensland.

The submission made by Rebecca Wallis, Stuart Kinner & Ross Homel of Griffith University pointed out:

Although there appears to be a strong culture of principle-based practice within the youth justice sector in Queensland, system performance remains predominantly internally, rather than independently, monitored. This places a great deal of power and discretion into the hands of the chief executive, and makes the system vulnerable to political pressure. The establishment of an independent body capable of unifying the sector, and enforcing minimum standards for youth justice would help to safeguard and promote the system's commitment to principle.⁶³⁵

Regular inspections of youth detention in Queensland began in 2002 following the Commission of Inquiry into Abuse of Children in Queensland Institutions (Forde Inquiry). The Forde Inquiry found that abuse had occurred in church and state-run facilities, including youth justice detention centres, and recommended that regular inspection and monitoring of residential care facilities and youth justice detention be specified in legislation.⁶³⁶

1.7.1 Youth Detention Inspectorate, Department of Communities, Child Safety and Disability Service

The Department of Justice and Attorney-General advised in its submission to me that it has recently developed:

a new Operational Inspector and support team that conduct quarterly inspections of the youth detention centres, review and assess the proactive audits conducted by the youth detention centres and facilitate investigations into emerging issues as required.⁶³⁷

It appears that this role sits within the Department of Justice and Attorney-General and therefore is not functionally independent.

Section 263(4) of the *Youth Justice Act 1992* (Qld) provides that the chief executive of the Department of Communities, Child Safety and Disability Services (the chief executive)⁶³⁸ must monitor the operation of detention centres and inspect each detention centre at least once every 3 months.

This monitoring and inspection responsibility has been delegated to the Youth Detention Inspectorate.⁶³⁹

The Youth Detention Inspectorate forms part of the Internal Audit and Compliance Services section of the Department of Communities, Child Safety and Disability Services.⁶⁴⁰ The Internal Audit and Compliance Services report directly to the Director-General of the Department of Communities, Child Safety and Disability Services.⁶⁴¹

According to the Queensland Youth Detention Centres Inspection Charter, the Youth Detention Inspectorate is independent from the Regional Service Delivery Operations area of the Department, meaning the Inspectorate:

- has 'no executive or managerial powers, authorities, functions or duties except those related to inspections'
- is not responsible for the 'detailed development or implementation of new operational systems'
- may, 'at the request of the Chief Executive or delegate, undertake any extraordinary inspections, if required'.⁶⁴²

The monitoring role of the Youth Detention Inspectorate is informed by the Expectations for Queensland Youth Detention Centres that outline the minimum standards for youth detention in Queensland. These standards are based on Queensland legislation, recommendations from the Forde Inquiry and the Royal Commission into Aboriginal Deaths in Custody, and relevant international human rights standards.⁶⁴³

Inspections of youth detention centres are conducted in accordance with the Queensland Youth Detention Centre Inspection Framework (the Framework), which describes that the purpose of conducting inspections is to 'review and promote the safety and wellbeing of young people in detention', report to the chief executive, and monitor the implementation of 'approved recommendations'.⁶⁴⁴

The Youth Detention Inspectorate gathers qualitative and quantitative data before, during and after each on-site phase through interviews, field observations, inspection, and examination of documentation. Analysis of this data informs the Inspectorate's findings and recommendations.⁶⁴⁵

The Framework is supplemented by the Queensland Youth Detention Centre Inspection Charter, which outlines the role, purpose and operating environment of the Youth Detention Inspectorate.⁶⁴⁶

According to the Framework, reports to the chief executive include:

- findings related to actual or potential non-compliance of detention centre practices with legislation, policies and standards, and any inconsistencies between these authorities
- impacts on young people and staff from implementing the above authorities
- risks and systemic issues related to the above
- recommendations to address findings and systemic issues, which may be informed by observations of relevant national and international good practice.⁶⁴⁷

A consultation draft of each report is provided to the relevant Centre Director and Assistant Director-General, Statewide Services. The draft details the findings and recommendations arising from the inspection, which are summarised in an implementation plan. Within 20 working days, the Centre Director and Assistant Director-General are required to provide written responses to each recommendation within the implementation plan. The Inspectorate will then prepare a final report for the chief executive including the findings, recommendations and implementation plan.⁶⁴⁸

Recommendations are followed up during scheduled inspections. All recommendations approved by Statewide Services are monitored through a register that records updates on the progress of implementation.⁶⁴⁹

1.7.2 Community Visitor Program

Queensland also has a **community visitor program** that is administered by the **Office of the Public Guardian**.

The Office of the Public Guardian is an independent statutory authority.⁶⁵⁰

Community visitors are appointed by the Public Guardian under the *Public Guardian Act 2014* (Qld).⁶⁵¹ A person is eligible for appointment only if the Public Guardian considers the person has the knowledge, experience or skills needed to perform the functions of a community visitor.⁶⁵²

The Office of the Public Guardian advised me that community visitors:

are employed by the Public Guardian as casual contract employees and come from a diverse range of backgrounds; some have qualifications and professional skills, including psychology, teaching and social work, while others have extensive experience in human services.⁶⁵³

A community visitor 'must regularly visit' youth detention centres, corrective services facilities and other visitable sites.⁶⁵⁴

The **purpose** of community visitors is to protect the rights and interests of children staying at 'visitable locations'.⁶⁵⁵ Visitable locations include both a 'visitable home' and a 'visitable site', the latter of which is defined as including detention centres and corrective services facilities.⁶⁵⁶

The Office of the Public Guardian advised in its submission to me that young people remain visitable while they are residing at a visitable site until they are 18 years old⁶⁵⁷ and that this means a ‘visitable site’ ‘may include an adult corrective services facility where a 17 year old may be detained’.⁶⁵⁸

Community visitors are also required to inspect the visitable site and report on its appropriateness for the accommodation of the child or the delivery of services to the child, having regard to relevant state and Commonwealth laws, policies and standards.⁶⁵⁹

The **functions** of a community visitor include:

- to develop a ‘trusting and supportive relationship with the child’⁶⁶⁰
- advocating on behalf of the child by ‘listening to, giving voice to and facilitating the resolution of the child’s concerns and grievances’⁶⁶¹
- to seek information about and facilitate the child’s access to service providers appropriate to the child’s needs⁶⁶²
- to inspect a visitable site and report on its appropriateness for the accommodation of or delivery of services to the child⁶⁶³
- ensure the child’s needs are being met by staff members at the site⁶⁶⁴
- to inquire into and report on the adequacy of information provided to the child about child rights and the physical and emotional wellbeing of the child⁶⁶⁵
- give advice and reports to the Public Guardian about matters relating to the functions and powers of a community visitor.⁶⁶⁶

Children and young people detained in youth justice centres may also request additional visits from community visitors or to communicate with a particular community visitor.⁶⁶⁷ A staff member is required to inform the Public Guardian of a request as soon as practicable.⁶⁶⁸ The community visitor must comply with a request to visit or communicate with a child staying at a visitable site as soon as practicable after being informed of the request.⁶⁶⁹

A child in detention is entitled to complaint directly to a community visitor or child advocacy officer and the chief executive may direct complaints to a community visitor or child advocacy officer.⁶⁷⁰

Under section 67 of the *Public Guardian Act 2014* (Qld), community visitors have the **power** to enter youth detention centres and adult corrective services facilities without notice, inspect the site, and require staff members to answer questions and produce documents.⁶⁷¹

It is a reasonable excuse for a person not to comply with a requirement for staff to answer questions and produce documents if compliance ‘might tend to incriminate the person’ or could ‘reasonably be expected to prejudice the security or good order of the facility or centre’.⁶⁷²

If the site that is an adult corrective services facility, the exercise of the powers of community visitors under section 67 of the *Public Guardian Act 2014* (Qld) is subject to ‘any direction or procedure given or made by’ the chief executive of Corrective Services to ‘facilitate the effective and efficient management of corrective services’.⁶⁷³

If the site is a youth detention centre, the exercise of the powers of community visitors under section 67 of the *Public Guardian Act 2014* (Qld) is subject to ‘any direction or procedure given or made by’ the chief executive of Youth Justice Services for the ‘security and management of detention centres and the safe custody and wellbeing of children detained’.⁶⁷⁴

The Department of Justice and Attorney-General advises that community visitors make weekly visits to youth detention centres.⁶⁷⁵

The Office of the Public Guardian advises that, ‘adult corrective services facilities are visited at least on a monthly basis if a young person is being detained at the facility during a particular month’.⁶⁷⁶ During 2014-15, community visitors provided 100 reports from visits to 17 year olds in adult corrective services, and recorded 174 issues arising from these visits, most commonly in relation to programs and services (37%), contact (26%), and transition into the community (11%).⁶⁷⁷

As soon as practicable after visiting a child at a visitable site, a community visitor must provide a **report** to the Public Guardian.⁶⁷⁸

The Public Guardian may give a copy of a report, or information from a report, about a visit to a child staying at a visitable site to:

- the person in charge of the site
- a government service provider responsible for regulating the site
- the chief executive responsible for an entity that is responsible for operating the site
- the chief executive of the department responsible for providing funding or services to the site or services for children staying at the site
- the child.⁶⁷⁹

There does not appear to be any requirement for the government department to respond to a report from the community visitors (via the Public Guardian) or any provisions encouraging dialogue.

1.7.3 Queensland Ombudsman

The **Queensland Ombudsman** is an independent statutory body with the role of investigating administrative actions of public agencies.

The Queensland Ombudsman is appointed by the Governor in Council under the *Ombudsman Act 2001* (Qld),⁶⁸⁰ for a term of not more than five years.⁶⁸¹ An Ombudsman may be reappointed, unless the total of the person’s terms of appointment would be more than 10 years.⁶⁸² An Ombudsman may be removed or suspended from office for proved incapacity, incompetence or misconduct, or conviction for an indictable offence.⁶⁸³

The Queensland Ombudsman is not subject to direction by any person about the way the Ombudsman performs the Ombudsman’s functions or the priority given to investigations (subject to any other Act or law).⁶⁸⁴

A parliamentary committee monitors and reviews the performance by the Ombudsman of the Ombudsman’s functions and reports to the Assembly on any matter that the committee thinks should be drawn to the Assembly’s attention. The committee also examines each annual report by the Ombudsman and may comment on any aspect of an annual report.⁶⁸⁵

The Queensland Ombudsman may conduct an investigation of a complaint, on the Ombudsman’s own initiative, or on reference from the Queensland Parliament.⁶⁸⁶

The Queensland Ombudsman **may require** a person, within a stated reasonable time, to provide an oral or written statement of information of a stated type, or a document or all documents of a stated type, or other thing relevant to the investigation.⁶⁸⁷ The Ombudsman may also require a person to attend before the Ombudsman at a stated reasonable place and time to provide information or documents or answer questions.⁶⁸⁸

The Queensland Ombudsman **may also**, on the giving of reasonable notice to the principal officers of an agency and at a reasonable time:

- enter and inspect a place occupied by that agency
- take into the place persons, equipment and materials reasonably required for the investigation
- take extracts from or copy documents
- require an officer of the agency to assist with the above.⁶⁸⁹

A person must comply with an investigation requirement unless they have a reasonable excuse.⁶⁹⁰ It is an **offence** for a person to knowingly provide a false or misleading statement or document⁶⁹¹ or to assault or obstruct the Ombudsman or an officer of the Ombudsman in the performance of their duties.⁶⁹²

In the context of youth detention, the Department of Justice and Attorney-General informed me that the Queensland Ombudsman:

- conducts visits to youth justice centres and makes recommendations to improve service delivery
- receives regular proactive audits for each youth detention centre and the quarterly inspection reports by the Youth Detention Inspectorate and the Operational Inspector
- discusses any issues of concern identified in these documents at a quarterly meeting with the Department and proposes 'areas to be investigated and addressed by the Operational Inspector as part of their next quarterly inspection process'. Outcomes of the Operational Inspector's review of these issues is then addressed and provided to this Ombudsman in the next quarterly report.⁶⁹³

The Ombudsman 'must conduct an investigation in a way that maintains **confidentiality**'.⁶⁹⁴

The *Ombudsman Act 2001* (Qld) provides protection from **recriminations**: a person must not cause, threaten to cause, or attempt or conspire to cause or induce someone else to cause, detriment to the relevant person because, or substantially because, the relevant person gave the information or document to the ombudsman. Doing so is punishable by a fine.⁶⁹⁵

The legislation also provides that a document created for the purposes of an Ombudsman investigation and given to the Ombudsman under an investigation requirement is **not admissible** in evidence against a person in civil or criminal proceedings.⁶⁹⁶

The functions of the Queensland Ombudsman include to consider the administrative practices and procedures of agencies generally and make **recommendations** or provide information or other help to the agencies for the improvement of practices and procedures.⁶⁹⁷ Recommendations within the functions of the Queensland Ombudsman are expressly regarding administrative practices and procedures. There is no mention of recommendations regarding legislation.

The Queensland Ombudsman reports directly to the Queensland Parliament. The Ombudsman may report to the Assembly on a matter arising out of the performance of the Ombudsman's functions where the Ombudsman considers it appropriate. The Ombudsman must report to the Assembly on an investigation undertaken following a parliamentary reference.⁶⁹⁸

In certain circumstances, the Queensland Ombudsman may report to the principal officer of the appropriate agency stating the action the Ombudsman considers that should be taken by the agency, including recommendations.⁶⁹⁹ Where such a report has been made, the Ombudsman may request that the principal officer advise of the steps taken to give effect to the Ombudsman's recommendations or of the reasons for not taking action on recommendations. If the Ombudsman considers that appropriate steps have not been taken, the Ombudsman may provide the original report and advice of the principal officer to the Premier and provide to the Assembly another report concerning the original report and advice.⁷⁰⁰

The Ombudsman is required to provide an annual report to the Minister and give a copy to the Speaker and the parliamentary committee.⁷⁰¹

The Queensland Ombudsman's 2014-15 Annual Report reported that 69% of the 6,980 complaints received that year were about state government agencies.⁷⁰² This was broken down by Departments: the highest number of complaints (29%) was regarding the Department of Justice and Attorney-General.⁷⁰³ There was no further breakdown and no mention of complaints relating to juvenile justice.

The same report noted that in 2014-15 the Queensland Ombudsman visited each of the state's 13 correctional centres.⁷⁰⁴ There was no mention of youth justice detention centres.

1.7.4 Access to information on treatment and conditions

The previous sections included the legislative functions and powers of each body to access information, including information on numbers of children and young people detained and information about the conditions and treatment of those children and young people.

This section outlines Queensland's arrangements regarding the monitoring and recording of conditions of detention and treatment of children and young people in detention. It includes the degree to which these arrangements are addressed in legislation, regulations and/or policy (so far as I have been able to establish), and the degree to which those records are independently monitored.

The primary legislation makes little specific provision regarding the conditions and treatment of children and young people detained under it.

Section 268 of the *Youth Justice Act 1992* (Qld) provides that a detention centre employee who becomes aware, or reasonably suspects, that a child has suffered harm while detained in a detention centre, must, unless the employee has a reasonable excuse, report the harm or suspected harm to the chief executive immediately; and if a regulation is in force under subsection (3)—in accordance with the regulation. It is an offence not to comply with this obligation.⁷⁰⁵ Harm, to a child, is any detrimental effect of a significant nature on the child's physical, psychological or emotional wellbeing.⁷⁰⁶ The same sections states that 'it is a reasonable excuse for the employee not to report a matter that reporting the matter might tend to incriminate the employee'⁷⁰⁷ and that reporting is not required if 'the employee knows, or reasonably supposes, that the chief executive is aware of the harm or suspected harm'.⁷⁰⁸

The framework for the use of restraint, use of force, isolation and searches, (including body searches) and accompanying records is in the *Youth Justice Regulation 2016* (Qld). Requirements to maintain records of use of force, restraint, segregation and searches are all contained in the regulations, not the primary legislation.

The *Youth Justice Regulation 2016* (Qld) requires that the chief executive of the Department ensure that any misbehaviour is managed in a way that respects the child's dignity and has regard to the nature of the misbehaviour; the child's age and maturity; and the child's cultural background and beliefs.⁷⁰⁹

The regulations prohibit the following in the context of disciplining a child:

- corporal punishment
- physical contact
- an act that involves humiliation, physical abuse, emotional abuse or sustained verbal abuse
- deprivation of sleep, food or visitors
- withholding letters or other mail, or access to a telephone or other means of communication
- exclusion from cultural, educational, or vocational programs
- medication or deprivation of medication.⁷¹⁰

The Department advised me that there is quarterly reporting to the Public Guardian regarding alleged instances of harm, potential breaches of Principles 3, 15, 19, or 20 of the Youth Justice Principles and the results of any investigation into these matters.⁷¹¹ The Public Guardian does not appear to report on this information.

The Department advised that Community Visitors have direct access to site records on their weekly visits.⁷¹² It is unclear if this includes the registers discussed below.

The Department of Justice and Attorney-General states that the Queensland Ombudsman receives 'regular proactive audits for each youth detention centre and the quarterly inspection reports by the Youth Detention Inspectorate and the Operational Inspector'.⁷¹³

1.7.4.1 Use of force

A detention centre employee may 'use reasonable force to protect a child, or other persons or property in the centre, from the consequences of the child's misbehaviour' but only where the employee reasonably believes the child, person or property cannot be protected in another way and only if the employee is appropriately trained.⁷¹⁴

Uses of reasonable force must be **recorded** by the chief executive.⁷¹⁵ The *Youth Justice Regulation 2016* (Qld) does not specify the particulars of what the record must include.

There is no requirement in the legislation or regulations for records of the use of force to be available to any external body or the public.

1.7.4.2 Segregation

A detention centre employee is only permitted to separate a child in a locked room:

- if the child is ill
- at the child's request
- for 'routine security purposes' under directions issued by the chief executive
- for the protection of the child or other persons or property
- to restore order in the youth detention centre.⁷¹⁶

Where a child is separated for the purpose of protecting the child or other persons or property, or to restore order, the child cannot be separated for more than two hours without the detention centre manager's approval. The chief executive must be informed if the separation is to be for more than 12 hours and the chief executive must approve separations of more than 24 hours.⁷¹⁷

Under the regulations, **the chief executive must record separations** of children in a locked room.⁷¹⁸ A record of separation must include the child's name, the reasons for the separation, the name of the detention centre employee who supervised the employee during the separation and the date and length of the separation.⁷¹⁹

There is no requirement in the legislation or regulations for the records of separations to be available to any external body or the public.

1.7.4.3 Restraints

The *Youth Justice Regulation 2016* (Qld) also permits the chief executive to approve the types of restraints that a staff member may use to restrain a child⁷²⁰ and authorise staff members to use approved restraints if they have completed 'physical intervention training approved by the chief executive'.⁷²¹

The chief executive may only authorise the use of approved restraints if the child is outside the detention centre or about to leave the detention centre, under escort by a staff member, or if the staff member reasonably believes the child is likely to:

- attempt to escape
- seriously harm himself, herself or somebody else
- seriously disrupt order and security at the detention centre

and the staff member reasonably believes there is no other way to stop the above behaviour.⁷²²

The chief executive must ensure that all reasonable steps are taken to use the restraints in a way that respects the child's dignity and that they are not used for longer that is reasonably necessary in the circumstances.⁷²³

The chief executive must make a **record of approved restraints**⁷²⁴ as well as a **record of the use of approved restraints** to restrain a child, including the child's name, the date, and the circumstances in which the restraints were used.⁷²⁵

There is no requirement in the legislation or regulations for the record of approved restraints or the record of the use of approved restraints to be available to any external body or the public.

1.7.4.4 Searches

The *Youth Justice Regulation 2016* (Qld) makes provision for searches that do and do not involve the removal of clothes as well as body searches.⁷²⁶ The chief executive may authorise a detention centre employee to search a child, or a medical practitioner to conduct a body search of a child.⁷²⁷ The chief executive may only authorise a body search where the chief executive considers, on reasonable grounds, that the child is in possession of a thing that may threaten the good order and security of the detention centre or endanger, or be used to endanger, the child or another person.⁷²⁸

If reasonably practicable, for searches involving the removal of clothes and body searches:

- the detention centre employee or medical practitioner conducting the search must inform the child that he or she will be required to remove clothing, explain why this is necessary and ask for the child's cooperation.⁷²⁹
- the child must be given the opportunity to remain partly clothed during the search.⁷³⁰
- the search must be conducted as quickly as reasonably practicable and the child must be allowed to dress as soon as the search is complete.⁷³¹
- the search must also be conducted in a way that provides reasonable privacy for the child.⁷³²

Searches that involve touching a child must be conducted by an employee of the same sex as the child.⁷³³ Searches involving the removal of clothes must not take place in the presence of a person of the opposite sex to the child.⁷³⁴ If reasonably practicable, a medical practitioner conducting a body search must be the same sex as the child.⁷³⁵ The new 2016 regulations now also specify that in the case of a child who identifies as transgender, the relevant people conducting the searches are of the sex requested by the child.⁷³⁶

Detention centre employees or medical practitioners conducting body searches may use reasonable force to carry out a search only if the employee or medical practitioner reasonably believes the search cannot be carried out in another way, and the employee has completed physical intervention training.⁷³⁷

The chief executive must maintain a **record of all searches** involving the removal of clothes and body searches, and searches which do not involve the removal of clothes but for which reasonable force was used.⁷³⁸ The record must include the child's name; the reason for the search; the names of person who carried out the search and any other person who assisted; if force was used, the reasons for the use of force and details of the force used.⁷³⁹

There are no requirements in the legislation or regulations for the records of searches to be made available to an external body or the public.

