

# **ombudsman** VICTORIAN

**Investigation into children transferred from  
the youth justice system to the adult prison system**

**December 2013**

**Ombudsman Act 1973**

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# Letter to the Legislative Council and the Legislative Assembly

To

**The Honourable the President of the Legislative Council**

and

**The Honourable the Speaker of the Legislative Assembly**

Pursuant to sections 25 and 25AA of the *Ombudsman Act 1973*, I present to Parliament a report into an *Investigation into children transferred from the youth justice system to the adult prison system*.



G E Brouwer

**OMBUDSMAN**

11 December 2013

<b>Contents</b>	<b>Page</b>
Executive Summary	3
Background	6
Introduction	6
The Department of Human Services	6
The Youth Parole Board	7
Corrections Victoria	7
Definition of child	8
Investigation methodology	8
Children entering the adult correctional system	8
The needs of children in custody	10
Transfers of children from the youth justice system to the adult prison system in July – August 2012	11
Key issues	11
Legislation	12
An increase in requests for transfers to the adult prison system	14
Alternative placement options	16
Consultation	17
Strategies to manage behaviour prior to transfer requests	19
Lack of information exchange	20
Conflicted role of the Secretary of the Department of Human Services	20
Department of Human Services' actions	22
The treatment of children transferred to the adult prison system	24
Key Issues	24
Placement in the Charlotte Management Unit	25
Considerations by the Sentence Management Branch	27
Long term management and exit plans	30
Delay in assessment to transfer back to the youth justice system	31
Children incorrectly remanded to adult custody	33
Corrections Victoria actions	33
Conclusions	34
Recommendations	39
The role of the Office of Correctional Services Review	40
Key issues	40
Monitoring	41
OCSR Review	42
Independence of the OCSR	44
Conclusions	45
Recommendation	46

## Executive summary

1. In October 2012, my office received information from several sources about a 16 year old Aboriginal boy who was transferred from the Parkville Youth Justice Precinct (the Precinct) to Port Phillip Prison and held in solitary confinement for a number of months.
2. My enquires identified that children have been received into an adult prison in 24 instances since 2007. Fifteen of those receptions were as a result of children transferred from Youth Justice Custodial Services (the youth justice system). There were also five instances of children mistakenly remanded into adult custody. As a result of my enquiries, on 19 March 2013, I commenced an investigation in relation to the transfer of children from the youth justice system to the adult prison system on my own motion under section 16A of the *Ombudsman Act 1973*.
3. My investigation focussed on the transfers of five children, requested by the Department of Human Services (the department), from the Precinct to the adult prison system following violent incidents in July and August 2012.

### An increase in transfer requests from the youth justice system

4. The high number of transfers from the youth justice system to the adult corrections system in July and August 2012 was influenced by a number of factors, including:
  - a shift in offending type from property based offences to violent offences
  - long term detainees becoming bored or outgrowing the youth justice system and committing violent acts in order to be transferred to the adult system.
5. I am concerned that acceding to detainees' demands to be transferred to an adult prison may increase the number of children willing to commit violent acts to achieve this outcome and will ultimately make youth justice more dangerous for staff and other detainees.
6. The department has advised that there were no appropriate placement options for three of the four children involved in the July incident to remain in youth justice. However, I received advice from witnesses that there may have been alternative placement options that could have been utilised and there was no written evidence to show that all of the options had been considered prior to requesting the transfer. Subsequently, two further children were transferred in August 2012.
7. During the course of my investigation, it became apparent that there was a lack of consultation between the department and independent agencies such as the Victorian Aboriginal Legal Service or the Victorian Aboriginal Child Care Agency in relation to two detainees who were Aboriginal children.

8. Also, the five children transferred in July and August 2012 had no legal representation. The transfers were authorised by the Youth Parole Board. While the Youth Parole Board is not within my jurisdiction, I consider consultation by the department with a child's legal representative to be a sensible measure and in the child's best interest.
9. My investigation identified that the transferred children demonstrated an escalating pattern of violent behaviour, directed towards other clients and staff, over several months prior to the transfers. The apparent failure of a number of strategies undertaken to manage their behaviour indicates that the youth justice system is struggling to meet the needs of some complex and potentially violent children.

## **The placement of children in the Charlotte Management Unit**

10. All of the children transferred in July and August 2012 to Port Phillip Prison were placed in the Charlotte Management Unit. Conditions in the Charlotte Management Unit are very sterile. The children were locked in their cells on their own for 23 hours a day. They were allowed one hour in the exercise yard per day and during that time they were in handcuffs. The children remained in solitary confinement for a number of months.
11. A number of rights under the *Charter of Human Rights and Responsibilities Act 2006* (the Charter) are engaged when a child is transferred to or detained in adult custody. I consider that, in placing these children in isolation for a number of months, Corrections Victoria acted inconsistently with the children's rights under section 17(2) (protection of families and children), section 22(1) (humane treatment when deprived of liberty) and section 23(3) (children in the criminal justice system) of the Charter. Therefore, I do not consider it appropriate to transfer children to the adult correctional system.
12. The impact isolation has on mental health was identified in a review prepared by Professor James Ogloff for Justice Health and Corrections Victoria in 2008. The review recommended that prisoners with active major mental health illness should not be placed in a restrictive environment setting as it is more likely to exacerbate mental illness. Corrections Victoria and the Sentence Management Panel were aware of one child's mental health history, however, he remained in the Charlotte Management Unit for several months.
13. Corrections Victoria said that they placed the children in the Charlotte Management Unit because they were difficult to place elsewhere. There are limited places in the youth unit. Also, Corrections Victoria advised that violent youth and youth with a sexual offending history are not appropriate for placement in the youth unit.
14. I do not consider it suitable to place children in a mainstream unit at an adult prison. Children are vulnerable in mainstream prison populations as they are impressionable and may also be subjected to sexual assaults. Victorian prisons are currently overcrowded, which increases the likelihood of a child in a mainstream unit sharing a cell with an adult.

15. It is evident that the youth justice system is limited in its capacity to deal with a small, but increasing, cohort of young people exhibiting violent behaviours. It is important that the youth justice system respond appropriately to these children rather than abrogate its responsibility by transferring them to the adult system.
16. I am of the view that there are no circumstances that justify the placement of a child in the adult prison system.

## The role of the Office of Correctional Services Review

17. The Office of Correctional Services Review (OCSR) sits within the Department of Justice and oversees the corrections system.
18. The OCSR became aware of the placement of the children in the Charlotte Management Unit and commenced an 'Inquiry', which involved passively monitoring the children. The OCSR identified that there was no plan to move the children from the Charlotte Management Unit to the youth unit and requested information from Corrections Victoria, which was not received for seven weeks.
19. OCSR then commenced a review about children in the adult correctional system. The review identified a number of issues including that four children had been remanded to an adult prison in error. The review made a recommendation regarding cross-checking children's dates of birth to prevent this from re-occurring in future. Corrections Victoria did not accept the recommendation.
20. My investigation identified a number of issues with the review, including that OCSR is somewhat limited in the recommendations it can make as officers are mindful of Corrections Victoria's resourcing issues. OCSR also advised that it is unable to intervene in operational matters.
21. I am concerned that there is a lack of independence between the OCSR and Corrections Victoria. There is an inherent conflict as the Secretary of the Department of Justice is responsible for both Corrections Victoria and the OCSR which is the agency responsible for monitoring it.

## Recommendations

22. As a result of my investigation, I made three recommendations:
  - That the Minister for Community Services consider amending the *Children, Youth and Families Act 2005* to remove the option to transfer children to the adult prison system once additional accommodation becomes available at the Malmsbury Youth Justice Centre.
  - That Corrections Victoria check the dates of birth of young offenders to ensure that no child is incorrectly remanded to prison.
  - That the Minister for Corrections give consideration to making the Office of Correctional Services Review separate and independent from the Department of Justice.

## Background

### Introduction

23. In October 2012, my office received information from several sources about a 16 year old Aboriginal boy who was transferred from the Parkville Youth Justice Precinct (the Precinct) to Port Phillip Prison and held in solitary confinement for a number of months.
24. My office made a number of enquiries to the Department of Human Services (the department) and the Office of Correctional Services Review (OCSR)<sup>1</sup>. As a result of these enquiries, on 19 March 2013, I commenced an investigation in relation to the transfer of children from the youth justice system to the adult prison system on my own motion under section 16A of the *Ombudsman Act 1973*.
25. I wrote to the Minister for Corrections, the Minister for Community Services, the Secretary of the Department of Human Services and the Acting Secretary of the Department of Justice and informed them of my intention to commence the investigation.
26. There have been 15 instances of children transferred from the Youth Justice Custodial Services (youth justice system) to the adult corrections system since 2007. My investigation focussed on decision making in relation to transfers in July and August 2012 because there were a number of transfers during this period and the children were placed in the Charlotte Management Unit at Port Phillip Prison.

### The Department of Human Services

27. Under the *Children, Youth and Families Act 2005* (the Children, Youth and Families Act), the Department of Human Services (the department) has the statutory responsibility for the care, custody and supervision of children who have been sentenced or remanded to a Youth Justice Custodial Centre (youth justice centre) for a criminal offence.
28. Victoria has three custodial facilities for children:
  - Melbourne Youth Justice Centre
  - Parkville Youth Residential Centre<sup>2</sup>
  - Malmsbury Youth Justice Centre<sup>3</sup>.
29. Under the Children, Youth and Families Act, the Secretary of the department may apply to the Youth Parole Board to transfer a child over the age of 16 years from the youth justice system to the adult corrections system (adult prison system) to serve the remainder of their detention as imprisonment. The department provides secretariat support to the Youth Parole Board.

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1 The OCSR commenced a review titled *The Management of under 18 year olds in the adult corrections system* on 1 November 2012.

2 Melbourne Youth Justice Centre and Parkville Youth Residential Centre are collectively known as the Parkville Youth Justice Precinct and holds sentenced and remanded detainees of both sexes aged 10 to approximately 18 years.

3 Malmsbury Youth Justice Centre generally holds sentenced detainees aged between 18 and 21 years of age.



## The Youth Parole Board

30. The Youth Parole Board is established under the Children, Youth and Families Act and consists of:
- a Judge of the County Court who is the chairperson
  - the Secretary of the department or an officer appointed by the Governor in Council on the nomination of the Secretary
  - two other persons appointed by the Governor in Council who must have experience in matters relating to child welfare and at least one of whom must be a woman.
31. In exercising its functions, the Youth Parole Board is not bound by the rules of natural justice. Children appearing before the Youth Parole Board are not legally represented.
32. The Youth Parole Board may approve the department's request for a child to be transferred to the adult prison system if it is satisfied that the child:
- has engaged in conduct that threatens the good order and safe operation of the youth justice centre and
  - cannot be properly controlled in the youth justice centre<sup>4</sup>.
33. My office does not have jurisdiction over the Youth Parole Board.

## Corrections Victoria

34. Corrections Victoria is a business unit of the Department of Justice and is responsible for adult correctional facilities in Victoria. It sets strategy, policy and standards for the management of the state's correctional facilities.
35. Across Victoria, there are 11 publically operated prisons, two privately operated prisons (Fulham Correctional System and Port Phillip Prison) and one transitional centre. Port Phillip Prison is a maximum security prison with capacity to house in excess of 800 prisoners.
36. The prisons provide a range of correctional services from maximum security imprisonment to reparation and treatment programs.
37. When an individual enters the adult prison system, the Sentence Management Branch of Corrections Victoria is responsible for the classification and placement of the individual within the system.
38. Sentence Management Panels carry out the functions of prisoner classification which includes:
- determining a prisoner's security rating
  - determining a prisoner's placement
  - developing a prisoner's sentence plan.

