



COMMISSION FOR CHILDREN  
AND YOUNG PEOPLE

CCYPD/17/6500

## **Submission to consultation on the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) in Australia**

**July 2017**

The Victorian Commission for Children and Young People (the Commission) welcomes the opportunity to contribute to the Australian Human Rights Commission's consultations about the implementation of OPCAT in Australia. We note that this part of the consultation process is focusing on key issues that should be resolved before OPCAT is ratified in December 2017.

The Commission is an independent statutory body that promotes improvement in policies and practices affecting the safety and wellbeing of Victorian children and young people.<sup>1</sup> Our focus is on vulnerable children and young people, and this is defined to include children and young people in the child protection and youth justice systems.<sup>2</sup> Given this focus, the Commission's submission concentrates on the implementation of OPCAT with respect to children and young people in detention.

The Commission strongly supports the Australian Government's decision to ratify OPCAT. Ratification of OPCAT, and the establishment of a National Preventative Mechanism (NPM), should help to prevent and address the ill treatment of children in detention. It should also promote the best interests and human rights of children in detention, strengthen the accountability of those who provide services to children in detention, and encourage innovation and best practice through enhanced and more consistent monitoring of children in detention and other closed environments.

The Commission considers it important that the agency or individuals responsible for monitoring facilities in which children and young people are detained take a specialist approach. Whenever children and young people are detained there is the risk that their needs will be conflated with the needs of adults. The Commission has recently observed that the youth justice system in Victoria is making significant departures from the separate and specialist approach that is needed to address children's needs.<sup>3</sup> In this context, it is even more important that the NPM for children in detention has the expertise to understand the particular risks that are faced by children and young people in detention. It is also crucial that the NPM has the skills to engage effectively with children and young people, and particularly vulnerable children and young people.

<sup>1</sup> *Commission for Children and Young People Act 2012 (Vic)*, s. 7(a)

<sup>2</sup> *Commission for Children and Young People Act 2012 (Vic)*, s. 5(a)-(c)

<sup>3</sup> Commission for Children and Young People, *Let's stick to the fundamentals in child and youth crime: Protecting and strengthening a specialised and effective criminal justice response to children and young people*, available at <https://ccyp.vic.gov.au/news/lets-stick-to-the-fundamentals-in-child-and-youth-crime/>

The Commission notes that the consultation paper invites input on issues relevant to OPCAT that do not arise directly in the consultation questions. In this context, this submission proposes that the Commission is well placed to function as the NPM for certain places where children and young people are deprived of their liberty in Victoria, namely youth justice centres, secure welfare services, police custody, and offender transport. If the Commission is not used as an NPM, the Commission should be engaged to provide advice and support to the NPM identified for these places of detention.

The Commission acknowledges that there are other places where children and young people are detained in Victoria, such as adult prisons,<sup>4</sup> mental health services,<sup>5</sup> disability services<sup>6</sup> and immigration detention centres.<sup>7</sup> In these contexts, the Commission acknowledges that there may be other entities who are better positioned to function as the NPM. The Commission could offer support and advice to these NPMs.

The inclusion of Children's Commissioners in the NPMs in other jurisdictions provides a good example of how specialist expertise can be brought to the implementation of OPCAT. The NPM in the United Kingdom (England and Wales) includes the Children's Commissioner for England, who chairs a Children and Young People's sub-group to support the wider NPM with specialist advice, information and recommendations. The Office for the Children's Commissioner in New Zealand is the designated NPM for youth justice residences, care and protection residences, and, alongside an Inspector from the Office of the Ombudsman, Mother and Baby Units in prisons.

The Commission notes that "it is vital that States Parties employ a transparent, inclusive and comprehensive decision-making process to determine the most appropriate form for the NPM or NPM system to take."<sup>8</sup> The Commission urges the Australian Government to consult widely with civil society about how Australia's NPM should be formed.

