



## **OPCAT and youth in custody**

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**Emily Mitchell, Senior Policy Officer**

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## Summary of recommendations

### ***Recommendation 1 – Data to be made available on LAC basis***

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*PIAC recommends that relevant data should be made available on a police Local Area Command basis, so that any systemic patterns in the detention of young people in custody can be appropriately identified.*

### ***Recommendation 2 – Review of young people in police custody***

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*PIAC recommends that Australia would benefit from a holistic review of young people in police custody under the OPCAT mandate, similar to the review that occurred in New Zealand.*

### ***Recommendation 3 – Increase age of criminal responsibility***

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*PIAC recommends that Australia should increase the age of criminal responsibility to an absolute minimum of 12 years of age, and that the principle of doli incapax should be preserved.*

## 1. Introduction

The Public Interest Advocacy Centre (PIAC) welcomes the opportunity to provide a submission to the Australian Human Rights Commission (AHRC) regarding the *Optional Protocol to the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment* (OPCAT) in the context of youth justice detention centres.

This submission addresses the following questions posed by the AHRC:

- Are the current oversight, complaints and monitoring mechanisms relating to the treatment and rights of children and young people in detention (youth justice centres and adult facilities) adequate? If not, how could they be improved?
- How could the ratification of OPCAT and the establishment of a National Preventative Mechanism (NPM) benefit children and young people in detention (youth justice centres and adult facilities)?
- The age of criminal responsibility is 10 years in all Australian jurisdictions. The *Convention on the Rights of the Child* does not specify what such a minimum age of criminal responsibility should be. However, the Committee on the Rights of the Child recommends 12 years of age should be the absolute minimum age. The Committee on the Rights of the Child has noted Australia's non-compliance with this standard and it has recommended Australia raise its minimum age of criminal responsibility. What is your view on this?

While noting that the focus of this consultation is regarding youth justice centres, PIAC will comment on these areas in relation to police custody, drawing on our casework.

NSW Department of Juvenile Justice NSW (JJ) acknowledges that it acts as a 'downstream' agency, and 'therefore has limited control over the number of young offenders entering custody'.<sup>1</sup> JJ has also previously noted that 'it is a downstream agency with limited ability to influence the decisions of police and the courts'.<sup>2</sup>

PIAC submits that it is important for OPCAT to play a role in examining places of detention and cruel, inhuman and degrading treatment or punishment, that occur further 'upstream', such as police custody.

## 1.1 The Public Interest Advocacy Centre

PIAC is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from NSW Trade and Investment for its work on energy and water, and from Allens for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

## 1.2 PIAC's work regarding OPCAT

For many years, PIAC has publicly supported the ratification and implementation of OPCAT. This has included the following actions:

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<sup>1</sup> The Hon. Barbara Perry MP, Minister for Juvenile Justice, Correspondence to Ms Libby Rogerson, 3 November  
<sup>2</sup> Edmund Tadros, 'Less help for young Aborigines in custody', *Sydney Morning Herald*, 3 July 2006, available at <http://www.smh.com.au/news/national/less-help-for-young-aborigines-in-custody/2006/07/02/1151778811746.html> (accessed 20 April 2016).

- In February 2011, PIAC identified the need to ratify OPCAT in its submission to the Attorney-General's Department regarding a National Human Rights Action Plan for Australia.<sup>3</sup>
- In December 2011, PIAC wrote to the Attorney-General with 28 other organisations, seeking the ratification of OPCAT.<sup>4</sup>
- In March 2012, PIAC provided a submission to the Joint Standing Committee on Treaties recommending ratification of OPCAT.<sup>5</sup>
- In March 2012, PIAC recommended the ratification of OPCAT in its submission regarding the National Human Rights Action Plan Exposure Draft.<sup>6</sup>
- In January 2014, PIAC recommended the ratification of OPCAT in its submission to the Australian Law Reform Commission regarding equality, capacity and disability in Commonwealth laws.<sup>7</sup>
- In September 2014, PIAC was one of 64 bodies urging the ratification of OPCAT in joint correspondence to the Attorney-General.

