

# **Australian Human Rights Commission**

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

**Children and Young People with Disability Australia  
Submission - June 2016**

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## INTRODUCTION

Children and Young People with Disability Australia (CYDA) welcomes the opportunity to contribute to the National Children's Commissioner's consultation regarding the *Optional Protocol to the Convention against Torture* (OPCAT) in the context of youth justice detention centres.

CYDA is the national representative organisation for children and young people with disability aged 0 to 25 years. The organisation is primarily funded through the Department of Social Services and is a not for profit organisation.

CYDA's vision is that children and young people with disability living in Australia are afforded every opportunity to thrive, achieve their potential and that their rights and interests as individuals, members of a family and their community are met.

CYDA supports the ratification of the OPCAT by Australia to increase oversight over places of detention and prevent torture, cruel, inhuman or degrading treatment or punishment. It is important that considerations around ratification of the OPCAT and the required National Preventive Mechanism (NPM) include a focus on the experiences of children and young people with disability.

Incidents of torture, degrading treatment, abuse and detention are shamefully common for children and young people with disability in Australia. However, frequently these experiences are not recognised as such due to prevailing attitudes within the Australian community that justify and accept harm when experienced by children and young people with disability. An example of this is seclusion of students with disability in schools, which is often renamed and justified as 'behaviour management.'

In addition, children and young people with disability are overrepresented in youth justice detention centres, despite a lack of data and limited research. It is therefore important that the specific needs and circumstances of children and young people with disability are considered in this project.

## OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE

CYDA supports ratification of the OPCAT by Australia and welcomes the focus of the present consultation. In particular, the NPM is seen as a useful oversight mechanism to protect the human rights of people in detention, through its mandate to inspect places of detention and make recommendations to relevant authorities.<sup>1</sup> It is critical to ensure that an NPM has coverage and oversight of all circumstances where people in Australia are detained.

As previously stated, children and young people with disability in Australia are often detained in institutional settings in Australia however this is rarely recognised. Further, CYDA has received frequent reports of experiences of torture, degrading treatment and abuse of children and young people with disability. It is critical that these experiences and circumstances are included within the scope of a NPM if developed in Australia.

### Education Settings

Students with disability frequently experience seclusion in education settings. The Australian Psychological Society (APS) has defined seclusion as "solitary confinement of a person in a room or area (e.g. garden) from which their exit is prevented by a barrier or another person. Seclusion

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<sup>1</sup> United Nations General Assembly 2002, *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Article 19.

involves situations in which people believe they cannot or should not leave an area without permission.”<sup>2</sup>

The seclusion of students with disability is often justified as ‘behaviour management’ and it is also often reported to CYDA that it is used as a punishment. There are uncomfortable parallels between seclusion and arbitrary detention and deprivation of liberty however this is not often recognised. It is CYDA’s experience that it is rare for schools to provide appropriate behaviour support to students.

The following are direct experiences of seclusion reported to CYDA:

*After being dragged by staff (my son) was put in a fenced-in outdoor area by himself in the middle of winter without a jumper. The staff even closed the blinds so he couldn't see into the room. He was terrified and banging on the door begging to be let back in as witnessed by another parent. The school didn't notify me about the physical restraint nor the locking him outside alone. I was told by another parent – Parent.*

*My child would spend most of the time he was permitted to attend school (which was under two hours) in a room with his aide with no windows. I would like to see any adult be subjected to those conditions and see if they cope – Parent.*

*My son has been sprayed with water to 'stop' a behaviour. He had his face held by an aide to teach him to look him in the eye. He was locked in a room alone with a ceiling fan going for most of the day, when I collected him he was on the floor asleep in his own vomit – Parent.*

*(My child was) placed in a small glassed office area in the corner of the classroom. He could not hear the class activity but could view (it). When I complained, the teacher placed paper on the glass to restrict his view – Parent.*

*At the school that my son used to attend, he and two other children aged five to six years old were locked inside a small windowless room called the ‘thinking room.’ My son now has a fear of small confined spaces such as lifts...I was not informed before or afterwards by his teacher or school Principal of this event. It is only years later that my son remembers and has had the courage to tell me – Parent.*

*My son attended a special school for six months when he was in Prep... Big mistake. He was put in a caged area outdoors to protect him from an aggressive student in his class, (this was) very upsetting for us and him...We quickly removed him from that school – Parent.*

CYDA is aware of numerous cases where enclosures have been used for students with disability. This issue was brought to national attention on several occasions in 2015, including a primary school student being repeatedly locked in a small room with boarded windows in Queensland<sup>3</sup> and the use of a cage for a student with disability in Canberra.<sup>4</sup> Other cases where the media has reported the use of small enclosures to seclude and abuse students with disability include in New South Wales<sup>5</sup>

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<sup>2</sup> Australian Psychological Society 2011, *Evidence-Based Guidelines to Reduce the Need for Restrictive Practices in the Disability Sector*, Melbourne, p. 11.

