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Your Ref:  
Our Ref: **616**

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

31 May 2016

Dear Megan

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

Thank you for the opportunity to comment on matters related to the above issue.

In this submission I focus on Ashley Youth Detention Centre (AYDC), which is Tasmania's only secure detention facility for young people detained under the *Youth Justice Act 1997*.

**My Role**

The functions of the Commissioner for Children, set out in s79(1) of the *Children, Young Persons and Their Families Act 1997*, include the following:

- (d) to increase public awareness of matters relating to the health, welfare, care, protection and development of children;
- (e) on the Commissioner's own initiative or on the request of the Minister, to advise the Minister on any matter relating to the administration of this Act and the policies and practices of the Department, another Government department or any other person which affect the health, welfare, care, protection and development of children;
- (f) on the Commissioner's own initiative or on the request of the Minister, to advise the Minister on any matter relating to the health, welfare, education, care, protection and development of children placed in the custody, or under the guardianship, of the Secretary under this or any other Act;

(fa) on the Commissioner's own initiative or on the request of the Minister, to act as an advocate for a detainee under the *Youth Justice Act 1997*;

(fb) to advise the Minister on any matter relating to the health, welfare, education, care, protection and development of detainees under the *Youth Justice Act 1997*;

A major focus of the Commissioner's role is to promote the health, welfare, care, protection and development of children and young people and to provide advice to the Minister for Human Services on policy, practice and services provided to or for children and young people in Tasmania, which may include any laws affecting them.

## Comments

My comments are grouped according to the questions asked in the request for submissions.

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?

In my capacity as advocate for all detainees under the *Youth Justice Act 1997*, I am of the opinion that the current oversight, complaints and monitoring mechanisms (in particular external oversight) are inadequate. The existing complaints mechanisms are outlined in section 129(1)(d) of the *Youth Justice Act 1997*, which states:

*(1) A detainee is entitled –*

*(d) 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.*

This places the onus of the complaint upon the individual child or young person to know, understand and navigate the complaints mechanism and to have sufficient information provided to them at induction to be cognisant of the complaints procedures. This approach to complaints handling isolates complaints to individual incidents, and does not foster an environment where systemic complaints are identified and acted upon in a routine manner.

As advocate for detainees under the *Youth Justice Act 1997*, my role includes regular visits to AYDC during which I am available to talk with young people detained there about their issues of concern. Young people detained at Ashley can also contact me by telephone at any other reasonable time. Although this role is not a complaint handling role, I can facilitate the complaints process and make representations to the Minister where an individual complaint raises a systemic issue. Despite this current arrangement working well, it is not equivalent to an external monitoring mechanism, such as the National Preventative Mechanism (NPM) which is to be established if Australia ratifies OPCAT.

I note that the Tasmanian Government is proceeding with the introduction of legislation (*Custodial Inspector Bill 2016*) which will create an independent custodial inspector to

undertake regular visits to custodial centres in Tasmania. The establishment of an independent Custodial Inspector is an initiative which I support.

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

Based on my experience as the advocate for children and young people detained under the *Youth Justice Act 1997*, some detainees have a very basic but limited understanding of the complaints mechanisms available to them. Furthermore, I have been told by them that their experience of utilising complaint mechanisms has been mixed. For example, I have been told that in some instances, once a complaint has been made by a detainee, there has been no subsequent discussion or follow up provided to the detainee on the progress or outcome of the complaint in question. Clearly such an approach would not inspire confidence in detainees that the complaints mechanism is effective in resolving issues, or that their complaint has been taken seriously.

It is important to acknowledge that concerted efforts are now being made to improve the complaint handling processes at AYDC.

As stated in my response to the first question, detainees can raise issues with me, as the advocate, however I do not have an official complaints handling role.

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?

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.

Discussion about human rights, and specifically child rights in a detention context, could be introduced during the induction process into AYDC, utilising available resources such as the Australian Children's Commissioners and Guardians' *A model charter of rights for children and young people detained in youth justice facilities*.

In April 2016, Noetic Solutions was commissioned by the Tasmanian Government to develop a Custodial Youth Justice Options Paper, which will explore the core problems of the current youth justice custodial system, and identify and evaluate a range of options for consideration by the Government. This process will include a review of current practices, and has potential to improve upon the existing model of care at AYDC.

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

In my experience, staff at AYDC have some understanding of children's rights in the context of a detention centre, however more could be done to ensure that all staff appreciate the importance of understanding and protecting these rights and of applying that understanding to their daily operations at the centre.

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 ratification of OPCAT would benefit children and young people in detention as it would allow regular visits to youth justice detention centres, by not only an independent national body (the NPM), but by an independent international body (Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture), with the aim to “prevent torture and other cruel, inhuman or degrading treatment or punishment” (Article 1, OPCAT).

The establishment of the NPM will provide jurisdictional consistency in the monitoring of detention facilities across all states and territories. The ratification of OPCAT will also address growing international concerns expressed during Australia’s recent appearance at the Universal Periodic Review (UPR) in November 2015.

National and international monitoring of youth justice detention centres will no doubt improve their operation, but will also provide a regular opportunity for children and young people to raise any issues, concerns and/or complaints directly with these bodies. This demonstrates to children and young people in detention that their rights, particularly whilst in detention, are important and that their views and complaints are taken seriously and addressed adequately.

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?

As a matter of principle I am in favour of raising the minimum age of criminal responsibility, however a proper consideration of this important issue could only occur, in my respectful opinion, alongside a detailed discussion of existing law, and a further elaboration of the comments made by the Committee on the Rights of the Child in its General Comment No. 10 (2007) *Children’s rights in juvenile justice*. In this respect I note Tasmania’s Criminal Code codifies the common law principle of *doli incapax*:

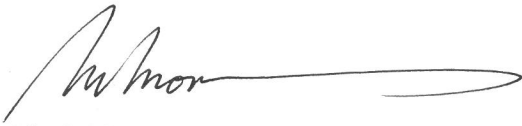
*18. Immature age*

- (1) No act or omission done or made by a person under 10 years of age is an offence.*
- (2) No act or omission done or made by a person under 14 years of age is an offence unless it be proved that he had sufficient capacity to know that the act or omission was one which he ought not to do or make.*
- (3) A male person under 7 years of age is conclusively presumed to be incapable of having sexual intercourse.*

**Conclusion**

Thank you for the opportunity to comment on the above. I am available to discuss my views and look forward to the outcome of this consultation process.

Yours sincerely

A handwritten signature in black ink, appearing to read 'M Morrissey', followed by a long horizontal flourish.

Mark Morrissey  
Commissioner for Children

Cc Minister for Human Services, Hon Jacquie Petrusma