



Victorian Equal Opportunity  
& Human Rights Commission

# OPCAT implementation in Australia

Submission to the Australian Human Rights Commission  
*OPCAT Implementation in Australia* Consultation Stage 2

September 2018

# 1. Introduction

The Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) commends the Australian Government for ratifying the Optional Protocol to the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (**OPCAT**).

OPCAT introduces a two-tiered system of regular, independent, preventive visits to all places where people are deprived of their liberty. It places an obligation on countries to:

1. set up an independent body or bodies (a National Preventive Mechanism (**NPM**)) to actively monitor all places of detention
2. allow international inspections of places of detention by the United Nations Subcommittee on the Prevention of Torture (**SPT**).

Risks of torture and other ill treatment significantly increase in places where people are deprived of their liberty. These places are out of public view, and are generally characterised by a significant power imbalance between detainees and those in charge.<sup>1</sup> Effective implementation of OPCAT will strengthen the process of inspecting places of detention and significantly assist in preventing the mistreatment of people who are deprived of their liberty.

VEOHRC welcomes the opportunity to provide a submission to stage 2 of the Australian Human Rights Commission's (**AHRC's**) consultation on the implementation of OPCAT in Australia. We commend the AHRC for its comprehensive consultation process, and the publication of its *OPCAT in Australia Interim Report*, published in June 2018. This submission complements VEOHRC's submission to stage 1 of the AHRC's consultation.<sup>2</sup>

VEOHRC has a clear mandate to protect and promote human rights of people in Victoria who are deprived of their liberty, and has a strong interest in seeing OPCAT reach its full potential in Australia. We acknowledge the significant existing expertise in this area within government, oversight agencies, human rights institutions and civil society organisations throughout Australia. We urge the Australian, state and territory governments to collaborate with these bodies to implement a comprehensive preventive framework to significantly improve the protection of human rights of people who are deprived of their liberty in Australia.

In order to create an effective preventive framework in Australia, VEOHRC recommends the following:

1. Legislation is enacted at the federal, state and territory levels that makes clear the express requirements of OPCAT, including:
  - Incorporating Part IV of OPCAT, which specifies the principles for an effective NPM framework. This includes the requirement that NPM bodies be adequately resourced and have functional independence, the capacity to build a multidisciplinary team, access to the necessary information, and the power to publically report.

<sup>1</sup> Bronwyn Naylor, Julie Debeljak and Anita Mackay (2018) 'A strategic Framework for Implementing Human Rights in Closed Environments' 41(1) *Monash Law Review* 218.

<sup>2</sup> Victorian Equal Opportunity and Human Rights Commission, Submission to Australian Human Rights Commission, *OPCAT Implementation in Australia Consultation Stage 1*, July 2017.

- Adopts the definition of ‘places of detention’ outlined in Article 4 of OPCAT. In Australia this means all places under the control of federal, state or territory governments where people are, or may be, deprived of their liberty, including in offshore immigration settings.
- Includes standards for minimum conditions of detention to protect the rights of detainees and for how inspections should be conducted.

2. Each jurisdiction in Australia maps its existing places of detention, and uses a risk-based methodology to identify and prioritise the initial focus of NPM bodies. The risk methodology should consider the interaction between individual vulnerability, institutional risk and socio-cultural factors that together determine the risk rating within a particular place of detention.
3. While the steps in Recommendation Two have not yet been undertaken in Victoria, those tasked with identifying potential vulnerable groups at the greatest risk of harm should consider:
  - Aboriginal young people in youth detention
  - the risks of ill treatment that can occur within the first 24 hours of detention.
4. Federal, state and territory governments adopt a full suite of preventive measures to complement monitoring activities, including education, thematic reporting, capacity building and advocacy.
5. Jurisdictions that appoint multiple NPM bodies should create a coordinating and administrative body, such as an OPCAT council, to:
  - determine overarching priorities and goals, and coordinate activities to achieve these
  - provide a mechanism for information sharing between NPM bodies
  - provide a formal avenue for dialogue with civil society organisations, and mechanisms to seek advice from other specialists.

