Human Rights Law Centre

Youth Justice Centres in Victoria

Submission to the Legal and Social Issues Committee Inquiry into Youth Justice Centres in Victoria

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Summary

Youth justice centres in Victoria have been plagued by a number of serious and confronting incidents including riots and an escape in which the safety of children and young people, staff and the community has been compromised.

Factors contributing to these incidents include:

- failing infrastructure;
- staff shortages, turnover, loss of expertise and casualisation;
- overuse of lockdowns – that is, locking children and young people in their cells when they would normally be out and engaged in meaningful activities;
- inconsistencies in management and practices and inadequate training; and
- increases in the number of children and young people detained on remand – that is, waiting their trial or sentence.

Similar issues were identified by reviews into problems in youth justice centres in other jurisdictions including Western Australia and the Northern Territory.

Successive Victorian Governments have been on notice about many of these issues, and in particular the poor infrastructure, since at least 2010 when the Victorian Ombudsman delivered a damning report on the Parkville Youth Justice Precinct.

The Victorian Government has now committed to build a new youth jail and close Parkville. This is only part of the answer. The Government needs to properly address all of the underlying causes of the problems. The best facilities will not be safe unless they are properly staffed, well-managed and guided by a focus on age-appropriate conditions and programs, in particular to address the causes of offending by children and young people.

Many children and young people detained in youth justice centres have complex needs, multiple health problems, including mental illness and substance misuse issues, and come from backgrounds of significant disadvantage. To safely manage these children and young people in custody, and to cut the risks of reoffending on release, we need to properly identify and respond to these issues.

A number of the Government's responses to the recent problems are deeply concerning and should be reversed. These include the transfer of children to the maximum security adult Barwon Prison and the impending transfer of the management of youth justice to the same department that manages adult prisons.

Finally, to ensure age-appropriate conditions that comply with human rights, the Victorian Government needs to address the lack of legal safeguards around the use restraints, strip searches, isolation and solitary confinement in youth justice centres.

Recommendations

Recommendation 1: Stop using Barwon Prison as a youth justice facility

The Victorian Government should stop using the Grevillia Unit in the maximum security adult Barwon Prison as a youth justice facility and should immediately transfer all children and young people detained there to an age-appropriate youth justice centre.

Recommendation 2: Legal safeguards around the use of restraints

The Victorian Government should introduce legislation to amend the *Children, Youth and Families Act 2005* (CYFA) to:

- ensure that restraints (including handcuffs) should only be used in exceptional circumstances such as imminent risk of escape, or risk of serious harm to self or others, where all other less restrictive control methods have been exhausted;
- ensure that restraints are never used for routine or disciplinary purposes; and
- provide that the Secretary of the relevant Department report publically each year on the use of restraints in youth justice centres.

Recommendation 3: Prohibit solitary confinement

The Victorian Government should introduce legislation to amend the CYFA to prohibit the use of solitary confinement in youth justice centres and provide that the Secretary of relevant Department report publically each year on the use of isolation in youth justice centres.

Recommendation 4: Prohibit random strip searching

The Victorian Government should introduce legislation to amend the CYFA to prohibit routine and random strip searches in youth justice centres. Strip searches should only be allowed in individual cases based on specific intelligence of dangerous contraband as a last resort where other less intrusive methods have been exhausted.

Recommendation 6: Legislate diversion and alternative responses

The Victorian Government should introduce legislation to amend the CYFA to provide a legislative framework for diversion that imposes a presumption in favour of diversion for appropriate offences and provides a flexible range of diversion and alternative options for police and the courts.

Recommendation 7: Independent oversight for youth justice centres

The Victorian Government should enhance the independent oversight of youth justice centres to comply with Australia's impending ratification of the Optional Protocol to the Convention against Torture and other mistreatment.

Recommendation 8: Raise the age of criminal responsibility

The Victorian Government should introduce legislation to raise the age of criminal responsibility to 12 years.

Background

Victoria has been a leader in youth justice

Victoria has been a leader in youth justice in Australia with its progressive and effective approach to dealing with children and young people who commit crimes. The strong focus on rehabilitation and targeted support has helped to deliver Victoria one of the lowest child offending rates in Australia and one of the lowest child imprisonment rates.[1]

In 2008 the Victorian Auditor-General conducted an audit of services to young offenders in Victoria.[2] This audit noted that the model included a clearly articulated strategic plan; effective coordination of services across agencies; a best practice assessment tool which examined underlying risk factors and engaged the young person in the assessment process; and good practice in case management and case planning.

More recently, Parkville College and the Education Justice Initiative have been achieving strong education results in the Victorian youth justice system.[3]

The number of children who commit crime is dropping

Despite high profile media coverage of youth crime in Victoria, the number of children who offend and the total number of crimes by children have both dropped significantly. Police data shows that overall crime by 10-17 year olds has dropped by around 25% over the past 5 years and the number of 10-17 year olds committing crime has dropped by around 40%.[4] Court sentencing data backs this trend.[5]

Very few children and young people come into contact with the justice system. Recent figures from the Sentencing Advisory Council show less than 1.4% of people in Victoria aged between 10-17 years were alleged by police to have committed a crime in 2015. [6]

Children in youth justice centres typically have endured significant disadvantage

While overall crime by children is dropping, a small group of children is responsible for a high number of offences including serious offences.[7] Many of these children have complex needs. A survey conducted in 2015 by the Department of Health and Human Services (DHHS) of 167 males and 9 females detained in youth justice centres showed:

