

Your Ref:  
Our Ref: 487

19 September 2018

Mr Edward Santow  
Human Rights Commissioner  
Australian Human Rights Commission  
[humanrights.commissioner@humanrights.gov.au](mailto:humanrights.commissioner@humanrights.gov.au)

Dear Commissioner

**Re: Submission – OPCAT in Australia Consultation Paper: Stage 2**

Thank you for the opportunity to contribute to the consultation process regarding the implementation of the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* in Australia, and specifically to the *OPCAT in Australia Consultation Paper: Stage 2* (the Consultation Paper). I express my appreciation to the Australian Human Rights Commission (the Commission) for undertaking this important and significant work.

**Background**

On 21 December 2017, the Australian Government ratified the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT). OPCAT aims to prevent torture and cruel, inhuman or degrading treatment or punishment of persons deprived of their liberty by establishing a system of regular visits to places of detention. OPCAT requires monitoring to occur through two complementary and independent bodies:

- the National Preventive Mechanism (NPM) – the domestic Australian entity or network responsible for inspections; and
- the UN Sub-Committee on the Prevention of Torture (SPT) – a United Nations body of independent experts responsible for conducting visits to places of detention.

**Commissioner for Children and Young People (Tas)**

As Interim Commissioner for Children and Young People, my statutory functions are set out in the *Commissioner for Children and Young People Act 2016* (Tas) (CCYP Act). These functions include providing systemic advocacy for all children and young people in Tasmania generally, influencing policy development into matters relating to children and young people, monitoring and promoting children and young people's



wellbeing, and promoting children and young people's participation in decision-making. I also have a role in assisting to ensure the State satisfies its national and international obligations in respect of children and young people generally.<sup>1</sup>

Additionally, I have a function to act as advocate for individual young people detained under the *Youth Justice Act 1997 (Tas)*.<sup>2</sup> This function is supported by specific rights of entry to youth justice detention centres and access to any young person detained therein, and access to information.<sup>3</sup> I also undertake a program of systemic monitoring of the out-of-home care system in Tasmania.

As I understand the situation, the CCYP Act does not provide for any inspectorate functions as contemplated by OPCAT.

In performing my functions, I am required to:

- do so according to the principle that the wellbeing and best interests of children and young people are paramount;
- observe any relevant provisions of the United Nations *Convention on the Rights of the Child*,<sup>4</sup> and
- give special regard to the needs of children and young people who are disadvantaged or vulnerable.<sup>5</sup>

## Comment

Consistent with my functions I provide the following comments in response to the Consultation Paper and the Commission's September 2017 Interim Report.

**Question Five: The Commission's Interim Report contains a number of preliminary views, expressed as Proposals, regarding how OPCAT should be implemented. Do you have any comments about these proposals to ensure Australia complies with its obligations under OPCAT?**

### *Proposal 1*

I welcome the Australian Government's ratification of OPCAT. I note that the Australian Government has invoked Article 24 which allows for a period of three years to introduce measures to fully implement its OPCAT arrangements. I emphasise the importance of ensuring that implementation processes are inclusive, transparent and timely.

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<sup>1</sup> Section 8(1) of the *Commissioner for Children and Young People Act 2016 (Tas)*

<sup>2</sup> Section 10 of the *Commissioner for Children and Young People Act 2016 (Tas)*

<sup>3</sup> Section 10 of the *Commissioner for Children and Young People Act 2016 (Tas)*, s 135A of the *Youth Justice Act 1997 (Tas)*, and *Youth Justice Regulations 2009 (Tas)*

<sup>4</sup> Section 3(1) of the *Commissioner for Children and Young People Act 2016 (Tas)*

<sup>5</sup> Section 3(2)(b) of the *Commissioner for Children and Young People Act 2016 (Tas)*



### *Proposal 2*

As outlined in Proposal 2, in principle agreement to the establishment of an NPM system that:

- has a preventive mandate;
- has clear lines of communication between the various entities designated as NPM bodies;
- requires NPM bodies be given sufficient powers and independence to fulfil their mandate, if necessary by legislative amendment;
- sets up formal paths of engagement with civil society organisations and human rights institutions; and
- is transparent in its operation, including publication of its reports and recommendations.

