Human Rights Law Centre

Human Rights Law Centre submission

Submission to the Youth Detention and Young Prisoner Review, Queensland

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1. Contents

2. Summary

2.1 Summary of submissions

1. These submissions are intended to provide an overview of a number of human rights issues relevant to the Youth Detention and Young Prisoner Review (the **Review**), with a particular focus on Terms of Reference (ii) and (iii), as well as a number of general issues falling outside, but still relevant to, the Review.

2. These submissions pay particular attention to the specific rights of Aboriginal and Torres Strait Islander young people, given they constitute 65 per cent of Queensland's youth detention population. Rather than dealing with Aboriginal and Torres Strait Islander young people's rights discretely, Queensland's entire youth justice system should be designed with the needs and rights of Aboriginal and Torres Islander young people at its core.

3. The HRLC would be pleased to provide further information, including in relation to matters not covered in these submissions.

2.2 Summary of recommendations

Recommendation 1: Aboriginal and Torres Strait Islander young people

- All of the Review's recommendations should be framed with the unique rights and vulnerabilities of Aboriginal and Torres Strait Islander young people at their core.

Recommendation 2: use of restraints

- Restraints should never be used for routine purposes, such as the movement of young people within or outside the detention facility. Restraints should only be used in exceptional circumstances, such as where a young person is at imminent risk of harm to self or others.
- The register of restraints should be made publically available annually.

Recommendation 2: solitary confinement

- Solitary confinement should not be permitted in any circumstances in youth detention.

Recommendation 3: strip searching

- The Review should seek clarification about existing strip searching policies and practices in Queensland's youth detention facilities.
- Strip searching should be abolished in youth detention or, at the very least, significantly limited to circumstances of absolute necessity, and informed by a risk-based (rather than routine) approach.

Recommendation 4: age of criminal responsibility

- The age of criminal responsibility should be raised to 12 years.

Recommendation 5: provision of medical care and proper education

- Early assessment of all young people in detention should be undertaken to diagnose disability, mental illness or other health issues, to enable provision of proper care and treatment.
- The provision of education in detention should be aligned to the needs and abilities of each young person and designed to prepare them for reintegration post release. The Review should consider a robust model of education provision for Queensland's youth detention facilities, similar to Parkville College in Victoria.

Recommendation 6: oversight

- A whole of government independent oversight body should be established, modelled on Western Australia's Office of the Inspector of Custodial Services.

Recommendation 7: vulnerable minorities

- Young people with disability – steps should be taken to ensure young people with disability are diagnosed early and have access to treatment and care in detention.
- Girls – the Review should explicitly consider the unique needs and rights of girls in detention and ensure that all recommendations are gender-sensitive.
- LGBTI young people – policies should be developed to protect the rights and integrity of lesbian, gay, bisexual, transgender and intersex young people in detention.

3. Human rights compliant youth detention framework

3.1 Why consideration of non-compliance is relevant to the Review

4. The Review's mandate includes an analysis of:

   (a) current policies and practices operating within Queensland's youth detention centres, including, relevantly to these submissions, the use of restraints and separation; and

   (b) the effectiveness of oversight mechanisms which operate in Queensland's youth detention centres.

5. Australia's human rights obligations require both federal and state compliance and are therefore binding on the Queensland government. A human rights compliant youth justice system will benefit young people in Queensland by protecting against the types of mistreatment that catalysed this Review. As such, it is integral as part of the Review that existing laws, policies and practices be considered against relevant human rights obligations and standards, in order to identify:

   (a) deficiencies in legislation, which contribute to treatment inconsistent with human rights obligations; and

   (b) a framework for reform, to provide mechanisms to remedy deficiencies and ensure laws, practices and oversight mechanisms are both human rights compliant, implementable and effective.

3.2 Key human rights principles

6. The key overarching human rights principles which should guide the Review's considerations can be summarised as follows:

   - Parties must implement legislation and practices which are in the best interests of the child and which protect children from all forms of physical or mental violence, injury, abuse, neglect, maltreatment or exploitation.[1]
   - The torture and ill-treatment of children is absolutely prohibited and states must ensure that children deprived of their liberty are treated with humanity and respect for their inherent dignity.[2]
   - Young people deprived of liberty are particularly vulnerable to abuse, torture and treatment which may undermine long-term psychological and physical well-being.[3] The

