

Mr Edward Santow
Human Rights Commissioner
Australian Human Rights Commission
Level 3, 175 Pitt Street
Sydney NSW 2000

Dear Mr Santow

Re: Australian Human Rights Commission (AHRC) consultation on the implementation of the *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)* in Australia

The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) welcomes the opportunity to provide a submission to the AHRC consultation on the implementation of OPCAT in Australia.

OPCAT is a human rights treaty that assists in the implementation of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**) and helps member countries meet their obligations under CAT. The key aim of OPCAT is to prevent the mistreatment of people in closed environments.

VEOHRC welcomes the Australian Government's intention to ratify OPCAT in December 2017. Ratification of OPCAT will present a significant opportunity for the improved protection of human rights of people in closed environments in Australia.

VEOHRC has a clear mandate to protect and promote human rights of people in Victoria who have been deprived of their liberty. Please find below our submission in relation to questions for discussion provided in the *OPCAT in Australia* Consultation Paper published by the AHRC in May 2017.

Question 1: What is your experience of the inspection framework for places of detention in your state, or in relation to federal places of detention?

While VEOHRC has an understanding of inspection mechanisms operating in closed environments in Victoria, we do not have a direct role in the inspection framework.

Ombudsman Victoria is currently undertaking an own-motion investigation in preparation for OPCAT ratification. This investigation will scope the type and number of places of detention in Victoria, consider the extent to which current monitoring arrangements are consistent with an OPCAT model (including a pilot OPCAT-style inspection at a custodial facility), and examine the legal, resourcing and operational implications of implementing OPCAT in Victoria. We look forward to the publication of

Ombudsman Victoria's report towards the end of the year, and anticipate that it will identify oversight gaps and other issues associated with the inspection framework.

VEOHRC has identified a number of specific issues and practices relating to existing detention facilities. These are outlined under question 3.

Question 2: How should the key elements of OPCAT implementation in Australia be documented? (legislation, formal agreement, MOU)

There are currently a number of monitoring, review and education mechanisms relating to the protection of human rights in closed environments in Victoria. The implementation of OPCAT provides an opportunity to strengthen these mechanisms and to ensure consistency in oversight and – ultimately – in human rights protections for people deprived of their liberty.

VEOHRC supports a model of implementation that builds on existing areas of expertise. Accordingly, we recommend a jurisdictional / thematic hybrid model of monitoring underpinned by a legislative framework. Under this model, National Preventative Mechanism (NPM) functions would be divided between jurisdictions and into areas of thematic expertise. It is logical that closed environments that fall within federal jurisdiction – for example, immigration, federal law enforcement and the majority of aged care services – be monitored by a federal body. Likewise, it is appropriate that within each state and territory, a number of bodies are designated as NPMs to cover places of detention within their specific expertise. This approach is similar to that adopted in a number of countries including the United Kingdom and New Zealand, and is supported by the Association for the Prevention of Torture (APT)¹ and other leading commentators.²

VEOHRC notes the strong support for a legislative framework as a means to achieve effective implementation. In 2011 the UN Human Rights Council recommended that Australia continue to incorporate international human rights obligations into domestic legislation in order to strengthen its national human rights framework.³ The SPT Guidelines on national preventive mechanisms clearly state that “[t]he mandate and powers of the NPM should be clearly set out in a constitution or legislative text.”⁴ Literature relating to OPCAT implementation in Australia also recommends that the rights protected by OPCAT be incorporated into a comprehensive Commonwealth statute as well as state and territory complementary legislation.⁵

¹ 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.ap.t.ch/content/files_res/OPCAT%20and%20Federal%20States%20-%20Eng.pdf>.

² See for example Bronwyn Naylor, Julie Debeljak and Anita Mackay, ‘A Strategic Framework for Implementing Human Rights in Closed Environments’ (2015) 41(1) *Monash University Law Review* 220; Richard Harding and Neil Morgan, *Implementing the Optional Protocol to the Convention against Torture: Options for Australia: A report to the Australian Human Rights Commission* (2008) <<https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/implementing-optional-protocol-convention-against-torture>>.

³ United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, 17th sess, Agenda Item 6, UN Doc A/HRC/17/10 (24 March 2011) 86.17 – 86.22.

⁴ United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on national preventive mechanisms*, 12th sess, UN Doc CAT/OP/12/5, (9 December 2010) 7.

⁵ Harding and Morgan, above n 2. See also Naylor, Debeljak and Mackay, above n 2.

