



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our ref: JJ:HRC:MTeh1148991

30 May 2016

Ms Megan Mitchell  
National Children's Commissioner  
Australian Human Rights Commission  
Level 3, 175 Pitt Street  
SYDNEY NSW 2000

By email: [kids@humanrights.gov.au](mailto:kids@humanrights.gov.au)

Dear Ms Mitchell,

**Optional Protocol to the Convention against Torture (OPCAT) in the context of Youth Justice Detention Centres**

Thank you for your email inviting written submissions from key stakeholders in relation to your examination of the special needs and interests of children and young people under the age of 18 in youth justice detention centres and how they could be considered and monitored in a national preventative mechanism ("NPM") under OPCAT.

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

The Law Society notes that existing oversight mechanisms dealing with detention are limited to detention centres. However in order to ensure compliance with OPCAT, implementation of these rights must be monitored across all forms of detention for example police cells, remand centres and court cells.

With regard to OPCAT in the context of youth detention, the fundamental rights outlined by the UN Convention on the Rights of the Child ("CRC") should be recognised and implemented throughout Australia as setting minimum legal and moral standards for the protection of children's rights.

In particular the Law Society supports Article 37 of CRC which states:

The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.<sup>1</sup>

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<sup>1</sup> United Nations Human Rights Office of the High Commissioner, *Convention on the Rights of the Child* (entry into force 2 September 1990) <<http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>>.

The ultimate goal of all involved in substantiating the rights of children and young people should be to eliminate the need for detention, by providing sufficient and appropriate support to allow children to grow up healthy and happy.

With respect to the specific questions posed, the Law Society has the following comments:

**1. Are the current oversight, complaints and monitoring mechanisms relating to the treatment and rights of children and young people in detention (youth justice centres and adult facilities) adequate? If not, how could they be improved?**

The Law Society's view is that the current oversight, complaints and monitoring mechanisms relating to the treatment and rights of children and young people in detention are inadequate.

In NSW there are multiple oversight mechanisms, for example the NSW Ombudsman, Inspector of Custodial Services, Advocate for Children and Young People and the Official Visitor scheme. Additionally the Law Society notes that judicial officers have the power to address issues which arise (i.e. an ability to visit young people in detention and take action as a result of any deficiencies they observe). The Law Society is of the view that there is a need for greater consistency and transparency in the way in which these mechanisms operate. Recommendations made by those with oversight should be binding and reports to Parliament should be made publicly available.

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.

In addition, the State and Territory specific nature of many of the oversight mechanisms can, from a federal perspective, result in a lack of consistency in the way in which monitoring occurs.

The Law Society would support the introduction of a national monitor with the power to receive reports from stakeholders, conduct an investigation, make recommendations and, where possible, either immediately rectify the matter or make a referral to the centre involved. Where necessary the monitor should also be able to meet with the Executive Director of Juvenile Justice NSW to address any outstanding issues which require rectification. Where possible, the monitor should have expertise in child development and experience in sentencing practices.

The Law Society notes that, in practice, those who are most likely to come into contact with the young people are those who visit frequently; that is, lawyers, health visitors, doctors, families etc. These stakeholders are often the 'front line' in identifying systemic issues in Juvenile Justice Centres and should have access to a mechanism which allows them to make a report directly to a monitor who has the power to take action. It should, however, be noted that young people may often fear retribution where such matters are raised. Therefore, protections and safeguards must be built into any such reporting mechanism to ensure a level of anonymity.

**2. Are there particular examples of good practice in relation to the promotion and safeguarding of children's rights in detention facilities?**

The Law Society refers the Australian Human Rights Commission ("AHRC") to a detention centre in the ACT which specifically adheres to human rights principles. See below a

statement made by ACT Corrective Services in relation to the Alexander Maconochie Centre, which was opened in March 2009:

The Alexander Maconochie Centre emphasises rehabilitation, compliance with Human Rights principles and adherence to the Healthy Prison Concept. A Healthy Prison is one in which: everyone is and feels safe (detainees, staff and visitors alike); everyone is treated with respect and as a fellow human being (again, all people within the AMC); everyone is encouraged to improve him/herself and is given every opportunity to do so through the provision of purposeful activity; and everyone is enabled to maintain contact with their families and is prepared for release.<sup>2</sup>

Norway is also a useful example of the use of appropriate oversight to ensure human rights abuses are addressed. According to a US Department of State Report on Human Rights Practices for 2013:

An ombudsman, who can visit at a prisoner's request or on the ombudsman's own initiative, represented prisoners. The ombudsman does not act on behalf of prisoners and detainees on matters such as alternatives to incarceration for nonviolent offenders; only the courts handle sentencing. The ombudsman may conduct investigations and express a legal, nonbinding opinion on whether public authorities erred or committed an injustice.

The ombudsman also may serve on behalf of prisoners and detainees concerning the status and circumstances of confinement of juvenile offenders but received few complaints on this problem.

Authorities permitted prisoners and detainees to submit complaints to judicial authorities without censorship and to request investigation of credible allegations of inhumane conditions; there were no such complaints or allegations during the year. Officials granted prisoners and detainees access to visitors and permitted religious observance for those incarcerated.<sup>3</sup>

Adoption of the system implemented by Norway, whereby those in detention may submit complaints to authorities without censorship and request investigation of credible allegations of inhumane conditions, should be considered and where appropriate, adopted in Australia.

### **3. How do children and young people in detention experience and understand the current oversight, complaints and monitoring mechanisms?**

Children and young people often have a very limited understanding of their rights while in detention. They require substantial assistance to assert their rights, as they are unable to do so on their own. Assisting a child or young person in asserting these rights falls within the responsibility of those in whose care they are placed.