- 45% had been subject to a previous child protection order;
- 19% were subject to a current child protection order;
- 63% were victims of abuse, trauma or neglect;
- 30% presented will mental health issues;
- 18% had a history of self harm or suicidal ideation;
- 24% presented with issues concerning their intellectual functioning

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[1] Australian Institute of Health and Welfare, Youth Justice in Australia 2014-2015, 12. See also Jesuit Social Services, An escalating problem: Responding to the increased remand of children in Victoria (2015), 2.
[2] Victorian Government Auditor-General's Office 2008, Services to Young Offenders, Victorian Auditor-General's Office, Melbourne, Australia.
[3] Te Riele, K. & Rosauer, K. (2015). Education at the Heart of the Children's Court. Evaluation of the Education Justice Initiative. Final Report. Melbourne: The Victoria Institute for Education, Diversity and Lifelong Learning.
[4] Department of Health and Human Services, Alleged youth offender incidents, Analysis of Crime Statistics Agency data15 June 2016.
[5] Sentencing Advisory Council, Sentencing Children in Victoria (2016) 13, 53.
[6] Sentencing Advisory Council, Reoffending by Children and Young People in Victoria, (2016) 2. See also Sentencing Advisory Council, Sentencing Children in Victoria, (2016) 1.
[7] Sentencing Advisory Council, Reoffending by Children and Young People in Victoria, (2016) 48.

- 66% had a history of both alcohol and drug misuse;
- 58% had offended while under the influence of both alcohol and drugs;
- 62% had previously been suspended or expelled from school;
- 12% were parents; and
- 38% had a family history of parental or sibling imprisonment.[8]

Youth justice centres must understand and address these factors, to ensure safe management and to reduce risks of reoffending.

Children should be treated differently from adults

Children are different from adults and justice systems needs to treat them differently. Children think and act differently. Their brains are not fully developed. They are more likely to act impulsively and with less regard for the consequences. They have greater capacity for rehabilitation.

Much offending by children is impulsive and transient, rather than planned and habitual. Unlike adult offending, crimes by children tend to be committed in small groups in public areas, and close to where they live. Further, offences tend to be attention-seeking, public, episodic, unplanned and opportunistic.[9]

Where children and young people continue to have ongoing contact with the justice system, this is largely linked to environmental and social factors. The factors that can lead a child or young person into the justice system are largely the same as those that can lead them into child protection,[10] – that is, family dysfunction, abuse, neglect, exposure to violence, and socio-economic disadvantage.

Just as laws in relation to voting, drinking, driving and smoking treat children differently from adults, the criminal justice system should treat them differently.

Building on the strengths, fixing the weaknesses

It is critical in responding to the incidents in youth justice centres that the Victorian Government not abandon the things that have served Victoria well in its youth justice system and delivered low crime and imprisonment rates of children. The Government needs to focus on strengthening those things that have worked well and fixing those things that have led to the problems.

Human rights compliant youth detention framework

Key child rights principles under international law

Australia (and Victoria as an Australian state) is required under international law to comply with a number of key child rights principles including:

- In all actions concerning children, the best interests of the child shall be a primary consideration.[11]

[8] Youth Parole Board, Annual Report 2015-16, 14.
[9] Cunneen, Chris, Rob White and Kelly Richards, Juvenile Justice in Australia (5th ed., Oxford University Press, 2015) 55.
[10] Joint Australian Children's Commissioners and Guardians submission to the Australian House of Representatives Inquiry into the over representation of Aboriginal and Torres Strait Islander young people in the justice system (2010), 6.
[11] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CROC*') art 3.

- The arrest and detention of a child should be only as a measure of last resort for the shortest possible period of time.[12]
- Every child deprived of liberty shall be treated with humanity and respect for their inherent dignity and in a manner which takes into account the needs of their age.[13]
- No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. [14]
- The unique status of children deprived of liberty requires 'higher standards and broader safeguards for the prevention of torture and ill-treatment.'[15]
- States must implement legislation and practices which are in the best interests of the child and which protect children from all forms of physical or mental violence, injury, abuse, neglect, maltreatment or exploitation.[16]
- Every child accused or found guilty of a crime shall be treated in a manner which takes into account the desirability of promoting the child's reintegration and assuming a constructive role in society.[17]
- The essential aim of detention should be rehabilitation and children should be accorded age-appropriate treatment.[18]

Key Victorian Legislation

Some of these key human rights principles are reflected in the CYFA and the *Charter of Human Rights and Responsibilities Act 2006* (the Charter).

The CYFA places a statutory duty on DHHS to provide for the care, custody and supervision of children who have been sentenced to detention or remanded in custody pending the finalisation of legal proceedings. The CFYA provides that the Secretary of DHHS must determine the form of care, custody or treatment that is in the best interests of each child.[19] It provides that persons detained in youth justice centres are entitled to have their developmental needs are catered for.[20]

The Charter provides a framework for the protection and promotion of human rights. The Charter makes it unlawful for a public authority to act in a manner that is incompatible with a human right, or, in making a decision, to fail to give appropriate consideration to a relevant human right. Rights relevant to children in youth detention include humane treatment in detention, protection from cruel, inhuman and degrading treatment, segregation from adults in detention, being brought to trial as quickly as possible, being treated in an age-appropriate way and being protected in accordance with their best interests as a child.[21]

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[12] CROC art 37(b).
[13] CROC art 37(c); See also *International Convention on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*') art 7 and art 10; and *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('*CAT*') art 2.
[14] CROC art 37(a); See also ICCPR art 7 and art 10 and CAT.
[15] Juan E. Mendez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/28/68 (5 March 2015), para 16.
[16] CROC art 19.
[17] CROC art 40(1).
[18] ICCPR art 10.
[19] CFYA s 482(1)(a).
[20] CFYA s 482(2)(a).
[21] Charter ss 10, 17, 22-23.