The incorporation of OPCAT into a legislative scheme would ensure the obligations imposed by the treaty are meaningful in that they are enforceable, and procedures necessary to implement the treaty are coordinated and clear.

Complementary state-based legislation operationalising the obligations of OPCAT is recommended by the VEOHRC, and expert commentators.⁶ Codification of the International Covenant on Civil and Political Rights into the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) has resulted in a more robust and effective human rights framework in Victoria. Section 10 of the Charter effectively codifies elements of CAT. Codification of OPCAT into Victorian law offers a further opportunity for the state to demonstrate best practice in this area.

VEOHRC recommends the adoption of a legislative OPCAT implementation instrument. While legislation is the preferred option, any instrument (legislative or otherwise) must be robust enough to provide clarity in relation to the role, governance and obligations of NPMs. An implementation instrument should clearly specify that NPM bodies must comply with OPCAT provisions, be functionally independent from the government, and have free and unfettered access to all categories and places of detention. It must empower inspecting NPMs to conduct regular visits, have access to private interviews with detainees and other persons that they believe may have relevant information as well as access to any relevant data and documentation. The coordinating bodies must have experience in detention monitoring as well as the independent financial and human resources necessary to act in an administrative role. The NPM process must be transparent and conducted in consultation with civil society.

Challenges faced by other jurisdictions in the successful implementation of OPCAT have commonly included a lack of funding and resources.⁷ For example in 2010 the Special Rapporteur on Torture (SPT), in a report to the UN General Assembly, stated that Germany was a “particularly worrying example...where the [NPM] has an alarming lack of human and financial resources”.⁸ In 2015, Germany’s OPCAT budget was increased and its personnel was doubled, allowing its national NPM to increase its visit frequency in regard to psychiatric hospitals, juvenile detention centres as well as to aged-care facilities.

It is the VEOHRC’s view that to achieve successful implementation, adequate funding and resourcing is required for all NPM bodies. Resourcing should be provided in a way that can ensure the independence of the NPM 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.

⁶ See for example Naylor, Debeljak and Mackay, above n 2.

⁷ Association for the Prevention of Torture, above n 1.

⁸ Special Rapporteur on Torture, *Interim report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 65th sess, Provisional Agenda Item 69(b), UN Doc A/65/273 (10 August 2010) 83.

Question 3: What are the most important or urgent issues that should be taken into account by the NPM?

The VEOHRC supports an evidence-based approach to determining the most important or urgent issues.

While VEOHRC has not undertaken a comprehensive analysis of places of detention in Victoria, or of the inspection frameworks, we have identified a number of concerning issues through the use of our statutory functions, such as our reviews and strategic interventions. In particular, we have noted significant issues in the youth justice system and in facilities for people with disabilities, outlined below. We also note that at the OPCAT round table meeting hosted in Melbourne by AHRC on 5 June 2017, it was identified that gaps in the current Victorian oversight framework include law enforcement places of detention, including police transportation and holding cells.

Treatment of juveniles in detention

In November 2016 in Victoria, a number of children were transferred to a unit within Barwon Prison, an adult maximum security prison, after a series of incidents at youth justice centres resulted in extensive property damage and a subsequent need for the children detained in those centres to be rehoused. Proceedings were brought against the Minister for Families and Children⁹ and VEOHRC intervened to make legal submissions concerning the application of the Charter.

Justice John Dixon of the Victorian Supreme Court found the conditions of incarceration were incompatible with sections 17(2) and 22(1) of the Charter,¹⁰ which relate to the right of every child to such protection as is in their best interests, and the right to humane treatment when deprived of liberty. Conditions included the extensive incidence of isolation, use of handcuffs, staff armed with capsicum spray and extendable batons and the facility's inability to address mental health needs exacerbated by the harsh prison environment.

The children the subject of the proceedings have since been transferred out of the prison back into existing youth justice facilities. Nonetheless, the Victorian Commission for Children and Young People has recently reported on longstanding issues of understaffing, poor transparency as well as unacceptably high levels of restrictive practices such as isolation, separation and lockdown across the youth justice system.¹¹

This is not the first instance in which children have been transferred to adult prisons and subjected to treatment which is incompatible with human rights in Victoria. In 2013, the Victorian Ombudsman reported that 24 children had been received in adult prisons over the previous six years, including a 16-year-old Aboriginal boy who was held in solitary confinement at Port Phillip Prison for a number of months.¹²

⁹ *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* [2016] VSC 796; *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children (No 2)* [2017] VSC 251.

