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OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

INTRODUCTION

1. Liberty Victoria is committed to the defence and advancement of human rights and civil liberties. We seek to promote Australia's compliance with the rights recognised by international law and the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) (the **Charter**). We are a frequent contributor to federal and state committees of inquiry, and we campaign extensively for better protection of human rights in the community. More information on our organisation and activities can be found at: <https://libertyvictoria.org.au/>. Thank you for the extension of time granted to make this submission.
2. We support the Commonwealth Government's commitment to ratify the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**).
3. The Charter imposes human rights obligations on every public authority in Victoria. Relevantly for present purposes, s 10 of the Charter provides that:

A person must not be—

- (a) subjected to torture; or
- (b) treated or punished in a cruel, inhuman or degrading way; or
- (c) subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent.

4. Section 38(1) provides that it is unlawful (subject to some qualifications) for a public authority to act incompatibly with human rights, or to fail to give proper consideration to relevant human rights in making a decision. A public authority includes:
 - a. a public sector employee or the holder of a statutory or a prerogative office;
 - b. a statutory entity that has functions of a public nature;
 - c. an entity with functions of a public nature, when it is exercising those functions on behalf of the State or a public authority; and
 - d. Victoria Police.
5. Under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*, State Parties are required to take effective measures to prevent torture or serious ill-treatment in territory under their jurisdiction. OPCAT buttresses these obligations by establishing a regime for independent inspections of places of detention. State Parties are required to establish a National Preventive Mechanism (**NPM**) to conduct such inspections. They are also required to allow visits to places of detention by the United Nations Subcommittee on the Prevention of Torture (**SPT**).
6. The NPM will play an integral part in Australia's OPCAT compliance. The SPT has limited resources. Since its commencement in 2007, it has conducted 60 visits. The National Children's Commissioner has observed that the United Kingdom has not yet received a visit from the SPT, despite being one of the first states to ratify OPCAT.¹ Accordingly, it is likely that the SPT will visit Australia infrequently. The NPM will be principally responsible for conducting inspections and ensuring the accountability of our prisons, detention centres, lock-ups and secure facilities. The NPM must be designed with this considerable duty in mind.

¹ National Children's Commissioner, *Children's Rights Report 2016* (Australian Human Rights Commission, 2016), 90.

INSPECTION FRAMEWORKS IN VICTORIA

THE REQUIREMENTS UNDER OPCAT

7. Part IV of OPCAT sets out clear requirements for an NPM. An NPM may be composed of a number of decentralised bodies, provided that they comply with these requirements.² The requirements include:
- a. functional independence and independence of personnel (art 18(1));
 - b. experts with required capabilities and professional knowledge, gender balance and adequate representation of ethnic and minority groups in the country (art 18(2));
 - c. necessary resources for functioning (art 18(3));
 - d. the power to undertake regular preventive visits, to make recommendations to relevant authorities, and to submit proposals and observations concerning existing or proposed legislation (art 19);
 - e. authorities must examine recommendations and enter into dialogue with the NPM on implementation measures (art 22);
 - f. access to information concerning the number of people detained and places of detention, and the treatment and conditions of people in detention (arts 20(a)-(b));
 - g. access to all places of detention (art 20(c));
 - h. the right to conduct private interviews with detained people and others (art 20(d));
 - i. liberty to choose places visited and people interviewed (art 20(e));
 - j. appropriate privileges and immunities (art 21(1)), including by ensuring confidential information shall be privileged (art 21(2)); and
 - k. annual reports of the NPM to be published and distributed by the State (art 23).
8. We note that the Victorian Ombudsman is currently investigating the practical changes needed in Victoria to implement OPCAT.³ The resulting report will shed important light on the adequacy of Victoria's current mechanisms for inspecting places of detention.

² OPCAT, art 17.

³ Victorian Ombudsman, *Victoria can protect human rights by acting on OPCAT: Ombudsman* (Press release, 3 April 2017), available online:

9. In light of the Ombudsman's forthcoming report, we confine ourselves to making the following observations on Victoria's current systems.