Such a body should comprise representatives from NPM bodies and human rights institutions.

## 2. Implementation

**Question 1: How should OPCAT be implemented to prevent harm to people in detention? How should the most urgent risks of harm be identified and prioritised?**

VEOHR supports the AHRC’s proposals for OPCAT implementation, outlined in its *OPCAT in Australia Interim Report*, published in June 2018.

Our answers to all the questions within this submission contain a component of what is required to implement OPCAT and thereby prevent harm to people in detention.

By way of brief summary, in questions 2 and 4 and part 5, VEOHRC recommends incorporating the express requirements of OPCAT within legislation. This is the most accountable and transparent way to approach implementation. In particular, in question 4, VEOHRC recommends such a legislative framework incorporate Part IV of OPCAT, which specifies the principles for an effective NPM framework. In question 2, VEOHRC recommends replicating the definition within Article 4 of OPCAT of ‘places of detention’ within such a legislative framework. VEOHRC recommends using this definition as the basis for places subject to visits by NPM bodies.

In question 4 and part 5, VEOHRC recommends either federal or state and territory based standards should be created for minimum conditions of detention to protect the rights of detainees and for how inspections should be conducted. VEOHRC recommends these standards should have legislative force and be developed through an open, independent process and reflect international benchmarks.

In question 3, VEOHRC recommends Australia adopt a ‘preventive package’ – a full suite of preventive measures to reduce ill treatment of people in detention. To complement monitoring activities, VEOHRC recommends federal, state and territory governments adopt measures including education, thematic reporting, capacity building and advocacy. This has proved to be an effective and practical approach to a monitoring system in other States who have ratified OPCAT. In question 3, VEOHRC recommends jurisdictions that nominate multiple NPM bodies establish an administrative and coordinating body, such as a council, as an effective governance framework to ensure the most efficient use of resources and expertise, and as the best approach to continual improvement.

### **Identification of the most urgent risks of harm**

OPCAT does not permit States to limit the preventative mandate of NPM bodies by excluding any place of detention or group from its oversight.<sup>3</sup> Nevertheless, VEOHRC acknowledges the need to identify the most urgent risks of harm to determine and prioritise the initial focus of NPM bodies. We know that certain types of institutional settings create heightened risks of harm, and for complex reasons, some groups of people are exposed to these risks more than others.

VEOHRC supports an evidence-based approach to determining the most urgent risks of harm for prioritisation. Within each jurisdiction this should involve, first, a thorough mapping of all places where people are deprived of their liberty, and, second, a comprehensive risk analysis to determine those most at risk of harm. This process must be left to the functionally independent NPM bodies<sup>4</sup> and coordinated through established mechanisms, such as an OPCAT council, where applicable.

VEOHRC proposes that such a risk methodology should consider the complex interaction between individual vulnerability, institutional risk and socio-cultural factors that together determine the level of risk within a particular place of detention:

- 1. Individual vulnerability of those deprived of their liberty** including consideration of age, gender, language, education, cultural or ethnic background, disability and other factors that increase an individual’s risk of

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<sup>3</sup> Article 4 of OPCAT broadly defines places of detention as including ‘any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence’.

<sup>4</sup> Article 18 of OPCAT requires States to guarantee the functional independence of the NPMs as well as the independence of their personnel.

being mistreated. An intersectional approach should be taken in determining individual vulnerability. For example, an Aboriginal child with mental health issues will be particularly vulnerable to mistreatment while in youth detention.

2. **Institutional risk** including the level of deprivation of liberty; the physical environment (including building and design features); the legal framework of the place of detention; relevant policies and practices; the culture and history of the place of detention; power dynamics between staff and individuals; practices such as seclusion, use of restraints, lack of privacy and punishments; and the level of transparency and oversight.
3. **Socio-cultural factors** such as structural racism and the attitudes of society more broadly towards minorities and those in detention.