1.7.4.5 Internal complaints

The *Youth Justice Act 1992* (Qld) provides that a child or parent of a child detained in a youth detention centre may complain about a matter that affects the child.⁷⁴⁰ The chief executive need not deal with a complaint the chief executive 'reasonably believes to be trivial or made only to cause annoyance'⁷⁴¹ and must tell the child how the complaint is to be dealt with.⁷⁴²

Under the regulations, the chief executive must maintain a **record of complaints** made by young people on admission to a detention centre about their previous treatment while detained while on remand or after arrest or under sentence.⁷⁴³

It does not appear that the legislation nor regulations require the maintenance of a record of other complaints, for example those made whilst in detention.

The Department advised that work is being done to develop 'quarterly corporate reporting on complaints in the youth detention centres'.⁷⁴⁴

The records kept by the chief executive are maintained on the Detention Centre Operational Information System (DCOIS), which captures information about service delivery in Queensland youth detention centres relating to all operations and events.⁷⁴⁵ According to the Department of Justice and Attorney-General, this information is used to 'facilitate annual public reporting on critical issues such as self-harm, suicide, assault and escapes in the Report on Government Services'.⁷⁴⁶

Information is also included in the quarterly reports of the Youth Detention Inspectorate. The executive summaries of these reports are published on the Department's website.⁷⁴⁷ The executive summaries are typically around one page long and contain limited information.

For example, the most recent report from June 2016 on Cleveland Youth Detention Centre stated that 'the Behavioural Development model is currently under review at CYDC. The Inspectors made a total of four recommendations, which will be monitored by the Inspectors during 2016-2017'.⁷⁴⁸

The most recent report from June 2016 on the Brisbane Youth Detention Centre focused on the condition of the facilities.

It was identified that there has been improvement in removing graffiti and repairing obvious signs of damage of the young people's bedrooms. The Inspectors recommend that repairs continue until completed. The majority of male young people in one accommodation unit did not have modesty curtains. The Executive Director undertook to have this rectified immediately. In total the Inspectors made a total of four recommendations, which will be monitored by the Inspectors during 2016-2017.⁷⁴⁹

The Department advised that information about complaints made regarding youth detention is also published on the Department's website.⁷⁵⁰ In the Department of Justice and Attorney-General *Client Complaints Annual Report 2014-15*, the Department reported that there were 78 complaints in the Youth Justice division,⁷⁵¹ and a total of 64 complaints were made by children and young people for the period 1 February to 30 June 2015 (previous to that, this information was not collected).⁷⁵² However, no further details are provided in relation to those complaints.

1.8 Northern Territory

In the Northern Territory, children and young people who have or have allegedly committed criminal offences are detained pursuant to the *Youth Justice Act 2005* (NT). The *Youth Justice Regulations 2005* (NT) further provide for the operation of youth detention centres in the Northern Territory.

There are two youth detention centres in the Northern Territory, Alice Springs Youth Detention Centre and Don Dale Youth Detention Centre in Darwin.

These youth detention centres are managed by the Department of Correctional Services, which is directed by the Commissioner of Correctional Services (the Commissioner). The Minister for Correctional Services has responsibility for this Department.

Currently, there is no single independent body responsible for the monitoring and oversight of youth justice centres in the Northern Territory.

The following are involved in the monitoring and oversight, including complaints, of youth detention centres in the Northern Territory:

- official visitors
- the Youth Justice Advisory Committee (YJAC)
- the Children's Commissioner of the Northern Territory (NT Children's Commissioner)
- the Ombudsman Northern Territory (Ombudsman NT).

In addition, the *Youth Justice Act 2005* (NT) provides that the Minister or a person authorised by the Minister may enter and inspect a detention centre at any reasonable time.⁷⁵³

Any Supreme Court Judge or Youth Judge, member of the Legislative Assembly, medical practitioner or nurse who is attending to business at the detention centre or person authorised in writing by the Corrections Commissioner may also attend at a detention centre at any reasonable time, subject to the conditions the Commissioner considers appropriate.⁷⁵⁴

According to the Department of Correctional Services, all bodies with powers to enter Northern Territory youth detention centres may access all areas of the detention centre.⁷⁵⁵

1.8.1 Official Visitors

Official Visitors are responsible under the *Youth Justice Act 2005* (NT) for regularly monitoring and reporting on youth detention centres.⁷⁵⁶

An Official Visitor is appointed by the Minister for Correctional Services for three years and can be reappointed. They receive remuneration, allowances and expenses as determined by the Minister.⁷⁵⁷ At least three Official Visitors must be appointed for each youth detention centre.⁷⁵⁸

Official Visitors 'must inquire into the treatment and behaviour of, and the conditions for, detainees in the detention centre'.⁷⁵⁹ An Official Visitor must visit their appointed youth detention centre at least once a month.⁷⁶⁰

An Official Visitor for the youth detention centre may attend the detention centre at a reasonable time, subject to the conditions the Commissioner considers appropriate.⁷⁶¹

There is no formal power that provides that Official Visitors can access information regarding the numbers of, location of, conditions and treatment of children held in youth detention centres in the Northern Territory.⁷⁶²

Although Official Visitors do not have a formal complaint handling role, complaints or issues that arise during official visitor visits are generally dealt with by the youth detention centre. More serious complaints, like those concerning misconduct or inappropriate conduct by staff are generally referred to the Superintendent of the youth detention centre and followed up through the report made to the Minister.⁷⁶³

Official Visitors must report in writing to the Minister as soon as practicable after each visit.⁷⁶⁴

Official Visitors must also report to the Commissioner of Correctional Services where the Minister has directed an official visitor to report to the Commissioner in relation to a specified matter.⁷⁶⁵

The reports to the Minister are not required to be, nor in practice are they, made public.

Official Visitors do not have a function relating to providing advice or recommendations to government. Nor is there any legislative provision requiring a response from government or encouraging dialogue between official visitors and government.

From 1 July 2014 to 30 June 2015, Official Visitors undertook a total of nine visits to Don Dale Youth Detention Centre and eight visits to Alice Springs Youth Detention Centre.⁷⁶⁶

1.8.2 Youth Justice Advisory Committee

Part 13 of the *Youth Justice Act 2005* (NT) provides for a Youth Justice Advisory Committee (YJAC) that gives advice and information to the Minister for Correctional Services on the administration of the Northern Territory's youth justice system.

YJAC members are appointed by the Minister for Correctional Services for three years, or for a period of less than three years specified in the instrument of appointment, and can be reappointed.⁷⁶⁷

The Minister may terminate a member's appointment 'on the grounds of misconduct or inability to competently perform the duties of office'.⁷⁶⁸ The Minister must terminate the appointment of a member who is absent for three consecutive meetings, except where a leave of absence has been granted by the Chairperson.⁷⁶⁹ A member's appointment will automatically terminate in specified circumstances including bankruptcy and conviction of an offence punishable by imprisonment for 12 months or more.⁷⁷⁰

The YJAC consists of not less than eight and no more than 12 members.⁷⁷¹ Membership must comprise government, non-government and community representatives and must reflect the composition of the community at large. As far as practicable, it should include:

- an equal number of men and women
- at least two Aboriginal members
- at least one member who is under the age of 25 years at the time of their appointment
- at least one former detainee
- an Official Visitor
- one member residing in Alice Springs and one member residing in a remote community at the time of appointment.⁷⁷²

The **functions** of the YJAC are to:

- monitor and evaluate the administration and operation of the *Youth Justice Act 2005* (NT)
- advise the Minister on issues relevant to the administration of youth justice
- collect, analyse and provide to the Minister information relating to issues and policies concerning youth justice
- any other functions the Minister directs or required by the Act,⁷⁷³ including establishing and maintaining a Register of Appropriate Support Persons who may be asked to sit in a police interview with a young person if their family is not available.⁷⁷⁴

The YJAC has the powers 'necessary or convenient' to perform its functions.⁷⁷⁵ The Department of Correctional Services advised that the YJAC has the power to visit youth justice centres,⁷⁷⁶ although this is not explicitly provided for in the legislation.

The YJAC does not appear to have a regular inspection routine, but it has visited youth detention facilities in the Northern Territory.⁷⁷⁷

The YJAC provides an annual report to the Minister that reports on the activities of the YJAC during the preceding financial year.⁷⁷⁸ The Minister must table the report in Parliament within five sitting days of having received it.⁷⁷⁹ These reports are publicly available on the Department of Correctional Services website.⁷⁸⁰

However there is no provision requiring the NT Government to respond to the report or recommendations within it. Nor is there any provision encouraging dialogue between the YJAC and government.

1.8.3 NT Children's Commissioner

The NT Children's Commissioner is an independent statutory officer with a focus on ensuring 'the safety and wellbeing of vulnerable children' and promoting 'continuous improvement and innovation in policies, practices and services relating to the safety and wellbeing of vulnerable children'.⁷⁸¹ The definition of 'vulnerable children' includes those in relation to whom an order has been made under the *Youth Justice Act 2005* (NT).⁷⁸²

The NT Children's Commissioner's independence is protected by section 11 of the *Children's Commissioner Act 2013* (NT) which provides that except as otherwise provided by another law of the Territory, the Commissioner is not subject to the direction of anyone in relation to: (a) the way in which the functions of the Commissioner are performed; or (b) the order of priority the Commissioner gives to investigations.

A member of the NT Children's Commissioner's staff is subject only to the direction of the Commissioner or another member of the Commissioner's staff.⁷⁸³

The NT Children's Commissioner is appointed by the Administrator on the recommendation of the Minister, and must have qualifications or experience relating to the Commissioner's functions.⁷⁸⁴ The Commissioner is appointed for a period not exceeding five years and is eligible for reappointment.⁷⁸⁵ The Commissioner is entitled to remuneration, expenses and allowances determined by the Administrator.⁷⁸⁶

The Administrator, may, in writing, suspend the NT Children's Commissioner on the grounds of misbehaviour or physical or mental incapacity.⁷⁸⁷ The Administrator must terminate the Commissioner's appointment if the Commissioner becomes bankrupt or 'applies to take the benefit of a law for the relief of bankrupt or insolvent debtors' or 'compounds with creditors or makes an assignment of the Commissioner's remuneration for their benefit'.⁷⁸⁸

The functions of the NT Children's Commissioner include:

- dealing with a complaint about 'required services' or a matter that may form grounds for a complaint on the Commissioner's own-initiative
- monitoring the ways service providers respond to the Commissioner's reports
- promoting understanding, and informed public discussion, of the 'rights, interests and wellbeing of vulnerable children'.⁷⁸⁹

The NT Children's Commissioner also has a number of functions relating to the Northern Territory's care and protection system.⁷⁹⁰

A complaint to the NT Children's Commissioner must be made on at least one of the following grounds:

- A service provider (a responsible service provider) failed to provide services (required services) for a vulnerable child that the provider was reasonably expected to provide.
- The required services provided for the child by the responsible service provider failed to meet the standard reasonably expected of the provider.⁷⁹¹

A 'responsible service provider' is a public authority or an organisation or an individual acting under an arrangement with a public authority.⁷⁹² 'Required services' include any services relating to the care and wellbeing of the child or child-related services.⁷⁹³

The NT Children's Commissioner 'has the powers necessary to perform the Commissioner's functions'.⁷⁹⁴

The NT Children's Commissioner also has the power to request a person to allow the Commissioner to have contact with vulnerable children, or a witness in relation to a complaint or investigation.⁷⁹⁵ The Commissioner may also, by written notice, request that a person give specified information or attend before the Commissioner to give information and answer questions about a specified matter or produce a specified thing.⁷⁹⁶

The NT Children's Commissioner may investigate a matter on the Commissioner's own-initiative irrespective of whether the matter occurred or a complaint was actually made in relation to that matter.⁷⁹⁷

Before commencing an investigation, the Commissioner must notify each responsible service provider and the CEO of each responsible agency of the decision to investigate, the details of the matter to which the investigation relates and that the Agency and service provider may make a submission about the matter.⁷⁹⁸

It is an **offence** to:

- fail to comply with a request for access to a child or a request for information, with exceptions⁷⁹⁹
- knowingly provide the NT Children's Commissioner with misleading information⁸⁰⁰
- prevent or obstruct a person from making a complaint⁸⁰¹
- make a false complaint⁸⁰²
- obstruct or improperly influence an investigation.⁸⁰³

The *Children's Commissioner Act 2013* (NT) **protects** complainants and people giving information to the Children's Commission in good faith from civil and criminal **liability**.⁸⁰⁴

Confidentiality of information is protected: it is an offence to disclose information obtained in the course of performing functions under the legislation.⁸⁰⁵

The NT Children's Commissioner does not have the express power to make recommendations regarding legislation to government.

However, the Commissioner can make recommendations regarding a service provider or agency, including a government department, in the context of an investigation.

After completing an investigation, the NT Children's Commissioner must prepare a report of the investigation and take any action the Commissioner considers appropriate in relation to the matter investigated.⁸⁰⁶ If the Commissioner proposes to make specified findings or recommendations regarding a service provider or agency, the Commissioner must give the service provider or agency the opportunity to comment and take those comments into account.⁸⁰⁷

The NT Children's Commissioner must provide the report to the service provider and the Chief Executive Officer of the agency and may give the report to the Minister if the Commissioner considers it appropriate to do so.⁸⁰⁸ The Commissioner may provide a further report to the responsible Minister where a service provider or agency has failed to take a recommended action.⁸⁰⁹

The NT Children's Commissioner must also provide an annual report by 31 October each year and may also provide the Minister with a report about a matter relating to the performance of a function of the Commissioner.⁸¹⁰ The Speaker may, at the Commissioner's request, authorise the publication of a report relating to the performance of a function of the Commissioner or relating to a particular complaint or investigation.⁸¹¹

In 2014-15, the Children's Commissioner dealt with 39 complaints relating to children in youth detention. Of these, 16 complaints were declined, 8 were resolved, 8 were referred and 7 were investigated.⁸¹²

In 2014-15, the following complaint themes were evident in complaints concerning youth detention:

- excessive periods of isolation/segregation
- inadequate case and behaviour management strategies
- inadequate access to education for young people in youth detention centres when being managed in the Behaviour Management Unit (BMU) (later known as the High Security Unit) and/or isolated/segregated for behavioural issues.⁸¹³

In 2014, the Commissioner also initiated an own-initiative investigation into services provided to young people by the Department of Correctional Services at the Don Dale Youth Detention Centre. The NT Children's Commissioner decided to initiate the investigation after a professional stakeholder raised concerns about the welfare of five young people confined to the BMU, in particular the alleged indefinite nature of their confinement and the unhygienic living conditions of the BMU.⁸¹⁴ The investigation focussed on events that occurred at the BMU in Don Dale between 4 and 21 August 2014, including the use of tear gas on six young people.⁸¹⁵

1.8.4 Ombudsman NT

The Ombudsman NT can receive complaints about Northern Territory Government departments and statutory authorities, including the Northern Territory Department of Correctional Services.⁸¹⁶

The Ombudsman NT is an independent authority which reports to the Northern Territory Parliament.

The Ombudsman NT is not subject to direction by any person about the way the Ombudsman NT exercises or performs the Ombudsman's powers or functions in relation to complaints and investigations and the priority given to investigations.⁸¹⁷

The Ombudsman NT must 'act independently, impartially and in the public interest' in the exercise or performance of the Ombudsman powers or functions in relation to complaints and investigations.⁸¹⁸

The relevant functions of the Ombudsman NT include:

- investigate and deal with complaints about the administrative actions of public authorities, and
- consider the administrative practices and procedures of those public authorities under investigation and make recommendations about appropriate ways of addressing the effects of inappropriate administrative actions or for the improvement of their practices and procedures, and
- consider the administrative practices and procedures of public authorities generally and make recommendations, provide information or other assistance for the improvement of their practices and procedures.⁸¹⁹

The Ombudsman NT has a complaints handling function which extends to the Department of Corrective Services. However, the functions of the Ombudsman NT do not extend to matters that NT Children Commissioner's is authorised to investigate under the *Children's Commissioner Act 2013* (NT).⁸²⁰ The Ombudsman NT must refer relevant complaints to the NT Children's Commissioner.⁸²¹

The Ombudsman NT has the power to 'do all things necessary or convenient to be done for, or in relation to, the performance of the Ombudsman's functions'.⁸²²

In the context of an investigation, the Ombudsman NT has the **power** to enter and inspect premises occupied by a public authority, access or copy documents located at the premises and require staff to give reasonable help in accessing information documents.⁸²³

The Department of Correctional Services states that the Ombudsman NT is able to visit youth justice centres.⁸²⁴

After completing an investigation of a public authority, the Ombudsman NT must inform the complainant and the principal officer of the public authority of the result of the investigation.⁸²⁵

Where the Ombudsman NT makes an adverse report, as specified in section 59(1) of the *Ombudsman Act 2009* (NT), the Ombudsman must give a copy of the report to the Minister responsible for the public authority.⁸²⁶ If the Ombudsman is satisfied there is evidence of a breach of duty or misconduct on the part of an officer of a public authority, the Ombudsman must report the matter to the principal officer of the public authority.⁸²⁷

Reports to the principal officer of a public authority may contain any recommendations the Ombudsman considers appropriate.⁸²⁸ The Ombudsman may request that the principal officer give written notice of the steps taken, or proposed to be taken, to give effect to the recommendations, or the reasons for not taking all steps necessary to give effect to the recommendations. If the Ombudsman considers that there has been no, or inadequate, action, the Ombudsman may give a copy of the report to the responsible Minister.⁸²⁹

1.8.5 Access to information on treatment and conditions

The previous sections included the legislative functions and powers of each body to access information, including information on numbers of children and young people detained and information about the conditions and treatment of those children and young people.

This section outlines NT's arrangements regarding the monitoring and recording of conditions of detention and treatment of children and young people in detention. It includes the degree to which these arrangements are addressed in legislation, regulations and/or policy (so far as I have been able to establish), and the degree to which those records are independently monitored.

With respect to the rights of young detainees, the *Youth Justice Act 2005* (NT) states that as soon as practicable after a youth is admitted to a detention centre, he or she must be given an explanation of the rules of the centre and his or her rights and responsibilities as a detainee. This includes a) information about the consequences of breaching the rules of the detention centre; and (b) information about the procedure for making a complaint.⁸³⁰

The primary legislation also makes provision regarding the use of force, isolation, restraint and searches allowed in juvenile detention centres in the NT, and the Regulations provide some further detail regarding procedures. Neither the legislation nor regulations appear to require that any of the existing registers be made available to external inspection and monitoring bodies or that they be published publicly. However, the Department of Correctional Services notes that, in practice, the registers are audited by the Department's Professional Standards Unit⁸³¹ and:

all bodies with powers to enter NT youth detention centres have the ability to access information regarding numbers of, location of, conditions and treatment of people held in youth detention centres. This access is conducted on an as-needs basis.⁸³²

There does not appear to be any public reporting by the NT Government of any of the registers.

None of the external bodies involved in the monitoring and oversight of youth justice centres in the NT have the express power to access the relevant registers or information on the conditions and treatment of children and young people in detention. It appears that none of them use implied powers, for example a broad incidental power, to access those documents on a routine basis.

1.8.5.1 Use of force

The legislation provides that the Superintendent of a detention centre may use the force reasonably required in the circumstances to maintain discipline at the detention centre.⁸³³ ‘Reasonably necessary’ force does not include:

- striking, shaking or any other form of physical violence
- enforced dosing with a medicine, drug or other substance
- compulsion to remain in a constrained or fatiguing position
- use of approved restraints to restrict normal movement.⁸³⁴

There appears to be no requirement in the legislation or regulations to keep a register of uses of force. However, the Department of Correctional Services advised that, in practice, a register of uses of force is maintained by NT youth detention centres.⁸³⁵

1.8.5.2 Restraint

In 2016, the *Youth Justice Act 2005* (NT) was amended to enable the Commissioner of Correctional Services to approve mechanical devices for restricting the movement of detainees (known as approved restraints).⁸³⁶

The Superintendent may ‘appropriately use’ or approve ‘appropriate use’ of an approved restraint:

- where the Superintendent is of the opinion that there is an emergency, or that restraining a detainee would ‘reduce a risk to the good order or security of the detention centre’⁸³⁷
- to protect a detainee from self-harm or to protect the safety of another person⁸³⁸
- when a detainee to being escorted, both inside and outside the detention centre.⁸³⁹

In this context, ‘appropriate’ refers to using the restraint in the ‘least restrictive or invasive way’ and for the minimum amount of time reasonable in the circumstances.⁸⁴⁰

The recent amendments expanded the types of restraints that may be used and the circumstances in which they were able to be used. Previously, the *Youth Justice Act 2005* (NT) provided that the Superintendent may approve the use of ‘handcuffs or a similar device’:

- to ‘restrain normal movement’ when detainees were escorted outside the detention centre⁸⁴¹ or
- to restrain a detainee in an emergency where temporary restraint would protect the detainee from self-harm or protect the safety of another person.⁸⁴²

Under the new legislation, the types of restraints allowed are no longer on the face of the primary legislation and are instead to be ‘approved’ by the Commissioner of Correctional Services⁸⁴³ under the new Section 151AB. It does not appear that this ‘approval’ is done by way of regulations or any other kind of subordinate legislation, with any parliamentary or any other oversight, or that a list needs to be publicly available, or available to any external body on request.