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<sup>4</sup> Prisons are governed by the *Corrections Act 1986* (Vic) and managed by Corrections Victoria within the Department of Justice and Regulation. The Justice Assurance and Review Office, also within the Department of Justice and Regulation, is mandated to provide oversight and advice on the operations, conduct and performance of Victoria's adult corrections system, including prisons and prisoner transport services.

<sup>5</sup> Mental health services in Victoria are governed by the *Mental Health Act 2014* (Vic). Part 9 of this Act establishes community visitors. The powers and functions of the community visitors include visiting premises to inquire into the adequacy of services and facilities provided to persons receiving mental health services including the adequacy of the accommodation and opportunities to participate in recreation, occupation, education, training and recovery. Their functions also include assisting persons receiving mental health services to resolve issues, seek support, and make complaints. Part 10 of this Act establishes the Mental Health Complaints Commissioner to receive, manage and investigate complaints relating to mental health service providers.

<sup>6</sup> Disability services in Victoria are governed by the *Disability Act 2006* (Vic). Division 6 of Part 3 of this Act establishes community visitors. The powers and functions of the community visitors include visiting premises to inquire the appropriateness and standard of premises for the accommodation of residents, the adequacy of opportunities, any case of suspected abuse or neglect, and the use of restrictive interventions and compulsory treatment. Division 3 of Part 3 of this Act establishes the Disability Services Commissioner who is responsible for investigating complaints about disability services.

<sup>7</sup> *Migration Act 1958* (Cth), s. 273

<sup>8</sup> Association for the Prevention of Torture and InterAmerican Institute for Human Rights, (2010) *Optional Protocol to the UN Convention against Torture Implementation Manual* (revised edition), 87.

## **Responses to questions for discussion**

The Commission has responded to questions 1, 3, 4 and 5.

### **1. What is your experience of the inspection framework for places of detention in the state and territory where you are based, or in relation to places of detention the Australian government is responsible for?**

**Stakeholders may wish to comment on issues such as:**

- **whether there are any crucial gaps or overlap in the inspection framework**
- **the staffing or relevant professional expertise you consider important for inspections, such as the need for mental health professionals to be included on visiting teams**
- **significant legislative, regulatory or policy changes that would be required for a relevant inspection body for it to be OPCAT compliant.**

The Commission provides specialist oversight of places of youth justice detention and secure welfare services in Victoria. Consistent with our legislative functions, the Commission undertakes a range of activities relating to children in detention, including:

- coordinating the Independent Visitor Program in youth justice centres
- undertaking inquiries that examine services provided to children in youth justice detention and secure welfare services
- conducting staff visits to youth justice centres
- conducting staff visits to secure welfare services
- reviewing incident reports about significant adverse events that relate to children in youth justice detention and secure welfare services
- monitoring any decisions to transfer children in youth justice detention to adult prisons
- conducting child death inquiries
- administering the Child Safe Standards scheme<sup>9</sup>
- administering and overseeing compliance with the Reportable Conduct Scheme.<sup>10</sup>

These activities, described in more detail below, provide a sound framework for independent monitoring of youth justice and secure welfare services.

The Commission has developed the necessary expertise to function as part of the NPM.<sup>11</sup> This includes specialist knowledge of how to engage with children and young

<sup>9</sup> *Child Wellbeing and Safety Act 2005* (Vic), Part 6. The Child Safe Standards aim to promote child safety, prevent child abuse, and ensure that allegations of child abuse are properly responded to. The Child Safe Standards apply to all entities outlined in Schedules 1 -2 of the Act.

<sup>10</sup> *Child Wellbeing and Safety Act 2005* (Vic), Part 5A. The Reportable Conduct Scheme aims to improve the ability of entities to identify reportable conduct, to report reportable allegations to the Commission and other relevant authorities, to properly investigate reportable allegations, and to protect children from reportable conduct that may occur in certain entities. The Reportable Conduct Scheme will eventually apply to all entities outlined in Schedules 3-5 of the Act.

<sup>11</sup> OPCAT states that "States Parties shall take the necessary measures to ensure that the experts of the national preventive mechanism have the required capabilities and professional knowledge." OPCAT, Article 18(2)

people, their rights, needs and experiences, and the other systems they may be involved with.