Within our casework, PIAC assists young people in civil claims for police behaviour and for treatment while detained in custody. Between 2014 and April 2016, PIAC settled 12 cases against the State of NSW for the treatment of young people under 25; 11 related to treatment by NSW Police, and one related to the treatment of a young person by JJ. We provide advice to many more people on policing issues.

PIAC is also a member of the Youth Justice Coalition (YJC) and worked with YJC to produce the 2010 report *Bail Me Out: NSW Young People and Bail*, which compiled and analysed data from observations at Parramatta Children's Court regarding bail conditions imposed on young people.<sup>8</sup>

## 2. Are the current oversight, complaints and monitoring mechanisms relating to the treatment and rights of children and young people in detention adequate? If not, how could they be improved?

While PIAC notes that the current focus of the inquiry is on youth detention centres, in our casework experience, there is also a need for a National Preventative Mechanism to examine

<sup>3</sup> PIAC, *Human Rights Action Plan for Australia*, Submission to the Attorney-General's Department, available at [http://www.piac.asn.au/sites/default/files/publications/extras/11.02.11\\_Piac\\_Sub\\_National\\_Action\\_Plan\\_Plan.pdf](http://www.piac.asn.au/sites/default/files/publications/extras/11.02.11_Piac_Sub_National_Action_Plan_Plan.pdf) (accessed 20 April 2016).

<sup>4</sup> PIAC, Correspondence to the Hon. Nicola Roxon MP, 'Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', (21 December 2011), available at [http://www.piac.asn.au/sites/default/files/news/attachments/letter\\_to\\_ag\\_re\\_opcat\\_0.pdf](http://www.piac.asn.au/sites/default/files/news/attachments/letter_to_ag_re_opcat_0.pdf) (accessed 20 April 2016).

<sup>5</sup> PIAC, *OPCAT – preventative, proactive and non-punitive*, Submission to the Joint Standing Committee on Treaties National Interest Analysis (30 March 2012), available at <http://www.piac.asn.au/publication/2012/04/opcat-preventative-proactive-and-non-punitive>

<sup>6</sup> PIAC, *National Human Rights Action Plan Exposure Draft*, (5 March 2012), available at <http://www.piac.asn.au/publication/2012/03/national-human-rights-action-plan-exposure-draft>

<sup>7</sup> PIAC, *Equality before the law for people with disability*, Submission in response to Australian Law Reform Commission Issues Paper: Equality, Capacity and Disability in Commonwealth Laws (20 January 2014), available at <http://www.piac.asn.au/publication/2014/01/equality-law-people-disability>

<sup>8</sup> Youth Justice Coalition, *Bail Me Out: NSW Young People and Bail* (February 2010), available at [http://mlc.org.au/files/2214/5395/6883/YJC\\_bail\\_report\\_final.pdf](http://mlc.org.au/files/2214/5395/6883/YJC_bail_report_final.pdf) (accessed 4 May 2016).

police custody. We note that New Zealand has adopted this approach and undertaken a review of young people in police custody, which was released in 2012.

## 2.1 Complaints mechanisms

The current complaints and monitoring mechanisms relating to the treatment and rights of children and young people in police custody are inadequate and can involve a conflict of interest.

### 2.1.1 Police complaints

A young person detained by the NSW Police, if unsatisfied with their treatment, may make a complaint to the NSW Police, which is then referred to the Local Area Command to investigate. While an individual may also complain to the NSW Ombudsman regarding police behaviour, these complaints are often referred to the NSW Police Local Area Command to investigate. The Police Integrity Commission (PIC) investigates misconduct within the NSW Police Force and NSW Crime Commission.<sup>9</sup>

PIAC has previously submitted that the current model, 'whereby police internally deal with complaints made against them and conduct their own investigations into critical incidents, is fundamentally flawed'.<sup>10</sup>

In November 2015, the NSW Government announced that the PIC would be replaced by a new body, the Law Enforcement Conduct Commission (LECC). Proposed by the Tink Review,<sup>11</sup> the LECC would be given oversight of the NSW Police Force and the NSW Crime Commission.<sup>12</sup> Legislation establishing the LECC is anticipated to be tabled in the NSW Parliament in 2016, with the LECC to become operational in 2017.