As part of these amendments a new provision was included requiring a Superintendent of a detention centre to keep a **register of the use of approved restraints**.⁸⁴⁴ The new section 158A specifies what details need to be included in the register, including the particular approved restraint that was used, the circumstances in which it was used, the time for which it was used, the name of the person who authorised the use, any medical attention required, and any other particulars prescribed in Regulations. It specifies that ‘a register may be kept in any form and on any medium that the Commissioner considers appropriate’.⁸⁴⁵

To oversee restraint practices in youth detention, the Department of Correctional Services established the Youth Detention Restraint Practice Advisory Committee. According to the Department of Correctional Services the Advisory Committee will:

provide specialist advice and guidance to the Commissioner of Correctional Services with regards to restraint practices in youth detention, including the development and assessment of operational procedures and training for staff.⁸⁴⁶

In late July, the Northern Territory Government announced that the use of spit hoods and restraint chairs on youth detainees would be suspended until the completion of a review.⁸⁴⁷

1.8.5.3 Isolation

The legislation provides that the Superintendent may isolate a detainee for a period not exceeding 24 hours, or with the approval of the Commissioner of Correctional Services, not exceeding 72 hours where the Superintendent is of the opinion that a detainee should be isolated:

- to protect the safety of another person, or
- for the good order or security of the detention centre.⁸⁴⁸

The Regulations provide that when a detainee is isolated, he or she must be continuously monitored by closed-circuit television or physical observation by a staff member and written observations, including the date, time and name of the staff member, must be recorded every 15 minutes.⁸⁴⁹

The Regulations also require the Superintendent to keep a **journal recording the isolation** of a detainee and the details of that period of isolation.⁸⁵⁰ The journal must include the date and time the detainee was isolated and released; the name of the detainee; the reason for their isolation; the time the on-call person in charge was notified and the name of that person; staff observations taken at intervals not exceeding 15 minutes and the name of the staff member; the date and time of exercise periods and ablutions; details of approval by the Commission for isolation exceeding 24 hours.⁸⁵¹

1.8.5.4 Searches

The legislation provides that the Superintendent may direct a detainee to submit to a search of his or her clothing, including a strip search, where the Superintendent believes on reasonable grounds that:

- it is necessary and in the interests of the security or good order of the detention centre
- the detainee may have in his or her possession any article that is not permitted.⁸⁵²

Any search must be conducted in accordance with the *Youth Justice Regulations 2005* (NT).⁸⁵³ The Regulations provide that the Superintendent or a member of staff may search a detainee when they are admitted, returned or transferred from the detention centre.⁸⁵⁴ The search must be conducted:

- having regard to the detainee's dignity and self-respect
- in the presence of another staff member
- by no less than two staff members of the same gender and only under the direction of the Superintendent where the search involved stripping the detainee of clothing.⁸⁵⁵

The detainee must not be stripped of clothing and searched in the presence of a person of the opposite gender or another detainee (unless it is 'impracticable' to move either detainee).⁸⁵⁶

The Regulations require the Superintendent of a detention centre to **maintain a register of searches**.⁸⁵⁷ The search register must include the names of the person searched and the members of staff who carried out the search; the nature of the search; the date and time the search was carried out; and the reasons for and results of the search.⁸⁵⁸

1.8.5.5 Internal complaints

The Regulations provide that a detainee may make a written complaint to the Superintendent in relation to a matter arising from his or her detention.⁸⁵⁹ A member of staff with whom the complaint is lodged or who writes a complaint on behalf of a detainee must forward the complaint to the Superintendent 'without delay'.⁸⁶⁰ The Superintendent must deal with the complaint 'as soon as practicable'.⁸⁶¹

The Superintendent must maintain of **register of complaints** made at the detention centre.⁸⁶² The register of complaints must include the name of the complainant; the name of the person from whom the complaint was received; the date and time the complaint was received; the nature of the complaint and the action taken.⁸⁶³

1.8.5.6 Critical incidents

The Department of Correctional Services advised that, in practice, a **critical incidents register** is also maintained by NT youth detention centres.⁸⁶⁴

- 1 WA Department of Corrective Services, *Youth Justice Framework*. At http://www.correctiveservices.wa.gov.au/_files/youth-justice/yjs-framework-2015-2018.pdf (viewed 5 August 2016).
- 2 *Young Offenders Act 1994* (WA) s 169.
- 3 *Auditor General Act 2006* (WA) Part 3.
- 4 WA Office of the Auditor General, *The Banksia Hill Detention Centre Redevelopment Project*, at <https://audit.wa.gov.au/reports-and-publications/reports/the-banksia-hill-detention-centre-redevelopment-project/> (viewed 5 August 2016).
- 5 WA Office of the Auditor General, *The Juvenile Justice System: Dealing with Young People under the Young Offenders Act 1994: Performance Examination* (2008). At https://audit.wa.gov.au/wp-content/uploads/2013/05/report2008_04.pdf (viewed 8 August 2016).
- 6 *Inspector of Custodial Services Act 2003* (WA) s 6(1).
- 7 *Inspector of Custodial Services Act 2003* (WA) s 8.
- 8 *Inspector of Custodial Services Act 2003* (WA) s 9.
- 9 *Inspector of Custodial Services Act 2003* (WA) s 6.
- 10 *Inspector of Custodial Services Act 2003* (WA) s 17(2).
- 11 *Inspector of Custodial Services Act 2003* (WA) ss 17-18.
- 12 WA Office of the Inspector of Custodial Services, *How we Inspect*. At <http://www.oics.wa.gov.au/how-we-inspect/> (viewed 29 July 2016).
- 13 *Inspector of Custodial Services Act 2003* (WA) s 19.
- 14 *Inspector of Custodial Services Act 2003* (WA) s 20.
- 15 *Inspector of Custodial Services Act 2003* (WA) ss 33-34.
- 16 *Inspector of Custodial Services Act 2003* (WA) s 3.
- 17 WA Office of the Inspector of Custodial Services, Report 87, *Court Custody Centres' Inspection 2012/13* (2013), iii-iv. At <http://www.oics.wa.gov.au/publications/inspection/page/2/> (viewed 29 July 2016); Commissioner for Children and Young People WA, Submission No 14 to Australian Human Rights Commission, *National Children's Commissioner's examination of OPCAT and Youth Justice*, 30 May 2016, 2-3.
- 18 *Inspector of Custodial Services Act 2003* (WA) s 21.
- 19 *Inspector of Custodial Services Act 2003* (WA) s 22.
- 20 *Inspector of Custodial Services Act 2003* (WA) s 34(2)(b).
- 21 WA Office of the Inspector of Custodial Services, *Annual Report 2014-15* (2015) 5.
- 22 *Inspector of Custodial Services Act 2003* (WA) s 25.
- 23 *Inspector of Custodial Services Act 2003* (WA) s 29.
- 24 *Inspector of Custodial Services Act 2003* (WA) s 29.
- 25 *Inspector of Custodial Services Act 2003* (WA) s 30.
- 26 *Inspector of Custodial Services Act 2003* (WA) s 27. The scope of the Inspector's access to prisons, detention centres, court custody centre and lock-ups is outlined in sections in order to perform functions under the Act is detailed in sections 28-30.
- 27 *Inspector of Custodial Services Act 2003* (WA) s 32.
- 28 *Inspector of Custodial Services Act 2003* (WA) s 47.
- 29 *Inspector of Custodial Services Act 2003* (WA) ss 44-46.
- 30 *Inspector of Custodial Services Act 2003* (WA) s 53.
- 31 *Inspector of Custodial Services Act 2003* (WA) s 18.
- 32 *Inspector of Custodial Services Act 2003* (WA) s 18(3).
- 33 *Inspector of Custodial Services Act 2003* (WA) s 33.
- 34 *Inspector of Custodial Services Act 2003* (WA) s 33.
- 35 *Inspector of Custodial Services Act 2003* (WA) s 23.
- 36 See for example, WA Office of the Inspector of Custodial Services *Annual Report 2014-2015* (2015) 12-15.
- 37 For example, WA Office of the Inspector of Custodial Services, Report 87, *Court Custody Centres Inspection 2012/13* (2013). At <http://test.oics.wa.gov.au/reports-publications/page/2/> (viewed 28 September 2016).
- 38 *Inspector of Custodial Services Act 2003* (WA) s 41.
- 39 *Young Offenders Act 1994* (WA) s 169.
- 40 *Inspector of Custodial Services Act 2003* (WA) s 40(1)(b).
- 41 WA Office of the Inspector of Custodial Services, *Annual Report 2014-2015* (2015) 22.
- 42 *Inspector of Custodial Services Act 2003* (WA) s 26(2).
- 43 *Parliamentary Commissioner Act 1971* (WA) s 13.
- 44 *Parliamentary Commissioner Act 1971* (WA) s 5.
- 45 *Parliamentary Commissioner Act 1971* (WA) s 12.
- 46 *Parliamentary Commissioner Act 1971* (WA) s 6.
- 47 *Parliamentary Commissioner Act 1971* (WA) s 16.
- 48 *Parliamentary Commissioner Act 1971* (WA) s 21.
- 49 *Parliamentary Commissioner Act 1971* (WA) s 20.
- 50 *Parliamentary Commissioner Act 1971* (WA) s 24.
- 51 *Parliamentary Commissioner Act 1971* (WA) ss 30 and 30A.
- 52 *Parliamentary Commissioner Act 1971* (WA) s 17A.

- 53 *Parliamentary Commissioner Act 1971* (WA) s 30B.
- 54 *Parliamentary Commissioner Act 1971* (WA) s 25.
- 55 *Financial Management Act 2006* (WA) s 63.
- 56 *Parliamentary Commissioner Act 1971* (WA) s 27.
- 57 See Ombudsman WA, *Ombudsman's Reports*. At <http://www.ombudsman.wa.gov.au/Publications/Reports.htm> (viewed 4 August 2016).
- 58 Ombudsman WA, *Annual Report 2014-15* (2015) 113, 188. At http://www.ombudsman.wa.gov.au/Publications/Annual_Reports.htm (viewed 10 October 2016).
- 59 Ombudsman WA, *Annual Report 2014-15* (2015) 33.
- 60 *Commissioner for Children and Young People Act 2006* (WA) s 7.
- 61 *Commissioner for Children and Young People Act 2006* (WA) s 7.
- 62 *Commissioner for Children and Young People Act 2006* (WA) s 9.
- 63 *Commissioner for Children and Young People Act 2006* (WA) s 8.
- 64 Under the *Commissioner for Children and Young People Act 2006* (WA) s 51.
- 65 Parliament of WA, Committee on the Commissioner for Children and Young People – Joint Committee. At http://www.parliament.wa.gov.au/Parliament/commit.nsf/WCurrentNameNew/1a755795ef44699948257b79000a912a?OpenDocument&ExpandSection=6#_Section6 (viewed 28 July 2016).
- 66 *Commissioner for Children and Young People Act 2006* (WA) s 19.
- 67 *Commissioner for Children and Young People Act 2006* (WA) s 20.
- 68 Special inquiries are provided for in Part 5 of the *Commissioner for Children and Young People Act 2006* (WA).
- 69 *Commissioner for Children and Young People Act 2006* (WA) s 33.
- 70 *Commissioner for Children and Young People Act 2006* (WA) s 23(1).
- 71 *Commissioner for Children and Young People Act 2006* (WA) s 41.
- 72 *Commissioner for Children and Young People Act 2006* (WA) s 59.
- 73 *Commissioner for Children and Young People Act 2006* (WA) s 40.
- 74 *Commissioner for Children and Young People Act 2006* (WA) s 39.
- 75 *Commissioner for Children and Young People Act 2006* (WA) s 42.
- 76 *Commissioner for Children and Young People Act 2006* (WA) s 43.
- 77 *Commissioner for Children and Young People Act 2006* (WA) s 44.
- 78 *Commissioner for Children and Young People Act 2006* (WA) s 49.
- 79 *Commissioner for Children and Young People Act 2006* (WA) s 46.
- 80 *Commissioner for Children and Young People Act 2006* (WA) s 48.
- 81 Commissioner for Children and Young People WA, *Youth justice*. At <https://www.cryp.wa.gov.au/media/1452/report-mental-health-inquiry-april-2011.pdf> (viewed 5 August 2016).
- 82 Commissioner for Children and Young People WA, *Submission to the Inspector of Custodial Services, Inquiry into Banksia Hill incident* (2013). At <https://www.cryp.wa.gov.au/media/1883/2013-submission-to-the-inspector-of-custodial-services-inquiry-into-banksia-hill-incident.pdf> (viewed 5 August 2016).
- 83 Commissioner for Children and Young People WA, *Submission to the Inspector of Custodial Services, Inquiry into Banksia Hill incident* (2013) 14. At <https://www.cryp.wa.gov.au/media/1883/2013-submission-to-the-inspector-of-custodial-services-inquiry-into-banksia-hill-incident.pdf> (viewed 5 August 2016).
- 84 Commissioner for Children and Young People WA, *The State of Western Australia's Children and Young People – Edition Two* (2014). At <https://www.cryp.wa.gov.au/media/1726/the-state-of-western-australia-s-children-and-young-people-edition-two-final-web-version-14-july-2014-1.pdf> (viewed 5 August 2016).
- 85 Commissioner for Children and Young People WA, *The State of Western Australia's Children and Young People – Edition Two* (2014) 301. At <https://www.cryp.wa.gov.au/media/1726/the-state-of-western-australia-s-children-and-young-people-edition-two-final-web-version-14-july-2014-1.pdf> (viewed 5 August 2016).
- 86 *Young Offenders Regulations 1995* (WA) reg 72.
- 87 *Young Offenders Regulations 1995* (WA) reg 71.
- 88 *Young Offenders Regulations 1995* (WA) reg 86(8).
- 89 *Young Offenders Regulations 1995* (WA) reg 74.
- 90 *Young Offenders Regulations 1995* (WA) reg 76 and reg 79.
- 91 *Young Offenders Regulations 1995* (WA) reg 77.
- 92 *Young Offenders Regulations 1995* (WA) reg 76. 'Unlock hours' means the period during which detainees who are not subject to confinement or restraint are able to leave their sleeping quarters: reg 73.
- 93 *Young Offenders Regulations 1995* (WA) reg 79(2).
- 94 *Young Offenders Regulations 1995* (WA) reg 79(4).
- 95 *Young Offenders Regulations 1995* (WA) reg 77(3) and 80(2).
- 96 *Young Offenders Regulations 1995* (WA) reg 80(1).
- 97 Government of Western Australia, Department of Corrective Services, *Youth Custodial Rules*. At <http://www.correctiveservices.wa.gov.au/youth-justice/juvenile-custodial-rules.aspx> (viewed 28 July 2016).
- 98 WA Department of Corrective Services, Youth Custodial Rule 203 'Detainee requests and complaints', Rule 3.8. At <http://www.correctiveservices.wa.gov.au/youth-justice/juvenile-custodial-rules.aspx> (viewed 28 July 2016).

- 99 WA Office of the Inspector of Custodial Services, Report 97, *Report of an Announced Inspection of Banksia Hill Juvenile Detention Centre* (2015) 99-100. At <http://www.oics.wa.gov.au/wp-content/uploads/2015/06/OIC-Banksia-Report-97.pdf> (viewed 29 July 2016).
- 100 WA Office of the Inspector of Custodial Services, Report 97, *Report of an Announced Inspection of Banksia Hill Juvenile Detention Centre* (2015) 101. At <http://www.oics.wa.gov.au/wp-content/uploads/2015/06/OIC-Banksia-Report-97.pdf> (viewed 29 July 2016).
- 101 WA Office of the Inspector of Custodial Services, Report 97, *Report of an Announced Inspection of Banksia Hill Juvenile Detention Centre* (2015) 102. At <http://www.oics.wa.gov.au/wp-content/uploads/2015/06/OIC-Banksia-Report-97.pdf> (viewed 29 July 2016).
- 102 See for example, WA Office of the Inspector of Custodial Services WA, Report 104, *Report of an Announced Inspector of Acacia Prison* (2016). At <http://www.oics.wa.gov.au/reports-publications/> (viewed 30 September 2016).
- 103 *Children (Detention Centres) Act 1987* (NSW) s 8.
- 104 *Inspector of Custodial Services Act 2012* (NSW) s 1.
- 105 *Inspector of Custodial Services Act 2012* (NSW) s 2.
- 106 *Inspector of Custodial Services Act 2012* (NSW) Sch 1.4.
- 107 *Inspector of Custodial Services Act 2012* (NSW) s 6(1)(d)-(g).
- 108 *Inspector of Custodial Services Act 2012* (NSW) s 25.
- 109 See <https://www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=175#tab-reportsandgovernmentresponses> (viewed 25 August 2016).
- 110 *Inspector of Custodial Services Act 2012* (NSW) s 17(2).
- 111 *Inspector of Custodial Services Act 2012* (NSW) Sch 1.1.
- 112 NSW Inspector of Custodial Services, *Annual Report 2014-15* (2015) 14. At <http://www.custodialinspector.justice.nsw.gov.au/Documents/Annual%20Report%202014-15.pdf> (viewed 22 July 2016).
- 113 *Inspector of Custodial Services Act 2012* (NSW) s 6.
- 114 *Inspector of Custodial Services Act 2012* (NSW) s 7(e).
- 115 *Inspector of Custodial Services Act 2012* (NSW) s 6(2).
- 116 *Inspector of Custodial Services Act 2012* (NSW) s 7(b).
- 117 *Inspector of Custodial Services Act 2012* (NSW) s 3.
- 118 *Inspector of Custodial Services Act 2012* (NSW) s 3.
- 119 *Inspector of Custodial Services Act 2012* (NSW) s 7.
- 120 *Inspector of Custodial Services Act 2012* (NSW) s 8.
- 121 *Inspector of Custodial Services Act 2012* (NSW) s 19.
- 122 *Inspector of Custodial Services Act 2012* (NSW) s 22.
- 123 *Inspector of Custodial Services Act 2012* (NSW) s 20.
- 124 *Inspector of Custodial Services Act 2012* (NSW) s 25.
- 125 *Inspector of Custodial Services Act 2012* (NSW) Part 2, Div 3.
- 126 *Inspector of Custodial Services Act 2012* (NSW) s 26.
- 127 *Inspector of Custodial Services Act 2012* (NSW) ss 10, 26.
- 128 Memorandum of Understanding between the Inspector of Custodial Services and the NSW Ombudsman (2 December 2014) para 5.1-5.3. At https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0013/20533/Memorandum-of-understanding-between-the-Inspector-of-Custodial-Services-and-the-NSW-Ombudsman-December-2014.pdf (viewed 2 February 2016).
- 129 Memorandum of Understanding between the Inspector of Custodial Services and the NSW Ombudsman (2 December 2014) para 5.4. At https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0013/20533/Memorandum-of-understanding-between-the-Inspector-of-Custodial-Services-and-the-NSW-Ombudsman-December-2014.pdf (viewed 2 February 2016).
- 130 *Inspector of Custodial Services Act 2012* (NSW) s 14.
- 131 *Inspector of Custodial Services Act 2012* (NSW) s 12.
- 132 *Inspector of Custodial Services Act 2012* (NSW) s 6(1)(d).
- 133 *Inspector of Custodial Services Act 2012* (NSW) s 6(1)(e).
- 134 *Inspector of Custodial Services Act 2012* (NSW) s 6(f).
- 135 *Inspector of Custodial Services Act 2012* (NSW) s 16.
- 136 NSW Inspector of Custodial Services, *Annual Report 2014-15* (2015) 10.
- 137 *Inspector of Custodial Services Act 2012* (NSW) s 14(1).
- 138 *Inspector of Custodial Services Act 2012* (NSW) s 14(3).
- 139 NSW Inspector of Custodial Services, *Annual Report 2014-15* (2015) 8.
- 140 NSW Inspector of Custodial Services, *Inspection standards: For juvenile justice custodial services in New South Wales* (2015) 7. At http://www.custodialinspector.justice.nsw.gov.au/Documents/ICS_Inspection-standards-JJ.pdf (viewed 2 February 2016).
- 141 *Inspector of Custodial Services Act 2012* (NSW) s 6(1)(h).
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- 151 *Ombudsman Act 1974* (NSW) s 12.
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- 153 *Ombudsman Act 1974* (NSW) s 20.
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- 207 NSW Department of Justice, *Annual Report 2014-15* (2015) 187.
- 208 NSW Department of Justice, *Annual Report 2014-15* (2015) 188.
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- 212 Ombudsman Tasmania, *Annual Report 2014-15* (2015) 1-2.
- 213 Custodial Inspector Bill 2016 (Tas) cl 5.
- 214 Custodial Inspector Bill 2016 (Tas) Sch 1.4.
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- 216 *Commissioner for Children and Young People Act 2016* (Tas) Sch 1.4(2).
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- 231 Custodial Inspector Bill 2016 (Tas) cl 20(3).
- 232 Custodial Inspector Bill 2016 (Tas) cl 25.
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- 234 *Ombudsman Act 1978* (Tas) s 30.
- 235 *Ombudsman Act 1978* (Tas) s 6.
- 236 *Youth Justice Act 1997* (Tas) s 129(1)(d).
- 237 *Ombudsman Act 1978* (Tas) s 13.
- 238 *Ombudsman Act 1978* (Tas) s 23A(1).
- 239 *Ombudsman Act 1978* (Tas) s 25.
- 240 *Ombudsman Act 1978* (Tas) s 24.
- 241 *Commissions of Inquiry Act 1995* (Tas) s 24.
- 242 *Ombudsman Act 1978* (Tas) s 24(1).
- 243 *Ombudsman Act 1978* (Tas) s 33.
- 244 *Ombudsman Act 1978* (Tas) s 27.
- 245 *Ombudsman Act 1978* (Tas) s 33A.
- 246 *Ombudsman Act 1978* (Tas) ss 15-16.
- 247 *Ombudsman Act 1978* (Tas) s 28.
- 248 *Ombudsman Act 1978* (Tas) s 28(6).
- 249 *Ombudsman Act 1978* (Tas) s 30.
- 250 *Ombudsman Act 1978* (Tas) s 31.
- 251 Ombudsman Tasmania, *Annual Report 2014-15* (2015) 8.
- 252 *Commissioner for Children and Young People Act 2016* (Tas) s 5.
- 253 *Commissioner for Children and Young People Act 2016* (Tas) Sch 1.1.
- 254 *Commissioner for Children and Young People Act 2016* (Tas) ss 19 and 20.
- 255 *Commissioner for Children and Young People Act 2016* (Tas) Sch 1.4(2).