[1] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CROC*') art 19.
[2] *CROC* art 37; *International Convention on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*') art 7 and art 10; and *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('*CAT*') art 2.
[3] This position was expressed by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment and was affirmed by the American Academy of Child and Adolescent Psychiatry in 2012. See, http://www.aacap.org/aacap/policy_statements/2012/solitary_confinement_of_juvenile_offenders.aspx

unique status of children deprived of liberty requires 'higher standards and broader safeguards for the prevention of torture and ill-treatment.'[4]

- The aim of detention is the reformation and social rehabilitation and young people should therefore be accorded age-appropriate treatment.[5]
- Deprivation of liberty should be 'a last resort measure to be used only for the shortest possible period of time.'[6]

3.3 Relevant international instruments

7. These submissions focus on the most pertinent ratified conventions,[7] being the Convention on the Rights of the Child (**CROC**) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**)**,** and the guiding principles, standards and international jurisprudence which shed light on these instruments.

8. These submissions also pay particular attention to the International Covenant on Civil and Political Rights (**ICCPR**), the International Covenant on Economic, Social and Cultural Rights (**ICESCR**), the Convention on the Rights of Persons with Disabilities (**CRPD**) and the UN Declaration on the Rights of Indigenous Peoples (**UNDRIP**).

9. Australia's obligations under each convention must be upheld by all levels of government in each state and territory.

3.4 Indigenous Peoples' rights

10. Approximately 65% of young people in youth detention facilities in Queensland are Aboriginal or Torres Strait Islander. This statistic is emblematic of the failure of successive governments to implement effective reforms and uphold Indigenous peoples' human rights, which has drawn criticism from the Committee on the Rights of the Child,[8] the Committee against Torture,[9] numerous Special Rapporteurs and, most recently, by the Human Rights Council when Australia was subject to its Universal Periodic Review.[10]

11. Whilst these submissions focus on specific inconsistencies between Queensland laws and relevant human rights obligations, each and every issue and reform proposal must be considered in light of the unique rights, needs and vulnerabilities of Aboriginal and Torres

[4] Juan E. Mendez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/28/68 (5 March 2015), para 16.
[5] ICCPR art 10.
[6] Ibid para 25.
[7] The ICESCR, ICCPR, CAT and CROC were ratified by the Australian Government in 1975, 1980, 1989 and 1990 respectively.
[8] Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention, Concluding observations: Australia*, UN Doc CRC/C/AUS/CO/4 (28 August 2012).
[9] Committee against Torture, *Report of the Committee against Torture*, UN Doc CAT A/56/44 (1 Jan 2001), para 52.
[10] Human Rights Council, *Report of the Working Group on the Universal Periodic Review*, UN Doc A/HRC/31/14 (13 January 2016).

Strait Islander young people, and the importance of ending their staggeringly high over-representation in the criminal justice system.

12. Human rights law imposes a number of additional obligations on states for upholding the rights of Indigenous peoples. For example, in addition to the various rights considered in detail below, the ICESCR and the ICCPR require parties to recognise the right of every person to take part in cultural life.[11] The Committee on Economic Social and Cultural Rights has emphasised the right of Indigenous peoples to participate in traditions, customs, forms of education, languages and other manifestations of cultural identity.[12] The fact of a young person's detention does not displace the state's obligation to fully provide for this right.

13. Whilst not explicitly dealing with the rights of Indigenous people in detention, the United Nations Declaration on the Rights of Indigenous People (**UNDRIP**) establishes a universal framework of minimum standards for the survival, dignity, wellbeing and rights of Indigenous peoples. The rights contained in UNDRIP should therefore inform relevant recommendations made by the Review.

14. The Expert Mechanism on the Rights of Indigenous Peoples has considered issues of access to justice for Indigenous children (though not specifically the issue of detention). Pertinent comments of the Expert Mechanism can be summarised as follows:

- states should implement special protection measures for Indigenous young people, which are culturally sensitive and trauma informed;[13]
- states should work with Indigenous peoples to develop alternatives for Indigenous young people in conflict with the law, including the design and implementation of culturally appropriate juvenile justice services and the use of restoratives justice approaches. Arrest, detention or imprisonment should only be used as a measure of last resort;[14] and
- traditional restorative justice systems consistent with international law could be used to address cases involving Indigenous young people.[15]

3.5 Specific deficiencies in Queensland law

(a) Restraints

Obligations deriving from international instruments

[11] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*') art 15.
[12] UN Committee on Economic, Social and Cultural Rights ('*CESCR*'), *General Comment no. 21*, *Right of everyone to take part in cultural life,* UN Doc E/C.12/GC/21 (21 December 2009), para 37.
[13] Expert Mechanism on the Rights of Indigenous Peoples, *Access to justice in the promotion and protection of the rights of indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with* disabilities, UN Doc A/HRC/27/65 (7 August 2014), para 52.
[14] Ibid Advice for States, para 11.
[15] Ibid para 51.