In 2014 – 2015, there were 8,578 complaints received by NSW Police. Between 2011 – 2015, there was a total of 36,766 complaints were received.<sup>13</sup> These complaints included customer service related issues, local management issues, investigations, service delivery, corruption/misuse of office, misuse of information and information systems and other issues. Complaints were also made regarding behaviour that may result in injury, such as unreasonable use of force (including assault): 478 in 2014-2015 alone,<sup>14</sup> and from 2011-2015, a total of 2,093 complaints made against NSW police alleging unreasonable use of force, including assault.<sup>15</sup>

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<sup>9</sup> See NSW Police Integrity Commission, available at <https://www.pic.nsw.gov.au> (accessed 10 May 2016).  
<sup>10</sup> Sophie Farthing, 'PIAC's submission to the Review of Police Oversight in NSW', Public Interest Advocacy Centre, 24 June 2015, at 4, available at [http://www.piac.asn.au/sites/default/files/publications/extras/15.6.24\\_piacs\\_submission\\_to\\_police\\_oversight\\_review.pdf](http://www.piac.asn.au/sites/default/files/publications/extras/15.6.24_piacs_submission_to_police_oversight_review.pdf) (accessed 10 May 2016).

<sup>11</sup> Andrew Tink AM, *Review of Police Oversight: A report to the NSW government on options for a single civilian oversight model for police*, 31 August 2015, available at <http://www.justice.nsw.gov.au/justicepolicy/Documents/review-police-oversight/review-police-oversight-final-report.pdf> (accessed 10 May 2016).

<sup>12</sup> Sarah Gerathy, 'NSW Government setting up new police integrity watchdog', *ABC News*, 26 November 2015, available at <http://www.abc.net.au/news/2015-11-26/new-south-wales-government-setting-up-new-police-watchdog/6977528> (accessed 10 May 2016).

<sup>13</sup> NSW Police, Annual Report 2014-2015, at 94, available at <https://www.opengov.nsw.gov.au/download/15215;jsessionid=71A992CBC01FFAC5634A2D61C55ADFE0> (accessed 9 May 2016).

<sup>14</sup> Unreasonable use of force (including assault) accounted for a total of 2,093 complaints in 2011 – 2015. See NSW Police, Annual Report 2014 – 2015, at 94; NSW Police Annual Report 2013 – 2014, at 90.

<sup>15</sup> See NSW Police, Annual Report 2014 – 2015, at 94. Note that this figure could be an underestimate as individuals also choose to pursue civil claims in lieu of police complaints.

It is not possible to ascertain how many of these complaints related to treatment of a young person or minor.

NSW Police indicate in their reports that in 2014-2015, more than 88 per cent of complaints against police officers were either declined or resolved without formal investigation.<sup>16</sup> This could indicate that the complaints were effectively resolved, but there is also anecdotal evidence suggesting that it stems from some stagnation within the complaints process.

