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26 July 2017

Mr Edward Santow
Human Rights Commissioner
Australian Human Rights Commission
Level 3, 175 Pitt St
SYDNEY NSW 2000

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

Dear Mr Santow

Victorian Ombudsman response to AHRC consultation paper – OPCAT in Australia

Thank you for your email dated 13 June 2017 and your consultation paper about OPCAT in Australia.

I note that your consultation follows the National Children's Commissioner's project on OPCAT in the context of youth justice detention, to which the Ombudsman provided a submission addressing similar points. That being said, I thought it would still be useful to provide you with some information on the role of the Victorian Ombudsman in 'places where people are deprived of their liberty' and her ongoing investigation about the implications of OPCAT in Victoria.

About the Victorian Ombudsman

1. As an independent officer of the Victorian Parliament, the Ombudsman has the principal function and broad remit of enquiring into or investigating administrative actions taken by or in an authority and making recommendations for administrative or legislative change.
2. The Ombudsman's jurisdiction encompasses actions taken by or on behalf of authorities such as government departments, public statutory bodies, municipal councils and actions by private sector entities when delivering services on behalf of government. In terms of 'places where people are deprived of their liberty' this includes adult public and private prisons and prisoner transport, youth justice detention centres, youth Secure Welfare Services and public health and disability services. The Ombudsman also has a role under the *Terrorism (Community Protection) Act 2003* (Vic) to make representations in relation to a person's treatment in connection with their detention under the preventative detention order.

3. The majority of matters considered by this office are dealt with using enquiry powers¹ as a means of informal resolution. Following an enquiry, a matter may be resolved where an authority offers an appropriate solution to address the concerns in question or accepts our proposals to resolve the matter. The Ombudsman can conduct a formal investigation on a complaint; on her own motion (proactively, without a complaint); on a referral by Parliament; or following a 'protected disclosure complaint' referred from the Independent Broad-based Anti-corruption Commission². At the completion of an investigation the Ombudsman may form an opinion that the action under investigation was, amongst other things, contrary to law, unreasonable or wrong.³ Accordingly the Ombudsman can make recommendations to remedy the error⁴. She can also request to be notified of any steps taken (or proposed to be taken) to give effect to her recommendations⁵ and report to the Parliament on any matter relevant to an investigation or recommendations that she thinks fit⁶. To ensure accountability, this office also reports on authorities' implementation of recommendations⁷.
4. In conducting an investigation the Ombudsman has the powers of a Royal Commission, including the ability to summons documents and witnesses, take sworn evidence, enter the premises of an authority and inspect anything therein.
5. The introduction of the Victorian *Charter of Human Rights and Responsibilities Act 2006* (the Charter) amended the Ombudsman Act to provide the Ombudsman with the express function to enquire into or investigate whether an administrative action is incompatible with a human right set out in the Charter. The Ombudsman is the only body in Victoria with this express function.
6. The conferral of a specific human rights complaint-handling function utilises the Ombudsman's independence, accessibility, Royal Commission style investigation powers and ability to make (and follow up on) remedial recommendations for administrative improvement.
7. The institution of the Ombudsman was created in response to the imbalance of power between the individual and the state, an imbalance that is at its most stark when people are deprived of their freedom by the state.

¹ See *Ombudsman Act 1973*, section 13A.

² Ibid, sections 15B, 15C, 16, 16A.

³ Ibid, section 23(1).

⁴ Ibid, section 23(2).

⁵ Ibid, section 23(4).

⁶ Ibid, section 23(6).

⁷ See 'Report on recommendations – June 2016' available online at: <https://www.ombudsman.vic.gov.au/getattachment/0f691af2-e66c-47db-a55e-8134ab0782d7//publications/parliamentary-reports/report-on-recommendations.aspx>.

Promoting and safeguarding the rights of people deprived of their liberty

8. The first Victorian Ombudsman, Sir John Dillon, commented in his first annual report some 40 years ago that he was surprised at the large number of complaints from people in custody. This is no longer surprising.
9. Over time, our focus on the conditions and treatment of persons held in custody or in secure facilities has necessitated regular visits. While this is not an express function in the Ombudsman Act (or separately funded), routine visiting of places of detention has been an important element of Ombudsman work for over 15 years.
10. Additional visits to places of detention are often conducted in the context of our enquiries and investigations. A small number of formal investigations are made public when they are tabled in Parliament. A sample of some investigation reports that may be relevant to your consideration of OPCAT, and provide examples of our work concerning places of detention and conditions for detainees are available on our website at www.ombudsman.vic.gov.au/Publications:
 - *Whistleblowers Protection Act 2001 Investigation into conditions at the Melbourne Youth Justice Precinct – 2010*
 - *Own motion investigation into children transferred from the youth justice system to the adult prison system – 2013*
 - *Investigation into deaths and harm in custody – 2014*
 - *Investigation following concerns raised by Community Visitors about a mental health facility - 2014*
 - *Investigation into reporting and investigation of allegations of abuse in the disability sector: Phase 1 – the effectiveness of statutory oversight - 2015*
 - *Investigation into the rehabilitation and reintegration of prisoners in Victoria – 2015*
 - *Investigation into reporting and investigation of allegations of abuse in the disability sector: Phase 2 – incident reporting - 2015*
 - *Report on youth justice facilities at the Grevillea unit of Barwon Prison, Malmsbury and Parkville - 2017*
11. As you would be aware, Victoria is the only state in Australia with a legislated charter of human rights. Subject to section 38 of the Charter it is unlawful for a Victorian public authority, including those likely to be covered by OPCAT, to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. Relevant to the treatment of people deprived of their liberty, the Charter provides:

- protection from torture and cruel, inhuman or degrading treatment (section 10)
 - the right to liberty and security of person (section 21)
 - the right to humane treatment when deprived of liberty (section 22).
12. Telephones in prisons and youth justice facilities across Victoria offer an unmonitored free-call line to this office. In addition, we regularly disseminate posters with information about the role of the Ombudsman and how to contact us. The Ombudsman recognises the importance of using a range of methods, especially for vulnerable groups, to be aware of and to access her office.

Investigation about the implications of ratifying OPCAT in Victoria

13. In March 2017 the Ombudsman notified the Secretary of the Department of Justice and Regulation and the Minister for Corrections of her intention to conduct an 'own motion' investigation under section 16A of the Ombudsman Act into the conditions in a custodial facility.
14. This investigation, which is ongoing, aims to contribute to discussion about OPCAT's implementation in Victoria and is:
- scoping the type and number of places of detention in Victoria and considering the extent to which current monitoring arrangements are consistent with an OPCAT model
 - piloting an OPCAT-style inspection at a custodial facility
 - examining the legal, resourcing and operational implications of implementing OPCAT in Victoria.
15. The Ombudsman decided to conduct her pilot OPCAT-style inspection at the Dame Phyllis Frost Centre (DPFC), a women's prison west of Melbourne. The inspection occurred between Wednesday 12 July 2017 and Tuesday 18 July 2017.
16. Consistent with OPCAT principles, and the Charter of Human Rights and Responsibilities Act, the inspection sought to ensure:
- the humane treatment of people deprived of their liberty
 - protective measures to safeguard the rights of people detained while maintaining the good order, safety and security of the prison
 - the material conditions of the prison meet minimum standards
 - the regimes and activities of people detained are appropriate to meet individual needs
 - adequate access to medical and other health services
 - appropriate staffing, monitoring and training.
17. An inspection methodology was developed in consultation with other inspectorates, NPMs and the Association for the Prevention of Torture. Over

the course of the inspection, a team of 12 officers, including the Chief Inspector from the New Zealand Ombudsman's office, gathered first-hand observations, spoke confidentially with prisoners and staff, and had access to inspect all areas of the facility. The inspection also involved a review of relevant records/documentation and a survey of prisoners and staff about their experiences.

18. The investigation is also consulting other Victorian monitoring bodies and non-government organisations regarding conditions at the DPFC and analysis of the evidence collected during the inspection is ongoing.

Ratifying OPCAT and establishing a NPM

19. As you know, Australian Parliamentary Ombudsmen have been involved in the conversation about OPCAT for a number of years, and in 2012 provided a joint submission to the Joint Standing Committee on Treaties that their offices are well placed to fulfil a NPM role under a 'mixed model' as outlined in the National Interest Analysis Summary⁸.
20. Parliamentary Ombudsman models operate in an array of jurisdictions with significant political, historical and cultural differences. A natural development has been to extend the Ombudsman jurisdiction beyond the investigation of maladministration, to the investigation of human rights breaches committed by public authorities.
21. In her submission to the National Children's Commissioner, the Ombudsman wrote:

An option worth considering would be to designate the Victorian Ombudsman as a state-based NPM, possibly with a Commonwealth-based NPM coordinating across the various jurisdictions. While further consideration would be required of the extent to which the criteria for a state-based NPM are compatible with my existing functions, it could be an appropriate option. In addition to broad jurisdiction and extensive powers, my office has significant experience and expertise in conducting inspections and investigations into closed environments. Finally, and to some extent most importantly, my office is one of only three bodies⁹ in Victorian with constitutional independence¹⁰ and reports directly to the parliament, rather than to a Minister of the Crown.

22. With the Commonwealth's announcement in February 2017, matters have clearly progressed; and regardless of which bodies are designated NPM, it is likely that there will need to be changes to current practices. OPCAT is a

⁸ Available online at: http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/28february2012/treaties/torture_nia.pdf.

⁹ The other bodies being the Victorian Audit-General and the Electoral Commissioner.

¹⁰ *Constitution Act 1975* (Vic), section 94E.

vital but complex tool, and one of the reasons for the Ombudsman's ongoing investigation is to help all parties involved gain an understanding of where the challenges to Victorian implementation of the protocol may lie.

23. As such you will appreciate that many of the issues explored in your consultation paper are also being considered by the Ombudsman's investigation, in the context of Victoria. The Ombudsman is intending to table her investigation report towards the end of the year; however, in the meantime, the Ombudsman would be happy to engage with you further as matters progress.

If you have any questions, or would like to arrange a time to discuss this further, please contact Mr Andrew Adams, Executive Officer, Strategy on (03) 9613 6202 or andrew.adams@ombudsman.vic.gov.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Megan Philpot', written in a cursive style.

Megan Philpot
Acting Ombudsman