¹⁰ *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children (No 2)* [2017] VSC 251 at [532].

¹¹ Commissioner for Children and Young People, *The Same Four Walls: Inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system* (2017).

¹² Victorian Ombudsman, *Investigation into children transferred from the youth justice system to the adult prison system* (2013).

Treatment of people with disabilities in service settings

There are a wide range of restrictive practices imposed on people with disabilities in services settings, such as disability residential services, mental health services and supported residential services that mean these settings may be considered places of detention within the ambit of OPCAT.¹³

VEOHRC's report *Beyond Doubt: The experiences of people with disabilities reporting crime*, published in 2014, included evidence relating to the experiences of people with disabilities reporting crime, and highlighted issues around treatment in the context of service settings.¹⁴ The report noted that people with disabilities in residential settings are at particular risk of a number of types of abuse by staff, including emotional, psychological, mental and sexual abuse. The report also documented the use of abusive behaviour management practices, and a failure by staff to provide basic requirements.¹⁵ In relation to the issue of independent oversight, VEOHRC found that there was a clear need to address gaps in safeguarding people's rights and to strengthen and extend monitoring and oversight.¹⁶

In 2015-16, the Office of the Public Advocate's (OPA's) Community Visitors made 5268 visits to 1356 facilities across Victoria. Community Visitors identified 321 incidents of abuse, neglect and assault across the three streams of disability residential services, mental health services and supported residential services.¹⁷ Community Visitors also made 25 notifications to the Public Advocate of people with a disability or mental illness being at serious or imminent risk.¹⁸ The Victorian Ombudsman has also reported into allegations of abuse in the disability sector, highlighting significant under-reporting and the need to provide a safe way of reporting abuse that addresses people's fear of repercussions.¹⁹

Treatment of Indigenous women in prison

VEOHRC's 2013 report *Unfinished Business: Koori women and the justice system* considered discrimination issues relating to Koori women in the criminal justice system. The report noted that Koori women made up the fastest growing segment of the Victorian prison population, and that the number of Koori women on remand was increasing at rate higher than for non-Koori women, and significantly faster than that of Koori male prisoners. Many of these women had grown up experiencing family violence, sexual abuse and intergenerational trauma; and a significant number were removed from their families as children and placed in out of home care. Mental illness and drug and alcohol dependence were widespread among this group. Further, once a Koori woman entered prison, she was likely to be imprisoned again, which had fundamental implications for the relationship between Koori women and

¹³ For a detailed exploration of this issue, see Office of the Public Advocate, *Submission to the Australian Human Rights Commission: Australia's Implementation of the OPCAT* (2017).

¹⁴ Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: The experiences of people with disabilities reporting crime* (2014) 30.

¹⁵ Ibid.

¹⁶ Ibid, 97.

¹⁷ Office of the Public Advocate, *Community Visitors Annual Report 2015-16* (2016), 8, 12.

¹⁸ Ibid, 8.

¹⁹ Victorian Ombudsman, *Reporting and investigation of allegations of abuse in the disability sector" Phase 2 – incident reporting* (2015), 18.

their children. A central argument in the report was the lack of investment in prevention and diversion options for Koori women as well as post-release support.²⁰

In relation to Koori women's experiences in prisons, the report identified that Koori women were more likely to have a higher security rating than non-Koori prisoners.²¹ The disparity in classifications acted to further entrench Koori women in the criminal justice system. The report also identified that, not only did many prison programs fail to take into account women's needs as they were designed for male prisoners,²² there existed a lack of culturally appropriate services in prison for Koori women.²³ Where appropriate services did exist, they were found to be infrequently run due to lack of funding or variation in the number of Koori women in a particular location.²⁴ The report found that there was often a lack of capacity in existing programs and long waiting lists existed, even in circumstances where the timely provision of services were crucial, such as drug and alcohol counselling.²⁵ Eligibility requirements for services also existed and operated as a barrier to accessing effective support programs. For example, prisoners were ineligible for programs they had accessed or completed in their previous sentence or recent past.²⁶ Due to high reimprisonment rates, this meant that many Koori women were excluded from prison programs, and issues that may have contributed to their offending were compounded.²⁷

Since the publication of *Unfinished Business*, a number of initiatives have commenced in Victoria in an effort to divert Koori women from prison, reduce numbers of remand, tailor specific women's programs, and provide transitional housing for Koori women upon release.²⁸ However, the over-representation of Koori women in prison remains a critical issue as do the challenges of responding to the distinct rights, histories and circumstances of Koori women in the criminal justice system.²⁹

Use of restraint and seclusion in schools

In 2012 VEOHRC published a report entitled *Held Back: the experiences of students with disabilities in Victorian schools*. This report documented the use of restraint and seclusion in schools. A number of parents reported that their child's school used placement in special rooms (other than time-out rooms) and the use of physical restraint as a behaviour management technique.³⁰ Some parents said that it was

²⁰ Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori women and the justice system* (2013), 3.