Incidents in youth justice centres

Recent incidents in youth detention centres have received significant coverage in the media and understandably generated public concern. These include riots, assaults on both children and young people and staff, significant property damage, self-harm incidents and a major escape followed by serious crimes.

These incidents did not occur in a vacuum. A number of factors have been identified as contributing to the problems including:

- failing infrastructure;
- unsafe and unsatisfactory conditions;
- staff shortages;
- staff turnover, loss of expertise, casualisation;
- inadequate staff training;
- overuse of lockdowns – that is, locking children and young people in their cells when they would normally be out of their cells and engaged in meaningful activities; and
- increases in the number of children and young people detained on remand – waiting their trial or sentence.

The former Victorian Ombudsman tabled two reports about youth justice issues in 2010 and 2013. The 2010 report identified a wide variety of serious deficiencies, including health and safety concerns, improper conduct and access to contraband, a number of which amounted to human right breaches.[22]

In 2013, the Ombudsman found that the youth justice system was struggling to respond appropriately to increasingly challenging behaviours among young offenders. The report cautioned the government against abrogating its responsibilities by merely transferring children and young people to the adult system. The Ombudsman stated:

> I am of the view that there are no circumstances that justify the placement of a child in the adult prison system.[23]

The Victorian Ombudsman's most recent report of February 2017 addressed the incidents at Parkville and Malmsbury and stated that:

> successive governments have failed to make the significant investment needed to address the long-term issues that are increasingly apparent. There is no short-term quick fix to the serious problems affecting youth justice, which have their origins not only in ageing infrastructure but in the complex interplay of health and human services, education and the justice system.[24]

In addition to these public documents, the Victorian Government commissioned and received a confidential report months before the high profile November 2016 riots at Parkville.[25] The report, by consultant Peter Muir, a former Director General of Juvenile Justice in NSW, investigated the reasons behind two incidents on 6 and 7 March 2016, in which boys at Parkville ran off from staff and engaged in property damage at the centre. In one incident, the boys scaled a fence and accessed weapons

[22] Victorian Ombudsman, Investigation into conditions at the Melbourne Youth Justice Precinct, October 2010.
[23] Victorian Ombudsman, Investigation into children transferred from the youth justice system to the adult prison system, December 2013, 5.
[24] Report on youth justice facilities at the Grevillea unit of Barwon Prison, Malmsbury and Parkville February 2017, 2.
[25] Nick McKenzie, Farrah Tomazin, Richard Baker, "Youth justice chief moved as report reveals chaos in system", The Age, 25 January 2017.

from the horticulture shed. In the other, the boys scaled a fence, got onto the roof of a unit and into the roof cavity. Police attended both incidents.

Mr Muir noted that challenging behaviour, such as running off from staff, is to be expected and is "entirely predictable". He concluded that the major causes of the incidents were:

- the failing of the infrastructure to contain the boys;
- the fact that they were able to access weapons from the buildings and programs area;
- staffing and recruitment issues that resulted in higher than normal lockdowns; and
- the high number of boys on remand at Parkville.

He warned the buildings present "a continued and ongoing threat to the safety of staff and clients" and notes that he had previously warned that they were not fit for purpose.

He noted very high levels of casual and agency staff and that on a significant number of days shifts can't be filled, leading to increased lockdowns which are "increasing tension" and "contributing to the level of risk". He added that "almost every level of Secure Services [which runs youth jails] has expressed concern at this issue [staffing] and the lack of staff and subsequent lockdowns have been a contributing factor".

Mr Muir states that "the quality of the relationships between staff and residents is one of the most important protective factors" and that "there are significant numbers of staff who do not understand this".

He also states that "inconsistency in practice between staff can be a trigger for escalated behaviours of clients. Inconsistency in practice can be exacerbated through the lack of permanent, experienced and competent staff such is the situation at PYJP [Parkville Youth Justice Precinct]."

Lessons from interstate

Victoria can learn from experiences in youth justice systems in other jurisdictions including Western Australia, which endured the Banksia Hill riot in 2013, and the Northern Territory, where the Royal Commission into the Protection and Detention of Children continues to receive evidence on the atrocities in youth detention exposed on Four Corners in July 2016. Recent incidents in NSW and Queensland are also relevant to the Victorian experience.

Experience from interstate highlights that common risk factors undermining the safety and security of youth justice centres include failing infrastructure, staff shortages, poor systems, inadequate training, poor management and improper conditions including the overuse of lockdowns.

Western Australia – Banksia Hill 2013

The Independent Inspector of Custodial Services review into the major Banksia Hill riot of 20 January 2013 found that a major incident was highly predictable.[26] Key contributing factors were staff shortages, excessive lockdowns of detainees, poor responses to detainee misbehaviour and an increasing disconnect between management and staff with the loss of clear leadership, a lack of continuity and increasing instability. As a result the regime in the centre was not sufficiently active or positive.

Northern Territory – Don Dale

Following incidents at the Don Dale and Alice Springs youth detention centres in the Northern Territory, Michael Vita, a juvenile and adult corrections expert from NSW, was commissioned to undertake the review into Northern Territory Youth Detention Centres in 2015.