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- 257 *Commissioner for Children and Young People Act 2016* (Tas) s 10.
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- 259 *Commissioner for Children and Young People Act 2016* (Tas) ss 11-12.
- 260 *Commissioner for Children and Young People Act 2016* (Tas) s 11(2)(c).
- 261 *Commissioner for Children and Young People Act 2016* (Tas) s 11(2)(d).
- 262 *Commissioner for Children and Young People Act 2016* (Tas) s 11(2)(e).
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- 266 *Commissioner for Children and Young People Act 2016* (Tas) s 23.
- 267 *Commissioner for Children and Young People Act 2016* (Tas) s 19.
- 268 *Commissioner for Children and Young People Act 2016* (Tas) s 20.
- 269 *Commissioner for Children and Young People Act 2016* (Tas) s 9(3).
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- 275 *Youth Justice Act 1997* (Tas) s 132(b).
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- 291 *Youth Justice Administration Act 2016* (SA) s 11.
- 292 Correspondence from SA Department for Communities and Social Inclusion to Megan Mitchell, National Children's Commissioner, Australian Human Rights Commission, 27 May 2016, 1.
- 293 *Youth Justice Administration Act 2016* (SA) s 11(2).
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- 295 *Youth Justice Administration Act 2016* (SA) s 11(3)-(4).
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- 297 *Youth Justice Administration Act 2016* (SA) ss 14(1) and 16(1).
- 298 *Youth Justice Administration Act 2016* (SA) s 16(2).
- 299 *Youth Justice Administration Act 2016* (SA) s 16.
- 300 *Youth Justice Administration Act 2016* (SA) s 16(3)-(4).
- 301 *Youth Justice Administration Act 2016* (SA) s 16(5).
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- 303 *Youth Justice Administration Act 2016* (SA) s 47.
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- 310 *Children's Protection Act 1993* (SA) s 52A.
- 311 *Children's Protection Act 1993* (SA) s 52A(4).
- 312 *Children's Protection Act 1993* (SA) s 52A(5).
- 313 Office of the Guardian for Children and Young People South Australia, Submission No 5 to Australian Human Rights Commission, *National Children's Commissioner's examination into OPCAT and Youth Justice*, 22 June 2016, 1.
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- 316 *Children's Protection Act 1993* (SA) s 52C(1).
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- 320 *Children's Protection Act 1993* (SA) Division 4.
- 321 *Children's Protection Act 1993* (SA) s 52B.
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- 340 *Ombudsman Act 1972* (SA) s 7.
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- 348 *Ombudsman Act 1972* (SA) s 30(2).
- 349 *Ombudsman Act 1972* (SA) s 20.
- 350 *Ombudsman Act 1972* (SA) s 29.
- 351 *Ombudsman Act 1972* (SA) s 26.
- 352 Ombudsman SA, *Annual Report 2014 / 2015* (2015) 2.
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- 376 Office of Guardian for Children and Young People South Australia, Submission No 5 to Australian Human Rights Commission, *National Children's Commissioner's examination into OPCAT and Youth Justice*, 22 June 2016, 9.
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- 383 Correspondence from SA Department for Communities and Social Inclusion to Megan Mitchell, National Children's Commissioner, Australian Human Rights Commission, 27 May 2016, 17.
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- 386 *Human Rights Act 2004* (ACT) s 40B.
- 387 *Human Rights Act 2004* (ACT) s 10.
- 388 *Human Rights Act 2004* (ACT) s 11.
- 389 *Human Rights Act 2004* (ACT) s 20.
- 390 *Human Rights Act 2004* (ACT) s 18.
- 391 *Human Rights Act 2004* (ACT) s 27.
- 392 *Human Rights Act 2004* (ACT) s 27A.
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- 397 *Human Rights Commission Act 2005* (ACT) s 16.
- 398 *Human Rights Commission Act 2005* (ACT) s 17.
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- 405 *Human Rights Commission Act 2005* (ACT) s 19B.
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- 407 *Children and Young People Act 2008* (ACT) s 207.
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- 412 Public Advocate of the ACT, *Annual Report 2014 – 2015* (2015) 35.
- 413 *Human Rights Commission Act 2005* (ACT) s 75.
- 414 *Human Rights Commission Act 2005* (ACT) ss 100-100A.
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- 423 *Human Rights Commission Act 2005* (ACT) s 18(2).
- 424 *Human Rights Commission Act 2005* (ACT) s 87.
- 425 *Human Rights Commission Act 2005* (ACT) s 81.
- 426 *Human Rights Commission Act 2005* (ACT) s 83.
- 427 *Human Rights Commission Act 2005* (ACT) s 85.
- 428 *Human Rights Commission Act 2005* (ACT) s 86.
- 429 Public Advocate of the ACT, *Annual Report 2014 – 2015* (2015) 35.
- 430 Public Advocate of the ACT, *Annual Report 2014 – 2015* (2015) 35.
- 431 *Official Visitor Act 2012* (ACT) s 10(1)(a).
- 432 *Official Visitor Act 2012* (ACT) s 11.
- 433 *Official Visitor Act 2012* (ACT) s 10(2).
- 434 *Official Visitor Act 2012* (ACT) s 10(3).
- 435 *Official Visitor Act 2012* (ACT) s 12.
- 436 *Official Visitor Act 2012* (ACT) s 12(3).
- 437 *Official Visitor Act 2012* (ACT) s 14(1)(a). The definition of 'visitable places' is in *Children and Young People Act 2008* (ACT) s 37.
- 438 *Official Visitor Act 2012* (ACT) s 14(1)(c).
- 439 *Official Visitor Act 2012* (ACT) s 14(1)(d).
- 440 *Official Visitor Act 2012* (ACT) s 22.
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Appendix 8: DLA Piper research on children and young people being held in adult correctional facilities

Australian Capital Territory	
Number of children held in adult facilities	No children held in adult facilities as at 11 December 2015 (Australian Bureau of Statistics, 2016).
Relevant legislative provisions allowing children to be held in adult facilities	<p><i>Children and Young People Act 2008 (ACT)</i></p> <p>Section 166 – Requirements regarding placement and separation of young detainees</p> <p>(1) A youth detention policy or operating procedure may make provision, consistent with this section, in relation to the placement and separation of young detainees, including separation for—</p> <ul style="list-style-type: none"> (a) use of facilities; and (b) participation in education or other activities. <p>(2) In placing a young detainee, the director-general must ensure that—</p> <ul style="list-style-type: none"> (a) young remandees are segregated from other young detainees; and (b) male young detainees are segregated from female young detainees; and (c) a young detainee who is under 18 years old is not placed with an adult. <p>(3) Subsection (2) does not apply if the director-general believes on reasonable grounds that another placement will be in the best interests of all affected detainees.</p> <p>(4) When deciding where to place a young detainee, the director-general must consider the following:</p> <ul style="list-style-type: none"> (a) the needs and special requirements of the young detainee because of the young detainee’s age, sex, emotional or psychological state, physical health, cultural background, vulnerability or any other relevant matter; (b) if it is proposed that a young detainee be isolated in detention, whether the isolation is in the best interests of the young detainee; (c) the desirability of the care provided to a young detainee being suited to the particular needs of the young detainee in order to protect the young detainee’s physical and emotional wellbeing; (d) that it is in the best interests of young detainees to be separated from co-offenders. <p>(5) When deciding where to place a young detainee, the director-general may also consider any security classification given to the young detainee under section 163.</p>

Australian Capital Territory

	<p>Note the following legislative definitions:</p> <ul style="list-style-type: none"> • “Child” is defined as a person who is under 12 years of age (s. 11). • “Young person” is defined as a person who is 12 years or older, but not yet an adult (s 12) [note that an individual who is at least 18 years old is considered an adult in accordance with the <i>Legislation Act 2001</i> (ACT)]. However, a “young person” can be a person up to 21 years who is required to be held in the Director-General’s custody and has the same meaning as a “young detainee” under s 95. A “child” can also be a “young detainee” under s 95.
<p>Legislative safeguards in place where children are held in adult facilities</p>	<p><u>Requirement to consider best interests and needs and requirements of young detainee</u></p> <p><i>Children and Young People Act 2008 (ACT)</i></p> <p>Section 8 – Best interests of children and young people paramount consideration</p> <p>(1) In making a decision under this Act in relation to a particular child or young person, the decision-maker must regard the best interests of the child or young person as the paramount consideration.</p> <p>...</p> <p>Section 166(4)</p> <p>(4) When deciding where to place a young detainee, the director-general must consider the following:</p> <p>(a) the needs and special requirements of the young detainee because of the young detainee’s age, sex, emotional or psychological state, physical health, cultural background, vulnerability or any other relevant matter;</p> <p>(b) if it is proposed that a young detainee be isolated in detention, whether the isolation is in the best interests of the young detainee;</p> <p>(c) the desirability of the care provided to a young detainee being suited to the particular needs of the young detainee in order to protect the young detainee’s physical and emotional wellbeing;</p> <p>(d) that it is in the best interests of young detainees to be separated from co-offenders.</p>

Australian Capital Territory	
	<p><u>Human rights safeguards for the rights of children in detention</u> <i>Human Rights Act 2004 (ACT)</i></p> <p>Section 20 – Children in the criminal process</p> <p>(1) An accused child must be segregated from accused adults.</p> <p>(2) An accused child must be treated in a way that is appropriate for a person of the child’s age who has not been convicted.</p> <p>(3) A child must be brought to trial as quickly as possible.</p> <p>(4) A convicted child must be treated in a way that is appropriate for a person of the child’s age who has been convicted.</p> <p><u>Safeguards for detention of young people at court</u> <i>Children and Young People Act 2008 (ACT)</i></p> <p>Section 100 – Detaining young detainees at court— young detainees to be kept separate from adult detainees</p> <p>(1) This section applies if a young detainee who is under 18 years old has been transported—</p> <p>(a) from a detention place to a court; or</p> <p>(b) from a court to a detention place.</p> <p>(2) The young detainee may be detained at the court—</p> <p>(a) before a hearing relating to the young detainee; or</p> <p>(b) after a hearing relating to the young detainee but before the young detainee is transported to the detention place.</p> <p>(3) However, the young detainee must not be placed in a room with an adult who is under detention.</p>
Case law	No relevant cases identified in relation to the <i>Children and Young People Act 2008 (ACT)</i> .

Australian Capital Territory

Other relevant information

Children and Young People Bill 2008 Explanatory Statement – s 165

[note that in the *Children and Young People Act 2008* (ACT), the proposed section 165 became section 166]

The Explanatory Statement states, in relation to the proposed s 165(2), that the “Requirements regarding placement and separation of young detainees” provision sets out the human rights requirements regarding segregation of categories of young detainees (i.e. that young remandees under 18 must be segregated from ‘any young detainees who are adults’ (18-21 years)).

Section 165(3), as an exception to s 165(2), is said to engage the right outlined at s 20(1) in the *Human Rights Act 2004* (ACT). The limitation outlined in s 165(3) is presented as a ‘proportionate limitation’ that is consistent with rule 28 of the *United Nationals Rules for the Protection of Juveniles Deprived of their Liberty*, and which allows the Chief Executive to determine that the placement of a young person will be in their best interests.

Policies and procedures – further safeguards

A number of ‘Children and Young People Policy and Procedures’ made under s 143 of the *Children and Young People Act 2008* recognise s 20 of the *Human Rights Act 2004* and the obligation that an accused child must be segregated from accused adults. These policies and procedures are reviewed at least once every 12 months.

New South Wales	
Number of children held in adult facilities	No children held in adult facilities as at 30 June 2015 (Australian Bureau of Statistics, 2016).
Relevant legislative provisions allowing children to be held in adult facilities	<p>There are four ways that a child may be held in an adult facility under NSW legislation:</p> <ol style="list-style-type: none"> (1) On remand; (2) If he/she commits a serious indictable offence; (3) If he/she is subject to a detention order for an indictable offence and commits a detention centre offence; or (4) On transfer. <p>Please note that references in the legislation to “detention centres” are references to any premises declared by the Minister to be a detention centre for the purpose of the <i>Children (Detention Centres) Act 1987</i> (NSW). Essentially, they are juvenile detention centres, often referred to as “juvenile justice centres”. References in the legislation to “correctional centres” are references to adult correctional centres.</p> <p><u>On remand</u></p> <p><i>Children (Detention Centres) Act 1987 (NSW)</i></p> <p>Section 9 – Persons on remand and persons subject to control to be detained in detention centres</p> <ol style="list-style-type: none"> (1) Except as otherwise provided by this Act, persons on remand and persons subject to control shall be detained in detention centres. (2) ... (3) Notwithstanding subsection (1), a person on remand may be detained in a police station, during the period between the person being charged with an offence and the person’s first appearing before a court in or in connection with proceedings for the offence, but only if it is impracticable for the person to be detained in a detention centre during that period. (4) A child who is detained in a police station under subsection (3) shall, so far as is reasonably practicable, be detained separately from any adults detained there. (5) This section does not limit the operation of sections 28A, 28B and 28BA of this Act and the <i>Crimes (Sentencing Procedure) Act 1999</i>.

Section 28A – Certain children may be remanded in correctional centres

(1) This section applies to a child of or above the age of 16 years who is:

- (a) a child (including a detainee) charged with an indictable offence, or
- (b) a detainee subject to a detention order relating to an indictable offence and is charged with a detention centre offence (as defined in section 28C) or an indictable offence.

(2) In any criminal proceedings against a child to whom this section applies a court may remand the child to a correctional centre pending the commencement of the hearing of the proceedings or during any adjournment of the hearing, but only if:

- (a) the person by whom the proceedings were commenced or the Secretary applies for such a remand, and
- (b) the child is not released on bail under the *Bail Act 2013*, and
- (c) the court is of the opinion that the child is not a suitable person for detention in a detention centre.

Section 28E – Consideration of suitability for detention centre

(1) In considering (for the purposes of section 28A, 28B, 28BA or 28D) whether a person is suitable for detention in a detention centre, a court must take into account the following:

- (a) the nature of any offence which the person has committed or is charged with having committed,
- (b) the likelihood of danger to the community should the person escape from a detention centre,
- (c) the likelihood of danger to staff or detainees if the person is detained at the detention centre concerned,
- (d) whether any previous behaviour of the person indicates that he or she is likely to create a serious management problem in a detention centre,
- (e) whether suitable accommodation is available for the person in a correctional centre.

(2) This section is not intended to prevent a court from taking into account other matters in considering the matter.

New South Wales	
	<p data-bbox="408 477 1110 529"><u>Child who commits a serious indictable offence or an indictable offence</u></p> <p data-bbox="408 546 931 573"><i>Children (Criminal Proceedings) Act 1987 (NSW)</i></p> <p data-bbox="408 592 673 618">Section 16 – Application</p> <p data-bbox="408 634 747 660">This Division applies to a person:</p> <ul data-bbox="408 675 1170 868" style="list-style-type: none"><li data-bbox="408 675 1170 757">(a) who has pleaded guilty to an indictable offence in, or has been found guilty or convicted of an indictable offence by, a court other than the Children’s Court,<li data-bbox="408 773 1005 799">(b) who was a child when the offence was committed, and<li data-bbox="408 814 1170 868">(c) who was under the age of 21 years when charged before the court with the offence. <p data-bbox="408 902 959 929">Section 17 – Serious children’s indictable offences</p> <p data-bbox="408 944 1099 995">A person to whom this Division applies shall, in relation to a serious children’s indictable offence, be dealt with according to law.</p> <p data-bbox="408 1011 1143 1092">[Note: “serious children’s indictable offence” is defined in s 3(1) and includes homicide, an offence punishable by imprisonment for life or for 25 years, as well as several other offences.]</p> <p data-bbox="408 1127 825 1153">Section 18 – Other indictable offences</p> <p data-bbox="408 1169 1170 1220">(1) A person to whom this Division applies shall, in relation to an indictable offence other than a serious children’s indictable offence, be dealt with:</p> <ul data-bbox="408 1235 1170 1671" style="list-style-type: none"><li data-bbox="408 1235 646 1262">(a) according to law, or<li data-bbox="408 1277 841 1304">(b) in accordance with Division 4 of Part 3. <p data-bbox="408 1319 1170 1401">(1A) In determining whether a person is to be dealt with according to law or in accordance with Division 4 of Part 3, a court must have regard to the following matters:</p> <ul data-bbox="408 1416 1170 1671" style="list-style-type: none"><li data-bbox="408 1416 975 1443">(a) the seriousness of the indictable offence concerned,<li data-bbox="408 1458 921 1485">(b) the nature of the indictable offence concerned,<li data-bbox="408 1500 1170 1563">(c) the age and maturity of the person at the time of the offence and at the time of sentencing,<li data-bbox="408 1578 1170 1629">(d) the seriousness, nature and number of any prior offences committed by the person,<li data-bbox="408 1645 962 1671">(e) such other matters as the court considers relevant.

Person subject to a detention order for an indictable offence and commits a detention centre offence

Children (Detention Centres) Act 1987 (NSW)

Section 28B – Certain children etc may be committed to correctional centres

- (1) This section applies to a person of or above the age of 16 years who:
- (a) is subject to a detention order relating to an indictable offence, and
 - (b) is subject to a further detention order (being an order under section 33(1)(g) of the *Children (Criminal Proceedings) Act 1987* in relation to a detention centre offence (as defined in section 28C) committed while the person was a detainee in relation to the offence referred to in paragraph (a).
- (2) The Children’s Court may order that a person to whom this section applies be committed to a correctional centre for the whole or any part of the period specified in that further detention order, but only if:
- (a) an application for the order is made by the Secretary or the person who commenced the proceedings which resulted in the making of that further detention order, and
 - (b) the Children’s Court is of the opinion that the person is not a suitable person for detention in a detention centre.

Transfer

Children (Detention Centres) Act 1987 (NSW)

[Note that an “older detainee” is defined as a person over the age of 16 (s 3). A juvenile detention centre is a centre housing juvenile inmates and a juvenile inmate is anyone who is under 21 years old (s 3). Therefore at the transfer stage, any transfer under s 28 could lead to a child (under 18) being moved into detention with an adult (i.e. a juvenile inmate, being under 21 but over 18).]

Section 28 – Transfer of older detainees from detention centres to correctional centres

- (1) The Secretary may, by order in writing made with the consent of the Commissioner of Corrective Services, direct the transfer of an older detainee from a detention centre to a correctional centre.
- (1A) An order may be made under subsection (1) regardless of whether or where the detainee is currently in custody.