Protective factors should also be considered such as the availability of Aboriginal cultural programs and competency, access to family, education, therapeutic support and trauma-informed care, healthcare and legal services.

Human rights considerations should be included in the risk methodology and human rights institutions, organisations and academics should be consulted to assist with this process. For example, it is important when considering complaints data to acknowledge the barriers experienced by vulnerable groups in detention environments who may not feel safe or capable to complain about treatment that may be impacting on their human rights.

Fundamentally, civil society including representatives from vulnerable and marginalised groups and those with lived experience of detention must be given an opportunity to actively participate in the design of an NPM system including identifying urgent risks of harm for prioritisation.

### **Case study: Aboriginal young people in detention as a vulnerable group**

While a comprehensive mapping and risk analysis process has not yet been undertaken in Victoria, VEOHRC urges future NPM bodies to have particular consideration for Aboriginal young people in youth detention. Through VEOHRC's recent work we have observed particular issues within the Victorian youth justice system which increases the risks of harm to Aboriginal young people within places of detention.

In Victoria, Aboriginal people comprise only 1.6 per cent of the population aged 10–18 years. However, compared to non-Aboriginal youth, an Aboriginal young person is approximately 13 times more likely to be in detention. Aboriginal young people are also incarcerated younger at all stages of the Victorian youth justice system compared with non-Aboriginal young people.<sup>5</sup> A range of factors contribute to the over-representation of Aboriginal people in youth justice, such as historical and ongoing political and social conditions, intergenerational trauma and loss, broken connection to culture, country and community, systemic discrimination (for example, police bias and over-policing), inadequate resourcing of Aboriginal legal services, and marginalisation from mainstream culture.<sup>6</sup>

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<sup>5</sup> Australian Institute of Health and Welfare, *Youth Justice in Australia 2016-2017*, Cat. no. JUV 116, May 2018.

<sup>6</sup> Penny Armytage and James Ogle, *Youth Justice Review and Strategy: Meeting Needs and Reducing Offending – Part 1* (Victorian Government, 2017) 172; Kelly Richards, Lisa Rosevear and Robyn Gilbert,

VEOHRC is focussed on protecting and promoting human rights in closed environments; and on reducing racism, as a key objective within its five year strategic plan. In 2018 VEOHRC and the Commissioner for Children and Young People (**CCYP**) published a report into Aboriginal cultural rights in youth justice centres. This report drew on findings that strong cultural identity and connection to culture, country and community is a protective factor for the social and emotional wellbeing of Koori young people.<sup>7</sup> The report makes a number of recommendations to improve the cultural connection for Aboriginal youth in youth justice centres, and to build the awareness, understanding and use of cultural rights for those involved with youth justice centres.<sup>8</sup>

#### *Disabilities and cognitive impairment*

Studies suggest there is a higher prevalence of cognitive impairment among Aboriginal offenders than non-Indigenous offenders.<sup>9</sup> Aboriginal people also have higher rates of disability across all age groups, which occurs against a backdrop of marginalisation, disadvantage, intergenerational trauma, discrimination, family and cultural breakdown, unemployment and poor educational attainment.<sup>10</sup> Aboriginal young people with cognitive impairments and disabilities are extremely vulnerable in detention environments including youth detention. This makes clear the importance of adopting an intersectional approach to the risk analysis exercise outlined earlier.

### **Question 2: What categories of ‘place of detention’ should be subject to visits by Australia’s NPM bodies?**

Article 4 of OPCAT requires States to allow NPM bodies to visit all places that are under its jurisdiction or control where people are, or may be deprived of their liberty.<sup>11</sup> It defines places of detention as any place under government control where persons are or may be deprived of their liberty.<sup>12</sup> VEOHRC recommends enabling Australian legislation adopt this broad definition, allowing the SPT and NPM bodies access to all places of detention described by Article 4.