[26] Office of the Inspector of Custodial Services, Directed Review into an Incident at Banksia Hill Detention Centre on 20 January 2013 (2013), vii.

The Vita report highlighted that similarities between the 'key stress factors' identified in the Banksia Hill and Northern Territory youth detention facilities'[27] For example there was a lack of training for staff across the board, with an uncoordinated case management system, "non-existent, outdated and inadequate" detention centre procedures and a lack of consistency and direction in managing adolescents often suffering from trauma, foetal alcohol syndrome, ADHD and mental health problems.[28] Staff relied too much on confinement, and detainees' basic rights were withheld for too long, which did not help with behaviour management. None of the programs provided to children in detention were sufficiently intensive to change the behaviour of the highest risk offenders.

Responding to the problems in youth justice centres

It's clear that successive Victorian Governments were on notice since at least 2010 about the need to improve youth justice centres. Recent problems stemmed from neglect in the face of repeated warnings about risk.

The Victorian Government is responding to these problems in a number of ways.

It has committed to address the infrastructure problems at Parkville by building a new youth jail in Werribee South. New infrastructure is part of the answer to the current problems but the new site won't be safe and won't reduce risks of reoffending if other underlying problems aren't addressed.

The Vita review into youth detention centres in the NT noted that 'where instability exists, improvement will not necessarily come from just toughening up a centre's physical security (e.g. installing bars, grills and fences), or toughening staff's emergency responses.'

Similarly, the review into the Banksia Hill riot in WA noted that "it goes without saying that having the right built environment is important but history shows that well-designed and well-maintained facilities will fail if human relationships fail, and that poor physical facilities can sometimes be successful."[29]

In a positive move, the Government has also commissioned two experts to review and modernise the framework around youth justice centres to ensure it is informed by best practice.

Concerningly however, a number of responses by the Victorian Government to recent incidents create serious risks to Victoria's youth justice system including:

- the transfer of children and young people to a unit in the maximum security adult Barwon Prison;
- the transfer of the management of youth justice to the same department that manages adult prisons;
- increased use of lock downs;
- using adult prison guards in youth justice centres;
- making tear gas, capsicum spray and extendable batons available in youth justice centres.

Barwon maximum security adult prison is not appropriate for children

The HRLC has commenced three legal proceedings challenging the transfer of children to the Grevillea Unit in the maximum security adult Barwon Prison. We have done this because Barwon is manifestly unfit for children. Grevillea Unit is effectively a maximum security prison within an adult prison. It is a harsh, desolate environment with high concrete walls, covered in razor wire.

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[27] Michael Vita, Review of the Northern Territory Youth Detention System Report (2015), 11.
[28] Ibid at 12-14
[29] Office of the Inspector of Custodial Services, Directed Review into an Incident at Banksia Hill Detention Centre, above n 26, 77

Sending children to Barwon Prison creates unacceptable risks to the children and also to staff. The incredibly harsh conditions and treatment combined with the inability to deliver proper education and programs undermine community safety by damaging the rehabilitation prospects of the children held there.

Court rules that using Barwon Prison was unlawful

The first proceeding we brought with the Victorian Aboriginal Legal Service was settled with the Government agreeing to remove Aboriginal boys from Barwon and not transfer any Aboriginal boys there without a best interests assessment from the Commissioner for Aboriginal Children and Young People.

The second proceeding we brought with Fitzroy Legal Service resulted in the Supreme Court ruling on 22 December 2016, that the Victorian Government acted unlawfully in establishing a youth justice facility in a unit at Barwon Prison. [30]

The Supreme Court documented evidence of appalling conditions at Barwon including:

- extreme solitary confinement;
- threats by staff, including threats of using tear gas;
- the use of the Security and Emergency Services Group of Corrections Victoria (SESG – the adult prison response team) inside the unit and German Shepherd dogs;
- little or no time outdoors for several days;
- boys were asked to sign a form on arrival that said "if you attempt to escape or escape you will be apprehended by SESG using dogs, OC spray, tear gas and firearms."[31]
- requiring children be handcuffed to access the exercise yard;
- increased risks of self-harm and fire;
- denial of proper schooling and programs; and
- denial of family visits.

The Supreme Court ruled that the government acted unlawfully by failing to properly consider the children's human rights and other important issues around the children's wellbeing. Justice Garde commented that "the Department and the Minister were flying blind as to the real situation and suitability of the Grevillea unit".[32]

Justice Garde found that Charter rights to protection from cruel, inhuman or degrading treatment, the protection of children in their best interests, and humane treatment in detention, were engaged.

The Government appealed the Supreme Court ruling. On 29 December 2016, the Victorian Court of Appeal confirmed that the Government had acted unlawfully.[33]

Conditions have worsened at Barwon

In late December there were only around 12 boys held at Barwon. Instead of transferring them back to a normal, lawful, safe and age-appropriate youth justice centre, the Victorian Government responded

[30] Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children [2016] VSC 796 (21 December 2016).
[31] Ibid, form in the schedule.
[32] Ibid [277].
[33] Minister for Families and Children v Certain Children by their Litigation Guardian Sister Marie Brigid Arthur [2016] VSCA 343 (29 December 2016).

to the court rulings by making a new decision to try and set up a youth jail at Barwon. It started sending more children there.