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<sup>4</sup> Section 467 *Children, Youth and Families Act 2005*.

## Definition of child

39. Under the Children, Youth and Families Act, a child for the purposes of the youth justice system is defined as:
  - ... a person who at the time of the alleged commission of the offence was under the age of 18 years but of or above the age of 10 years but does not include any person who is of or above the age of 19 years when a proceeding for the offence is commenced in the Court ...
40. The *Charter of Human Rights and Responsibilities Act 2006*, defines a child as:
  - 'child' means a person under 18 years of age;
41. The United Nations Convention on the Rights of the Child defines a 'child' as a person below the age of 18, unless relevant laws recognise an earlier age of majority.
42. The *Family Law Act 1975* defines a 'child' as a person who is under 18.

## Investigation methodology

43. In investigating this matter my officers:
  - reviewed relevant Department of Human Services, Department of Justice and OCSR records, documents, reports and policies
  - made enquiries of the Department of Human Services, Department of Justice, Corrections Victoria, Office of Correctional Services Review, Victorian Equal Opportunity and Human Rights Commission, Office of the Commission for Children and Young People, Victorian Aboriginal Legal Service, Victorian Aboriginal Child Care Agency
  - reviewed relevant legislation
  - reviewed closed circuit television footage of incidents at the Precinct
  - reviewed practices in other jurisdictions
  - conducted site inspections to Parkville Youth Justice Precinct, Malmsbury Youth Justice Centre and Port Phillip Prison
  - in the course of the investigation 24 witnesses were interviewed. No witness sought to be accompanied by a legal representative.

## Children entering the adult correctional system

44. There are four ways a child can enter the adult correctional system:
  - a transfer from a youth justice centre
  - a direct sentence by order of either the Supreme Court or the County Court
  - a breach of parole where the child was released to adult parole
  - direct remand to an adult facility.

45. My investigation identified that children were received into adult custody in 24 instances since 2007. Fourteen of these receptions were as a result of section 467<sup>5</sup> applications and one was a section 468<sup>6</sup> application made by the department to the Youth Parole Board.
46. Summary of children transferred to adult custody under section 467 and section 468 of the Children, Youth and Families Act:

**Table 1: Children transferred to adult custody**

Year	Number of transfers
2007	1
2008	0
2009	0
2010	3
2011	4
2012	7

47. Four children were either directly sentenced to adult prison, or sentenced due to a breach in parole. Children who are received into adult custody by direct sentencing or breach of parole have legal representation and the decision is made by a Judge or Magistrate. My investigation focused on children transferred to adult custody from a youth justice centre via section 467 of the Children, Youth and Families Act.
48. My review also identified five instances of children remanded to adult custody in error due to incorrect dates of birth. The Office of Correctional Services Review (OCSR) conducted a '*Review of the Management of Under 18 Year Olds in the Adult Corrections System*' which found that at the time of each of the remands, the information available to Corrections Victoria indicated that the individual was over 18 years old. The review considered that the incorrect dates of birth may have been a result of inaccurate information being provided to Corrections Victoria from court documents, but that Corrections Victoria could be more proactive in cross checking dates of birth.
49. On review of the relevant youth justice files, my officers found the birth certificate of one child, which was received by the department on 28 March 2013. It shows that he was only 14 years old when he was mistakenly placed into adult custody.

<sup>5</sup> Section 467 of the *Children, Youth and Families Act 2005* states that the Youth Parole Board may, on application of the Secretary of the department, direct a person aged 16 years or more to be transferred to a prison to serve the unexpired portion of the period of his or her detention or imprisonment.

<sup>6</sup> Section 468 states that a detainee over the age of 16 years may request a transfer to prison from a youth justice centre.

## The needs of children in custody

50. Victorian law recognises that children have particular needs different from those of adult offenders<sup>7</sup>. The Youth Parole Board's 2011-12 Annual Report stated that:

- young Aboriginal people continue to be over-represented in the youth justice system
- 40 per cent of young people on custodial sentences present with mental health issues which include symptoms of depression, anxiety and other mood disorders
- between 22 and 39 per cent of young people have an intellectual disability
- alcohol and drugs were a significant factor in offending behaviour for the vast majority of young people.

51. The Chairperson of the Youth Parole Board said in his message in the 2011-12 Annual Report:

The need and obligation to rehabilitate young people is particularly emphasised when one considers the nature of the population within the youth justice system ... The stories of their early lives are sad and disturbing. There is neglect, abandonment and abuse, often in circumstances which would shock many in our community.

52. It has been recognised that the behavioural and emotional characteristics of children require different approaches from custodial services to those applied to adults<sup>8</sup>.

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<sup>7</sup> *Seen and Heard: priority for children in the legal process*, Australian Law Reform Commission, 1997.

<sup>8</sup> *Seen and Heard: priority for children in the legal process*, Australian Law Reform Commission, 1997.

# Transfers of children from the youth justice system to the adult prison system in July – August 2012

## Key issues

My investigation identified 15 children were transferred from the youth justice system to the adult corrections system since 2007. Seven of the transfers occurred in June – August 2012.

An examination of the transfers in July and August 2012 identified:

- offending has changed from property based offences to violent offences
- long term detainees were expressing dissatisfaction with youth justice and were committing violent acts in order to be transferred.

In applying to transfer children from youth justice to adult custody, the department failed to:

- consider a number of rights under the *Charter of Human Rights and Responsibilities Act 2006* (the Charter)
- document the consideration of alternative placement options within youth justice
- consult with the Victorian Aboriginal Child Care Agency, Child Protection or the children's legal representatives
- provide relevant information such as mental health history to the Youth Parole Board
- follow up the transfer with Corrections Victoria to ensure the placement of the children was appropriate.

## Case study – July 2012 transfer

In July 2012, four children attempted to escape from Parkville Youth Justice Precinct (the Precinct). During the incident, a staff member was assaulted and required stitches after being cut several times on the neck with a make-shift weapon. The children physically restrained a second staff member and removed her security belt which contained keys to the Precinct.

The four children then barricaded themselves in a room, caused significant property damage and demanded to be transferred to adult prison. The standoff lasted for three hours. When the children were apprehended, they were detained in isolation at the Precinct.

The following day, the Department of Human Services (the department) applied to the Youth Parole Board to have three of the four children transferred from the youth justice system to the adult prison system under section 467 of the Children, Youth and Families Act.

The Youth Parole Board usually met on a fortnightly basis, however, two members agreed to meet the following day.

The Youth Parole Board approved the applications and three children (Child A, Child B and Child C) were transferred to the Melbourne Assessment Prison. One child (Child D) was placed in the Malmsbury Youth Justice Centre because the department considered his role in the incident to be limited. He was transferred to adult custody two weeks later.

The Sentence Management Branch, Corrections Victoria, recommended Child A, Child B and Child C be placed in the Charlotte Management Unit at Port Phillip Prison. A Management Unit or High Security Unit separates prisoners from other prisoners for management, protection, security reasons or pending investigation of an alleged offence.

The three children were initially under a regime that meant they were locked in their cells for 23 hours a day. They had one hour a day in the exercise yard on their own and in handcuffs. They took meals in their cells and had no access to education or programs. They each spent between 84-99 days in the Charlotte Management Unit.

## Legislation

### *The Children, Youth and Families Act 2005*

53. The provision to transfer young people between the youth justice system and the adult prison system is allowed by the Children, Youth and Families Act.
54. The relevant sections of the Children, Youth and Families Act are:
  - Section 467 states that the Youth Parole Board may, on application of the Secretary, direct a person aged 16 years or more to be transferred to a prison to serve the unexpired portion of the period of his or her detention as imprisonment. The Youth Parole Board may only make the direction if it is satisfied that the person has engaged in conduct that threatens the good order and safe operation of the youth justice centre and cannot be properly controlled in the youth justice centre.
  - Section 468 states that a detainee over the age of 16 years may request a transfer to prison from a youth justice centre.
  - Section 471 allows the Adult Parole Board to consider a transfer of persons under the age of 21 years from prison to a youth justice centre.
  - Section 472 states that if the Adult Parole Board considers it appropriate, a child under the age of 18 years imprisoned in a prison, may be directed to be transferred to a youth residential centre.

## ***The Charter of Human Rights and Responsibilities Act 2006***

55. Victoria is the only state in Australia to have a human rights Act<sup>9</sup> – the *Charter of Human Rights and Responsibilities Act 2006* (the Charter). The Charter applies to the actions and decisions of public authorities, such as the Department of Human Services and the Department of Justice. Section 38(1) of the Charter provides that it is unlawful for public authorities to:

... act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right<sup>10</sup>.

56. Under the Ombudsman Act, my functions include the power to enquire into or investigate whether any administrative action taken by or in an authority is incompatible with a human right in the Charter<sup>11</sup>. My investigation identified a number of rights under the Charter that were engaged by the actions and decisions of authorities in transferring children to and detaining them in the adult prison system. Those rights are:

- Protection of families and children (section 17):
  - (2) Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.
- Humane treatment when deprived of liberty (section 22):
  - (1) All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.
- Children in the criminal process (section 23):
  - (1) An accused child who is detained or a child detained without charge must be segregated from all detained adults.
  - ...
  - (3) A child who has been convicted of an offence must be treated in a way that is appropriate for his or her age.

57. Section 10 of the Charter may also be engaged when children are transferred to or detained in the adult prison system. Section 10 states that a person must not be ‘treated or punished in a cruel, inhuman or degrading way’. The United Nations Human Rights Committee has noted that prolonged solitary confinement of detained or imprisoned persons may amount to cruel, inhuman or degrading treatment<sup>12</sup>.

58. In addition to the Charter, children’s rights are also protected by international law. The *United Nations Convention on the Rights of the Child* (the Convention), to which Australia is a signatory, provides that the best interests of the child must be the primary concern when making decisions that may affect them. Article 37(c) of the Convention provides that:

... 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.

9 The Australian Capital Territory also has a human rights Act – the *Human Rights Act 2004*.

10 While this section is subject to some limitations, they are not relevant in this case.

11 Section 13(2) of the Ombudsman Act.

12 General Comment No. 20, Article 7, 44th session (1992), HRI/GEN/1/Rev.9 (Vol. I) [6].

59. While Australia has a reservation against article 37(c), it is in relation to allowing children to maintain contact with their families, having regard to the geography and demography of Australia<sup>13</sup>. The reservation was put in place due to Australia's size and population.
60. In relation to this issue the Manager Policy and Projects, Victorian Equal Opportunity and Human Rights Commission said:
- Although the reservation operates, a child's remaining rights under the Convention still apply, regardless of whether they are detained in a youth justice setting or adult prison.
61. The United Nations has developed a series of non-binding rules on the subject of child detention<sup>14</sup>. The rules require that juveniles are kept separate from adults and 'shall be detained in a separate institution or in a separate part of an institution also holding adults'<sup>15</sup>.

## An increase in requests for transfers to the adult prison system

### Case study - August 2012 transfers

In August 2012, two children (Child E and Child F) were involved in a violent assault at Parkville Youth Justice Precinct (the Precinct) that resulted in two staff members requiring hospitalization and another staff member requiring medical treatment. A transfer from the Precinct to adult custody was requested two days later. Both of the children were transferred to Port Phillip Prison and placed in the Charlotte Management Unit for between 76 and 79 days.