<sup>3</sup> B Vownow 2015, ‘School Puts Autistic Boy in ‘Cell-like’ Room,’ *Courier Mail*, viewed 7 June 2016, <http://goo.gl/Vm3UjME>.

<sup>4</sup> R Brown 2015, ‘Children with Autism Caged and Abused at School,’ *Sydney Morning Herald*, viewed 7 June 2016, <http://goo.gl/YlDuWl>.

<sup>5</sup> *News.com.au* 2010, ‘Outrage over Seven Hills West Public School putting Autistic Children in Cage,’ viewed 7 June 2016, <http://goo.gl/Fik0cr>.

and Tasmania<sup>6</sup> in 2010. These reports, as well as the direct experiences shared with CYDA, demonstrate that cases of seclusion of students with disability within purpose built enclosures are far from isolated.

Further, students with disability also frequently experience restraint in education settings. The APS defines restraint as “a range of programs, procedures, and psychosocial techniques that can impede a person’s exercise of choice and self-determination, all of which prevent people from being able to exercise human and legal rights that are ordinarily available to other members of the community.”<sup>7</sup> Different types of restraint include:

- *Physical restraint refers to the prolonged use of any part of a person’s body to restrict the free movement of that person;*
- *Chemical restraint involves the use of medication to control a person’s behaviour when that medication is not prescribed by a registered medical practitioner for treating a formally identified physical or mental illness;*
- *Mechanical restraint refers to the use of devices such as harnesses or straps to restrict the free movement of an individual or to prevent self-injury, with the exception of an authorised device recommended by a medical practitioner or therapist for therapeutic purposes, or devices required by law to transport a person safely; and*
- *Psychosocial restraint is the use of social or material sanctions, or verbal threat of those sanctions, to attempt to moderate a person’s behaviour.*<sup>8</sup>

Experiences of restraint reported to CYDA include:

*Our son has been restrained in a chair that is bolted to a large piece of timber continuously throughout his day. He is only removed when taken to the toilet, where once again he is strapped to the toilet, or for outside play. While he is in class he is restrained at all times – Parent.*

*On numerous occasions the school had restrained (my son) to stop him from chasing a boy who hurt him – Parent.*

*(My son) has had teachers use intimidation and physically drag him down corridors for refusing to follow instructions – Parent.*

*Three to four adults (held my son) down. The last method we heard about was (staff) telling him to pretend he was a jellyfish, therefore going limp and not struggling. This was obviously after he had been restrained and put on the ground – Parent.*

*(My son) is currently being sedated to attend school. The school says he is doing well. His doctors say he is suffering a huge amount of emotional distress due to his education – Parent.*

CYDA believes that the treatment of students with disability in these circumstances constitutes torture or other cruel, inhuman or degrading treatment or punishment. The experience of seclusion for many children with disability involves: isolation for long periods which are reported to range from one hour to most of the school day; being exposed to weather without reasonable protection

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<sup>6</sup> D Brown 2010, ‘Autistic Kids ‘Caged’ at School,’ *the Mercury*.

<sup>7</sup> Australian Psychological Society 2011, *Evidence-Based Guidelines to Reduce the Need for Restrictive Practices in the Disability Sector*, p. 11.

<sup>8</sup> *Ibid*, p. 11.

provided; denial of food; denial of access to a toilet; and placement in the dark. Restraint frequently involves: injury; and restricted movement. Students and families frequently report high levels of distress and long term mental health impacts for the children involved. This is reflected in the following experiences reported to CYDA:

*(My son has) anxiety due to school locking him I sensory room for lengthy periods of time and not redirecting his behaviour – Parent.*

*The use of a time-out room at our current school, where they literally dragged my son kicking and screaming to the room, was the most horrific of my son’s experiences- Parent.*

*My child has witnessed a child being kept in a restraint thereby appearing to normalise this behaviour. Whether you’re in the restraint or looking at someone else who is restrained (it) has an impact – Parent.*

Despite experiences of restraint and seclusion of students with disability frequently being reported to CYDA, there is no national data on these experiences available. Further, many education authorities do not keep records of cases of restraint, seclusion and other forms of abuse of students with disability. CYDA recently requested information about cases of alleged violence, abuse, neglect or exploitation (including restrictive practices) of students with disability through freedom of information legislation. All states aside from New South Wales and the Australian Capital Territory (ACT) informed that they do not collect this information or that providing the information would involve ‘unreasonable diversion of resources.’ This illustrates the lack of reporting, oversight and accountability regarding seclusion of students with disability.

