Optional Protocol to the Convention against Torture in the context of youth justice detention centres

Submission to the Australian Human Rights Commission – Children's Commissioner

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1. Overview

The Human Rights Law Centre (**HRLC**) strongly supports Australia's ratification of the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**). Ratifying OPCAT is a key step in safeguarding children's rights in detention centres, other places of confinement and adult prisons.

The HRLC strongly supports all states and territories raising the minimum age of criminal responsibility to 12 years of age, in accordance with Australia's obligations under the *Convention on the Rights of the Child* (**CROC**).

2. Background to OPCAT

Australia signed OPCAT on 19 May 2009. OPCAT aims to prevent ill treatment and promote humane conditions of detention through the establishment of independent bodies to monitor and oversee places of detention. In particular, OPCAT provides for a system of regular visits to places of detention by designated inspectorates, or 'national preventative mechanisms' (**NPMs**), and also by the United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**SPT**).

Australia is already a party to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (**Convention against Torture**), which imposes a range of obligations in relation to preventing and redressing acts of torture and other forms of ill treatment. Australia also has obligations in this regard under the *International Covenant on Civil and Political Rights*, including the obligation under article 10 to ensure humane conditions of detention.

It is not only in the interests of persons deprived of liberty, but also the broader community, that all places of detention – whether youth detention facilities, child protection facilities, prisons, psychiatric hospitals, immigration detention centres, police cells or disability facilities – promote rehabilitation and reintegration. It is fundamental that all detainees are treated with basic dignity and respect. Independent inspections and oversight are critical to this end.

3. Reasons for Ratification

The HRLC considers that ratification of OPCAT will play an important role in ensuring the protection of the human rights of children and young people deprived of their liberty. OPCAT ratification is important for the following reasons:

4.1 Demonstrating international human rights leadership

Ratification of OPCAT will demonstrate the Australian Government's commitment to being a regional and global leader in the protection and promotion of human rights.[1]

[1] National Interest Analysis (NIA) [2012] ATNIA 6, para 5.

Accession to OPCAT will give real substance to the Australian Government's commitment to promote and provide leadership on human rights at the international level – particularly in light of Australia's bid for a seat on the UN Human Rights Council.

Ratification of OPCAT will also give effect to a number of recommendations made to Australia by respected United Nations bodies and mechanisms, including recommendations made to Australia during its Universal Periodic Review in 2016, Concluding Observations made by the Committee against Torture in 2014 and Concluding Observations made by the Human Rights Committee in 2009.

Finally, by becoming party to OPCAT, Australia will be able to participate in the nomination and election of experts to the SPT.

4.1 Fulfilment of existing international legal obligations

Australia has obligations under international law to prevent and redress torture and ill-treatment and to guarantee that all persons deprived of liberty are 'treated with humanity and with respect for the inherent dignity of the human person'.[2] Evidence and experience from comparable jurisdictions, such as the United Kingdom and New Zealand, demonstrate that ratification and implementation of OPCAT will positively contribute to the fulfilment of these existing international legal obligations.

Australian law already strongly prohibits the use of torture in all its forms[3] and there are already some mechanisms in place for oversight and inspection of places of detention.[4] However, there are varying levels of oversight throughout Australia, as well as gaps in monitoring, which could be addressed by implementing OPCAT.[5] Additionally, many of the mechanisms that do exist lack institutional, functional or practical independence.

4.2 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.

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,

[2] See, particularly, article 2 of CAT and articles 7, 9 and 10 of the ICCPR.

[3] NIA para 5.

[4] NIA para 9.

[5] Ibid.

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.

In Victoria, for example, the Office of Correctional Services Review is an internal business unit within the Department of Justice. It reports to the Secretary of the Department – the very Secretary with responsibility for correctional management.

An additional concern with existing mechanisms is that their findings are often not published. The Victorian Office of Correctional Services Review, for example, does not make its reports public. This has undermined the transparency, credibility and effectiveness of these agencies.

The system of investigation and inspection required by 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. The investigation and inspection mechanisms required by OPCAT ratification are also essential to ensure that the human rights of persons deprived of their liberty are properly protected.

4.3 There are significant human rights issues in Australian youth detention facilities

While, generally speaking, children and young people in detention in Australia are treated with dignity and humanity, it is also clear that there remain serious and well-documented incidents and issues. For example: most, if not all, jurisdictions maintain the practices of solitary confinement and strip-searching of young people; many jurisdictions' youth detention education and treatment services are sub-standard; some jurisdictions continue to allow 17 year olds to be transferred to adult prison facilities; and the over-use of pre-trial detention remains a significant issue across Australia.

Accordingly, it is clear that further steps need to be taken by Australia to address these ongoing issues of concern. Monitoring and oversight of places where people are deprived of their liberty is crucial in this regard. Indeed, in the Western Australian context, the benefit of the Independent Inspector of Custodial Services to improving conditions in youth detention, through his early and independent reporting of significant issues, is apparent.

4. OPCAT Obligations

Ratification of OPCAT will give rise to two key, overarching obligations – one at the international level, and one at the domestic level.

3.1 Subcommittee on the Prevention on Torture

At the international level, OPCAT ratification will require that Australia allow and facilitate visits by the SPT to places of detention in Australia.[6] It will also require Australia to guarantee to the SPT: unrestricted access to places of detention; unrestricted access to all information concerning the number of persons deprived of their liberty in places of detention, as well as the number of places and their location; and the opportunity to conduct private interviews with detainees and other relevant persons, such as medical personnel.[7]

3.2 National Preventative Mechanisms

At the domestic level, OPCAT ratification will require that Australia establish or designate independent NPMs with sufficient independence, functions and powers to regularly visit places of detention.

