Submission of Emeritus Professor Richard Harding
to the Children's Commissioner regarding
the ratification of OPCAT by Australia

1. It is pleasing that the Australian Human Rights Commission, through the Children's Commissioner, has decided to revive the push for Australia to ratify OPCAT. After signature in May 2009, some progress was made, but from early 2012 the momentum was lost. Australia appeared to have missed the boat.

The National Interest Analysis 2009-2012

2. A factor contributing to this was the manner in which the National Interest Analysis was carried out. Whilst this is a standard procedure for new international commitments that will bear directly upon the States and Territories, the process took too long. It was entirely predictable that there would be resistance, for very few State instrumentalities were OPCAT-compliant as to the standards that should be applied in "places where persons are deprived of their liberty".

3. The National Interest Analysis raised six points, each of which is contentious or can readily be finessed. These points are as follows:
    (a) The definition of "places of detention" is too wide;
    (b) "Torture" does not occur in Australia, and the meaning of "cruel, inhuman and degrading" is both uncertain and potentially too far-reaching;
    (c) Australian jurisdictions already have effective internal accountability systems in relation to "places of detention", so that new National Preventive Mechanisms (NPMs) would be redundant;
    (d) An OPCAT-compliant system would be too costly;
    (e) Visits by the UN Sub-Committee for the Prevention of Torture (SPT) would be intrusive and in any case unnecessary; and
    (f) These matters are essentially State and Territory issues, so that Commonwealth standard setting by way of use of the external affairs power would undermine the balance of Australian federalism.

4. As to point (a), it is agreed that the possible scope of the notion of "places of detention" is wide-ranging. However, there are five major areas that could be prioritised in the Commonwealth led strategy. These are: prisons; juvenile detention centres; police lock-ups; closed psychiatric institutions; and immigration detention centres. An emerging category of "secure juvenile welfare centres", though not numerous, would also merit consideration for priority inclusion.

5. It is true that areas such as old people's homes arguably could fall within OPCAT. Also, other criminal justice related places of detention,

such as court custodial centres and prisoner transportation vehicles fall within OPCAT. However, in ratifying OPCAT the Commonwealth could lawfully set priorities for the NPMs.

6. As to point (b), it is unfortunate that OPCAT is always referred to in its shorthand form, emphasising "torture". Torture necessarily involves intention by the agency. This does not occur in Australia. To suggest that it does, as ratification of OPCAT may seem to imply, understandably raises the hackles of State and Territory agencies that are doing their best in difficult circumstances. However, ratification is not somehow an admission that Australia perpetrates torture.

7. The notion of "cruel, inhuman and degrading" refers to the effect of the regime and its impact upon detained persons. It does not look to the motivation or attitude of those in charge of the detention arrangements. It is system-focused rather than motivation-focused. There is already a strong case law established in countries that either have ratified OPCAT or have been operating under a similar system such as the European Convention against Torture The legal scope of the OPCAT notion is well understood, and in practical terms can readily be anticipated.

8. As to (c), it is simply not accurate to assert that Australian States and Territories already have OPCAT-compliant systems in place in relation to the five major detention areas identified above. OPCAT require that the inspecting agency (the NPM) should have full access to places of detention and the people detained there. It should be able to publish its reports, and to keep confidential any individual information obtained in the course of its inspection, and there should be no adverse impact or sanction imposed on anyone who cooperates with the NPM.

9. In Australia only two States (WA and NSW) have specific-purpose agencies (each called the Inspector of Custodial Services) that can inspect prisons and juvenile detention centres. Tasmania is in the course of establishing one as a stand-alone part of the Ombudsman's office. The other States only have Departmental groups that carry out these functions, reporting internally and working very much at the behest of the Departmental management.

10. No States or Territories have OPCAT-compliant specific-purpose bodies that can inspect police cells. The same is true of closed psychiatric institutions.

