



***Optional Protocol to the Convention Against Torture and other
Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)***

Submission to the National Children's Commissioner, Australian Human Rights Commission

30 May 2016

Contents

1. About UNICEF Australia	3
2. Parameters of this submission	3
3. Executive summary.....	4
4. Recommendations	6
5. Chief guiding instruments and rights	8
6. Good practice	10
7. Circumstances in which children are at risk of torture and other cruel, inhuman and degrading treatment or punishment.....	14
8. Detention through executive power	16
A: Detention by police prior to court order	16
B: Detention pursuant to counter-terrorism measures.....	17
C: Detention in immigration detention facilities, detention at sea and potential for refoulement.....	19
9. Juvenile detention centres	22
A: The failure to detain children as a measure of last resort.....	23
B: The over-representation of Aboriginal and Torres Strait Islander children and young people	24
C: The placement of children in adult facilities	26
D: The low minimum age of criminal responsibility	27
E: The use of solitary confinement, seclusion and inappropriate or unsafe use of restraint or force.....	29
F: Case study: <i>Brough v Australia</i> (Human Rights Committee, 2006).....	30
10. Other treatment or circumstances amounting to cruel, inhuman and degrading treatment or punishment	31
A. Corporal punishment	32
B: Seclusion and restrictive practices.....	34
11. The benefit for children of ratifying OPCAT and establishing a National Preventative Mechanism.....	36
Contact	39

1. About UNICEF Australia

1. UNICEF is a multilateral organisation that works in over 190 countries to promote and protect the rights of children. UNICEF supports child health and nutrition, clean water and sanitation, quality basic education for all boys and girls, and the protection of children from violence, exploitation, abuse and HIV. UNICEF is unique among world organisations in our rights based and participatory approach to working with children and young people.
2. UNICEF Australia is a national committee of UNICEF which advocates for the rights of all children and works to improve public and government support for child rights and international development.

2. Parameters of this submission

1. This submission considers broadly the circumstances in which children might be at risk of torture and other cruel, inhuman or degrading treatment or punishment (TCIDTP) in contexts which are either permitted by Australian law or policy or otherwise risk occurring in practice. In doing so, this submission seeks to highlight the benefit that ratification of OPCAT, the establishment of a National Preventative Mechanism (NPM) and visits by the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), could have for children.
2. UNICEF Australia recognises that this submission goes beyond the questions raised by the National Children's Commissioner which focus primarily on the experiences of children in youth justice detention centres. However, this submission responds to a number of questions specifically raised by the Commissioner, including the following:
 - *Are there particular examples of good practice in relation to the promotion and safeguarding of children's rights in detention facilities?* Discussed at section 6.
 - *How could the ratification of OPCAT and the establishment of a NPM benefit children and young people in detention (youth justice centres and adult facilities)?* Discussed at section 11.
 - *The age of criminal responsibility is 10 years in all Australian jurisdictions. The Convention on the Rights of the Child does not specify what such a minimum age of criminal responsibility should be. However, the Committee on the Rights of the Child recommends 12 years of age should be the absolute*

minimum age. The Committee on the Rights of the Child has noted Australia's non-compliance with this standard and it has recommended Australia raise its minimum age of criminal responsibility. What's your view on this? Discussed at section 9D.

3. This submission does not seek to explain in detail the requirements of OPCAT, as these have been discussed thoroughly by others previously.¹

3. Executive summary

1. UNICEF Australia is grateful for the opportunity to provide this submission to the National Children's Commissioner, Australian Human Rights Commission, concerning the *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT).
2. Childhood is a unique stage of development during which time children's capacities are evolving. Article 5 of the *Convention on the Rights of the Child* (CRC) articulates the principle of evolving capacities and the obligation to provide guidance consistent with the growing capacities of the individual child. It establishes that as children acquire enhanced cognitive, physical, social, emotional competencies, there is a reduced need for adult direction, and a greater capacity to take responsibility for the decisions affecting their lives. Article 1, the definition of the child, acknowledges the growing autonomy of the child and the need to respect the gradual acquisition of independent exercise of rights. The CRC further recognises that children in different environments and cultural contexts who are faced with diverse life experiences will acquire competencies at different ages, and their development of competencies will vary according to individual circumstances. Children, therefore, require varying degrees of protection, participation and opportunity for autonomous decision-making in different contexts.²
3. The United Nations General Assembly has recognised that "juveniles deprived of their liberty are highly vulnerable to abuse, victimization and the violation of their

¹ See, for example, Law Council of Australia, *Optional Protocol to the Convention Against Torture - Submission to the Joint Standing Committee on Treaties* (30 March 2012) <<https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2628%20-%20Optional%20Protocol%20to%20the%20Convention%20against%20Torture.pdf>>.

² Gerison Lansdown, UNICEF and Save the Children, *The Evolving Capacities of the Child* (2005), 2-10 <<https://www.unicef-irc.org/publications/pdf/evolving-eng.pdf>>.

rights”.³ This vulnerability is often compounded by virtue of the child’s status as a minor, status as a detainee and institutional culture. It can also be exacerbated by other factors, such as where a child has had previous experiences of abuse and violence, is experiencing poverty and disadvantage, belongs to a cultural minority or has a disability. Circumstances of detention make possible “...the abuse of power and authority and invites insensitivity to the experiences of those who come into the process.”⁴

4. UNICEF Australia submits that the rights of children would be further protected and promoted if the Australian Government was to ratify the OPCAT. Having ratified the *Convention on the Rights of the Child* (CRC) and the *International Covenant on Civil and Political* (ICCPR) and the *Convention against Torture, Cruel, Inhuman and Degrading Treatment or Punishment* (CAT), Australia is currently under an obligation to protect children from TCIDTP. This is particularly important for children who, because of their age and developmental state, can experience serious, life-long and potentially inter-generational consequences as a result of experiences at childhood.⁵
5. Currently across Australia, oversight and inspection mechanisms applying to places of detention are varied in terms of mandate and degree of independence, apply inconsistent standards and, in some instances, gaps exist.⁶ A NPM to monitor places where all people, including children, are deprived of their liberty, alongside the international work of the SPT, would entail more effective oversight to these facilities which are often quite removed from the view of the community.
6. This submission seeks to demonstrate that monitoring through a NPM, the work of the SPT and associated reforms could help lower the risk that children might experience TCIDTP in the following circumstances:
 - a) Detention through executive power, including:
 - Detention by police prior to court order;
 - Detention pursuant to counter-terrorism measures; and

³ *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, General Assembly, 45/113, 68th plen mtg, UN Doc. A/RES/45/113 (14 December 1990).

⁴ Danny Sandor “7. Kids, cops, lock ups and the convention on the rights of the child” in *Citizen child: Australian law and children’s rights*, Australian Institute of Family Studies (December 1996) <<https://aifs.gov.au/publications/citizen-child-australian-law-and-childrens-rights/7-kids-cops-lock-ups-and-convention>>.

⁵ See, for example, Committee on the Rights of the Child, *General Comment No. 7 (2005) Implementing child rights in early childhood*, 40th sess, UN Doc CRC/C/GC/7/Rev.1 (20 September 2006).

⁶ Bronwyn Naylor, Julie Debeljak and Anita McKay, “A Strategic Framework for Implementing Human Rights in Closed Environments”, *Monash University Law Review* 41 Monash U. L. Rev. 218 2015, 257-258.

- Detention in immigration detention facilities, detention at sea and potential for return to circumstances of TCIDTP; and
- b) Detention in juvenile detention centres and associated concerns, including:
- The failure to detain children strictly as a measure of last resort;
 - The over-representation of Aboriginal and Torres Strait Islander children and young people;
 - The placement of children in adult facilities;
 - The low minimum age of criminal responsibility; and
 - The use of solitary confinement and inappropriate and unsafe use of restraint; and
- c) Through the use of corporal punishment, seclusion or restrictive practices in other contexts.
7. Conditions involving the deprivation of liberty can threaten multiple rights simultaneously and often whether an act constitutes torture, or cruel, inhuman and degrading treatment or punishment, or violence generally can be an issue of degree and can also be dependent on the individual child or person affected. As such, the prohibition of torture of children must also be seen in light of the right of children to be protected from all forms of violence⁷ and the right of boys, girls and young people to be treated with dignity, respect and in accordance with their best interests and with special protection due to their age. UNICEF Australia urges the adoption of a broad mandate for the NPM, especially when considering the places and conditions in which children might be deprived of their liberty or otherwise at risk of TCIDTP.

4. Recommendations

UNICEF Australia makes the following recommendations:

Recommendation 1: That the Australian Commonwealth Government ratify as soon as practicable the *Optional Protocol on the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, and that federal, state and territory governments adopt legislation to give it full effect.

Recommendation 2: That the Australian Commonwealth Government ratify the *Optional Protocol to the Convention on the Rights of the Child on a communications procedure*.

⁷ CRC, Article 19. See also Paulo Sérgio Pinheiro, *Report of the independent expert for the United Nations study on violence against children*, 61st sess, UN Doc. A/61/299 (29 August 2006); Marta Santos Pais, Special Representative of the Secretary-General on Violence against Children, *Toward a world free from violence – Global survey on violence against children* (October 2013) <http://srsg.violenceagainstchildren.org/sites/default/files/publications_final/toward_a_world_free_from_violence.pdf>.

Recommendation 3: That the Australian Commonwealth Government establish and adequately resource an independent National Preventative Mechanism (or bodies which could collectively constitute the NPM), through open and inclusive consultation. The established NPM should have the following:

- a) A human rights based approach to monitoring.
- b) A mandate which is sufficiently broad so as to include all circumstances in which children and others could be at risk of experiencing torture or cruel, inhuman or degrading treatment or punishment.
- c) The express power to access all places of detention without restriction, have access to all relevant information and speak to individuals in private.
- d) Staff who are skilled in communicating with children in a manner that is appropriate to their age, stage of development, level of maturity, culture, and other circumstances.
- e) A framework which includes specific reference to children and young people.
- f) Sufficient resources, staff, expertise, mandate and powers to discharge its function.

The NPM should also conduct ongoing preventative dialogue including through scheduled interim discussions with relevant authorities regarding the practical implementation of recommendations.

Recommendation 4: That the Council of Australian Governments resource a national strategy to reduce the over-representation of Aboriginal and Torres Strait Islander children and adults in detention under the Close the Gap Framework, including:

- a) Strategies to address underlying social and economic causes of children and young people coming into contact with the criminal justice system.
- b) Establishing justice targets and strategies aimed at significantly reducing the number of Aboriginal and Torres Strait Islander children and young people in detention.
- c) Developing a commitment to working in genuine partnership with Aboriginal and Torres Strait Islander communities, leaders and representative bodies.
- d) Investing sufficient resources to ensure practical implementation.