10. Victoria has a **number of existing mechanisms** for the inspection of places of detention, but many of these mechanisms are **not OPCAT-compliant**. These mechanisms include:

- a. The Justice Assurance and Review Office (JARO), a business unit with the Department of Justice and Regulation (DJR). JARO 'operates as an internal review and assurance function to advise the Secretary [to DJR] on the performance of youth justice precincts, youth justice community services, prisons, Community Correctional Services and prisoner transport services'.⁴ JARO clearly has no functional independence. It is responsible for monitoring the conduct and operations of Corrections Victoria, but both entities are located with DJR and report to the Secretary to DJR. JARO does not publish its reports, which means that 'the public and Parliament have no way of knowing whether appropriate remedial action has been taken by prison authorities'.⁵ In a recent Ombudsman report, an officer from the Office of Correctional Services Review (the **OCSR**) (the precursor to JARO) was quoted as saying:

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.⁶

In November 2014, the Ombudsman found that OCSR 'lacks independence from Corrections Victoria; lacks transparency; and has repeatedly failed to take

<https://www.ombudsman.vic.gov.au/getattachment/8676367a-3dad-4416-9569-6e3771c778c3/news/media-releases/media-alerts/victoria-can-protect-human-rights-by-acting-on-opc.aspx>.

⁴ Department of Justice and Regulation, *Justice Assurance and Review Office* (7 July 2017), available online:

<http://www.corrections.vic.gov.au/utility/justice+assurance+and+review+office/>.

⁵ Victorian Ombudsman, *Investigation into deaths and harm in custody* (March 2014), 8.

⁶ Victorian Ombudsman, *Investigation into children transferred from the youth justice system to the adult prison system* (December 2013), 45.

appropriate action in relation to systemic issues affecting the Victorian prison system, including prisoner deaths'.⁷

- b. The Independent Visitor schemes under the *Corrections Act 1986* (administered by JARO) and in respect of youth justice centres (administered by the Commission for Children and Young People). Under the *Corrections Act 1986*, the Minister for Corrections may appoint independent visitors for each prison. The terms and conditions of appointment of an IPV are those stated in the instrument of appointment (s 35). A prisoner has a right to make complaints to an independent visitor (s 47(1)(j)). However, independent visitors are volunteers. The Governor of the prison and the prison officers have advance warning of an independent visitor's visit. Independent visitors do not generally receive feedback or follow-up on any issues they raise.⁸ Finally, as the Ombudsman found in March 2014, '[t]here is no publicly reported information available about the information provided by the independent visitors to the Minister for Corrections or the actions taken in response to raising these issues'.⁹ While independent visitors play an important role, they are not alone sufficient to protect against and prevent ill-treatment in detention.
- c. The Victorian Ombudsman. The Ombudsman has jurisdiction to receive complaints and conduct own motion investigations into matters at youth justice centres and public and private prisons.¹⁰ We consider that the Ombudsman has done an excellent job in endeavouring to hold the State to account for conditions in its places of detention.¹¹ But as the only independent body with oversight over prisons, alongside its numerous other areas of responsibility, the Ombudsman is under 'significant

⁷ Victorian Ombudsman, *Investigation into deaths and harm in custody* (March 2014), 8.

⁸ Victorian Ombudsman, *Investigation into deaths and harm in custody* (March 2014), 134.

⁹ Victorian Ombudsman, *Investigation into deaths and harm in custody* (March 2014), 134.

¹⁰ *Ombudsman Act 1973*, s 3 (definitions of 'authority' and 'specified entity'), sch 1.

¹¹ Ombudsman Victoria, *Report on conditions and overcrowding in police cells* (May 2002); Ombudsman Victoria and Office of Police Integrity, *Conditions for persons in custody* (July 2006); Ombudsman Victoria, *Assault of a Disability Services Client by Department of Human Services Staff* (March 2011); Victorian Ombudsman, *Investigation into children transferred from the youth justice system to the adult prison system* (December 2013); Victorian Ombudsman, *Investigation into deaths and harm in custody* (March 2014); Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria* (September 2015); Victorian Ombudsman, *Report on youth justice facilities at the Grevillea unit of Barwon Prison, Malmsbury and Parkville* (February 2017).

resource strain'.¹² The Ombudsman does not have the resources to undertake regular visits of places of detention within Victoria. Furthermore, the Ombudsman is principally a complaints-focused entity. While the Ombudsman can initiate own-motion investigations, these investigations are generally catalysed by specific complaints or incidents. By contrast, the animating purpose of OPCAT is to **prevent** abuse or ill-treatment in detention **before it occurs**, by regular and rigorous inspections. In our view, these considerations indicate that the Ombudsman should continue to perform its current, important functions, in collaboration with a new body properly suited and resourced to perform NPM functions in Victoria.