Research commissioned by Community Legal Centres NSW involved a survey in 2009 of users' experience of the police complaints process. The survey, which canvassed 378 practitioners, found that a high proportion of practitioners (67 per cent) reported that clients with legitimate complaints declined to make a formal complaint, against their practitioners' advice, for the following reasons:

- 51 per cent were afraid of complaining;
- 42 per cent believed the behaviour at issue was normal for police;
- 18 per cent found the process too protracted;
- 17 per cent were dissuaded by friends or family;
- 11 per cent lacked free/affordable professional assistance;
- 5 per cent acted on the advice of other professionals to avoid it;
- 4 per cent resolved the issue informally;
- 3 per cent by-passed the complaint process to file a civil action.<sup>17</sup>

Community Legal Centres NSW has previously outlined the need for change in this area.<sup>18</sup>

While PIAC supports the proposed establishment of the LECC in NSW, we will be closely monitoring the implementation of the new arrangements to ensure that the body is equipped with the statutory powers and resources that it needs to properly and effectively fulfil its mandate.

### **2.1.2 Civil claims**

Police complaints and civil claims cannot be lodged at the same time and, if a police complaint has been lodged, a claimant will have to wait until termination or finalisation of their complaint prior to commencing a civil claim.

Between January 2014 and April 2016, PIAC settled 11 cases against the NSW Police, and one against the NSW Department of Justice. All of these cases related to young people under 25. Most of these were settled in the best interests of our clients, and did not attract significant media attention or public awareness.

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<sup>16</sup> NSW Police, Annual Report 2014-2015, at 93.

<sup>17</sup> Community Legal Centres NSW, *The NSW Police Force Complaints Process: Experience of Client Advocates and Legal Practitioners* (2009), available at [http://www.clcsw.org.au/cb\\_pages/police\\_complaints\\_survey\\_findings.php](http://www.clcsw.org.au/cb_pages/police_complaints_survey_findings.php) (accessed 9 May 2016).

<sup>18</sup> See Community Legal Centres NSW, 'What's Wrong With the Current System: Brief Overview', available at [http://www.clcsw.org.au/cb\\_pages/police\\_systems\\_whats\\_wrong\\_with\\_the\\_current\\_system.php](http://www.clcsw.org.au/cb_pages/police_systems_whats_wrong_with_the_current_system.php) (accessed 12 May 2016).

The unlawful acts pertaining to the majority of these claims occurred while young people were in police custody, and therefore involved issues relevant to OPCAT. Claims included assault and battery, trespass to the person, false imprisonment and misfeasance in public office. Some claims involved serious injury resulting from physical assault, and unlawful strip searches of young people.

It is valid to question to what extent the systemic issues raised in legal claims are being adequately rectified. There have been few police disciplinary actions since 2012,<sup>19</sup> and therefore it is valid to query whether police officers responsible for unlawful conduct have been appropriately disciplined.

It is also valid to question whether administrative issues creating problems have been appropriately changed. One example is the class action in which PIAC and law firm Maurice Blackburn represented more than 56 young people for unlawful detention claims in NSW, *Amom v State of New South Wales*. The case started after PIAC became aware that many children and young people were being arrested and detained (sometimes overnight) as a result of a flaw in the Police computer database. The problem stemmed from inaccurate or out of date information on the computer system known as COPS (Computer Operational Policing System). For more than ten years, PIAC has been urging the NSW Government to fix COPS.<sup>20</sup>

In 2015, the class action reached a settlement of more than \$1.85 million.<sup>21</sup> However, within PIAC's casework it appears that young people are still being detained on the basis of administrative errors. Therefore, it appears that the much-needed change has not been fully implemented.

Civil claims identify legal issues within policing that are often systemic in nature. However, any change that results from such civil claims is localised to the geographical area in which the unlawful conduct occurred, or within the NSW jurisdiction.

PIAC submits that it is quite probable that the issues that we encounter within our policing casework are national in character. However, no monitoring of these types of issues occurs on a national level at present. The NPM proposed under OPCAT would go some way towards identifying these issues and making national recommendations for change.

### 2.1.3 Police discipline

The efficacy of complaint mechanisms can be seen in the lack of disciplinary actions taken against police in the past number of years.