Recommendation 5: That the Australian Commonwealth, state and territory governments ensure that detention occurs as a last resort for any person up to and including the age of 17, including by:

- a) Reforming sentencing and bail laws which limit judicial discretion to apply individual, fair and appropriate sentences and ensure that all relevant legislation includes the principle that detention must only be used as a last resort.
- b) Ensuring the provision of appropriate accommodation options so that children are subject to remand only when necessary.

- c) Increasing the availability and use of diversion and non-custodial sentences.
- d) In Queensland, amending the *Youth Justice Act 1992* (QLD) to ensure a child is defined as a person under the age of 18 years.

Recommendation 6: That the Australian Commonwealth, state and territory governments raise the minimum age of criminal responsibility to at least 12 years of age.

Recommendation 7: That state and territory governments implement the 2012 recommendation of the UN Committee on the rights of the Child regarding corporal punishment, including specifically to:

- a) prohibit the use of corporal punishment in all settings;
- b) abolish the defence of “reasonable chastisement” to a charge of assault against a charge; and
- c) strengthen and expand awareness-raising and education campaigns to promote positive and alternative forms of discipline.

Recommendation 8: That the Australian Government and state and territory governments provide the necessary human, technical and financial resources to fully implement the recommendations of the Senate Standing Committee on Community Affairs report on *Violence, abuse and neglect against people with disability in institutional and residential settings*.⁸

5. Chief guiding instruments and rights

1. UNICEF Australia’s submission is informed by the following human rights instruments:

- *Convention on the Rights of the Child 1990* (CRC);
- *Declaration on the Rights of the Child 1959*;
- *Universal Declaration of Human Rights 1948*;
- *International Covenant on Civil and Political Rights 1966* (ICCPR);
- *International Covenant on Economic, Social and Cultural Rights 1966* (ICESCR);
- *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1987* (CAT);
- *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 2006* (OPCAT);

⁸ Senate Standing Committee on Community Affairs, *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability* (25 November 2015)
<http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Report>.

- *UNESCO Universal Declaration on Cultural Diversity* 2001;
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (The Beijing Rules);
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty 1990 (The Havana Rules);
- United Nations Guidelines for the Prevention of Juvenile Delinquency 1990 (Riyadh Guidelines);
- Standard Minimum Rules for the Treatment of Prisoners (Section I) (the Nelson Mandela Rules) 2015; and
- *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* 2012 (UNHCR Detention Guidelines).

2. UNICEF Australia's submission is specifically informed by the following:

- Right to non-discrimination (Article 2, CRC);
- Best interests of the child as a primary consideration (Article 3, CRC);
- Right to life, survival and development (Article 6(2), CRC);
- Right to be free from all forms of violence (Article 19, CRC);
- Rights of children who are deprived of family environment (Article 20, CRC);
- Appropriate protection and assistance for minors who seek refugee status or who are recognised as refugees (Article 22, CRC);
- Right to culture (Article 30, CRC);
- Prohibition of torture or other cruel, inhuman or degrading treatment or punishment (Article 37(a), CRC);
- Detention as a measure of last resort and a prohibition of arbitrary detention (Article 37(b), CRC and General Comment 10 CRC Committee);
- Right to be treated with humanity and respect for inherent dignity and in accordance with age and kept separate from adults (Article 37(c), CRC);
- The right to rehabilitation for victims of torture (Article 39, CRC);
- Right to non-discrimination (Article 2, ICCPR);
- Right to life (Article 6, ICCPR);
- Right to be free from degrading treatment or punishment (Article 7, ICCPR);
- Right to liberty and security of person (Article 9, ICCPR);
- Right to humane treatment in detention (Article 10, ICCPR);
- Right to be presumed innocent until proved guilty according to law (Article 14(2), ICCPR); and

- Right to equality before the law and special protection as a child (Article 24(1), ICCPR).
3. UNICEF Australia recognises that ratification of OPCAT and the establishment of a NPM would be in accordance with Sustainable Development Goals (Goal 16, target 16.2), which aims to reduce all forms of violence against children.

6. Good practice

1. The Subcommittee on the Prevention of Torture has provided guidance about the establishment of NPMs⁹ and is a valuable source of advice and assistance regarding the setup of NPMs. UNICEF Australia encourages the Australian Government to establish a NPM in accordance with this detailed guidance and to liaise closely with the SPT and to take advice from it regarding the NPM and connected matters.
2. In addition, UNICEF Australia submits that a NPM should:
 - a) Have a mandate which is sufficiently broad so as to include all circumstances in which children could be subjected to torture or cruel, inhuman or degrading treatment or punishment.
 - b) Have staff who are skilled in communicating with children in a manner that is appropriate to their age, stage of development, level of maturity and other circumstances.
 - c) Adopt a framework which includes specific reference to children and young people.
 - d) Adopt a human rights based approach to its monitoring work.
 - e) Have sufficient resources, staff, expertise, mandate and powers to discharge its function.

⁹ For example, see Office of the High Commissioner for Human Rights (OHCHR), Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), *The approach of the Subcommittee on Prevention of Torture to the concept of prevention of torture and other cruel, inhuman or degrading treatment or punishment under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 12th sess, UN Doc. CAT/OP/12/6 (30 December 2010); SPT, *Guidelines on national preventative mechanisms*, 12th sess, UN Doc. CAT/OP/12/5 (9 December 2010); SPT, *Compilation of SPT Advice in response to NPM requests* <<http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/OPCATIndex.aspx>>; SPT, *Analytical assessment tool for national preventative mechanisms*, UN Doc. CAT/OP/1/Rev.1 (25 January 2016) <http://www.ohchr.org/Documents/HRBodies/OPCAT/AnalyticalToolsNPM_en.pdf>; SPT *SPT documents* (including decisions and notes on pre-trial detention and women in detention) <<http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/Documents.aspx>>; SPT, *SPT Introduction* <<http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/OPCATIntro.aspx>>.

- f) Conduct ongoing preventative dialogue including through scheduled interim discussions with relevant authorities regarding the practical implementation of recommendations.
3. To help prevent violence against children within juvenile justice systems, the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children have also published guidance.¹⁰ In addition to many of the functions listed above, it recommends the following which UNICEF Australia also encourages:
- a) Establishing safe and effective child-sensitive complaints and counselling mechanisms;
 - b) Safeguarding the right of all children within the juvenile justice system to have access to legal assistance;
 - c) Providing for qualified and trained personnel; and
 - d) Promoting data collection, analysis and dissemination, and developing research and reporting schemes to assess, prevent and respond to incidents of violence against children within the juvenile justice system.¹¹
4. For practical application, Defence for Children International (DCI) Belgium has produced a *Practical Guide - Monitoring places where children are deprived of liberty* (February 2016) which outlines elements of good practice.¹² It sets out where children are deprived of their liberty, suggests a monitoring methodology and outlines child specific indicators of visits. Additionally, the approach and work of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment should also help inform the establishment of an Australian NPM.¹³ The Australian Children's Commissioners and Guardians have also recently published guidance in relation to human rights standards in youth detention facilities.¹⁴

¹⁰ Office of the High Commissioner for Human Rights (OHCHR), the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children, *Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system*, 21st sess, UN Doc. A/HRC/21/25 (27 June 2012) [66]–[100].

¹¹ Ibid.

¹² Defence for Children International (DCI) Belgium, *Practical Guide - Monitoring places where children are deprived of liberty* (February 2016) <<http://www.defenceforchildren.org/monitoring-places-where-children-are-deprived-of-liberty-a-practical-guide/>>.

¹³ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment <<http://www.cpt.coe.int/en/>>.

¹⁴ Australian Children's Commissioners and Guardians, *Human rights standards in youth detention facilities in Australia: the use of restraint, disciplinary regimes and other specified practices* (April 2016) <<https://www.cyp.wa.gov.au/media/2152/report-accg-human-rights-the-use-of-restraint-disciplinary-regimes-and-other-specified-practices.pdf>>.

5. In relation to youth detention facilities in particular, the *Joint thematic review of young persons in Police detention* conducted by the New Zealand Human Rights Commission, Office of the Children's Commissioner and the Independent Police Conduct Authority (IPCA) published in October 2012 provides a good example of collaborative working to further the protection of children deprived of liberty under the remit of the organisation's NPM mandates.¹⁵ The review was conducted to "examine the treatment and conditions experienced by children and young people detained in Police cells in order to ensure that they are safe, humane and consistent with international standards."¹⁶ The review resulted in 24 recommendations ranging from improving data collection, establishing national guidelines, develop a strategy to provide a range of placement options, planning when police stations are being constructed, training for custodial staff and information sharing.¹⁷ The IPCA has reported that "[t]his positive experience serves to reinforce the constructive relationship that has been fostered through the OPCAT mandate and highlights the opportunities that exist for future preventative research and evaluation projects".¹⁸ As such, a similar review in the context of Australian jurisdictions could be similarly beneficial to help inform practice and policy recommendations.
6. Ideally, the work of the NPM and SPT should also be complemented by:
- a) Comprehensive incorporation of international human rights protections into domestic legislation.¹⁹
 - b) Enforceable standards of accountability and remedy in instances where torture and cruel, inhuman or degrading treatment or punishment occur. Because the NPM is not an investigative body,²⁰ it is important to provide for

¹⁵ Human Rights Commission, Office of the Children's Commissioner and the Independent Police Conduct Authority, *Joint thematic review of young persons in Police detention* (October 2012) <<http://www.ipca.govt.nz/Site/media/2012/2012-October-23-Joint-Thematic-Review.aspx>>.

¹⁶ Ibid, 18.

¹⁷ Human Rights Commission, Office of the Children's Commissioner and the Independent Police Conduct Authority, *Joint thematic review of young persons in Police detention*, October 2012. Available <<http://www.ipca.govt.nz/Site/media/2012/2012-October-23-Joint-Thematic-Review.aspx>>, pp.Ibid, 93-95.

¹⁸ New Zealand Human Rights Commission, *Monitoring Places of Detention – Annual report of activities under the Optional Protocol to the Convention against Torture (OPCAT), 1 July 2010 to 30 June 2011* (February 2012), 5 <https://www.hrc.co.nz/files/6214/2398/7080/Opcat-2011_final_web.pdf>.