To be effective, inspections of places where children and young people are deprived of their liberty must be performed by people with deep understanding that most children and young people involved in these services will have experienced complex trauma,<sup>12</sup> and how specific elements of the deprivation of liberty can compound rather than remedy trauma. The Commission also recognises that experiences of trauma are likely to shape and limit the way children and young people will engage with adults and professionals. This includes an awareness of the importance of allowing time to develop relationships and trust with children and young people, a recognition that children and young people will be less likely than adults to raise concerns, and an understanding of the importance of responding to concerns that may appear minor to adults but are important to the child. NPM staff must also have the skills to effectively engage with these children and young people without exacerbating the effects of trauma.

Those conducting inspections must be familiar with the particular protections afforded to children by the Convention on the Rights of the Child, including that children deprived of their liberty are entitled to be treated with humanity and respect for their dignity, as well as in a manner that takes into account their age.<sup>13</sup> In addition, inspections must be conducted by a body that recognises that children and young people may experience treatment or punishment as cruel, inhuman or degrading where an adult would not.

In Victoria, the NPM should also have a sound knowledge of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). This Act sets out a number of human rights that need to be promoted and protected in Victoria. These rights include protection from torture and cruel, inhuman and degrading treatment,<sup>14</sup> humane treatment when deprived of liberty,<sup>15</sup> and children who have been convicted of an offence being treated in a way that is appropriate for their age.<sup>16</sup> The Act also imposes a legal obligation on all public authorities to act in a way that is compatible with these human rights.<sup>17</sup>

The NPM should also understand the equal opportunity and anti-discrimination legislation that applies in youth justice and secure welfare services. In Victoria, this includes the *Equal Opportunity Act 2010* (Vic) as well as relevant Commonwealth legislation.

The majority of children and young people in youth justice centres have a history of contact with the child protection system.<sup>18</sup> Given the intersection between child protection and youth justice services, the NPM should have a good understanding of the jurisdiction's child protection system and the role it should play in a child's case

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<sup>12</sup> In 2016, the Youth Parole Board published the results of a snapshot survey of young people on remand and sentence in youth justice centres and noted that 63 per cent were victims of abuse, trauma or neglect. Youth Parole Board, *Annual Report 2015-16*, 14.

<sup>13</sup> Convention on the Rights of the Child, art 37.

<sup>14</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s. 10

<sup>15</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s. 22(1)

<sup>16</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s. 23(3)

<sup>17</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s. 38

<sup>18</sup> In 2016, the Youth Parole Board published the results of a snapshot survey of young people on remand and sentence in youth justice centres and noted that 45 per cent had been subject to a previous child protection order and 19 per cent were subject to a current child protection order. Youth Parole Board, *Annual Report 2015-16*, 14.

management and care. The Commission's legislated role to monitor and oversee child protection services in Victoria means that the Commission has unique insight and knowledge of these services.

However, for the Commission to be used as an OPCAT compliant NPM, a number of additional powers would be required:

- An explicit right of access to places of detention for children and young people.<sup>19</sup> The Commission does not have a legislated right of entry to any places of detention, including youth justice or secure welfare services. Currently the Commission's visits to youth justice and secure welfare services are facilitated by the Department of Justice and Regulation (DJR) and the Department of Health and Human Services (DHHS).<sup>20</sup>
- A right to interview children and young people in private.<sup>21</sup> The Commission relies on staff at youth justice and secure welfare services to provide a private space for the Commission to interview children and young people.
- A right to interview staff and others who are responsible for providing youth justice and secure welfare services.<sup>22</sup> Currently the Commission has very limited powers to interview staff, and only in the context of administering the Reportable Conduct Scheme.
- A right to be provided with data and information about the way in which places of detention for children and young people are operating.<sup>23</sup> Currently the Commission can only require information and documents in certain circumstances, and only when it is exercising one of its other functions such as conducting inquiries, monitoring compliance with the Child Safe Standards, or administering the Reportable Conduct Scheme.
- The capacity to monitor and inspect all places where children and young people are deprived of their liberty.<sup>24</sup> Currently the Commission only has oversight of youth justice and secure welfare as places where children and young people are deprived of their liberty.

