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FOR
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Dear Commissioner,

Australia's Implementation of the Optional Protocol to the Convention against Torture (OPCAT) – Stage 2

Australian Lawyers for Human Rights (**ALHR**) thanks you for the opportunity to provide this submission in relation to the second stage of the Inquiry by the Australian Human Rights Commission (**Commission**) on how the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)* should be implemented in Australia.

ALHR

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

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Executive Summary

- 1.1 ALHR congratulates the Federal Government for taking the important step of ratifying OPCAT and the Commission for its excellent consultative work around the implementation of OPCAT. As an international human rights treaty that aims to strengthen the protection of persons deprived of their liberty through preventive, non-judicial means, OPCAT is a very important tool for the protection of the basic human rights of vulnerable people in detention settings in Australia.
- 1.2 ALHR broadly supports the recommendations made by the Commission for implementation of OPCAT in Australia, including the detailed proposals developed by the Commission.
- 1.3 ALHR particularly commends the Commission's recognition of the importance of independent, impartial, well resourced National Preventive Mechanisms (**NPMs**), developed in consultation with and informed by the voices of people with lived experience of vulnerability and detention.
- 1.4 ALHR emphasises that continuing consultation and engagement with civil society is vital to the successful implementation of OPCAT, both during and following the implementation period.

2. Recommendations

- 2.1 ALHR submits that OPCAT's mandate must be preventive and proactive and not simply reactive if it is to be successful in fulfilling its purpose.
- 2.2 ALHR reiterates the submissions it made during Stage One of the OPCAT in Australia consultation as to:
 - (a) the value of establishing specific thematic subcommittees within the NPM model;
 - (b) the need to ensure the NPM has access to mental health experts when conducting inspections; and
 - (c) the importance of enacting national human rights legislation to provide baseline human rights protection in Australia and to support the implementation of OPCAT.
- 2.3 ALHR submits that 'places of detention' subject to inspection must include traditional and informal places of detention, including prisons, forensic detention centres, immigration detention facilities, police watch houses, locked wards of hospitals, authorised mental health facilities, residential aged care facilities, relevant educational institutions and specialist disability accommodation and private residential settings where a person with a disability is subject to a Restrictive Practices order.
- 2.4 ALHR strongly supports the enactment of a single, dedicated piece of federal legislation to implement OPCAT, with corresponding state and territory legislation.
- 2.5 ALHR strongly supports all of the proposals expressed in the Commission's Interim Report.

3. Background

- 3.1 ALHR was grateful for the opportunity to provide a submission to the first stage of the OPCAT in Australia inquiry in July 2017. ALHR's submission to this first stage provided a jurisdictional comparative analysis, with a view to identifying proposed Australian best practice.

- 3.2 We note that the majority of the findings of the Commission's Interim Report are consistent with the recommendations made in our submission of July 2017 and thank the Commission for considering the feedback provided by ALHR and other organisations and individuals.
- 3.3 In particular, ALHR is pleased to see the following recommendations made by the Commission, which reflect our first submission:
- (a) recognition of the need for the National Preventive Mechanism (NPM) to be directly informed by the voices of those with lived experience of detention;
 - (b) adoption of a model of progressive implementation, which allows time for appropriate implementation and for educative work to be undertaken by key stakeholders;
 - (c) the need for independence and impartiality of the NPM;
 - (d) that the NPM be appropriately resourced; and
 - (e) that the NPM will engage with and draw upon the expertise of civil society.
- 3.4 We reiterate our earlier submissions on the following issues:
- (a) the value of establishing specific thematic subcommittees within the NPM model - ALHR considers that this is important to ensure the NPM is well equipped to recognise, understand and respond to human rights violations;
 - (b) the need to ensure the NPM has access to mental health experts when conducting its reviews - ALHR submits that this is critically important, given the well documented link between mental health concerns and the experience of detention, torture, inhuman and degrading treatment or punishment;
 - (c) the importance of enacting a national Human Rights Act to both complement the implementation of OPCAT and protect the basic human rights of all Australians.
- 3.5 ALHR submits that these issues warrant further consideration during this second stage.

4. Relevant International Human Rights Law

- 4.1 OPCAT was adopted on 18 December 2002 and entered into force on 22 June 2006.¹ It was signed by Australia in 2009 and ratified in December 2017.²
- 4.2 OPCAT aims to strengthen the protection of persons deprived of their liberty through preventive, non-judicial means. OPCAT differs fundamentally from other human rights treaties - though a stand-alone treaty, it does not create substantive human rights, it focuses on cooperation rather than condemnation, is proactive rather than reactive and establishes direct communication between the international body (the SPT) and domestic bodies (the NPMs).

