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21 July 2017

Mr Edward Santow  
Human Rights Commissioner  
Australian Human Rights Commission

**By email:** [humanrights.commissioner@humanrights.gov.au](mailto:humanrights.commissioner@humanrights.gov.au)

Dear Mr Santow

### [Australia's implementation of the Optional Protocol to the Convention against Torture \(OPCAT\).](#)

Australian Lawyers for Human Rights (**ALHR**) thanks you for the opportunity to provide a submission on the Australian Government's implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**OPCAT**).

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 national thematic subcommittees. 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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## 1. Introduction

On 9 February 2017, the Australian Government announced that it intends to ratify the OPCAT by December 2017<sup>1</sup> and ALHR welcomed this decision. In May 2017, the Australian Human Rights Commission invited submissions to be made in response to its *Consultation Paper – OPCAT in Australia*.<sup>2</sup> ALHR is pleased to provide this submission in response to that invitation.

ALHR has long been active in advocating for Australia to ratify OPCAT. As noted in an open letter to the Commonwealth Attorney-General in September 2014 which was signed by 63 civil society organisations, including ALHR:

*“Since Australia signed OPCAT in 2009, a National Interest Analysis has been conducted and in 2012 the bipartisan Joint Standing Committee on Treaties completed an inquiry into Australia’s ratification of OPCAT. We strongly support the recommendation of the Committee that the Australian Government work in collaboration with the States and Territories to ratify OPCAT and implement a NPM as soon as possible.”<sup>3</sup>*

In ratifying OPCAT the Australian Government will demonstrate, nationally and internationally, its commitment to safeguarding the human rights of people deprived of their liberty in all places of detention, including prisons, police lock ups, juvenile detention centres, immigration detention centres, mental health facilities and forensic disability units.

The aim of OPCAT is to strengthen the protection of persons deprived of their liberty through non-judicial means of a preventative nature. ALHR strongly supports this goal and believes that independent monitoring by autonomous bodies under OPCAT will serve to strengthen a culture of respect for human rights within Australian detention facilities.

Please note that this submission is not intended to be an exhaustive examination of the issues. The submission should be supplemented by reference to other key Australian NGO submissions in relation to other UN processes and reviews.

We have taken a focused approach in this submission and seek to provide a jurisdictional comparative analysis. ALHR believes that Australia can learn best practices from a comparative review of OPCAT implementation in other jurisdictions. We have highlighted these best practices below, mainly in relation to the establishment of a National Preventative Mechanism (**NPM**) in Australia.

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<sup>1</sup> Commonwealth Attorney-General, ‘Media Release - Improving oversight and conditions in detention’, 9 February 2017, (accessed 20 June at <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FirstQuarter/Improving-oversight-and-conditions-in-detention.aspx>).

<sup>2</sup> Found at <https://www.humanrights.gov.au/opcat-consultation-page>.

<sup>3</sup> Open Letter available here: <https://alhr.org.au/wp/wp-content/uploads/2014/09/Open-letter-re-the-Optional-Protocol-to-the-Convention-against-Torture.pdf>

## 2. Recommendations

While there are a number of issues to consider in implementing the OPCAT in Australia, ALHR focuses here upon broad recommendations relating to the independence and functionality of the prospective NPM.

**Recommendation 1:** That Australia adopt a NPM model which includes the establishment of specific thematic subcommittees and recognises the need to strengthen the expertise of the NPMs by engaging with experts in different fields.

**Recommendation 2:** That Australia ensure the NPM has access to mental health experts when conducting its reviews.

**Recommendation 3:** That in order to meet its obligations under the OPCAT, Australia adopt a NPM model which includes the establishment of a body similar to the United Kingdom's Quality Care Commission as advised by a Service User Reference Panel, noting that it is essential that any NPM seeks to utilise lived experience of detention in the review of interrogation rules, instructions, methods and practices to prevent torture.

**Recommendation 4:** That, in consultation with the entities to be included in the NPM, a model of *progressive implementation* which draws upon the New Zealand experience be adopted. Such a model should allow the Ombudsman and other concerned entities sufficient time to properly implement their new responsibilities under the NPM. This should include a timeline for the organisations constituting the NPM to assess the scope of their roles and develop a preventive monitoring programme, processes, and activities based on international human rights standards.