Conditions at Barwon have deteriorated significantly since January 2017. Problems include:

- continued use of solitary confinement;
- children being denied access to outdoors;
- use of lockdowns due to staff shortages;
- the use of isolation as punishment;
- assaults by staff members on detained boys including systematic assaults by SESG;
- inappropriate use of capsicum spray by adult prison guards;
- the failure to transfer one 16 year old after serious concerns were raised about his safety, leading to an assault on him by other boys and injuries including a fractured vertebrae requiring hospitalisation;
- children still being handcuffed to access the exercise yard;
- some boys being handcuffed for the entire time they are out of their cell;
- further self harm incidents and inadequate mental health care;
- continued denial of proper education to mandatory school age children due to inadequate facilities and the inability to register the unit as a school site.

Two Supreme Court judges, in separate bail cases, commented on the situation at Barwon Prison. Justice Elliott said:

> The overwhelming impression given from the building and its surrounds is that Barwon Children's Remand Centre is an adult prison and not a centre for holding young people on remand…it is difficult to envisage that, whatever measures are taken with respect to programs and other resources that might be made available to the residents, this distinct impression will materially change.[34]

In an unrelated application for bail, Justice Lasry expressed similar concerns as to the conditions and treatment of a 16 year old boy at Barwon. In considering recent assaults upon the youth, the most recent resulting in a fractured neck, his Honour stated,

> The idea that a 16-year-old child could be accommodated in a high security adult prison, where he could be attacked in the way that he was, appals me.'

His Honour also made strong comments about the youth justice system on, saying that sending more children to custody was not "breaking the cycle" of reoffending.[35]

Government should stop using Barwon as a youth justice facility

Mistreatment in jails makes reoffending more likely on release. All the boys held at Barwon will eventually be released into the community. Youth justice centres need to provide pathways away from crime so that they can reach their potential. The way to do this is through education and rehabilitation programs. All of boys we have spoken to at Barwon want proper education. At Parkville and Malmsbury they were getting credit towards their VCE or equivalent school qualification. Some were getting their white card for construction work, others were engaged in landscaping, carpentry and much more. None of this is possible at Barwon.

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[34] Application for bail by HL (No 2) [2017] VSC 1 (6 January 2017), 27 [114].
[35] Jane Lee, The Age, Judge 'appalled' by attack on teen inmate, says adult jail no place for children.

The Victorian Government should immediately end the use of Barwon Prison as a youth justice facility and transfer the boys held there to lawful, humane and age-appropriate youth justice facilities.

Improving conditions in youth justice centres

Our work with clients detained at Barwon, Parkville and Malmsbury has highlighted a number of specific human rights problems concerning both law and practice.

Restraints

International human rights law strictly limits the use of restraints on children

Restraints such as handcuffs or flexicuffs should only be used as a last resort, in very limited circumstances, including to prevent escape or injury, and with appropriate supervision and authorisation.[36] They should not be used as a method of discipline.[37]

In applying this principle specifically to young people, the Special Rapporteur on Torture has stated that restraints or force may be used only when a young person poses an imminent threat of injury to herself, himself or others, when all other means of control have been exhausted and for as limited a period as possible.[38]

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules) state that:

> Instruments of restraint and force can only be used in exceptional cases, where all other control methods have been exhausted and failed, and only as explicitly authorised and specified by law and regulation. They should not cause humiliation or degradation, and should be used restrictively and only for the shortest possible period of time.[39]

States should systematically and regularly collect and publish disaggregated data on the use of restraints and other restrictive interventions on young people.[40]

Victorian legislation is deficient

There is no clear legislative provision regarding who is authorised to apply restraints, in what circumstances, and what type of restraining devices are approved for use on children and young people. It is our understanding that this information is only contained in internal policies.

The recent Australian Children's Commissions and Guardians report, which had access to Victorian policies, stated that:

> Victorian practice…dictates that handcuffs are only to be used in situations where there is an immediate and serious threat to safety or security and can only be used by staff specifically trained in their use. Further, they are to be used for the shortest conceivable time and removed at the earliest point possible.[41]

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[36] United Nations Standard Minimum Rules for the Treatment of Prisoners ('*Mandela Rules*') UN Doc E/CN.15/2015/L.6/Rev.1, rules 47(2) and 48.
[37] United Nations Standard Minimum Rules for the Treatment of Prisoners ('*Mandela Rules*') UN Doc E/CN.15/2015/L.6/Rev.1, rule 43. For commentary, see also Committee on the Rights of the Child, *Concluding observations of the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland*, UN Doc CRC/C/GBR/CO/5 (12 July 2016).
[38] Juan E. Mendez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/28/68 (5 March 2015), para 86(f).
[39] United Nations Rules for the Protection of Juveniles Deprived of their Liberty ('*Havana* Rules') UN Doc A/RES/45/113 (14 December 1990), para 64.
[40] See eg Committee on the Rights of the Child, *Concluding observations of the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland*, UN Doc CRC/C/GBR/CO/5 (12 July 2016).
[41] Australian Children's Commissions and Guardians, Human rights standards in youth detention facilities in Australia: the use of restraint, disciplinary regimes and other specified practices, April 2016, 38.

Adult prison legislation and regulations contain better safeguards against overuse and abuse of restraints than legislation applying to youth justice centres.[42]

The Charter prohibits cruel, inhuman and degrading treatment and guarantees humane treatment in detention.