New South Wales	
	<p>(2) In the case of a detainee who is under the age of 18 years, an order may not be made under subsection (1) unless:</p> <p>(a) he or she is a person on remand or a person subject to control by reason of an order in force under section 10, or</p> <p>(b) he or she is a person on remand in relation to a serious children’s indictable offence within the meaning of the <i>Children (Criminal Proceedings) Act 1987</i>, or</p> <p>(c) he or she is a person subject to control by reason of an order in force under section 19 of the <i>Children (Criminal Proceedings) Act 1987</i>, or</p> <p>(d) the Secretary is satisfied that the detainee’s behaviour is or has been such as warrants the making of such an order.</p> <p>...</p> <p>(2B) An order under subsection (1) with respect to a detainee who is under the age of 18 years may only be made for the purpose of transferring the detainee to a juvenile correctional centre.</p> <p>Crimes (Administration of Sentences) Act 1999 (NSW)</p> <p>Section 41C – Transfers to and from juvenile correctional centres</p> <p>(1) ...</p> <p>(2) The Minister may order that a juvenile inmate be transferred from a juvenile correctional centre to an adult correctional centre if:</p> <p>(a) the Commissioner, in the case of a juvenile inmate who is of or above the age of 18 years, or</p> <p>(b) the Review Council, in the case of a juvenile inmate who is under the age of 18 years,</p> <p>recommends to the Minister that the inmate should be transferred.</p>
<p>Legislative safeguards in place where children are held in adult facilities</p>	<p>On remand</p> <p>Children (Detention Centres) Act 1987 (NSW)</p> <p>Section 9 – Persons on remand and persons subject to control to be detained in detention centres</p> <p>(1) Except as otherwise provided by this Act, persons on remand and persons subject to control shall be detained in detention centres.</p> <p>(2) While a regulation referred to in section 5 is in force, a person shall, so far as is reasonably practicable, be detained in a detention centre that is appropriate to the class of person to which that person belongs.</p>

New South Wales

(3) Notwithstanding subsection (1), a person on remand may be detained in a police station, during the period between the person being charged with an offence and the person's first appearing before a court in or in connection with proceedings for the offence, but only if it is impracticable for the person to be detained in a detention centre during that period.

(4) A child who is detained in a police station under subsection (3) shall, so far as is reasonably practicable, be detained separately from any adults detained there.

(5) This section does not limit the operation of sections 28A, 28B and 28BA of this Act and the *Crimes (Sentencing Procedure) Act 1999*.

Section 28F – Consent of Minister administering *Crimes (Administration of Sentences) Act 1999* required

(1) The remand of a child to a correctional centre under section 28A, or an order under section 28B for the committal of a person to a correctional centre, has no operation unless and until the Minister administering the *Crimes (Administration of Sentences) Act 1999* consents to it operating.

(2) Until the remand or order operates it shall be taken to be a remand to a detention centre or remains a detention order, as appropriate.

[Note that there are no statutory provisions for review of orders remanding a child to a correctional centre.]

Section 28D – Review etc of s 28B orders

(1) An order under section 28B must be reviewed at least once a month by the Minister administering the *Crimes (Administration of Sentences) Act 1999*.

(2) An application for the variation or revocation of an order under section 28B may be made to the Children's Court by or on behalf of:

(a) the person to whom the order relates, or

(b) the Minister administering the *Crimes (Administration of Sentences) Act 1999*.

(3) An application under subsection (2) (b) may be made only if the Minister administering this Act consents.

(4) In any proceedings on an application under this section, the person to whom the order relates is entitled:

(a) to appear in the proceedings and be heard, and

(b) to be represented by a barrister or solicitor or, by leave of the Children's Court, by an agent.

New South Wales

Section 28E – Consideration of suitability for detention centre

(1) In considering (for the purposes of section 28A, 28B, 28BA or 28D) whether a person is suitable for detention in a detention centre, a court must take into account the following:

- (a) the nature of any offence which the person has committed or is charged with having committed,
- (b) the likelihood of danger to the community should the person escape from a detention centre,
- (c) the likelihood of danger to staff or detainees if the person is detained at the detention centre concerned,
- (d) whether any previous behaviour of the person indicates that he or she is likely to create a serious management problem in a detention centre,
- (e) whether suitable accommodation is available for the person in a correctional centre.

(2) This section is not intended to prevent a court from taking into account other matters in considering the matter.

Crimes (Administration of Sentences) Act 1999 (NSW)

Section 41C

(3) A recommendation for the transfer of a juvenile inmate from a juvenile correctional centre to an adult correctional centre may not be made unless the Commissioner or Review Council, as the case may be, is satisfied that:

- (a) the inmate wishes to be transferred, or
- (b) the inmate's behaviour is or has been such that he or she should be transferred, or
- (c) it is in the inmate's best interests that he or she be transferred, or
- (d) the association of the inmate with other juvenile inmates at the juvenile correctional centre constitutes, or is likely to constitute, a threat to:
 - (i) the personal safety of any other person, or
 - (ii) the security of the juvenile correctional centre, or
 - (iii) good order and discipline within the juvenile correctional centre.

Section 41D – Procedure to be followed by Review Council as to transfer of juvenile inmate to adult correctional centre

- (1) On the application of the Commissioner, the Review Council is to conduct an inquiry for the purpose of deciding whether or not to recommend the transfer of a juvenile inmate from a juvenile correctional centre to an adult correctional centre, as referred to in section 41C (2) (b).
- (2) In conducting an inquiry under this section, the Review Council is not bound by the rules of evidence but may inform itself of any matter in such manner as it thinks appropriate.
- (3) The Review Council must cause notice of any hearing in relation to an inquiry under this section to be given to the Commissioner and to the juvenile inmate to whom the inquiry relates.
- (4) If the inmate so wishes, the Review Council must allow the juvenile inmate to be present, and to be heard, at the hearing.
- (5) The juvenile inmate may be represented by an Australian legal practitioner chosen by the inmate or, if the Review Council so approves, by some other person chosen by the inmate.
- (6) The Commissioner may be represented by an Australian legal practitioner or by some other person.
- (7) For the purposes of an inquiry under this section, the Review Council must co-opt a person who is:
- (a) a Children’s Magistrate or former Children’s Magistrate, or
 - (b) an Australian legal practitioner of at least 7 years’ standing who has experience as an advocate on behalf of children, unless such a person is already a member of the Review Council and is available for the inquiry.
- (8) A person who is co-opted to the Review Council under subsection (7):
- (a) may be co-opted:
 - (i) as a community member, if the Review Council, as constituted for the purposes of the inquiry, includes a judicial member, or
 - (ii) as a judicial member, if the Review Council, as constituted for the purposes of the inquiry, does not include some other judicial member, and
 - (b) is taken, for the purposes of the inquiry, to be a judicial member or community member, as the case may be, and has, in relation to the inquiry, all of the powers and immunities of such a member.
- (9) Division 2 of Part 9 applies to the conduct of an inquiry by the Review Council under this section.

New South Wales	
Case law	<p><i>ID, PF and DV v Director General, Department of Juvenile Justice and Another</i> [2008] NSWSC 2008</p> <p>Outlines the basis that natural justice should be afforded to a young offender who is transferred under s 28 of the <i>Children (Detention Centres) Act 1987</i> (NSW) and the process of the authorities' decision making.</p> <p><i>R v Hoai Vinh Tran</i> [1999] NSWCCA 109</p> <p>The Court said that in the case of young offenders, although the purpose of the courts is to consider the fostering of the offender's rehabilitation instead of punishment and deterrence, if the offender conducts themselves in a way that an adult does, and commits a crime that involves violence or is one of considerable gravity, the court should give effect to the retributive and deterrent elements of sentencing. Citing <i>Pham</i> (1991) 55 A Crim R 128.</p> <p><i>KT v R</i> [2008] 182 A Crim R 571</p> <p>In this case, a 16 year old was found guilty of manslaughter. In assessing whether the six year sentence was excessive, the Court looked at the emphasis on providing an opportunity for rehabilitation and also allowances to be made for an offender's youth, not just their biological age. Cites the decision in <i>R v Hearne</i> (2001) 124 A Crim R 451 NSWCCA 37, which sets out criteria to be considered in relation to whether the offender had engaged in 'adult behaviour' (<i>R v Voss</i> [2003] NSWCCA 182), including behaviour such as the use of weapons, planning or pre-meditation, the existence of an extensive criminal history and nature and circumstances of the offence (<i>R v Adamson</i> [2002] 132 A Crim R 511).</p> <p><i>Nguyen</i> (Court of Criminal Appeal New South Wales 14 April 1994)</p> <p>Court held that proximity of the age of the offender to eighteen years is a relevant factor for sentencing.</p>
Other relevant information	Not applicable

Northern Territory	
Number of children held in adult facilities	There were three children held in adult facilities as at 30 June 2015 (Australian Bureau of Statistics, 2016).
Relevant legislative provisions allowing children to be held in adult facilities	<p>Youth Justice Act 2005 (NT)</p> <p>[Note: The <i>Youth Justice Act 2005</i> (NT) defines “youth”, in section 6, as a person who is under 18 years of age or, in the absence of proof as to age, a person apparently under 18 years of age. It also includes, if the context requires, a person who committed an offence as a youth but has since turned 18 years of age.]</p> <p>Section 65 – Court may remand youth</p> <p>(1) The Court may, at any stage of proceedings in relation to a youth, remand the youth and, by order:</p> <p>...</p> <p>(d) remand the youth in custody.</p> <p>(2) If the youth is remanded in custody, he or she can be detained in a detention centre or, if the youth has turned 15 years of age, in either a custodial correctional facility or detention centre as ordered by the Court.</p> <p>(3) Unless the youth is committed for trial in the Supreme Court, an order remanding the youth in custody must not, except with his or her consent, be for a period of more than 15 days.</p> <p>[Note for subsection (3): subsection (3) does not prevent the Court from making consecutive orders remanding the youth in custody that result in the youth remaining in custody in excess of 15 days.]</p> <p>(4) The Court may revoke an order made under subsection (1) and may substitute any other order it can make under that subsection.</p> <p>[Note: a “custodial correctional facility” is defined in the <i>Correctional Services Act 2014</i> (NT) as a correctional centre, a court custody centre or a police custody centre (i.e. essentially an adult correctional centre).]</p> <p>Section 82 – Powers of Supreme Court in sentencing</p> <p>(1) If a youth is found guilty before the Supreme Court of an offence, the Supreme Court may do any of the following:</p> <p>(a) exercise, in addition to its powers, the powers of the Youth Justice Court;</p>

Northern Territory	
	<p>(b) order that the youth be detained in a detention centre or imprisoned for a period not exceeding the period of imprisonment for which such an offence would be punishable if committed by an adult;</p> <p>(c) remit the case to the Youth Justice Court.</p> <p>(2) If the Supreme Court makes an order under subsection (1)(b), it may also make any order in relation to that detention or imprisonment that it could make in relation to a sentence of imprisonment under the Sentencing Act.</p> <p>(3) If the Supreme Court finds a youth guilty of murder, the Supreme Court may, despite section 157(2) of the Criminal Code, sentence the youth to life imprisonment or a shorter period of detention or imprisonment as it considers appropriate.</p> <p>Section 83 – Orders Court may make</p> <p>(1) If the Court finds a charge proven against a youth it may, whether or not it proceeds to conviction, do one or more of the following:</p> <p>...</p> <p>(i) order that the youth serve a term of detention or imprisonment that is suspended wholly or partly (see Division 7);</p> <p>(j) order that the youth serve a term of detention or imprisonment that is suspended on the youth entering into an alternative detention order (see Division 8);</p> <p>(k) order that the youth serve a term of detention or imprisonment that is to be served periodically under a periodic detention order (see Division 9);</p> <p>(l) order that the youth serve a term of detention or imprisonment;</p> <p>(m) make any other order in respect of the youth that another court could make if the youth were an adult convicted of that offence other than a community based order or community custody order under the Sentencing Act.</p> <p>(2) If the Court orders that the youth serve a term of detention or imprisonment, the term must not exceed the lesser of:</p> <p>(a) the maximum period that may be imposed under the relevant law in relation to the offence; or</p> <p>(b) for a youth who is:</p> <p>(i) 15 years of age or more – 2 years; or</p> <p>(ii) less than 15 years of age – 12 months.</p>

Northern Territory

(3) The Court must not order the imprisonment of a youth who is less than 15 years of age.

(4) If the Supreme Court remits a case to the Youth Justice Court under section 82(1)(c), the Youth Justice Court must deal with the youth as if the youth had been found guilty of the offence in that Court.

(5) This section does not limit the power of the Supreme Court to impose on a youth a sentence it could otherwise impose on him or her.

Section 154 – Use of custodial correctional facility to temporarily accommodate detainees

(1) This section applies if the superintendent of a detention centre considers it necessary to accommodate a detainee at a custodial correctional facility.

[Examples: damage from a natural disaster leading to overcrowding; in order to maintain order at the detention centre.]

(2) The superintendent of the detention centre may request the Commissioner to accommodate the detainee at a custodial correctional facility for a maximum period of 72 hours.

(3) If necessary, the superintendent can apply to a Local Court Judge for an order to extend the maximum period to 10 days.

(4) If the Commissioner agrees to accommodate the detainee at a custodial correctional facility, this Act applies:

(a) to the detainee as if he or she were a detainee at a detention centre; and

(b) to the General Manager of the custodial correctional facility as if he or she were the superintendent of a detention centre; and

(c) to the correctional officers employed at the custodial correctional facility as if they were members of the staff of a detention centre.

(5) A detainee accommodated in a custodial correctional facility must be kept separate from all prisoners at the facility, including youth prisoners.

(6) Unless there is no practical alternative, detainees under the age of 15 years must not be accommodated in a custodial correctional facility.

Northern Territory	
	<p>Section 164 – Detainee who becomes an adult</p> <p>(1) A detainee who turns 18 years of age while serving a sentence of detention, or on remand in custody, in a detention centre must, within 28 days after turning that age, be transferred to a custodial correctional facility to serve the remainder of the sentence or period of remand.</p> <p>...</p> <p>(4) The Commissioner may direct that subsection (1) does not apply in relation to a particular youth:</p> <ul style="list-style-type: none">(a) whose sentence has 6 months or less remaining to be served; or(b) if the youth is remanded in custody – for a period not exceeding 6 months or for the remainder of the period of remand (whichever is the lesser). <p>(5) When deciding whether to give a direction under subsection (4), the Commissioner:</p> <ul style="list-style-type: none">(a) must have regard to the interests of other detainees as well as the interests of the particular youth; and(b) may have regard to any other matters the Commissioner considers appropriate. <p>(6) A direction under subsection (4) is not subject to appeal or review in any court or tribunal.</p>

Northern Territory

Legislative safeguards in place where children are held in adult facilities

Youth Justice Act 2005 (NT)

Section 4 – Principles

The following are general principles that must be taken into account in the administration of this Act:

...

(c) a youth should only be kept in custody for an offence (whether on arrest, in remand or under sentence) as a last resort and for the shortest appropriate period of time;

(d) a youth must be dealt with in the criminal law system in a manner consistent with his or her age and maturity and have the same rights and protection before the law as would an adult in similar circumstances;

...

(h) family relationships between a youth and members of his or her family should, where appropriate, be preserved and strengthened;

(i) a youth should not be withdrawn unnecessarily from his or her family environment and there should be no unnecessary interruption of a youth's education or employment;

(n) punishment of a youth must be designed to give him or her an opportunity to develop a sense of social responsibility and otherwise to develop in beneficial and socially acceptable ways;

(q) unless the public interest requires otherwise, criminal proceedings should not be instituted or continued against a youth if there are alternative means of dealing with the matter;

(r) as far as practicable, proceedings in relation to youth offenders must be conducted separately from proceedings in relation to adult offenders.

Section 26 – Separation from adults where practicable

If a youth is taken from the place at which he or she is detained to a court, or from a court to the place of detention, he or she must, as far as practicable, be kept apart from other persons under detention who are not youths.

Northern Territory	
Case law	<p><i>Police v HT [2009] NTMC 20 (20 May 2009)</i></p> <p>The Court imposed a short sentence so that the youth offender would be released before he turned 18, when he would be transferred to an adult prison if he continued to be in detention. The court stated <i>‘given his age, lack of other relevant criminal history and that he is engaging in productive programmes, it may be destructive to the process of rehabilitation to order a term that would require him to enter the adult prison’</i>. Further, <i>‘In my view the seriousness of the offence requires a significant period of detention but the Defendant should be released before being required to serve a term of imprisonment in an adult prison. The sentence I am passing today would be wholly inappropriate if the Defendant were a mature adult. In my view the principles under the Youth Justice Act readily permit his release before he turns 18.’</i></p>
Other relevant information	<p>No information of note in the Second Reading Speech or the Explanatory Statement.</p> <p>In August 2015, the Northern Territory Children’s Commissioner released a report called <i>‘Own Initiative Investigation Services Provided by the Department of Correctional Services at the Don Dale Youth Detention Centre’</i>. This report was produced in response to events that occurred at the Don Dale Youth Detention Centre in August 2014 where there was a confrontation between five youth detainees and centre staff. The detainees had been separated from other detainees in a Behavioural Management Unit, effectively in solitary confinement. Tear gas was used to control the detainees. The detainees, including a 14 year old, were temporarily transferred to an adult detention centre following the incident and were held in the maximum security section of the adult prison (Gwynne, 2015).</p>

Queensland	
Number of children held in adult facilities	There were 58-60 children under the age of 18 held in adult facilities as at 30 June 2015 (Australian Bureau of Statistics, 2016).
Relevant legislative provisions allowing children to be held in adult facilities	<p>It is important to note that the provisions below are very recent, having received assent on 27 June 2016. This is discussed further in the section “Other relevant information”.</p> <p>Youth Justice Act 1992 (Qld)</p> <p>[Note: Schedule 4 of the <i>Youth Justice Act 1992</i> (Qld) defines a “child” as a person who has not turned 17 years (or a person who has not turned 18 years where the Governor in Council has made a regulation fixing a day after which a person will be a child for the purpose of the <i>Youth Justice Act 1992</i> (Cth)).]</p> <p>Section 276B – Particular detainees liable to be transferred to corrective services facility</p> <p>(1) The following persons are liable to be transferred to a corrective services facility—</p> <p>(a) a person in detention who—</p> <p>(i) turns 18 years while serving a period of detention; and</p> <p>(ii) is liable to serve a remaining period of detention of 6 months or more;</p> <p>(b) a person beginning detention who—</p> <p>(i) is 18 years or older when beginning detention; and</p> <p>(ii) is liable to serve a remaining period of detention of 6 months or more.</p> <p>(2) For this section, the remaining period of detention for a person—</p> <p>(a) is taken to start—</p> <p>(i) if turning 18 years during detention—on the day the person turns 18 years; or</p> <p>(ii) if 18 years or older when beginning detention—on the day the person begins detention; and</p> <p>(b) is taken to end—</p> <p>(i) at the conclusion of all periods of detention that the person is liable to serve cumulatively; but</p> <p>(ii) no later than the day the person is required to be released from detention under section 227.</p>

Queensland	
	<p>(3) In this section—</p> <p>beginning detention includes returning to detention to continue or complete a period of detention because of a contravention of a conditional release order or supervised release order.</p> <p>Section 276C – Transfer of particular detainees to corrective services facility</p> <p>(1) As soon as practicable after the chief executive becomes aware a person is liable to be transferred to a corrective services facility under section 276B, the chief executive must give a written direction (a prison transfer direction) to the chief executive (corrective services) stating—</p> <p>(a) that the person is to be transferred to a corrective services facility on a stated day (the transfer day); and</p> <p>(b) the period of detention the person remains liable to serve at the transfer day.</p> <p>(2) The transfer day must not be earlier than the day the person becomes liable to be transferred to the corrective services facility.</p> <p>(3) Within 28 days after giving the prison transfer direction to the chief executive (corrective services), the chief executive must—</p> <p>(a) give the person a copy of the direction; and</p> <p>(b) inform the person that, from the transfer day, the person will be held at a corrective services facility and be subject to the <i>Corrective Services Act 2006</i>; and</p> <p>(c) inform the person of his or her right under this subdivision to apply for a delay of the transfer.</p> <p>(4) The chief executive may issue another prison transfer direction in relation to the person if the chief executive considers—</p> <p>(a) the circumstances relevant to the person previously obtaining a delay no longer exist; or</p> <p>(b) the person poses a risk to the safety or wellbeing of a detainee at the detention centre at which the person is detained.</p> <p>(5) Failure to comply with subsection (1) does not invalidate a prison transfer direction.</p>

Queensland

Section 276D – Application for temporary delay of transfer

(1) If, when a court makes a detention order against a person for an offence, the person becomes liable to be transferred to a corrective services facility under section 276B, the person may immediately apply to the court for a temporary delay of the person's transfer to the corrective services facility.

(2) A detainee given a copy of a prison transfer direction under section 276C(3) may, before the transfer, apply to the Children's Court for a temporary delay of the detainee's transfer to the corrective services facility.

(3) On receipt by the court of a detainee's application made under subsection (2), the detainee's transfer is stayed until the application is decided, withdrawn or otherwise ends.

(4) The court may grant an application made under subsection (1) or (2) only if it is satisfied the delay—

(a) would be in the interests of justice; and

(b) would not prejudice the security or good order of the detention centre at which the applicant is, or is to be, detained; and

(c) would not prejudice the safety or wellbeing of any detainee at the detention centre at which the applicant is, or is to be, detained; and

(d) would not cause the person to be detained at a detention centre after the person turns 18 years and 6 months.

(5) Without limiting the matters the court may have regard to, the court must have regard to the following matters in making a decision on an application made under subsection (1) or (2)—

(a) any vulnerability of the applicant;

(b) any interventionist, rehabilitation or similar activities being undertaken by the applicant and the availability of those activities if transferred.

(6) However, if the chief executive agrees to the application—

(a) subsections (4) and (5) do not apply; and

(b) the court's proper officer may grant the application.