### Transfer requests

62. My investigation focussed on decision making in relation to transfers in July and August 2012 as there was rise in the number of section 467 transfer requests during this period.
63. A number of witnesses stated that the increased number of transfer requests could in part be due to a shift in offending type and higher numbers of young people held in youth justice centres.
64. The department advised that its analysis comparing data from 2001-02 to 2010-11 concluded that:
- there had been an increase in the number of children held in youth justice custodial centres
  - there was an increase in the number of children held on remand
  - children on remand were generally more unsettled and volatile than sentenced children due to their short stays and uncertainty about their future

<sup>13</sup> *Seen and Heard: priority for children in the legal process*, Australian Law Reform Commission, 1997.

<sup>14</sup> *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ('the Beijing Rules').

<sup>15</sup> *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ('the Beijing Rules').



- the number of young people with violence as their principal offence had increased and has overtaken 'property offences' as the predominant offending category.

65. This change in offending behaviour was supported by witness evidence during my investigation. The General Manager, Malmsbury Youth Justice Centre (Malmsbury) said:

The offence type has changed, there is no doubt about that. We are getting an increased offence against person. We are getting increased gang related activity, which can create some complexity about how you manage them in custody.

66. The General Manager at the Precinct said that the youth justice system was increasingly having to deal with damage caused by substance misuse. He said that young people would leave the youth justice system on parole; their drug use would escalate in the community; and they would return 'hostile and more difficult for staff to engage'. The General Manager also stated that young people were increasingly suffering from acquired brain injuries due to substance misuse.

67. The Forensic and Mental Health Manager, Royal Children's Hospital<sup>16</sup> said at interview that she observed opioid dependency to be decreasing and an increase in methamphetamine use:

I've been working in the system in which heroin was a particularly problematic substance and that the majority of young people coming into detention were coming in heroin dependent and going through opiate withdrawals. That has decreased over time and other substances have come to the fore ... methamphetamine is certainly the most significant illicit drug ... From a mental health perspective ... methamphetamine use is linked to drug induced psychosis.

### Long term detainees dissatisfaction with youth justice

68. The General Manager at the Precinct and the Director, Secure Services, both stated that some children who are in youth justice for longer periods of time may become bored or outgrow the system.

69. The General Manager said that the youth justice system made efforts to discourage children who said that they wished to transfer to the adult prison system. He said he believed some children wanted to be transferred to the adult prison system because:

- they entered the youth justice system at a young age and the youth justice system eventually becomes 'boring and mundane'
- children are not able to smoke in the youth justice system
- youth justice staff actively try to engage children and some children see prison as an easier option to this engagement
- young people in prison had at times communicated with children in the youth justice system via mail and would send examples of the canteen lists which children found more appealing than items available in the youth justice system

<sup>16</sup> The Royal Children's Hospital is contracted by Youth Justice Custodial Services to provide medical services at the Precinct.

- family and friends of the children were in the adult system
  - prisons were 'glorified' on television and in movies.
70. The Director, Secure Services advised that the children transferred in July 2012 were demanding that they be transferred to adult custody and may have been violent towards staff to achieve the transfer.
71. The General Manager said:
- Some of our decision making at the time was also around saying we've got to really stop this trend here of young people thinking that they can assault staff and that we will just buckle to that and you assault a staff, you instantly go to prison. Because that then sets a precedent that we were very mindful of.

## Alternative placement options

72. During my investigation witnesses provided evidence that there were three units within the youth justice system which could have provided a secure placement after the incident in July 2012:
- The Ulabara Unit at the Malmsbury Youth Justice Centre, a 16 bed secure unit.
  - The 'Intensive Supervision Annex' at the Malmsbury Youth Justice Centre which is a four bedroom unit that is fully enclosed and secure. It is not staffed on a day to day basis but young people may be placed there if they are required to be managed separately for a period of time for safety and security reasons.
  - The 'Preventative Detection Order Wing' at the Precinct. A four bed wing of the Oakview Unit which shares meals, programs, exercise space with the Oakview unit.
73. At interview, the General Manager at the Precinct said that he contacted the General Manager at Malmsbury to discuss the possibility of placing the four children at Malmsbury. The outcome of the discussion was that the placement was not possible as Malmsbury was operating at capacity.
74. One of the four children, Child D, was placed in the Intensive Supervision Annex at Malmsbury and then moved to the Ulabara Unit. The Director, Secure Services said that Child D was not transferred to adult custody immediately as, unlike the other three boys, he had not requested a transfer. He was transferred two weeks later as the department stated he 'posed an unacceptable risk to the safety and good order of the Malmsbury Youth Justice Centre due to his involvement in subsequent incidents'.
75. When asked at interview what the options are for housing young people such as those involved in the July 2012 incident at Parkville, the General Manager at the Precinct stated that the Preventative Detection Order Wing could be utilised.
76. When asked if the Intensive Supervision Annex could have been utilised for Child A, the General Manager at Malmsbury said:

In essence it's isolation, it's not a healthy environment and I wouldn't think it was conducive to keeping someone in youth justice. It is very much a safety containment environment first and foremost.

77. The General Manager at Malmsbury has since clarified this statement advising that his response was in the context of long term placement rather than an immediate response.
78. The department provided the following response to my draft report:

At the time of the July 2012 incident there were no available options for placement within the Youth Justice system of all the four young people involved. The Malmsbury Youth Justice Centre was operating at full capacity. The Intensive Supervision Annexe at Malmsbury is used to manage those within the capacity of 90 beds who need intensive support for a short period. It is not suitable, or resourced, for longer term accommodation. Accepting one client (Child D) to Malmsbury lifted the centre above capacity and it was not possible to take the remaining three young people.

The only available beds at the Parkville Youth Justice Precinct were within the Oakview Unit for remand clients (one bed) and the Southbank Unit for more vulnerable clients (two beds). The Oakview Unit was not a suitable option given the statutory requirement to separately accommodate sentenced and remanded young people; and the Southbank Unit was not a suitable option given it was accommodating highly vulnerable clients and clients with an intellectual disability. Placing young people involved in the violent incident with those cohorts was deemed to pose an unacceptable safety risk.

79. Several witnesses said that staff were very upset following the incident in July 2012. The Chief Practitioner, Child Protection and Youth Justice, said:

When I asked that question [if alternatives were considered] the answer was, look, the staff at Parkville were so acutely traumatised and distressed that there is no way they could have stayed there.

80. The Operations Manager, Parkville Youth Justice Precinct said that following the incident he attended a meeting with union representatives who expressed dissatisfaction that a staff member was injured.
81. The *'Youth Justice guidelines for section 467 CYFA - transfers from youth justice centre to prison'* states that 'there may be industrial issues that have to be managed in the context of extreme client behaviour'.

## Consultation

82. Child A and Child B are both Aboriginal young people. The Director, Secure Services said that the Aboriginal Support Worker at the Precinct, provided verbal advice to support the transfer of the two children. However, no formal written advice was sought, either from the Aboriginal Support Worker or from an independent agency such as the Victorian Aboriginal Legal Service or the Victorian Aboriginal Child Care Agency (VACCA).

83. Child A and Child B are also both 'dual order clients' which means they are subject to concurrent child protection and youth justice orders. The Children, Youth and Families Act states that a decision in relation to the placement of an Aboriginal child, or any other significant decision in relation to an Aboriginal child, should involve a meeting by an Aboriginal convener (who has been approved by an Aboriginal agency) or by an Aboriginal organisation approved by the Secretary<sup>17</sup>.
84. The department has a protocol between child protection and VACCA that establishes a consultation process in relation to decisions about Aboriginal children. Despite this, the department did not consult with VACCA regarding the transfer of the two Aboriginal dual order clients.
85. The Chief Executive Officer, VACCA said:
- They've got Aboriginal staff and sometimes they think by talking to their own staff internally they're talking to the Aboriginal community ... It's very disappointing that they didn't consult with us.
86. The department's procedure document titled '*Youth justice guidelines for section 467 CYFA - transfers from youth justice centre to prison*' was amended in March 2012 to state that when a child protection client is transferred the case worker must be consulted. The new guidelines were emailed to the youth justice managers on 30 March 2012.
87. My officers found no evidence to show that Child A or Child B's child protection case workers were consulted about the transfers to adult prison. The department has since advised that the transfer report for Child A was signed by the Executive Director, Children, Youth and Families, CEO Parkville, Director Youth Justice Custodial Services and Executive Director Operations Division in recognition that he was a child protection client. This followed consultation between the Operations Manager at the Parkville Youth Justice Precinct and the Child Protection manager in Gippsland.
88. While there is no requirement for a child to have legal representation at Youth Parole Board hearings, the Chief Executive Officer, Victorian Aboriginal Legal Service was concerned that the practice of legal representation for young people is not occurring:
- I have a concern with the way the Youth and Adult Parole Boards work, and I know it's contained in their relevant Acts and this is the way they operate, but the fact that somebody can effectively be charged with an offence, go before a body without any natural justice or right of defence can then can be duly sentenced without any review or overview concerns me enormously.
89. There are no agreed national standards that provide natural justice mechanisms for young people in relation to the decision to transfer<sup>18</sup>.

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<sup>17</sup> Section 12(1)(b) of the *Children Youth and Families Act 2005*.

<sup>18</sup> *Seen and Heard: priority for children in the legal process*, Australian Law Reform Commission, 1997

90. In New South Wales, orders to place children in adult prisons must be reviewed at least once each month by the relevant Minister and children are able to apply to court to have orders varied or revoked<sup>19</sup>. The New South Wales legislation also provides that children are entitled to be heard and to be legally represented in the proceedings.

## Strategies to manage behaviour prior to transfer requests

91. The Secretary's report to the Youth Parole Board requesting a transfer sets out the young person's behaviour in custody prior to transfer and the strategies undertaken to manage their behaviour while in the youth justice setting.
92. Departmental records indicate that each of the children transferred in July and August 2012 demonstrated a pattern of violent behaviour towards staff and other young people at the Precinct.
93. This pattern of violence was also identified in a review commissioned by the department regarding young people transferred from the youth justice system to the adult prison system<sup>20</sup>. It analysed a number of client files and found common themes concerning the children subject to the transfers, including:
- an escalating pattern of violent behaviour directed towards other clients and/or staff over a period of several months
  - a lack of responsiveness to centre interventions and behaviour management plans.
94. Strategies undertaken to manage the children's behaviour are contained in the department's reports to the Youth Parole Board. They include:
- promoting positive behaviour by a reward system
  - client behaviour management plans
  - time management plans
  - intervention and support from the Aboriginal support team
  - ongoing therapeutic intervention
  - a hierarchy of warnings including a unit manager warning, operations manager's warning and a warning from the CEO
  - a letter from the Youth Parole Board.
95. In response to this, the department stated:
- The department believes that every effort should be made to maintain each young person within the Youth Justice system and has been working over recent years to introduce policy changes, develop staff skills and establish support structures which promote this approach. As noted in your report [chapter titled '*Department of Human Services actions*' below], this has included initiatives to address and respond to violent behaviour amongst clients, improvements in education and activities and the revision of policies to ensure that youth justice staff engage specialist practitioner support.

<sup>19</sup> *Children (Detention Centres) Act 1987*, section 28D.

<sup>20</sup> *Review of young people transferred from a youth justice centre to prison*, prepared by Consulting and Training Services Pty Ltd for the Department of Human Services Youth Justice and Youth Justice Branch Directorate, February 2013.

...

[The number of children transferred since 2007] represents a very small proportion of the 771 sentenced admissions to custody of young people under 18 over that period. No young people aged under 18 years have been transferred since August 2012, despite several instances of very aggressive behaviour which have been managed in an alternative way.