**Recommendation 5:** That the need for independence and preservation of impartiality, both real and perceived, in the NPM be recognised as fundamental to public and detainee confidence in the operation and integrity of the NPM.

**Recommendation 6:** That the Federal Government must allocate dedicated finance and resources to the NPM. While it is practical to utilise existing review and grievance mechanisms such as the Commonwealth Ombudsman, ALHR notes that existing entities will require significant additional resources in order to carry out their additional responsibilities.

**Recommendation 7:** That consideration be given to Australia's federal framework and as to how the State and Commonwealth governments are going to work together within the NPM.

**Recommendation 8:** That Australia utilise the experience in human rights held by organisations such as the Australian Human Rights Commission, the Australian Red Cross, Amnesty International and other civil society organisations, and seek to engage them in the reporting and review process.

**Recommendation 9:** That the Federal Parliament of Australia legislate to create a national domestic human rights framework in the form of a Federal *Human Rights Act* to complement the implementation of the OPCAT and as an essential aspect of the domestic protection of

human rights in Australia, noting that Australia is the only Western democracy bereft of such a legislative framework.

### 3. National Preventative Mechanism

#### 3.1 Overview<sup>4</sup>

The requirement to designate a NPM under the OPCAT affords a broad discretion to states. Whilst the OPCAT requires that NPM bodies are independent and well resourced, and prescribes certain standards for their composition, jurisdiction and powers, it is left to each state to select the most appropriate NPM for its national enforcement of the OPCAT.<sup>5</sup>

When selecting the most appropriate body to act as NPM, states should consider:

- resources (human, financial and logistical);
- relations with the authorities and other actors;
- scope of jurisdiction; independence (real and perceived);
- powers and immunities; and
- working methods (e.g. number, duration and frequency of visits).<sup>6</sup>

The Association for the Prevention of Torture (**APT**) has argued that NPMs are in a much better position to carry out regular monitoring and inspection of places of detention than the UN Subcommittee on the Prevention of Torture (**SPT**):<sup>7</sup>

*From the outset, the SPT has estimated that it would prefer to visit each state party every four to five years, noting that 'less frequent visits could jeopardize the effective monitoring of how national preventative mechanism fulfilled their role and the protection afforded to persons deprived of liberty ... [however] ... the SPT has been able to carry out on average only three country visits per year, and as of October 2011, has carried out 13 visits to states parties and one follow-up visit.'*<sup>8</sup>

*[The] APT argues in favour of longer in-depth visits, lasting three to four days, mixed with shorter ad hoc visits...the aim should be to carry out one in-depth visit per year to police stations with known problems, to remand pre-trial detention centres, places with high concentrations of especially vulnerable groups and any other place known*

<sup>4</sup> See generally Association for the Prevention of Torture, 'The Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: A Manual for Prevention (Association for the Prevention of Torture and the Inter-American Institute for Human Rights, Geneva, 2004); Association for the Prevention of Torture, 'Guide on the Establishment and Designation of National Prevention Mechanism (Association for the Prevention of Torture, Geneva, 2006).

<sup>5</sup> Audrey Olivier and Marina Narvaez, 'OPCAT Challenges and the Way Forwards: The Ratification and Implementation of the Optional Protocol to the UN Convention against Torture' (2009) 6(1) *Essex Human Rights Review* 39, 45 available at <<http://projects.essex.ac.uk/ehrr/V6N1/OlivierNarvaez.pdf>>.

<sup>6</sup> Ibid 47.

<sup>7</sup> Elina Steinarte, Rachel Murray and Judy Liang, 'Monitoring those Deprived of their Liberty in Psychiatric and Social Care Institutions and National Practice in the UK' (2012) 16 *The Journal of Human Rights* 865, 870.

<sup>8</sup> Ibid 870 n 31.

or suspected to have significant problems with ill-treatment, plus one in-depth visit every three years to other places.<sup>9</sup>

### 3.2 Key Requirements of a NPM

**ALHR views the following two requirements as integral to ensure Australia complies with its obligations under the OPCAT in establishing a NPM:**

1. **Independence:** The operational independence of the NPM should be guaranteed and there should be complete financial and operational autonomy when the NPM is carrying out its functions under the Optional Protocol.