15. The foundational human rights proposition for the permissible use of restraints is that they should only be used as a last resort, in very limited circumstances, including to prevent escape or injury, and with appropriate supervision and authorisation.[16]

16. In applying this principle specifically to young people, the Special Rapporteur on Torture stated in 2015 that restraints or force may be used only when a young person poses an imminent threat of injury to herself, himself or others, when all other means of control have been exhausted and for as limited a period as possible.[17]

17. The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (**Havana Rules**) are particularly pertinent when considering the use of restraints in juvenile detention.

> Instruments of restraint and force can only be used in exceptional cases, where all other control methods have been exhausted and failed, and only as explicitly authorised and specified by law and regulation. They should not cause humiliation or degradation, and should be used restrictively and only for the shortest possible period of time.[18]

18. The United Nations Standard Minimum Rules for the Treatment of Prisoners (**Mandela Rules**), which apply generally to places of detention, prohibit the use of restraints as a method of discipline.[19] They also prohibit the use of chains, irons or other instruments of restraint which are inherently degrading or painful.[20]

19. Further, on a number of recent occasions, the Committee on the Rights of the Child and the Committee against Torture have articulated concerns about the use of restraints on children in custodial settings. Examples include:

    (a) In its 2016 concluding observations in relation to the United Kingdom and Northern Ireland, the Committee on the Rights of the Child expressed concern about the use of restraints to maintain good order and discipline in young offenders and urged the abolition of restraints for disciplinary purposes. The Committee emphasised that restraints should only be used to prevent harm and as a last resort. The Committee also urged the UK to systematically and regularly collect and publish disaggregated data on the use of restraints and other restrictive interventions on children.[21]

    (b) In its 2016 concluding observations in relation to New Zealand, the Committee on the Rights of the Child noted its concern about the 'use of restraints and deprivation of liberty in the form of Secure Care.'[22] It recommended that New Zealand take various

[16] Ibid rule 47(2) and 48.
[17] Juan E. Mendez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/28/68 (5 March 2015), para 86(f).
[18] United Nations Rules for the Protection of Juveniles Deprived of their Liberty ('*Havana* Rules') UN Doc A/RES/45/113 (14 December 1990), para 64.
[19] United Nations Standard Minimum Rules for the Treatment of Prisoners ('*Mandela Rules*') UN Doc E/CN.15/2015/L.6/Rev.1, rule 43.
[20] Ibid, rule 47(1).
[21] Committee on the Rights of the Child, *Concluding observations of the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland*, UN Doc CRC/C/GBR/CO/5 (12 July 2016).
[22] Committee on the Rights of the Child, *Concluding observations of the fifth periodic report of New Zealand*, UN Doc CRC/C/NZL/CO/5 (30 September 2016), para 22.

actions to eradicate the abuse of children, 'including in the form of restraints and detention, and ensure that all professionals and staff working with and for children are provided with the necessary training and supervision, and are subjected to the necessary background checks.'[23]

(c) In its 2016 concluding observations in relation France, the Committee against Torture criticised the use of restraints without reference to consistent criteria and for varying duration.[24]

20. Whilst these observations were not made directly about Australia, they (and other similar comments) are relevant in guiding Australia's obligations. Further, Australia has generally not reported to UN human rights treaty body mechanisms on the use of restraints (or the extent of the use of solitary confinement) in youth detention facilities. This will likely change when Australia reports in future given the profile of the issues being investigated by this Review as well as the Royal Commission into the Protection and Detention of Children in the Northern Territory.

Queensland legislative provisions

21. The relevant provisions relating to the use of restraints are contained in the *Youth Justice Regulations 2016* (Qld) (**Regulations**).

22. Regulation 18(1) enables the chief executive to approve the types of restraints which are permissible for use on young people in detention. The Regulations do not specify the types of restraints which may be approved, nor prohibit the approval of particularly inhuman restraints, such as restraint chairs and spit hoods.