¹ Adopted at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199.

² United Nations. Office of the High Commissioner of Human Rights. Available from: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx>.

5. How should OPCAT be implemented to prevent harm to people in detention? How should the most urgent risks of harm be identified and prioritised? The NPM may, for example, include a focus on particular:

- **categories of detainees — such as children and young people, people with disability, Aboriginal and Torres Strait Islander people and people held in immigration detention**
- **detention practices — for example, solitary confinement or disciplinary sanctions**
- **places of detention**
- **jurisdictions.**

5.1 ALHR submits that harm to people in detention can only be prevented by taking a proactive and preventive approach – OPCAT cannot be simply reactive.

5.2 As detailed in our first submission, ALHR recommends that the NPM model implemented in Australia should include the establishment of specific thematic subcommittees, informed by expert opinion and oversight. Experts must include those with lived experience of detention and torture or inhuman or degrading treatment or punishment. We note that expertise in the vulnerabilities and needs of particular detainees is important in identifying and responding to issues that may be particularly harmful for a particular type of detainee. For example, as the recent Human Rights Watch Report has identified, many prisoners with disabilities are experiencing aggravated harm by virtue of their basic support needs not being met, stigma and discrimination, and behaviours directly linked to their disability which can result in the excessive use of solitary confinement.³ Where a person has multiple vulnerabilities, such as an Aboriginal or Torres Strait Islander prisoner with a disability, there is potential for more aggravated harm.

5.3 We note that familiarity with the culture of a certain sector or organisation can enable NPM inspectors to identify potential patterns of abuse within that sector or organisation, whereas a regional or jurisdictional approach will likely lead to investigators engaging with a wider variety of sectors/organisations and not developing the necessary depth of experience.⁴ Ensuring that inspectors are familiar with relevant cultures can enable inspectors to gain insight into issues that may hinder the inspection, such as the informal detainee hierarchies that often develop in prisons and will preclude detainees from speaking frankly in group settings.⁵

5.3 The mandate of the NPM must recognise that people with particular types of vulnerability - such as disability or mental illness - are not only incarcerated within particular types of detention settings⁶ but are represented in all detention settings. Therefore, the NPM

³ Human Rights Watch. “*I Needed Help, Instead I Was Punished*”: Abuse and Neglect of Prisoners with Disabilities in Australia. 6 february 2018.

⁴ Association for the Prevention of Torture (2015). *Institutional culture in detention: A framework for preventive monitoring*. A Detention Monitoring Tool resource. Second edition. Available from: https://www.ap.t.ch/content/files_res/thematic-paper-1_culture-in-places-of-detention-en.pdf

⁵ Association for the Prevention of Torture (2015). *Institutional culture in detention: A framework for preventive monitoring*. A Detention Monitoring Tool resource. Second edition. Available from: https://www.ap.t.ch/content/files_res/thematic-paper-1_culture-in-places-of-detention-en.pdf

⁶ Such as, in this example, forensic disability service units and authorised mental health service facilities.

bodies must be informed about, and tasked with, addressing issues that may particularly affect certain categories of detainees in inspecting all detention settings.

6. What categories of 'place of detention' should be subject to visits by Australia's NPM bodies?

- 6.1 OPCAT does not explicitly define 'places of detention', but authorises visits to be made to:⁷

[A]ny place under [the State Party's] 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.

- 6.2 The clear intent and purpose of OPCAT, as articulated in Article 1, is that it will have a broad scope to prevent torture or cruel, inhuman or degrading treatment or punishment of all persons. Consistent with the *Convention against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), the scope of this prevention is universal and is consistent with respect for human rights and fundamental freedoms.⁸

- 6.3 ALHR submits that there is no precedent for Australia to adopt a restrictive interpretation of 'places of detention'.⁹ Rather, this phrase must be interpreted broadly and non-exhaustively to encompass traditional and less widely recognised places of detention.

- 6.4 The SPT guidelines provide:¹⁰

[T]he State should allow the NPM to visit all, and any suspected, places of deprivation of liberty, as set out in Articles 4 and 29 of the Optional Protocol, which are within its jurisdiction... should ensure that the NPM is able to carry out visits in the manner and with the frequency that the NPM itself decides.'

