



Australian
Human Rights
Commission

OPCAT in Australia

Consultation Paper: Stage 2

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Table of Contents

1	Introduction.....	3
2	What is OPCAT?.....	3
3	OPCAT consultation and implementation to date.....	4
	<i>3.1 What decisions have already been made regarding OPCAT?.....</i>	<i>4</i>
	<i>3.2 The Commission’s Interim Report.....</i>	<i>6</i>
4	Key questions in the current consultation process.....	6
5	How to participate in this consultation.....	7

1 Introduction

1. On 21 December 2017, the Australian Government ratified the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT).¹ This is a major advancement in human rights protection in Australia.
2. OPCAT *requires* independent inspections of all places of detention in Australia.²
3. By ratifying OPCAT, Australia has signalled to the world that it will comply with the treaty. The next step is to *implement* OPCAT by incorporating the terms of the treaty as necessary into Australian law, policy and practice. Australia has invoked article 24 of OPCAT, which allows for a three-year period to introduce measures to fully implement the treaty.
4. Each country has some discretion or flexibility in determining precisely how to implement a treaty in its own legal system. This reflects that a treaty needs to be adapted to local conditions to ensure that it is effective in achieving its aims. OPCAT is no different. The Australian Government is now working with the states and territories to determine the best way to implement OPCAT in Australia.
5. In this context, in February 2017, the then Attorney-General asked Australia's Human Rights Commissioner to lead a consultation process with civil society regarding how OPCAT should be implemented in Australia.³ The Commission is conducting this consultation in two stages. This document forms the basis of the second round of consultation by the Commission.
6. The first stage of this consultation took place before Australia ratified OPCAT. The focus of this initial consultation was on five questions on which the Government sought feedback regarding OPCAT implementation, prior to ratification. In September 2017, the Commission communicated an Interim Report to the Attorney-General, setting out its preliminary views on these five questions (the Interim Report). The Interim Report is published as an appendix to this Consultation Paper.
7. In this second stage of consultation with civil society, the Commission invites comments on the proposals set out in the Interim Report, as well as a further set of questions regarding how OPCAT should be implemented in Australia. The two stages of the Commission's consultation are intended to be complementary.

2 What is OPCAT?

8. By way of brief summary, OPCAT is an international human rights treaty that aims to prevent ill-treatment in places of detention through the establishment of a preventive-based inspection mechanism.
9. OPCAT is an optional protocol to the *Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment* (CAT).⁴ As a party to CAT, Australia must prevent torture and other acts of cruel, inhuman or degrading treatment or punishment.

10. OPCAT provides a practical means to achieve the requirements of CAT – focused on transparency and accountability in places of detention. OPCAT requires countries to introduce a systematic approach to visiting all places where individuals are deprived of their liberty in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.
11. In other words, OPCAT does not establish new rules about how individuals (including vulnerable groups such as children and young people) should be treated in detention. Instead, OPCAT encourages a systematic approach to monitoring of treatment in detention, to ensure a high level of transparency and accountability for the treatment of people who are detained.
12. OPCAT requires monitoring of places of detention to occur through two complementary and independent processes.
13. The first is known as the **National Preventive Mechanism (NPM)**. It is a country's own means of conducting inspections. Australia's NPM will be a network of inspection bodies that are responsible for visiting places of detention.
14. The second process is undertaken by the **United Nations Sub-committee on the Prevention of Torture (SPT)**. This is the UN body of independent experts that, over time, visits all countries that have ratified OPCAT. The SPT visits a selection of places of detention in each jurisdiction, and it also offers guidance to NPMs in performing their duties.
15. In determining how OPCAT should be implemented in Australia, the focus naturally falls on the NPM process, because this is the system that each country must establish to make regular visits and recommendations.
16. The NPM takes a preventive approach, as distinct from a reactive, complaints-driven approach. Through regular and unannounced visits, the NPM identifies problematic detention issues before ill-treatment occurs or before it escalates. The NPM can then seek to address such problems through regular dialogue with detention authorities.
17. Further information about OPCAT is available in the Commission's first Consultation Paper on the implementation of OPCAT, which is available on our website.⁵

3 OPCAT consultation and implementation to date

3.1 What decisions have already been made regarding OPCAT?

18. When announcing its intention to ratify OPCAT, the Australian Government indicated it would take a consultative, collaborative approach with the states and territories regarding how OPCAT should be implemented.⁶ This recognises that the majority of Australia's places of detention are run by the states and territories. The Australian Government is working with the states and territories on OPCAT implementation, including through the Council of Attorneys-General.