This requires, for example, that the funding provided by the government is adequate, enables the NPM to have its own staff and premises (in order to be and be seen to be independent of the government) and not be subject to financial control which might affect its real or perceived independence.<sup>10</sup>

2. **Expertise of the Members of the NPM:** A key factor in determining whether national and international bodies are capable of carrying out effective visits to psychiatric and social care institutions is the level of expertise that the membership of those bodies possesses.<sup>11</sup>

The SPT has recommended that members of the NPM should collectively have the expertise and experience necessary for the NPM's effective functioning.<sup>12</sup> Varied expertise is important because it ensures that, no matter the context of the institution being visited, the NPM's staff will have the requisite experience to conduct a proper review.

Furthermore, it has been noted that having individuals on the visiting body with a background or expertise in the particular institutions which are being visited serves to engender respect among those visited and in the authorities in charge of such institutions.<sup>13</sup> The establishment of these relationships is integral to a properly conducted, thorough and transparent review process.

## 4. Comparative Parameters

Given that state parties to the OPCAT have such discretion in implementing NPMs, there have been a number of structures, systems and methods employed by states to address their obligations under the OPCAT. The United Kingdom and New Zealand both have similar legal and societal structures to Australia and serve as key comparisons for Australia. Importantly, each country offers for analysis a distinctly different legal approach

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<sup>9</sup> Ibid 870 n 43.

<sup>10</sup> Elina Steinarte, Rachel Murray and Judy Liang, 'Monitoring those Deprived of their Liberty in Psychiatric and Social Care Institutions and National Practice in the UK' (2012) 16 *The Journal of Human Rights* 865, 874–5.

<sup>11</sup> Ibid 871.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid 872.

to implementing the OPCAT. Germany is also considered below as a comparative federal example of a NPM.

#### 4.1 United Kingdom

The UK ratified the OPCAT on 10 December 2003 and has to date designated 21 bodies as part of the UK NPM, each having a 'specific thematic mandate' under the OPCAT.<sup>14</sup>

The UK approach to NPM designation is unique in the sense that UK has "a number of well-established specialist monitoring bodies (which all form part of the National Preventative Mechanism) in place".<sup>15</sup>

Her Majesty's Inspectorate of Prisons (HMIP) is one of these bodies, and carries out the coordination and communication role for the 20 bodies. The 21 bodies designated as part of the UK's NPM are:<sup>16</sup>

<b>United Kingdom</b>	Independent Reviewer of Terrorism Legislation;
<b>England and Wales</b>	Her Majesty's Inspectorate of Prisons (HMIP); Independent Monitoring Board (IMB); Independent Custody Visiting Association (ICVA); Her Majesty's Inspectorate of Constabulary (HMIC); Care Quality Commission (CQC); Healthcare Inspectorate of Wales (HIW); Children's Commissioner for England (CCE); Care and Social Services Inspectorate for Wales (CSSIW); Office for Standards in Education, Children's Services and Skills (OFSTED); and Lay Observers (in England and Wales);
<b>Scotland</b>	Her Majesty's Inspectorate of Prisons for Scotland (HMIPS); Her Majesty's Inspectorate of Constabulary for Scotland (HMICS); Scottish Human Rights Commission (SHRC); Mental Welfare Commission for Scotland (MWCS); Social Care and Social Work Improvement Scotland; and Independent Custody Visitors Scotland;

<sup>14</sup> See <[http://www.apt.ch/en/opcat\\_pages/opcat-ratification-70?pdf=info\\_country](http://www.apt.ch/en/opcat_pages/opcat-ratification-70?pdf=info_country)>.

<sup>15</sup> Elina Steinarte, Rachel Murray and Judy Liang, 'Monitoring those Deprived of their Liberty in Psychiatric and Social Care Institutions and National Practice in the UK' (2012) 16 *The Journal of Human Rights* 865, 866.

<sup>16</sup> See <[http://www.apt.ch/en/opcat\\_pages/opcat-ratification-70?pdf=info\\_country](http://www.apt.ch/en/opcat_pages/opcat-ratification-70?pdf=info_country)>.