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<sup>19</sup> OPCAT states that States Parties shall grant the national preventive mechanisms "access to all places of detention and their installations and facilities." OPCAT, Article 20(c)

<sup>20</sup> The Victorian Government transferred responsibility for the management of youth justice services from the Department of Health and Human Services to the Department of Justice and Regulation in April 2017. Prior to the transfer, the Commission's visits were supported by the DHHS.

<sup>21</sup> OPCAT states that States Parties shall grant the national preventive mechanisms "the opportunity to have private interviews with the persons deprived of their liberty without witnesses." OPCAT, Article 20(d)

<sup>22</sup> OPCAT states that States Parties shall grant the national preventive mechanisms "the opportunity to have private interviews with...any other person who the national preventive mechanism believes may supply relevant information." OPCAT, Article 20(d)

<sup>23</sup> OPCAT states that States Parties shall grant the national preventive mechanisms "unrestricted access to all information concerning the number of persons deprived of their liberty in places of detention as defined in Article 4, as well as the number of places and their location" and "unrestricted access to all information referring to the treatment of those persons as well as their conditions of detention." OPCAT, Article 20(a)-(b)

<sup>24</sup> OPCAT states that "The national preventive mechanisms shall be granted at a minimum the power...to regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in Article 4, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment." OPCAT, Article 19(a)

To be OPCAT-compliant, the Commission would also need to “strive for a gender balance and the adequate representation of ethnic and minority groups in the country.”<sup>25</sup> The over-representation of Aboriginal and Torres Strait Islander children and young people in Victoria’s youth justice and child protection services makes it imperative that inspections and monitoring be conducted by an agency that employs Aboriginal and Torres Strait Islander staff at all levels, and which otherwise has expertise in the particular experiences of Victoria’s Aboriginal community. The Commission benefits from the depth of knowledge brought by the role of Commissioner for Aboriginal Children and Young People and from a dedicated Koori Advisory and Engagement team. This team should be increased to meet the needs and enhance the Commission’s function as part of the NPM.

The Commission also considers that it may be necessary to recruit staff with expertise in conducting mental health assessments to provide insight into whether children and young people are in a suitable state to engage with inspecting officers.

### Independent visitor program

Since 2012, the Commission has managed the Independent Visitor Program at Parkville Youth Justice Precinct, and from 2013, at the Malmsbury Youth Justice Precinct. Between November 2016 and May 2017 the program was also extended to the Grevillea Unit at Barwon Prison during its operation as a youth justice centre.

The Commission recruits, trains and supports a team of volunteer Independent Visitors to visit young people in youth justice centres on a monthly basis. Through this program the Commission hears the voice of children and young people in custody, supports them to have their issues, including any mistreatment, addressed and finds ways to improve their experience of being in custody.

Independent Visitors also conduct exit interviews with young people to give them the opportunity to provide anonymous feedback about their experiences of custody, including how they were treated and the programs and services they received. The Independent Visitor Program has two Aboriginal independent visitors who specifically visit Aboriginal and Torres Strait Islander children and young people and undertake exit interviews.

The Independent Visitors adopt a child centred approach for engaging with children and young people, and all matters raised are followed up and outcomes fed back to the young people as soon as practicable.

The information is also used to inform the Commission of children’s experiences in youth justice centres, including decisions about whether particular systemic inquiries are warranted.

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<sup>25</sup> OPCAT, Article 18(2)

### Staff visits to youth justice centres

Commission staff regularly visit youth justice centres alongside the Independent Visitors, or for separate purposes.

At times this will involve a Commissioner or a Commission staff member making a direct visit to a child or young person, usually at the child's request or in response to concerns raised by a family member. Commission staff will also visit youth justice centres to determine that a recommended improvement has been fulfilled, or as part of fulfilling its Inquiry function (discussed in more detail below).