### *Proposal 3*

In-principle support for comprehensive mapping of current inspection frameworks and arrangements in Tasmania to identify gaps, areas of overlap and/or alignment with OPCAT requirements. In this regard, I note that the Commonwealth Ombudsman in his capacity as NPM co-ordinator is currently engaged in a process of mapping existing inspectorate bodies (including in Tasmania) which inspect primary places of detention to ascertain the extent to which they are OPCAT compliant.

### *Proposals 4 & 5*

I support the provision of necessary resources through appropriate resourcing methods to enable NPM bodies to effectively and independently fulfil their functions as contemplated by OPCAT. As outlined in Proposal 5, those resources should be provided in a way which respects the functional, structural and personal independence required of NPM activities by OPCAT.

I do, however, have misgivings about the appropriateness of determining resourcing by reference to hypothesised cost-savings arising from the undertaking of detention practices in accordance with human rights law.

### *Proposals 6, 7 & 8*

I support the development of national standards:

- a) governing how inspections of places in which children and young people are detained are to be conducted (Proposal 6); and
- b) outlining the minimum requirements for conditions of, and treatment applicable to, children and young people in places of detention (Proposal 7).



The development of national standards is an important means by which consistency of approach may be promoted within the NPM system particularly given that the Australian Government has indicated that multiple bodies at both the state and federal level will work in partnership to fulfil NPM functions in Australia.

Preferably these Standards would be developed by an independent body and reflect Australia's domestic and international human rights obligations, as well as existing good practice standards and guidelines in Australia and overseas. This may also provide an appropriate mechanism for implementation of the Child Safe Standards identified by the Royal Commission into Institutional Responses to Child Sexual Abuse.<sup>6</sup> The independent body should be expert in human rights, including children's rights, and be independent of those parts of government responsible for detaining people. The views of experts, detainees and other key stakeholders should inform the development of the standards (refer to Proposal 8).

**Question One: How should OPCAT be implemented to prevent harm to people in detention? How should the most urgent risks of harm be identified and prioritised?**

Children and young people who are deprived of their liberty are among the most vulnerable groups of people in detention because of their age and level of maturity, and as a consequence of the impact that detention can have on their development and wellbeing.<sup>7</sup> In saying this, I acknowledge that children are not a homogenous group; their individual needs and vulnerability to harm will vary according to numerous factors including their gender, ethnicity, sexual orientation, developmental stage, disability, experience of trauma or abuse, and mental health as well as the environment in which they are detained.<sup>8</sup>

Therefore, all environments in which children and young people are deprived of their liberty should be subject to NPM inspections, although I acknowledge there may be a need for incremental implementation (refer to my response to Question 2 below).

The Royal Commission into Institutional Responses to Child Sexual Abuse has stated that detention environments may present higher levels of risk of child abuse, as compared with other institutional contexts.<sup>9</sup> A significant power imbalance between children deprived of their liberty and adult staff members is a feature of

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<sup>6</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, 2017, *Final Report: Contemporary detention environments*, viewed 11 September 2018, <https://www.childabuseroyalcommission.gov.au/contemporary-detention-environments> (Recommendation 15.1).

<sup>7</sup> Association for the Prevention of Torture, *Jean-Jacques Gautier NPM Symposium 2014: Addressing children's vulnerability in detention Outcome Report*, viewed 18 September 2018, [https://www.ap.t.ch/content/files\\_res/report-jjq-symposium-2014-en.pdf](https://www.ap.t.ch/content/files_res/report-jjq-symposium-2014-en.pdf)

<sup>8</sup> Ibid.

<sup>9</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, 2017, *Final Report: Contemporary detention environments*, viewed 11 September 2018, <https://www.childabuseroyalcommission.gov.au/contemporary-detention-environments> (p. 9).



contemporary detention environments and this power differential has the capacity to increase the risk of abuse.<sup>10</sup>

The Australian Children's Commissioners and Guardians (ACCG) has emphasised that children and young people in youth justice detention are subject to a specific set of risks and face a particular set of issues, and that the vulnerabilities of children and young people require different strategies and standards to those used for adults.<sup>11</sup>

For example, the Queensland Family and Child Commission has noted that, 'many children in detention have a history of trauma, neglect, abuse, mental health and disability...[t]hey are also likely to have been exposed to family violence, drug and alcohol misuse, disengagement from education and homelessness'.<sup>12</sup>

