



AUSTRALIAN
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HUMAN RIGHTS

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The Hon. Daniel Andrews, Premier of Victoria

Via email: Daniel.andrews@parliament.vic.gov.au

CC:

Victorian Attorney-General: martin.pakula@parliament.vic.gov.au

Minister for Families and Children and Youth Affairs: jenny.mikakos@parliament.vic.gov.au

Deputy Premier: james.merlino@parliament.vic.gov.au

Minister for Corrections: gayle.tierney@parliament.vic.gov.au

Dear Premier,

RE: Decision to send 40 children to adult jails in Victoria

Australian Lawyers for Human Rights (ALHR) urges the Victorian government to reconsider its recent decision to transfer 40 children to adult jails. Whatever the circumstances surrounding recent riots at the Parkville and Malmsbury Youth Justice Centres, there are no circumstances that justify the placement of children in the adult prison system. If you forge ahead with these transfers it will constitute a clear breach of the human rights of Victorian children and Australia's international legal obligations.

We are deeply disappointed by the decision you have taken. Not only is this in clear contravention of Australia's obligations under the *Convention on the Rights of the Child* (CRC) and other international standards, but it is also contrary to what research tells us we should be doing to reduce rates of recidivism and rehabilitate young people.

ALHR urges you to reconsider this regressive and populist move. The Victorian Government should instead look at current practices and policies affecting children detained in Victoria and take a more sophisticated approach – one which respects international law, recognises best practice and the voluminous research dealing with the realisation of positive outcomes for children in contact with the criminal justice

system.

ALHR has serious concerns there may be systemic failures in Victoria's youth justice system. We note that Victoria's Commissioner for Children and Young People, Liana Buchanan, is currently investigating the use of restraints and isolation in juvenile detention, including a child's 10-day stay in solitary confinement at Malmsbury. Ms Buchanan is also examining how a child broke a limb when a staff member intervened in a confrontation at Parkville.

Your decision to transfer forty 16 and 17-year-olds into the adult prison system will only further expose Victoria's children to human rights violations. We note that an estimated 80 per cent of the Parkville Centre's population are on remand and therefore entitled to a presumption of innocence. Furthermore, as has been pointed out by Ms Buchanan, many if not most of the young people responsible for the rioting come from damaged backgrounds and have been subjected to neglect, abuse or trauma.

Time and time again punitive approaches to juvenile justice have been proven to fail. ALHR strongly supports Ms Buchanan's calls for the Victorian Government to invest in early intervention, intensive case management and clinical assistance, including trauma led treatment.

Putting children in adult prisons causes irreversible harm

The regressive step of placing children into adult jails will make Victoria a lone wolf in its abuse of children's rights. Yours will be the only state in Australia to be moving children **into** the adult prison system. This is deeply disappointing given the Queensland Parliament has just passed a Bill to remove 17-year-olds from adult jails, after recognising the practise is entirely inconsistent with Australia's international human rights obligations, the safety of children and is wholly counterproductive to positive outcomes in the juvenile justice system.

Make no mistake, the available data irrefutably evidences¹ that your decision to transfer 40 children to adult jails will mean that these children are exposed to **a drastically increased risk of:**

- irreversible emotional and psychological harm;

¹ *The Risks Juveniles Face When They Are Incarcerated With Adults*, Youth Justice Policy Institute http://www.justicepolicy.org/images/upload/97-02_rep_riskjuvenilesface_jj.pdf; 5 Sullivan, James M., "From Monkey Bars to Behind Bars: Problems Associated with Placing Youth's in Adult Prisons" (2014). Law School Student Scholarship. Paper 587. http://scholarship.shu.edu/student_scholarship/587

- physical abuse;
- sexual abuse;
- recidivism when released back into the community;
- entrenchment in a life of crime; and
- suicide.

The juvenile justice system was developed a century ago, precisely because it was recognised that placing young offenders within adult prisons not only subjected those children to very serious abuse in adult jails, but it returned them to society as hardened criminals.² Even where children are kept separate from the adult prison population, the fact is that they are being detained in a facility designed for adults not children and cared for by staff without specialist training in dealing with children. Placing a young offender in an adult prison does little to advance the rehabilitative aims of juvenile justice. It is clear that housing young offenders with adult prisoners is self-destructive and self-defeating.³

Further, children are not little adults. Their behavior is different because their brains are different.⁴ That Victoria now chooses to arbitrarily treat some 16 and 17-year-old child offenders as adults, does not in fact transform those children into adults. There is now long-held scientific support that teenage brains are still developing,⁵ and that young people are highly subject to reward and peer-influence. Your decision to place children under the age of 18 years into Victoria's adult criminal justice system, fails to acknowledge the fundamental differences between adults and children and the way in which these differences impact upon both criminal responsibility and rehabilitative and therapeutic needs.