<b>Northern Ireland</b>	Independent Monitoring Boards (IMBNI); Criminal Justice Inspection Northern Ireland (CJINI); Regulation and Quality Improvement Authority (RQIA); and Northern Ireland Policing Board Independent Custody Visiting Scheme (NIPBICVS).
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In addition to the oversight by HMIP, the UK established a ‘steering group’, which is composed of 5 members, including HMIP and one member from each of the four nations. The steering group’s role is to coordinate the work of the 21 bodies and to “facilitate decision making, set strategies for joint work, monitor the work and support the NPM coordinator”.<sup>17</sup>

There are also three sub-groups within the UK NPM, which are:

1. Subgroup on Children and Young Peoples, coordinated by the Office for the Children’s Commissioner for England;
2. Subgroup on mental health, chaired by the Care Quality Commission (**CQC**); and
3. Subgroup composed of the Scottish members of the UK NPM and chaired by Her Majesty’s Chief Inspector of Prisons for Scotland, aimed at coordinating the NPM activities in Scotland.

**ALHR views the establishment of specific thematic subcommittees as a world’s best practice approach to a NPM framework and further recognises the need to strengthen the expertise of the NPMs by engaging with experts in different fields (for example mental health experts).**

**Recommendation 1: That Australia adopt a NPM model which includes the establishment of specific thematic subcommittees and which recognises the need to strengthen the expertise of the NPMs by engaging with experts in different fields.**

**Recommendation 2: That Australia ensure the NPM has access to mental health experts when conducting its reviews.**

#### **4.1.1 The Care Quality Commission**

The CQC provides a strong example of how the UK NPM system is responding effectively to its obligations under art 18 of the OPCAT. Steinarte, Murray and Liang, writing in *The Journal of Human Rights* (UK) note that:

*[T]he CQC tries to focus on the patient’s experience by constantly drawing on the feedback and suggestions of a service user reference panel and the ‘Experts by Experience’ program. The panel is made up of 20 people who are, or have been, detained patients, and it brings a unique and powerful perspective to the monitoring*

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<sup>17</sup> Ibid.

*and inspection work of the CQC in England. Involving patients and service users is a vital step towards understanding the impact of deprivation of liberty and the quality of care in individual settings. ... it is only by engaging users as the true voice of experience that the effect of detention can be assessed.*<sup>18</sup>

**ALHR submits that the involvement of all stakeholders is essential to any NPM framework. The CQC provides an excellent example of this and could be implemented in Australia with relative ease.**

**Recommendation 3: That in order to meet its obligations under the OPCAT, Australia adopt a NPM model which includes the establishment of a body similar to the United Kingdom's Quality Care Commission as advised by a Service User Reference Panel, noting that it is essential any NPM seeks to utilise lived experience of detention in the review of interrogation rules, instructions, methods and practices to prevent torture.**

#### **4.2 New Zealand**

The CAT and OPCAT are enacted as schedules to the *Crimes of Torture Amendment Act 2006* (NZ) ("the Act"). The Act closely mirrors the text of the OPCAT and Article 17 of the OPCAT permits states to designate multiple bodies as NPMs where appropriate. New Zealand has designated the New Zealand Human Rights Commission (**NZHRC**) as the NPM. Subsidiary NPMs are:

- the Ombudsman;
- the Independent Police Conduct Authority (**IPCA**);
- the Office of the Children's Commission (**OCC**); and
- the Inspector of Service Penal Establishments of the Office of the Judge Advocate of the Solicitor-General of the Armed Forces.<sup>19</sup>

The NZHRC was designated as the central NPM in June 2007. Its role is to ensure cooperation between the subsidiary NPM bodies. The Act does not provide for the NZHRC to have a direct inspection role.<sup>20</sup>

The OCC is designated to oversee and monitor the detention and care of children and young persons.<sup>21</sup>

The Office of the Ombudsman oversees 'the treatment of persons detained in prisons, immigration detention, health and disability places of detention, youth justice residences, and care and protection residences'.<sup>22</sup>

<sup>18</sup> Elina Steinarte, Rachel Murray and Judy Liang, 'Monitoring those Deprived of their Liberty in Psychiatric and Social Care Institutions and National Practice in the UK' (2012) 16 *The Journal of Human Rights* 865, 873.

<sup>19</sup> Richard Harding and Neil Morgan, 'OPCAT in the Asia-Pacific and Australasia' (2009) 6(2) *Essex Human Rights Review* 99, 107 available at <<http://projects.essex.ac.uk/ehrr/V6N2/HardingMorgan.pdf>>.

<sup>20</sup> Natalie Pierce, 'Implementing Human Rights in Closed Environments: The OPCAT Framework and the New Zealand Experience' (2014) 31 *Law Context: A Socio-Legal Journal* 154, 181.