- d. The Victorian Commission for Children and Young People, a statutory authority established by the *Commission for Children and Young People Act 2012*. The Commission has a special statutory focus on children who are vulnerable, which include:
- i. children detained awaiting trial, the hearing of a charge, or sentence; and
 - ii. people detained in youth justice centres, youth residential centres or youth justice services.

In relation to these children and young people, the Commission can advise government in relation to services, promote their interests, monitor and report to ministers on the effectiveness of strategies, and conduct inquiries.

The Commission is an independent, specialist body authorised to monitor the conditions and treatment of youth in detention. However, the Commission is not entirely OPCAT-compliant. It does not have an express right of access to places where children and young people are being detained. Nor does it have the power to obtain data and information about these matters.¹³ In our view, the Commission also presently lacks the resources to conduct the inspections required under a robust NPM.

¹² Victorian Ombudsman, *Why it is important to have independent oversight of the Victorian prison system* (6 November 2014).

¹³ Commission for Children and Young People, *Submission to the National Children's Commissioner's Review of the Optional Protocol to the Convention against Torture in the context of Youth Justice Detention Centres* (4 July 2016), 6-7.

- e. The Victorian Equal Opportunity and Human Rights Commission (VEOHRC). Under s 41(c) of the Charter, VEOHRC may, upon the request of a public authority, review and report on the authority's programs and practices for compliance with human rights obligations. In 2013, VEOHRC reviewed the programs and practices of Corrections Victoria and Youth regarding the transfer of children into adult prisons. We consider that VEOHRC is not best placed to perform the functions of the NPM in Victoria. As Victoria's leading human rights body, however, VEOHRC has an important part to play in the implementation of OPCAT. We consider that the NPM should be empowered to draw on VEOHRC's expertise in conducting its inspections and making recommendations. VEOHRC should be provided with a corresponding increase in resources to reflect its role in Australia's OPCAT regime.
- f. The Office of the Senior Practitioner within the Department of Health and Human Services. The Senior Practitioner is 'responsible for ensuring the rights of persons who are subject to restrictive interventions and compulsory treatment are protected and that appropriate standards in relation to restrictive interventions and compulsory treatment are complied with'.¹⁴ Among other things, the Senior Practitioner evaluates and monitors the use of restrictive interventions (which include chemical, physical or mechanical restraint or seclusion) and compulsory treatment in disability services. The Senior Practitioner has the power to (among other things) visit and inspect premises where restrictive interventions or compulsory treatment are being used, see persons subject to such treatment, request information and documents, and direct a service provider to discontinue a procedure or treatment.¹⁵
- g. The Disability Services Commissioner, established under the *Disability Act 2006*. The Disability Services Commissioner can receive complaints about disability services providers. He or she may investigate complaints which are not suitable for conciliation,¹⁶ and has the power to compel to production of information and documents for this purpose.¹⁷ As discussed above with respect to the Ombudsman, however, the Disability Services Commissioner is primarily complaints-focused.

¹⁴ *Disability Act 2006*, s 23(2)(a) (the **Disability Act**).

¹⁵ *Disability Act*, s 27.

¹⁶ *Disability Act*, s 118.

¹⁷ *Disability Act*, s 122.

- h. The Mental Health Complaints Commissioner, established under the *Mental Health Act 2014* (the **Mental Health Act**). The Mental Health Complaints Commissioner is an independent, specialist organisation which receives complaints about public mental health services. While the Commissioner may identify systemic issues arising out of complaints and make recommendations, it has no power to conduct own-motion investigations.¹⁸ The Commissioner has powers of entry, but only for the purposes of investigating a complaint.¹⁹
- i. The Office of the Public Advocate (OPA). OPA has a broad range of roles in the disability and mental health sector. Relevantly, OPA is entitled to enter any disability service provider, public hospital, residential service or treatment facility under the Disability Act, or mental health facility under the Mental Health Act. In conducting an inspection, OPA is entitled to see any person resident or receiving services from that institution, and to inspect documents.²⁰
- j. The Community Visitor schemes under the Mental Health Act and the Disability Act, which are administered by OPA. The Community Visitors schemes are much more robust than the Independent Visitor scheme for prisons discussed above. Community Visitors are trained volunteers who visit facilities providing services to people with disabilities or mental illness. They may visit with or without notice,²¹ and have the power to inspect documents (other than clinical records).²² The relevant Community Visitors board may refer matters to an appropriate authority, such as OPA, the Mental Health Complaints Commissioner, the Disability Services Commissioner or the Ombudsman (among other bodies).²³ It also tables an annual report in Parliament.²⁴

11. While Victoria's current range of institutions and authorities ably scrutinise the treatment of people in detention, each of them is hampered by one or more of the following issues:

¹⁸ The Mental Health Complaints Commissioner may investigate into mental health services providers at the request of the Minister: Mental Health Act, s 228(k).