As was pointed out by the Australian Law Reform Commission more than 18 years ago:

“Children have particular needs that are very different from those of adult offenders. For instance, they tend to have a reduced fear of danger and display 'acting out' behaviours. They may have volatile behavioural patterns

² see: *The Risks Juveniles Face When They Are Incarcerated With Adults*, Youth Justice Policy Institute http://www.justicepolicy.org/images/upload/97-02_rep_riskjuvenilesface_jj.pdf;

³ see: *The Risks Juveniles Face When They Are Incarcerated With Adults*, Youth Justice Policy Institute http://www.justicepolicy.org/images/upload/97-02_rep_riskjuvenilesface_jj.pdf

⁴ This is recognised in *The Integrated Approach: The Philosophy and Directions of Juvenile Detention* Qld Corrective Services Commission Brisbane 1997, 16. See also for example, H Blagg & M Wilkie *Young People and Police Powers* Australian Youth Foundation Sydney 1995 rec 22.

⁵ For an extensive list of references on this see: Massachusetts General Hospital Centre for Law, Brain and Behaviour at: <http://clbb.mgh.harvard.edu/juvenilejustice/>

and emotional states, self-harming behaviour, different perceptions of time and shorter concentration spans. They are also more vulnerable to contamination from criminal influences they encounter. Their different behavioural and emotional characteristics require different approaches than those for adult offenders.

Separating juveniles from adult offenders is important in preventing criminalisation of children through contact with adult offenders. It recognises that children have developmental needs that require different programs and services than those for adults. It protects the well-being and safety of children.”⁷

Disproportionate impact on Indigenous children

ALHR is particularly concerned that moves to place children in adult prisons in Victoria may disproportionately impact Indigenous youth.

Twenty-five years ago the Royal Commission into Aboriginal Deaths in Custody included a recommendation that imprisonment should only be utilised only as a sanction of last resort yet the current over-representation of Aboriginal young people in detention, especially on remand, has been described as a national crisis. According to the most recent statistics⁸, Indigenous children are 26 times more likely to be imprisoned than non-Indigenous children, yet Indigenous Australians account for only 3% of Australia’s population.

Victoria will be breaching its human rights obligations to its children

It is the considered view of ALHR that the transfer of any child under 18 years of age into an adult jail in Victoria is in breach of Australia’s binding legal obligations under the:

- a) *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,⁹

⁷ Australian Law Reform Commission Report: *Seen and heard: priority for children in the legal process* (ALRC Report 84) 19 November 1997: http://www.alrc.gov.au/publications/20-detention/separation-adults-and-juveniles-detention#_ftn230

⁸ Australian Institute of Health and Welfare, *Juvenile Justice National Minimum Data Set* (2015) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>>

⁹ Signed by Australia on 10 Dec 1985 and ratified by Australia on 8 Aug 1989.

- b) *Convention on the Rights of the Child (CRC)*;¹⁰
- c) UN Standard Minimum Rules for the Administration of Juvenile Justice (the *Beijing Rules*);¹¹ and
- d) UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).¹²

Article 37(c) of CRC requires that:

[e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person...In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so...

Article 26.3 of the Beijing Rules require that juveniles in institutions be kept separate from adults and be detained in a separate institution or in a separate part of an institution also holding adults.¹⁷

The CRC defines children as persons under the age of 18 years. It also stresses the importance of young people who come into conflict with the law being afforded treatment appropriate to their age and legal status. 16 and 17-year-olds remain children for all other legal purposes in Victoria, yet you are proposing to treat them as adults within the criminal justice system. ALHR submits that this does not afford them treatment appropriate to their age and legal status.

We note that the previous failures of Queensland governments to extend protection to 17-year-olds in detention did not escape the attention of the United Nations Committee on the Rights of the Child. In its Concluding Observations in 2005 the Committee recommended the removal of children who are 17 years old from the adult justice system in Queensland.¹⁸ Victoria should learn from the Queensland experience that detaining children under 18 in adult prisons is not acceptable.

¹⁰ Signed by Australia on 22 Aug 1990 and ratified by Australia on 17 Dec 1990.

¹¹ Adopted by the United Nations General Assembly on 29 Nov 1985.

¹² Adopted by the United Nations General Assembly on 17 December 2015.

¹⁷ United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") Adopted by General Assembly resolution 40/33 of 29 November 1985 Article 26.3.

¹⁸ *UN Committee on the Rights of the Child: Concluding Observations, Australia*, 20 October 2005, CRC/C/15Add.268. See also submission by the Anti-Discrimination Commission Queensland to the Legal Affairs and Community Safety Commission (Qld), Inquiry into the Youth Justice and Other Legislation Amendment Bill 2014, submitted February 2014.

In March 2015, the United Nations Special Rapporteur on Torture, Juan Mendez, tabled a report outlining the current international benchmarks that are expected of countries when it comes to detaining children.¹⁹ Mr Mendez, in interpreting and setting standards under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* in the context of Australia's youth detention policies, said:

*...Australia's youth detention policies are out of date. We're allowing a number of physically and psychologically harmful practices to continue, and permitting punitive policies and practice, which do not priorities young people's rehabilitation or reintegration.*²⁰

Mr Mendez, in his report, states that children should be charged as minors until they are 18 years old, and highlights that children are different to adults – they are less emotionally and psychologically developed and are less culpable for their actions.