It is therefore the view of CYDA that an NPM enacted through Australia’s ratification of the OPCAT should have jurisdiction over education settings to ensure oversight and accountability for restraint and seclusion of students with disability, with a focus on prevention. CYDA has previously recommended that a national oversight body for the use of restraint and seclusion be established that alone is charged with the power to authorise the use of restrictive practices beyond a first unplanned emergency. Further, this body should adopt an educative role to ensure that restraint and seclusion is accurately recognised as abuse and a violation of human rights. Consideration should therefore be given to how this role could fulfil the requirements for a NPM.

**Recommendation 1:** Ensure that a National Preventive Mechanism developed through Australia’s ratification of the *Optional Protocol for the Convention Against Torture* is able to inspect, report on and make policy recommendations about education settings, with a particular focus on restraint and seclusion of students with disability.

**Recommendation 2:** Establishment of a national oversight body for the use of restraint and seclusion that alone is charged with the power to authorise the use of restrictive practices beyond a first unplanned emergency. This body should also record national data on the use of restraint and seclusion regardless of setting. This body could fulfil elements of the National Preventive Mechanism requirements.

### **School Transport**

School transport is another area CYDA strongly believes should be included within the scope of a potential NPM. Policy and procedures regarding school transport vary in each jurisdiction. CYDA’s prominent concerns relate to the length of travel, pre-employment and ongoing screening of staff, qualifications and professional development for bus personnel and widespread inadequate policies and procedures.

In Victoria, bus transport is provided to students enrolled in special schools. Presently the policy is that the travel time for each journey can be up to two hours for a student to travel to and from school – a potential of four hours per day. CYDA is aware that children from as young as five years of age, are spending four hours a day traveling to and from school. In some instances this involves very short distances of less than 10km. This can mean that a child leaves home at 7.00am and returns at 5.00pm.

In many instances the families must utilise school transport because of work or other family commitments so it is not simply a preferred choice of families but the only transport option. The extensive travel time immediately denies many children significant opportunities and experiences of play, recreation, extracurricular activities and family time. Further, for children with high health and physical care needs, the long periods spent travelling to and from school inhibits the provision of necessary support. Depending on jurisdiction and circumstance, many children who are dependent on this bus transport, are often denied the opportunity to eat, drink or go to the toilet while travelling. In previous incidents, proposals have been made to withhold fluid intake from earlier in an attempt to prevent the need to urinate during the later bus trip. There have additionally been incidents where children have had toileting accidents due to their being no access to toilets, and the child must sit in urine or faeces for the duration of subsequent bus travel.

In different jurisdictions it is unclear what mechanisms there are for training and supervision of staff that drive or chaperone on these transport services. The limited or poor policies and procedures in relation to school transport, notably regarding supervision, creates a significant risk. A lack of appropriate supervision raises significant concerns regarding the quality and safeguarding provided to children with disability in this circumstance. Additionally, incidents of restraint through the use of seat belt locks are not uncommon for children utilising this method of transport.

Some experiences provided to CYDA include:

*My eight year old son used to spend up to four hours a day travelling to and from his school which was less than 10km away from our home – Parent.*

*I have a 10 year old son that attends (a special school) and can be traveling for 90 minutes or more each way every day. I feel that this is a disadvantage to him and many other children therefore I believe that the education department should do a review of their current policy – Parent.*

*The many attributes associated with longer travel time (for my son) are:*

- *Headaches every day from pure exhaustion due to travel time;*
- *Dehydration from not drinking and sitting in the hot bus for long periods;*
- *Not being able to go to the toilet for the duration of the bus trip;*
- *No food whilst on the bus;*
- *Sickness increased from (being) run down and sheer exhaustion;*
- *More meltdowns when he gets home;*
- *Unable to eat properly at night (because he is) too tired;*
- *Medication given way too early in the morning in order to catch a bus;*
- *(Sensory issues) with the increased noise;*
- *We should never put a cost figure on a child with (disability), (the school) currently disadvantages our children making the buses bigger (and) trips longer instead of smaller buses and shorter routes;*
- *The emotional and physical cost on a child;*

- *Not being able to join sports clubs events (from) Monday- Friday (because) they come home too late and too exhausted;*
- *Miss out on...after school therapies;*
- *The emotional toll and stress on families due to having more meltdowns; and*
- *Teachers at (school) would find that these children are less attentive during the day and possibly more disruptive – Parent.*

*In June 2015, a student who attends a special school in Melbourne was left on a locked bus for five hours because the driver failed to check that all students had exited. The student had fallen asleep when the other students exited the bus at 9am and was not found until 2.30pm.*