Between November 2016 and May 2017, Commission staff visited the Grevillea Unit at Barwon Prison during its operation as a youth justice centre. These visits occurred at least once and usually twice per week, and allowed the Commission to monitor the safety and wellbeing of children placed in the Grevillea Unit. Many of the concerns that the Commission raised with both the Department of Health and Human Services and the Minister for Families and Children can be viewed in the Victorian Ombudsman's *Report on Youth justice facilities at the Grevillea unit of Barwon Prison, Malmsbury and Parkville*.<sup>26</sup>

### Staff visits to secure welfare services

Secure welfare services placements are available for child protection clients (10 to 17 years) who are at substantial and immediate risk of harm. The service is considered an option of last resort, where containment is deemed necessary, and when the broader protection and care network cannot manage or reduce the risks to the child. Placement at secure welfare services is the most extreme form of protective intervention. In Victoria there are two ten-bed, gender specific units that are staffed on a rostered 24 hour 'stand up' model.

In 2016-17, Commission staff visited secure welfare services monthly. Visitors engaged with children and young people, seeking their views about the care they were receiving, and the environment and services delivered to them.

### Review of incident reports regarding significant adverse events

In March 2016, amendments to the *Commission for Children and Young People Act 2012* (Vic) (CCYP Act) came into effect that require the Secretary to the Department of Health and Human Services to "disclose to the Commission any information about an adverse event relating to a child in out of home care or a person detained in a youth justice centre or a youth residential centre if the information is relevant to the Commission's functions."<sup>27</sup>

The Commission and the Department of Health and Human Services have a memorandum of understanding that outlines the process for receiving notification of

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<sup>26</sup> Victorian Ombudsman, *Report on youth justice facilities at the Grevillea unit of Barwon Prison, Malmsbury and Parkville*, February 2017, available at <https://www.ombudsman.vic.gov.au/getattachment/c6880f35-3cf3-4237-b463-9be28db448c8>

<sup>27</sup> Section 60A, *Commission for Children and Young People Act 2012* (Vic).

adverse events and requesting further information if the Commission deems that it is appropriate to do so. The memorandum of understanding clarifies that 'adverse event' will include the following:

- Category One incident reports generated by child protection services (including secure welfare services) and youth justice services.<sup>28</sup> These are allegations of incidents that have resulted or could result in a serious outcome or trauma.
- Category Two incident reports generated by youth justice services that relate to an allegation of misconduct by police.

As of 3 April 2017, the Department of Justice and Regulation has been responsible for youth justice centres and has continued to provide reports about adverse events.<sup>29</sup>

This legislative amendment has greatly increased the Commission's capacity to independently monitor youth justice and secure welfare services. Commission staff review all incident reports received on a daily basis. Where required, the Commission requests the managing department to provide further information about key aspects of the child or young person's safety and wellbeing. This may involve reviewing CCTV footage. In 2016-17 the Commission initiated follow up inquiries regarding approximately one third of adverse events.

#### Transfer of children to adult prison

In Victoria, the *Children, Youth and Families Act 2005* (Vic) allows the Youth Parole Board to direct a person 16 years or older to be detained in, or transferred to, an adult prison.<sup>30</sup> Under current government policy, the Commission must be notified when a 16 or 17 year old is sentenced or transferred to an adult prison. The Commission sits as an observer on the Young Offender Transfer Review Group, which monitors young people who have been, or are likely to be, transferred between a youth justice centre and prison.

#### Child death inquiries

The CCYP Act requires that the Commission conduct an inquiry about a child who has died who was known to child protection within 12 months of their death. Child death inquiries are not initiated due to practice failures, inquiries focus on services provided or omitted to be provided in order to promote learning. Inquiries do not focus on the circumstances of the death.

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<sup>28</sup> The Department of Health and Human Services requires all funded service providers to comply with its client incident management and reporting processes. The most serious incidents relating to children and young people are referred to as Category One.