¹⁹ In Naylor, Debeljak and McKay, above n 6, 220-221, it is suggested that a strategic framework on protecting human rights in closed environments must incorporate "1) A regulatory framework which includes the suite of internationally recognised human rights obligations, a comprehensive domestic human rights instrument, and sector-specific legislation operationalizing the human rights guarantees; 2) Preventative monitoring mechanisms based on human rights standards, such as oversight by Ombudsman Offices, and a system of national and international oversight mechanisms required under the *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("OPCAT"); and 3) *Organisational culture change to embed human rights compliance in daily practices*".

²⁰ SPT, *Compilation of SPT Advice in response to NPMs requests*, II(3) <<http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/OPCATIndex.aspx>>

this through other means, if not already in place. These mechanisms must be accessible, child-sensitive, safe and effective for children.

- c) Sector specific legislation, policy and guidelines (for example, applying to care settings, juvenile detention settings, educational settings etc.).²¹
 - d) Mandatory reporting requirements (for example, regarding the use of restraints) to increase knowledge and transparency.
 - e) Education, training and on-going monitoring of personnel in relevant sectors to encourage the adoption of a human rights culture and a pro-active approach to mitigating against risks of human rights abuses, including torture and cruel, inhuman or degrading treatment or punishment.
 - f) Investment and initiatives to encourage a human rights culture throughout the community, public sector, legislative, judiciary and business.²²
7. The SPT has recommended that “NPMs should complement rather than replace existing systems of oversight...”,²³ and the desirability of the NPM knowing and applying a human rights based approach. Accordingly, a mixed model of state and territory-based or sector-based mechanisms overseen by the Australian Human Rights Commission (AHRC) would be the preferred NPM model in Australia. However, if such a model is adopted, additional resources should be provided to enable the AHRC to incorporate this new area of work without detracting from the existing work and resources of the organisation. In this respect, it is noted that the ability of the NZ Office of the Children’s Commissioner to conduct inspections has been limited to an extent due to the lack of resources provided for it to undertake NPM responsibilities (rather, this additional function was absorbed by combining the Office’s general monitoring work in residences).²⁴
8. Whatever model is decided, it should be done so by “an open, transparent and inclusive process which involves a wide range of stakeholders, including civil society.”²⁵

²¹ See Naylor, Debeljak and McKay, above n 6, 224.

²² Ibid, 220-221.

²³ SPT, *Guidelines on national preventative mechanisms*, 12th sess, UN Doc. CAT/OP/12/5 (9 December 2010), [5].

²⁴ Human Rights Commission, *Monitoring Places of Detention – Annual report of activities under the Optional Protocol to the Convention Against Torture (OPCAT)*, 1 July 2013 to 30 June 2014 (December 2014), 15.

²⁵ SPT, above n 23, [16].

7. Circumstances in which children are at risk of torture and other cruel, inhuman and degrading treatment or punishment

1. The SPT has explained that Article 4 “places within the scope of the OPCAT any public or private custodial setting under the jurisdiction and control of the State party, where persons may be deprived of their liberty and are not permitted to leave, either by an order given by any judicial, administrative or other authority or at its instigation or with its consent or acquiescence.”²⁶ The French version specifies “jurisdiction or control” (emphasis added).²⁷ This has been interpreted as a broad and inclusive requirement which can extend to private contractors (i.e. when locations of detention are privately owned or run)²⁸ and also to locations where the State party has effective control, with the Committee Against Torture emphasizing with regard to CAT that “...the State’s obligation to prevent torture also applies to all persons who act, de jure or de facto, in the name of, in conjunction with, or at the behest of the State party”.²⁹
2. The Human Rights Committee outlined in 2014 that detention can occur “in connection with criminal proceedings, military detention, security detention, counter-terrorism detention, involuntary hospitalization, immigration detention, detention for extradition and wholly groundless arrests. It also applies to detention for vagrancy or drug addiction, detention for educational purposes of children in conflict with the law and other forms of administrative detention. Detention within the meaning of paragraph 4 also includes house arrest and solitary confinement” (references omitted).³⁰ Importantly for children also, detention can occur in “less obvious” circumstances such as secure accommodation for young people and social care institutions.³¹ This submission will consider a number of these contexts.
3. The SPT has confirmed that OPCAT must be given “an expansive an interpretation as possible in order to maximise the preventative impact of the work of the NPM”.³²

²⁶ SPT, above n 20, I[2].

²⁷ See Association for the Prevention of Torture, *APT Legal Briefing Series – Application of OPCAT to a State Party’s places of military detention located overseas* (October 2009) <http://www.apr.ch/content/files_res/LegalBriefing1_OPDAT.pdf>.

²⁸ Committee Against Torture, *General Comment No. 2 Implementation of Article 2 by States Parties*, UN Doc. CAT/C/GC/2, 24 January 2008, [17] states: “Where detention centres are privately owned or run, the Committee considers that personnel are acting in an official capacity on account of their responsibility for carrying out the State function without derogation of the obligation of State officials to monitor and take all effective measures to prevent torture and ill-treatment”.

²⁹ *Ibid*, [7].

³⁰ Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, UN Doc. CCPR/C/GC/35 (16 December 2014), [40].

³¹ Rachel Murray, Elina Steinerte, Malcolm Evans and Antenor Hallo De Wolf, *The Optional Protocol to the UN Convention Against Torture* (2011), 70.

³² SPT, above n 20, I[2].

Accordingly, UNICEF Australia submits that the scope of NPM mandate should be as broad as practically possible so as to include facilities that potentially fall within the definition of “deprivation of liberty” or otherwise could create conditions which could create a risk of TCIDTP so as to ensure oversight and monitoring of any and all circumstances in which children might be at risk. This is particularly important given the European Court of Human Rights has indicated that whether or not a person is deprived of liberty depends on a range of criteria, including the type, duration, effects and manner of implementation of the measure in question. Further, this can be a mere matter of degree or intensity.³³ This is particularly relevant when considering children who will also be affected by their age, maturity, developmental state and other factors. Additionally, the severity required to establish inhuman treatment of a child with a disability is lower than the relative level of adults and children without disabilities.³⁴ It is therefore appropriate to err on the side of inclusion in mandate, particularly due to the heightened vulnerability of children.

4. In the context of Australia, the NPM should cover, at a minimum, the places identified by the Committee Against Torture, namely; “all contexts of custody or control, for example, in prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm.”³⁵ It flows that such facilities should include, at minimum:
 - Juvenile justice detention facilities;
 - Police and court detention facilities and vehicles;
 - Other places where children are held (including adult correctional facilities);
 - Care and institutional facilities, particularly for children with disabilities;
 - Places of military detention; and
 - Immigration detention and processing facilities (onshore and offshore).

5. An interpretation of the provisions which seeks to narrow the application of the NPM would, in the view of UNICEF Australia, be contrary to the objective of the treaty.³⁶

³³ *Amuur v. France*, 17/1995/523/609, Council of Europe, European Court of Human Rights (25 June 1996), [42].

³⁴ Darcie Lyons, “Restraint and Seclusion of Students with Disabilities” *International Journal of Children’s Rights* 23 (2015) 189-239, 200-201.

³⁵ Committee Against Torture, *General Comment No. 2 – Implementation of article 2 by States parties*, UN Doc CAT/C/GC/2 (2 January 2008), [15].

³⁶ Article 1 of OPCAT provides: “The objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.”

8. Detention through executive power

1. Although there is no broadly accepted international definition of administrative detention, it generally covers “all situations where a person is deprived of his or her liberty under the power or order of the executive branch of government”.³⁷ Administrative detention has been described as anathema to liberal democracy³⁸ due to the serious nature of deprivation of liberty in the absence of criminal charge. International human rights law accepts that administrative detention of children is permissible, but only in strictly defined conditions and with the protection of extensive safeguards.³⁹ This section will outline some conditions in which children can be deprived of liberty in administrative detention by virtue of executive power and where additional monitoring would be welcome, including in circumstances of:
 - Detention by police prior to court order;
 - Detention pursuant to counter-terrorism measures; and
 - Detention in immigration detention facilities, detention at sea and potential for refoulement.

A: Detention by police prior to court order

2. In the context of criminal justice, children in conflict with the law can potentially be detained in a range of contexts in the absence of a conviction and in the absence of a court order. Although the exact circumstances in which a child can be detained vary across different state and territories, these facilities can include, for example, police prison, police stations, watch-houses or lock ups⁴⁰ and also police vehicles.
3. It has long been recognised that “[i]t is during apprehension, interrogation and questioning that most violations of young people's rights occur. This is the most hidden aspect of the child's contact with the criminal justice system and the stage at which the child is most vulnerable”.⁴¹ As such, it is important to ensure the NPM has oversight of facilities and conditions including police cells, vehicles and other settings in which children can be detained before being brought before court.

³⁷ UNICEF and the Children's Legal Centre, *Administrative detention of children: A global report* (February 2011), 2.

³⁸ Paul Fairall and Wendy Lacey, “Preventative Detention and Control Orders under Federal Law: The case for a bill of rights”, *Melbourne University Law Review*, 1076
<http://law.unimelb.edu.au/_data/assets/pdf_file/0009/1707795/31_3_12.pdf>.

³⁹ UNICEF and the Children's Legal Centre, above n 37, 99.

⁴⁰ See, for example, *Young Offenders Act 1993* (SA) s 15(2).

⁴¹ Ian O'Connor, 'Young people and their rights', in Rob White and Christine Alder (eds), *The Police and Young People*, (1994) 90, as cited in Sandor, above n 4.

B: Detention pursuant to counter-terrorism measures

4. In recent years, Australian law has undergone a range of reforms in response to terrorist attacks and reported terrorist threats. Specifically, the *Anti-Terrorism Act (No. 2) 2005* (Cth) introduced Preventative Detention Orders (PDOs) to the *Criminal Code Act 1995* (Cth). PDOs allows for the detention of persons for an initial period of 48 hours and potentially longer in order to prevent an imminent terrorist act occurring or to otherwise preserve evidence of a recent terrorist act.⁴² PDOs can be imposed on children aged 16 and 17 years old⁴³ and initial preventative detention orders can be made by a senior Australian Federal Police (AFP) member.⁴⁴ Generally, the lower standard of proof (balance of probabilities) applies to the issuance and extension of a PDO.⁴⁵
5. Additionally, the *Anti-Terrorism Act 2004* (Cth) introduced into the *Crimes Act 1914* (Cth) powers of detention the purposes of investigation.⁴⁶ In essence, these powers allow the AFP to question persons without charge. Persons under 18 years of age can be detained for up to 2 hours (in contrast to 4 hours for adults), with an extension to this period allowed in certain circumstances.⁴⁷
6. Although the *Criminal Code 1995* (Cth) includes a requirement persons who are detained (a) must be treated with humanity and with respect for human dignity; and (b) must not be subjected to cruel, inhuman or degrading treatment⁴⁸ and additional safeguards apply children (persons who are under 18),⁴⁹ these mechanisms have nevertheless raised numerous and serious human rights concerns.⁵⁰ The Committee Against Torture has also raised concerns about these practices⁵¹ and the former Independent National Security Legislation Monitor has also been critical of PDOs, stating:

⁴² *Criminal Code Act 1995* (Cth) div 105

⁴³ *Criminal Code Act 1995* (Cth) s 105.5.