*A boy aged eight years old who was completely independent in toileting and continent was not provided with any options in the event he needed to go to the toilet if required throughout his two hour trip to and from school. After wetting his pants on a trip as he could not hold on any longer, his parents sought action from the Department of Education to ensure he could go to the toilet if needed to. The Department advised this was not an available option for him instead suggesting a number of possible options including a) wearing a nappy b) withholding of fluids during the afternoon or c) the provision of an absorbent towel in the event a situation arose if he couldn't access a toilet and simply couldn't hold on any longer.*

In 2010 CYDA and the Disability Discrimination Legal Service, made representations to the Attorney-General regarding breaches of human rights conventions in school transport for students with disability in Victoria. The letter informed of breaches of the *Convention on the Rights of the Child*, the *Convention on the Rights of Persons with Disabilities* and *Victorian Charter of Human Rights and Responsibilities*. The submission is attached for the Commission's consideration (see Appendix A). Many of the rights breaches described can be defined as torture or other cruel, inhuman or degrading treatment. In the time since the letter was sent, there has been no discernible change and students with disability continue to experience abuse and violation of rights due to lengthy school bus rides. School transport should therefore also be included within the scope of an NPM.

It is presently unclear how the transition to the National Disability Insurance Scheme will impact the provision of school transport for students with disability. Recent media reports have suggested that the National Disability Insurance Agency in Victoria and Tasmania is developing a trial of alternative transport options, including taxis, car-share providers and other transport for students with NDIS funding packages.<sup>9</sup> CYDA has significant concerns regarding the reported proposal, particularly around the need to ensure appropriate safeguards and supervision.

**Recommendation 3:** Ensure that a National Preventive Mechanism developed through Australia's ratification of the *Optional Protocol for the Convention Against Torture* is able to inspect, report on and make policy recommendations about school transport for students with disability.

### **Immigration Detention**

CYDA also supports the inclusion of immigration detention within the scope of an NPM. The Department of Immigration and Border Protection reported that in March 2016, there were 15 children in immigration detention and 317 children in community detention.<sup>10</sup> There is presently no data regarding the number of children with identified disability in this cohort. It was previously

<sup>9</sup> R Morton 2016, 'Uber Could Replace School Buses for Disabled Children,' *The Australian*, viewed 9 June 2016, <http://goo.gl/ngV2qx>.

<sup>10</sup> Department of Immigration and Border Protection 2016, *Immigration Detention and Community Statistics Summary*, Commonwealth of Australia, Canberra, p. 10.

reported that in September 2014 there were 54 minors with identified disability in immigration detention, however there is a lack of clarity regarding how disability is defined and identified.<sup>11</sup> Given prevailing concerns regarding the impact of detention on children, particularly regarding prevalence of abuse and mental health impacts,<sup>12</sup> it is important that immigration detention, including in offshore settings, are included within the scope of the NPM.

**Recommendation 4:** Ensure that a National Preventive Mechanism developed through Australia's ratification of the *Optional Protocol for the Convention Against Torture* is able to inspect, report on and make policy recommendations about immigration detention settings.

#### **Features of a National Preventive Mechanism**

CYDA understands that the NPM requirement for states that have ratified the OPCAT can be fulfilled using existing organisations and institutions that undertake a similar role. Consideration should therefore be given to how existing organisations can be adequately resourced and where required, expanded, to fulfil the role of an NPM. Further, the gaps in existing oversight will need to be identified and addressed. For example, as previously stated, there is currently no oversight regarding restraint and seclusion of students with disability in schools.

**Recommendation 5:** Undertake a review of existing oversight bodies at the national, state and territory level to establish which functions of the National Preventive Mechanism are currently being fulfilled within Australia to inform a gap analysis.

#### **YOUTH JUSTICE DETENTION CENTRES**

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.<sup>13</sup> Research suggests that children and young people with cognitive disability are overrepresented in the criminal justice system.<sup>14</sup>

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.

Further, children who have had contact with the child protection system, including children in out of home care (OOHC) are also disproportionately represented in youth justice detention.<sup>15</sup> Children with disability are believed to be overrepresented in statutory OOHC despite there being no reliable national data. Limited available research reflects this high representation. Research undertaken by the Victorian Equal Opportunity and Human Rights Commission, CREATE Foundation and OzChild

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<sup>11</sup> Department of Immigration and Border Protection, cited in J Flanagan 2014, *The plight of people living with disabilities within Australian immigration detention: Demonised, detained and disowned*, National Ethnic Disability Alliance, Civic Square, p. 17.

<sup>12</sup> Australian Human Rights Commission 2014, *The Forgotten Children: National Inquiry into Children in Immigration Detention*, Sydney.