<sup>29</sup> The Department of Justice and Regulation has continued to provide reports relating to adverse events in youth justice in a way consistent with the memorandum of understanding, pending the development of a new memorandum of understanding about Youth Justice incidents.

<sup>30</sup> *Children, Youth and Families Act 2005* (Vic) s 467, and 473. The Youth Parole Board can only make such a direction if it takes into account the personal circumstances and behaviour of the person, including their age and maturity, and a report from the Secretary: s. 467(2).



## Undertaking individual, group and systemic inquiries

The Commission undertakes inquiries in accordance with Part 5 of the CCYP Act with the objective of promoting continuous improvement and innovation in policies and practices relating to the safety and wellbeing of children and young people.

In May 2017, the Commission tabled *The Same Four Walls, a systemic inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system*.<sup>31</sup> The findings from this inquiry are discussed in more detail below, in response to question 4. In addition, the Commission is currently undertaking an inquiry into allegations of assault made by children and young people detained in a youth justice facility. This inquiry will be finalised later in 2017.<sup>32</sup>

The Commission can also examine the services provided to children while in youth justice detention or placed at a secure welfare service in individual inquiries.

For example, the Commission has conducted an inquiry into the services provided to a dual client of the child protection and youth justice systems who experienced frequent episodes of isolation. The Commission also conducted an inquiry into the treatment of a boy whose limb was broken twice, in two separate restraints.

The Commission monitors the implementation of all inquiry recommendations.

## Regulatory functions

### *Child Safe Standards*

The Commission oversees and enforces organisations' compliance with Victoria's legislated Child Safe Standards.<sup>33</sup> The Standards apply to specified organisations that provide services specifically for children, or who provide facilities specifically for use by children including secure welfare and youth justice services.<sup>34</sup> These seven, legislated standards require the specified organisations to promote the safety of children, to have the right systems, processes and culture to prevent abuse and respond properly to allegations of abuse within the organisation.<sup>35</sup>

### *Reportable Conduct Scheme*

On 1 July 2017, the Commission began administering Victoria's Reportable Conduct Scheme, which applies to a range of organisations, including secure welfare services and youth justice detention facilities. The scheme requires these organisations to report, investigate and respond to allegations of child abuse made against their workers or volunteers. As the regulator, the Commission's role includes being notified of allegations made against workers (and volunteers), supporting organisations as they investigate the

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<sup>31</sup> Victorian Commission for Children and Young People, *The Same Four Walls: Inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system* (May 2017).

<sup>32</sup> This inquiry is being undertaken pursuant to s. 37(1)(b) of the *Commission for Children and Young People Act 2012* (Vic). Inquiries conducted under this section are not tabled in Parliament.

<sup>33</sup> *Child Wellbeing and Safety Act 2005* (Vic), Part 6

<sup>34</sup> *Child Wellbeing and Safety Act 2005* (Vic), ss. 19-23, and Schedules 1-2.

<sup>35</sup> *Child Wellbeing and Safety Act 2005* (Vic), s. 17

allegations and checking the organisations are investigating and responding in a timely and appropriate way.

The addition of these functions is another basis for the Commission's monitoring and inspection of youth justice detention facilities in Victoria.

### 3. What are the most important or urgent issues that should be taken into account by the NPM?

Stakeholders may wish to comment on issues such as:

- **specific places of detention that are of immediate concern**
- **broader systemic issues that the NPM should focus on, such as indefinite detention of people with cognitive disabilities; or**
- **current practices on seclusion and restraint.**

The Commission considers that the NPM should provide coverage of all places where children and young people are deprived of their liberty. However, the Commission acknowledges that the NPM will need to take a staged approach to achieving universal coverage, and that it will be necessary to prioritise some areas for urgent attention.

The Commission considers that initially the NPM should focus on youth justice services, secure welfare services, police custody and police and prisoner transport.

Considering their significant over-representation in each of these areas, the NPM should have particular regard to the experiences of Aboriginal and Torres Strait Islander children and young people in each of these settings.