The obligations required by OPCAT relating to NPMs include:[8]

- guaranteeing the functional independence of the NPMs and the independence of personnel;
- making available the necessary resources for the performance of the functions of the NPMs;
- granting NPMs the power to regularly examine the treatment of persons deprived of their liberty, including the liberty of choosing where it will visit and a right of access to places of detention;
- granting NPMs the power to make recommendations to relevant authorities with the aim of improving the treatment and conditions of persons deprived of their liberty and preventing torture and other ill-treatment;
- granting NPMs the power to submit proposals and observations concerning existing or draft legislation;
- providing NPMs with information concerning the numbers of detainees, the location of their places of detention, and information concerning the treatment of detainees and their conditions of detention;
- providing NPMs with the opportunity to conduct private interviews with detainees and the liberty of choosing who it will interview; and
- granting a right to NPMs to contact and meet with the SPT.

The HRLC agrees with the 2012 Attorney-General's National Interest Analysis (**NIA**) (a comprehensive overview and analysis of the issues relevant to Australia's ratification of OPCAT), which concludes that Australia's system for inspection of places of detention, while substantial, currently does not fully meet the OPCAT requirements.[9]

[6] Articles 4 and Part III of the Optional Protocol sets out the obligations of each State Party to receive and support the SPT to undertake its functions of investigation and inspection.

[7] See articles 12 and 14 of OPCAT.

[8] See NIA paras 19 and 20 and articles 18, 19 and 20 of OPCAT.

[9] NIA para 27.

The HRLC also agrees with the NIA's assessment that the costs in designating, establishing and administering the NPMs will be modest, particularly given that significant changes are not expected to be necessary.[10]

Further, it is open to Australia to make a declaration under article 24 of the Optional Protocol to allow up to three years for Australia to take the necessary steps to ensure that designated or established NPMs are OPCAT compliant.[11] This provides a clear and reasonable timeframe for ensuring the necessary administrative and legislative steps are taken to ensure implementation of OPCAT.[12]

Finally, any costs involved in ensuring that NPMs are provided with the necessary independence as required under OPCAT and resources to perform their functions, are highly likely to be more than offset by the benefits that will flow from improved risk management and other flow on effects.[13]

Since ratifying OPCAT, jurisdictions such as New Zealand have found that preventing ill-treatment of detainees contributes to a costs saving in the use of the legal and health care systems arising from incidents of ill-treatment.[14] Monitoring and inspection of places of detention can also contribute to avoiding liability for ill-treatment in places of detention.

Accordingly, the HRLC agrees with the NIA's assessment that there is unlikely to be any disadvantages or negative impacts for Australia and that, rather, ratification of OPCAT is likely to have significant positive impacts, including economic benefits.

5. Age of Criminal Responsibility

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.

While the CROC does not specify an appropriate minimum age, the Committee on the Convention on the Rights of the Child is clear that any minimum age below 12 years is unacceptable. The Committee encourages states to set a minimum age of 12 years, and preferably higher than this.[15] An international study of 90 countries revealed that 68 per cent had a minimum age of criminal responsibility of 12 or higher, and the most common minimum age was 14 years.[16]

Accordingly, increasing the age of criminal responsibility is consistent with Australia's human rights law obligations; and is also consistent with evidence showing that brain development of children under

[10] NIA para 34.

[11] NIA paras 2 and 25.

[12] NIA para 26.

[13] NIA para 35.

[14] NIA para 35.

[15] Committee on the Rights of the Child, *General Comment No 10: Children's rights in juvenile justice.* 44th session, UN Doc CRC/C/GC/10 (25 April 2007) para 33.

[16] Neal Hazel, 'Cross-national comparison of youth justice', Youth Justice Board for England and Wales, United Kingdom (2008). Available at: http://dera.ioe.ac.uk/7996/1/Cross_national_final.pdf

12 is not sufficiently progressed to enable them to have the necessary skills for full criminal responsibility.[17]

In Australia the principle of *doli incapax* – which assumes that children aged 10 to less than 14 years are 'criminally incapable' unless proven otherwise – is intended to act as a protective principle and to mitigate Australia's low age of criminal responsibility. In practice, this presumption is very difficult to rebut and usually requires expert evidence. Accordingly, the HRLC does not consider *doli incapax* to be sufficient to displace Australia's international obligations under the CROC.

Although in practice there are a relatively small number of 10-14 year olds involved in the criminal justice system – evidence shows that Aboriginal and Torres Strait Islander young people are over-represented in this cohort.[18] This inequality is significant given evidence shows that early involvement in the criminal justice system results in likely enmeshment.[19]

Further, it is well recognised that a high proportion of children and young people who are involved in the criminal justice system come from backgrounds characterised by disadvantage, and are also clients of the care and protection system.[20] In other words, severe vulnerability stemming from exposure to violence, drug and alcohol misuse, neglect, homelessness and lack of education are common in young offenders.

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.

[17] Jesuit Social Services, 'Too much too young: Raise the age of criminal responsibility to 12', JSS Report (October 2015). Available at: http://jss.org.au/wp-content/uploads/2016/01/Too_much_too_young_-_Raise_the_age_of_criminal_responsibility_to_12.pdf.

[18] JSS Report, p 4.

[19] JSS Report, p 6.

[20] 78 per cent of children aged 10-12 years who had contact with the criminal justice system in 2010 were known to child protection. JSS Report.