<sup>21</sup> *Ibid.*



The Inspector of Service Penal Establishments oversees the treatment of persons detained in New Zealand Defence Force Custody.<sup>23</sup>

#### 4.2.1 *Progressive implementation*

**In ALHR's view, the New Zealand experience evidences the importance of a model of progressive implementation and of taking time to establish a network of NPMs where each organisation has clear delineation of its responsibilities.**<sup>24</sup>

In New Zealand, the organisations making up the NPM dedicated their first year of activity to assessing the scope of their roles and developing a preventive monitoring programme, processes, and activities based on international human rights standards.<sup>25</sup> ALHR strongly supports this type of considered approach.

The Ombudsman and other concerned entities must be given the time and resources to *properly* prepare for their new responsibilities under the NPM and decisions relating to this should be made in close consultation with the entities to be included in the NPM.

**Recommendation 4: Australia should ensure the NPM is structured properly. We recommend that, in consultation with the entities to be included in the NPM, a model of *progressive implementation* which draws upon the New Zealand experience be adopted. This should include a timeline for the organisations making up the NPM to assess the scope of their roles and develop a preventive monitoring programme, processes, and activities based on international human rights standards.**

#### 4.2.2 *Amendments made by NZ*

Section 26(2) of the New Zealand Act requires the Minister to have regard to the requirements under article 18 of the OPCAT, which includes the “functional independence” of the NPM bodies. In order to comply with article 18, New Zealand implemented legislative amendments in the form of the *Independent Police Conduct Authority Act* (2007), as it was thought that the IPCA did not satisfy the requirement of functional independence for a NPM:<sup>26</sup>

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<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> As discussed at page 12 of AHRC Consultation Paper – OPCAT in Australia the Consultation Paper.

<sup>25</sup> Audrey Olivier and Marina Narvaez, ‘OPCAT Challenges and the Way Forwards: The Ratification and Implementation of the Optional Protocol to the UN Convention against Torture’ (2009) 6(1) *Essex Human Rights Review* 39, 51 available at <http://projects.essex.ac.uk/ehrr/V6N1/OlivierNarvaez.pdf>.

<sup>26</sup> Richard Harding and Neil Morgan, ‘OPCAT in the Asia-Pacific and Australasia’ (2009) 6(2) *Essex Human Rights Review* 99, 107 available at <http://projects.essex.ac.uk/ehrr/V6N2/HardingMorgan.pdf>.

*‘Accordingly, in 2007 the Independent Police Conduct Authority Act was passed, changing the composition of the Authority from a single person to a board of up to five members comprising both legal experts and lay people.’<sup>27</sup>*

Insofar as resources are concerned, art 18 of the OPCAT requires that NPMs have the ‘necessary resources’ to perform their role. Both the Ombudsman and the IPCA received additional resources at the outset of the implementation of the NPM.<sup>28</sup> Section 27(b)(i) of the Act requires each NPM body to prepare one report per year on the exercise of their powers and functions under the Act.

**ALHR stresses the need for independence and preservation of impartiality within the NPM.**

**Recommendation 5: That the need for independence and preservation of impartiality, both real and perceived, in the NPM be recognised as fundamental to public and detainee confidence in the operation and integrity of the NPM.**

#### **4.2.3 Ongoing Challenges for New Zealand**

The New Zealand NPMs conducted a Review in 2013 of the first five years of OPCAT implementation in New Zealand.<sup>29</sup>

A key ongoing challenge for New Zealand identified in the Review was resourcing:

*the under-resourcing of their OPCAT functions impacts on their capacity to carry out monitoring to the full extent required by the protocol and, by diverting resources from other work streams, also impacts their core functioning.’<sup>30</sup>*

**Recommendation 6: The Federal Government must allocate dedicated finance and resources to the NPM. While it is practical to utilise existing review and grievance mechanisms, such as the Commonwealth Ombudsman, ALHR notes that the existing entities will require significant additional resources in order to carry out their additional responsibilities.**

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<sup>27</sup> Ibid.

<sup>28</sup> Richard Harding and Neil Morgan, ‘OPCAT in the Asia-Pacific and Australasia’ (2009) 6(2) *Essex Human Rights Review* 99, 107 available at <<http://projects.essex.ac.uk/ehrr/V6N2/HardingMorgan.pdf>>.