(7) If the court grants an application made under subsection (1) or (2)—

(a) the court must decide a new day for the prison transfer direction to take effect being no more than 6 months after the day the applicant turns 18 years; and

(b) the chief executive must inform the chief executive (corrective services) of the new day for the prison transfer direction.

Queensland	
	<p>(8) In this section—</p> <p>temporary delay means a delay of 6 months or less.</p> <p>Section 276E – Transferee subject to Corrective Services Act 2006 from transfer</p> <p>(1) This section applies if a person is transferred to a corrective services facility under this subdivision.</p> <p>(2) From the transfer—</p> <p>(a) the person is liable to serve a term of imprisonment equal to the period of detention the person remains liable to serve at the transfer; and</p> <p>(b) the person is taken to be a prisoner subject to the <i>Corrective Services Act 2006</i>; and</p> <p>(c) any rights, liberties or immunities of the person as a detainee end and are not preserved, transferred or otherwise applicable for the person as a prisoner; and</p> <p>(d) the day the person would otherwise have been released under section 227, for the period of detention, is the day the person is to be released on parole under the <i>Corrective Services Act 2006</i>.</p> <p>(3) However, the release is subject to the <i>Corrective Services Act 2006</i> as if granted under a court ordered parole order (the statutory parole order) and the provisions of that Act applying to parole orders also apply to the statutory parole order.</p> <p>Section 276F – Persons over 18 years and 6 months should not serve period of detention at a detention centre</p> <p>(1) This Act is subject to the overriding principle that it is in the best interests of the welfare of all detainees at a detention centre that persons who are 18 years and 6 months or older are not detained at the centre.</p> <p>...</p>

Queensland	
<p>Legislative safeguards in place where children are held in adult facilities</p>	<p>Corrective Services Act 2006 (Qld)</p> <p>Section 18 – Accommodation</p> <p>(1) Whenever practicable, each prisoner in a corrective services facility must be provided with his or her own room.</p> <p>(2) A prisoner who is under 18 years must be kept apart from other prisoners who are 18 years or older unless it is in the prisoner’s best interests not to be kept apart.</p> <p>Examples for subsection (2)–</p> <ol style="list-style-type: none"> 1. A young Aboriginal prisoner may be accommodated with older prisoners to enable the young prisoner to be with a family member. 2. A young prisoner may be accommodated with older prisoners at a work camp. 3. A young prisoner may be accommodated with an older prisoner if the young prisoner is at risk of self-harm.
<p>Case law</p>	<p>In <i>R v Loveridge</i> [2011] QCA 32, the applicant pleaded guilty to an armed robbery, which he committed a few weeks after his 17th birthday. He was sentenced to three years imprisonment. He applied for leave to appeal against his sentence, contending that it was excessive. The appeal was dismissed. In a dissenting judgment, McMurdo P stated ‘<i>This appeal highlights the difficulty facing Queensland judges when sentencing 17 year olds for serious criminal offences.</i>’ In Her Honour’s view, despite the serious aspects of the offence, there were significant mitigating features, including the fact that the applicant was only 17 years old. McMurdo P’s view was that the sentencing judge erred in finding that the applicant’s rehabilitative prospects were not promising and there should be a re-sentence. McMurdo P pointed out, at paragraphs [5]-[7], that under the <i>UN Convention on the Rights of the Child</i>, a 17 year old is a child and every child deprived of liberty must be separated from adults unless it is considered in the child’s best interests not to do so. Her Honour also pointed out that Queensland is the only Australian jurisdiction where 17 year old offenders are dealt with in the adult criminal justice system.</p> <p><i>R v AAV</i> [2014] QCA 343 arose out of a decision in which the applicant was sentenced in 2013 for offences he had committed when he was 16 years old. The applicant was originally sentenced before the 2014 amendments to the <i>Youth Justice Act 1992</i> (Qld). Before these amendments there was a discretionary power to make a transfer order where a person aged 16 years or more would be detained when the person was aged 18 or more.</p>

Queensland	
	<p>The sentencing judge opted not to make a transfer order, i.e. chose not to make an order that, from the day the applicant was 18 years old, the unserved part of the period of detention should be served as a period of imprisonment. The sentencing judge observed that in the circumstances of the case <i>'and what appears to be some lack of maturity for your age and aspects of naiveté and your lack of prior exposure to the youth justice system, I have considered but will not make a transfer order...'</i>. After the 2014 amendments became operative, the applicant was transferred to an adult prison notwithstanding the sentencing judge's decision not to make a transfer order. On appeal, the applicant raised this as an argument that a less severe sentence was warranted. The applicant sought to adduce fresh evidence establishing the differences between the programs and facilities available at the detention centre and those available at the corrective services facility, arguing the sentencing judge took into account the availability in the detention centre of various programs. The Appeal Court held that, whilst the sentencing judge may have anticipated the programs designed for the rehabilitation of children that would be available in detention would probably be unavailable in a corrective services facility, there was no sufficient basis for finding that the sentencing judge took that into account when refusing the transfer order.</p>

Queensland

Other relevant information

Note: On 27 June 2016 the Government assented the *Youth Justice and Other Legislation Amendment Act (No. 2) 2016* which ended the automatic transfer of 17 year olds to adult correctional facilities. Before these amendments, 17 year olds were automatically transferred to an adult corrective services facility when they had six months or more actual detention to serve.

In the Explanatory Speech to the *Youth Justice and Other Legislation Amendment Bill 2016*, Attorney-General Yvette D'Ath made the following comments:

'The government has also committed to moving away over time from treating 17-year-olds as adults for the purposes of the criminal justice system. As a significant initial step in this process, the bill will increase from 17 to 18 the age at which young people, who have at least six months to serve in detention, are to be transferred to an adult correctional facility. Furthermore, to ensure the developmental and rehabilitative needs of young people are taken appropriately into account, the bill will empower a court to delay a young person's transfer for up to six months. However, to maintain the safety of youth detention centres, the bill provides a statutory age cap for detention of 18 years and six months. Under the proposed provisions, a person who is 18 years and six months will not be able to enter a detention centre to begin serving or return to complete a period of detention. The bill also amends the Corrective Services Act 2006 to provide certainty for a young person who is transferred from youth justice to adult corrections, so that a parole order issued under the Youth Justice Act 1992 is a parole order under the Corrective Services Act 2006.'

South Australia	
Number of children held in adult facilities	There were no children held in adult facilities as at 30 June 2015 (Australian Bureau of Statistics, 2016).
Relevant legislative provisions allowing children to be held in adult facilities	<p><i>Young Offenders Act 1993 (SA)</i></p> <p>Section 3 – Objects and statutory policies</p> <p>...</p> <p>(2a) In imposing sanctions on a youth for illegal conduct –</p> <p>(a) regard should be had to the deterrent effect any proposed sanction may have on the youth; and</p> <p>(b) if the sanctions are imposed by a court on a youth who is being dealt with as an adult (whether because the youth’s conduct is part of a pattern of repeated illegal conduct or for some other reason), regard should be had to –</p> <p>(i) the deterrent effect any proposed sanction may have on other youths; and</p> <p>(ii) the balance to be achieved between –</p> <p>(A) the protection of the community; and</p> <p>(B) the need to rehabilitate the youth.</p> <p>...</p> <p>Section 16 – Where charge is to be laid</p> <p>(1) Subject to this section, if a youth is to be charged with an offence to which this Act applies, the charge must be laid before the Court.</p> <p>(2) The DPP may, instead of laying a charge of an offence against a youth before the Court, lay the charge before the Magistrates Court if –</p> <p>(a) the youth is charged with a major indictable offence; and</p> <p>Note— See also section 102 of the Summary Procedure Act 1921.</p> <p>(b) the DPP is of the opinion that the youth poses an appreciable risk to the safety of the community and should, therefore, be dealt with in the same way as an adult.</p>

South Australia

Section 17 – Proceedings on charge laid before Youth Court

(1) Subject to this Act, the Court will deal with a charge laid before the Court in the same way as the Magistrates Court deals with a charge of a summary offence and, in doing so, has the powers of the Magistrates Court.

(2) ...

(3) If—

(a) the offence with which the youth is charged is a homicide, or an offence consisting of an attempt to commit, or assault with intent to commit homicide; or

(b) the offence with which the youth is charged is an indictable offence and the youth, after obtaining independent legal advice, asks to be dealt with in the same way as an adult; or

(c) the Court or the Supreme Court determines, on the application of the DPP or a police prosecutor, that the youth should be dealt with in the same way as an adult because of the gravity of the offence, or because the offence is part of a pattern of repeated offending, the Court will conduct a preliminary examination of the charge, and may commit the youth for trial or sentence (as the case requires) to the Supreme Court or the District Court.

Section 17A – Proceedings on charge laid before Magistrates Court

(1) Subject to this section, Part 5 of the Summary Procedure Act 1921 applies to the procedure to be followed in relation to a charge of an offence that has, under this Division, been laid against a youth before the Magistrates Court.

(2) At the conclusion of the preliminary examination, the Magistrates Court may—

(a) if of the opinion that the youth poses an appreciable risk to the safety of the community—commit the youth for trial or sentence (as the case requires) to the Supreme Court or the District Court;

(b) in any other case—commit the youth for trial or sentence (as the case requires) to the Court.

South Australia	
	<p>Section 29 – Sentencing youth as an adult</p> <p>(1) Subject to this Act, where a youth is committed to the Supreme Court or the District Court for trial, and is found guilty on trial in that court, or is committed to the Supreme Court or the District Court for sentence, that court, on sentencing the youth, may—</p> <p>(a) deal with the youth as an adult; or</p> <p>(b) make any order in relation to the youth that may be made by the Youth Court on sentencing a youth; or</p> <p>(c) remand the youth to the Youth Court for sentencing.</p> <p>(2) If a youth is found guilty by the Supreme Court or the District Court of an offence that is a lesser offence than the one on which the youth was committed for trial, the court cannot deal with the youth for that offence as if he or she were an adult unless—</p> <p>(a) the offence is an indictable (but not minor indictable) offence; and</p> <p>(b) the court is satisfied that, because of the gravity of the offence or the youth’s history of offending, the youth should be dealt with as if he or she were an adult.</p> <p>(3) If a youth is committed for trial or sentence in the Supreme Court or the District Court at his or her own request, the court cannot deal with the youth for the offence as if he or she were an adult unless the court is satisfied that, because of the gravity of the offence or the youth’s history of offending, the youth should be dealt with as if he or she were an adult.</p> <p>(4) A youth who is found guilty of murder—</p> <p>(a) must be sentenced to imprisonment for life; and</p> <p>(b) must be dealt with as an adult.</p>
Legislative safeguards in place where children are held in adult facilities	<p>Youth Offenders Act 1993 (SA)</p> <p>[Note: section 4 defines “youth” to mean a person of or above the age of 10 years but under the age of 18 years and, in relation to proceedings for an offence or detention in a training centre, includes a person who was under the age of 18 years on the date of the alleged offence.]</p>

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Section 3 – Objects and statutory policies

...

(2a) In imposing sanctions on a youth for illegal conduct—

...

(3) Effect is to be given to the following statutory policies so far as the circumstances of the individual case allow:

(a) ...

(b) family relationships between a youth, the youth's parents and other members of the youth's family should be preserved and strengthened;

(c) a youth should not be withdrawn unnecessarily from the youth's family environment;

(d) there should be no unnecessary interruption of a youth's education or employment;

(e) a youth's sense of racial, ethnic or cultural identity should not be impaired.

Section 23 – Limitation on power to impose custodial sentence

(1) Subject to subsection (6), the Court cannot sentence a youth to imprisonment.

(2) If an offence of which a youth is convicted, or found guilty, is punishable by imprisonment where committed by an adult, the Court may sentence the youth to—

(a) detention in a training centre for a period not exceeding three years; or

(b) home detention for a period not exceeding six months, or for periods not exceeding 6 months in aggregate over one year or less; or

(c) detention in a training centre for a period not exceeding two years to be followed by home detention for a period not exceeding six months or for periods not exceeding 6 months in aggregate over one year or less.

(3) If, however, the maximum term of imprisonment prescribed for the offence is less than three years, the period of detention to which the youth is sentenced cannot exceed that maximum.

South Australia	
	<p>(4) A sentence of detention must not be imposed for an offence unless—</p> <p>(a) the offender is a recidivist young offender or a serious firearm offender; or</p> <p>(b) in any other case—the Court is satisfied that a sentence of a non-custodial nature would be inadequate—</p> <p>(i) because of the gravity or circumstances of the offence; or</p> <p>(ii) because the offence is part of a pattern of repeated offending.</p> <p>(5) A sentence of home detention—</p> <p>(a) must not be imposed unless the Court is satisfied that the residence the Court proposes to specify in its order is suitable and available for the detention of the youth and that the youth will be properly maintained and cared for while detained in that place; and</p> <p>(b) should not be imposed if the Court is not satisfied that adequate resources exist for the proper monitoring of the youth while on home detention by a home detention officer.</p> <p>(6) If the Court sentences a youth to detention in respect of an offence and does not suspend the sentence—</p> <p>(a) where the youth is already in custody in a prison, the youth will serve the detention, or such part of it as the Court may direct, in a prison; or</p> <p>(b) where the youth has previously served a sentence of imprisonment or detention in a prison, the Court may direct that the youth serve the detention in a prison.</p> <p>(7) The Correctional Services Act 1982 applies to and in relation to a youth serving detention in a prison under subsection (6).</p>

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Section 36 – Detention of youth sentenced as adult

(1) Subject to any direction of the sentencing court to the contrary, a youth who has been dealt with as an adult and sentenced to imprisonment will serve that sentence in a training centre.

(2) If a youth is serving a sentence of imprisonment in a training centre, the sentencing court must, before the youth reaches 18 years of age, review the detention and either direct that the imprisonment in a training centre continue or that the youth be transferred to a prison.

(3) Subject to subsection (4), while a youth is serving a sentence of imprisonment in a training centre, this Act applies to the youth, to the exclusion of the Correctional Services Act 1982, as if the youth had been sentenced to detention in a training centre.

(4) The following provisions of the Correctional Services Act 1982 apply to and in relation to a youth who is serving a sentence of imprisonment in a training centre:

(b) Division 3 of Part 6 (release on parole) applies to a youth in respect of whom a non-parole period has been fixed, with the following modifications:

(i) a reference to the Board will be taken to be a reference to the Training Centre Review Board;

(ii) a reference to a prisoner will be taken to be a reference to a youth;

(iii) a reference to a prison will be taken to be a reference to a training centre;

(iv) a reference to a community corrections officer will be taken to be a reference to an officer or employee of the Department whose duties include the supervision of youths in the community.

(5) If a youth who is on parole attains the age of 18 years—

(a) the preceding provisions of this section cease to apply in relation to the youth; and

(b) any reference in the parole conditions to the Training Centre Review Board will be taken to be a reference to the Parole Board; and

(c) any reference in the parole conditions to an officer of the Department will be taken to be a reference to a community corrections officer.

South Australia	
Case law	<p><i>R v N&P [1998] SASC 6565</i></p> <p>The appellants were charged with assault occasioning actual bodily harm, and were sentenced in the Supreme Court to imprisonment for 18 months with a non-parole period of 12 months. They were classified as youths under the Youth Offenders Act 1993 (SA) as they were 15 and 17 years old respectively, however, they were dealt with as adults pursuant to sections 17(3)(c) and 29(1) of that Act. On appeal, they argued that the decision to deal with them as adults was wrong and that the sentences imposed were excessive. Doyle CJ set out the circumstances in which a court should sentence a youth as an adult: <i>'[A] court will sentence a youth as an adult when, bearing in mind the gravity of the offence or the history of the youth's offending, the statutory objects and policies will best be achieved by sentencing the youth as an adult.'</i></p> <p>The Court concluded that it was open to the trial judge to find that the gravity of the offence was such that, to achieve the statutory objects and policies, the offenders should be sentenced as adults. Importantly, His Honour noted that the discretion under s 29 of the <i>Youth Offenders Act 1993 (SA)</i> is broad, and will not often be interfered with on appeal. The Court held that the sentences imposed in this case were excessive, because the trial judge failed to give sufficient weight to the ages of the appellants at the time of offending, the fact that this was the first violent offence that either had committed, the fact that the victim's injuries were not severe and the importance to be attributed to rehabilitation of young offenders. The Court held that the appropriate sentence was imprisonment for 12 months with 6 months non-parole period.</p>

South Australia

R v A, D [2011] SASCFC 5

This case involved an appeal by the DPP against a sentence on the basis that the non-parole period was too short. In the court below, the defendant pleaded guilty to murder. The judge imposed a mandatory sentence of life imprisonment, with a non-parole period of six years. In setting the non-parole period, the judge had regard to the age of the defendant at the time of offending, the defendant's cognitive abilities (which were far less than his age), the circumstances of what occurred, the defendant's difficult upbringing and the defendant's progress since he has been in detention. The judge also considered that the defendant was '*a good candidate for rehabilitation*', a factor of particular relevance having regard to his age. The judge went on to say that '*the sentence that I impose must act as a deterrent to you in the future and a deterrent to other young persons who may become involved in altercations and fights. It must act as a deterrent to young persons to prevent them from carrying weapons of any nature.*' The judge concluded that a non-parole period of six years was appropriate having regard to the guilty plea, the defendant's contrition and entitlement to a discount having regard to the guilty plea and acceptance of responsibility.

The question was whether the mandatory minimum non-parole period provisions apply to youths sentenced as adults. On appeal, the Court held that it had been appropriate for the trial judge to sentence the defendant as an adult pursuant to s 29(4) of the *Youth Offenders Act* and said that, in sentencing a youth as an adult, the principles and policies in the *Youth Offenders Act* continue to apply, and prevail in the event of a conflict between that Act and the *Sentencing Act*. The Court noted that the non-parole period was very low, but said that comparisons cannot be made with sentences imposed on adults. The Court held that the judge in the court below did not err in deciding on a 6 year non-parole period.

South Australia	
	<p data-bbox="408 477 753 506">A, MC v Police [2008] SASC 279</p> <p data-bbox="408 521 1161 738">This case involved an appeal by the offender against a sentence on the grounds that the Youth Court judge failed to apply the correct principles, the sentence was manifestly excessive and the judge erred in not suspending the sentence. The offender was 17 years and 10 months at the time of offending. He was sentenced to 16 months imprisonment for two offences of recklessly causing serious harm. While the attack was unprovoked, violent, and alcohol-fuelled, the offender turned himself in to the police and showed high level of remorse and maturity.</p> <p data-bbox="408 755 1180 1110">The appeal was allowed and the sentence was reduced to 46 weeks, with a 23 week suspended sentence. The Court said: <i>'It is plain that the sentence had to take account of the severe injuries and harm inflicted to the victims, the lack of provocation, and the effect which the appellant's alcohol consumption had in explaining an unprovoked ferocious attack. The very nature of the appellant's offences meant that the statutory policies in s 3(2) of protection for the community, and ensuring that the appellant was aware of the consequences of his breaches of the law, had to be prominent in the sentencing decision. The same could be said about the importance of personal deterrence. But, at the same time, the appellant's conduct in presenting himself to the police, his cooperation with their investigation, and his pleas of guilty provided promise that, with appropriate assistance, he would develop into a responsible and useful member of the community.'</i></p> <p data-bbox="408 1140 682 1169">R v QTV [2003] SASC 424</p> <p data-bbox="408 1184 1174 1372">This case involved an appeal from a decision where the offender was not quite 18 years old. The offender was convicted of four charges of robbery with violence, one charge of attempted armed robbery and one charge of assisting an offender to escape apprehension. The offender had appeared on 8 previous occasions before courts on drug and vehicle theft charges. He was sentenced as an adult to 11 years imprisonment in an adult prison, with a non-parole period of 6 years and 6 months.</p> <p data-bbox="408 1389 1182 1690">The Court found that trial judge had been justified in sentencing the youth offender as an adult due to the nature, gravity and number of offences, the nature of the appellant's involvement in those offences, the fact that the offences were pre-planned and the appellant's previous criminal history. Further, the Court held that it was appropriate to sentence the offender to serve his sentence in an adult prison. In determining whether it was appropriate to make an order for transfer to prison, the Court said: <i>'Each case will turn very much on its own particular facts. However, the age of the offender and the length of his sentence are plainly relevant considerations...'</i> Taking these factors into consideration, the Court held that it was not inappropriate to direct that the sentence be served in prison.</p>

South Australia	
	<p>However, the Court held that when sentencing a youth as an adult, the Court is required to assume that the youth has potential that can be realised. Further, much greater emphasis must be given to the youth's prospects and potential than would be the case in sentencing an adult, where punishment and general deterrence may well assume a more dominant role. The Court allowed the appeal and reduced the sentence to 9 years, with a non-parole period of 4 years.</p>
Other relevant information	<p>In the second reading speech of the <i>Young Offenders Bill</i> in the second reading (23 April, p 2078):</p> <p><i>'The Liberal Party policy options paper did propose that we should at least consider reducing the age from 18 to 17 years. There is a view in the community that, in relation to offences involving the use of a motor car, particularly licensing offences, young offenders, even at 16, ought to be treated as though they were adults. There are some persuasive arguments in favour of that, but we have taken the decision that we will adhere to the recommendation of the select committee that 18 be the age at which an offender becomes and is treated as an adult, rather than seeking to reduce the age.'</i></p>

Tasmania	
Number of children held in adult facilities	There were no children held in adult facilities in Tasmania as at 30 June 2015 (Australian Bureau of Statistics, 2016).
Relevant legislative provisions allowing children to be held in adult facilities	<p>Youth Justice Act 1997 (Tas)</p> <p>[Note: Under the <i>Youth Justice Act 1997 (Tas)</i>, “detention” refers to detention in a youth detention facility, not in a prison. Therefore, youths sentenced under the <i>Youth Justice Act 1997</i> cannot be sentenced to imprisonment in adult detention. However, youths convicted of “prescribed offences” will be tried by the Supreme Court which has the discretion to sentence either under the <i>Youth Justice Act 1997</i> or under the <i>Sentencing Act 1997</i>.]</p> <p>[Note that “youth” is defined in section 3 as a person who is ‘10 or more years old but less than 18 years old at the time when the offence the person has committed, or is suspected of having committed, occurred’.]</p> <p>Section 3 – Interpretation</p> <p>“offence” means any offence other than a prescribed offence.</p> <p>“prescribed offence” means –</p> <p>(a) in respect of a youth who is less than 14 years old –</p> <ul style="list-style-type: none"> (i) an offence under section 158 of the Criminal Code (murder); and (ii) an offence under section 159 of the Criminal Code (manslaughter); and (iii) an offence under section 299 of the Criminal Code in relation to an offence referred to in section 158 of the Criminal Code (attempted murder); and <p>(iv) an offence which is prescribed by the regulations to be a prescribed offence for the purposes of this subparagraph; and</p> <p>(b) in respect of a youth who is 14, 15 or 16 years old –</p> <ul style="list-style-type: none"> (i) an offence referred to in paragraph (a); and (ii) an offence under section 127A of the Criminal Code (aggravated sexual assault); and (iii) an offence under section 185 of the Criminal Code (rape); and (iiia) an offence under section 125A of the Criminal Code (maintaining a sexual relationship with a young person under the age of 17 years); and (iv) an offence under section 240(3) of the Criminal Code (armed robbery); and

Tasmania

(v) an offence under section 240(4) of the Criminal Code (aggravated armed robbery); and

(vi) an offence under section 248(a) of the Criminal Code (being found prepared for the commission of a crime under Chapter XXVII of the Criminal Code armed with a dangerous or offensive weapon or instrument); and

(vii) an offence which is prescribed by the regulations to be a prescribed offence for the purposes of this subparagraph; and

(c) in respect of a youth who is 17 years old –

(i) an offence referred to in paragraph (b); and

(ia) an offence under section 37J of the Police Offences Act 1935; and

(ii) an offence under the Marine Safety (Misuse of Alcohol) Act 2006, the Road Safety (Alcohol and Drugs) Act 1970, the Traffic Act 1925 or the Vehicle and Traffic Act 1999 except where proceedings for that offence are, or are to be, determined in conjunction with proceedings for an offence that is not a prescribed offence; and

(iii) an offence which is prescribed by the regulations to be a prescribed offence for the purposes of this subparagraph.