Furthermore, the United Nations Committee on the Rights of the Child has repeatedly criticised Australia's contravention of the Convention on the Rights of the Child, most recently in its mid-2012 Concluding Observations, recommending that Australia "remove children who are 17 years old from the adult justice system in Queensland".

In 2013, then Victorian Ombudsman George Brouwer was scathing in a 2013 report²¹ of a request by the Department of Human Services to incarcerate five children in the Charlotte Management Unit at Port Phillip Prison between July and August 2012. In his report, Mr Brouwer revealed human rights abuses against children, such as one 16-year-old Aboriginal boy who was kept in solitary confinement for several months with only one hour in the exercise area each day during which time he was handcuffed.

The practice of keeping children in solitary confinement is in breach of Victoria's Charter of Human Rights and Responsibilities, contrary to advice from the Equal Opportunity and Human Rights Commissioner and a violation of Australia's international legal obligations.

Mr Mendez's report made it clear that the use of practices such as strip searches and solitary confinement on children in Australia are inherently dangerous, cause

¹⁹ Human Rights Law Centre, Torture Convention Standards (March 2015) <http://hrlc.org.au/wp-content/uploads/2015/04/TortureConventionStandards_March2015.pdf>.

²⁰ Human Rights Law Centre, *Australian Youth Justice Practices are Failing* (17 April 2015) <hrlc.org.au/ausyouthjusticepracticesarefailing/>.

²¹ Investigation into children transferred from the youth justice system to the adult prison system, Ombudsman Victoria, December 2013 available at: <https://www.ombudsman.vic.gov.au/Publications/Parliamentary-Reports/Investigation-into-children-transferred-from-the-y>

irreversible psychological trauma and are completely inconsistent with Australia's legal human rights obligations.

Children who are detained in adult jails are more vulnerable to such practices.

Other reforms also need to be made

While the purpose of this letter is the call on the Victorian Government to urgently reverse its decision to send children to adult jails, further immediate steps are also required to protect the rights of children in Victoria's youth justice system.

1. We urgently ask the Victorian Government to call on the federal Government to ratify the *Optional Protocol to the Convention against Torture* and adopt a Federal Human Rights Act so that the human rights of all Australian citizens, including our youth, can be legally protected.
2. We call for the Victorian Government to adopt practices where detention of juveniles is limited to exceptional cases and alternatives to detention are favoured.
3. Where detention is undertaken, we call for children to be detained in purpose-built age-appropriate facilities with non-prison like environments which are run by specialised staff trained in dealing with children.
4. We call for the immediate appointment of an Independent Custodial Inspector in Victoria with unfettered access to youth detention centers to ensure that national and international standards are being complied with (such as in NSW and WA).
5. Noting that Victoria's Commissioner for Children and Young People, Liana Buchanan, is currently investigating the use of possible excessive force, restraints and isolation in juvenile detention, including a child's 10-day stay in solitary confinement at Malmsbury, we call for an immediate investigation into any legislation, policies and practices that allow the use of sentence management practices such as solitary confinement, isolation and mechanical restraints. Given such practices breach international standards we call for the immediate repeal of any enabling legislation, policies or procedures that make such practices possible.

6. We call for higher standards of training and skills of personnel working with juvenile detainees and a focus on rehabilitation of children as opposed to punitive measures.
7. We call for appropriately funded, evidence-based diversionary and education programs to be rolled out in Victoria which recognise the principle that detention is a last resort for children and should be providing a therapeutic, stimulating and educational environment that can help youth offenders on a path to rehabilitation and reintegration upon release into society.
8. We call for the minimum age of criminal responsibility of juveniles to be increased to 12 years, not 10 years, in Victoria and all jurisdictions within Australia.

Conclusion

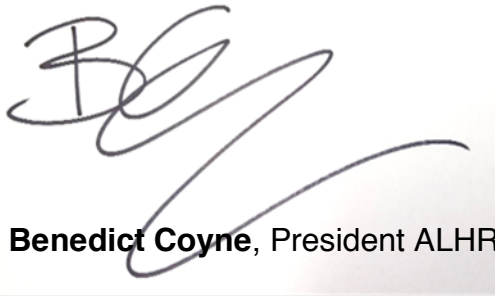
Recognition that children are different to adults does not mean that young people are not dealt with for the offences they commit. Regardless of what they have done, a 17-year-old child is still a child and incarcerating them in adult prisons is in fundamental breach of Australia's human rights obligations.

The Victorian government must reflect on the damage that will occur to children as a consequence of this archaic youth justice policy initiative. The trauma these children will be exposed to in adult jails not only is in fundamental breach of Australia's human rights obligations, but may do a damage so profound and irreversible that it may entrench within these children a criminal mindset and create a pathway for an adult life of crime.

Australia is better than this and our children deserve much better.

We urge you to demonstrate a genuine commitment to all Victorian children by reversing your decision to transfer the 40 children to adult jails and by instead implementing legislative and policy reforms which bring the juvenile justice system in Victoria in line with the international human rights laws that Australia has ratified and committed to implementing.

Yours faithfully,



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Australian Lawyers for Human Rights

ALHR was established in 1993 and is a national network of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and a secretariat at La Trobe University Law School in Melbourne. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.