<sup>13</sup> L Haysom et al. 2014, 'Intellectual Disability in Young People in Custody in New South Wales, Australia – Prevalence and Markers,' *Journal of Intellectual Disability Research*, Vol. 58, No. 11, p. 1005.

<sup>14</sup> K Tyler 2015, 'Shining a Light into the Shadows: The Hidden Health Needs of Juveniles in Detention,' *Alternative Law Journal*, Vol. 30, No. 2, p. 102.

<sup>15</sup> Australian Institute of Health and Welfare 2012, *Children and Young people at Risk of Social Exclusion: Links Between Homelessness, Child Protection and Juvenile Justice*, Commonwealth of Australia, Canberra, J Cashmore 2011, *The Link Between Child Maltreatment and Adolescent Offending: Systems Neglect of Adolescents*, Australian Institute of Family Studies, Melbourne.

indicated that the prevalence of disability within the OOHC populations surveyed was 14 per cent, 22.5 per cent and 42 per cent respectively.<sup>16</sup> Even when considering the lowest estimate of 14 per cent, this is almost double the prevalence rate of children and young people with disability aged 0 to 24 in the Australian population (7.7 per cent).<sup>17</sup> Again, the issue of unrecognised disability may be a critical barrier to accurate data.

It is therefore important to consider the needs of children with disability in youth justice detention when developing considerations and recommendations regarding ratification of the OPCAT and designing an NPM.

**Recommendation 6:** States and territories collaborate to more accurately identify and establish mechanisms to collect data regarding children with disability who come into contact with the criminal justice system, including those in youth justice detention.

## **SPECIFIC RESPONSES TO QUESTIONS POSED BY THE NATIONAL CHILDREN'S COMMISSIONER**

**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?** Being detained by definition involves a denial of rights. This is particularly the case for children, who overwhelmingly come from disadvantaged backgrounds, with many children in youth justice detention having previously experienced interaction with the child protection system and homelessness.<sup>18</sup>

As a society we recognise the inherent vulnerabilities of children and aim to afford appropriate protections. However, many areas of disadvantage that contribute to offending behaviour of children are not addressed. This was most recently reflected in a report regarding Australia's progress in meeting its obligations under the *Convention on the Rights of the Child*, which stated:

*It is now widely understood that various forms of social and economic disadvantage can increase the likelihood of young people coming into conflict with the law...The criminal justice system is an inappropriate vehicle for addressing these social and economic issues faced by vulnerable and at risk young people.*<sup>19</sup>

Given the considerable disadvantage typically confronting all children, including children with disability, in correctional detention, there is a risk that many are not aware of their rights and entitlements. It is important that all children in youth justice detention centres receive accessible information about rights, in both verbal and written formats, including easy read information. This particularly critical to ensure access for children and young people with disability with a diverse

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<sup>16</sup> Victorian Equal Opportunity and Human Rights Commission 2012, *Desperate Measures: The Relinquishment of Children with Disability into State Care in Victoria*, Carlton, p. 7, CREATE Foundation 2013, *Experiencing Out of Home Care in Australia: The Views of Children and Young People*, Brisbane, p. 14, G Mitchell 2013, *Children with Disabilities using Child and Family Welfare Services*, Melbourne, OzChild, South Melbourne, p. 2.

<sup>17</sup> Australian Bureau of Statistics 2016, 'Table 1.1 Persons with Disability, by Age and Sex—2003, 2009, 2012 and 2015, Estimate,' *Disability, Ageing and Carers, Australia: First Results, 2015*, Commonwealth of Australia, Canberra.

<sup>18</sup> Australian Institute of Health and Welfare 2012, *Children and Young People at Risk of Social Exclusion: Links Between Homelessness, Child Protection and Juvenile Justice*, Commonwealth of Australia.

<sup>19</sup> Australian Child Rights Taskforce 2016, *Australian Child Rights Progress Report: A report on 25 years of the UN Convention on the Rights of the Child in Australia*, UNICEF Australia, Sydney, p. 70.

range of support needs. CYDA understands that information about rights is provided in certain jurisdictions. It is also important that there is ongoing review of any information provided about rights, including direct feedback from children and young people.

Further, children also have a fundamental right to protection as identified in the *Convention on the Rights of the Child*.<sup>20</sup> In the case of children in youth justice detention centres, this places the fundamental obligation for upholding the rights of children on service providers and governments. Strong safeguards and policy that reflects a human rights framework must therefore be embedded at all levels of service provision.

**Recommendation 7:** Ensure appropriate and accessible information about rights is provided to ALL children in youth justice detention.

**Recommendation 8:** Develop mechanisms to review information about rights that is provided to children in youth justice detention which includes direct feedback from children.