23. Regulation 19(1)(b) sets out the circumstances in which restraints may be used, including:

(a) to escort young people outside a detention centre; and

(b) inside a detention centre, where a staff member reasonably believes a young person is likely to attempt escape, seriously harm herself/himself or someone else or seriously disrupt the order and security at the centre. The Regulations stipulate that in these circumstances, restraints should only be used as a last resort and for no longer than is reasonably necessary in the circumstances.

Inconsistencies and reform

24. The Regulations are deficient and require reform in the following areas:

(a) The restraints approved for use in youth detention facilities must be explicitly set out in the legislative scheme. Currently, without such stipulation, restraints which cause significant harm or humiliation (such as a restraint chair, as seen on Four Corners)

[23] Ibid, para 23.
[24] Committee against Torture, *Concluding observations on the seventh periodic report of France*, UN Doc CAT/C/FRA/CO/7 (10 June 2016).

may be used on young people and the types of restraints permitted for use may change from time to time at the absolute discretion of the chief executive.

(b) Restraints are currently used for routine movement of young people outside the detention facility, without any assessment of risk or consideration of whether their use is required in the circumstances. Routine use of restraints is patently contrary to Australia's human rights obligations.

(c) The Regulations do not explicitly require that the register of the use of restraints be made publically available. Whilst this may be done in practice, the Regulations should specify this requirement on at least an annual basis. If the register is not publically available, there is a risk of over-use of restraints and a lack of accountability and transparency.

(b) Solitary confinement

Obligations deriving from international instruments

25. The Mandela Rules define 'solitary confinement' as the confinement of prisoners for 22 hours or more a day without meaningful human contact.[25] The Istanbul Statement on the use and effects of solitary confinement further states that 'the reduction in stimuli is not only quantitative but also qualitative. The available stimuli and the occasional social contacts are seldom freely chosen, are generally monotonous, and are often not empathetic.'[26]

26. The use of solitary confinement on children is strictly prohibited.[27] This is because the isolation inherent in solitary confinement can have severe, long-term and irreversible effects on a child's psychology and physiology, as was recently articulated by the Special Rapporteur on Torture.[28] Negative health effects include insomnia, confusion, compounded trauma, hallucinations and psychosis.[29]

27. Accordingly, in his 2015 Report, the Special Rapporteur on Torture recommended the prohibition on solitary confinement of children for any duration and for any purpose.[30] This position was also emphasised by the Committee on the Rights of the Child, which urged parties to prohibit and abolish the use of solitary confinement against children.[31]

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[25] Mandela Rules rule 44.
[26] 'The Istanbul Statement on the use and effects of solitary confinement' (9 December 2007) *International Psychological Trauma Symposium, Istanbul*. Available at: http://solitaryconfinement.org/uploads/Istanbul_expert_statement_on_sc.pdf
[27] Mandela Rules rule 45(2) and Havana Rules, para 67. See also CAT/C/MAC/CO/4, para. 8; CAT/OP/PRY/1, para. 185; CRC/C/15/Add.151, para. 41; and CRC/C/15/Add.232, para. 36 (a).
[28] Juan E. Mendez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/22/53 (1 February 2013).
[29] 'The Istanbul Statement on the use and effects of solitary confinement' (9 December 2007) *International Psychological Trauma Symposium, Istanbul*. Available at: http://solitaryconfinement.org/uploads/Istanbul_expert_statement_on_sc.pdf.
[30] Juan E. Mendez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/28/68 (5 March 2015), para 86(f).
[31] Committee on the Rights of the Child, *General comment no. 10*, UN Doc CRC/C/GC/10 (25 April 2007). See also CRC/C/15/Add.151, para. 41; CRC/C/15/Add.220, para. 45 (d); and CRC/C/15/Add.232, para. 36 (a).

28. Further, in 2016, the Committee on the Rights of the Child urged the UK to 'immediately remove all children from solitary confinement, prohibit the use of solitary confinement in all circumstances and regularly inspect the use of segregation and isolation in child detention facilities.'[32]

29. The US has recently banned the use of solitary confinement for juvenile offenders in the federal prison system, noting the potential long-term psychological and developmental damage it can cause.

30. In addition to the potential for harm, the Istanbul Statement emphasises that placing young people in solitary confinement also risks putting them out of sight and in conditions ripe for abuse. The safeguarding of young peoples' rights are best ensured where young people are easily accessible and have consistent contact with the outside world.

Queensland legislative provisions

31. Under regulation 21, a child may be 'separated' for reasons including, routine security purposes and to restore order in the detention centre. Certain approvals must be obtained if the 'separation' is for more than 24 hours, however the Regulations do not prescribe a maximum period of 'separation', nor the maximum hours per day for which a young person can be separated.