## Lack of information exchange

96. My investigation identified shortcomings in relation to the exchange of information between Youth Justice Custodial Services (youth justice) and Corrections Victoria.
97. There was a lack of clarity from youth justice regarding the exchange of information between health services. The General Manager at the Precinct said that they do not have visibility regarding what health information is transferred to the adult system. He advised that the Precinct's contracted health service liaises with the health provider in the adult system. He said:

We wouldn't necessarily be privy to what information they release or whether or not that's a smooth process.
98. Evidence suggests that one of the children had a significant mental health history prior to the transfer to adult prison.
99. At interview, the Forensic and Mental Health Manager said that a verbal handover occurred between the health provider at the Precinct and the health provider at Port Phillip Prison at the time of the transfer. She advised that discharge summaries were sent to the health provider at Port Phillip Prison after the children were transferred.
100. The Forensic and Mental Health Manager also said that at the time of the transfers in July and August 2012 there was no general policy or guidelines in relation to the exchange of information between the youth justice system and the adult prison system when children are transferred.
101. A review of the files relating to each of the three children transferred in July 2012 did not reveal any evidence of relevant health information (such as mental health history) being provided to the Youth Parole Board when it was considering the transfer.

## Conflicted role of the Secretary of the Department of Human Services

102. The department is responsible both for administration of youth justice services and for the child protection program within the legislative framework of the Children, Youth and Families Act. The department can make a Protection Application to the Children's Court if it considers a child to be in need of protection. The Children's Court can issue a range of Protection Orders. Some orders transfer the custody or guardianship of children from the parent to the department; others allow the department to monitor children while they remain in their parents' care<sup>21</sup>.

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<sup>21</sup> Victorian Ombudsman, *Department of Human Services Child Protection Program (Loddon Mallee Region)*, October 2011.

103. The conflicted role of the department when dual order clients are transferred to adult prison was raised at interview by the Chief Executive Officer, Victorian Aboriginal Legal Service. He said:
- We call into question the state's duty of care ... because he [Child A] was a child protection client ... it is my view that they failed in their duty of care.
104. The General Manager of the Precinct said that he believed there was a role for child protection in relation to Child A and said:
- ... The department should provide some continued support of young people who are transferred to the adult system ... I don't think it is the role of a custodial facility that initiated the transfer ... our preference would be to have a consistent and greater, response of engagement from them [child protection] with young people that we've got in our facility but it's a bit hit and miss.
105. The Chief Practitioner, Child Protection and Youth Justice commented on the 'inherent tension' between child protection and youth justice:
- I think I would have bent over backwards to stop [Child A] going to an adult prison, a 16 year old, despite what he'd done ... We're still working under the same Act, we're the same organisation.
106. The department subsequently acknowledged that Child A was placed at risk in the adult prison system and recommended that he be returned to the youth justice system. See chapter titled '*Delay in assessment to transfer back to the youth justice system*' for further details.
107. My investigation found that there were no clear guidelines about the department's role following the transfer of both dual order clients and those who are solely youth justice clients.
108. The Principal Commissioner for Children and Young People said:
- In this case, I would have thought that it would be logical, common sense, it would be an indication of us 'walking our talk' that we should follow this young person up once we transferred a 16 year old to an adult facility. If we didn't know what situation he was in, it's an indictment on all of us, including myself.
109. While documentation shows that the children subject to child protection orders were visited by workers, there is no official role in relation to those children who are not child protection clients.
110. The Acting Executive Director, Children, Youth and Families division provided the following response about Youth Justice's oversight once a child is transferred to adult prison:
- It is important to note that once a young person is transferred to prison by the Youth Parole Board they come under the jurisdiction of the Adult Parole Board, with Corrections Victoria responsible for their sentence management.

111. In response to my draft report, the department advised:

Whilst there is no official role for Youth Justice once a child is under the jurisdiction [*sic*] the adult correctional system, the department has clear responsibilities to maintain its involvement with a young person who is subject to a statutory child protection order made by the Children's Court. Child Protection must retain its responsibilities commensurate with the order and advocate for them as their guardian, regardless of the place of residence of the child.

... By way of follow up, six visits were made by departmental workers to [Child A] whilst in adult prison, including by staff of Child Protection, Youth Justice and the Office of Professional Practice. This was intended to maintain his engagement and monitor his well-being, including working to assess his suitability to return to Youth Justice. The department provided case notes from these visits to the investigation. While these visits were designed to support [Child A], I acknowledge that they should have been used to greater effect to escalate concerns about his welfare and management with Corrections Victoria.

## Department of Human Services' actions

112. Since the July and August 2012 transfers the department has introduced a number of processes aimed at mitigating the need to transfer children to the adult prison system. These include:

- Two senior clinicians have been employed at the Precinct to provide an 'Intensive Therapeutic Service' to young people with complex issues and challenging behaviours.
- The Intensive Therapeutic Service is the first stage of the implementation of a trauma informed approach to working with young people in custody.
- Monash University has been commissioned to develop an Adolescent Violence Intervention Program for young people detained in custody or on community orders who have committed violent offences. The Adolescent Violence Intervention Program is now being piloted at the Precinct.
- The policy guideline on transfers from youth justice centres to adult prisons has been revised and requires staff to consider obligations under the Charter.
- There is now a requirement for youth justice to consult with the Office of the Principal Practitioner, Child Protection (if the child is subject to a protection order), the Youth Justice Senior Practice Advisor and a requirement to meet with Sentence Management Operations, Corrections Victoria to consider how the young person will be accommodated in adult prison.
- Construction has begun on the building of a new 45 bed secure youth justice centre on the Malmsbury Precinct. This project is planned for completion in October 2015.
- The Precinct has implemented a Safety and Emergency Response Team. The team undertakes a range of preventative procedures and responds to incidents.



- A Young Offenders Transfer Review Group has been established involving the Youth Parole Board, Adult Parole Board, the department and Corrections Victoria. The group meets monthly and monitors the placement and management of children in adult custody.
- A Memorandum of Understanding (MOU) between Youth Justice and Corrections Victoria is being negotiated and is close to being finalised. The MOU is designed to support better decision making around the management of young people,

## The treatment of children transferred to the adult prison system

### Key issues

My investigation identified that prior to the transfers in July and August 2012, children in adult prison were generally placed in a youth unit. The children transferred in July and August 2012 were all given a V1 violence rating<sup>22</sup>, on handcuff regimes and placed in the Charlotte Management Unit. The handcuff regime meant that they were in handcuffs whenever they were not in their cell.

My investigation identified that:

- the Sentence Management Panel did not consider rights engaged under the *Charter of Human Rights and Responsibilities Act 2006* when placing the children in solitary confinement for a number of months
- children are difficult to place within the prison system because they are vulnerable in the mainstream prison population
- there are limitations within the youth unit at Port Phillip Prison such as a small number of available places and an inability to manage violent young people or those with a sexual offending history
- Corrections Victoria is continuing the practice of placing children in solitary confinement, despite advice from the Victorian Equal Opportunity and Human Rights Commission stating they should cease
- there have been a number of children mistakenly remanded into adult custody.

113. The Sentence Management Branch, Corrections Victoria, has responsibility for classifying and placing prisoners within the adult prison system.
114. The *Corrections Regulations 2009* and the *Sentence Management Manual* provides guidance when determining security ratings and a prisoner's placement<sup>23</sup>.
115. Due to the severity of the incidents at the Precinct in July and August 2012, the five boys were all given V1 violence ratings, put on handcuff regimes and placed in the Charlotte Management Unit.

<sup>22</sup> V1 violence rating indicates the highest risk of violence.

<sup>23</sup> The sentence management system is responsible for the security ratings. There is also another sequence of risks called the 'risk and recommended actions', which is a joint system. Victoria Police, Corrections Victoria and medical and psychiatric providers can ascribe risk ratings. Risk and recommended actions have six ratings: violence (V rating), escape (E rating), placement (T rating), psychiatric (P rating), medical (M rating) and suicide (S rating).

## Placement in the Charlotte Management Unit

116. The three boys transferred in July 2012 were placed in the Exclusion Placement Area (EPA) within the Charlotte Management Unit. Prisoners who are on a 'loss of privileges' regime or under investigation are generally placed in the EPA, which is separate from the main section of the Charlotte Management Unit. There are two secure exercise yards at the end of the hallway that serve as the 'run out' for prisoners. The only time prisoners are not in cell they are in the 'run out' on their own.
117. Conditions in the Charlotte Management Unit have been described as 'very sterile'. The Manager Risk and Compliance, Port Phillip Prison stated:
- There is very little, you've got a concrete slab with a mattress on it, you've got a shower cubicle, a shelf, not an awful lot else ...

**Image 1: Photo of the Exclusion Placement Area (EPA)**



**Image 2: Photo of a cell in the EPA**



118. Prior to July and August 2012, children transferred from youth justice were generally placed in a youth unit such as the Penhyn Unit at Port Phillip Prison. My investigation identified other incidents that occurred in youth justice, of a similar level of violence or involving an escape attempt, where the children were placed in the youth unit rather than the Charlotte Management Unit.

### Use of handcuffs

119. The handcuff regime meant that the children were in handcuffs whenever they were not in their cell. This included in the exercise yard.

120. A Senior Analyst, OCSR identified non-compliance with the Port Phillip Prison handcuff regime:

All three remain on the Hand Cuff regime and separate management; this includes their daily exercise. Interestingly the 'Charlotte Handcuff' procedures ... states *'Handcuffs must be applied prior to any physical interaction with the prisoner handcuffs can be removed when the prisoner is in the exercise yard on his run out'*.

121. When asked why handcuffs remained on the boys while they were in the exercise yard the former Operations Manager at Port Phillip Prison stated that at the time, the two exercise yards in the EPA had no 'traps' [trap doors] in the cell door to get the handcuffs on and off. Therefore they remained on throughout the hour they were in the exercise yard. However, the inference could be drawn that handcuffs were used as punishment.

122. In response to my report the Commissioner, Corrections Victoria stated:

The report has inferred that the decision to place the under 18 year old prisoners in restricted regimes may have been to deter other young offenders from committing violent acts, or as a punishment for their behaviour whilst in the Youth Justice System. Please be assured that the central focus of CV's [Corrections Victoria] assessment, classification and placement process is the safety of the prisoner, other prisoners, staff and the community, while at the same time endeavouring to place prisoners at the lowest appropriate level of security, based on an individual assessment of their risks and needs.

123. In response to my draft report, the former Operations Manager at Port Phillip Prison said:

The prisoners were managed according to their violence risk rating and the outcomes of their Behaviour Management Plan, developed with the input of relevant stakeholders during the case management process. The prisoners in question had been involved in a serious violent offence against staff and an attempted escape from youth custody. The decision to apply handcuffs took into consideration staff safety and the good order and management of the prison. As a senior manager of Port Phillip Prison (PPP) at the time I also had legislative responsibilities to maintain a safe working environment for all persons.

...

During their placement in Charlotte Unit staff continuously engaged and worked proactively to encourage positive behaviours in order to ensure a quick, safe and effective transition to a more stable unit. I reject the assertion that handcuffs were used as a punishment.