⁴⁴ *Criminal Code Act 1995* (Cth) s 100.1. Definition of “issuing authority” is (a) for initial preventative detention orders—means a senior AFP member; and (b) for continued preventative detention orders—means a person appointed under s 105.2.

⁴⁵ *Criminal Code Act 1995* (Cth) s 104.4(1)(c).

⁴⁶ *Crimes Act 1914* (Cth) pt 1C div 2.

⁴⁷ *Crimes Act 1914* (Cth) ss 23C, 23D, 23DA, 23DB, 23DC, 23DD, 23DE and 23DF.

⁴⁸ *Criminal Code Act 1995* (Cth) s 105.33.

⁴⁹ *Criminal Code Act 1995* (Cth) s 105.33A.

⁵⁰ See, for example, Australian Human Rights Commission, *A Human Rights Guide to Australia’s Counter-Terrorism Laws* (2008) <https://www.humanrights.gov.au/human-rights-guide-australias-counter-terrorism-laws#4_1>.

⁵¹ Committee Against Torture, *Concluding Observations of the Committee Against Torture – Australia*, 40th sess, UN Doc CAT/C/AUS/CO/3 (22 May 2008), [10].

[t]he combination of non-criminal detention, a lack of contribution to CT [(counter-terrorism)] investigation and the complete lack of any occasion so far considered appropriate for their use is enough to undermine any claim that PDOs constitute a proportionate interference with liberty.⁵²

7. Concerningly as well, serious penalties apply regarding unauthorised disclosures of information relating to special intelligence operations, meaning that, practically, practices which could amount to torture or other cruel, inhuman or degrading conduct might never be publicly known.⁵³
8. Both PDOs and powers that provide for detention for questioning allow the very serious result of deprivation of liberty by virtue of executive power (at least in initial stages) in the absence of criminal charge and in conditions which are highly secretive. These circumstances create a risk of circumstances in which TCIDTP could occur. UNICEF Australia therefore submits that the existence of these mechanisms in Australian law present compelling need for additional monitoring and oversight of places of detention.
9. Additionally, Australian law allows for control orders which can be used to impose serious restrictions on people, including children who are 16 and 17 years old, for the purpose of (a) protecting the public from a terrorist act; (b) preventing the provision of support for or the facilitation of a terrorist act; or (c) preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.⁵⁴ Although there is a question regarding whether control orders can be classified as amounting to a “deprivation of liberty”,⁵⁵ they nevertheless allow for serious and broad obligations, prohibitions and restrictions to be imposed upon a person, including prohibition or restrictions to certain places, prohibition of leaving Australia and a requirement to report to specified persons at specified times and places.⁵⁶
10. Concerningly as well, the Australian Government has recently introduced the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 which sought, amongst other things, to extend the control order regime to children aged 14 and 15 years of

⁵² Bret Walker SC, Independent National Security Legislation Monitor, *Declassified annual report* (20 December 2012), 45.

⁵³ *Australian Security Intelligence Organisation Act 1979* (Cth) s 35P.

⁵⁴ *Criminal Code Act 1995* (Cth) div 104.

⁵⁵ Although the Human Rights Committee has indicated that detention can include house arrest and solitary confinement. See Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, UN Doc. CCPR/C/GC/35 (16 December 2014), [40].

⁵⁶ *Criminal Code Act 1995* (Cth) s 104.5(3).

age.⁵⁷ The Bill lapsed at prorogation in April 2016, so is yet to become law. However, when it recently considered such measures, the Parliamentary Joint Committee on Human Rights reiterated its concern about control order regime, stating in relation to the proposal to allow for the imposition of control orders on children aged 14 and 15 that the Bill engages and limits a number of human rights, including the prohibition of torture and cruel, inhuman or degrading treatment.⁵⁸

C: Detention in immigration detention facilities, detention at sea and potential for refoulement

11. Australia's complex immigration legislation and policy has been marked by significant changes in recent years instigated by successive federal governments. These changes have, on the whole, significantly limited the right to claim international protection in Australia, particularly for those who arrive by boat. Australia has a policy of mandatory, indefinite and non-reviewable immigration detention, requiring all illegal maritime arrivals to be detained.⁵⁹ From 19 July 2013, all asylum seekers who arrive in Australia by boat are automatically transferred to offshore processing centres on Nauru or Manus Island where they have little to no practical chance of resettlement in Australia and are often kept for significant periods. Australia has a policy of turning back boats 'where it is safe to do so' and also conducts on board, fast-tracked screening of asylum claims,⁶⁰ a practice which has raised concerns with the Office of the United Nations High Commissioner for Refugees.⁶¹ Children and adults alike have been subject to these policies, although significant efforts have been made in recent years to release children from immigration detention facilities to allow them to reside in the community.

12. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has observed that "immigration detainees are

⁵⁷ Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 sch 2.

⁵⁸ Parliamentary Joint Committee on Human Rights – *Human Rights Scrutiny Report - Thirty-sixth report of the 44th Parliament* (16 March 2016), [2.327] <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2016/Thirty-sixth_Report_of_the_44th_Parliament>.

⁵⁹ *Migration Act 1958* (Cth) s 189.

⁶⁰ *Migration Act 1958* (Cth) and *Maritime Powers Act 2013* (Cth). For further details, see also Kaldor Centre, *Factsheets* <<http://www.kaldorcentre.unsw.edu.au/factsheets>>.

⁶¹ See *CPCF v. Minister for Immigration and Border Protection & Anor* [2015] HCA 1 (28 Jan 2015), Submissions of the Office of the United Nations High Commissioner for Refugees – Seeking leave to intervene as *amicus curiae* (15 September 2014) <http://www.hcourt.gov.au/assets/cases/s169-2014/CPCF_UNHCR.pdf> and also UNGCR, *UNHCR Legal Position: Despite court ruling on Sri Lankans detained at sea, Australia bound by international obligations* (4 February 2015) <<http://unhcr.org.au/wp-content/uploads/2015/05/unhcr-legal-position-despite-court-ruling-on-sri-lankans-detained-at-sea-australia-bound-by-international-obligations.pdf>>.

particularly vulnerable to various forms of ill-treatment, whether at the moment of apprehension, during the period of custody or while being deported.”⁶²

Unaccompanied or separated children are particularly vulnerable in this circumstance.

13. The risk of TCIDTP exists, or has existed, under Australian law and policy due to:

- Conditions and circumstances in immigration detention or processing centres themselves; and/or
- Detention at sea and the possible return to circumstances where people can be at risk of torture and other cruel, inhuman or degrading treatment or punishment (refoulement).

14. Over recent years, Australia’s asylum framework has been found by UN experts and the Australian Human Rights Commission to create conditions and circumstances amounting to torture and/or cruel, inhuman or degrading treatment or punishment. In 2015, the UN Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment stated that “...by failing to provide adequate detention conditions; end the practice of detention of children; and put a stop to the escalating violence and tension at the Regional Processing Centre, [Australia] has violated the right of the asylum seekers, including children, to be free from torture or cruel, inhuman or degrading treatment.”⁶³

15. Additionally, *The Forgotten Children* report of the Australian Human Rights Commission published in 2014 reconfirmed the findings of the 2004 national inquiry into children in immigration detention, highlighting again the profound negative impacts of prolonged detention on the mental and emotional health, and the development of children.⁶⁴ Since that time, immigration detention facilities on Nauru have become “open” facilities⁶⁵ and additionally, it has been reported that there are

⁶² Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *CPT standards*, CPT/Inf/E (2002) 1 – Rev. 2015, 69 <<http://www.cpt.coe.int/en/documents/eng-standards.pdf>>.

⁶³ Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Addendum: Observations on communications transmitted to Governments and replies received*, UN doc A/HRC/28/68/Add.1 (2015), [19] <<http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Pages/ListReports.aspx>>.

⁶⁴ Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014) <https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf>.

⁶⁵ See ABC News *Detainees in Nauru to be granted full freedom of movement 24 hours a day* (3 October 2015) <<http://www.abc.net.au/news/2015-10-03/nauru-to-grant-asylum-seekers-full-freedom-of-movement/6825482>>. This article cites the Republic of Nauru, Department of Justice and Border Control, *Regional Processing – Open Centre* (2 October 2015).

no longer children held in detention facilities on mainland Australia. Although these developments represent some improvement, on-going concerns remain.⁶⁶

16. Additionally, the policy of turning back boats to effectively prevent any maritime arrivals has also been criticised for failing to uphold human rights. The United Nations High Commissioner for Human Rights, Mr Zeid Raád Al Hussein, has observed: “Australia’s policy of off-shore processing for asylum seekers arriving by sea, and its interception and turning back of vessels, is leading to a chain of human rights violations, including arbitrary detention and possible torture following return to home countries.”⁶⁷ Since that comment was made, the Australian Parliament passed the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth). The Act effectively expanded powers to intercept and detain people at sea, excluded Australia’s international obligations under the Refugee Convention, excluded rules of natural justice and limited availability of judicial review. The Parliamentary Joint Committee on Human Rights has assessed these measures to be incompatible with Australia’s obligations of non-refoulement under the ICCPR and CAT.⁶⁸

17. The SPT has itself clarified that “[s]hould a State party to the OPCAT (a sending State) enter into an arrangement under which those detained by that State are to be held in facilities located in a third State (a receiving State), the SPT considers that the sending State should ensure that such an agreement provides for its National Preventative Mechanism having the legal and practical capacity to visit those detainees in accordance with the provisions of OPCAT and the SPT Guidelines on NPMs”.⁶⁹

18. The Committee Against Torture has clarified that: “[a]ll persons who are under the effective control of the State party, because, inter alia they were transferred by the State party to centres run with its financial aid and with the involvement of private contractors of its choice, enjoy the same protection from torture and ill treatment

⁶⁶ UNICEF Australia, *Moving children out of held detention in Australia a positive step* (4 April 2016). <<http://www.unicef.org.au/blog/april-2016/moving-children-out-of-held-immigration-detention>>.