11. In 2008 my colleague, Professor Neil Morgan, and I attempted to make an inventory of all groups or agencies that purportedly had some role in monitoring standards in the principal places of detention in Australia. It turned out to be a near impossible task, as the role of intra-Departmental groups was often unclear and their responsibilities and status ambiguous. What was apparent, however, was that there was confusion and overlap in many bureaucracies, with their various

performance indicator monitoring systems and the like. Many people seemed to be involved in these activities, with very little focus as to their achievements and outcomes.

12. Some confusion arises from the fact that all States have a position of Ombudsman; several have Children's Commissioners; and some (including, notably, the Commonwealth) have Human Rights Commissions. Each of these bodies are OPCAT-compliant in terms of their powers. They possess "own motion" jurisdiction to inspect these closed places of detention in appropriate circumstances. However, that is not their primary function, or even one of their most significant ones. Typically, they are multi-purpose agencies with a wide range of functions. Their expertise does not lie in inspecting closed institutions against the criteria of what is cruel, inhumane or degrading, and their staff profile is not developed for this purpose.

13. To bring out this point: in the last 15 years the WA Inspector of Custodial Services has carried out 103 inspections, whilst the WA Ombudsman has conducted just one own motion investigation into aspects of the prison system. In Victoria, where there is not an OPCAT-compliant special-purpose prison inspection system, the Ombudsman has understandably been more active, having carried out eight investigations into prison issues in the last ten years. Over the same period, a comparable number of investigations have also been carried out into matters relating to the Victoria Police Department. Even so, the Ombudsman's activity in these areas is a very small proportion of the overall investigative work.

14. The other point to emphasis is that "own motion" investigations always arise out of an incident or problem. The point of OPCAT inspections is that they should be routine and *preventive, not simply a response to crisis*. Own motion investigations are almost by definition triggered by crisis.

15. As to point (d), cost, inspection systems are notably inexpensive. The WA Inspector of Custodial Services operates on a budget of 0.3 of 1 per cent of the budget of the Department of Corrective Services. In Canada the Correctional Services Investigator has a budget of C$4.5 million to inspect an agency (Corrective Services Canada) with a budget of C$3 billion, i.e. 0.15% (2011 figures). The UK inspectorate of Prisons operates on a budget comparable in percentage terms to the WA Inspector.

16. The establishment of an NPM system would enable dozens of supposedly useful internal groups or semi-autonomous agencies to be replaced: see paragraph 11, above. This rationalisation would save costs, possibly as much overall as it would cost to set up a proper NPM system.

17. Regardless of this possibility, the governance system of the various jurisdictions would be improved. Political risk as a system drifts into crisis would be minimised, as long as governments adapted their cultures so as to listen intelligently to the preventive insights of the NPMs. To give one example: The WA Inspector warned of the dangers of land-based prisoner transports in torrid climatic conditions, but was ignored. Subsequently, when an Aboriginal prisoner died of heat stroke and burns in the back of one of those vans in the circumstances anticipated by the Inspector, two results ensued. First, it was the beginning of the end for the Government of the day, a kind of symbol of incompetent management by a tired government. Second, the compensation payable to the family of the deceased was about the cost of running the Inspector's office for six months.

18. A rigorous cost/benefit analysis could be put in place simultaneously with the ratification of OPCAT. Also, consideration could be given to levying the operational Departments and agencies for the cost of the NPM system – a drop in the ocean, in comparison to their normal outlays.

19. As to point (e), SPT visits would not be intrusive. The protocols that have been developed by the SPT are sensitive to national concerns. The visits are never unannounced, and liaison with the national NPM as to the logistics is normal. Reports are not published without the consent of the State, and indeed the intention is that there should be dialogue behind the scenes about the content of the reports. The hope is that practices and processes may be changed as a means of *prevention* of future problems. The SPT does not operate according to a "Gotcha" philosophy.

20. In recent years the SPT has also switched emphasis from country inspections as its principal activity to consultations with, and advice to, national NPMs as a focus. In other words, *the national preventive mechanism is paramount*. Another way of characterising this shift of emphasis is to say that the SPT is sensitive to sovereignty issues, of the sort that might worry some Australian politicians.