Categories of detention in Australia include (but may not be limited to):

- Defence detention facilities
- Immigration detention facilities, including offshore detention settings
- Prisons

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<sup>7</sup> ‘Promising Interventions for Reducing Indigenous Juvenile Offending’ (Brief No 10, Standing Committee of Attorneys-General, Parliament of Australia, (2011) 2.

<sup>8</sup> See, Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report* (2017) 184–5; Muriel Bamblett, ‘Self-determination and Culture as protective Factors for Aboriginal Children’ (2006) 16 *Developing Practice: The Child, Youth and Family Work Journal* 9, 14; Victorian Equal Opportunity and Human Rights Commission and Commissioner for Children and Young People, *Aboriginal cultural rights in youth justice centres*, (2018), 6.

<sup>9</sup> Victorian Equal Opportunity and Human Rights Commission and Commissioner for Children and Young People, *Aboriginal cultural rights in youth justice centres*, (2018), 6.

<sup>10</sup> Shepherd, Ogloff, Paradies and Jeffrey Pfeifer, *Aboriginal prisoners with cognitive impairment: Is this the highest risk group?*, Trends and Issues in Crime and Criminal Justice, No 536 October 2017, Australian Institute of Criminology, 2.

<sup>11</sup> Ibid.

<sup>12</sup> OPCAT, Articles 4 and 29. See also Subcommittee on the Prevention of Torture (2010) *Guidelines on national preventive mechanisms*, CAT/OP/125, 2 10.

<sup>13</sup> Article 4 of OPCAT broadly defines places of detention as including ‘any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence’.

- Youth justice centres
- Designated mental health facilities
- Disability residential services
- Secure child protection services
- Police custody
- Prison transport
- Aged care facilities
- State facilities for serious sex offenders
- Temporary detention, such as the use of restraint and seclusion in care settings and in schools.

At the time of ratification, the Australian Government indicated there will be a focus, at least initially, on ‘primary’ places of detention within Australia. In this vein, the Commonwealth Ombudsman has been appointed the NPM body for Commonwealth primary places of detention, such as federal police cells and defence detention facilities.<sup>13</sup>

OPCAT does not permit States to limit the preventive mandate of NPM bodies by excluding any place of detention or group from its oversight.<sup>14</sup> Therefore, States must define ‘places of detention’ broadly to include all places where people may be deprived of their liberty. States should not seek to limit the NPM’s preventative mandate to ‘primary places’ of detention or exclude places from OPCAT’s remit. A constraint of the definition of ‘place where people are deprived of their liberty’ will risk Australia being non-compliant with its undertakings under OPCAT.

VEOHRC acknowledges that the prioritisation of particular groups or places of detention by NPM bodies is necessary to ensure the best use of resources and to prevent the most urgent risks of harm. However, we note the significant normative effect that including all places of detention in a monitoring regime can have on detention providers. The possibility of being visited by an NPM or the SPT will of itself provide a significant incentive for organisations to implement preventive measures that reduce the risk of torture and other cruel inhuman or degrading treatment or punishment. In addition, while all organisations may not be subject to initial NPM visits under a prioritisation approach, they may benefit from other aspects of the preventive package, including through education, advocacy and thematic reporting.

### **Risks of ill treatment in the first 24 hours of detention**

In determining coverage and prioritisation, VEOHRC urges NPM bodies to give consideration to the risks of ill treatment that can occur within the first 24 hours of detention. VEOHRC is aware that the risks of ill treatment occurring within the first 24 hours of detention can be high, particularly for vulnerable groups. The following Aboriginal children’s stories compiled from a report recently published by the Koorie Youth Council make real the risks of harm and the complexities inherent in the context of police custody and short term detention:

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<sup>13</sup> Advice provided by the Commonwealth Ombudsman to the Australian Human Rights Commission (AHRC), published in the AHRC’s *OPCAT in Australia, Consultation Paper: Stage 2 – June 2018*.