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

It is important that all institutions that work with children uphold human rights. One key mechanism to ensure this occurs is through adopting child safe standards and accreditation. Broadly, child safe organisations emphasise the rights of children to protection and to have a safe childhood, with these values underpinning workforce culture. Policies, procedures and staff training around the human rights and developmental needs of all children is a core aspect of child safe practice.

There is great diversity between states and territories as to whether organisations providing the care of children are required to have child safe accreditation. It is the view of CYDA that there needs to be a requirement for all organisations that have the care of children to maintain a child safe accreditation. Presently, significant work regarding the definition and development of child safe standards is being undertaken through the *Royal Commission into Institutional Child Sexual Abuse*.<sup>21</sup> This current work in this area may be of valuable assistance for Australia in meeting its requirements to prevent torture and other inhuman treatment under the OPCAT.

**Recommendation 9:** Establishment of mandatory requirements to ensure all organisations providing services to children implement child safe policies and accreditation.

### **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 OPCAT requires States Parties to “establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.”<sup>22</sup> This additional oversight would benefit children and young people with disability in detention by increasing safeguards.

Further, the policy advice function of the NPM could also be utilised to improve supports provided to children and young people in youth justice detention, not only in terms of safeguarding against torture, but to support transition to community following release.

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<sup>20</sup> United Nations General Assembly 1989, *Convention on the Rights of the Child*, Article 3.

<sup>21</sup> Royal Commission into Institutional Responses to Child Sexual Abuse 2016, *Consultation Paper: Institutional Responses to Child Sexual Abuse in Out of Home Care*, Commonwealth of Australia, Canberra, pp. 83-87.

<sup>22</sup> United Nations General Assembly 2002, *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Article 1.

Finally, as stated above, ratification of the OPCAT provides an opportunity to develop oversight mechanisms for places of detention of children and young people with disability that are not recognised as a breach of human rights, particularly regarding restraint and seclusion in schools and school transport.

**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?**

CYDA is of the view that Australian legislation should accord with international human rights standards as defined by the Committee on the Rights of the Child. Further, specific considerations regarding the needs of circumstances of children with disability should be taken into account in any decisions regarding sentencing.

CYDA would also like to express concern that some children in Australia, particularly in Queensland, are detained in adult prisons. CYDA supports comprehensive examination of the circumstances in which this occurs to develop mechanisms to ensure that this practice is eliminated and that the human rights and developmental needs of children in contact with the criminal justice system are upheld.

**Recommendation 10:** Increase age of criminal responsibility in Australia to 12 years, as recommended by the Committee on the Rights of the Child.

**Recommendation 11:** Undertake a review of the circumstances in which children in Australia are placed in adult prisons to develop policy and legislative recommendations to ensure this does not occur.

## **CONCLUSION**

Ratification of the OPCAT would provide a significant opportunity to increase oversight and protections against torture and other cruel, inhuman or degrading treatment or punishment in Australia.

It is critical that any NPM has jurisdiction over all situations and places of detention where there is a risk of torture occurring. The direct experiences of children and young people with disability discussed in this submission demonstrates that this must include education settings and school transport, as well as settings more commonly understood as 'detention,' notably youth justice and immigration detention.

Please do not hesitate to contact CYDA if further information is required.

## SUMMARY OF RECOMMENDATIONS

**Recommendation 1:** Ensure that a National Preventive Mechanism developed through Australia's ratification of the *Optional Protocol for the Convention Against Torture* is able to inspect, report on and make policy recommendations about education settings, with a particular focus on restraint and seclusion of students with disability.

**Recommendation 2:** Establishment of a national oversight body for the use of restraint and seclusion that alone is charged with the power to authorise the use of restrictive practices beyond a first unplanned emergency. This body should also record national data on the use of restraint and seclusion regardless of setting. This body could fulfil elements of the National Preventive Mechanism requirements.

**Recommendation 3:** Ensure that a National Preventive Mechanism developed through Australia's ratification of the *Optional Protocol for the Convention Against Torture* is able to inspect, report on and make policy recommendations about school transport for students with disability.

**Recommendation 4:** Ensure that a National Preventive Mechanism developed through Australia's ratification of the *Optional Protocol for the Convention Against Torture* is able to inspect, report on and make policy recommendations about immigration detention settings.

**Recommendation 5:** Undertake a review of existing oversight bodies at the national, state and territory level to establish which functions of the National Preventive Mechanism are currently being fulfilled within Australia to inform a gap analysis.

**Recommendation 6:** States and territories collaborate to more accurately identify and establish mechanisms to collect data regarding children with disability who come into contact with the criminal justice system, including those in youth justice detention.