¹⁹ Mental Health Act, s 254.

²⁰ *Guardianship and Administration Act 1986*, s 18A.

²¹ Mental Health Act, s 218; Disability Act, s 129.

²² Mental Health Act, s 217; Disability Act, s 130.

²³ Mental Health Act, s 222; Disability Act, s 33.

²⁴ Mental Health Act, s 224; Disability Act, s 35.

- a. a **lack of functional independence** from the Executive government, which generally is primarily responsible for the treatment of people in detention;
 - b. **insufficient resources** to carry out regular inspections of places of detention, and to make regular recommendations and proposals to relevant authorities in light of those inspections;
 - c. a **lack of important powers**, including (but not limited to) the power to undertake regular, own motion visits of any and all places of detention, and the power to require the production of documents and information for this purpose; and
 - d. a **lack of specialist expertise** in relevant areas, including criminal justice, human rights and physical and mental health.
12. For these reasons, **Victoria should create a dedicated, independent, specialist NPM body, which will form part of Australia’s national NPM.** The same should occur in each jurisdiction in Australia. We consider that the Western Australian Office of the Inspector of Custodial Services (**OICS**), established under the *Inspector of Custodial Services Act 2003* (WA), provides an example of best practice that should be replicated in other jurisdictions:
- a. OICS has its own budget and its own staff. The Inspector himself or herself has security and tenure, cannot recently have been a member of State or federal Parliament, and is generally not subject to Ministerial direction. These features protect the independence and impartiality of OICS from the remainder of the Executive government;
 - b. OICS has a broad jurisdiction, which includes prisons, juvenile detention centres, prisoner transport and court security;
 - c. OICS has the requisite powers to be OPCAT-compliant, including powers to enter any site, to carry out random visits, to access documents, and to report on its findings to Parliament;
 - d. the *Inspector of Custodial Services Act 2003* (WA) incorporates a number of important auxiliary elements, such as protection from victimisation for involvement with OICS, and the creation of offences for hindering OICS’ operations;
 - e. OICS takes a proactive approach to structural and systemic problems through an ongoing cycle of inspections, rather than relying on complaints; and

- f. the *Inspector of Custodial Services Act 2003* (WA) requires that inspections of prisons, detention centres, court custody centres and lock-ups take place every three years.

13. It is fundamentally important that the new NPM receive **sufficient funding**. By way of comparison, New Zealand ratified OPCAT in 2007. It adopted a similar structure for its NPM to that proposed by the Commonwealth: five existing institutions, with the Human Rights Commission acting as the coordinator. In its report on its April-May 2013 visit, however, the SPT stated that:

the Subcommittee is of the view that the situation regarding the mechanism within the State party has reached a critical point. Since their designation, most of its component bodies have not received extra resources to carry out their mandate under the Optional Protocol, which, together with general staff shortages, has severely impeded their ability to do so...**Should the current lack of human and financial resources available to the mechanism not be remedied without delay, the State party will inevitably find itself in the breach of its obligations under the Optional Protocol.**²⁵

14. These comments underscore the importance of adequate resourcing for Australia's ratification of OPCAT. We cannot assume that business as usual will suffice. Australia's institutions are not currently OPCAT-compliant, and we require changes to our institutions and funding to address this shortfall.

URGENT ISSUES FOR THE NPM

15. We consider that the NPM should prioritise the following forms of detention:

- a. imprisonment of adults;
- b. detention in a secure institution for young people;
- c. detention in a police lock-up or police station;
- d. involuntary detention in a closed psychiatric institution; and
- e. detention in an immigration detention.

16. These are the principal forms of detention in Australia, by frequency, duration and intensity.²⁶

²⁵ United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Visit to New Zealand undertaken from 29 April to 8 May 2013: observations and recommendations addressed to the State party* (10 February 2017), [12] (emphasis added).

²⁶ Richard Harding and Neil Morgan, *Implementing the Optional Protocol to the Convention against Torture: Options for Australia* (2008), 9.