32. Whilst the words 'isolation' and 'solitary confinement' are not used in the Regulations, the term 'separate' is defined to mean 'to separate the child from all other persons in a detention centre.' In accordance with the definition of solitary confinement in the Mandela Rules, such separation amounts to deprivation of 'meaningful human contact', making it tantamount to solitary confinement.

Inconsistencies and reform

33. Queensland legislation explicitly breaches human rights obligations by allowing for the use of solitary confinement on young people.

34. Further, the breadth of circumstances which may justify solitary confinement on the basis of routine security purposes or to restore order in the facility compound this violation. Queensland should abolish the use of solitary confinement in youth detention facilities both to ensure human rights compliance and to prevent children suffering serious health consequences.

35. While the term 'meaningful human contact' is not clearly defined under international law, the use of the term 'meaningful' indicates that, for example, the provision of books; communication through an intercom or through the door; or other dehumanised forms of contact, would not satisfy the requirement. As such, any attempt to justify isolation on the basis that 'meaningful human contact' is taking place should not be accepted.

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

(c) Strip searching

Obligations deriving from international instruments

36. Subjecting children and young people to strip searches can be demeaning and traumatising. This is particularly the case in light of the high number of young people in detention who have experienced physical and sexual abuse.[33] As such the Special Rapporteur on Torture states that strip searches should not be performed without reasonable suspicion and that routine strip searches should be abolished.[34]

37. In addition to the requirement that children be treated with humanity and respect for their inherent dignity, the CROC stipulates that no child shall be subject to arbitrary or unlawful interference with his or her privacy.[35] Further, the Mandela Rules state that strip searches should be undertaken only if absolutely necessary and that appropriate alternatives should be used wherever possible.[36]

Queensland legislative provisions

38. Pursuant to regulation 25, where a strip search is performed, a young person must be given the opportunity to remain partly clothed at all times. This may be done, for example, by allowing the child to dress the upper body before being required to remove items of clothing from the lower part of the body.

39. Further, the Regulations confine the use of strip searches to circumstances where the chief executive reasonably believes it is necessary for the security of employees or children in the detention centre. However, it is unclear on the face of the Regulations whether this assessment is to be undertaken on a case by case basis (ie each time a risk to security is reasonably identified), or whether the chief executive is able to permit the routine use of strip searching in certain circumstances (for example, after contact visits or after court attendance); and to justify such permission in general terms on the basis of security reasons.

Inconsistencies and reform

40. In light of the human rights obligations set out above, strip searching of young people in youth detention facilities should be abolished and other techniques such as pat searches and detection devices should be used instead.

41. At the very least, if strip searching is not abolished, it should be clearly and explicitly limited to individual circumstances of identified risk or reasonable suspicion of possession of contraband, to be determined on a case-by-case basis, rather than through the use of blanket approvals in particular circumstances. That is, strip searching should not be permitted on a routine basis.

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[33] Australian Children's Commissioners and Guardians, *Human rights standards in youth detention facilities in Australia: the use of restraints, disciplinary regimes and other specified practices*, April 2016, page 39.
[34] Juan E. Mendez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/28/68 (5 March 2015), para 86(f).
[35] CROC art 16.
[36] Mandela Rules rule 52.

(d) Age of criminal responsibility

Obligations deriving from international instruments

42. The CROC requires parties to establish a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.[37] The internationally accepted minimum age of criminal responsibility is 12 years and both the Committee on the Rights of the Child and, more recently, the Special Rapporteur on Torture have recommended that the minimum age must be set at no lower than 12 years.[38]

Queensland legislative provisions

43. Currently, the age of criminal responsibility in all Australian states and territories, including in Queensland, is 10 years, subject to the *doli incapax* principle.[39]

Inconsistencies and reform

44. The Committee on the Rights of the Child has expressed concern in this regard. For example, in 1997, in its concluding observations on Australia, the Committee stated that it was 'deeply concerned that the minimum age of criminal responsibility is generally set at the very low level of 7 to 10 years, depending upon the state.'[40] In 2012, the Committee again expressed concern that 'no action has been undertaken…to increase the minimum age of criminal responsibility.'[41]