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<sup>19</sup> Between January 2013 and August 2015, 62 critical incidents were investigated by police. Two adverse findings were recorded against a police officer in one case, with the officer given counseling. No disciplinary action was recorded against police in any of the 62 cases. See Natasha Robinson and Alex McDonald, 'No NSW police officers disciplined during past two-and-a-half years of investigations, figures reveal', *ABC News*, 24 September 2015, available at <http://www.abc.net.au/news/2015-09-24/police-escape-discipline-in-investigations:-figures/6803146> (accessed 24 May 2016).

<sup>20</sup> For more information, see PIAC, 'Access to justice: false imprisonment of young people class action', available at <http://www.piac.asn.au/projects/node/64/information-1> (accessed 12 May 2016).

<sup>21</sup> For more information, see PIAC, 'Register for class action on behalf of falsely imprisoned young people,' available at <http://www.piac.asn.au/news/2015/08/register-class-action-behalf-falsely-imprisoned-young-people> (accessed 12 May 2016).



Figures released in NSW parliamentary estimates noted that the outcomes of critical incident investigations had resulted in very few disciplinary actions in the past number of years within the NSW Police Force.<sup>22</sup> Given that critical incident investigations occur in only the most serious circumstances, a lack of disciplinary action in the most serious of circumstances indicates that potentially, allegations raised within less serious offences, police complaints and civil claims are also not resulting in appropriate disciplinary action.

The UN Human Rights Committee, in its Concluding Observations on Australia in April 2009, expressed its regret 'that the investigations of police misconduct [are] carried out by the police'.<sup>23</sup>

## 2.2 Monitoring and data availability

At a national level, there is inconsistency in the data available regarding the detention of children and young people. Data is not readily available regarding the number of young people detained in police custody and for what period of time. It is also difficult to assess the movement of young people from initial arrest to detention in police custody to remand, on current data.

While the NSW Bureau of Crime Statistics and Research releases quarterly reports regarding the number of people in custody (including young people, and Aboriginal and Torres Strait Islander people), there are some limitations to the data publicly available.

The NSW Police *Youth Strategy 2013 – 2017* aims within Objective 4 to 'engage in early intervention and prevention initiatives to divert youth from the criminal justice system'.<sup>24</sup> However, it does not appear that this objective is appropriately reflected in measurable key performance indicators or appropriately monitored for compliance or benchmarking.

There is also a lack of transparency and accountability regarding allegations of mistreatment or unlawful conduct by young people, with data largely unavailable regarding:

- The number and types of complaints made by young people regarding police behaviour;
- The number and types of civil claims made by young people in relation to their detention by police or JJ;
- The Local Area Commands responsible for the number and types of complaints, and the number and types of civil claims;
- The discipline undertaken to remedy any systemic issues in Local Area Commands raised by young people within existing complaint mechanisms;
- The number of times that Tasers are used on young people, including the minimum age and ethnicity of the person involved.

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<sup>22</sup> There were 46 critical incidents involving police investigated by the NSW Police Force between 2013 - 2014 calendar years. This resulted in 2 adverse findings against police officers in critical incident investigations, and no disciplinary action subsequently taken (where 'disciplinary action' is defined as 'reviewable action' in accordance with s173, s80(3) or s181D of the *Police Act 1990* (NSW)). See NSW Parliament, Questions on notice, '4856 – Critical Incidents involving Police', available at <http://www.parliament.nsw.gov.au/prod/lc/qalc.nsf/c63f637ee30ce3beca2578c300122a54/4b5b4b0bf75c6e8cca257b97002062a9?OpenDocument> (accessed 24 March 2016)

<sup>23</sup> Concluding observations of the Human Rights Committee 3 April 2009 Australia, para 21. <http://www2.ohchr.org/english/bodies/hrc/hrca95.htm>

<sup>24</sup> See NSW Police Force, *Youth Strategy 2013 – 2017*, at 15.