<sup>29</sup> New Zealand Human Right Commission, ‘Monitoring Places of Detention: Annual Report of Activities under the Optional Protocol to the Convention against Torture (OPCAT)’ (2013) cited in Natalie Pierce, ‘Implementing Human Rights in Closed Environments: The OPCAT Framework and the New Zealand Experience’ (2014) 31 *Law Context: A Socio-Legal Journal* 154, 191.

<sup>30</sup> New Zealand Human Right Commission, ‘Monitoring Places of Detention: Annual Report of Activities under the Optional Protocol to the Convention against Torture (OPCAT)’ (2013) 21.

## 5. Moving Forward: Australia

### 5.1 Federal Structure of Government

As a federal system, Australia will need to address whether the NPM will be made up of one entity or several entities, and whether these entities will operate at the State and/or Federal levels.

A persuasive argument in favour of a 'multi-agency model'<sup>31</sup> is that it allows different bodies to complement each other's skills, expertise and resources:

*One benefit of the multi-agency model is that State Parties can build on the work of existing agencies that perform complementary functions and can empower NPMs to apply their subject matter expertise to their OPCAT activities, or choose to develop specialist agencies to breathe new life into the domestic human rights framework.<sup>32</sup>*

### 5.2 The German Case Study

Like Australia, Germany has a federal governance system. Germany established two new institutions to operate as the NPM: a federal NPM known as the 'Federal Agency for the Prevention of Torture' and a regional NPM known as the 'Joint Commission of the Länder'. Together they form the 'National Agency for the Prevention of Torture' (NAPT).<sup>33</sup>

#### **Functions**

The NAPT is neither an NGO nor a state agency, but an independent institution. Not only does the NAPT visit places of detention, it also makes recommendations and observations on legal provisions that are already in force or are being drafted relating to detention and or places of detention. The NAPT provides yearly reports about its activities to the Federal Government, the governments of the states, the German Parliament and the parliaments of the states. The NAPT is contactable by the general public by email, mail and phone; individual complaints influence the selection of places of detention to be visited.<sup>34</sup>

#### **Independence**

The members who make up the NAPT are not subject to the direct supervision of the federal or state governments and can only be recalled in very narrow circumstances in

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<sup>31</sup> Natalie Pierce, 'Implementing Human Rights in Closed Environments: The OPCAT Framework and the New Zealand Experience' (2014) 31 *Law Context: A Socio-Legal Journal* 154, 181.

<sup>32</sup> Ibid.

<sup>33</sup> Audrey Olivier and Marina Narvaez, 'OPCAT Challenges and the Way Forwards: The Ratification and Implementation of the Optional Protocol to the UN Convention against Torture' (2009) 6(1) *Essex Human Rights Review* 39, 47 available at <<http://projects.essex.ac.uk/ehrr/V6N1/OlivierNarvaez.pdf>>.

<sup>34</sup> See [http://www.nationale-stelle.de/no\\_cache/en/frequently-asked-questions.html](http://www.nationale-stelle.de/no_cache/en/frequently-asked-questions.html)

strict accordance with the German Judiciary Act. NAPT has an inherent right to communicate with the SPT without state interference.<sup>35</sup>

### **Financing**

NAPT is financed one third by the Federal Government and two thirds by the states. The funds are administered and allocated by the Ministry of Justice.<sup>36</sup>

### **5.3 Using a National Human Rights Institution as NPM**

A key question for Australia to consider when designating its NPM is whether a national human rights institution (**NHRI**), such as the Australian Human Rights Commission (**AHRC**), should be the NPM or the coordinating, federal, NPM. A number of issues arise for consideration on this point:

1. Whether the NHRI has enough resources (financial, logistical and human) to undertake the work of a NPM;<sup>37</sup>
2. Whether the current methodological approach employed by the AHRC is appropriate to overseeing Australia's implementation of the OPCAT. As Audrey Olivier and Marina Narvaez note, "NHRIs commonly react to complaints as opposed to pro-actively visiting places of detention. Upon assuming the NPM function, NHRIs should adopt a different approach to effectively prevent torture."<sup>38</sup> One potential solution to overcome this "reactive versus proactive" issue is to 'to create a specific preventive unit to carry out the NPM work so as to avoid any confusion between the preventive and reactive mandates of the NHRIs';<sup>39</sup>
3. Whether, where an NHRI is designated as NPM, it will have an active inspection role, in addition to an oversight and/or coordination role. For instance, the NZHRC does not have an active inspection role. Richard Harding and Neil Morgan propose that this approach should not be adopted within the Australian context: "[T]he coordinating NPM may be better placed to carry out its OPCAT role effectively if it also has the direct responsibility of carrying out some substantive OPCAT inspection role and, thus, develops hand-on experience and skills in an area of activity that is by no means straightforward."<sup>40</sup>

