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18 July 2017

Mr Edward Santow
Human Rights Commissioner
Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2001

By email: humanrights.commissioner@humanrights.gov.au

Dear Commissioner

**OPCAT implementation in Australia**

Thank you for the opportunity to contribute to the *OPCAT in Australia Consultation Paper* (the Consultation Paper). Thank you also for your invitation to Victoria Legal Aid (VLA) to participate in the roundtable discussion on OPCAT implementation on 5 June.

VLA regards the Australian Government's intention to ratify OPCAT by the end of the year as an important measure to strengthen respect for the right to freedom from torture, inhuman and degrading treatment. As we articulated at the 5 June discussion, working towards independent inspection of places of detention is the first step in realising this right for disadvantaged people in Australia. We note that OPCAT's goal is not the establishment and coordination of an inspection regime, but the prevention of breaches of a fundamental human right. As the statutory authority tasked to ensure access to justice in Victoria, VLA is committed to working with the Australian Human Rights Commission, the Commonwealth Government, and all relevant stakeholders, in pursuit of that goal.

The Consultation Paper seeks stakeholder views on how OPCAT should be implemented in Australia. In general terms, we consider that:

- whichever entity or entities become the National Preventative Mechanism (NPM) inspection bodies in Victoria, they need to be independent of Government, have free and unfettered access to places of detention and be properly resourced to fulfil their functions
- there will need to be specific processes developed to address the needs of Aboriginal and Torres Strait Islander people who are incarcerated or detained in Victoria
- there should be clear and simple processes for civil society representatives to raise issues for consideration by NPM bodies, as well as the capacity to work together to develop solutions.

We also make the following comments in relation to specific issues raised in the Consultation Paper. In response to question 3, we consider that the following places of detention are the most important for monitoring and inspection by the NPM:

- mental health and psychiatric facilities
- facilities (such as nursing homes and child protection residential care units) in which people experiencing mental illness and disability are subject to 'de facto detention'
- immigration detention centres
- police cells and other places where people are held in police custody
- youth justice and youth residential centres
- secure welfare under the *Children, Youth and Families Act 2005* (Vic).

Our reasons for specifying these places of detention are as follows.

**Mental health and psychiatric facilities**

People detained in the mental health system and in receipt of forensic disability services are particularly vulnerable. Unnecessary and prolonged periods of detention of people with cognitive and psychiatric disabilities raise fundamental issues of compatibility with Australia's international human rights obligations, and fairness and equality before the law.

Careful consideration needs to be given to people with intellectual disabilities who are detained under the *Disability Act 2006* (Vic) in a residential treatment facility for compulsory treatment, or in a disability residential service pursuant to a supervised treatment order. Also of central concern are those detained in psychiatric hospitals pursuant to a compulsory inpatient treatment order under the *Mental Health Act 2014* (Vic). Consideration should also be given to those found not guilty but indefinitely detained pursuant to a custodial supervision order under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

**Facilities where people with disabilities are subject to 'de facto detention'**

We also note the problem of people with disabilities who are 'de facto detained' by being coerced or persuaded to remain in locked facilities irrespective of their personal preferences. We note and commend the work of Victoria's Public Advocate in respect of people in this position.

Young people with intellectual or physical disabilities who are in residential care units under the authority of child protection orders made under the *Children, Youth and Families Act 2005* (Vic) likewise face 'de facto detention' if they are unable to leave the unit where they reside. Accordingly, residential care units should also be subject to monitoring and inspection by the NPM in respect of residents with disabilities.

**Immigration detention centres**

VLA's migration practice includes the provision of legal assistance to asylum seekers and other vulnerable non-citizens in immigration detention centres across Victoria and off-shore territories. People are frequently subject to long periods of detention, without apparent justification on security or other grounds, while they await an outcome from the Minister for

Immigration and Border Protection. The imposition of indefinite detention has very serious mental health implications for adults and children. Mandatory detention also affects people whose visa has been cancelled by the Minister, for example, on character grounds. The pursuit of review and appeal processes by people affected can, in some cases, take several years.

We understand that the Australian Human Rights Commission has reported on the conditions of immigration detainees since the introduction of mandatory detention in 1992 and conducts regular inspections of immigration detention facilities. However, access to persons detained in immigration centres can prove challenging. We would welcome further independent oversight and inspection of these facilities.

**Police cells and other police custody**

It will be important to ensure that the NPM monitoring and inspection regime includes police cells. Those detained in police cells are particularly vulnerable. Facilities in police holding cells are more basic than those at custodial facilities built to hold offenders for longer periods of time. In recent years, police cells in Victoria have often been operating at very close to, or beyond, capacity and they are currently used to hold prisoners on remand, as well as sentenced prisoners.

People who are transported by police between police cells and court are in police custody. Accordingly, consideration should also be given to including police transit in the NPM monitoring and inspection regime.

**Youth justice and youth residential centres**

The Victorian Parliament Standing Committee on Legal and Social Issues is currently conducting an inquiry into youth justice centres in Victoria. In recent months, the Victorian Ombudsman and the Commission for Children and Young People have also both conducted investigations in relation to the treatment of children and young people in youth justice centres. VLA believes that poor infrastructure, overcrowding, staff shortages and inadequate staff training in Victoria's youth justice centres have exacerbated tensions and compromised the security and safety of staff and young people in detention. VLA welcomes measures to further improve and strengthen transparency and oversight in Victoria's youth justice and youth residential centres.

**Secure welfare**

Under the *Children, Youth and Families Act*, the Secretary to the Department of Health and Human Services may place a child for whom the Secretary has parental responsibility in a secure welfare service if the Secretary is satisfied that there is a substantial and immediate risk of harm to the child, and in other cases, under the authority of a Children's Court order. Victoria currently has two secure welfare facilities. Children in these facilities are among the most vulnerable and disadvantaged in Victoria. Although there is provision under the *Children, Youth and Families Act* for the Secretary to inspect a secure welfare facility or to commission an independent review of a secure welfare service, the inclusion of such facilities in the NPM

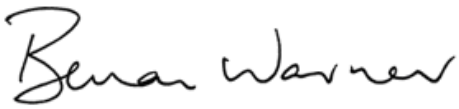
monitoring and inspection regime would provide a level of independent and continuous oversight which is currently lacking.

We note in relation to the detention of children generally, that treatment may be cruel, inhuman or degrading for a child when it would not necessarily be so for an adult. For example overcrowding, deprivation of social, educational and physical activities and lack of access to outdoor areas may amount to cruel, inhuman or degrading treatment for children in detention.

Once again, thank you for the opportunity to contribute to the Consultation Paper. VLA has long experienced the challenge of responding to the legal needs of disadvantaged people. We welcome the work being undertaken towards the ratification of OPCAT, and the close engagement, in the course of that process, between government, statutory agencies, and civil society.

If you have any queries in relation to this letter, please contact Katya Zissermann or Catherine Tobin on 9280 3749.

Yours faithfully



**BEVAN WARNER**
Managing Director