21. That is not to say that when the SPT visits it will not inspect a sample of places of detention. It will do so. But its capacity is limited. It is highly unlikely that relatively developed States would receive an inspection visit more than once every ten years or so – hardly an intrusion. And when they do visit, they typically can only visit eight or ten institutions because of time constraints. Spread across the whole of Australia, this is hardly intrusive.

22. It is said that the States, led by NSW, have developed model legislation to cover SPT visits. This does not appear to have been made public; indeed, it is not entirely clear whether the model legislation was developed to cover NPM activity rather than SPT visits. There really seems no proper basis for not making that model legislation public at

this stage of the OPCAT debate. Its release may clarify some of the concerns that underlay the National Interest Analysis.

23. As to point (f), which boils down to States' rights slogans, these will always be with us in Australia's form of federation. However, it is the Constitutional entitlement and obligation of the Commonwealth to lead. The external affairs power exists to enable the Commonwealth, amongst other responsibilities, to ensure, by its own considered actions, that Australia is not out of step with the international community in its domestic human rights standards. Already, 81 nations have ratified OPCAT, so Australia is starting to be an outlier in an area – human rights – where it has traditionally (since the time of Dr H. V. Evatt onwards) thought of itself as a leader.

Changing circumstances

24. Of course, since the push for OPCAT ratification started in 2007[1], a gorilla has entered the room – namely Australia's immigration detention arrangements. In 2007 the numbers of detainees were small, they were all held either onshore or at a place (Christmas Island) that was still within the jurisdictional reach of the inspection agencies.[2] Also, as the pressure of numbers was quite small, the conditions were not demonstrably sub-standard. Possibly, Commonwealth Government enthusiasm for OPCAT ratification will have diminished in the light of the changed circumstances, particularly at Nauru and Manus Island.

25. However, as things stand, the Australian Human Rights Commission still has jurisdiction to inspect the onshore detention centres. It does not have jurisdiction over Nauru and Manus Island. Arguably, the SPT would have such jurisdiction. The impact of OPCAT ratification could be humiliating to Australia if Nauru and Manus Island were inspected by the SPT, therefore.

Following ratification, the postponement of implementation.

26. However, OPCAT allows for postponement of the implementation of obligations for three years following ratification: Article 24. By then, it is likely that the Nauru/Manus Island issues will have been resolved. A further benefit of postponement would be that States and Territories would have had a realistic lead-time to establish their own systems and become OPCAT-compliant.

A structure for Australia

27. In 2008, Professor Morgan and I co-authored for the Australian Human Rights Commission Discussion Paper on whether, and how, OPCAT should be introduced into Australia. The possible structure was discussed at length, and can be found in that paper. Nothing that has subsequently happened has caused a change of mind. A

[1] The matter was first drawn to the attention of the incoming Rudd Government in December 2007.

[2] The Australian Human Rights Commission and the Commonwealth Ombudsman.

Commonwealth agency should be the national or lead NPM: the one with whom the SPT coordinates: the one that represents Australia internationally in relation to OPCAT; and the one that, quite loosely, oversights the State and Territory NPMs.

28. The Commonwealth agency that should carry this responsibility is the Australian Human Rights Commission. The Commonwealth Ombudsman is a complaints-based agency, and there is no benefit in distracting it from this role, which is rather different fro *prevention*. Of course, as a high-level accountability agency, one would expect that it would, formally or informally, have some useful contact with the Australian Human Rights Commission in this respect.

29. Within the Commission, the question of "who does what" can be sorted out internally and, doubtless, with Ministerial input. The general liaison role with State NPMs would seem to be a presidential responsibility, perhaps with a very small team within to assist. And as for the inspections themselves, there will obviously be competing claims and skills.