Proper safeguards should be introduced

Using restraints on children can have serious implications for their health and wellbeing. It can 're-traumatise', compound or exacerbate the experiences of these vulnerable children.[43] It can also escalate tensions and risk to both the children and staff. Evidence from Barwon shows that handcuffs are being used in an extremely harsh manner – whenever children access the exercise yard and for some children, whenever they are outside of their cells.

Victoria should introduce clear legislation governing the use of restraints on children. It should stipulate that restraints must only be used in exceptional circumstances, for example, in circumstances of imminent and serious risk of harm to self or others where all other less restrictive methods have been exhausted or failed. Restraints should never be used for routine or disciplinary purposes.

Further any use of restraints must be recorded in a register that is made public to ensure transparency and accountability.

Solitary confinement

Solitary confinement of children is prohibited under international law

The United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) define 'solitary confinement' as the confinement of prisoners for 22 hours or more a day without meaningful human contact.[44]

The Mandela Rules strictly prohibit solitary confinement of children.[45] This is because the isolation inherent in solitary confinement can have severe, long-term and irreversible effects on a child's psychology and physiology, as was recently articulated by the UN Special Rapporteur on Torture.[46] Negative health effects include insomnia, confusion, compounded trauma, hallucinations and psychosis.[47]

States should regularly inspect the use of segregation and isolation in youth detention facilities to ensure that it does not amount to solitary confinement.[48]

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[42] See for example *Corrections Regulations 2009*, regs 13-15.

[43] Australian Children's Commissions and Guardians, Human rights standards in youth detention facilities in Australia: the use of restraint, disciplinary regimes and other specified practices, above n 41, 39.

[44] United Nations Standard Minimum Rules for the Treatment of Prisoners ('*Mandela Rules*') UN Doc E/CN.15/2015/L.6/Rev.1, rule 44.

[45] Mandela Rules rule 45(2) and Havana Rules, para 67. See also Committee on the Rights of the Child, *General comment no. 10*, UN Doc CRC/C/GC/10 (25 April 2007); Juan E. Mendez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/28/68 (5 March 2015), para 86(f).

[46] Juan E. Mendez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/22/53 (1 February 2013).

[47] 'The Istanbul Statement on the use and effects of solitary confinement' (9 December 2007) *International Psychological Trauma Symposium, Istanbul*. The US has recently banned the use of solitary confinement for juvenile offenders in the federal prison system, noting the potential long-term psychological and developmental damage it can cause. See further https://www.washingtonpost.com/politics/obama-bans-solitary-confinement-for-juveniles-in-federal-prisons/2016/01/25/056e14b2-c3a2-11e5-9693-933a4d31bcc8_story.html?utm_term=.ff043fdb70f9.

[48] See eg, Committee on the Rights of the Child, *Concluding observations of the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland*, UN Doc CRC/C/GBR/CO/5 (12 July 2016).

Victorian legislation is deficient

The use of isolation as a punishment for a child or young person is expressly prohibited by s 487 of the CYFA. The Charter also prohibits cruel, inhuman and degrading treatment and guarantees humane treatment in detention.

Section 488 of the CYFA permits the isolation of a child or young person to prevent that person from harming themselves or others, damaging property, trying to escape or in the interests of the security of the centre.

What is meant by 'isolation', including the maximum period of isolation, is not defined. There is no prohibition in the CYFA on solitary confinement.

In addition, what can and does occur in practice may vary considerably given the breadth of s 488. On any given day, certain situations or incidents may result in the isolation of a child – for example because of staffing issues, staff changeovers, behavioural management plans or 'time outs'. Each results in the involuntary placement of a child in a room from which they are not able to leave or have contact with others.

Proper safeguards should be introduced

The CFYA is not consistent with international human rights law. Evidence from Barwon shows serious and ongoing breaches of international law - children are routinely being held in solitary confinement for days on end.

The CYFA should be amended to strictly prohibit the solitary confinement of children.

The CYFA should also be amended to introduce improved safeguards around the use of isolation. In particular, as recommended by the Australian Children's Commissions and Guardians, the use of isolation must consider the individual circumstances of the affected child and should not be used in any form on children with known psychosocial issues, indicators of self-harm, mental illness or other related vulnerabilities.[49]

Youth justice policies around the use of isolation should also be made public.

Evidence from Barwon also reveals the use of isolation as punishment under a reward and penalty system where children on the lowest level are locked alone in their cells, separated from the normal routine of the unit, for around three additional hours each day. This practice should be immediately stopped.

Strip searching

International law prohibits routine strip searches of children

Strip searches are humiliating and degrading and can be traumatising, particularly for children and young people who have experienced physical and sexual abuse.[50] The Mandela Rules state that strip searches should be undertaken only if absolutely necessary and that appropriate alternatives should be used wherever possible.[51] The Special Rapporteur on Torture states that strip searches should only be performed where there is reasonable suspicion and that routine strip searches should be abolished.[52]

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[49] Australian Children's Commissioners and Guardians, *Human rights standards in youth detention facilities in Australia: the use of restraints, disciplinary regimes and other specified practices*, April 2016 at 63.
[50] Ibid at 39.
[51] Mandela Rules rule 52.
[52] Juan E. Mendez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/28/68 (5 March 2015), para 86(f).

Victorian legislation is deficient

Section 488AC of the CYFA permits strip searches where the officer in charge believes it is necessary 'in the interests of the security or good order' of the centre or it is 'in the interests of the safety or security of the detainee or any other person' in the centre.