## Considerations by the Sentence Management Branch

124. On 27 June 2013, it was reported in *The Age* that a County Court judge had questioned whether the conditions a 32 year old man had experienced, including being kept in the Charlotte Management Unit at Port Phillip Prison, had complied with the *Charter of Human Rights and Responsibilities Act 2006* (the Charter). In his sentencing comments, the Judge described the conditions as ‘extremely onerous’ and reduced the jail term he imposed given the conditions this man had experienced.
125. Public bodies, such as the Department of Justice, are required to give proper consideration to relevant rights under the Charter when making decisions, and to act consistently with the Charter.
126. Section 17(2) of the Charter provides that every child has the right ‘to such protection as is in his or her best interests and is needed by him or her by reason of being a child’. Section 23(3) of the Charter also states that ‘a child who has been convicted of an offence must be treated in a way that is appropriate for his or her age’.
127. A review of the files of the five children transferred in July and August 2012 found no evidence that the Charter was considered by the Sentence Management Panel when considering the placement of the children.
128. Section 10 of the Charter provides protection from torture and cruel, inhuman or degrading treatment. In March 2013, the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) conducted a review of Corrections Victoria’s policies in relation to children and advised Corrections that:
- The use of solitary confinement for long periods of time has been found to be degrading treatment<sup>24</sup>. This is even stronger for children, so that it may not be necessary for the young person to be in solitary confinement for long periods to breach this right. As a principle, solitary confinement should never be used for prisoners under 18 years.
129. Corrections Victoria did not accept VEOHRC’s recommendation to amend its policy to include a statement that children must not be placed in solitary confinement. In the response to VEOHRC, the Commissioner, Corrections Victoria stated:
- Corrections Victoria will maintain the use of the separation of prisoner when there is a reasonable belief that placement outside a separation regime will pose an unacceptable risk to prison security ...
130. In response to my draft report, the Commissioner said:
- The decision to accommodate the under 18 year old prisoners in restricted regimes followed assessments of risk (posed to and by each of the prisoners) and were also consistent with the SMPs’ [Sentence Management Panel] responsibilities under the Regulations. These risk assessments were reviewed regularly during their management unit placements.

24 General Comment No. 20, Article 7, 44th session (1992), HRI/GEN/1/Rev.9 (Vol. I) [6].

## Mental health considerations

131. The *Corrections Regulations 2009* (the regulations) outline factors that may be considered when determining placement. The regulations state that consideration may be given to 'any risk the prisoner poses to the welfare of himself or herself or any other person'<sup>25</sup>.
132. The impact of isolation and management units such as the Charlotte Management Unit on mental health was identified in a review titled '*Review of the mental health and psychosocial needs of prisoners detained in restrictive environments*' prepared for Justice Health and Corrections Victoria in September 2008.
133. The review recommended that prisoners with active major mental illness should not be placed in restrictive environment settings as they are ill-suited to provide adequate care and are more likely to exacerbate the mental illness<sup>26</sup>.
134. The youth justice 'Client Health Admission Sheet' for one of the children indicated that he had a significant mental health history prior to transfer to adult prison. The form stated that the child was being treated for a psychiatric condition and had a history of suicide attempts.
135. The Forensic and Mental Health Manager gave her opinion on the impact of solitary confinement:
- Whether you're a young person, an Aboriginal young person, a person with a mental illness ... The impact of solitary confinement is that you're literally isolated in every way. The obvious impact is that it will exacerbate your stress levels and as you become more stressed you become more vulnerable ... you dissociate from reality and start to exhibit psychotic symptoms
136. Corrections Victoria has recently provided further information indicating that:
- [The child] was regularly reviewed by the health staff at both the Melbourne Assessment Prison and Port Phillip Prison. ... he was reviewed by the medical officer and mental health professionals on a regular basis to address his health issues.
- ... [the child] was reviewed by the Sentence Management Panels fourteen times between July 2012 and October 2012 and on each of those occasions it referred specifically to the matter of his mental health.
137. While the Sentence Management Panel may have been aware of the child's mental health history, he remained in solitary confinement despite the 2008 review which recommended that prisoners with active mental health issues should not be placed in restrictive settings.

## Vulnerability due to age

138. Staff at Port Phillip Prison identified some of the difficulties placing a child in the adult system. The Manager Risk and Compliance at Port Phillip Prison said:

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<sup>25</sup> *Corrections Regulations 2009*, regulation 26(c).

<sup>26</sup> *Review of the mental health and psychosocial needs of prisoners detained in restrictive environments*, Professor James Ogloff, prepared for Justice Health and Corrections Victoria, September 2008.

It is a difficult task given their age. I mean, you bring them out of Charlotte, where do you put them? I mean you can't put seriously violent prisoners into Penhyn [youth unit], as I said it disrupts the rest of the unit. You certainly can't put 16-17 year olds into a general mainstream unit because they could be even further corrupted by entrenched prisoners that have been in the system a long time.

139. The former Operations Manager at Port Phillip Prison said:

... We've got to keep them safe from other prisoners too so if they're not suitable for Penhyn, just putting them into another mainstream environment, you know, it's just a recruitment city, sexual standover, standover for sexual favours ... they are so vulnerable in a general mainstream environment too. So it's a difficult situation that everyone sees them faced with.

140. There has been recent media coverage about overcrowding in Victoria's prisons. It has been reported that Victorian prison cells have become so overcrowded that many are holding up to three times their designed capacity.

141. In this regard, at interview, the Youth Development Officer, Port Phillip Prison raised concerns regarding the possible placement of children in the same cell as adults if they were in the general mainstream prison population.

### **Placement in the Charlotte Management Unit as a deterrent**

142. The Youth Development Officer said that she believed that the increase in transfers to adult prison was due to a child (who was transferred to prison from youth justice) telling young people in youth justice that prison was a better place to be.

143. Child G was transferred from youth justice to Port Phillip Prison in May 2010 and was placed in the Charlotte Management Unit before being transferred to the youth unit. The Youth Development Officer said:

... and then, promptly writes to all of his mates at juvenile and says "hey do something wild, you'll get transferred to the youth unit at Port Phillip Prison, it's fantastic"... and then it started ... it was just this avalanche of kids.

144. The placement of children in the Charlotte Management Unit in July and August 2012 may have been as a deterrent to detainees in youth justice who were willing to assault staff in order to be transferred to adult prison.

145. The Department of Human Services February 2012 review titled *Review of young people transferred from a youth justice centre to prison*, states:

[the Operations Manager] and other members of the sentence management committee were concerned about the lack of consequence these young men experienced following violent assaults on staff and the possibility that transfer to prison became an option of choice for young people rather than an absolute last resort. To provide a more significant consequence the sentence review committee decided to extend the period in maximum security for young men transferred via section 467 for violent assaults to 2 to 3 months.

146. The former Operations Manager responded:

It is my firm contention that I have been misquoted in the review conducted by the Department of Human Services (DHS) and that the writer has misrepresented both myself, and the Sentence Management Branch (SMB). [The author] did not attend PPP [Port Phillip Prison] with the purpose of conducting an interview, and any comments made to her were done so in order to provide background and context to prison operations, an area which she stated she had no familiarity.

147. When asked at interview if the placement of the children in the Charlotte Management Unit was a punishment for their actions at youth justice, the former Operations Manager said:

It wasn't a punishment, it was about keeping people safe and secure ... You can draw a bow and say it is a deterrent ... If you do something wrong at ... youth justice ... and you know you are going to Penhyn Unit, where I got a PlayStation ... there is no deterrent factor there ...

148. The limited number of places in the youth unit may have contributed to the placement of the children in the Charlotte Management Unit and the delay in exiting them. The Penhyn Unit is a 35 bed single cell unit for under 25 year olds. The Youth Development Officer said that the unit is constantly full and she is 'inundated' with requests from the Sentence Management Branch and the Courts to create space for young people.

149. My investigation identified that there are limited placement options for young offenders with a history of sexual offences. The Penhyn Unit does not provide programs for prisoners with a sexual offending history.

## Long term management and exit plans

150. Placement in a High Security or Management Unit for longer than 30 days is considered a long term management placement. No prisoner can stay in a management unit for longer than 30 days without authority of the Director or the Assistant Commissioner of the Sentence Management Branch.

151. In the case of the five transfers in July and August 2012, the decision to place the children in the Charlotte Management Unit beyond 30 days was made by the Assistant Commissioner, Sentence Management Branch. At interview he said that the decision to keep the children in the Charlotte Management Unit as long term prisoners troubled him:

I was deeply troubled by the fact that we had these young guys locked up which is very unusual for us, but I was satisfied that they were in the right spot whilst we under[went] some ... kind of assessment of the risk they posed ...

152. The Assistant Commissioner advised that he considered adequate information was exchanged in the cases of the children transferred in July 2012. He arranged for a case conference to be held at the end of July 2012 to discuss the children's placements.



153. The case conference minutes indicate that seven staff members attended from Corrections Victoria, seven staff members from Port Phillip Prison, one youth justice staff member and two Office of Correctional Services Review staff members attended as observers. The Assistant Commissioner said that he chaired the case conference and that nobody objected to the placement of the children in the Charlotte Management Unit.
154. Only two of the three children placed in the Charlotte Management Unit in July 2012 were subject to an exit plan from the to the Penhyn Unit (youth unit).
155. In August 2012 long term management/high security unit reports were signed for Child B and Child C. Child C's report recommended he stay in the Charlotte Management Unit for a period of one month before moving to the Penhyn Unit. Child B's report stated that he should stay in long term management for a period of two months.
156. My investigation identified that the plans to exit Child B and Child C were not adhered to within the specified timeframes. Child C was not exited until eight weeks beyond the plan. Child B did not exit the Charlotte Management Unit until five weeks beyond the plan. Also, there was no approved plan to exit Child A out of the Charlotte Management Unit.
157. The Youth Development Officer said that one of the reasons Child A was not considered suitable for the Penhyn Unit was that he was not willing to 'engage', so it was difficult to assess how he would interact with other young people. Staff at Port Phillip Prison consistently reported that Child A was difficult to 'engage' or communicate with.
158. The Manager Policy and Projects, Victorian Equal Opportunity and Human Rights Commission questioned the relevance of the requirement to 'engage':
- Within the Charter and within international law there's no rule that says a child has to 'engage' or advocate for their own rights. Rather, the obligation is on the prison to ensure the child's rights are considered and observed.
159. When asked about the delays in transition from the Charlotte Management Unit to the Penhyn Unit, the Assistant Commissioner said:
- That transition for [Child B] and [Child C] didn't actually get completed until October ... probably 5 weeks beyond the plan, and that wasn't satisfactory ...

## **Delay in assessment to transfer back to the youth justice system**

160. Witnesses from the Department of Human Services (the department) provided conflicting evidence as to when they became aware the children were placed in the Charlotte Management Unit.