19. The Australian Government has indicated that multiple bodies from the federal, state and territory governments will fulfil the NPM inspection function in Australia. Each Australian jurisdiction will be responsible for determining which body or bodies will undertake this function in respect of its own places of detention.
20. The work of the various inspection bodies will be supported by a national body responsible for coordination and capacity building among all the federal, state and territory bodies that fulfil the NPM function. The Australian Government announced that the Commonwealth Ombudsman will perform the national coordinating function.⁷
21. In respect of places of detention under the *federal* jurisdiction, the Government has indicated that the NPM role will also be performed by the Commonwealth Ombudsman. The Australian Human Rights Commission will continue to undertake own-motion inspections of places of detention in accordance with its legislative functions.
22. The Commission invited the Office of the Commonwealth Ombudsman to include any material it believed relevant to the Commission's consultation process on OPCAT implementation. The Ombudsman noted the following:

The Office of the Commonwealth Ombudsman has extensive experience in undertaking independent inspections of immigration detention facilities, and this role will be expanded to also encompass an inspectorial function with respect to other Commonwealth places of detention such as federal police cells and Defence detention facilities. The Commonwealth Ombudsman will be the NPM body for Commonwealth primary places of detention, as well as being the NPM Coordinator.

The Commonwealth Ombudsman has commenced preliminary work on its role as NPM Coordinator, which formally begins on 1 July 2018. The Ombudsman's Office will participate in consultations with civil society being led by the AHRC, and has indicated a keen interest in hearing the views of civil society stakeholders through that process and more generally. The Ombudsman has indicated that whilst states and territories have not yet nominated their NPMs (and hence the entities which the Ombudsman will "coordinate" are not yet determined) he will shortly be writing to existing inspectorial bodies with a view to assembling a report that provides an initial baseline of information about how existing bodies operate, how and what facilities they inspect, among other things. This is intended to provide a basis for an initial assessment of the extent to which OPCAT compliance is, or is not, currently being achieved in different places of detention by different inspecting bodies. While the Ombudsman envisages that this will be an iterative process in the years ahead, his goal is that this baseline report be prepared during the second half of 2018 for provision to Attorneys-General and for publication early in 2019.

The AHRC will also continue to have a role in inspecting immigration detention facilities, as it has done for some years.

23. The Australian Government has explicitly recognised the importance of other stakeholders in contributing to the success of OPCAT — especially civil society organisations that undertake inspections.
24. The Government has indicated that, pursuant to article 24 of OPCAT, it will adopt a three-year implementation period for the NPM, with an initial focus on primary places of detention. The three-year implementation period also enables the

consultation processes with the states and territories, and with civil society, to be considered as Australia implements OPCAT.

3.2 The Commission's Interim Report

25. The Commission communicated its Interim Report to the Attorney-General on 1 September 2017, and it is published as an appendix to this Consultation Paper.⁸ The Interim Report focused on five key issues that the Government identified with the Commission as important to receiving civil society input prior to ratifying OPCAT.
26. The Interim Report was informed by the civil society consultation that the Commission undertook during the first stage of consultation in 2017. The Interim Report contains a series of proposals that deal with how OPCAT should be implemented. As with any document of its status, the Interim Report generally expressed preliminary views.
27. The process to determine how the federal, state and territory governments will implement OPCAT is ongoing. The Commission accordingly now welcomes, through this consultation process, feedback on the preliminary views expressed in the Interim Report. The finalisation of the arrangements to implement OPCAT, and whether the views expressed in the Commission's Interim Report are accepted, are both a matter for government.
28. The Interim Report covers five key issues regarding OPCAT implementation. Part of the rationale for this second stage of consultation is to cover other important issues that were not addressed in the Interim Report. Accordingly, questions 1 to 4, below, seek views on additional issues; and question 5 seeks input on the Interim Report.