²¹ Ibid 65. In 2011-2012, whilst 29 per cent of all female prisoners were classified as maximum security, 48 per cent of Koori female prisoners received this classification.

²² Ibid 69.

²³ Ibid 70.

²⁴ Ibid.

²⁵ Ibid 71.

²⁶ Ibid 72.

²⁷ Ibid.

²⁸ See for example, Victorian Aboriginal Justice Agreement Phase 3 (AJA3): A Partnership between the Victorian Government and Koori Community (Department of Justice, 2013), 102. See also the Victorian Koori Women's Diversion Program documented in Human Rights Law Centre, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment* (2017), 37. See also the Transitional Housing for Aboriginal Prisoners project, being developed in partnership between Corrections Victoria, Victorian Aboriginal Legal Services and Aboriginal Housing Victoria <<http://www.edwardodonohue.com.au/new-transitional-housing-to-improve-aboriginal-justice-outcomes/>>

²⁹ See Human Rights Law Centre, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment* (2017).

³⁰ Victorian Equal Opportunity and Human Rights Commission, *Held Back: The experiences of students with disabilities in Victorian schools* (2012) 109.

often difficult to get the full story around these incidents as schools may be reluctant to disclose the incidents and the child may not be able to articulate what happened.³¹ While these allegations have not been substantiated, around 60 per cent of educators surveyed reported that they had physically restrained a student at school during their career.³² The report notes that this high rate may be due to educators not knowing exactly what constitutes restraint, indicating that monitoring and education may have a role to play in this area.

The VEOHRC is currently undertaking an evaluation of our recommendations in the Held Back report. It is clear from our evaluation that the Victorian Department of Education and Training has undertaken significant reforms in the context of the use of restraint and seclusion in Victorian schools. For example, the Department of Education and Training has implemented a practice of mandatory reporting of restrictive interventions used by schools (from October 2015) and we understand that the data is actively monitored to examine and improve school conduct. The Department has published a *Policy Guidance, Procedures and Resources for the Reduction and Elimination of Restraint and Seclusion in Victorian Government* and a number of supporting resources for schools.³³ In addition, the Government has established the Principal Practice Leader (Education) (**PPL**), which is responsible for building knowledge and capability in reducing the use of restraint and seclusion and developing revised policy guidance with input from a range of stakeholders. The PPL has a strong emphasis on early intervention, positive behaviour support plans and working in partnership with families.

There is a question around whether the use of seclusion in the school environment constitutes *de facto* detention such that school facilities fall within the ambit of OPCAT. This issue requires further consideration. The VEOHRC position is that seclusion in schools should be prohibited.³⁴ We consider that further research needs to be done in this area, particularly in the context of the role of OPCAT.

As demonstrated by the above examples, the VEOHRC encourages the NPM to pay particular attention to vulnerable groups within closed environments. Beyond examples identified, we would encourage the NPM to routinely use any available internal complaints data as a means to identify issues and trends worthy of attention within closed environments. Further, when considering complaints data, and urgent or important issues, we would encourage the NPM to be mindful of vulnerable groups within closed environments who may not feel able to complain about treatment that may be impacting on their human rights.

Question 4: How should Australian NPM bodies engage with civil society representatives and existing inspection mechanisms (eg, NGOs, people who visit places of detention etc.)?

The SPT recommends “the NPM should establish sustainable lines of communication [including] ... with civil society organisations”.³⁵ In order to ensure civil society can

³¹ Ibid at 111.

³² Ibid at 110.

³³ Department of Education and Training, *Restraint and Seclusion: Policy Guidance, Procedures and Resources* (7 July 2017)

<<http://www.education.vic.gov.au/school/teachers/studentmanagement/Pages/behaviourofconcern.aspx>>

³⁴ Victorian Equal Opportunity and Human Rights Commission, above n 30 at 124.