- 6.5 At a minimum, places of detention should include, but not necessarily be limited to, all institutional settings where people can be detained by operation of law or by order of a court or tribunal, irrespective of the conditions or duration of the detention. We note that this would require that the NPMs have jurisdiction to not only inspect prisons, forensic detention centres and immigration detention facilities, but also police watch houses, locked wards of hospitals, authorised mental health facilities, residential aged care facilities, relevant educational institutions and specialist disability accommodation and private residential settings where a person with a disability is subject to a Restrictive Practices order.¹¹

7. What steps should be taken to ensure that measures to implement OPCAT in Australia are consultative and engage with affected stakeholders? This might include processes for:

- co-ordination between NPM bodies
- civil society organisations and people with lived experience of detention to provide ongoing input to the NPM bodies

⁷ Article 4 of OPCAT.

⁸ Preamble to the Convention against Torture.

⁹ The APT has noted that, of the 67 States that have implemented OPCAT to date, none of the states that have designated an NPM have placed restrictions on the categories of places that their NPMs can visit: Information provided by Ben Buckland, Independent Oversight Adviser, Association for the Prevention of Torture.

¹⁰ Subcommittee on the Prevention of Torture (2010). Guidelines on national preventive mechanisms, CAT/OP/12/5, p10. Sourced on the 3 June 2018 from

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/OP/12/5&Lang=en

¹¹ An order authorising the application of mechanical, physical or chemical restraint, seclusion, containment, or restricting access to objects by a funded disability service provider on a person with disability.

- education that promotes human rights protection within detention places
- engaging with the UN Sub-committee on the Prevention of Torture.

- 7.1 ALHR thanks the Commission for the extensive consultation process it has engaged in around OPCAT to date. This process has gathered important data that is informing the implementation of OPCAT in Australia. ALHR strongly supports the continued work of the Commission in this regard.
- 7.2 ALHR submits that consultation and engagement with civil society organisations and people with lived experience of detention, in the initial implementation period and on an ongoing basis, is vital to ensuring the NPM is properly informed and equipped to fulfil its mandate.
- 7.3 ALHR submits that education which promotes and protects human rights within places of detention is vital. The designated NPMs and the Commission should be tasked with conducting this educative work and should utilise the three-year implementation period to develop a strong body of knowledge and understanding, tailored to the Australian context and informed by relevant experts, including those with lived experience of detention and torture and those representative of people with particular vulnerabilities, and to disseminate this knowledge within places of detention and more broadly.
- 7.4 There must be clear lines of communication between the Australian NPM bodies and the SPT that ensure the provision of relevant information for each body to effectively conduct inspections and publicise and action the findings of the inspections.
- 8. 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?**
- 8.1 ALHR submits that the following core principles should be legislatively implemented:
- (a) functional, structural, financial and operational independence of NPM functions;
 - (b) broad powers vested in the NPM to designate the timing and frequency and scope of inspections, with the powers of workers to prevent denial of entry explicitly stated;
 - (c) power to make full and unfettered publication of the findings of inspections;
 - (d) reciprocity of access - NPMs must have autonomy to freely and confidentially interact with staff of the NPM and the SPT during inspections and must be at liberty to raise concerns or suggestions with the NPM at any time, with full protection from reprisals;¹² and
 - (e) interaction between different Australian NPM bodies and between the NPMs and the SPT.
- 8.2 ALHR submits that the form of legislative implementation should be a single, dedicated federal Act, with corresponding state and territory legislation. This is preferable to the patchwork amendment of existing legislation.
- 9. The Commission's Interim Report contains a number of preliminary views, expressed as Proposals, regarding how OPCAT should be implemented in**

¹² Association for the Prevention of Torture (2012) *Briefing N°4: Mitigating the risks of Sanctions related to Detention Monitoring*.

Australia. Do you have any comments about these proposals to ensure Australia complies with its obligations under OPCAT?

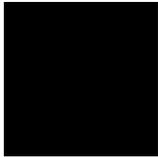
- 9.1 ALHR thanks the Commission for considering the views expressed during the first stage of consultations, including those expressed by ALHR, in reaching its position on each issue.
- 9.2 ALHR strongly supports all of the proposals expressed in the Commission's Interim Report.

Conclusion

ALHR congratulates the Commission for initiating this consultation. We are pleased that the Commission has convened this consultation as the second in a two-phase process for the implementation of OPCAT in Australia.

If you would like to discuss any aspect of this submission, please email ALHR President Kerry Weste at: [REDACTED]

Yours faithfully



Kerry Weste
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Australian Lawyers for Human Rights