161. The 7:30 program on the ABC reported that Child A had been placed in the Charlotte Management Unit in October 2012. The Director, Secure Services response to the report was:
- ... as a father and as a member of the community, on the face of it, it certainly alarmed me.
- ...
- I think prima facie, it is, repugnant is too strong a word, but without knowing what the rationale is for doing it ... All I can say is on the face of it, it felt extreme.
162. The General Manager of the Precinct said that he was informed in July 2012, subsequent to a meeting with staff from Port Phillip Prison and a case conference which a departmental representative attended.
163. In September 2012, the Victorian Aboriginal Legal Service made representations on Child A's behalf to the Adult Parole Board for a return to youth justice. The Adult Parole Board then requested the department conduct a suitability assessment for Child A to return to the youth justice system.
164. A Clinical and Forensic Psychologist conducted an assessment and provided a report to the department in October 2012. The report concluded that there was high risk of Child A reoffending, due to a range of family, personal and environmental risk factors. The Clinical and Forensic Psychologist's prognosis was 'guarded in this situation given the range of issues involved and the complexity of care required to help ameliorate the situation'<sup>27</sup>.
165. Subsequent to the assessment, the Chief Practitioner, Child Protection and Youth Justice, interviewed Child A and completed a report which recommended he be transferred to Malmsbury Youth Training Centre. The Chief Practitioner stated:
- I am unequivocal in my view that three months in a tiny cell where there is no space to exercise, for 23 hours 4 days per week and 22 hours for 3 days per week, behind a heavy clad door with a small rectangular slot (the size of a post box opening) through which his meals are delivered and eaten alone, simply cannot continue. Within this tiny space which has the stench of a urinal, the only relief is the television. His one hour where he can walk, is in the 'run out' ... an empty space with a urinal in the corner. He is handcuffed every day during this hour in the 'run out' and at any other time he is moved from his cell ... Otherwise for the rest of the 23 hours the sounds he hears are the muffled calls from other prisoners who are in high security because of the nature of their crimes. For a developmentally compromised boy this is simply unacceptable.
166. In mid-October 2012 the Adult Parole Board made the decision to transfer Child A from Port Phillip Prison to the Malmsbury Youth Justice Centre and he was transported on the same day.
167. The process to assess Child A for transfer back to youth justice from adult prison took approximately one month. By contrast, the assessment to transfer him from youth justice to adult prison took only 24 hours.

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<sup>27</sup> Clinical and Forensic Psychological Assessment, October 2012.

## Children incorrectly remanded to adult custody

168. Section 347 of the Children, Youth and Families Act states that:
- If a child is remanded in custody by a court or a bail justice, the child must be placed in a remand centre except as otherwise provided by the regulations with respect to prescribed regions of the State.
169. My officers reviewed the youth justice files of four children that the Office of Correctional Services Review (OCSR) identified as being remanded to adult custody in error. My officers' review identified the translation of a foreign birth certificate that confirmed that one child was initially remanded into adult prison when he was only 14 years old. A copy of the birth certificate was received by the Department of Human Services (the department) in March 2013. Prior to this date, the department and Corrections Victoria considered the child's age at the time of the remand to be either 17 or 18 years old.
170. The child's case manager, wrote a letter dated September 2011 which was located on the child's youth justice file:
- ... [Child H] aged fourteen and a half was incarcerated in an adult prison he spent his fifteenth birthday in the Melbourne Remand Centre where fearing for his safety he asked the quote 'blacks' unquote, to keep him safe this was after an inmate threatened [Child H] on his first day of incarceration. [Child H] has expressed the trauma of being jailed with adult offenders has been the cause of ongoing nightmares, depression, use of alcohol ...
171. The Commissioner, Corrections Victoria responded that:
- Corrections Victoria and the Office of Correctional Services Review investigated the date of birth of this young man at the time concerns were initially raised. These investigations relied on information made available by the Courts, Victoria Police, Department of Human Services and the Department of Immigration. The Department of Justice did not have ... information your investigation was able to access.
- The department of justice investigation concluded there was a discrepancy on the two receptions into prison custody of [Child H] however, these discrepancies related to whether the correct date of birth made him either 17 or 18 years old at the time ...

## Corrections Victoria actions

172. Since the transfer of the children in July and August 2012, Corrections Victoria advised that it has strengthened some of its processes concerning children in the adult prison system:
- Oversight of the placement and classification of children has been reinforced as cases are now considered by the High Risk Management Advisory Panel, which provides advice to the Commissioner on the placement of young people under 18 years. The Commissioner, Corrections Victoria, now makes the final decision.

- There is now consultation about the possible prison placement of children with the Youth Parole Board prior to any decision regarding transfer.
- A group comprising of representatives from the Adult Parole Board, the Youth Parole Board and the Sentence Management Branch meets on a monthly basis to discuss the progress of each child in prison. The group commenced meeting in November 2012.
- Regular case conferences are now occurring for each young prisoner transferred from youth justice to prison. The case conference now includes representatives from youth justice, child protection and disability services, as well as relevant parties within Corrections Victoria.
- A Memorandum of Understanding to formalise the exchange of information between the department and Corrections Victoria has been drafted.
- The Young Offenders Advisory Committee commenced in December 2011 to oversee issues relating to young offenders.
- VEOHRC conducted a review of Corrections Victoria's policies. VEOHRC made a number of recommendations, including that Corrections Victoria amend its policy to state that prisoners under 18 years old not be placed in solitary confinement. Corrections Victoria has accepted a number of VEOHRC's recommendations. However, it states that it will maintain the practice of placing children in management units if necessary.

## Conclusions

### Alternative placements

173. There was a significant rise in the number of children transferred from youth justice to adult prison in mid-2012. This appears to have been influenced by factors such as an increase in violence; changing patterns of drug use; and long term detainees becoming dissatisfied with placement in youth justice and committing violent acts in order to be moved to prison. The department advised that:
- The increase of transfers of children from youth justice to adult prison in mid-2012 resulted from two incidents.
174. The three children transferred in July 2012 said they committed the violent act against staff in order to be transferred to adult prison. It is possible that acceding to detainee's demands to be transferred after committing violent acts may ultimately make youth justice more dangerous for staff and other residents, unless their conduct can be better managed.
175. A number of witnesses suggested that the children could have been contained at Youth Justice after the incidents occurred and there is no written evidence to show that all of the potential placement options were considered by the department prior to transfer.

176. Although longer periods in isolation is not in accordance with the therapeutic approach adopted at youth justice, I consider that placement in the Intensive Supervision Annex at Malmsbury or the Preventative Detection Order Wing at the Precinct would have been preferable to the children's ultimate placement in solitary confinement in a maximum security adult prison.
177. Statements made by witnesses and departmental policy suggests that the reaction of staff and union involvement may have contributed to the decision to transfer the children to the adult prison system. Further, the short timeframe between the incident and transfer appears to indicate that the decision was reactionary.
178. The department provided the following response:
- The department shares your view that every effort should be made to maintain a young person within Youth Justice. However, the Secretary is also responsible for maintaining safety and good order for other clients and staff. On this occasion, maintaining the young people within Youth Justice was considered to be an unacceptable risk.
- ... Since then [the July 2012 incident], during 2013 there have been three separate incidents at the Parkville Youth Justice Precinct involving young people displaying very threatening and violent behaviour which might previously have warranted the department applying to the Youth Parole Board to transfer them to the adult correctional system. Rather than seeking a transfer, the young people have been able to be managed by short term placement in the Intensive Therapeutic Unit, then successfully reintegrated into the Parkville or Malmsbury centres.

### **Failure to consult with Aboriginal agencies**

179. Two of the children transferred in July 2012 were Aboriginal and dual order clients but there was no consultation with the Victorian Aboriginal Child Care Agency as required by the *Children, Youth and Families Act 2005*.
180. I am concerned that the children transferred in July and August 2012 had no legal representation. Although the Youth Parole Board is not within my jurisdiction, I would consider consultation with a child's legal representative regarding such a significant decision to be a reasonable and sensible measure. I would also consider consultation to be in the children's best interests.

### **Strategies to manage violent behaviour**

181. Many strategies, such as therapeutic intervention, a hierarchy of warnings and client management plans, were enacted to address the violent behaviour of the children prior to the transfers in July and August 2012.
182. In October 2010, I tabled a report in Parliament titled *Investigation into conditions at the Melbourne Youth Justice Precinct*, which identified issues in relation to the Precinct meeting the needs of children<sup>28</sup>. The implementation and apparent failure of strategies to manage the children's violent behaviour indicates that the youth justice system is still struggling to meet the needs of some complex children.

<sup>28</sup> Victorian Ombudsman, *Whistleblowers Protection Act 2001 Investigation into conditions at the Melbourne Youth Justice Precinct*, October 2010.

183. Reviewing the department's response to violent incidents and separating violent young people within the youth justice system may be necessary to prevent them from harming other detainees or staff.
184. I am of the view that there are no circumstances that justify the placement of a child in the adult prison system.

### **Lack of information exchange**

185. At the time of the July and August 2012 transfers there was a lack of clarity around information exchange. Health information was exchanged between medical service providers but there was no evidence to show the relevant health information was provided to the Youth Parole Board or to the Sentence Management Branch.
186. I established that the department has no process to follow up on transfers to adult custody of youth justice clients who are not child protection clients. A number of witnesses were of the view that once children are transferred to the adult system they are no longer in its jurisdiction and they are no longer responsible for their welfare.
187. The department has clear responsibilities to maintain its involvement with children who are subject to child protection orders. Child A was visited on a number of occasions by departmental staff, however concerns about his welfare were not escalated.
188. The role of the Secretary of the department is conflicted when considering the best interests of dual order clients as the department is not only responsible for protecting the child but also for their supervision in the criminal justice system.

### **Placement in the Charlotte Management Unit**

189. The circumstances surrounding the transfers to Port Phillip Prison in July and August 2012 were unusual in that they were all placed in the Charlotte Management Unit, rather than in the Penhyn Youth Unit.
190. In response to my draft report, the former Operations Manager responded that:

The prisoners' placement in Charlotte Unit was not "unusual" given the serious nature of the incident which led to their transfer to the adult system. The placement was determined by SMB [Sentence Management Branch] and was supported by PPP [Port Phillip Prison] management.
191. The children were in solitary confinement for a number of months. This meant that they were alone in their cell for 23 hours a day. They had one hour a day by themselves in the exercise yard. For this hour they were in handcuffs. One inference is that the handcuffs were used as a punishment for their earlier behaviour.

### **Inadequate assessment**

192. The Sentence Management Panel did not consider the Charter or Convention when making the decision to place the children in solitary confinement.

193. One child remained in solitary confinement notwithstanding the Sentence Management Panel being aware of his mental health history. This was despite a report, prepared for Justice Health and Corrections Victoria in 2008, that recommended prisoners with active major mental illness should not be placed in restrictive environment settings.
194. Although there was a case conference in July 2012 to discuss the placement of the boys, it was not multi-disciplinary as 14 of the 17 people present were Corrections Victoria or Port Phillip Prison staff and the remaining three people were not advocating for the children or providing any critical advice regarding placement decisions.

### **Delayed exit plans**

195. It is concerning that two of the children's plans to exit the Charlotte Management Unit to the youth unit were delayed by up to two months and there was no plan to transition the other three boys.
196. I note that the suitability assessment to transfer Child A from adult prison to youth justice took approximately one month. By way of contrast, the assessment to transfer him from youth justice to adult prison conducted a few months earlier, took 24 hours.

### **Breach of human rights**

197. A number of rights under the Charter are engaged when a child is transferred to or detained in adult custody. These include the right to protection of families and children (section 17), the right to humane treatment when deprived of liberty (section 22), and the rights of children in the criminal process (section 23).
198. There is no evidence that the Charter was considered by the Department of Human Services when it applied to the Youth Parole Board to transfer the children, or by the Sentence Management Unit when making the decision to place the children in solitary confinement.
199. I am particularly concerned by the length of time Corrections Victoria held the three children in isolation and its failure to adequately consider the children's best interests. I consider that, in placing these children in isolation for a number of months, Corrections Victoria acted inconsistently with the children's rights under sections 17(2), 22(1) and 23(3) of the Charter.
200. I also note that international human rights principles identify that the use of solitary confinement may amount to cruel, inhuman or degrading treatment. Where detainees are children, the likelihood of solitary confinement constituting such treatment is significantly increased.
201. In response to my draft report, the Commissioner, Corrections Victoria stated:

In determining a prisoner's placement the SMP [Sentence Management Panel] needs to balance not only the human rights of the prisoner, but also the human rights of staff and other prisoners. SMP decisions are recorded in the form of risk assessments, consistent with regulatory requirements, and do not at present record which particular human rights were engaged or limited in their decisions. It is not seen to be practicable to record such information in respect of every decision made by SMPs, of which there are thousands annually, but I am confident that human rights are central to the decision-making process.