⁶⁷ Opening Statement by Mr Zeid Ra’ad Al Hussein High Commissioner for Human Rights at the Human Rights Council 27th sess (8 September 2014) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14998&LangID=E>>.

⁶⁸ Parliamentary Joint Committee on Human Rights – *Human Rights Scrutiny Report - Thirty-sixth report of the 44th Parliament* (16 March 2016), [2.615] – [2.617] http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2016/Thirty-sixth_Report_of_the_44th_Parliament

⁶⁹ SPT, above n 20, V[1].

under the Convention (Arts 2, 3 and 16).⁷⁰ Likewise, the Human Rights Committee has confirmed that "...States Parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*."⁷¹

19. As such, UNICEF Australia submits that the immigration detention facilities and/or processing centres facilitated by Australian law and policy (including onshore and offshore facilities) should be included in the mandate and powers of the NPM.

9. Juvenile detention centres

1. Juvenile detention centres are perhaps the most apparent places where children can be deprived of their liberty. On an average day in 2014-2015, there were 5,600 children (aged 10-17) on youth justice supervision, with 900 of those (16%) in detention.⁷² In the five year period to 2014-15, there was a steady decrease in the number of young people under supervision, including on detention. This is a positive development, and the efforts of various governments and communities to achieve this reduction should be praised.
2. However, standards applicable to juvenile detention centres vary from jurisdiction to jurisdiction and some facilities lack independent oversight.⁷³ UNICEF Australia is concerned about this and also a number of concerning trends and reports of conditions in the youth justice system. These raise serious risks regarding the existence of conditions or practices which could constitute torture or other forms of cruel, inhuman or degrading treatment or punishment.
3. Additionally, the Committee on the Rights of the Child has expressed numerous concerns about aspects of the administration of juvenile justice in Australia which, although not necessarily amounting to torture in isolation, nevertheless represent inconsistencies with the *Convention on the Rights of the Child*. These include, failures to ensure that children with intellectual disabilities or mental illness who are in

⁷⁰ Committee Against Torture, *Concluding observations on the combined fourth and fifth periodic reports of Australia*, UN Doc. CAT/C/AUS/CO/4-5 (23 December 2014), [17].

⁷¹ Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of torture or cruel, inhuman or degrading treatment or punishment)*, 44th sess, UN Doc. HRI/GEN/1/Rev.1 (1992), [9].

⁷² Australian Institute of Health and Welfare, *Youth justice in Australia 2014-15*, Bulletin 133 (April 2016) <<http://www.aihw.gov.au/publications/youth-justice/>>.

⁷³ For example, the Victorian Ombudsman has reported: "Victoria does not have an independent prisons inspectorate responsible for overseeing prisons". See Victorian Ombudsman, *Why it is important to have independent oversight of the Victorian Prison System* (6 November 2014) <<https://www.ombudsman.vic.gov.au/getattachment/Publications/Presentations/Why-we-need-independent-oversight-of-the-Victorian/WHY-WE-NEED-INDEPENDENT-OVERSIGHT-OF-THE-VICTORIAN-PRISON-SYSTEM.pdf.aspx>>.

conflict with the law are diverted away from judicial proceedings to alternative avenues, the placement of 17 year olds in adult facilities and reported instances of abuse at some detention facilities, the use of mandatory sentences and the minimum age of criminal responsibility being considered inconsistent with international standards.⁷⁴ A number of these issues are considered below.

A: The failure to detain children as a measure of last resort

4. Recent statistics indicate that on an average night in 2015, a majority of children in detention (55%, approximately 487 children) were unsentenced.⁷⁵ As such, these children were yet to be found guilty of an offence. The Australian Institute of Health and Welfare has explained:

*Most young people in unsentenced detention have been remanded in custody by a court until their next court appearance. In 2013–14, 97% of young people in unsentenced detention on an average day were on remand (excluding young people in Western Australia and the Northern Territory, where standard data were not available) (AIHW 2015). The remainder were in police-referred detention—that is, they were detained before their first court appearance (which is possible in most states and territories).*⁷⁶

5. Only a small proportion of children who are remanded are subsequently convicted and sentenced to a custodial order.⁷⁷
6. The increase of children on remand is a very concerning trend and one which has been highlighted as being inconsistent with the principle that children should be detained only as a measure a last resort.⁷⁸ This is particularly the case where children are remand due to welfare concerns or lack of accommodation options due to homelessness or housing instability.⁷⁹
7. Additionally, legislation in Queensland has provided expressly that the principle of detention as a last resort not be applied, however the Queensland Government has introduced a bill that would remove this problematic provision.⁸⁰

⁷⁴ Committee on the Rights of the Child, *Concluding Observations: Australia*, 60th sess, UN Doc. CRC/C/AUS/CO/4 (28 August 2012), [82]–[83].

⁷⁵ Australian Institute of Health and Welfare (AIHW) *Youth detention population in Australia 2015*, Bulletin 131 (December 2015), 1 <<http://www.aihw.gov.au/publication-detail/?id=60129553700>>.

⁷⁶ *Ibid.*, 4-5.

⁷⁷ Kelly Richards, *Trends in juvenile detention in Australia*, Australian Institute of Criminology (May 2011), 5 <<http://www.aic.gov.au/publications/current%20series/tandi/401-420/tandi416.html>>.

⁷⁸ *Ibid.*, 5-6.

⁷⁹ *Ibid.*

⁸⁰ Youth Justice and Other Legislation Amendment Bill 2015 (Qld).

B: The over-representation of Aboriginal and Torres Strait Islander children and young people

8. The alarming increase in the level of over-representation of Aboriginal and Torres Strait Islander children in detention has been particularly acute in recent years. In June 2015, Aboriginal and Torres Strait Islander children aged 10-17 were, on average, 26 times as likely as non-Indigenous children to be in detention.⁸¹ This represents an increase from 19 times in the June quarter of 2011.⁸² Over half (480 children or 54%) the population of young people in detention on an average night in the June quarter of 2015 were Aboriginal or Torres Strait Islander.⁸³ With projections indicating that the population of Aboriginal and Torres Strait Islander children aged zero to 14 years will increase by 19-31% by 2026 and young people aged 15 to 24 by 21%,⁸⁴ these figures are likely to get worse in the absence of reform and investments in initiatives that address underlying risk factors, such as “justice reinvestment” programs.

9. The Committee Against Torture has previously expressed concern regarding the over-representation of Aboriginal and Torres Strait Islander young people and women⁸⁵ and it has been observed that, in some circumstances, “cruel, inhuman or degrading treatment or punishment can take on a dimension of ethnic persecution”.⁸⁶ The UN Committee on the Rights of the Child has also expressed particular concern about racial discrimination in Australia, citing the significant over-representation of Aboriginal and Torres Strait islander children in the criminal justice system and in out-of-home care.⁸⁷ In the Australian context, discriminatory outcomes have historically been observed in relation to both Aboriginal and Torres Strait islander young people and also young people from culturally and linguistically diverse backgrounds.⁸⁸

10. Accordingly, UNICEF Australia submits that law and policy reform in the context of OPCAT should be complemented by specific strategies, targets and investments to address the related issue of the over-representation of Aboriginal and Torres Strait

⁸¹ AIHW, above n 75, 11.

⁸² Ibid.

⁸³ Ibid, 9.

⁸⁴ Australian Bureau of Statistics, *ABS 3238.0 Estimates and Projections, Aboriginal and Torres Strait Islander Australians, 2001 to 2026* (20 April 2014) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0>>.

⁸⁵ Committee Against Torture, *Concluding observations on the combined fourth and fifth periodic reports of Australia*, UN Doc. CAT/C/AUS/CO/4-5 (23 December 2014), [12].

⁸⁶ William Schabas and Helmut Sax, *A Commentary on the United Nations Convention on the Rights of the Child – Article 37 Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty* (Martinus Nijhoff Publishers, 2006), 19.

⁸⁷ Committee on the Rights of the Child, *Concluding Observations: Australia*, 60th sess, UN Doc. CRC/C/AUS/CO/4 (28 August 2012), [29]–[30].

⁸⁸ Sandor, above n 4.

Islander children and young people in youth detention facilities and otherwise in conflict with the law.⁸⁹

11. Additionally, detention environments in Australia have traditionally been constructed with the express purpose to deprive persons of their liberty, with limited, or no consideration of culturally appropriate or sensitive custodial environments.

12. In accordance with the *International Covenant on Social, Cultural and Economic Rights* 1966 and the *UNESCO Declaration on Cultural Diversity* 2001 UNICEF Australia defines culture as:

- Distinctive spiritual, material, intellectual, and emotional features of society or a social group, and that it encompasses lifestyles, connection to land, ways of living together, value systems, traditions and beliefs;
- Central to identity, social cohesion and the development of a knowledge based economy.⁹⁰

13. UNICEF Australia re-emphasises that detention for young people from Aboriginal and Torres Strait backgrounds should strictly be a last resort measure. Culture is a critical protective factor for children experiencing detention, and may assist in developing their coping skills and mitigating suicide and self-harm behaviours.

14. UNICEF Australia strongly recommends the adoption of strategies, policies and programs to ensure that concrete opportunities exist for incarcerated children from Aboriginal and Torres Strait Islander backgrounds are able to express and enjoy their culture. An investment in this approach is consistent with the enjoyment of cultural rights and may:

- reduce the impacts of structural racism in detention environments; and
- create a built and social environment that is less likely to constitute cruel and degrading treatment or punishment due to separation from homelands and community.

15. Concrete measures to support cultural connection, expression and identity may include:

⁸⁹ For example, see House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing: Indigenous youth in the criminal justice system* (Commonwealth of Australia, June 2011) <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_committees?url=atsia/sentencing/report.htm>.

⁹⁰ United Nations Educational, Scientific and Cultural Organisation, *UNESCO Universal Declaration on Cultural Diversity* (2 November 2001) and Article 27 of the UDHR.