³⁵ United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Analytical self-assessment tool for National Prevention Mechanisms (NPM)*:

continue to contribute as effectively as possible to improving conditions of detention, VEOHRC recommends formal arrangements be put in place to facilitate ongoing communication between NPM bodies and civil society. Such mechanisms may include the establishment of an effective procedure through which civil society may provide NPMs with information, and requirements for NPMs to include such information, where appropriate, in communication with detaining bodies and in reports.

Question 5: How should Australian NPM bodies work with key government stakeholders? (Parliament, HR bodies, detaining authorities)

Australia's obligations under CAT include ensuring that education and information regarding the prohibition against torture and other cruel, inhuman or degrading treatment or punishment are fully included in the training of all people involved in the arrest, custody, interrogation, detention or imprisonment of any individual. Australia is also responsible under CAT for regularly reviewing interrogation rules, instructions, methods and practices to prevent torture. Having regard to how NPM bodies should work with human rights institutions, the VEOHRC recommends that in order to maximise the effectiveness of OPCAT, clear lines of communication should be created and maintained between NPMs and human rights bodies like VEOHRC, including formal avenues for communication and effective data sharing processes.

VEOHRC has a statutory function of providing education to individuals, community organisations and service providers regarding human rights and equal opportunity laws. VEOHRC continues to lead Victoria in the provision of human rights and equal opportunity education and training to both duty holders and rights holders in numerous settings. We provide a tailored education and consultancy service to equip public, corporate and community organisations and advocates with the skills and knowledge to comply with human rights and equal opportunity laws and develop good practice.

VEOHRC also has the power, where requested by a public authority, to review that authority's programs and practices to determine their compatibility with human rights. For example, in 2012 VEOHRC undertook a review for Corrections Victoria and Youth Justice under Section 41(c) of the Charter. This review provided those agencies with recommendations to improve human rights compliance in relation to the transfer of children into adult prison.³⁶

Accordingly, VEOHRC is able to provide a facilitative and empowering role for detention providers, community organisations and affected individuals, by carrying out education and review functions in relation to OPCAT.

Question 6: How can Australia benefit most from the role of the SPT?

VEOHRC does not wish to comment on this issue at this stage.

A preliminary guide by the Subcommittee on Prevention of Torture regarding the functioning of an NPM, UN Doc CAT/OP/1/ (6 February 2012) [30].

³⁶ Victorian Equal Opportunity and Human Rights Commission (2013) *Statement: Commission welcomes Victorian Ombudsman's report into children transferred from the youth justice system to the adult prison system*

< <https://www.humanrightscommission.vic.gov.au/home/news-and-events/commission-news/item/703-statement-commission-welcomes-victorian-ombudsmans-report-into-children-transferred-from-the-youth-justice-system-to-the-adult-prison-system> >

Question 7: After the Government formally ratifies OPCAT, how should more detailed decisions be made on how to apply OPCAT in Australia?

VEOHRC submits that any decision making framework adopted by the Government should include formal mechanisms for inclusion of the views of civil society. The SPT recommends that any NPM “should be identified by an open, transparent and inclusive process which involves a wide range of stakeholders, including civil society.”³⁷ VEOHRC commends the AHRC’s extensive consultation with community representatives from all states and territories this year. VEOHRC supports the ongoing involvement of community organisations in the identification of an NPM, and the ongoing design and implementation of OPCAT in Australia. We encourage the creation of formal ongoing consultation arrangements to ensure civil society can contribute as effectively as possible to decisions regarding the design and implementation of OPCAT.

Further, the SPT recommends “the NPM should establish a strategy for making its mandate and work known to the general public and should establish a simple and accessible procedure through which the general public might provide it with relevant information”.³⁸ It is particularly important to ensure that people with lived experiences of closed environments are meaningfully involved in the design and implementation of OPCAT, and in NPM processes.

If you have any further questions about this submission, please feel free to contact Emily Minter, Senior Legal Adviser at Emily.Minter@veohrc.vic.gov.au or by phone (03) 9032 3483.

Yours sincerely,

Catherine Dixon

A handwritten signature in black ink, appearing to read 'C. Dixon', with a long horizontal flourish extending to the right.

Executive Director

³⁷ United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on national preventive mechanisms*, UN. Doc CAT/OP/12/5 (9 December 2010), [16].

³⁸ Above n 35 at [30], [33].