Children and young people who are deprived of their liberty also face a range of barriers when seeking to access justice. They have access to fewer physical and financial resources, a more limited awareness of the rights to which they are entitled and the supports available to them. Children and young people may face language barriers, or barriers associated with the conceptual understandings of justice processes. Children and young people often have limited awareness of the structured nature of institutions, the governance under which they operate and the recourse to rights that this governance enables.<sup>13</sup> The QFCC has noted, based on a study directly with young people in detention, a range of barriers to young people raising concerns, including: concern about their confidentiality being maintained; not having faith in the system; not feeling heard or respected, and fear about what may happen if they raise concerns.<sup>14</sup>

The Commission for Children and Young People (Victoria) states that:

'Whenever children and young people are detained there is the risk that their needs will be conflated with the needs of adults... In this context, it is even more important that the NPM for children in detention has the expertise to understand the particular risks that are faced by children and young people in detention...'<sup>15</sup>

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<sup>10</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, 2017, *Final Report: Contemporary detention environments*, viewed 11 September 2018, <https://www.childabuseroyalcommission.gov.au/contemporary-detention-environments> (p. 46).

<sup>11</sup> Australian Children's Commissioners and Guardians, 2016, *Human rights standards in youth detention facilities in Australia: the use of restraint, disciplinary regimes and other specified practices*, viewed 20 August 2018, <http://www.childcomm.tas.gov.au/wp-content/uploads/2016/10/report-accg-human-rights-the-use-of-restraint-disciplinary-regimes-and-other-specified-practices.pdf>

<sup>12</sup> Queensland Family & Child Commission, 2018, *Options for Youth Detention Oversight: A model for inspecting places of detention in Queensland*, The State of Queensland, viewed 10 August 2018, <https://www.qfcc.qld.gov.au/sector/research-policy/policy-submissions> (p. 27).

<sup>13</sup> Law Council of Australia, 2017, *The Justice Project: Children and Young People Consultation Paper*, viewed 20 August 2018, <https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Consultation%20Papers/Children%20and%20Young%20People.pdf>

<sup>14</sup> Queensland Family & Child Commission, 2018, *Options for Youth Detention Oversight: A model for inspecting places of detention in Queensland*, The State of Queensland, viewed 10 August 2018, <https://www.qfcc.qld.gov.au/sector/research-policy/policy-submissions> (p. 28).

<sup>15</sup> Commission for Children and Young People (Victoria), 2017, *Submission to the consultation on the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) in Australia*, CCYPD/17/6500, CCYP, Melbourne (p. 1).



Therefore in order to fulfil their important role in preventing ill-treatment of children deprived of their liberty, NPM bodies require multi-disciplinary and specialist expertise on the protection and promotion of children's rights and wellbeing in detention. At an operational level this should include expertise in child-centred interviewing and other engagement practices, child development, trauma-informed practice, and child and adolescent mental health.

Noting the over representation of Aboriginal and Torres Strait Islander children and young people in youth justice detention, and the child protection system,<sup>16,17</sup> and the unique vulnerabilities experienced by Aboriginal and Torres Strait Islander children who are deprived of their liberty,<sup>18</sup> NPM bodies should also maintain a focus on empowering and promoting the cultural safety of Aboriginal and Torres Strait Islander children in detention.

For a more comprehensive discussion about the role of NPMs in addressing the unique vulnerabilities of children who are deprived of their liberty, including as advocates for children's rights, see the outcomes report of the *Jean-Jacques Gautier NPM Symposium 2014: Addressing children's vulnerability in detention*.<sup>19</sup>

## **Question Two: What categories of 'places of detention' should be subject to visits by Australia's NPM bodies?**

In 2017, the then Attorney-General, George Brandis MP, stated: 'in implementing OPCAT, our focus will be on what might be termed 'primary' places of detention, such as prisons, juvenile detention, police cells and immigration facilities. Any environment in which the state deprives a person of his or her liberty poses unique challenges; such challenges are perhaps at their most acute in such places.'<sup>20</sup>

I acknowledge the need for the work of NPMs to be incrementally developed over time and on that basis I would support an initial focus on places of detention such as youth justice detention centres, police watch houses and cells, court holding cells, and vehicles used for transporting young people in youth justice detention.