- in-country custody wherever possible so that children are not (unsafely) transported and detained considerable distances from their homelands
- ensuring that wherever possible, Aboriginal peoples can opt to be in a cell with a friend or relative
- recognising the role of elders in prisons and encourage cultural transmission with young people who are detained
- creating a functional learning space for Aboriginal children to participate in quality education
- wherever possible, creating Aboriginal sites within detention facilities, such as cooking pits, fire pits, and humpies
- dedicating space for traditional artworks, which may be particularly important for children who are isolated by distance
- resourcing workshops where children can participate in carving, music, dance, painting and rural horticulture.
- increasing the number of Aboriginal staff (including support staff) in prisons, and guarantee cross cultural training of non-Aboriginal staff
- releasing children who have been detained back to their homelands rather than leaving them stranded out-of-country.⁹¹

C: The placement of children in adult facilities

16. Article 37(d) of the CRC requires that every child deprived of their liberty be separated from adults unless it is considered in the child's best interests not to do so. In various circumstances, children in Australia are allowed by law to be placed in adult facilities by law.⁹² For example, legislation in Queensland permits the automatic transfer of 17 year olds with at least six months left to serve in detention to adult correctional centres, although the Queensland Government is currently reforming this and many other aspects of the juvenile justice system.⁹³ Concerningly however, children who are 17 years old continue to be treated as adults in the juvenile justice

⁹¹ Elizabeth Grant, Special Feature 'Architecture for Aboriginal and Torres Strait Islander Children' *Place: Architecture, Design and Placemaking South Australia* 45, 21-24
<https://www.researchgate.net/publication/269035350_Grant_E.2014_Special_Feature_%27Architecture_for_Aboriginal_and_Torres_Strait_Islander_Children%27_Place_Architecture_Design_and_Placemaking_South_Australia_45_pp_21_-_24>.

⁹² See, for example, *Children (Detention Centres) Act 1987 No 57* (NSW) s 28A which allows for children to be remanded in correctional centres in certain circumstances.

⁹³ See Youth Justice and Other Legislation Amendment Bill 2015 (Qld) and the Legal Affairs and Community Safety Committee, *Youth Justice and Other Legislation Amendment Bill 2015, Report No. 22, 55th Parliament*, (March 2016) <<https://www.parliament.qld.gov.au/documents/committees/LACSC/2015/11-YouthJusticeAOLAB15/11-rpt-022-01Mar2016.pdf>>.

system in Queensland.⁹⁴ This represents a fundamental inconsistency with the definition of “child” in Article 1 of the CRC and the Committee on the Rights of the Child has raised repeated concerns about this aspect of Queensland law.⁹⁵

D: The low minimum age of criminal responsibility

17. Currently in Australia, children under 10 cannot be held liable for an offence.⁹⁶ There is a rebuttable presumption that children aged 10-14 lack the capacity to understand that their criminal conduct is wrong, and a child can only be found liable in the event that the prosecution can prove that the child knew his or her conduct was wrong.⁹⁷

18. The UNICEF Innocenti Research Centre has previously considered the issue of minimum age of criminal responsibility, stating:

The age at which a child incurs legal responsibility for his or her acts under domestic law varies widely, from 7 to 18 years, depending on the history and culture of a country, and in many cases also on the nature of the crime. Most frequently, the age limit for criminal responsibility is set somewhere between 14 and 16 years.

International law does not specify a minimum age at which a child can be held criminally responsible for his or her actions. The CRC only provides that States must fix a specific age below which children cannot be held legally responsible. While States have discretion regarding this age limit, the UN Standard Minimum Rules for the Administration of Juvenile Justice ('Beijing Rules') require that the age of legal responsibility not be set too low. This point has repeatedly been emphasized by the Committee on the Rights of the Child, which has welcomed proposals to set this age at 18.

Irrespective of where the minimum age is set, States retain obligations under the CRC towards children under the age of 18. Thus all measures taken should be guided by standards set in the CRC. This also applies to children

⁹⁴ *Youth Justice Act 1992* (Qld) sch 4, dictionary, states “child means (a) a person who has not turned 17 years; or (b) after a day fixed under section 6 a person who has not turned 18 years”.

⁹⁵ Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Australia*, 60th sess, UN Doc. CRC/C/15/Add.79 (21 October 1997), [11]; Committee on the Rights of the Child, *Concluding Observations: Australia*, 40th sess, UN Doc. CRC/C/15/Add.268 (20 October 2005), [74] and Committee on the Rights of the Child, *Concluding Observations: Australia*, 60th sess, UN Doc. CRC/C/AUS/CO/4 (28 August 2012), [84].

⁹⁶ See, for example, *Crimes Act 1914* (Cth) s 4M.

⁹⁷ Known as *doli incapax* in common law. Under this presumption children aged between 10 and 14 are presumed to lack the necessary criminal intent to commit a crime. The prosecution can rebut this presumption if they can establish that the child knew that their actions were seriously wrong. This is protected by statute in the Northern Territory, Queensland, Western Australia, ACT and Tasmania, and established by common law in New South Wales, Victoria and South Australia. See also *Crimes Act 1914* (Cth) s 4N.

*who have allegedly committed serious crimes under international law, regardless of the jurisdiction in which they may be held accountable (references omitted).*⁹⁸

19. The Committee on the Rights of the Child has concluded that 12 years of age is considered the lowest internationally acceptable age for criminal responsibility, but further encouraged states to raise it to 14 or 16 years.⁹⁹ The rationale behind doing so is that a higher minimum age contributes to a juvenile justice system which deals with children in conflict with the law without resorting to judicial proceedings.¹⁰⁰ The Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children have also recommended in a joint report that States should raise the minimum age of criminal responsibility to a minimum of at least 12 years.¹⁰¹

20. Additionally, it is also known that a significant number of children in conflict with the law, including many Aboriginal and Torres Strait islander children, have experienced the following risk factors:

- low educational attainment and unemployment;
- substance misuse;
- intellectual disability;
- psychological, psychiatric and mental health problems (including stress and anxiety);
- prior victimisation (child abuse, neglect, and exposure to family violence);
- anger;
- poor coping or problem-solving skills and poor impulse control; and
- peer group pressure, particularly among young males.¹⁰²

⁹⁸ UNICEF Innocenti Research Centre *International Criminal Justice and Children* (September 2002) 53-54 <<http://www.unicef.org/emerg/files/ICJC.pdf>>.

⁹⁹ Committee on the Rights of the Child, *General Comment No. 10 Children's rights in juvenile justice* UN Doc. CRC/C/GC/10 (25 April 2007), [32]–[33].

¹⁰⁰ *Ibid.*, [33].

¹⁰¹ Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children, *Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system*, 21st sess, UN Doc. A/HRC/21/25 (27 June 2012), [68].

¹⁰² Daryl Higgins and Kristen Davis, *Law and justice: prevention and early intervention programs for Indigenous Youth*, Resource sheet no. 34 produced by the Close the Gap Clearinghouse, Australian Institute of Health and Welfare and the Australian Institute of Family Studies (July 2014), 4 <http://www.aihw.gov.au/uploadedFiles/ClosingTheGap/Content/Our_publications/2014/ctg-rs34.pdf>.

21. Because of these known risk factors, and the principle of evolving capacities of children, UNICEF Australia submits that all measures that can address underlying causative factors of children coming into conflict with the law and otherwise divert children away from judicial processes should be fully utilised. In Australia, this should include raising the minimum age of criminal responsibility to 12 years or higher.

E: The use of solitary confinement, seclusion and inappropriate or unsafe use of restraint or force

22. The UN Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment has explained that solitary confinement is highly problematic “[b]ecause of the absence of witnesses, solitary confinement increases the risk of acts of torture and other cruel, inhuman or degrading treatment or punishment.”¹⁰³ The Special Rapporteur considers that the use of solitary confinement of juveniles can amount to a violation of art 16 of the CAT and also article 7 of the ICCPR.¹⁰⁴ In its General Comment No. 10 on “Children’s rights in Juvenile Justice”, the UN Committee on the Rights of the Child states also that placement in a dark cell, closed or solitary confinement or any other punishment or treatment that may compromise the physical or mental health or well-being of the child concerned must be strictly prohibited.¹⁰⁵

23. Although some jurisdictions have prohibited solitary confinement as a punishment in correctional facilities,¹⁰⁶ confinement and force remain permissible in certain circumstances¹⁰⁷ and there have been concerning reports of confinement used in juvenile justice facilities.¹⁰⁸ One recent incident prompted the Children’s Commissioner of the Northern Territory to conduct an investigation report, in which the Commissioner concluded: “[t]he conditions in the BMU in August 2014 were well below acceptable standards. There was no access to natural light, drinking water, or

¹⁰³ United Nations General Assembly, *Interim report of the special rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment*, 66th sess, UN Doc. A/66/268 (5 August 2011), [70].

¹⁰⁴ Ibid.

¹⁰⁵ Committee on the Rights of the Child, *General Comment No. 10 (2007) Children’s Rights in Juvenile Justice*, UN Doc. CRC/C/GC/10 (25 April 2007), [89].

¹⁰⁶ *Children (Detention Centres) Act 1987 No 57* (NSW) s 19(2).

¹⁰⁷ For example, s 153 *Youth Justice Act* (NT).

¹⁰⁸ See, for example, Jack the insider “Juveniles in solitary is Australia’s dirty secret”, *The Australian* (1 October 2015) <<http://www.theaustralian.com.au/opinion/blogs/jack-the-insider-juveniles-in-solitary-is-australias-dirty-secret/news-story/5f57a8a8842e6fb77bd156d0f76610f7>>. Also Michael Bochenek, “Juvenile detention is another area where Australia is falling behind”, *The Age* (1 October 2015) <<http://www.theage.com.au/comment/juvenile-detention-is-another-area-where-australia-is-falling-behind-20150929-gjxgz.html>>.

programs to address rehabilitation or perceived behavioural issues.”¹⁰⁹ Likewise, there were concerning reports about conditions and practices at a facility in the ACT in 2010 which included high rates of use of force.¹¹⁰

24. Across states and territories, a differentiated approach exists regarding these practices.¹¹¹ A NPM could help ensure consistent and high standards are applied regarding resort to such serious measures.

F: Case study: *Brough v Australia* (Human Rights Committee, 2006)

25. A number of the concerning issues highlighted above in relation to juvenile detention centres were illustrated in the individual communication of *Brough v Australia* (Human Rights Committee, 2006) which was submitted to the UN Human Rights Committee in 2003. This case involved complaint of a young Aboriginal man with a disability who, when he was 16 years old, was placed in an adult correctional facility in NSW. His disability meant that he experienced “significant impairments of his adaptive behaviours, his communication skills and his cognitive functioning.”¹¹² Whilst at the facility, he was subjected to certain treatment which he claimed was a violation of his rights under the ICCPR.