4 Key questions in the current consultation process

29. The Commission is particularly interested in receiving responses to the following questions.

Question 1

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.

Question 2

What categories of ‘place of detention’ should be subject to visits by Australia’s NPM bodies?

Question 3

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

Question 4

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?

Question 5

The Commission’s Interim Report (see Appendix) contains a number of preliminary views, expressed as Proposals, regarding how OPCAT should be implemented in Australia. Do you have any comments about these proposals to ensure Australia complies with its obligations under OPCAT?

5 How to participate in this consultation

30. The Commission encourages input from those in the civil society sector with particular experience and expertise regarding conditions of detention, such as relevant medical professionals, lawyers, social workers, academics, human rights bodies, religious and faith-based groups, people with lived experience of detention and their representatives.
31. While the focus of the Commission’s consultation is to facilitate the participation of civil society in OPCAT implementation, the Commission also welcomes the views of representatives from federal, state and territory governments who will be, or who are currently involved with, the OPCAT implementation process in their jurisdiction (including corrective services, oversight bodies, justice policy specialists etc).
32. The Commission is seeking input from individuals and organisations in two ways.
 - **First**, the Commission invites written responses to the guideline questions posed in this Consultation Paper. Responses to the paper should be

emailed to humanrights.commissioner@humanrights.gov.au by **14 September, 2018**. Please note that when making a submission, you are indicating that you have read and understood the Commission's Submission Policy, which can be found at <https://www.humanrights.gov.au/submission-policy>. Please note that the Commission intends to publish submissions on its website, unless you state that you do not want the Commission to do so.

- **Secondly**, the Commission will continue to host a small number of consultation roundtables around Australia. These roundtables draw on the expertise of relevant stakeholders to inform how OPCAT should be implemented in Australia. These roundtables will provide the opportunity for more in-depth discussion on OPCAT implementation and facilitate a joined-up conversation between the range of stakeholders from civil society, academia, government, inspectorates and monitoring bodies.
33. In the first stage of the Commission's consultation, the Commission encouraged stakeholders to provide input on any aspect of OPCAT implementation. Many stakeholders made submissions that covered issues beyond the five questions that were the focus of the Commission's Interim Report. The Commission will take account of matters raised in earlier submissions received, where they relate to questions raised in this Consultation Paper.
 34. At the conclusion of the consultation period, the Commission will analyse the written responses received and the discussion at the consultation roundtables. The Commission will provide a final written report to be published in early 2019.
 35. You can access up-to-date information about the Commission's work on OPCAT on the Commission's website at our Consultation Page <https://www.humanrights.gov.au/opcat-consultation-page> and our OPCAT page <https://www.humanrights.gov.au/our-work/rights-and-freedoms/projects/optional-protocol-convention-against-torture-opcat>.

¹ Australia signed OPCAT on 19 May 2009. On 9 February 2017, the Australian Government announced it intended to ratify OPCAT, working closely with the states and territories on implementation: Commonwealth Attorney-General, 'Media Release - Improving oversight and conditions in detention', 9 February 2017. At <http://pandora.nla.gov.au/pan/21248/20171220-1246/www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FirstQuarter/Improving-oversight-and-conditions-in-detention.html> (viewed 3 May 2018).

² *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006). At <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx> (viewed 3 May 2018).

³ Commonwealth Attorney-General, 'Media Release - Improving oversight and conditions in detention', 9 February 2017. At <http://pandora.nla.gov.au/pan/21248/20171220-1246/www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FirstQuarter/Improving-oversight-and-conditions-in-detention.html> (viewed 3 May 2018).

⁴ *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987). At https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=en (viewed 3 May 2018).

⁵ *OPCAT Consultation Page*, <https://www.humanrights.gov.au/opcat-consultation-page> (viewed 3 May 2018)

⁶ Commonwealth Attorney-General, 'Media Release - Improving oversight and conditions in detention', 9 February 2017. At <http://pandora.nla.gov.au/pan/21248/20171220-1246/www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FirstQuarter/Improving-oversight-and-conditions-in-detention.html> (viewed 3 May 2018).