<sup>14</sup> Article 4 of OPCAT broadly defines places of detention as including ‘any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence’. Article 29 of OPCAT provides that ‘the provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions’.

‘I was in a cell, my hands in cuffs and everything aching. There was a toilet in the corner but I was too embarrassed to go in the open like that, especially after cops took the toilet paper out. I was in so much pain I couldn’t sleep that night. Cops said I couldn’t have a blanket or see a doctor about my pain. They told me I’d never see my family again, that I was going to juvi. I couldn’t hear much after that.’<sup>15</sup>

‘Cops threw me in the back of the van so hard that my head hit the grate. I started gagging from the stink. The seat was sticky with blood or spew or piss from whoever was in there before me, I freaked. When we got in the cell those dogs knelt me in front of the bed and threw my head into the mattress again and again and again. When it was over they left me overnight without a blanket or anything. I’d pissed these cops off for years so I felt like I deserved it.’<sup>16</sup>

‘Most of the time cops picked me up I didn’t know what my charges were or nothing, or what kind of behaviour bond thing I was on. My family didn’t come to help me do the interviews with those dogs, so I always had to wait till the next day. I spent hours going crazy in the cell. I stopped caring, got numb. I didn’t get all those bullshit cop and lawyer words so I’d just say what they told me to, take their cordial and crackers and get a lift back to Dad’s.’<sup>17</sup>

### 3. Places of detention

#### **Question 3: What steps should be taken to ensure that measures to implement OPCAT in Australia are consultative and engage with affected stakeholders?**

VEOHRC supports the implementation of an OPCAT framework that features multiple NPM bodies in Victoria. This makes best use of the existing expertise within independent entities that currently perform oversight roles in places of detention.

An OPCAT framework featuring multiple NPM bodies will require a mechanism for the determination of overarching priorities and goals, and for the coordination of actions to achieve these. It will also require a mechanism for the sharing of information and expertise, and to publish and disseminate the required NPM annual reports, and additional thematic reports.

##### **OPCAT council**

In order to implement an effective OPCAT framework involving multiple NPM bodies, VEOHRC recommends the creation of a coordinating and administrative body, such as an OPCAT council, to provide these functions within each jurisdiction. Such a body should comprise representatives from NPM bodies and human rights institutions.

VEOHRC recommends that a coordinating and administrative body also provide a formal avenue for dialogue with civil society organisations, and mechanisms to seek advice from other specialists, such Aboriginal Elders, multicultural organisations and health care professionals. Article 18 of OPCAT requires NPM bodies to be composed

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<sup>15</sup> Koorie Youth Council, *Ngaga-Dji (Hear Me) – Young voices creating change for justice* (2018), 15.

<sup>16</sup> Ibid 19 – 20.

<sup>17</sup> Ibid.

of persons with the necessary capabilities and professional knowledge. For example, it is important that an NPM is culturally safe for Aboriginal and Torres Strait Islander peoples. This would mean, at a minimum, ensuring meaningful involvement in any councils or bodies established, and particularly in Victoria, consideration of the Aboriginal Justice Agreement and the involvement of its associated Aboriginal Justice Caucus and the Aboriginal Justice Forum. Ensuring cultural safety will also require consideration of cultural rights under s 19(2) of the Charter and how those rights interplay with the NPM's role.