17. We consider that **immigration detention** is a particularly urgent issue for the NPM:

- a. The Commonwealth continues to brutalise approximately 1,400 people in off-shore detention. The appalling conditions on Manus Island, Nauru and Christmas Island have been canvassed repeatedly in the media, by institutions like the Australian Human Rights Commission (**AHRC**), and by the United Nations. The 2015 Moss Review found that there have been multiple incidents of sexual and physical assault in the Nauru Regional Processing Centre, and that these incidents are under-reported.²⁷ In April 2016, an Iranian refugee imprisoned on Nauru died after setting himself alight in protest. In 2015, United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, found that Australia:

by failing to provide adequate detention conditions; end the practice of detention of children; and put a stop to the escalating violence and tension at the Regional Processing Centre, has violated the right of the asylum seekers, including children, to be free from torture or cruel, inhuman or degrading treatment, as provided by articles 1 and 16 of the CAT.²⁸

- b. Meanwhile, almost 1,000 people languish in onshore detention centres. Many of these are children, whom paediatricians engaged by the AHRC described as ‘amongst the most traumatised children [they] have ever seen’.²⁹

18. We also consider that **youth detention** must be a pressing priority for the NPM:

- a. In 2016 and 2017, the Victorian Government was found to have breached the human rights of children in detention, by transferring them to a designated section of Barwon Prison, a prison built for adult prisoners.³⁰ The damage caused by such conditions is something that that Victorian community will have to deal with in years to come as

²⁷ Phillip Moss, *Review into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru* (2015)

²⁸ Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 28th session, Agenda item 3, UN Doc A/HRC/28/68 (6 March 2015), [19][25].

²⁹ Professor E Elliott and Dr H Gunasekera, *The health and well-being of children in immigration detention: Report to the Australian Human Rights Commission Monitoring Visit to Wickham Point Detention Centre, Darwin, NT* (2016), 3.

³⁰ *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* [2016] VSC 796; *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251.

we begin to understand the cost of prioritising punitive policies over the rehabilitation of child detainees.

- b. The Royal Commission into the Protection and Detention of Children in the Northern Territory, established following the revelations about the treatment of children in the Don Dale Youth Detention Centre, has already uncovered systemic failings in the youth justice system in the Territory. Commissioner Margaret White has commented that '[a]t every level we have seen that a detention system which focuses on punitive – not rehabilitative – measures fails our young people.'³¹

HOW CAN AUSTRALIA BENEFIT MOST FROM THE ROLE OF THE SPT?

19. We consider that Australia can benefit most from the role of the SPT in three ways:

- a. First, under Part III of OPCAT, the SPT only publishes its reports at the request of the relevant State. Australia should provide swift and complete consent to the publication of reports following SPT visits. This will ensure that the SPT is able to shine a bright light into some of Australia's darker or less well-known places of detention.
- b. Second, Australia must provide the SPT with unrestrictive private access to people and documents relating to the operation of our places of detention.
- c. Third, Australia should contribute to the Special Fund of the Optional Protocol to the Convention against Torture. Established under art 26(1) of OPCAT, the Special Fund supports projects that implement the SPT's recommendations following a visit to a State part. Such a contribution would demonstrate Australia's commitment to the principle that torture and cruel, inhuman and degrading treatment are unacceptable, either within or beyond our borders. The Special Fund has had proven positive impacts:

In 2012 and 2013, two subsequent projects focused on implementation of SPT recommendations concerning children deprived of liberty in Benin. The 2012 project focused on revisions to the Code of Criminal Procedure, providing stronger guarantees for children deprived of their liberty, coupled with training of juvenile judges. The 2013 project addressed the promulgation of the Code of Criminal Procedure and provided for training of police officers and juvenile judges on torture and

³¹ Helen Davidson, 'NT youth detention system a failure, says royal commission', *The Guardian* (31 March 2017).

ill-treatment of children in conflict with law and tools to enforce prevention and accountability mechanisms. Follow-up monitoring visits have shown a positive outcome: a reported 17% decrease in violence against children deprived of their liberty.³²

If you have any questions regarding this submission, please do not hesitate to contact Liberty Victoria President Jessie Taylor or the Liberty office on 9670 6422 or info@libertyvictoria.org.au. This is a public submission and is not confidential.



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³² United Nations Officer of the High Commissioner for Human Rights, *The Special Fund – A Focus on Torture Prevention*, <http://www.ohchr.org/EN/HRBodies/OPCAT/Fund/Pages/SpecialFund.aspx>.