### ***Recommendation 1 – Data to be made available on LAC basis***

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*PIAC recommends that relevant data should be made available on a police Local Area Command basis, so that any systemic patterns in the detention of young people in custody can be appropriately identified.*

## **3. How could the ratification of OPCAT and the establishment of a National Preventative Mechanism benefit children and young people in detention (youth justice centres and adult facilities)?**

### **3.1 Examine police custody**

There is opportunity for the ratification of OPCAT to provide improved monitoring regarding the detention of young people in police custody and remand. This includes:

- Reviewing current procedures regarding data collation and monitoring, regarding young people and Aboriginal and Torres Strait Islanders;
- Making recommendations regarding improving records, statistics and monitoring in relation to young people and Aboriginal and Torres Strait Islander people;
- Increase accountability regarding any mistreatment or unlawful conduct in relation to young people in custody;
- Identifying the adequacy of conditions in custody in rural and regional areas; and
- Identifying any specific Local Area Commands where issues are repeated and ongoing, with recommendations to ensure best practice.

### **3.2 New Zealand’s review of young persons in police detention**

In New Zealand, the Independent Police Conduct Authority, the Office of the Children’s Commissioner and the Human Rights Commission have responsibilities by virtue of New Zealand’s implementation of OPCAT.

In 2012, the New Zealand Human Rights Commission, the Independent Police Conduct Authority and the Office of the Children’s Commissioner released their first joint thematic review under the OPCAT mandate, of young persons in police detention. The review was launched in December 2010, focusing on what might be done to:

- reduce the numbers of young people being detained in police custody, and the length of time they spend there;
- improve the treatment of young people who are detained;
- strengthen monitoring and feedback mechanisms in order to identify systemic issues and ensure best practice.<sup>25</sup>

The review identified that 213 young people were detained in police cells for an average of

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<sup>25</sup> New Zealand Human Rights Commission, Independent Police Conduct Authority, Office of the Children’s Commissioner, *Joint thematic review of young persons in Police detention*, (October 2012), at 8 [12] available at <http://www.ipca.govt.nz/includes/download.aspx?ID=124584> (accessed 12 May 2016).

1.9 days, with indications that the numbers were trending upwards.<sup>26</sup> Similar statistics are not currently available in Australia.

The review made 24 recommendations, including recommendations regarding improving conditions, monitoring, strategy development, training and improving documentation of decisions and collation of data.

A number of recommendations made by the review would be helpful to be adopted in Australia, including the recommendation that Police and Child, Youth and Family develop a protocol to ensure that records kept of young people in Police detention are monitored at the operational level.<sup>27</sup>

The review noted:

There is a need for data collection and reporting requirements to be improved so that a better understanding of the circumstances surrounding the decision to detain young people in Police custody can be developed. Continuing to improve collaboration between all those involved in the youth justice sector, and in particular, between [the Department of] Child, Youth and Family and Police, is essential if practice standards are to be met consistently. Improving feedback mechanisms and information sharing, both vertically within each organisation and across the two organisations would also help to raise the standard and consistency of practice.<sup>28</sup>

The review also acknowledged that as at October 2012, NZ Police was developing a youth-specific custody module to address the lack of youth specific information collected in their national database or police custody module.<sup>29</sup>

The review also suggested that improving reporting regarding arrests with a warrant and would mean that Police and Child, Youth and Family would be better able to monitor the exercise of discretion at these points and assess compliance with the provisions of the Children, Young Persons and Families Act. It would also enable them to identify trends in the way discretion is being exercised, and where necessary, to provide guidance or support to ensure best practice.<sup>30</sup>

In NSW, as at March 2016, 50.3 per cent of young people detained in custody identified as Aboriginal or Torres Strait Islander.<sup>31</sup>

PIAC submits that the adoption in Australia of the types of recommendations raised within New Zealand's review of young persons in custody would create benchmarking that would assist in moving towards reducing the over-representation of Aboriginal and Torres Strait Islander people in custody.