Section 23 – Application of general law

Subject to this Act, the law of the State relating to investigation, interrogation, arrest, bail, remand and custody applies to youths, with necessary adaptations and any further adaptations that are set out in this Act or the regulations.

Section 25 – How youth is to be dealt with if not granted bail

(1) If a youth is not admitted to bail under section 34 of the Justices Act 1959 or under section 4 of the Criminal Law (Detention and Interrogation) Act 1995, the youth must be detained in a watch-house while waiting to be brought before a justice under section 34A of the Justices Act 1959.

(2) If a youth who is less than 19 years old is refused bail by a justice under section 35 of the Justices Act 1959 but an order is not made under section 47(2) of that Act, the youth must be detained –

(a) in a detention centre if, in the opinion of the Secretary, it is practicable to do so; or

(b) in a prison if, in the opinion of the Secretary, it is not practicable to detain the youth in a detention centre.

(3) ...

Tasmania	
	<p>(4) If a youth who is 19 or more years old is refused bail by a justice under section 35 of the Justices Act 1959, the youth is to be remanded to a prison as if he or she were an adult unless the Secretary determines that the youth is to be remanded to a detention centre.</p> <p>Sentences 46 – Application and interpretation of certain sentence provisions</p> <p>(1) If, in this or any other Act, a penalty including imprisonment is specified in respect of an offence against this or any other Act and a youth is found guilty of the offence, that reference to imprisonment is taken to be a reference to detention.</p> <p>...</p> <p>Section 47 – Sentences and other orders that may be imposed</p> <p>[Note that the definition of “offence” does not include a prescribed offence. Therefore for a prescribed offence committed by a youth, this section does not apply.]</p> <p>Section 107 – Sanctions available to other courts</p> <p>(1) In this section, summary court means a court of summary jurisdiction other than the Magistrates Court (Youth Justice Division).</p> <p>(2) The Supreme Court, or a summary court, may exercise all the powers of the Magistrates Court (Youth Justice Division) under this Part in addition to, or instead of, any other power it may exercise when sentencing for an offence, including a prescribed offence, a person who was 10 years old or more but less than 18 years old at the time when he or she committed the offence.</p> <p>(3) If, under subsection (2), the Supreme Court or a summary court makes an order under section 47, the Supreme Court or summary court –</p> <p>(a) must specify in the order that it is made under this Part; and</p> <p>(b) may specify in the order whether the responsible Department in relation to this Act or the responsible Department in relation to the Sentencing Act 1997 is to be responsible for all or any matters relating to the administration of the order.</p> <p>(4) A failure to comply with subsection (3)(a) does not affect the validity of the order.</p> <p>(5) If, in making an order referred to in subsection (3), the Supreme Court or summary court does not specify which department is to be responsible for matters relating to the administration of the order, the responsible Department in relation to this Act is responsible for those matters.</p>

Tasmania	
	<p>Section 161A – Court may impose certain sentences under Sentencing Act 1997</p> <p>(1) The Court, in sentencing for an offence a youth who is 18 years old or more, may exercise the powers of a court of petty sessions under the Sentencing Act 1997 in addition to, or instead of, any other power it may exercise under this Act.</p> <p>(2) In determining the sentence to impose in accordance with subsection (1) on a youth for an offence, the Court must take into account the age of the youth when he or she committed the offence.</p> <p>...</p> <p>(8) This section applies despite section 103.</p> <p>Sentencing Act 1997 (Tas)</p> <p>Section 7 – Sentencing orders</p> <p>A court that finds a person guilty of an offence may, in accordance with this Act and subject to any enactment relating specifically to the offence –</p> <p>(a) record a conviction and order that the offender serve a term of imprisonment; or</p> <p>...</p> <p>(b) record a conviction and order that the offender serve a term of imprisonment that is wholly or partly suspended;</p> <p>...</p>
<p>Legislative safeguards in place where children are held in adult facilities</p>	<p>Youth Justice Act 1997 (Tas)</p> <p>Section 25(3)</p> <p>If a youth who is less than 19 years old is detained in a prison or watch-house, the person for the time being in charge of the prison or watch-house must take such steps as are reasonably practicable to keep the youth from coming into contact with any adult detained in that place.</p>

Tasmania	
	<p>Section 47 – Sentences and other orders that may be imposed</p> <p>...</p> <p>(3A) In weighing up the matters to be taken into account in determining which orders to make under subsections (1) and (2) in relation to a youth, the Court must ensure that the matter of the rehabilitation of the youth is given more weight than is given to any other individual matter.</p> <p>Section 5 – General principles of youth justice</p> <p>(1) The powers conferred by this Act are to be directed towards the objectives mentioned in section 4 with proper regard to the following principles:</p> <p>...</p> <p>(g) detaining a youth in custody should only be used as a last resort and should only be for as short a time as is necessary;</p> <p>(h) any sanctioning of a youth is to be designed so as to give him or her an opportunity to develop a sense of social responsibility and otherwise to develop in beneficial and socially acceptable ways;</p> <p>(i) any sanctioning of a youth is to be appropriate to the age, maturity and cultural identity of the youth;</p> <p>(j) any sanctioning of a youth is to be appropriate to the previous offending history of the youth.</p> <p>(2) Effect is to be given to the following principles so far as the circumstances of the individual case allow:</p> <p>...</p> <p>(b) family relationships between a youth, the youth’s parents and other members of the youth’s family should be preserved and strengthened;</p> <p>(c) a youth should not be withdrawn unnecessarily from his or her family environment;</p> <p>(d) there should be no unnecessary interruption of a youth’s education or employment;</p> <p>(e) a youth’s sense of racial, ethnic or cultural identity should not be impaired;</p> <p>(f) an Aboriginal youth should be dealt with in a manner that involves his or her cultural community.</p>

Tasmania

Case law

C v The Queen [2002] TASSC 55

The appellant was a youth who was sentenced by the Supreme Court under the *Sentencing Act 1997* (not the *Youth Justice Act*) to 15 months imprisonment for causing grievous bodily harm. The appellant argued that the Supreme Court was bound by the provisions of the *Youth Justice Act* when sentencing him. The Court considered the effect of s 107 of the *Youth Justice Act* and said: ‘*Section 107 is an enabling provision which allows the Supreme Court to exercise the powers referred to. It is intended to supplement the powers of the Supreme Court and is not intended to confine them. When the Supreme Court sentences a youth pursuant to the powers vested in it by the Sentencing Act, the Court’s powers are not circumscribed by any of the provisions contained in the Youth Justice Act, Pt 4.*’ The Court held that the sentence was not unlawful.

M J D v The Queen [2000] TASSC 175

Cox CJ explained the interaction between ss 46(1) and 81 of the *Youth Justice Act 1997* (Tas) and how they apply to youths being sentenced as adults in the Supreme Court:

‘The view was expressed that a youth, no matter how serious the charge, could not be sentenced to anything other than detention and that the maximum term was two years. If this were so, a youth of almost 18 years who commits murder could not be sentenced to more than two years’ detention, a proposition I find difficulty believing Parliament would have countenanced... I think the better view is that both provisions operate only to restrict the powers of “the Court” as defined by the Act, that is, the Magistrates Court (Youth Justice Division) and that they in no way cut down the powers of the Supreme Court, those powers not being expressly restricted by the Act, but being augmented by s 107 thereof.’

Hyde and T v Tasmania [2010] TASCRA 14

The appellant, T, was 17 years old at the time of offending but was tried in the Supreme Court as he was jointly charged with an adult pursuant to s 28 *Youth Justice Act 1997* (Tas). Despite having a discretion under s 107(2) to sentence T under that Act, the trial judge instead sentenced him under the *Sentencing Act*. On appeal, T argued that the trial judge had given insufficient weight to T’s age, record of convictions, prospects of rehabilitation, the adverse consequences of a period of imprisonment on him, and the reason why he was being sentenced in the Supreme Court (i.e. because of s 28 of the *Youth Justice Act*). The appeal court disagreed and said that the trial judge has referred to all of those matters expressly or by inference in her comments. Therefore she did not err in sentencing T to 8 months’ imprisonment under the *Sentencing Act*.

Tasmania	
	<p>TAP v Tasmania [2014] TASCCA 5</p> <p>The appellant committed numerous sexual offences against a 9 year old girl while the appellant was 17 and 18 years old. On appeal, the appellant argued that, in respect of the offences committed prior to turning 18, the sentencing judge ought to have been guided by the principles in the <i>Youth Justice Act 1997</i> (Tas).</p> <p>The Court considered the sentencing principles in the <i>Youth Justice Act 1997</i> (Tas):</p> <p><i>'[24] The principles are that the rehabilitation of the offender is always an important, if not dominant, consideration, and that any sentence should be tailored with greater emphasis on the welfare of the youth; the emphasis on rehabilitation is consistent with the broader sentencing goal of community protection. ...</i></p> <p><i>[26] It is true that the justification for the principles governing the sentencing of youthful offenders is that such offenders are not able to appreciate the nature and extent of their criminality. They are more likely to make ill-considered and immature decisions ... the importance of rehabilitation of a youthful offender is usually far more important than general deterrence, but ... there are cases in which just punishment and general deterrence become at least equally important.'</i></p> <p>The Court went on to say that where the level of seriousness in the criminality increases, there will be a corresponding reduction in the mitigating effects of the offender's youth. The Court held that the sentencing judge had taken into consideration the youthfulness of the appellant, and found that the sentence of six and a half years imprisonment was not manifestly excessive.</p>
Other relevant information	<p>Youth Justice Bill 1997, Second Reading Speech</p> <p><i>'The Youth Justice Bill addresses problems within the current system, in particular the range of sentencing options available to the court and the means by which young people may have their offending behaviour addressed in the least restrictive and most effective manner.'</i></p>

Tasmania

'The proposed legislation is designed to create a system based on restorative justice in cases where the harm needs to be put right. The legislation has been developed from examining the laws of other States and New Zealand. International conventions were also referenced in the development of the bill. The legislation is based on young persons being held responsible for their actions, together with promoting the idea of diverting young people away from the court in the first instance.'

'The Youth Justice Bill requires that serious offences like rape, murder and other prescribed indictable offences will be heard in the Supreme Court of Tasmania.'

Victoria	
Number of children held in adult facilities	<p>There were no children held in adult facilities in Victoria as at 30 June 2015 (Australian Bureau of Statistics, 2016). However, the Youth Parole Board of Victoria stated in its latest Annual Report (2015, table 7), that two children had been transferred from youth detention centres to adult prisons in the 2014-2015 financial year.</p>
Relevant legislative provisions allowing children to be held in adult facilities	<p>There are four ways a child can be detained in an adult prison in Victoria:</p> <ol style="list-style-type: none"> (1) A transfer from a Youth Justice Centre; (2) A direct sentence by order of the Supreme Court or the County Court; (3) A breach of parole where the child was released to adult parole; and (4) A direct remand to an adult facility. <p><i>Children, Youth and Families Act 2005 (Vic)</i></p> <p>The <i>Children, Youth and Families Act 2005 (Vic)</i> is the primary legislation relevant to the sentencing of children in Victoria. Under that Act, the Criminal Division of the Children’s Court has jurisdiction to hear all charges against children, except for offences resulting in death or attempted murder, which must be prosecuted and sentenced pursuant to the <i>Sentencing Act 1991 (Vic)</i>.</p> <p>The Children’s Court has no jurisdiction to sentence a child to detainment in an adult facility. Instead, children ordered to serve a custodial sentence must be detained in either a Youth Residential Centre (if aged 10 to 15 – s 410(1)) or a Youth Justice Centre (if aged 15 to 21 – s 412(1)) rather than an adult prison. In addition, children serving custodial sentences under the <i>Children, Youth and Families Act 2005 (Vic)</i> cannot be detained for more than one year in the case of an offender detained in a Youth Residential Centre (s 411(1)), or two years in the case of an offender detained in a Youth Justice Centre (s 413(2)). This is the case even if multiple offences have been committed. However, the <i>Children, Youth and Families Act 2005 (Vic)</i> allows the Youth Parole Board to transfer children under the age of 18 to adult facilities (ss 464, 474, 475).</p> <p>Section 464 – Power of Youth Parole Board to transfer person to prison</p> <ol style="list-style-type: none"> (1) The Youth Parole Board may, on the application of the Secretary, direct a person aged 16 years or more sentenced as a child by the Children’s Court or any other court to be detained in a youth justice centre be transferred to a prison to serve the unexpired portion of the period of his or her detention as imprisonment.

Victoria

(2) The Youth Parole Board may only make a direction under subsection (1) in respect of a person if—

- (a) it has had regard to the antecedents and behaviour of the person; and
- (b) it has had regard to the age and maturity of the person; and
- (c) it has taken into account a report from the Secretary; and
- (d) it is satisfied that the person—

(i) has engaged in conduct that threatens the good order and safe operation of the youth justice centre; and

(ii) cannot be properly controlled in a youth justice centre.

(3) A report from the Secretary under subsection (2)(c) must set out the steps that have been taken to avoid the need to transfer the person concerned to prison.

(4) The Youth Parole Board may direct that a person aged 18 years or more sentenced by a court other than the Children’s Court to be detained in a youth justice centre be transferred to a prison to serve the unexpired portion of the period of his or her detention as imprisonment if the Board considers the direction appropriate, having regard to the antecedents and behaviour of the person.

Section 468 – Detainee may request transfer to prison

(1) A person aged 16 years or more who is sentenced to be detained in a youth justice centre may apply to the Youth Parole Board for a direction that he or she be transferred to a prison to serve the unexpired portion of the period of his or her detention as imprisonment.

(2) A person who applies to the Youth Parole Board under subsection (1) must appear before the Board to support the application.

(3) The Youth Parole Board may make a direction under subsection (1) if the Board considers the direction appropriate, having taken into account a report from the Secretary and having regard to the antecedents and behaviour of the person.

Victoria	
	<p>Section 474 – Person in youth residential centre sentenced to detention in youth justice centre or imprisonment</p> <p>(1) If a person—</p> <p>(a) has been sentenced to detention in a youth residential centre; and</p> <p>(b) before the end of that sentence is sentenced to a period of detention in a youth justice centre or to a term of imprisonment in respect of any offence—</p> <p>the Youth Parole Board may direct that the person must serve the unexpired portion of the period of detention in a youth residential centre as detention in a youth justice centre or as imprisonment (as the case requires) and thereafter the person is subject to the jurisdiction of the Youth Parole Board or the Adult Parole Board (as the case requires).</p> <p>(2) If a person—</p> <p>(a) has been sentenced to detention in a youth residential centre; and</p> <p>(b) before the end of that sentence is sentenced to a period of detention in a youth justice centre or to a term of imprisonment to be served cumulatively on the sentence of detention in a youth residential centre—</p> <p>service of the sentence of detention in a youth residential centre must be suspended until that person has served the sentence of detention in a youth justice centre or the sentence of imprisonment (as the case requires).</p> <p>(3) If a person undergoing a sentence of detention in a youth residential centre is brought before a court under section 490 or under any warrant or order of the Magistrates' Court, that person is, subject to subsection (2), deemed to be continuing to serve the sentence of detention which that person is then undergoing even if he or she is held in custody in a prison, police gaol, youth justice centre or other place that is not a youth residential centre.</p> <p>(4) If a person who is sentenced to detention in a youth residential centre is at that time being held in custody in a prison, police gaol, youth justice centre or other place that is not a youth residential centre, that person is, subject to subsection (2), deemed to be serving that sentence of detention even if he or she is being held in custody otherwise than in a youth residential centre.</p>

Victoria

Section 475 – Person in youth residential centre sentenced to detention in youth justice centre or imprisonment

(1) If a person—

- (a) has been sentenced to detention in a youth residential centre; and
- (b) before the end of that sentence is sentenced to a period of detention in a youth justice centre or to a term of imprisonment in respect of any offence—

the Youth Parole Board may direct that the person must serve the unexpired portion of the period of detention in a youth residential centre as detention in a youth justice centre or as imprisonment (as the case requires) and thereafter the person is subject to the jurisdiction of the Youth Parole Board or the Adult Parole Board (as the case requires).

(2) If a person—

- (a) has been sentenced to detention in a youth residential centre; and
- (b) before the end of that sentence is sentenced to a period of detention in a youth justice centre or to a term of imprisonment to be served cumulatively on the sentence of detention in a youth residential centre—

service of the sentence of detention in a youth residential centre must be suspended until that person has served the sentence of detention in a youth justice centre or the sentence of imprisonment (as the case requires).

(3) If a person undergoing a sentence of detention in a youth residential centre is brought before a court under section 490 or under any warrant or order of the Magistrates' Court, that person is, subject to subsection (2), deemed to be continuing to serve the sentence of detention which that person is then undergoing even if he or she is held in custody in a prison, police gaol, youth justice centre or other place that is not a youth residential centre.

(4) If a person who is sentenced to detention in a youth residential centre is at that time being held in custody in a prison, police gaol, youth justice centre or other place that is not a youth residential centre, that person is, subject to subsection (2), deemed to be serving that sentence of detention even if he or she is being held in custody otherwise than in a youth residential centre.