#### Youth justice services

As the Australian Human Rights Commission would be aware, youth justice centres in most states and territories are under considerable strain. Like most jurisdictions, Victoria's youth justice centres are struggling with growing numbers of children and young people on remand, staffing challenges, poor facilities and underdeveloped approaches to working effectively with children and young people with complex needs. This leads to inadequate care for and responses to children and young people, the misuse of isolation, and a high number of incidents between children, young people and staff. Concerns about inappropriate and over-medication of children and young people are also raised with the Commission.

Within youth justice services, the NPM should have a particular focus on:

- the use of isolation. The Commission's recent report *The same four walls: Inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system* showed that restrictive practices involving isolation, separation and lockdowns were not applied in accordance with relevant legislative and policy requirements. The inquiry revealed many instances where these approaches

could have been avoided if there were adequate levels of staffing, and if the staff had the appropriate tools, support and training to respond to problematic behaviours and vulnerabilities of the children and young people in the centres. These findings suggest that the NPM should consider the use of seclusion as a key priority.

- the use of chemical and mechanical restraints. The use of restraints can re-traumatise already vulnerable children,<sup>36</sup> and can cause physical and psychological harm.<sup>37</sup> A recent Supreme Court of Victoria decision found that the use of extendable batons and oleoresin capsicum (OC) spray unreasonably limited the right of the child to have decisions made in their best interests.<sup>38</sup>
- the use of force. There is no entirely safe way to use force to restrain children and young people in youth justice detention.<sup>39</sup> The use of force has been linked to the deaths of children and young people in custodial settings in jurisdictions outside Victoria.<sup>40</sup> Force, particularly when used inappropriately, can exacerbate, rather than ameliorate challenging behaviour, and can impact on the health and wellbeing of a child or young person. Children and young people in youth justice detention frequently experience the use of force as painful and distressing.

### Secure welfare services

Admission to a secure welfare service is often caused by a significant crisis in a child or young person's life, and is the child protection system's most restrictive option for children at immediate risk of harm. Considering the risks and vulnerabilities for this cohort, the Commission considers that the NPM should have oversight of these services.

### Police custody and transport

There is no independent, child-focussed monitoring and oversight of police custody and offender transport in Victoria. While legislation requires that children may only be held in police custody for two business days,<sup>41</sup> the Commission is aware of circumstances that have led to a child being in police custody for as long as a week. Considering the risks inherent to police cells, particularly for Aboriginal children and young people, the Commission considers this area is in urgent need of scrutiny.

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<sup>36</sup> Guardian for Children and Young People, *Inquiry into the Policy and Practice in the Use of Physical Restraint in South Australian Residential Facilities for Children and Young People* (2009) 7.

<sup>37</sup> Peter Smallridge and Andrew Williamson, *Independent Review of Restraint in Juvenile Secure Settings* (Ministry of Justice, 2008) 5.

<sup>38</sup> *Certain Children v Minister for Families and Children & Ors* (No 2) [2017] VSC 251 (11 May 2017)

<sup>39</sup> HM Inspectorate of Prisons, *Behaviour management and restraint of children in custody: A review of the early implementation of MMPR by HM Inspectorate of Prisons* (London, 2015) 10.

<sup>40</sup> See Guardian for Children and Young People, *Inquiry into the Policy and Practice in the Use of Physical Restraint in South Australian Residential Facilities for Children and Young People* (2009) 6-7 (describing incidents in the United States of America between 2005 and 2008); Peter Smallridge and Andrew Williamson, *Independent Review of Restraint in Juvenile Secure Settings* (London, 2008).

<sup>41</sup> *Children Youth and Families Regulations 2007* (Vic) s. 9(2).

#### 4. How should Australian NPM bodies engage with civil society representatives and existing inspection mechanisms?

Stakeholders may wish to comment on issues such as how:

- best to arrange regular consultation and liaison
- civil society representatives can identify problems in places of detention and how they can work with the NPM process to develop solutions.