It does not require that there must be reasonable grounds for the search and does not require that other less intrusive search methods must be exhausted before conducting the strip search. It does not prohibit random strip searches (for example on a random sample of detained children). It does not prohibit routine strip searches (for example, a requirement that children be stripped whenever they enter a youth justice centre or before and after contact visits).

Adult prison legislation and regulations, while still deficient, contain better safeguards against overuse and abuse of strip searches than legislation applying to youth justice centres.[53]

The Charter has a general prohibition against cruel, inhuman and degrading treatment and guarantees humane treatment in detention and privacy.

Introducing proper safeguards

The CYFA should be amended to prohibit random and routine strip searches. Strip searches should only be permitted where there is reasonable grounds for believing the children or young person is concealing dangerous contraband and where other less intrusive means have been exhausted.[54]

Alternative approaches to detention

Reducing the remand population

The government needs to address, as a priority, the issues leading to extremely high numbers of young people being held on remand, that is detained waiting their trial or sentence. It is a concerning trend that on any given day around 63% of children in detention are unsentenced – a majority are not serving a sentence of detention as a result of a finding of guilt.[55] The dynamic created by a high remand population in youth justice centres is one in which many children spend short periods of time in pre-trial detention, which means limited access to rehabilitation and support programs, before often being released into the community at the finalisation of court proceedings.[56] High remand rates in youth justice centres make management of centres more difficult as children on remand tend to be less settled and stable, particularly given the stresses of impending court hearings.

Jesuit Social Services has undertaken significant research into many of the issues the Committee is to address as part of this inquiry. Its report, *Thinking Outside: Alternatives to Remand for Children,* provides an overview of current initiatives and offer guidance on alternatives to the present youth remand crisis. The HRLC commends this report and the prioritisation of funding towards a holistic approach to youth offending, founded on prevention, early intervention and diversion.

Tackling the underlying causes of offending

Preventing youth offending requires the government to focus its energy and resources on tackling the issues that lead young people to commit crime in the first place - childhood neglect and abuse, involvement in child protection, disengagement from school, mental health problems and substance abuse. Investing in addressing these issues will prevent crime.

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[53] See *Corrections Regulations 2009* regs 69-70
[54] See for example section 113(a) of the *Corrections Management Act 2007* (ACT).
[55] Australian Institute of Health and Welfare, Youth Justice Fact Sheet no. 67, Young people in unsentenced detention in Australia in 2014-15; http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129556320.
[56] Ibid.

There is a place for custody but that must always be used as a last resort, with the end goal being rehabilitation and successful reintegration into the community as a contributing citizen.

Mandate cautions, warnings, diversionary and alternative actions

The Convention on the Rights of the Child requires that alternatives to detention, such as care, guidance and supervision orders, counselling; probation, education and vocational training programmes be considered before detention, or other alternatives that ensure that children are dealt with in a manner appropriate to their well-being and proportionate to both their circumstances and the offence committed.[57]

Police diversion (warnings and alternative action) can be effective in reducing crime and making a positive difference for children and young people who offend. Research confirms that once a child enters the formal criminal justice system, they are more likely to return, more so if they are detained.[58] Approaches that operate outside the formal youth court system appear most effective.[59]

The Northern Territory Government has just announced a commitment of additional funding in excess of $18 million per annum to fund diversionary programs and support services to assist at risk children.[60] The Chief Minister described the investment in diversion as 'the first big step to fixing' the Territory's broken youth justice system.[61]

New Zealand has for some decades had a system that prioritises diversion. From the outset, it seeks to divert children and young people away from the formal criminal justice system. This approach was reinforced through the *Children, Young Persons and Their Families Act 1989*. The Act ushered in a 'new paradigm of re-integration, restorativeness, diversion and family empowerment'.[62] Enacted amid significant concerns about court-centred, formalised and institutional responses to youth offending, which disempowered young people, their families and the community, the Act was truly a pioneering paradigm.

The twin, and equal, principles place an emphasis on accountability but also responses which address the needs of the young person and the causes of offending. Around 80% of young people in New Zealand who offend are not charged or brought before the courts, instead they are dealt with by police diversion in the community. Through police diversion they are dealt with by prompt, community-based alternative intervention.[63] The statistics speak for themselves in terms of the marked reduction in police apprehension, charging, and court appearances as well as reduction in youth crime rates.[64]

Recognising that for some young people diversion is inappropriate, there is a secondary focus on Family Group Conferencing, applicable to young people police intend to charge or who are before the

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[57] Article 40(3)(b), (4).

[58] Sentencing Advisory Council, Reoffending by Children and Young People in Victoria, (2016), 4, 52.

[59] Kaye McLaren, Alternative Actions That Work: A Review of the Research on Police Warnings and Alternative Action (2011) Police Youth Services Group, New Zealand Police. Note that this report provides a review of research into NZ police warnings and diversionary practices but also international models. It identifies 23 effectiveness principles, starting with overarching principles, followed by principles that relate to the various stages of the youth diversion process. These effectiveness principles have then been distilled into 11 key findings that are outlined in the report.

[60] http://www.newsroom.nt.gov.au/mediaRelease/22812.

[61] Ibid.

[62] Nessa Lynch, 'Playing Catch Up? Recent Reform of New Zealand's Youth Justice System', Criminology and Criminal Justice *(*9 January 2012)

[63] Judge Andrew Beacroft, 'Playing to Win- Youth Offenders Out of Court (And Sometimes In): Restorative Practices in the New Zealand Youth Justice System at https://www.youthcourt.govt.nz/assets/Documents/Publications/Youth-Court-playing-to-win-youth-offenders-out-of-court.pdf.