### ***Recommendation 2 – Review of young people in police custody***

*PIAC recommends that Australia would benefit from a holistic review of young people in police custody under the OPCAT mandate, similar to the review that occurred in New Zealand.*

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<sup>26</sup> Ibid, at 5.

<sup>27</sup> Ibid, Recommendation 23, at 17 [50].

<sup>28</sup> Ibid, at 14 [45].

<sup>29</sup> Ibid, at 14 [46].

<sup>30</sup> Ibid, at 10 [20].

<sup>31</sup> There were 294 young people in custody as at March 2016, 148 of whom identified as Aboriginal or Torres Strait Islander. See NSW Bureau of Crime and Statistics, 'NSW Custody Statistics January 2011 to March 2016', available at <http://www.bocsar.nsw.gov.au/Documents/custody/Custody-Data-Table-Mar2016.xlsx> (accessed 12 May 2016).

## 4. Age of criminal responsibility

The common law principle of *doli incapax* presumes that a child is incapable of guilt from the age of 10 to 14 years of age. This presumption may be rebutted by the prosecution calling evidence that the child knew the act was seriously wrong (as opposed to mischievous or naughty); such evidence must be strong and clear beyond all doubt or contradiction.<sup>32</sup>

The age of criminal responsibility has been described as ‘the main legal barrier to the criminal justice system; it is therefore vital that it is not set too low’.<sup>33</sup>

The age of criminal responsibility presents ‘a primary point at which the Indigenous youth can be kept out of this system’.<sup>34</sup> Raising the age of criminal responsibility would assist in reducing the over-representation of Aboriginal and Torres Strait Islander children in custody.<sup>35</sup>

### ***Recommendation – Increase age of criminal responsibility***

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*PIAC recommends that Australia should increase the age of criminal responsibility to an absolute minimum of 12 years of age, and that the principle of doli incapax should be preserved.*

## Conclusion

PIAC continues to support the ratification of OPCAT.

Currently, there is a gap in the oversight of the treatment of people in police custody, and existing complaints mechanisms are not adequate to appropriately identify and address systemic issues.

The introduction of an NPM would be an invaluable and progressive step towards increasing the transparency and accountability in the treatment of young people in custody.

The legal protections available to individuals who are detained in custody are largely limited to the common law, and what limited redress may be available within the police complaints system. However, these legal avenues are reactive in nature and individual-focused, rather than on identifying systemic problems and recommending steps to prevent unlawful conduct.

Human rights frameworks need to be more centrally considered within policing across Australia. Especially given the absence of any Australian Charter of Rights and Responsibilities, ratification of OPCAT provides an opportunity for human rights to be better considered in the detention of young people, in a form that also assesses compliance.

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<sup>32</sup> See Matthew Johnston, ‘Doli Incapax: the Criminal Responsibility of Children’, delivered at the Children’s Magistrates Conference (February 2006), available at [www.childrenscourt.justice.nsw.gov.au%2FDocuments%2Fdoliincapax-thecriminalresponsibilityofchildren.doc&usg=AFQjCNGikHnH0ByfVltBI9C2Cg7pc-AEFA&sig2=m0Wg7c0-ZiROZD5bsxovJg](http://www.childrenscourt.justice.nsw.gov.au%2FDocuments%2Fdoliincapax-thecriminalresponsibilityofchildren.doc&usg=AFQjCNGikHnH0ByfVltBI9C2Cg7pc-AEFA&sig2=m0Wg7c0-ZiROZD5bsxovJg) (accessed 12 May 2016).

<sup>33</sup> Thomas Crofts, ‘A Brighter Tomorrow: Raise the Age of Criminal Responsibility’, (2015) 27(1) *Current Issues in Criminal Justice*, available at <http://www.austlii.edu.au/au/journals/CICrimJust/2015/15.html>

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

PIAC has supported the ratification of OPCAT for a considerable period of time and looks forward to seeing its ratification in due course. We welcome the opportunity to be engaged in further consultation and discussions surrounding the ratification of OPCAT in Australia.