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

(e) Medical care

Obligations deriving from international instruments

46. Article 12 of the ICESCR entitles all persons to the highest attainable standard of physical and mental health. Further, the Mandela Rules and Havana Rules require the provision of prompt access to medical attention and specialised treatment for people in detention.[42] The Havana Rules also emphasise the importance of access to treatment for mental illness and substance abuse,[43] as well as notification of family about the state of health of a young person on request or in the event of illness.[44]

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[37] CROC art 40(3).
Juan E. Mendez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/28/68 (5 March 2015), para 85(g).
[39] *Criminal Code Act* 1899 (Qld), section 29(1).
[40] Committee on the Rights of the Child, *Concluding observations of the Committee on Rights of the Child: Australia*, UN Doc CRC/C/15/Add.79 (1997).
[41] Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention, concluding observations: Australia*, UN Doc CRC/C/AUS/CO/4 (28 August 2012), 82(a).
[42] Mandela Rules, rule 27 and Havana Rules, para 49.
[43] Rules 51 and 53.
[44] Rule 56.

47. The denial of medical treatment or the administration of inappropriate treatment can amount to inhuman conditions in detention in contravention of the requirements under ICCPR, CAT and CROC.[45]

48. The Special Rapporteur on Torture recommended that states ensure paediatricians and child psychologists with trauma-informed training are available on a regular basis to all children in detention.[46] Such treatment should also be delivered in a culturally informed and appropriate manner for Aboriginal and Torres Strait Islander young people.

49. The Committee on the Rights of the Child has expressed concern that in Australia, 'no measures have been taken to ensure that children with mental illness and/or intellectual deficiencies who are in conflict with the law are dealt with using appropriate alternative measures without resorting to judicial proceedings.'[47]

Queensland legislative provisions

50. Regulation 35 states that every child in detention has a right to medical treatment and other health services. Further, pursuant to regulation 11, where the chief executive believes a child who is about to be admitted to a detention centre is physically or mentally ill, the child must be examined and, if necessary, treated and provided with a medical certificate of fitness for admission to detention.

51. However, there does not appear to be a general requirement for the health assessment of young people prior to or shortly after admission into detention and the Regulations are silent (or at least are not explicit) about disability or mental health assessment or the provision of appropriate treatment. Further, we understand that in practice there are significant concerns about the provision of health care and, in particular, mental health services.

Inconsistencies and reform

52. Failure to diagnose can result in a number of inequities, including inappropriate sentencing, inappropriate placement in youth detention, and unfair or inhumane treatment.

53. Given this risk, the Regulations should be amended to require both the youth justice system and the youth detention system to undertake early assessment and diagnosis of all young people, to enable proper care and treatment.

(f) Provision of Education

Obligations deriving from international instruments

54. The CROC states that parties must recognise the rights of the child to education and that such education be directed to the development of the child's personality, talents and mental and

[45] Juan E. Mendez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/28/68 (5 March 2015).
[46] Ibid para 85(d).
[47] Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention, Concluding observations: Australia*, UN Doc CRC/C/AUS/CO/4 (28 August 2012), para 82(b).

physical abilities to their fullest potential.[48] This right is also articulated in the ICESCR.[49] Importantly, the CROC requires that Indigenous children not be denied the right, in community with other members of their group, to enjoy culture, practices and language as part of their education.[50]

55. The Mandela Rules and the Havana Rules provide for the mandatory education of every young person of compulsory school age, aligned to their needs and abilities and designed to prepare them for return to society.[51] Further, the Havana Rules stipulate that, where possible, such education should be provided outside the detention facility in community schools to ensure that juveniles can continue their education after release, without difficulty.[52]

56. The Special Rapporteur on the right to education has noted that persons in detention constitute 'a group subject to discrimination generally and to discrimination in the provision of education specifically.'[53] The Special Rapporteur recommended the compulsory provision of primary and, wherever possible, secondary level education to all detainees, whether sentenced or in remand, with the aim of minimising the negative impact of detention and improving the prospects of reintegration, rehabilitation and morale.[54]

Inconsistencies and reform

57. These fundamental principles form the basis of the international obligations relevant to the provision of education in youth detention.

58. We note that Parkville College in Victoria is a best practice example of the implementation of the human right to education in a custodial context, and recommend that Queensland adopt a similar model.

59. Parkville College was established after a damning report by the Victorian Ombudsman in 2010,[55] which described appalling conditions at the Melbourne Youth Justice Centre. Recommendations flowing from the review included the implementation of human rights compliant practices, including access to appropriate educational opportunities.