⁷ Commonwealth Attorney-General, 'Media Release - Improving oversight and conditions in detention', 9 February 2017. At <http://pandora.nla.gov.au/pan/21248/20171220-1246/www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FirstQuarter/Improving-oversight-and-conditions-in-detention.html> (viewed 3 May 2018).

⁸ The Interim Report is published in the form it was communicated to the Attorney-General, with one minor exception related to terminology.



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Interim Report to the Commonwealth Attorney-General

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Table of Contents

1	Human Rights Commissioner’s Foreword.....	3
2	List of proposals.....	5
3	Background.....	8
	<i>3.1 Key features of OPCAT.....</i>	<i>8</i>
	<i>3.2 Commission’s consultation methodology.....</i>	<i>9</i>
4	Support for OPCAT ratification and implementation.....	10
5	Decisions to be made prior to OPCAT ratification.....	11
	<i>5.1 NPM Model.....</i>	<i>12</i>
	<i>5.2 Resourcing of NPM activities.....</i>	<i>16</i>
	<i>5.3 National standards.....</i>	<i>18</i>
	<i>5.4 Incorporating OPCAT requirements in Australian law and practice.....</i>	<i>22</i>
	<i>5.5 Departmental policy oversight.....</i>	<i>25</i>
6	Immediate post-ratification focus.....	26
7	Further issues.....	27
	Appendix 1 Comparison with other OPCAT jurisdictions.....	29
	Appendix 2 Submissions received.....	32

1. Human Rights Commissioner's Foreword

Places of detention are often said to be dark and hidden. They present particular human rights challenges for people who are detained and those responsible for detention.

The images published last year from the Don Dale Youth Detention Centre are a reminder that people in detention can be exposed to mistreatment and worse. Such images also challenge us to improve our detention system to ensure that the human rights of all detainees are protected.

Acknowledging this is nothing more, or less, than an acknowledgement of our shared humanity. It is part of Australia's egalitarian ethos to care about the basic dignity of every member of our community. We must protect the human rights that guarantee a dignified life – even when a person is detained in a prison, mental health facility, juvenile or immigration detention centre, or elsewhere.

The Australian Human Rights Commission commends the Australian Government on its commitment to ratify the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT) by December 2017.

Implementing OPCAT will mean establishing a regime of independent inspections for all Australian places of detention. OPCAT aims to *prevent* mistreatment, rather than simply to react to its occurrence. In recent years, we have seen how policy and oversight failures have allowed abusive treatment in places where people are detained. OPCAT can help address systemic problems such as poor detention conditions and practices. It can also enable us to learn from and apply good detention practices more broadly and build the capacity of institutions to protect human rights.

OPCAT has the potential to be the single most positive step in a generation to improve human rights protection of people who are detained. That potential can be realised, but only if Australia's federal, state and territory governments work together, and with civil society, to implement OPCAT. That co-operation should be guided by principle, and focused on achieving practical and effective results.

The Commission welcomes the Australian Government's collaborative approach with the states and territories, building on best practice in current inspectorates. The Commission also welcomes the Government's desire to harness the experience and expertise of civil society. To this end, the Attorney-General, the Hon Senator George Brandis QC, has invited the Commission to consult widely to help the Government determine how best to implement OPCAT in Australia.

This Interim Report records the very strong support in civil society for the Government to proceed on its course to ratify OPCAT by December 2017, and to work with the states and territories to implement the treaty within the three-year implementation period.