26. The Human Rights Committee concluded that his treatment constituted a violation of Article 10 of the ICCPR, paragraphs 1 (providing that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person) and 3 (requiring that juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status). The Human Rights Committee concluded: “[i]n the circumstances, the author’s extended confinement to an isolated cell without any possibility of communication, combined with his exposure to artificial light for prolonged periods and the removal of his clothes and blanket, was not commensurate with his status as a juvenile person in a particularly vulnerable position because of his disability and his status as an Aboriginal. As a consequence, the hardship of the imprisonment was manifestly

¹⁰⁹ Office of the Children’s Commissioner Northern Territory, *Own initiative investigation report – Services provided by the Department of Correctional Services at the Don Dale Youth Detention Centre* (August 2015), 44 <<http://childrenscommissioner.nt.gov.au/publications/Childrens%20Commissioner%20DDYDC%20-%20Report%20to%20Minister%20170915.pdf>>.

¹¹⁰ Australian Children’s Commissioners and Guardians, *Human rights standards in youth detention facilities in Australia: the use of restraint, disciplinary regimes and other specified practices* (April 2016), 12 <<https://www.cryp.wa.gov.au/media/2152/report-accg-human-rights-the-use-of-restraint-disciplinary-regimes-and-other-specified-practices.pdf>>.

¹¹¹ Ibid.

¹¹² Human Rights Committee, *Views – Communication No. 1184/2003 Brough v Australia*, UN Doc. CCPR/C/86/D/1184/2003 (27 April 2006), [2.1].

incompatible with his condition...”¹¹³ This case demonstrates the intersectional disadvantage faced by persons who are from Aboriginal and Torres Strait Islander communities and also faced by persons with a disability and children who are deprived of their liberty generally. The conclusion that the author, who was then a child, was treated inhumanely and in a manner that was inconsistent with his dignity and right to be treated in accordance with his age, indicates the real risks of inhuman treatment when children, particularly those from vulnerable or marginalised groups, are deprived of their liberty. Had a NPM existed, the experiences of Mr Brough could have been mitigated against and potentially prevented.

10. Other treatment or circumstances amounting to cruel, inhuman and degrading treatment or punishment

1. The prohibition of torture and other cruel, inhuman or degrading treatment or punishment applies to children regardless of where they are¹¹⁴ and the risk that children might experience cruel, inhuman and degrading treatment in particular is not limited to these contexts alone. The CAT does not provide for a definition of “cruel, inhuman or degrading treatment or punishment”, but it has been observed to include all residual acts that “do not rise to the level of torture”.¹¹⁵ However, the nature, purpose and severity of the treatment can be critical to determine whether or not the circumstances can be classified as constituting cruel, inhuman or degrading treatment or punishment,¹¹⁶ as can the sex, age, state of health (including mental health) or other status of the individual subjected to the treatment or punishment.¹¹⁷
2. The Committee on the Rights of the Child has accordingly indicated that the following can constitute manifestations of cruel, inhuman or degrading treatment or punishment of children:¹¹⁸
 - Psychological intimidation;
 - Solitary confinement;
 - Police brutality;
 - Corporal punishment; and

¹¹³ Human Rights Committee, *Views – Communication No. 1184/2003 Brough v Australia*, UN Doc. CCPR/C/86/D/1184/2003 (27 April 2006), [9.4].

¹¹⁴ UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (2007), 548 <http://www.unicef.org/publications/index_43110.html>.

¹¹⁵ Schabas and Sax, above n 86, 16, citing GA Res. 39/46, annex, Article 16(1).

¹¹⁶ Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of torture or cruel, inhuman or degrading treatment or punishment)*, 44th sess, UN Doc. HRI/GEN/1/Rev.1 (1992), [4]. See also Schabas and Sax, above n 86, 16.

¹¹⁷ Human Rights Committee, *Views – Communication No. 1184/2003 Brough v Australia*, UN Doc. CCPR/C/86/D/1184/2003 (27 April 2006), [9.2].

¹¹⁸ Schabas and Sax, above n 86, 16-18.

- Harsh conditions of detention.

A. Corporal punishment

3. The Committee on the Rights of the Child has described States party obligations regarding protecting children from torture as follows:

*Article 37 of the Convention requires States to ensure that “no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment”. This is **complemented and extended** by article 19, which requires States to “take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child”. **There is no ambiguity:** “all forms of physical or mental violence” does not leave room for any level of legalized violence against children. Corporal punishment and other cruel or degrading forms of punishment are forms of violence and States must take all appropriate legislative, administrative, social and educational measures to eliminate them” (emphasis added).¹¹⁹*

4. The Committee Against Torture,¹²⁰ the Human Rights Committee¹²¹ and the Committee on Economic, Social and Cultural Rights¹²² have all similarly indicated that corporal punishment violates the prohibition of torture and cruel, inhuman or degrading treatment or punishment and is inconsistent with the dignity of the child. Various international human rights standards, including the United Nations Rules for

¹¹⁹ Committee on the Rights of the Child, *General Comment No. 8 (2006) The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19, 28, para 2, and 37, inter alia)* UN Doc. CRC/C/GC/8 (2 March 2007), [18].

¹²⁰ Rachel Murray, Elina Steinerte, Malcolm Evans and Antenor Hallo De Wolf, *The Optional Protocol to the UN Convention Against Torture* (Oxford University Press, 2011), 72, citing Committee Against Torture, *Conclusions and recommendations of the Committee against Torture - Saudi Arabia*, UN Doc. CAT/C/CR/28/5/ (12 June 2002), [8(b)].

¹²¹ Human Rights Committee has considered that “[t]he prohibition [in article 7 of the ICCPR]... must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure. It is appropriate to emphasise in this regard that article 7 protects, in particular, children, pupils and patients in teaching and medical institutions.” UN Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of torture or cruel, inhuman or degrading treatment or punishment)*, 44th sess, UN Doc. HRI/GEN/1/Rev.1 (1992), [5].

¹²² In the context of educational settings, the United Nations Committee on Economic, Social and Cultural Rights expressed the view that “... corporal punishment is inconsistent with the fundamental guiding principle of international human rights law enshrined in the Preambles to the Universal Declaration of Human Rights and both Covenants: the dignity of the individual... A State party is required to take measures to ensure that discipline, which is inconsistent with the Covenant, does not occur in any public or private educational institution within its jurisdiction.” Committee on Economic, Social and Cultural Rights, *General Comment No. 13: The Right to Education (Art 13)*, 21st sess, UN Doc. E/C.12/1999/10 (8 December 1999), [41].

the Protection of Juveniles Deprived of their Liberty¹²³ and the United Nations Guidelines for the Prevention of Juvenile Delinquency¹²⁴ also emphasise a prohibition of corporal punishment.

5. Across Australia, measures have been taken to prohibit corporal punishment in many circumstances,¹²⁵ including in public schools and generally in formal care settings (such as long day care, family day care, outside school hours care and pre-school services).¹²⁶ However, there remain circumstances in which children can be subjected to corporal punishment. For example, s 280 of the *Criminal Code Act 1899* (Qld) provides:

It is lawful for a parent or a person in the place of a parent, or for a schoolteacher or master, to use, by way of correction, discipline, management or control, towards a child or pupil, under the person's care such force as is reasonable under the circumstances.

6. Similarly, section 11 of the *Criminal Code Act* (NT) provides:

A person who may justifiably apply force to a child for the purposes of discipline, management or control may delegate that power either expressly or by implication to another person who has the custody or control of the child either temporarily or permanently and, where that other person is a school teacher of the child, it shall be presumed that the power has been delegated unless it is expressly withheld.

7. That corporal punishment is permitted in some circumstances in Australia represents a fundamental inconsistency with the rights of the child. The use of force applied to

¹²³ Rule 67 provides: "All disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned. The reduction of diet and the restriction or denial of contact with family members should be prohibited for any purpose. Labour should always be viewed as an educational tool and a means of promoting the self-respect of the juvenile in preparing him or her for return to the community and should not be imposed as a disciplinary sanction. No juvenile should be sanctioned more than once for the same disciplinary infraction. Collective sanctions should be prohibited." General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, UN Doc. A/RES/45/113 (14 December 1990).

¹²⁴ General Assembly, *United Nations Guidelines for the Prevention of Juvenile Delinquency*, UN Doc. A/RES/45/112 (14 December 1990), [21(h)] states that education systems should devote particular attention to "avoidance of harsh disciplinary measures, particularly corporal punishment" and [54] provides "No child or young person should be subjected to harsh or degrading correction or punishment measures at home, in schools or in any other institutions."

¹²⁵ For example, in NSW the *Crimes (Administration of Sentences) Regulation 2014* (NSW) prohibits the use of corporal punishment, torture, cruel, inhuman or degrading treatment or any other punishment or treatment that may reasonably be expected to adversely affect a person's physical or mental health (cl 164). Also, the *Education Act 2004* (ACT) prohibits the use of corporal punishment in ACT schools (s 7(4)).

¹²⁶ For example, *Children and Young People Act 2008* (ACT) s 741. See also Australian Institute of Family Studies *Corporal Punishment: Key Issues* (March 2014) <<https://aifs.gov.au/cfca/publications/corporal-punishment-key-issues>>.

an adult would constitute assault and this is an area in need of reform. The Committee on the Rights of the Child has on multiple occasions expressed concern that the corporal punishment of children is lawful in some circumstances in Australia.¹²⁷

B: Seclusion and restrictive practices

8. The UN Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment has found that solitary confinement of any duration imposed on children constitutes cruel, inhuman or degrading treatment and violates article 7 ICCPR and article 16 CAT.¹²⁸ He has also found that the prolonged restraint or seclusion of people with disabilities can constitute torture.¹²⁹
9. In Australia, there have been concerning reports of the use of restrictive practices, particularly against children with disabilities, reportedly used for purposes other than to prevent imminent harm and which have not resorted to the least rights-restrictive practice.¹³⁰
10. In the context of criminal detention, the Public Advocate in Victoria has observed: “[o]nce in the system, people with disabilities’ needs are often not met because of a lack of understanding of their disability and a lack of appropriate sanctions for breaching prison rules. For example, people with...autism spectrum disorders are sometimes placed in seclusion as punishment for inappropriate behaviours that they were unable to control because of their disability.”¹³¹
11. In relation to institutional care settings, the 2015 Senate Standing Committee on Community Affairs report on *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and people from culturally and linguistically diverse backgrounds with disability* found that many forms of violence (including psychological or emotional harm and abuse; constraints and restrictive practices;

¹²⁷ Committee on the Rights of the Child, *Concluding Observations: Australia*, 60th sess, UN Doc. CRC/C/AUS/CO/4 (28 August 2012), [44].