60. Parkville College has been a transformative addition to the Victorian Youth Justice System. It involves cooperation between the Department of Health and Human Services and the Department of Education and Early Childhood Development.

[48] CROC arts 28 and 29.
[49] ICESCR art 13.
[50] CROC arts 29 and 30.
[51] Havana Rules rule 38 and Mandela Rules, para 104.
[52] Havana Rules rule 38.
[53] Human Rights Council, Report of the Special Rapporteur on the right to education of persons in detention, A/HRC/11/8 (2 April 2009).
[54] Human Rights Council, Report of the Special Rapporteur on the right to education of persons in detention, A/HRC/11/8 (2 April 2009), [91].
[55] https://www.ombudsman.vic.gov.au/getattachment/47eb3c0d-36fb-4b5b-b7fb-d584c03ca46f.

61. Parkville College adopts a therapeutic and trauma informed model, underpinned by the universal right of children to receive appropriate education. The College provides access to a tailored education program to all young people in detention (remand and sentenced). Importantly, the focus of the Parkville College model is on normalising education in detention and making it as consistent as possible with ordinary schooling. One of the key ways this is achieved is by prioritising education and ensuring that the good order and security of detention facilities is balanced with the obligation to ensure access to education.[56] Moreover, the experience of Parkville College is that engaging young people through meaningful education bolsters the security in the prison, making the facility overall a more therapeutic and safe environment.

[56] http://parkvillecollege.vic.edu.au/.

4. Independent oversight

4.1 Why consideration of independent oversight is relevant to the Review

62. Independent oversight of detention facilities is integral to preventing mistreatment of detainees and ensuring accountability. To achieve these imperatives, inspectors must be independent from the authority charged with administration of detention facilities. Oversight also assists in ensuring compliance with domestic and international human rights obligations more broadly.

63. Currently, there is no oversight mechanism in Queensland that is independent, expert and resourced, and which enables the unfettered, spontaneous inspection of detention facilities, including access to detainees, documents and information.

64. Whilst it may be appropriate to expand existing powers of relevant office holders (for example the Commission for Children and Young People and Child Guardian), such a remedy would not be a panacea to the lack of independent oversight of all detention facilities in Queensland. A whole of government approach to independent oversight, as set out below, is necessary. This approach would ensure consistency of oversight and expertise across all places of detention.

4.2 Optional Protocol to the Convention against Torture

65. The Optional Protocol to the Convention against Torture (**OPCAT**) is an international treaty that establishes a system of independent inspections of detention facilities by national and international monitoring bodies. Australia signed OPCAT in 2009 but has not yet ratified it.

66. In 2012, the Joint Standing Committee on Treaties supported ratification of OPCAT. The Committee recommended that the Australian Government work with states and territories to establish a national mechanism to comply with OPCAT. Some states and territories have already drafted legislation in preparation for OPCAT compliance after ratification.

67. Whilst ratification is a decision for the Australian Government, there are important steps that states and territories should take to implement OPCAT compliant oversight of detention facilities.

68. Governments can choose how they comply with OPCAT and there are a number of good models internationally, such as in South Africa and New Zealand.

69. Taking into account Australia's federated system, the HRLC recommends a model for an independent oversight body in Queensland based on Western Australia's Office of the Inspector of Custodial Services (**WA Inspector**). Under the *Inspector of Custodial Services Act 2003* (WA), the WA Inspector is required to inspect all detention facilities in the State (other than police cells). This includes routine inspections of each facility at least once every three years as well as unannounced inspections occurring outside this cycle.

70. The WA Inspector's work has included reporting and providing recommendations following serious incidents in youth detention, such as a riot at Banksia Hill Juvenile Detention Centre in 2013. To this end, the Inspector's work has been critical in ensuring subsequent positive developments in youth detention practices in Western Australia.

71. The WA Inspector reports to Parliament about its inspections and those reports are publically available. The stated intention of the WA Inspector is to:

- improve public confidence in the justice system;
- ensure decent treatment of detained people; and
- ensure the justice system provides value for money.

72. It is noteworthy that this year, the West Australian model has been replicated in Tasmania, and to some extent NSW, and could be appropriately adapted for Queensland.

73. As noted above, a limitation of the WA model is that the inspector's mandate does not cover oversight of police custody. If a similar body is established in Queensland, its mandate should include oversight of police custody.