Additionally, children and young people in detention often cannot read and may have had limited access to education. Many also suffer from a form of cognitive deficit, intellectual disability or have difficulties communicating. These issues may restrict children and young people from obtaining access to the necessary oversight, complaints and monitoring mechanisms necessary to facilitate change.

Indeed, all children have some form of vulnerabilities and require a level of support. As such, the importance of appointing a dedicated advocate who is able to speak for and on behalf of a child or young person should not be underestimated. Advocates should be

<sup>2</sup> ACT Corrective Services, *Custodial Operations* (15 Sep 2014) <[http://cs.act.gov.au/custodial\\_operations](http://cs.act.gov.au/custodial_operations)>.

<sup>3</sup> United States Department of State, *Country Reports on Human Rights Practices for 2013* <<http://www.state.gov/documents/organization/220527.pdf>>.



specialists in the specific jurisdictions in which they operate and should have experience in child development.

The advocate is a necessary link between the child and the mechanisms which support and underpin their rights. Advocates should ensure access to positive rights, such as education and health, and also to those rights which are perceived as more 'specialist' (and therefore require greater resourcing) for example access to long term psychological care.

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.

The Law Society 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.

**4. How well do children and young people in correctional detention (youth justice centres and adult facilities) understand their human rights, including those under the Convention on the Rights of the Child? What could be done to better promote the human rights of children in these facilities?**

See point 3 above.

**5. How well do staff understand and promote children's rights, including those under the Convention on the Rights of the Child?**

Generally speaking, in the Law Society's experience, staff in detention centres have a strong understanding of children's rights. However, occasionally competing priorities means that programs are developed and approved which do not demonstrate a full understanding of those rights. For example, the Law Society has been advised by members about previous practices in which it was alleged that young people were held in isolation for significant periods of time, and were not permitted peer interaction. More detail can be separately provided to the Commission.

We understand and acknowledge that there may be genuine reasons for placing certain detainees in behavioural management programs (including protecting children and young people in detention from themselves, and from other detainees). However, the Law Society would be concerned about prolonged periods of isolation, which can have serious consequences for many young people, including Aboriginal children.

In terms of active promotion of children's rights in challenging situations, the Law Society supports the provision of ongoing adequate resources and support to allow staff to undertake specialist training regarding situations where children are displaying behaviours which may be difficult to control.

**6. How could the ratification of OPCAT and the establishment of a NPM benefit children and young people in detention (youth justice centres and adult facilities)?**

The Law Society notes this matter was not included in the roundtable agenda and as such has dealt with this point more broadly above.

**7. Generally, in relation to the monitoring of youth justice detention centres in your jurisdiction, are there any areas that require greater resourcing to operate more effectively?**

The Law Society supports an injection of resourcing into the establishment of an independent national monitor supported by a national preventative mechanism to provide more overt, legally sanctioned, independent oversight.

At present, inspections of detention centres are undertaken on average every 3 years. The Law Society is of the view this is entirely inadequate and suggests an inspection every 3 to 6 months would be more effective (or every 12 months as a minimum).

Additionally the Law Society supports the provision of powers to a national monitor to undertake spot checks without notice. For monitoring to be effective, there should be no mechanism by which centres can anticipate that checks will be made.

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

In NSW there is a conclusive presumption that a child under the age of ten cannot commit an offence.<sup>4</sup>

Under the common law, children aged between 10 and 14 who commit criminal offences are presumed to be incapable of committing a crime because they lack the necessary knowledge to have a criminal intention. To rebut this presumption, the prosecution must prove that the child did the act charged and that when doing the act, the child knew that the act was seriously wrong in the criminal sense.<sup>5</sup>

The United Nations Committee on the Rights of the Child has repeatedly criticised England, Wales and Northern Ireland for having an age of criminal responsibility of ten years old,<sup>6</sup> and has recommended that it should be raised.<sup>7</sup> The United Nations Committee on the Rights of the Child concluded:

... that a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable. States parties are encouraged to increase their lower MACR to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level.<sup>8</sup>

The Consultation Paper refers to research into adolescent brain development that links psychological development and offending; and has found that 10-14 year olds are prone to

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<sup>4</sup> Section 5 *Children (Criminal Proceedings) Act 1987*.

<sup>5</sup> For further discussion in relation to *doli incapax* in NSW see 'Doli Incapax – the criminal responsibility of Children', Matthew Johnston, paper prepared for the Children's Magistrates' Conference, 1 February 2006.

<sup>6</sup> United Nations Committee on the Rights of the Child, 'Concluding Observations: United Kingdom and Northern Ireland', September 2008, [77(a)].

<sup>7</sup> *Ibid*, [78(a)].

<sup>8</sup> United Nations Committee on the Rights of the Child, General Comment No.10, Children's Rights in Juvenile Justice (2007), [32].

risk-taking behaviours, are impulsive, short-sighted and are particularly vulnerable to peer pressure.

In 'The age of criminal responsibility: developmental science and human rights perspectives' Farmer concludes that research suggests that:

...children aged ten and 11 are most definitely not competent to participate effectively in the legal system and have reduced culpability. Additionally, those particular ten and 11 year olds who come into contact with the YJS are likely to be especially vulnerable.<sup>9</sup>

The Law Society does not support the current age of criminal 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).

Should you have any questions regarding this letter I would be grateful if you could direct them to Elaine Heaney (Senior Policy Advisor) by email at [elaine.heaney@lawsociety.com.au](mailto:elaine.heaney@lawsociety.com.au). Miss Heaney can also be reached by telephone on 02 9926 0310.

Yours sincerely,



Michael Tidball  
**Chief Executive Officer**

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<sup>9</sup> Elly Farmer, 'The age of criminal responsibility: developmental science and human rights perspectives', *Journal of Children's Services*, Vol 6 No 2 2011, p91.