### **The 'preventive package'**

VEOHRC recommends the adoption of a comprehensive 'preventive package' approach to the prevention of torture and other ill treatment in Australia.<sup>18</sup> A preventive package approach recognises that no single measure alone is sufficient to prevent torture, and includes a combination of monitoring, legislative, administrative, judicial and other measures to ensure ill treatment is prevented.<sup>19</sup>

Characteristics of a preventive package include:

- thematic examinations of systemic issues
- advocacy, such as commenting on draft and implementing legislation
- the provision of education to detention providers, detainees and the general public
- capacity-building
- active engagement with State authorities
- dialogue with international human rights bodies.<sup>20</sup>

### **The Danish Model**

VEOHRC has reviewed several OPCAT implementation models globally and recommends the Danish model is an effective model to replicate in Australian jurisdictions. The Danish NPM model consists of the Danish Parliamentary Ombudsman, in collaboration with DIGNITY (NGO) and the Danish Institute for Human Rights (DIHR).

The DIHR has been appointed by the Danish government as a human rights advisor to the Danish NPM. Cooperation between the Ombudsman, the DIHR and DIGNITY is set out in an MOU: 'The OPCAT Tasks: General Principles'.<sup>21</sup> Cooperation between the three bodies is implemented through the OPCAT Council and OPCAT working group. The OPCAT Council meets bi-annually to discuss and prepare overall guidelines for OPCAT activities. It is also responsible for the design of the inspection manual, and for reviewing the method of inspections. The OPCAT working group is made up of representatives from the three bodies, who participate in inspections and drafting reports. The Ombudsman performs secretariat functions to the working group and has overall responsibility for organising and coordinating NPM activities.

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<sup>18</sup> This approach is broadly supported. See e.g. Association for the Prevention of Torture, "Yes, Torture Prevention Works" *Insights from a global research study on 30 years of torture prevention* (2016), 29; Richard Carver and Lisa Handley, *Does Torture Prevention Work?* (2016).

<sup>19</sup> *Optional Protocol to the Convention Against Torture*, Preamble.

<sup>20</sup> Subcommittee of the Prevention of Torture (2018). *Eleventh annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, CAT/C/63/4, V. Reflections on the year under review, A. Capacity of national preventive mechanisms to work effectively in a preventive manner and the "preventive package", Article 54, 10.

<sup>21</sup> Available at [https://www.apt.ch/content/files/npm/eca/Denmark\\_NPM%20Internal%20Rules.pdf](https://www.apt.ch/content/files/npm/eca/Denmark_NPM%20Internal%20Rules.pdf)

Under the Danish model, each of the three institutions may independently decide to carry out research and/or education activities in relation to detention environments. The DIHR's role includes conducting research into the conditions and rights of the inmates in Danish prisons, including for example the issue of solitary confinement of prisoners remanded in custody and the presence of the inmates' children in the prison.

In the Victorian setting, VEOHRC welcomes the opportunity to explore its potential role within a coordinated framework such as the one outlined above. In particular, we are keen to explore how our existing expertise in human rights research, education, reporting, and consultancy, and our established relationships with both Government and civil society could be best leveraged in a 'preventive package' approach to OPCAT's implementation.

VEOHRC is focussed on protecting and promoting human rights in closed environments as a key objective within its five year strategic plan. In addition to annually reporting on Victorian's human rights framework, over the last 12 months VEOHRC has visited every prison in Victoria to deliver targeted human rights training to senior prison staff. Through this work we have seen first-hand how education and sharing good practice knowledge across institutions can be instrumental in preventing human rights breaches and improving the safety and respect for those incarcerated.

## 4. Principles of implementation

**Question 4: 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?**

SPT Guidelines clearly state that the mandate and powers of an NPM should be set out in a constitution or legislation.<sup>22</sup> International experience also shows that the most effective implementation models are underpinned by a strong legislative framework.<sup>23</sup> In Australia this would mean that the requirements of OPCAT would be incorporated into a comprehensive Commonwealth statute as well as state and territory complementary legislation. In addition to setting out the powers and functions of the NPM and SPT in relation to detention settings in Australia, legislation should give effect to standards governing:

1. how inspections should take place
2. minimum conditions of detention to protect the human rights of detainees.

This would ensure that obligations are enforceable, and procedures necessary to implement the treaty are coordinated and clear.