¹²⁸ Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/66/268 (5 August 2011), [77].

¹²⁹ Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/63/175 (28 July 2008), [55]-[56].

¹³⁰ Darcie Lyons, “Restraint and Seclusion of Students with Disabilities” *International Journal of Children’s Rights* 23 (2015) 189-239, 211-212.

¹³¹ Public Advocate of Victoria, Submission No. 91 to the Productivity Commission, *Inquiry into the Disability Discrimination Act* (May 2003), 4, as extracted in Naylor, Debeljak and McKay, above n 6, 244.

forced treatments and interventions; humiliation and harassment; passive neglect; and wilful deprivation) are “considered by the health, legal and disability service sectors to be lawful therapeutic practice”.¹³² The Australian Cross Disability Alliance summarised the situation as follows: “[m]any of the practices would be considered crimes if committed against people without disability, or outside of institutional and residential settings. However, when “perpetrated against persons with disabilities”, restrictive practices “remain invisible or are being justified” as legitimate treatment, behaviour modification or management instead of recognised as “torture or other cruel, inhuman or degrading treatment or punishment”.¹³³ One high-profile example in recent times is the case of a ten year old boy with autism being placed in a purpose built cage structure in a primary school in the ACT.¹³⁴

12. The Senate Standing Committee on Community Affairs went on to conclude:

[t]he committee believes that the use of restrictive practice against children must be eliminated as a national priority. The committee recommends the Australian Government work with state and territory governments to implement a zero-tolerance approach to restrictive practice in a schools context, which should include:

- *the principle that restrictive practice must not form a part of a behaviour management plan;*
- *written behaviour management plans must be agreed to by the student, their parents, the school and a Principal Practice Leader or Senior Practitioner (or similar position) within the state education department;*
- *that parents must be notified should there be an instance of emergency restrictive practice being used;*
- *specialist support be made available by the state education department to guide and support teachers, students and families through the understanding and implementation of these new policies; and*
- *a compulsory unit of training should be developed and delivered to all principals, teachers and teachers' aides to ensure that these new policies are clearly understood and implemented. This training should be made available to interested students and families.*¹³⁵

¹³² Senate Standing Committee on Community Affairs, above n 8, [4.25].

¹³³ Australian Cross Disability Alliance, Submission 147, 45-46, Senate Standing Committee on Community Affairs, above n 8, cited at 77.

¹³⁴ See Senate Standing Committee on Community Affairs, above n 8, 102.

¹³⁵ Ibid, [10.59].

13. UNICEF Australia is concerned that the use of restrictive practices could constitute cruel, inhuman or degrading treatment or punishment of people, including children with disability and urges further reform in line with the recommendations of the Senate Standing Committee on Community Affairs so as to ensure appropriate safeguards.

11. The benefit for children of ratifying OPCAT and establishing a National Preventative Mechanism

1. The unique vulnerability of children who are deprived of their liberty creates heightened need for independent oversight and monitoring mechanisms. In addition to the power imbalance that exists between detainees and the authorities that detain, children face the compounding power imbalance between child and adult due to their age and level of maturity. Additionally, they might not have the benefit of family around them, members of which would ordinarily play an important protective function. In some instances, this can again be compounded by intergenerational grief, the existence of disability, mental illness, and drug and alcohol dependency. Children can also face difficulties in identifying a problem as one with a legal or administrative remedy and, in turn, accessing legal advice and representation can be particularly difficult for children.¹³⁶ In short, the vulnerability of children who are deprived of their liberty is high. As a result, the Committee on the Rights of the Child has previously called on States parties to ratify OPCAT.¹³⁷ The Committee Against Torture has also invited Australia to become a party to the *Optional Protocol to the Convention on the Rights of the Child on a communications procedure*.¹³⁸
2. Despite this, monitoring and oversight mechanisms and standards remain varied across Australian jurisdictions.¹³⁹ Although there are good practices of monitoring and oversight in some settings,¹⁴⁰ and some jurisdictions provide for protection against torture and cruel, inhuman and degrading treatment and punishment in certain circumstances,¹⁴¹ there is no consistent, uniform and human rights based approach to monitoring applying across all relevant facilities and settings across

¹³⁶ Sandor, above n 4.

¹³⁷ Committee on the Rights of the Child, *General Comment No. 5 General measures of implementation of the Convention on the Rights of the Child (arts 4, 42 and 44, para 6)*, 34th sess, UN Doc. CRC/GC/2003/5 (27 November 2003), Annex 1.

¹³⁸ Committee Against Torture, *Concluding observations on the combined fourth and fifth periodic reports of Australia*, UN Doc. CAT/C/AUS/CO/4-5 (23 December 2014), [23].

¹³⁹ Sandor, above n 4.

¹⁴⁰ For example, the Western Australian Office of the Inspector of Custodial Services (*Inspector of Custodial Services Act 2003* (WA)) and the NSW Inspector of Custodial Services (*Inspector of Custodial Services Act 2012* (NSW)).

¹⁴¹ For example, *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 10, *Human Rights Act 2004* (ACT) s 10 and *Criminal Code Act 1995* (Cth) div 274.

Australia. As a result, there is a risk that children and others could be exposed to conditions which amount to torture or cruel, inhuman or degrading treatment, such as was found in *Brough v Australia*¹⁴² (discussed above).

3. As such, the ratification of OPCAT would fill a gap in monitoring and prevention and bring with it associated benefits. These benefits have been well-canvassed by others in recent years and include:¹⁴³
 - a) Preventing torture and cruel, inhuman and degrading treatment or punishment;
 - b) Proactive identification of emerging issues, sharing of good practice and aid in risk management;
 - c) Encouraging a culture of respect for human rights;
 - d) Potential cost savings; and
 - e) Enhancing Australia's international reputation and leadership through greater commitment and compliance with international human rights law.
4. One strength of the OPCAT model is that the SPT works on the basis of "constructive dialogue and collaboration rather than condemnation".¹⁴⁴ Working in collaboration with national authorities, such a model offers the benefit of proactive implementation and problem resolution, as opposed to a more confrontational model which could otherwise exist.
5. In New Zealand where a mixed model NPM has been established, some of these benefits are being seen. There, where the Office of the Children's Commissioner (OCC) is responsible for, inter alia, monitoring of care and protection and youth justice residences, it has been reported that the OCC has had a range of positive impacts for children, including "the quality of records concerning the statutory authority and case-specific reasons for the use of 'secure care' within youth justice residences; staff accreditation for the use of seclusion, mental health training and training on OPCAT; staffing levels; staff conduct; improvement of grievance panel systems, and processes and complaints processes (including suggestion boxes);

¹⁴² Human Rights Committee, *Views – Communication No. 1184/2003 Brough v Australia*, UN Doc. CCPR/C/86/D/1184/2003 (27 April 2006).

¹⁴³ Australian Human Rights Commission, *Australian Human Rights Commission Submission to the Joint Standing Committee on Treaties* (29 March 2012), [23]–[38] <<http://www.humanrights.gov.au/consideration-australia-s-ratification-optional-protocol-convention-against-torture>>. Also Law Council of Australia, *Optional Protocol to the Convention Against Torture - Submission to the Joint Standing Committee on Treaties* (30 March 2012), [30]–[95] <<https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2628%20-%20Optional%20Protocol%20to%20the%20Convention%20against%20Torture.pdf>>.

¹⁴⁴ SPT, *SPT Introduction* <<http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/OPCATIntro.aspx>>.

exercise and activities available in residences; behaviour management plans in residences and residential schools; transition planning and cohesion between care and clinical teams; critical incident reporting systems and audit report implementation; quality of food provision for residents; cultural assessments; the time available to staff to plan and deliver programs; and the extent to which young people are able to access mental health services (references omitted)."¹⁴⁵

6. The issues discussed in this submission indicate the need for increased monitoring of places where children are at risk of torture or cruel, inhuman or degrading treatment or punishment. A NPM would act as a frontline of torture prevention. Because of the serious and on-going consequences that experiences such as torture and cruel, inhuman or degrading treatment or punishment can have on children, the prevention of such experiences is paramount.
7. Additionally, a number of the issues raised highlight additional human rights concerns observable from current law, policy and practice, particularly in the youth justice system. Although these extend to broader human rights concerns, they nevertheless link with conditions or circumstances that create a risk of torture or cruel, inhuman or degrading treatment or punishment. A NPM with sufficient mandate and the oversight of the SPT could also help address these broader, systemic human rights concerns connected with youth justice systems across Australia through incremental transformation.
8. Establishing an adequately resourced NPM would help bring facilities and conditions of detention to a consistent and high standard, ensuring conditions of safety and dignity for all individuals affected. Ratifying OPCAT therefore creates an opportunity to bring facilities and practices in line with Australia's international human rights obligations – including the CRC, ICCPR, CAT and UNHCR Detention Guidelines.¹⁴⁶ As the National Interest Analysis conducted against OPCAT in 2012 concluded:

Australian law already strongly prohibits the use of torture in all its forms. The proposed treaty action recognises the importance of supporting and strengthening the measures already in place in Australia. It will further underline our commitment to the values and protections of the Convention and support our efforts to ensure that other countries meet the same

¹⁴⁵ Natalie Pierce, "Implementing Human Rights in Closed Environments: The OPCAT Framework and the New Zealand Experience", *Human Rights in Closed Environments* (2014), 194.

¹⁴⁶ UNHCR, *Detention Guidelines – Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) <<http://www.unhcr.org/refworld/docid/503489533b8.html>>.

*standard. Undertaking monitoring of places of detention in accordance with the Optional Protocol will achieve a more national and comprehensive approach with a greater ability to identify gaps and issues particular to individual Australian jurisdictions, or commonly experienced by all.*¹⁴⁷

9. As outlined above, however, the benefit is not one simply of compliance. It is fundamentally to protect children and adults who are subject to perhaps the most striking example of state power over an individual, namely; the power to deprive liberty.

Contact

For more information please contact Alison Elliott, Senior Policy Advisor, UNICEF Australia at aelliott@unicef.org.au or (02) 8917 3247.

¹⁴⁷ National Interest Analysis [2012] ATNIA 6 with attachment on consultation – Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on 18 December 2002 [2009] ATNIF 10, 5.