5. Vulnerable minorities

5.1 Young people with disabilities

74. It is well-accepted that a high number of young people in youth detention have a disability, enlivening the application of the Convention on the Rights of Persons with Disabilities. Of particular relevance are the requirements to ensure effective access to justice,[57] and to ensure that persons with disabilities are treated humanely, are not deprived of their liberty unlawfully or because of the existence of their disability.[58]

75. Importantly, the state can only appropriately respond to the rights of people with disability when proper diagnostic tools are in place. Given the known high incidence of undiagnosed disability in the youth detention population, it is critical to the realisation of human rights that appropriate steps be taken to ensure young people with disability have access to early diagnosis, and subsequent care and treatment. This is a core human right, and the cost of diagnosis and treatment does not displace the state's obligation to ensure young people with disabilities are treated appropriately.

5.2 Girls

76. Girls in detention face unique gender-based vulnerabilities. They are nearly twice as likely to have experienced abuse or neglect prior to entering detention compared to boys,[59] and are particularly susceptible to abuse and ill-treatment in detention.

77. Women and girls suffer from discrimination in the criminal justice system where there is 'a lack of gender-sensitive, non-custodial alternatives to detention, a failure to meet the specific needs of women in detention and an absence of gender-sensitive monitoring and independent review mechanisms'.[60]

78. The United Nations Committee on the Rights of the Child has observed that because girls in youth justice systems are only a small group, they may be overlooked. To remedy this,

[57] *Convention of the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008), art 13.
[58] Ibid art 14.
[59] See Devon Indig et al, 2009 NSW Young People in Custody Health Survey: Full Report (Justice Health and Juvenile Justice, 2011) 157-159. See also research from the United States on the high rates of young women and girls in detention who have been victims of sexual assault: Malika Saada Saar et al, *The Sexual Abuse to Prison Pipeline: The Girls' Story* (2015).
[60] Committee on the Elimination of Discrimination against Women, *General Recommendation 33 on women's access to justice*, UN Doc CEDAW/C/GC/33 (23 July 2015), para 48.

'special attention must be paid to the particular needs of the girl child, e.g. in relation to prior abuse and special health needs.'[61]

79. Further, The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (**Bangkok Rules**) require that the vulnerability of young women and girl offenders be taken into account in decision making. The Bangkok Rules also require that young women and girls in detention have:

(a) their protection needs addressed;

(b) equal access to education and vocational training;

(c) access age and gender specific programs and services, including sexual assault and violence counselling;

(d) education on women's health care and regular access to gynaecologists; and

(e) appropriate support and medical care if they are pregnant, taking into account the fact that they may be at greater risk of complications due to their age.[62]

80. The Review should explicitly consider the unique vulnerability of girls in detention and ensure that all recommendations are gender-sensitive.

5.3 LGBTI young people

81. Lesbian, Gay, Bisexual, Transgender and Intersex (**LGBTI**) people in detention experience extreme forms of violence, discrimination and ill-treatment.[63] In particular, transgender women are at a significant risk of violence, sexual assault and rape from other inmates in male prisons.[64] Transgender prisoners are more likely to experience assault and engage in self-harm; this vulnerability is further exacerbated in detention.[65]

82. The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (**Yogyakarta Principles**) systemically articulate the international human rights law obligations as they apply to the lives and experiences of LGBTI people. Pertinently, Principle 9 relates to the right to treatment with humanity while in detention, including:

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[61] 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) . See als**o** United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) rules 26.4.

[62] Bangkok Rules, rules 36-39; 65.

[63] 'Targeted and tortured: UN experts urge greater protection for LGBTI people in detention' (Joint Statement, 23 June 2016), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20165&LangID=E.

[64] Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights (National Consultation Report)* 2015 <https://www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity/publications/resilient-individuals-sexual> 69.

[65] Ibid.

- that placement in detention is appropriate to a person's sexual orientation and gender identity and avoids further marginalisation or risk of violence or abuse;
- adequate access to medical care, including access to hormonal and other therapy and gender-reassignment treatment;
- necessary protective measures to ensure safety, but no greater restriction on rights; and
- appropriate and adequate training of personnel regarding relevant standards and principles.

83. Where they do not currently exist, specific correctional policies should be developed to protect the rights and integrity of LGBTI young people in detention (i.e. policies on placement and access to hormone treatment). In particular, it is integral that there are comprehensive policies relating to the placement and treatment of transgender, gender diverse and intersex young people. Such policies should be developed or amended with a focus on the matters set out above, deriving from the Yogyakarta Rules and should be strongly informed by international human rights law and best practice and in consultation with affected communities.