In the Victorian context, codification of the *International Covenant on Civil and Political Rights* into the Charter resulted in a more robust and effective human rights

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<sup>22</sup> United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on national preventive mechanisms*, 12<sup>th</sup> sess, UN Doc CAT/OP/12/5, (9 December 2010) 7.

<sup>23</sup> Steven Caruana, *Enhancing best practice inspection methodologies for oversight bodies with an Optional Protocol to the Convention Against Torture focus* (2017), 43 – 44.

framework. Section 10 of the Charter effectively codifies elements of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Codification of OPCAT into Victorian law offers a further opportunity for the state to demonstrate best practice in this area.

NPM bodies must have the power and resources to regularly visit (including unannounced visits) all places where people are deprived of their liberty.<sup>24</sup> Challenges faced by other jurisdictions in the successful implementation of OPCAT have commonly included a lack of funding and resources.<sup>25</sup> Funding should be provided in a way that can ensure the independence of NPM bodies and other bodies with responsibilities under OPCAT. In addition, other important aspects of the scheme – including consultation, education and review, and arrangements to address systemic issues identified through the monitoring process – must be adequately resourced.

In terms of the principles required to be set out in legislation to ensure that each NPM has unfettered and unrestricted access to places of detention, VEOHRC emphasises the importance of Part IV of the OPCAT. Part IV makes clear ratifying States' obligations regarding NPM bodies and ought to be replicated in full in any domestic legislation developed in order to best mitigate against any risk of non-compliance.

Some examples of relevant principles outlined in Part IV of OPCAT that ought to be set out in legislation include (but are not limited to):

- functional independence and independence of personnel. This includes operational aspects of monitoring, including how they will inspect, and the standards used as a benchmark in inspections<sup>26</sup>
- the capacity to build a multidisciplinary team, made up of experts with the required capabilities and professional knowledge. This includes a team with gender balance and adequate representation of ethnic and minority groups<sup>27</sup>
- the power to publically report, make recommendations and comment on legislation<sup>28</sup>
- access to the necessary information, and private interviews with detainees.<sup>29</sup>
- the prohibition on sanctions against any person or organisation that communicates information to an NPM<sup>30</sup>
- the publication and dissemination of annual reports of the NPMs in order to ensure adequate transparency and accountability of the OPCAT framework.<sup>31</sup>

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<sup>24</sup> *Optional Protocol to the Convention Against Torture* Articles 4, 18, 19, 29.

<sup>25</sup> Association for the Prevention of Torture, *Implementation of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Federal and other Decentralised States* (March 2011) Association for the Prevention of Torture <[http://www.apt.ch/content/files\\_res/OPCAT%20and%20Federal%20States%20-%20Eng.pdf](http://www.apt.ch/content/files_res/OPCAT%20and%20Federal%20States%20-%20Eng.pdf)>.

<sup>26</sup> *Optional Protocol to the Convention Against Torture*, Article 18(1).

<sup>27</sup> *Ibid*, Article 18(2).

<sup>28</sup> *Ibid*, Article 19.

<sup>29</sup> *Ibid*, Article 20.

<sup>30</sup> *Ibid*, Article 21

<sup>31</sup> *Ibid*, Article 22

# 5. AHRC Proposals

## **Proposal 1: The Australian Government ratify OPCAT by December 2017**

VEOHRC commends the Australian Government's ratification of OPCAT in December 2017. We urge the Australian, State and Territory Governments to continue to collaborate with human rights institutions, oversight bodies and civil society organisations in the design and implement a comprehensive and effective preventive framework.

## **Proposal 2: The Australian Government establish an NPM system that has a preventive mandate, clear lines of communication, sufficient powers and independence, formal paths of engagement with civil society and human rights institutions, is transparent in its operation**

VEOHRC supports this proposal, as outlined above at Questions 3 and 4.