CV [Corrections Victoria] has recently made amendments to the SMM [Sentence Management Manual] to reinforce with staff their obligations under the Charter. This has included providing detail on the human rights that are likely to be relevant in the sentence management context and the circumstances where a right may be limited. We have also asked the Victorian Equal Opportunity and Human Rights Commission to deliver Charter training to our staff engaged in SMPs. This training is scheduled for delivery towards the end of November 2013.

202. The Department of Human Services responded to my draft report stating:

[A] policy review was undertaken in consultation with the Victorian Equal Opportunity and Human Rights Commission. This revised policy makes explicit the requirement for the department to explore and exhaust all options for placement of a young person in the Youth Justice system prior to seeking a transfer to adult correctional system. The revised policy demonstrates the department's intent to strengthen its preparations and decision-making prior to requesting a Transfer .... It is a current priority to introduce a trauma informed approach to custodial settings and the Office of Professional Practice will work with Secure Services to achieve this.

...

The department's view is that making an application to the Youth Parole Board to transfer a young person to prison should be a last resort, avoided wherever possible, and only considered in extreme circumstances (for example where groups of young people are involved and the violence cannot be controlled).

### **The unsuitable placement of children in adult prison**

203. My investigation has found that Corrections Victoria placed the children in the Charlotte Management Unit because they were difficult to place elsewhere. There are limited places in the youth unit and violent youth and/or youth with a sexual offending history are not appropriate for placement in the youth unit.
204. Children are vulnerable in mainstream prison populations as they are impressionable and may be subjected to sexual assaults. Victorian prisons are currently overcrowded, which increases the likelihood of a child sharing a cell with an adult.
205. The children may also have been placed in the Charlotte Management Unit as a deterrent to those in the youth justice system who were willing to commit violent acts in order to be transferred to the adult system.



206. The Victorian Equal Opportunity and Human Rights Commission advised Corrections Victoria that as a principle, solitary confinement should never be used for prisoners under 18 years old. Corrections Victoria has not amended its practices in accordance with this advice.
207. Further, section 23(1) of the Charter requires that accused children who are detained must be segregated from all detained adults. My investigation identified this did not occur in relation to a number of children remanded to adult prisons. Such action is clearly incompatible with the right contained in section 23(1) of the Charter.
208. I do not consider it appropriate to transfer children to the adult correctional system. There are very few places in the youth units; children are vulnerable in mainstream prison; and, in any event, I consider that placing children in adult prison is inconsistent with their rights under the Charter.
209. It is evident that the youth justice system is limited in its capacity to deal with a small, but increasing, cohort of young people exhibiting violent behaviour. It is important that the youth justice system respond appropriately to these children rather than abrogate its responsibility by transferring them to the adult system.

## Recommendations

### Recommendation 1

I recommend that the Minister for Community Services consider amending the *Children, Youth and Families Act 2005* to remove the option to transfer children to the adult prison system once additional accommodation becomes available at the Malmsbury Youth Justice Centre.

#### ***Department of Human Services response:***

Until the additional capacity through the expansion at Malmsbury comes online in late 2015, it may be necessary to make an application to the Youth Parole Board to transfer a young person were there to be an extreme incident that compromises the safety of young people and staff. The department has redoubled its efforts to ensure that this option would be a last resort; and submits that retaining the legislative flexibility is required in the context of current capacity constraints.

### Recommendation 2

I recommend that Corrections Victoria check the dates of birth of young offenders to ensure that no child is incorrectly remanded to prison.

#### ***Corrections Victoria (CV) response:***

CV will implement a process of verification of birth dates for teenage remand prisoners where multiple birth dates are on the record, or where there is cause for concern that the Police and the Magistrates' Court's recorded birth date is incorrect.

## The role of the Office of Correctional Services Review

### Key issues

The Secretary of the Department of Justice is responsible for both Corrections Victoria and the agency responsible for monitoring it, the Office of Correctional Services Review (OCSR).

The OCSR identified the placement of the children in the Charlotte Management Unit and commenced an 'Inquiry', which involved passively monitoring the children.

OCSR identified that there was no plan to move the children from the Charlotte Management Unit to the youth unit and requested information from Corrections Victoria. A response was not received for 7 weeks.

OCSR commenced a review about children in the adult correctional system. My investigation identified the following issues with the review:

- Corrections Victoria had some influence over the terminology used by OCSR in its report
- Corrections Victoria did not accept several recommendations
- OCSR may be restricted in the recommendations it makes as it needs to consider Corrections Victoria's resources.

These issues demonstrate a lack of independence between the OCSR and Corrections Victoria.

210. The OCSR sits within the Department of Justice. The Department of Justice's website describes the OCSR's role as overseeing the corrections system to ensure it is fair, accountable and humane. It provides monitoring and reporting on the performance of all prisons; conducts reviews and inspections; conducts investigations into critical incidents within the corrections system; and administers the volunteer independent prison visitor scheme.
211. The OCSR is part of the Community Operations and Strategy Division and Corrections Victoria sits within the Corrections, Health and Crime Prevention Division. Both areas report to the Secretary of the Department of Justice.
212. OCSR's role in relation to the transfer of children from youth justice to the adult system was twofold:
  - monitoring
  - review.

## Monitoring

213. A Senior Analyst identified that the three children had been transferred from youth justice in July 2012, as soon as it was recorded on the Corrections Victoria database. In interview, the Senior Analyst said that the three were flagged because of their age. He raised the issue in an 'intelligence briefing' and it was forwarded to the assessment panel. He said that a decision was made to start an 'Inquiry' into the matter.
214. OCSR staff conducted a site visit, interviewed the children and attended a case conference as observers in relation to the children in late July 2012.
215. Following the site visit, a Senior Analyst raised concerns about the children's placement in an email to several OCSR staff:
- ... All three remained on a Hand Cuff [*sic*] regime and separate management; this includes their daily exercise ...
- [The Operations Manager] advised that they did not envisage sending any of the three to Penhyn. When asked about their long term prospects, he doesn't have a plan; rather is managing them on a week by week basis. He considered that a message has to be sent to juvenile offenders that is what happens if you take staff hostage etc; and he needs to ensure the safety of his staff.
- In my opinion, the management of these three prisoners is gratuitous and they couldn't pose any greater threat to staff than the majority of prisoners at PPP [Port Phillip Prison]. The V1 classification is an emotional response to the incident at YTC [Youth Training Centre], and is not based on a calculated assessment.
216. A memorandum was prepared on 17 August 2012 for endorsement by the Acting Director, OCSR to the Acting Commissioner, Corrections Victoria. The memorandum was endorsed by the Acting Director and sent to Corrections Victoria on 4 September 2012. The memorandum sought the following information:
- the strategies considered or engaged when the three youths were transferred to the adult system
  - the strategies in place to review the violence risk ratings of the youths
  - programs identified and implemented for the youths
  - patterns and trends identified in relation to youth justice transfers
  - copies of Corrections Victoria's long term management plans for the three youths.
217. OCSR staff attended another site visit on 6 September 2012, observing that the three youths had 'no complaints and are being treated appropriately'.

218. A response to the memorandum was received from the Acting Commissioner, Corrections Victoria seven weeks later, on 24 October 2012. The response provided information about the children, stating that Child A had been transferred to Malmsbury Youth Justice Centre in October 2012 and the other two children were 'recently' transferred to the Penhyn Youth Unit. The response also outlined the general patterns and trends of young people transferred from the youth justice system to adult custody.
219. The former Director, OCSR said at interview that although Corrections Victoria's response included a lot of information, it raised many questions about the children's placement in the Charlotte Management Unit. She stated that the lack of clarification in the response triggered the OCSR review.
220. When asked at interview if they were satisfied with the action OCSR took in response to the placement of the children in the Charlotte Management Unit, one OCSR officer said:
- My opinion was that as a unit we weren't really challenging Corrections as strongly as we could of [sic] on this matter and that the three boys were being treated excessively hard ... My view is the unit didn't act strongly enough and we probably just dragged the chain a bit ... We monitored the management of the boys but that was quite passive really, we just noted what was happening to them and nothing else.

## OCSR Review

221. On 1 November 2012, the OCSR commenced a '*Review of the Management of Under 18 year olds in the Adult Corrections System*'.
222. The OCSR review concluded that children were received into adult custody in 23 instances since June 2007. A total of 14 of these receptions were as a result of section 467 applications made by the department to the Youth Parole Board<sup>29</sup>.
223. The report was finalised in May 2013 and established:
- given the level of violence displayed, it was reasonable that the children were initially placed in a management regime
  - it was not acceptable that a 16 year old remained on a management regime without any clarity regarding his next placement
  - the adult corrections system provides limited options for accommodating under 18 year olds and in the main is not designed to accommodate children
  - concerns were identified about the effective information exchange between youth justice and Corrections Victoria.
224. The OCSR made 13 recommendations to Corrections Victoria to strengthen its processes concerning under 21 year old offenders.

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<sup>29</sup> *The Management of Under 18 Year Olds in the Adult Corrections System*, Office of Correctional Services Review, May 2013

225. The review identified that four children were incorrectly remanded a total of five times into adult custody since June 2007. At the time of each of the remands, the information available to Corrections Victoria indicated that the individual was over 18 years old when in fact they were younger. The review considered that the inaccurate dates of birth may have been a result of inaccurate information being provided to Corrections Victoria from court documents, but that Corrections Victoria could be more proactive in cross checking dates of birth.
226. As discussed in the chapter titled '*Children incorrectly remanded to adult custody*' above, my investigation found that Child H was fourteen at the time he was placed in adult custody in error. The director of OCSR responded that:
- ... the OCSR did not have access to the youth justice or child protection files on [Child H] held by the Department of Human Services, in the course of its review, to establish Child H's correct date of birth ... the OCSR relied on information provided by the Department of Human Services to establish Child H's date of birth was reasonable in the circumstances.
227. Corrections Victoria did not accept OCSR's recommendation that it ensure that appropriate action is taken to obtain correct dates of birth in respect of all under 21 year olds received into custody.
228. Another finding in the OCSR draft report was that while there are three young offender accommodation units across Victoria's system, the maximum capacity had been compromised by other operational needs. Only the Penhyn Unit at Port Phillip Prison maintained a consistent young prisoner population. The OCSR draft report concluded that there is a need for further youth accommodation units with almost 13.3 per cent of the prison population, (649 of 4,884 at 30 June 2012) under 25 years of age.
229. Corrections Victoria initially accepted only five of the thirteen recommendations. OCSR amended several of its recommendations and Corrections Victoria ultimately accepted ten of the thirteen recommendations.
230. Corrections Victoria did not accept the following recommendations:
- CV [Corrections Victoria] ensure that appropriate action is taken to obtain the correct date of birth in respect of all under 21 year olds received into custody where the offender's age may impact upon the possibility that they be subject to the application of the dual track system.
- CV [Corrections Victoria] establish a documented means of informing the YOTRG [Youth Offenders Transfer Review Group] of the placement, progress, and plans in respect of all prisoners within its mandate and give consideration to broadening the Terms of Reference to include under 18 year olds directly sentenced to the adult system where the sentencing comments indicate the potential for a youth justice placement.

CV [Corrections Victoria] and DHS [Department of Human Services] establish a mechanism for regular consideration of whether an offender may be suitable for transfer to youth justice, for all offenders under 21 years of age.