[64] Ibid and Ministry of Justice, Trends in Child and Youth Prosecutions at https://www.justice.govt.nz/assets/Documents/Publications/trends-in-child-and-youth-prosecution-june-2016.pdf.

Youth Court to be dealt with. It places families, victims and the community at the heart of the decision making process and reflects a restorative approach to youth offending.

Through the conference process, a holistic plan is agreed upon to hold the young person accountable for their offending, in addition to addressing the underlying causal factors. The primary goal is to ensure sentences are rehabilitative, wraparound, and are community-based. Custody is an absolute last resort.[65] In mandating the Family Group Conference and supporting the implementation of the plan, the Youth Court effectively adopts a therapeutic, multi-disciplinary approach. The result has been a marked reduction in court numbers, the closure of government youth residences and prisons and the stabilisation of youth offending rates.

It is a hallmark of the success of this scheme that youth are actively involved in discussions about their offending and in decision making. Victims are involved at all stages and family and community are central. Further the Act seeks to make the court system more culturally appropriate and flexible and offers greater scope for processes to better reflect the "needs, values and beliefs of particular cultural and ethnic groups" by giving decision-making primacy to family or kinship groups.[66]

In light of the success of New Zealand's focus on early intervention, diversion and re-integration, it is recommended that the CFYA be amended to include a legislative framework for diversion that imposes a presumption in favour of diversion and that the Government invest in ensuring that a flexible range of diversion and alternative options are available for police and the courts.

Independent oversight

Independent oversight of detention facilities is integral to preventing mistreatment of detainees and ensuring accountability, including in relation to the use of restraints, solitary confinement and strip searching.

The Optional Protocol to the Convention against Torture (OPCAT) is an international treaty that establishes a system of independent inspections of detention facilities by national and international monitoring bodies. Australia signed OPCAT in 2009 but only recently committed to its ratification and implementation by December 2017.

OPCAT requires Australia (including its states and territories) to ensure a system of independent inspections via a national preventative mechanism, which in Australia is likely to be coordinated by the Commonwealth Ombudsman working with state and territory bodies. Under OPCAT, the mechanism must have a proper mandate, expertise, resources, access, privileges and immunities, dialogue with authorities regarding recommendations and the power to submit proposals and observations.

Currently, there are a number of independent oversight mechanisms within Victoria relevant to youth justice centres including the Children's Commissioner, Aboriginal Children's Commissioner, Victorian Equal Opportunity and Human Rights Commission and the Victorian Ombudsman. Each assist in protecting human rights in different ways through investigations, reporting and complaint-handling but each has limitations, including in relation to free access to centres, access to information, mandate and capacity.[67] The Victorian Government should proactively address these limitations as part of engaging with OPCAT to ensure best practice oversight of youth justice centres.

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[65] Judge Andrew Beacroft, 'Playing to Win- Youth Offenders Out of Court (And Sometimes In): Restorative Practices in the New Zealand Youth Justice System, 1.
[66] CYPFA, s 4(a).
[67] Commission for Children and Young People, Submission to the National Children's Commissioner's Review of the Optional Protocol to the Convention against Torture in the context of Youth Justice Detention Centres (2016)

Age of Criminal Responsibility

International obligations and Victorian law

The Committee on the Rights of the Child (CRC) concluded that 12 is the lowest internationally accepted minimum age of criminal responsibility.[68]

In Victoria, like other Australian states and territories, the age of criminal responsibility is 10, subject to the *doli incapax* principle – which assumes that children aged 10 to less than 14 years are 'criminally incapable' unless proven otherwise.[69]

In Australia the principle of *doli incapax* 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. This situation has drawn criticism from the CRC.[70]

Inconsistencies and reform

Australia is now out of step with comparative jurisdictions such as Canada, where the age of criminal responsibility is 12 years, and New Zealand, where the age is staggered depending on the severity of the crime, but is 13 years for the majority of criminal offences.

Increasing the age of criminal responsibility is consistent with Australia's human rights law obligations; and is also consistent with evidence showing that the brain development of children under 12 is not sufficiently progressed to enable them to have the necessary skills for full criminal responsibility.[71]

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 children are over-represented.[72] This inequality is significant given evidence shows that early involvement in the criminal justice system results in likely entrenchment.[73]

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.[74] In other words, severe vulnerability stemming from exposure to violence, drug and alcohol misuse, neglect, homelessness and lack of education are common in young children who offend.

The complex needs of this vulnerable group of children and young people should be addressed through developmentally appropriate early intervention and prevention programs, rather than through criminal justice intervention.

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[68] United Nations, Convention on the Rights of the Child 2007, 'General Comment No.10: Children's rights in juvenile justice', Committee on the Rights of the Child, 44th Session, No. CRC/C/GC/10. p.11, see also, Juan E. Mendez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/28/68 (5 March 2015), para 85(g).
[69] *Children, Youth and Families Act (Vic) 2005, s 344*.
[70] Committee on the Rights of the Child, *Concluding observations of the Committee on Rights of the Child: Australia*, UN Doc CRC/C/15/Add.79 (1997).
[71] Jesuit Social Services, Too much too Young: Raise the age of criminal responsibility to 12, October 2015, 5.
[72] Ibid, 4.
[73] Ibid.
[74] Jesuit Social Services, Too much too Young: Raise the age of criminal responsibility to 12, October 2015, 3.