It will be essential for the Australian NPM bodies to have effective engagement with civil society representatives in addition to existing inspection mechanisms. One option could be the creation of a Children and Young People's sub-group, such as exists in the United Kingdom, to ensure those with expertise and experience of working with children and young people could support the wider NPM with specialist advice, information and recommendations.

Given the over-representation of Aboriginal and Torres Strait Islander children and young people in places where people are deprived of their liberty, and the Victorian Government's commitment to self-determination, NPM bodies will require particularly good channels of communication with Aboriginal communities and Aboriginal community controlled organisations. One avenue for this could be through regular reports to the Victorian Aboriginal Justice Forum<sup>42</sup> and the Aboriginal Children's Forum.<sup>43</sup> As a member of both of these forums, the Commissioner for Aboriginal Children and Young People drives specific improved outcomes for Aboriginal children and young people.

If the Commission is used as an NPM, it would be beneficial to have formalised arrangements with other NPMs in Victoria that have oversight of other places where children and young people are deprived of their liberty. For example, the Commission could contribute its expertise in engaging with children and young people to the NPM responsible for inspecting prisons where young people are in custody, or places where young people are receiving compulsory inpatient services.

If the Commission is not used as an NPM, the Commission would recommend the NPM for youth justice and secure welfare services liaise regularly with the Commission to share any trends or issues being identified by each body.

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<sup>42</sup> The Aboriginal Justice Forum includes representatives from Aboriginal communities and Victorian Government agencies who meet quarterly to oversee the Aboriginal Justice Agreement, established to achieve improved justice outcomes for Aboriginal communities in Victoria.

<sup>43</sup> The Victorian Aboriginal Children's Forum is a representative Forum of Aboriginal Community Controlled Organisations, the community sector and the Victorian Government, established to drive the safety and wellbeing of Aboriginal children and young people in, or at risk of entering, out of home care.

## 5. How should the Australian NPM bodies work with key government stakeholders?

Stakeholders may wish to comment on issues such as:

- how the NPM could engage with parliament, government human rights bodies and detaining authorities
- how the NPM could should engage with the SPT
- how communication across the different state and territory NPMs could be facilitated and co-ordinated
- whether specific processes should be developed to address the needs of vulnerable groups of people in detention.

The Commission's comments in relation to this question are confined to the specific processes that should be developed to address the needs of vulnerable groups of children and young people deprived of their liberty.

In particular, the Commission would urge any NPM conducting inspections of places where children and young people are deprived of their liberty to have specific processes for children and young people who are, or could be, clients of the child protection system. NPMs will not only require knowledge of the child protection system and its role and processes, the impact of trauma and how it should shape engagement but also be aware of how specific elements of custody can compound rather than remedy trauma. Children who have experienced trauma may have a distrust of authorities that makes it unlikely that they will raise issues or concerns, and also may display approval-seeking behaviour. This could require the NPM to allow more time to build relationships and trust with children and young people, and to adopt more child-friendly communication techniques than a traditional question and answer style interview allows.

Specific processes are also recommended to address the particular needs of Aboriginal and Torres Strait children and young people. For example, the NPM should understand how an Aboriginal individual's social and emotional wellbeing is intrinsically tied to culture, beliefs, connection to community and place, deprivation of liberty and space, spirituality and their individual experiences. Active and enduring connections have a positive impact on this sense of social and emotional health and wellbeing, and their safety,<sup>44</sup> and damaging these connections and relationships risks undermining norms of appropriate social and cultural behaviour.<sup>45</sup> Inspections developed and conducted by Aboriginal and Torres Strait Islander inspectors would help to ensure processes are developed that are mindful of these connections and attune to how they will affect the experience of custody.

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<sup>44</sup> M. Chandler and T. Proulx (2006). Changing Selves in Changing Worlds: Youth Suicide on the Fault Lines of Colliding Cultures. Archives of Suicide Research.

<sup>45</sup> The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (2011) *Doing Time - Time For Doing: Indigenous youth in the criminal justice system*.