**Recommendation 7:** Ensure appropriate and accessible information about rights is provided to ALL children in youth justice detention.

**Recommendation 8:** Develop mechanisms to review information about rights that is provided to children in youth justice detention which includes direct feedback from children.

**Recommendation 9:** Establishment of mandatory requirements to ensure all organisations providing services to children implement child safe policies and accreditation.

**Recommendation 10:** Increase age of criminal responsibility in Australia to 12 years, as recommended by the Committee on the Rights of the Child.

**Recommendation 11:** Undertake a review of the circumstances in which children in Australia are placed in adult prisons to develop policy and legislative recommendations to ensure this does not occur.

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6 August 2010

The Hon Robert McClelland, MP  
Attorney General  
Parliament House  
Canberra ACT 2600

Dear Mr McClelland

**Notification of breach of the Convention On The Rights Of The Child ("CROC")**  
**Notification of breach of the Convention on the Rights of Persons with Disabilities ("CRPD")**  
**Notification of breach of the Victorian Charter of Human Rights and Responsibilities Act (2006)**

We write in relation to the inhumane conditions of the Victorian bus service provided to children attending specialist schools.

Utilisation of this bus service by students can result in travel time of up to 4 hours per day to access their educational facility, in an environment which is inappropriate, unsafe and degrading. When the bus is not door to door and involves "pick up points", extra travel time is involved. We consider this situation to be totally unacceptable, and to constitute a breach of Australian and international human rights legislation.

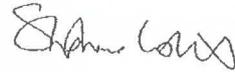
This matter has been raised with the Victorian government on numerous occasions, at the highest level. We now understand that there is no commitment to resolve the matter at the state level, and notify you as the State Party responsible for complying with international conventions of these abuses.

The attached submission provides the full detail of the various breaches in relation to this matter.

We notify your office of our intention to have these breaches investigated if the current situation cannot be quickly rectified.

We await your urgent response to this pressing issue.

Yours sincerely



Julie Phillips  
Manager  
Disability Discrimination Legal Service

Stephanie Gotlib  
Executive Officer  
Children with Disability Australia

cc. Dr Helen Szoke  
Commissioner  
Victorian Equal & Opportunity  
Human Rights Commission

Mr Bill Shorten  
Parliamentary Secretary for Disabilities  
and Children Services

**SUBMISSION**  
**THE ATTORNEY GENERAL OF AUSTRALIA**  
**BREACH OF HUMAN RIGHTS CONVENTIONS**  
**AUGUST 2010**

**1. Background**

The bus service in question is the only form of transport provided by the Victorian Government for the transport of students with a disability to specialist schools. The service, in our view, constitutes inhumane and degrading treatment. The conditions (Conditions) experienced by students on this bus include:

***Lack of reasonable accommodation to suitably transport students with a disability or chronic medical condition, including:***

- 1.1. Absence of appropriate staff trained in the care and support of children with a disability or chronic medical condition.
- 1.2. Reliance on a bus driver and/or minimally trained supervisor for a period of up to two hours and with 20 or more children.
- 1.3. Inappropriate level of care and communication with children, some of whom are nonverbal and are unable to communicate any form of emergency, whether medical, emotional or physical.

***Lack of reasonable accommodation to provide access to appropriate educational facilities including:***

- 1.4. Unreasonable travel time to and from school, including journeys of up to 2 hours each way.
- 1.5. Reduced capacity to concentrate and ensure educational involvement following a two hour journey to school.
- 1.6. Reduced capacity for private study and homework completion when four hours of the day are set aside for travel.
- 1.7. Reduced ability to access the educational support of parents, friends and/or tutors or other supports when four hours of the day are set aside for travel.
- 1.8. Reduced capacity to enjoy social interaction, family time, positive community involvement and leisure following a two hour journey from school.
- 1.9. Reduced capacity for health when a onerous burden of four hours travel is added to the commitments of a child with a disability attending full time education.
- 1.10. Reduced capacity for physical well being when children are required to sit in a fixed and immobile position for up to four hours per day *in addition to* normal immobility associated with attending school.

***Detention for a period of up to two hours without food or water, including:***

- 1.11. Medical complications arising from mandatory two hour fasting for children with dietary conditions, including diabetes.
- 1.12. Medical complications arising from mandatory two hour fast for children with kidney or other urinary tract conditions.

***Detention for a period of up to two hours without any bathroom or toilet facilities, including:***

- 1.13. Children soiling or wetting themselves whilst detained on the bus.
- 1.14. Children remaining in soiled or wet clothes for the remainder of their journey on the bus.
- 1.15. Children detained on a bus alongside children who have soiled or wet themselves during the course of the journey.
- 1.16. Medical complications arising from the detention of children for a prolonged period in a seated, immobile position and without ability to attend the bathroom, including constipation, contracture development, pain, bone deformity, reduction in functional ability, increased use of medications and invasive treatments.
- 1.17. Medical complications arising from inability to attend bathroom for children with kidney or other urinary tract conditions.