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<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Audrey Olivier and Marina Narvaez, 'OPCAT Challenges and the Way Forwards: The Ratification and Implementation of the Optional Protocol to the UN Convention against Torture' (2009) 6(1) *Essex Human Rights Review* 39, 48 available at <http://projects.essex.ac.uk/ehrr/V6N1/OlivierNarvaez.pdf>.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Richard Harding and Neil Morgan, 'OPCAT in the Asia-Pacific and Australasia' (2009) 6(2) *Essex Human Rights Review* 99, 107 available at <http://projects.essex.ac.uk/ehrr/V6N2/HardingMorgan.pdf>.

Richard Harding and Neil Morgan note in a 2009 article that the two most appropriate bodies at the Commonwealth level to be designated as NPM are the AHRC and the Commonwealth Ombudsman. They also suggest that each State/Territory develop a single body to be a NPM at the state/territory level.<sup>41</sup>

As noted in the open letter to the Commonwealth Attorney-General in September 2014 which was signed by 63 civil society organisations, including ALHR:

*“In supporting the recommendation of the Committee, we point to the importance of the accountability mechanism provided by the Subcommittee on Prevention of Torture (SPT). The Committee identified that the SPT has proven to be a valuable and successful mechanism in exercising oversight and providing support for State Parties as they implement OPCAT.*

*Ratification of OPCAT will provide the opportunity for the SPT to lend its expertise to Federal, State and Territory jurisdictions in aligning existing mechanisms to meet the requirements of OPCAT, particularly the establishment and implementation of a NPM.”<sup>42</sup>*

**Recommendation 7: That consideration be given to Australia’s federal framework and how the state and commonwealth governments are going to work together within the NPM.**

**Recommendation 8: That Australia utilise the experience in human rights held by organisations such as the Australian Human Rights Commission, the Australian Red Cross, Amnesty International and other civil society organisations, and seek to engage them in the reporting and review process.**

**Recommendation 9: That the Federal Parliament of Australia legislate to create a national domestic human rights framework in the form of a Federal *Human Rights Act* to complement the implementation of the OPCAT and as an essential aspect of the domestic protection of human rights in Australia, noting that Australia is the only Western democracy bereft of such a legislative framework.**

## **6. Conclusion**

It is clear that the implementation of an independent, fully funded NPM with diverse expertise and which is inclusive of all stakeholders is absolutely fundamental to ensuring Australia’s ratification of OPCAT is effective and not merely symbolic. A failure to realise these essential ingredients in the implementation of OPCAT would not only risk continued occurrences of torture and inhumane or degrading treatment or punishment occurring in places of detention in Australia but would also compromise Australia’s stated commitment to human rights at a time when we are poised to take a seat on the UNHRC.

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<sup>41</sup> Ibid.

<sup>42</sup> Open Letter available here: <https://alhr.org.au/wp/wp-content/uploads/2014/09/Open-letter-re-the-Optional-Protocol-to-the-Convention-against-Torture.pdf>

Recent examples of human rights abuses against children in youth detention, such as the shocking treatment of children at the Don Dale Youth Detention Centre and Victoria's recent treatment of children in maximum security adult jails, all evidence a dire need for greater human rights oversight, including within places of immigration detention.

OPCAT, the SPT and the NPM bodies safeguard the human rights of people in custodial settings and provide independent oversight of places of detention. The transparency and accountability offered by OPCAT and its mechanisms provide Australia with the opportunity to act as regional and global model for best practice on human rights in places of detention.

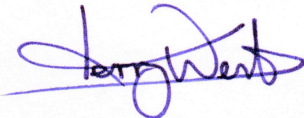
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Australian Lawyers for Human Rights thanks the Commissioner for the opportunity to provide a submission on the Government's intention to ratify the OPCAT. If you would like to discuss any aspect of this submission, please contact Benedict Coyne, President Australian Lawyers for Human Rights, by email at [president@alhr.org.au](mailto:president@alhr.org.au)

Yours faithfully,



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