I note, however, that OPCAT provides a broad definition of 'deprivation of liberty':

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<sup>16</sup> SNAICC, University of Melbourne, Griffith University and Save the Children, 2017, *The Family Matters Report 2017*, viewed 21 August 2018, <http://www.familymatters.org.au/wp-content/uploads/2017/11/Family-Matters-Report-2017.pdf>

<sup>17</sup> Australian Law Reform Commission, 2017, *Pathways to Justice: Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report No 133, viewed 2 August 2018 [https://www.alrc.gov.au/sites/default/files/pdfs/publications/final\\_report\\_133\\_amended1.pdf](https://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_133_amended1.pdf)

<sup>18</sup> Queensland Family & Child Commission, 2018, *Options for Youth Detention Oversight: A model for inspecting places of detention in Queensland*, The State of Queensland, viewed 10 August 2018, <https://www.qfcc.qld.gov.au/sector/research-policy/policy-submissions> (p. 28).

<sup>19</sup> Association for the Prevention of Torture, *Jean-Jacques Gautier NPM Symposium 2014: Addressing children's vulnerability in detention Outcome Report*, viewed 18 September 2018, [https://www.apt.ch/content/files\\_res/report-jig-symposium-2014-en.pdf](https://www.apt.ch/content/files_res/report-jig-symposium-2014-en.pdf)

<sup>20</sup> Caruana S, 2017, *Enhancing best practice inspection methodologies for oversight bodies with an Optional Protocol to the Convention against Torture focus: Report to the Winston Churchill Memorial Trust of Australia*, viewed 22 August 2018, [https://www.churchilltrust.com.au/media/fellows/Caruana\\_S\\_2017\\_inspection\\_methodologies\\_for\\_oversight\\_bodies\\_with\\_an\\_OPCAT\\_focus.pdf](https://www.churchilltrust.com.au/media/fellows/Caruana_S_2017_inspection_methodologies_for_oversight_bodies_with_an_OPCAT_focus.pdf)



'[f]or the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.'<sup>21</sup>

Further, the Committee Against Torture has emphasised the obligation to prevent torture and ill-treatment in, "all contexts of custody or control, for example, in prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm".<sup>22</sup>

Children and young people can be detained in a range of environments and, as OPCAT is implemented further, I would support a broad visiting mandate for NPMs which incorporates 'non-traditional' places of detention including in-patient health and psychiatric facilities, and disability and other care settings from which children are not free to leave at will.

**Question Three: What steps should be taken to ensure that measures to implement OPCAT in Australia are consultative and engage with affected stakeholders?**

It is important that measures for implementing OPCAT include opportunities for meaningful and child-centred consultation and engagement with children and young people in, or with experience of, places of detention. This is a matter requiring further and more detailed consideration by those with particular expertise in relevant areas.

**Question Four: What are the core principles that need to be set out in relevant legislation to ensure that each body fulfilling the NPM function has unfettered, unrestricted access to places of detention in accordance with OPCAT?**

The core principles as elaborated in OPCAT should be set out in Commonwealth, state and territory legislation so as to promote national consistency of the oversight system. At a minimum, these principles should reflect those set out in Part IV of OPCAT (i.e. Articles 17-23) and Article 35. Reference is also made to the basic principles set out in the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment's *Guidelines on national preventive mechanisms*.

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<sup>21</sup> *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res 57/199, 3<sup>rd</sup> Comm, 77<sup>th</sup> plen mtg, Agenda Item 109 (a), UN Doc A/RES/57/199 (9 January 2003) [4.2].

<sup>22</sup> Committee Against Torture, *General Comment No. 2 – Implementation of article 2 by State Parties*, UN Doc CAT/C/GC/2 (24 January 2008) [15].



## **Conclusion**

Thank you again for the opportunity to provide comment in response to Stage 2 of the Commission's consultation process. I also take the opportunity to extend my thanks for providing an extension of time in which to provide this submission.

Please do not hesitate to contact my office should you wish to discuss any aspect of my submission.

Yours sincerely

**David Clements**  
**Interim Commissioner for Children and Young People**

*cc: Minister for Human Services*  
*cc: Minister for Justice / Attorney General*