Victoria	
	<p>Sentencing Act 1991 and the dual track system</p> <p>Charges against children for offences resulting in death or attempted are heard and determined by higher courts pursuant to the <i>Sentencing Act 1991</i> (Vic). There is nothing in the Sentencing Act 1991 that prevents higher courts from making an order that a child offender serve a custodial sentences in an adult prison. However, Victorian courts have acknowledged that the detention of children in adult facilities is only to be imposed on a child in “exceptional circumstances” (<i>R v Mills</i> [1998] 4 VR 235, Batt JA).</p> <p>Under the <i>Sentencing Act 1991</i> (Vic), higher courts may sentence young offenders (defined in the <i>Sentencing Act 1991</i> (Vic) as those under 21 years) to youth detention facilities. Victoria’s “dual track” system was implemented to ensure, to the extent possible, that young offenders are not ordered to serve custodial sentences in adult prisons, aimed at diverting young people away from the formal criminal justice system. The Sentencing Act 1991 allows for a young offender to be sentenced, where appropriate, to a custodial sentence in a Youth Justice Centre or a Youth Residential Centre where the court believes that the young person has ‘<i>reasonable prospects for rehabilitation, or is particularly impressionable, immature or likely to be subjected to undesirable influences in adult prison</i>’ (s 32(1) <i>Sentencing Act 1991</i>). The Law Institute of Victoria submitted that ‘<i>the dual track principle is extremely valuable ... and the system has received positive outcomes</i>’ (Law Institute of Victoria submission to Attorney-General on “Youth Transfers To Prison”, 2014, p 5).</p>
<p>Legislative safeguards in place where children are held in adult facilities</p>	<p><i>Children, Youth and Families Act 2005</i> (Vic)</p> <p>Section 347 – Child in custody to be placed in remand centre</p> <p>(1) If a child is remanded in custody by a court or a bail justice, the child must be placed in a remand centre except as otherwise provided by the regulations with respect to prescribed regions of the State.</p> <p>(2) If any children are remanded in custody in a police gaol under this section, they—</p> <p>(a) are entitled to be kept separate from adults who are detained there;</p> <p>(b) are entitled to be kept separate according to their sex;</p> <p>(c) subject to the Corrections Act 1986 and the regulations made under that Act, are entitled to receive visits from parents, relatives, legal practitioners, persons acting on behalf of legal practitioners and other persons;</p>

Victoria

(d) are entitled to have reasonable efforts made to meet their medical, religious and cultural needs including, in the case of Aboriginal children, their needs as members of the Aboriginal community;

(e) are entitled to complain to the Chief Commissioner of Police or the Ombudsman about the standard of care, accommodation or treatment which they are receiving in the police gaol;

(f) are entitled to be advised of their entitlements under this subsection.

(3) It is the responsibility of the Chief Commissioner of Police to make sure that subsection (2) is complied with.

Children's special needs

Citing a 1997 report by the Australian Law Reform Commission, the Victorian Ombudsman maintains that "*Victorian law recognises that children have particular needs different from those of adult offenders... it has been recognised that the behavioural and emotional characteristics of children require different approaches from custodial services to those applied to adults*" (Victorian Ombudsman 2012).

Victorian Charter of Human Rights

Victoria is one of the few Australian states to have a Human Rights Charter. Public bodies must give proper consideration to the provisions of the Charter when making decisions.

Section 17(2) of the *Charter of Human Rights and Responsibilities Act 2006 (the Charter)* states that '*every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.*'

In relation to imprisonment of a child, the Charter states, at s 23(1): '*an accused child who is detained or a child detained without charge must be segregated from all other detained adults*' and at s 23(3) '*a child who has been convicted of an offence must be treated in a way that is appropriate for his or her age*'.

It is important to note that in practice, children are not separated from the adult prison population when they are detained in adult prisons (Victorian Ombudsman, 2013).

Victoria	
	<p><i>Children, Youth and Families Act</i> – designed to minimise at the sentencing stage the number of children in adult prisons</p> <p>The <i>Children, Youth and Families Act 2005 (Vic)</i> provides various safeguards geared towards limiting the number of children serving custodial sentences in both youth and adult detention facilities. The existence and operation of the dual track system, as well the option for higher courts to sentence children to a custodial sentence in a youth detention facility, is aimed at preventing children from entering the adult justice system.</p> <p>Although <i>Children, Youth and Families Act 2005 (Vic)</i> provides a mechanism for the Youth Parole Board to transfer a young offender to an adult prison, it also empowers the Adult Parole Board with a right to transfer a young offender to a Youth Justice Centre or a Youth Residential Centre (ss 471, 472).</p> <p>Part 5.8 of the <i>Children, Youth and Families Act 2005 (Vic)</i> regulates the treatment of children in detention. No child or young offender detained in a youth justice centre or a police gaol may be subject to isolation or corporal punishment as a penalty; have physical force used upon them unless reasonable; be subject to physical or emotional abuse or discriminatory behaviour; or be subject to any form of psychological pressure intended to intimidate or humiliate them (s 487). However, this section does not appear to apply to those children detained in adult prisons.</p>

Victoria

Case law

ELJ v R [2012] VSCA 70

This case involved an appeal of a decision in which a youth (who was 15 years old at the time of his offences) was convicted of murder for stabbing a manager at a Hungry Jack's store in an attempt to steal his phone. Evidence demonstrated that the child tried to conceal the offences and exhibited a 'degree of callous indifference to the victim's death'. The youth pleaded guilty and was sentenced to 13 years for murder and two and a half years for armed robbery. The sentencing judge also recommended that arrangements be made for the child to serve his sentence at a youth facility. The youth sought leave to appeal the sentence on the grounds that it was manifestly excessive when regard was had to his extreme youth. The Court of Appeal dismissed the appeal, stating at [17]:

'The youth of an offender, particularly a first offender like the applicant, is a primary consideration for a sentencing court. Rehabilitation is most important. See generally R v Mills [1998] 4 VR 235. On the other hand the gravity of the offence may be such as to give prominence to the sentencing objectives of deterrence, denunciation, just punishment and the protection of the community. As those considerations become more significant, the weight to be attached to youth is correspondingly reduced. See R v Azzopardi [2011] VSCA 372.'

CNK v R (2011) 32 VR 641

The child was 15 at the time of his offences. He was acquitted in the Supreme Court of attempted murder but convicted of aggravated burglary, kidnapping, recklessly causing serious injury and recklessly endangering a person. The trial judge sentenced the child to three years' detention at a youth justice centre. On appeal, this was decreased to 194 days' detention in a youth justice centre. The court held that when determining a sentence for a child offender, the 'matters to which regard must be had were – without exception – directed at consideration of the effect of the proposed sentence of the child... the sentencing court was to impose a sentence which fitted the young offender as much as – or perhaps even more than – it fitted the crime.' [4]-[16].

Victoria	
<p>Other relevant information</p>	<p>Transferring youths to adult facilities</p> <p>In a recent report tabled in Parliament, the Victorian Ombudsman (2013, page 5) recommended that “<i>the Minister for Community Services consider amending the Children, Youth and Families Act 2005 to remove the option to transfer children to the adult prison system once additional accommodation becomes available.</i>” Following this report, the Law Institute of Victoria (2014, page 9) made submissions to the effect that transfers of children to adult prisons should not occur in the first instance, the process in which transfers occur must be revised and children must be afforded the right to special protections to which they are entitled.</p> <p>Corrections Victoria Sentence Management Manual – safeguards to regulate the treatment of children within the adult prison system</p> <p>The <i>Sentence Management Manual (Manual)</i> is a policy document developed by Corrections Victoria, which gives consideration to the <i>Corrections Act 1986</i>, the <i>Corrections Regulations 2009</i>, the <i>Charter</i>, among others, in relation to the management of prisoners in adult detention facilities in Victoria.</p> <p>The Manual recognises that children in adult prisons have particularly special needs. The Manual acknowledges that additional international law and <i>Charter</i> provisions must be considered with respect to children.</p> <p>With respect to determining a child’s placement in an adult prison, Corrective Services is required to liaise with the Assistant Commissioner of the Sentence Management Branch. The Commissioner must approve of all classifications of children. A case management conference must be held with representatives from Youth Justice, the Sentence Management Branch, the Disability, Youth and Ageing Unit and the prison staff to consider the management of the child and whether “external expertise” is required to assist with age-appropriate interventions and engagement (<i>Corrections, Prisons and Parole Victoria 2016</i>, AC 4, section 2.12).</p>

Victoria

Further, Corrections staff are required to consider what is in “the best interests of the child” when determining whether a child should be separated, and is required to notify the Chief Practitioner of Child Protection and Youth Justice, the Department of Human Services and the Ombudsman of Victoria (*Corrections, Prisons and Parole Victoria 2016*, PM 3, section 4).

Youth Units

Many prisons in Victoria have established youth units for younger prisoners. These youth units are designed for young adult prisoners, and purport to “recognise the vulnerability of young offenders in terms of environment, social, individual, and health-related issues” (*Corrections, Prisons and Parole Victoria 2016*, AC 4, section 2.12; Australian Institute of Criminology 2011, page 6). Prisoners in the youth units range in age between 18-25 (preference for 18-21 year olds), must have a minimal history of offending, and display a willingness to participate in unit programs. Prisoners are offered therapeutic and offending behaviour programs (such as coping with stress and anxiety and cognitive skills) and employment skills (Australian Institute of Criminology 2011, page 8). However, the Victorian Ombudsman acknowledged that places in youth units (such as that offered at Penhyn at Port Phillip Prison, and Nalu Unit at Fulham Correctional Facility) are limited, and some violent children and those with a history of sexual offending will be unable to be placed into youth units, resulting in them being placed within the mainstream prison population where they are particularly vulnerable to negative influences (2013, page 34).

Practical difficulties

Corrective Justice staff have expressed concerns in relation to the appropriate placement of children in adult detention centres. It is certainly not as easy as placing the children into a youth unit. In his report, the Victorian Ombudsman cites the Manager of Risk and Compliance at Port Phillip Prison as follows (2013, page 29):

‘It is a difficult task given their age. I mean, you bring them out of Charlotte, where do you put them? I mean you can’t put seriously violent prisoners into Penhyn [youth unit], as I said it disrupts the rest of the unit. You certainly can’t put 16-17 year olds into a general mainstream unit because they could be even further corrupted by entrenched prisoners that have been in the system a long time.’

Victoria	
	<p>Further, the former Operations Manager at Port Phillip Prison stated that (2013, page 29):</p> <p><i>... We've got to keep them safe from other prisoners too so if they're not suitable for Penhyn, just putting them into another mainstream environment, you know, it's just a recruitment city, sexual standover, standover for sexual favours ... they are so vulnerable in a general mainstream environment too. So it's a difficult situation that everyone sees them faced with.</i></p> <p>Corrections Victoria's approach to the placement and treatment of children in adult prisons (particularly those being transferred from youth detention centres), appears confused and lacks consistency. It appears that the children are still treated on an ad hoc basis. There is also limited availability in many established youth units.</p> <p>Room for improvement</p> <p>Despite some apparent safeguards designed to assist children in adult prisons, the Victorian Ombudsman found in 2013 that when transferring children from youth detention facilities to adult prisons, the Department of Human Services failed to consider a number of rights under the <i>Charter</i>; document the consideration of alternative placement options; provide relevant information such as mental health history to the board; or follow up the transfer with Corrections to ensure that the placement of the children was appropriate (2013, page 11). To ameliorate this, Corrections Victoria now endeavours to consult relevant stakeholders (including the Youth Parole Board) before placement or transfer of children; and hold regular case management conferences with the Adult Parole Board and the Youth Parole Board to discuss the progress of each child (Victorian Ombudsman 2013, page 34).</p>

Western Australia	
Number of children held in adult facilities	No children in adult facilities as at 30 June 2015 (Australian Bureau of Statistics, 2016).
Relevant legislative provisions allowing children to be held in adult facilities	<p>[Note: There is a clear distinction between an adult prison under the Prisons Act 1981 (WA) and detention centres created under the Young Offenders Act 1994 (WA).]</p> <p>Young Offenders Act 1994 (WA)</p> <p>Section 7 – General principles of juvenile justice</p> <p>The general principles that are to be observed in performing functions under this Act are that –</p> <p>...</p> <p>(i) detention of a young person in custody, if required, is to be in a facility that is suitable for a young person and at which the young person is not exposed to contact with any adult detained in the facility, although a young person who has reached the age of 16 years may be held in a prison for adults but is not to share living quarters with an adult prisoner;</p> <p>...</p> <p>Section 46A – Application of Sentencing Act 1995</p> <p>(1) The Sentencing Act 1995 applies to and in respect of the sentencing of a young person –</p> <p>(a) in a case to which section 50B applies; or</p> <p>(b) to the extent that section 50A or 118 provides for it to apply; or</p> <p>(c) subject to subsection (2), to the extent that this Act does not provide for a matter that is provided for in the Sentencing Act 1995.</p> <p>(2) Part 5 of the Sentencing Act 1995 does not apply to and in respect of the sentencing of a young person except –</p> <p>(a) for the purposes of deciding whether a community order can be imposed under section 50A; or</p> <p>(b) in a case to which section 50B applies.</p>

Western Australia

Section 118 – Offences punishable by imprisonment, options

(1) If the statutory penalty for an offence is or includes imprisonment and the court dealing with the offender decides to impose a custodial sentence, the court may –

(a) impose a term of imprisonment under Part 13 of the Sentencing Act 1995 but may not impose suspended imprisonment under Part 11 of that Act or conditional suspended imprisonment under Part 12 of that Act; or

(b) sentence the offender to a term of detention that is not longer than the term of imprisonment to which the offender would have been liable if the offender were not a young person.

(2) Despite section 86 of the Sentencing Act 1995 the court sentencing a young person to a term of imprisonment or a term of detention may impose a term of 6 months or less.

(3) If the court sentences an offender to imprisonment it may, subject to Part 14 of the Sentencing Act 1995, also sentence the offender to indefinite imprisonment.

(4) If the court sentences an offender to imprisonment it may, if the offender is at least 16 and under 18 years old and having regard to the matters in section 178(4)(a), direct that the offender serve the sentence in a prison under the Prisons Act 1981.

Section 118A – Where sentence of imprisonment to be served

(1) If –

(a) as a result of a sentence imposed by a court a young person is to be imprisoned; and

(b) the young person is under 18 years old at the time when under that sentence he or she is to be imprisoned, then, unless a direction has been made under section 118(4),

the young person is to serve that sentence in a detention centre and not in a prison until a direction is made under section 178.

(2) If –

(a) as a result of a sentence imposed by a court a young person is to be imprisoned; and

(b) the young person has reached the age of 18 years at the time when under that sentence he or she is to be imprisoned,

then the young person is to serve that sentence in a prison.

Western Australia

(3) If it is not practicable to immediately transport a young person to a detention centre in accordance with subsection (1), the offender may be held in a prison or a lock-up until transport to a detention centre is practicable.

Section 178 – Transfer of offender from detention centre to prison

(1) If an offender is in a detention centre serving a sentence of detention or a sentence of imprisonment, the chief executive officer may apply to the Children’s Court, constituted so as to consist of or include a judge, for a direction under subsection (3).

(2) An application under subsection (1) cannot be made in respect of an offender who is under 16 years old.

(3) On an application under subsection (1), the Court may direct that the offender be transferred to a prison under the Prisons Act 1981 to serve the unserved portion of the sentence in a prison.

(4) A direction under subsection (3) can only be made –

(a) in the case of an offender who is under 18 years old, if the Court is satisfied that the offender should be transferred to a prison because –

(i) the offender’s behaviour in the detention centre (including when serving a previous sentence) is or has been a significant risk to the safety or welfare of other people in custody in, or of the staff of, the centre; or

(ii) of the offender’s antecedents; or

(iii) of any other reason the Court thinks is relevant;

or

(b) in the case of an offender who has reached the age of 18 years and is serving a sentence of detention –

(i) if the offender has a substantial period of the sentence of detention to serve; or

(ii) if the court is satisfied that the offender should be transferred to a prison because of any of the factors referred to in paragraph (a);

or

(c) in the case of an offender who has reached the age of 18 years and is serving a sentence of imprisonment, if the court thinks fit.

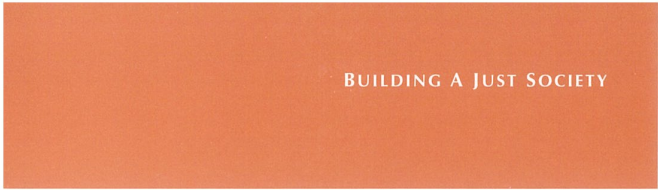
Western Australia	
	<p>(5) If a direction is made under subsection (3) in respect of an offender serving a sentence of detention —</p> <p>(a) the Prisons Act 1981 applies to and in respect of the offender while in prison; and</p> <p>(b) Part 8 and Division 8 of Part 7 continue to apply to the sentence of detention.</p> <p>(6) If the Court decides to make or refuse to make a direction under subsection (3), the offender or the chief executive officer may appeal against the decision under and subject to Part 3 of the Criminal Appeals Act 2004 which, with any necessary changes, applies as if the direction were an order that might be made as a result of a conviction.</p>
Legislative safeguards in place where children are held in adult facilities	<p><i>Young Offenders Act 1994 (WA)</i></p> <p>Section 7 – General principles of juvenile justice</p> <p>The general principles that are to be observed in performing functions under this Act are that –</p> <p>...</p> <p>(h) detaining a young person in custody for an offence, whether before or after the person is found to have committed the offence, should only be used as a last resort and, if required, is only to be for as short a time as is necessary; and</p> <p>Section 120 – Custodial sentence is sentence of last resort</p> <p>(1) The court cannot impose any custodial sentence unless it is satisfied that there is no other appropriate way for it to dispose of the matter.</p> <p>(2) A court that imposes on a young person a custodial sentence is to give written reasons why it considers that there is no other appropriate way for it to dispose of the matter.</p> <p>...</p>
Case law	<p>In <i>Wilson v Minister for Corrective Services (WA)</i> [2013] WASC 157 at [157], the Supreme Court of Western Australia found that the role of the Minister under section 13 is “to declare a place to be detention centre, and does not extend to the power to specify that a particular custodial regime is to be followed at the place declared to be a detention centre”.</p> <p>The Court further commented that by implication of section 7(i), the Minister is required to take into account whether the facility is suitable for a young person as well as the physical characteristics of the facility.</p>

Western Australia	
	<p>The Court concluded that the Minister fulfilled his requirements to consider the “suitability requirement” in section 7(i) and the relevant objectives and principles in sections 6 and 7. Therefore, the Court found that the Minister’s decision to declare various units at a prison for adults to be a detention centre is valid.</p> <p>Given that the Minister’s decision was valid, the Court rejected the applicant’s submission for exercise of <i>parens patriae</i> jurisdiction, that can allow the Court to grant orders substantially restricting the liberty of a child where such orders are in a child’s best interests and necessary for the child’s on-going care and protection.</p>
Other relevant information	<p>ABC <i>Law Report</i> titled “WA children sent to adult prison” presented by Damien Carrick on 23 April 2013 (audio available at http://www.abc.net.au/radionational/programs/lawreport/hakea-prison/4643658).</p>

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Appendix 9: Letter to Australian Attorneys-General, signed by 36 bodies, calling for the raising of the age of criminal responsibility from age 10 to age 12, in line with international law and reflecting evidence about children’s brain development



24 October 2015

TOO MUCH TOO YOUNG: RAISE THE AGE OF CRIMINAL RESPONSIBILITY

Dear Attorneys-General,

The undersigned signatories wish to express our concern that the current minimum age of criminal responsibility in Australia is out of step with international law, and with evidence about children’s brain development that clearly demonstrates that children under 12 years lack the necessary capacities for full criminal responsibility – and many do not gain these capacities until 15.

As we enter International Children’s Week, it is timely to reflect on our national observance of children’s rights and promotion of children’s best interests. We urge you to reform the law in each of your jurisdictions to increase the age of criminal responsibility to 12 years, in line with the absolute minimum age that the United Nations has ruled for jurisdictions to hold children criminally responsible.

We also urge the maintenance of the *doli incapax* transitional protection for children as they develop the necessary cognitive skills, and extension of this protection to children under 15.

The document that accompanies this letter outlines in more detail the evidence around children’s development that we believe should inform criminal legislation pertaining to children.

The paper also draws attention to the serious disadvantage and vulnerability that is common among children with behaviours that bring them to the attention of police, and the overrepresentation of Aboriginal and Torres Strait Islander children. The most effective way we can respond to the needs and vulnerability of these children is not to further victimise and punish them, but to address entrenched and persistent disadvantage in the community, including in Aboriginal and Torres Strait Islander communities, and put in place the necessary measures to protect children from harm, and to respond to neglect and abuse when it occurs.

We are happy discuss the contents of this letter in more detail.

Yours sincerely,

Sally Parnell
Acting CEO

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ABN 72 005 269 554

BUILDING A JUST SOCIETY



On behalf of:

- Amnesty International
- Andrew Jackomos, Victorian Commissioner for Aboriginal Children and Young People
- Anglicare Victoria
- ANTaR
- Australian Council of Social Service
- Bernie Geary OAM, Victorian Commissioner for Children and Young People
- Berry Street
- CatholicCare Melbourne
- Catholic Social Services Victoria
- Centre for Excellence in Child and Family Welfare
- Centre for Multicultural Youth
- Change the Record Coalition
- Criminal Lawyers Association of the Northern Territory
- Federation of Community Legal Centres (VIC)
- Good Shepherd Australia New Zealand
- Human Rights Law Centre
- Just Reinvest NSW
- Law Institute of Victoria
- MacKillop Family Services
- National Aboriginal and Torres Strait Islander Legal Services
- National Family Violence Prevention Legal Services Forum
- Northern Territory Council of Social Service
- Northern Territory Legal Aid Commission
- Oxfam Australia
- Secretariat of National Aboriginal and Islander Child Care
- Sisters Inside
- Smart Justice for Young People
- Victoria Legal Aid
- Victorian Council of Social Service
- Vincentcare Victoria
- Western Community Legal Centre Ltd
- Whitelion
- Youth Affairs Council of Victoria
- Youthlaw - Young People's Legal Right's Centre



National Children's Commissioner talking with children about their rights.