***Detention for a period of up to two hours resulting in forced restraint of some children, including:***

- 1.18. Psychological distress for children thus restrained.
- 1.19. Psychological distress for children witnessing restraint of their peers for extended periods on an ongoing basis.
- 1.20. Psychological distress for children removed from their families and educational facilities for four hours and in conditions requiring the immobility, inactivity and compliance of the child.
- 1.21. Psychological and physical distress as a result of reduced seizure control related to extended immobility.
- 1.22. Physical sensory deprivation can result in self injurious and self stimulating behaviors.
- 1.23. Boredom.

Children without disabilities are able to access both schools and appropriate transport which do not involve any of the above conditions. In this circumstance we believe there are reasonable accommodations which could be made to provide an appropriate service. It should also be made clear, that it is not always in the best interests of these children to attend special schools. They do so because of the inability of the Victorian state system to include them in mainstream schools. These problems have previously been brought to the attention of the office of the Attorney General.

***Reasonable accommodations in this context would be the following:***

- 1.24. A maximum one way journey time of 30 minutes for all children, whether by means of additional buses, or suitable alternative modes of transport.
- 1.25. The provision of appropriately trained staff to supervise and care for the children whilst on the bus.

**2. Convention on the Rights of the Child**

***Article 3***

- 2.1. The best interests of the children concerned are not a primary consideration in the context of the Conditions described above.
- 2.2. The Conditions above do not comply with standards for duty of care of children with a disability of chronic medical condition.

***Article 19***

- 2.3. The Conditions do not demonstrate all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment ... while in the care of ... any ... person who has the care of the child.

***Article 20***

- 2.4. The Conditions temporarily deprive these children of their family environment on an ongoing basis.

***Article 23***

- 2.5. The Conditions provided to Victorian children with a disability do not facilitate the enjoyment of a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.
- 2.6. The Conditions imposed on children with a disability in utilising the bus service as outlined above are in breach of the obligation of the Victorian government to ensure effective access to education and in a manner conducive to social integration and individual development.
- 2.7. The Conditions require the children concerned to comply with a difficult condition in order to gain access to education.

***Article 31***

- 2.8. The Conditions preclude the exercise of the right to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts due to the onerous burden of a significant period of each day spent in an inappropriate environment.

***Article 37***

- 2.9. The conditions are inhumane, degrading and cruel.  
The Conditions deprive these children of their liberty while not treating them with an appropriate standard of humanity and respect.

### **Article 39**

- 2.10. The Conditions do not take appropriate measures to promote physical and psychological recovery and social reintegration of the children following the cruel and degrading treatment they endure daily.

## **3. Convention on the Rights of Persons with Disabilities**

### **Article 71**

- 3.1. The Victorian government has not taken all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children in relation to the Conditions.

The best interests of the children concerned have not been a primary consideration in defining appropriate modes of transport and care.

### **Article 9**

- 3.2. The Victorian government has not taken appropriate measures to ensure children with a disability have access on an equal basis with others to the physical environment, transportation, schools and other services.

### **Article 17**

- 3.3. The Conditions do not demonstrate respect for the physical and mental integrity of the children concerned, on an equal basis with others.

### **Article 24**

- 3.4. The Conditions preclude the children involved from accessing the same level of education as other children, as it requires an additional four hours of their day, additional reserves of physical and emotional energy, and the ongoing experience of humiliation in order to access the school.

## **4. Charter of Human Rights & Responsibilities Act 2006**

### **Section 10**

- 4.1. The Conditions are a breach of the right of these children to be free from cruel, inhuman or degrading treatment.

### **Section 13**

- 4.2. The Conditions preclude the right to privacy of these children in their access for appropriate care and support for chronic medical conditions and outcomes of their disability
- 4.3. The Conditions preclude a right to privacy for these children in their homes during the hours before and after school when other children are at home.

### **Section 17**

- 4.4. The Conditions reduce the amount of family and social time available to both the child and their family, and does not provide necessary measures to protect their rights in terms of personal development and education.

**Section 21**

- 4.5. The Conditions preclude the right to liberty and security of these children, by means of forcible restraint and detention for extended periods.

**Section 22**

- 4.6. The Conditions preclude the right to humane treatment while the children are detained on the bus. Section 22 requires that all persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person. This imposes positive obligations on the state to protect people who are particularly vulnerable as a result of their detention.