## **Proposal 3: All state and territory governments map their respective current inspection frameworks**

VEOHRC supports this proposal. A thorough mapping process should be undertaken in each Australian jurisdiction to identify all places (and potential places) of deprivation of liberty.<sup>32</sup> In undertaking this mapping, the NPM should consult widely, including with civil society and people with lived experience of detention, in order to identify gaps and overlaps in monitoring coverage and to identify key monitoring priorities.

Any such mapping should also be made public to best support transparency and accountability of Australia's OPCAT framework.

## **Proposals 4 and 5: Australia's federal, state and territory governments provide adequate resources to support all NPM activities, including effective liaison with civil society and people with lived experience of detention**

VEOHRC supports this proposal, as outlined above at Questions 3 and 4.

## **Proposals 6, 7 and 8: The Australian government commit to the development of national standards that govern how detention inspections should take place and setting the minimum conditions of detention. These standards should have legislative force. The**

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<sup>32</sup> This recommendation was also made by the Association for the Prevention of Torture (APT), Submission No 26 to Australian Human Rights Commission, *OPCAT Implementation in Australia Consultation 1*, 21 July 2017, 7.

## **Australian government should engage an independent human rights body to lead the development of national standards**

VEOHRC supports these proposals. OPCAT is a principles-based human rights treaty that is expressed in broad terms and sets out overarching requirements. It is the responsibility of each country implementing OPCAT to develop its own approach to how inspections should take place, and guidelines outlining the minimum conditions of detention, by which detention facilities will be assessed.

In Australia there are some standards that deal with certain issues that are relevant in this context, including standards regarding youth justice and prisons. The existing standards – taken individually or when added together – are not comprehensive or binary and do not address, on a national basis, all the issues relevant to OPCAT. Nevertheless, existing standards could help inform the development of new national standards.

Should the Australian government not commit to the development of national standards, VEOHRC supports the creation of state-based standards governing:

1. how inspections should take place
2. minimum conditions of detention to protect the human rights of detainees.

Standards setting out the minimum conditions of detention should deal with issues including:

- the protection of particularly vulnerable detainees, such as children and young people, people with disability, Aboriginal and Torres Strait Islander people, LGBTI people and immigration detainees
- complaints processes and consequences for unlawful or improper conduct
- restrictive practices, seclusion, strip searches and the use of force
- the safe transport of detainees
- the material condition of places of detention
- the provision of essential services (e.g. health care, legal services and education).

These standards should have legislative force and should be developed through an open, independent process and reflect international benchmarks. They must also be compatible with domestic legislation, including that protecting human rights such as the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* and the *Human Rights Act 2004 (ACT)*.

## **Proposal 9: The Australian Government incorporate OPCAT's core provisions in a dedicated federal statute**

VEOHRC supports this proposal, as outlined above at Question 4.

## **Proposal 10: If proposal 9 is not adopted, the Australian government should identify another way of incorporating OPCAT's requirements into domestic law, including by giving legislative force to national OPCAT standards, or additional legal means such as an intergovernmental agreement**

Regardless of whether Proposal 9 is adopted, VEOHRC recommends the Victorian government incorporate the requirements of OPCAT into Victorian legislation with respect to Victorian places of detention. This is detailed above at Question 4.

### **Proposal 11: The federal NPM establish formal arrangements with civil society, such as an advisory committee**

VEOHRC supports this proposal, as outlined above at Question 3.

### **Proposal 12: All governments assign overarching policy responsibility to the department responsible for human rights compliance**

VEOHRC supports this proposal.

### **Proposal 13: Immediately after ratification the Australian government coordinate with state and territory governments to implement OPCAT**

VEOHRC supports this proposal, and urges Australian federal, state and territory governments to implement a comprehensive framework that provides NPM bodies with the adequate powers and resources to effectively monitor all places of detention in Australia, and to carry out other important preventive activities such as education, thematic reporting, capacity building and advocacy.



**Victorian Equal Opportunity  
& Human Rights Commission**

#### *Contact us*

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