30. In terms of the legislation to implement ratification, each State or Territory would make its own internal NPM arrangements. These should be subject to the guidance of the national NPM as to whether they are OPCAT-compliant. Some States may choose a single agency. For example, one can surmise that Tasmania would have a single NPM – the Ombudsman – as the size of the State and the range of activities to be covered would readily fit within that office. Also in that State the prison inspection function is already being assigned to the Ombudsman, so the role is being expanded beyond that of complaints handling to inspection aimed at the *prevention* of unacceptable practices or standards..

31. Others may have several NPMs. Those that already have specific-purpose, NPM-compliant inspection agencies in place may decide that this should be the lead, or even the sole, NPM. For example, NSW could well expand the role of the recently established Inspector of Custodial Services.

32. Others may need to establish a new body altogether. Except in the special circumstances of Tasmania, Ombudsman agencies are generally both too stretched already and, possibly, have a different culture to take on the full NPM role, even though in terms of their powers they are OPCAT-compliant.

33. The main point is that each jurisdiction could mix and match as seemed best to fit its own patterns and needs. In Western Australia, there are already three OPCAT-compliant agencies in terms of autonomy and powers – the Inspector of Custodial Services, the Ombudsman, and the Children's Commissioner. As preventive inspection is different from complaints-based investigations (the

Ombudsman) and policy development (the Children's Commissioner), my own view is that the Inspector's office should be the lead NPM within WA.

34. But common sense would indicate that any such arrangement would be structured in such a way that there was input from the other two agencies into the workings of the Inspector's office, particularly in relation to juvenile detention matters and the inspection of closed psychiatric institutions. In the latter case, there should also be input from, and close liaison with, the Mental Health Commissioner and the Chief Psychiatrist. In the case of police lock-ups, it is understood that the current Police management would be acceptant of the need for inspection and prepared that it should be carried out by an existing agency (the Inspector's office) that already has a track record of sensible evaluations.

35. These are details, and each State would find its own model. Now, in 2016, as opposed to 2009, there are some robust precedents. New Zealand has successfully melded four agencies into the NPM structure that it has created. The UK has melded 18 agencies, with HM Inspector of Prisons as the lead NPM. Australia will not be going into the unknown. These paths are well trodden in culturally similar countries.

Strategy for ratification

36. Proceed at a manageable pace.
    - Ratify subject to Article 24, giving time for the States to come into line.
    - Also, extend the NPM arrangements initially only to the five big areas of deprivation of liberty: prisons, juvenile detention centres, police lock-ups, closed psychiatric institutions, and immigration detention centres. The only other area, arguably, should be secure welfare centres for juveniles, for this is only marginally different from juvenile detention through the court process.
    - Omit fringe areas such as old people's homes, military detention, and so on. These can be considered for inclusion down the track, if appropriate.

37. Proceed by way of Commonwealth legislation.
    - This must be within the terms of the external affairs power, so it must be focused on the prevention of cruel, inhuman and degrading treatment. Some existing agencies, such as the WA Inspector, go further, in that their remit is not merely to prevent these breaches of standard but positively to say whether the positive aspects of imprisonment – education, work skilling, rehabilitation programs, and so on – are being done well. Whilst this is desirable, and jurisdictions may decide to emulate that approach, the initial stage relates to

the prevention of the undesirable, rather than the achievement of the desirable.

- This legislation should establish the Australian Human Rights Commission as the National NPM.
- The time for further State consultation is past. This may well provide an opportunity for a delaying strategy for those States that may be opposed or resistant to change.

38. Evaluate the outcomes.

- In the criminal justice administration field and related areas, we often struggle to know whether our new strategies are effective. Establishing an evaluation program from the outset enables a proper assessment to be made. This must be separate from the NPM agencies themselves. The NSW Bureau of Crime Statistics and Research is the sort of body that could design a research model. Alternatively, proposals could be called from the university sector.

39. Summary.

The delay in ratifying OPCAT has gone on long enough. It has been a missed opportunity within Australia, as well as a source of some embarrassment internationally. All the dilemmas and challenges are now well understood, so there is no further rational basis for delay.

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