## Independence of the OCSR

231. I have identified the need for a transparent and accountable system for monitoring Victoria's correctional system in two previous reports tabled in Parliament.
232. In July 2006, I tabled a report titled *Conditions for persons in custody*<sup>30</sup>. At the time the Corrections Inspectorate performed the monitoring role as a separate unit within the Department of Justice. Following my investigation, the former Secretary of the Department of Justice established the OCSR in August 2007, reporting direct to her.
233. In April 2012, I tabled a report titled *The death of Mr Carl Williams at HM Barwon Prison – investigation into Corrections Victoria*<sup>31</sup>. In that report, I raised concerns about the former Secretary of the Department of Justice having both legal custody of prisoners and monitoring the performance of correctional services in Victoria.
234. I found that in matters relating to Mr Williams it was apparent that the former Secretary's numerous roles in the correctional system led to her being involved in the review of decisions in which she played an active and significant part.
235. I also raised concerns about deficiencies in the OCSR's investigation regarding the death of Mr Williams, including failing to pursue a line of enquiry and not formally interviewing a key witness.
236. Although the OCSR now reports to the current Secretary through a different Executive Director to Corrections Victoria, a review of the OCSR review files raises doubts about its independence.
237. The Director, OCSR responded that:
- The OCSR is separate to Corrections Victoria and its work is overseen by the Corrections Monitoring and Review Steering Committee, which consists of two independent members and a range of senior departmental officers.
- There is not an inherent conflict in the Secretary's role in being responsible for both Corrections Victoria and the OCSR. In my view, the Secretary's dual role does not have an impact on the OCSR's ability to operate effectively, separately and objectively from Corrections Victoria. Working within this framework does not cause the OCSR to be fettered in how it operates. There are no restrictions placed on the matters the OCSR enquires into, investigates or makes the subject of a review.
238. One OCSR officer said that they are 'somewhat limited' in the recommendations they can make:

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<sup>30</sup> Victorian Ombudsman, *Conditions for persons in custody*, July 2006.

<sup>31</sup> Victorian Ombudsman, *The death of Mr Carl Williams at HM Barwon Prison – investigation into Corrections Victoria*, April 2012.

Recommendations that require ... resourcing are always ... going to be viewed with some difficulty by Corrections Victoria. Again it gets back to the OCSR and Corrections Victoria serve the same master at the end of it all, so from that point of view we are somewhat limited in the recommendations we can make because we need to be mindful of the resourcing ... To say we are, you know, without fear or favour is a big call in my view, we are quite restricted in what we can and cannot do.

239. As previously advised, Corrections Victoria initially accepted only five of the thirteen draft recommendations. OCSR amended several of its recommendations and Corrections Victoria ultimately accepted ten of the thirteen recommendations.

240. The Director, OCSR responded that:

The OCSR is not fettered, however, it makes realistic recommendations that are implementable and likely to influence and cause change. This is a reasonable approach to making recommendations.

## Conclusions

241. OCSR identified that the children were in the Charlotte Management Unit as soon as they were placed. It monitored the children passively, attending case conferences as observers, visiting the children but did not ensure exit plans were in place or adhered to and failed to take any proactive steps to have the children removed from prison.

242. The current Director, OCSR acknowledged that:

... while enquiries were made at officer level in October 2012 to follow up on the progress of Corrections Victoria's response to the OCSR's memorandum, in hindsight the OCSR could have done more to escalate the matter.

However, I note the inability of the OCSR to intervene in operational matters. Operational day-to-day decision-making, such as the placement of the children, is appropriately the responsibility of the Commissioner, Corrections Victoria.

243. When OCSR did request information from Corrections Victoria, a response was not received for seven weeks, in the meantime, the children remained in solitary confinement.

244. It is concerning that the OCSR made recommendations that were not accepted by Corrections Victoria. In particular in relation to children incorrectly remanded to adult custody. Corrections Victoria has not accepted the recommendation to take appropriate action to obtain the correct date of birth for those under 21 years old.

245. Witnesses reported that OCSR is limited in the recommendations it can make as it considers the resource restrictions on Corrections Victoria's systems rather than bringing an independent view to the issue.

246. There is an inherent conflict as the Secretary of the Department of Justice is responsible for both Corrections Victoria and the agency responsible for monitoring it, the OCSR.

## Recommendation

### Recommendation 3

I recommend that the Minister for Corrections give consideration to making the Office of Correctional Services Review separate and independent from the department.

#### ***Department of Justice response:***

The Department of Justice advised that the Minister will give the recommendation due consideration.





# Ombudsman's Reports 2004-13

## 2013

*Ombudsman Act 1973* Review of the governance of public sector boards in Victoria  
December 2013

*Ombudsman Act 1973* Report on issues in public sector employment  
November 2013

*Ombudsman Act 1973* A section 25(2) report concerning the constitutional validity of aspects of Victoria's new integrity legislation  
October 2013

*Ombudsman Act 1973* Own motion investigation into unenforced warrants  
August 2013

*Whistleblowers Protection Act 2001* Investigation into allegations of improper conduct by a Magistrates' Court registrar  
May 2013

## 2012

Own motion investigation into the governance and administration of the Victorian Building Commission  
December 2012

A section 25(2) report to Parliament on the proposed integrity system and its impact on the functions of the Ombudsman  
December 2012

*Whistleblowers Protection Act 2001* Investigation into allegations concerning rail safety in the Melbourne Underground Rail Loop  
October 2012

*Whistleblowers Protection Act 2001* Investigation into allegations of improper conduct by CenITex officers  
October 2012

*Whistleblowers Protection Act 2001* Investigation into allegations of improper conduct involving Victoria Police  
October 2012

*Whistleblowers Protection Act 2001* Investigation into allegations against Mr Geoff Shaw MP  
October 2012

Investigation into the temporary closure of Alfred Health adult lung transplant program  
October 2012

Investigation into an alleged corrupt association  
October 2012

*Whistleblowers Protection Act 2001*

Investigation into allegations of detrimental action involving Victoria Police  
June 2012

Own motion investigation into Greyhound Racing Victoria  
June 2012

The death of Mr Carl Williams at HM Barwon Prison – investigation into Corrections Victoria  
April 2012

*Whistleblowers Protection Act 2001* Conflict of interest, poor governance and bullying at the City of Glen Eira Council  
March 2012

Investigation into the storage and management of ward records by the Department of Human Services  
March 2012

## 2011

Investigation into the Foodbowl Modernisation Project and related matters  
November 2011

Investigation into ICT-enabled projects  
November 2011

Investigation into how universities deal with international students  
October 2011

Investigation regarding the Department of Human Services Child Protection program (Loddon Mallee Region)  
October 2011

Investigation into the Office of Police Integrity's handling of a complaint  
October 2011

SafeStreets Documents – Investigations into Victoria Police's Handling of Freedom of Information request  
September 2011

Investigation into prisoner access to health care  
August 2011

Investigation into an allegation about Victoria Police crime statistics  
June 2011

Corrupt conduct by public officers in procurement  
June 2011

Investigation into record keeping failures by WorkSafe agents  
May 2011

*Whistleblowers Protection Act 2001*

Investigation into the improper release of autopsy information by a Victorian Institute of Forensic Medicine employee  
May 2011

Ombudsman investigation - Assault of a Disability Services client by Department of Human Services staff  
March 2011

The Brotherhood - Risks associated with secretive organisations  
March 2011

Ombudsman investigation into the probity of The Hotel Windsor redevelopment  
February 2011

*Whistleblowers Protection Act 2001*

Investigation into the failure of agencies to manage registered sex offenders  
February 2011

*Whistleblowers Protection Act 2001*

Investigation into allegations of improper conduct by a councillor at the Hume City Council  
February 2011

**2010**

Investigation into the issuing of infringement notices to public transport users and related matters  
December 2010

Ombudsman's recommendations second report on their implementation  
October 2010

*Whistleblowers Protection Act 2001*

Investigation into conditions at the Melbourne Youth Justice Precinct  
October 2010

*Whistleblowers Protection Act 2001*

Investigation into an allegation of improper conduct within RMIT's School of Engineering (TAFE) - Aerospace  
July 2010

Ombudsman investigation into the probity of the Kew Residential Services and St Kilda Triangle developments  
June 2010

Own motion investigation into Child Protection - out of home care  
May 2010

Report of an investigation into Local Government Victoria's response to the Inspectors of Municipal Administration's report on the City of Ballarat  
April 2010

*Whistleblowers Protection Act 2001*

Investigation into the disclosure of information by a councillor of the City of Casey  
March 2010

Ombudsman's recommendations - Report on their implementation  
February 2010

**2009**

Investigation into the handling of drug exhibits at the Victoria Police Forensic Services Centre  
December 2009

Own motion investigation into the Department of Human Services - Child Protection Program  
November 2009

Own motion investigation into the tendering and contracting of information and technology services within Victoria Police  
November 2009

Brookland Greens Estate - Investigation into methane gas leaks  
October 2009

A report of investigations into the City of Port Phillip  
August 2009

An investigation into the Transport Accident Commission's and the Victorian WorkCover Authority's administrative processes for medical practitioner billing  
July 2009

*Whistleblowers Protection Act 2001* Conflict of interest and abuse of power by a building inspector at Brimbank City Council  
June 2009

*Whistleblowers Protection Act 2001*

Investigation into the alleged improper conduct of councillors at Brimbank City Council  
May 2009

Investigation into corporate governance at Moorabool Shire Council  
April 2009

Crime statistics and police numbers  
March 2009

**2008**

*Whistleblowers Protection Act 2001* Report of an investigation into issues at Bayside Health  
October 2008

Probity controls in public hospitals for the procurement of non-clinical goods and services  
August 2008

Investigation into contraband entering a prison and related issues  
June 2008

Conflict of interest in local government  
March 2008

Conflict of interest in the public sector  
March 2008

## **2007**

Investigation into VicRoads' driver licensing arrangements  
December 2007

Investigation into the disclosure of electronic communications addressed to the Member for Evelyn and related matters  
November 2007

Investigation into the use of excessive force at the Melbourne Custody Centre  
November 2007

Investigation into the Office of Housing's tender process for the cleaning and gardening maintenance contract - CNG 2007  
October 2007

Investigation into a disclosure about WorkSafe's and Victoria Police's handling of a bullying and harassment complaint  
April 2007

Own motion investigation into the policies and procedures of the planning department at the City of Greater Geelong  
February 2007

## **2006**

Conditions for persons in custody  
July 2006

Review of the *Freedom of Information Act 1982*  
June 2006

Investigation into parking infringement notices issued by Melbourne City Council  
April 2006

Improving responses to allegations involving sexual assault  
March 2006

## **2005**

Investigation into the handling, storage and transfer of prisoner property in Victorian prisons  
December 2005

*Whistleblowers Protection Act 2001*  
Ombudsman's guidelines  
October 2005

Own motion investigation into VicRoads registration practices  
June 2005

Complaint handling guide for the Victorian Public Sector 2005  
May 2005

Review of the *Freedom of Information Act 1982*  
Discussion paper  
May 2005

Review of complaint handling in Victorian universities  
May 2005

Investigation into the conduct of council officers in the administration of the Shire of Melton  
March 2005

Discussion paper on improving responses to sexual abuse allegations  
February 2005

## **2004**

Essendon Rental Housing Co-operative (ERHC)  
December 2004

Complaint about the Medical Practitioners Board of Victoria  
December 2004

Ceja task force drug related corruption - second interim report of Ombudsman Victoria  
June 2004