The Interim Report also sets out the Commission's views on a number of key issues that the Government considers necessary to resolve prior to ratification. The Commission proposes the following approach in respect of those issues:

- (a) The Australian Government should establish an independent inspection system, known as the National Preventive Mechanism (NPM). It should have: a preventive mandate; broad powers; clear lines of communication; transparent systems; and a focus on engaging civil society and all relevant government agencies. Assuming governments wish to adapt existing inspection bodies to perform this function, state and territory governments should identify the steps needed to make those bodies OPCAT compliant.
- (b) Federal, state and territory governments should work together to ensure that NPM activities are adequately funded to fulfil the functions required by OPCAT.
- (c) The Australian Government should commit to developing national standards on how inspections should take place, and that set minimum conditions of detention to protect the human rights of detainees. Those national standards should have legislative force, reflect international benchmarks and be developed through an open, independent process.
- (d) The Australian Government should ensure OPCAT's core requirements and functions are incorporated into federal law.
- (e) The co-ordinating NPM should establish formal arrangements with civil society, such as an advisory committee.
- (f) All governments in Australia should assign policy responsibility for OPCAT compliance and detention policy, as well as co-ordination, to the department or agency in each jurisdiction that has responsibility for overseeing human rights compliance and that has a broad mandate in relation to detention.

This Interim Report marks the end of the first phase of the Commission's work on implementing OPCAT.

In the next phase, the Commission will continue to consult civil society on how OPCAT should be implemented in Australia, focusing especially on more detailed questions of how the inspection regime should operate and how it should interact with the United Nations inspection process. We anticipate publishing a final report in the latter part of 2018.



1 September 2017

Edward Santow

Human Rights Commissioner

2. List of proposals

Proposal 1

Noting the very strong community support for Australia ratifying OPCAT, the Commission proposes that the Australian Government ratify OPCAT by December 2017, in accordance with its timetable.

Proposal 2

The Commission proposes that the Australian Government establish an NPM system that:

- has a preventive mandate
- has clear lines of communication between the various entities designated as NPM bodies
- requires NPM bodies be given sufficient powers and independence to fulfil their mandate, if necessary by legislative amendment
- sets up formal paths of engagement with civil society organisations and human rights institutions
- is transparent in its operation, including publication of its reports and recommendations.

Proposal 3

The Commission proposes that all state and territory governments map their respective current inspection frameworks, reviewing these against OPCAT requirements, identifying any gaps or overlap in how they apply to places of detention, and proposing any law changes needed to make existing inspection bodies OPCAT compliant.

Proposal 4

The Commission proposes Australia's federal, state and territory governments provide adequate resources to support NPM activities. This should be determined by reference to:

- the need to fulfil the core NPM inspection functions
- the need to implement recommendations made by NPM bodies
- the inherent good in protecting the human rights of people in detention and the cost savings in undertaking detention activities in accordance with international human rights law.

Proposal 5

The Commission proposes Australia's federal, state and territory governments should provide resources to support NPM activities in a way that:

- respects the functional, structural and personal independence required by OPCAT
- enables any existing inspection body that is designated as an NPM body to become OPCAT compliant
- ensures effective liaison with, and involvement of, civil society representatives and people with lived experience of detention in the OPCAT inspection process.

Proposal 6

The Commission proposes that the Australian Government commit to the development of national standards that govern *how detention inspections should take place* by the bodies performing the NPM function. Those standards should have legislative force and, among other things:

- provide for NPM independence and the full range of inspection and information access powers available under OPCAT
- require transparent publication of detention inspection reports
- provide for community members to identify concerning detention practices
- provide for good practice and national consistency in the collection and analysis of data related to detention
- ensure appropriate expertise among inspectors, including by working with specialists and civil society representatives.

Proposal 7

The Commission proposes the Australian Government commit to the development of national standards that set *minimum conditions of detention* to protect the human rights of detainees in the various detention settings covered by OPCAT. Those standards should have legislative force and should deal with issues including:

- the protection of particularly vulnerable detainees, such as children and young people, people with disability, Aboriginal and Torres Strait Islander people, LGBTI people and immigration detainees
- complaints processes and consequences for unlawful or improper conduct
- restrictive practices, seclusion, strip searches and the use of force
- the safe transport of detainees
- the material condition of places of detention
- the provision of essential services (eg health care, legal services and education).

Proposal 8

The Commission proposes the Australian Government should engage an independent body to lead the development of the national standards referred to in Proposals 6 and 7 above. This independent body should:

- be expert in human rights and independent of those parts of government responsible for detaining people;
- seek the views of experts, detainees and others affected
- develop the standards by reference to Australia's domestic and international human rights law obligations, as well as existing good-practice standards and guidelines in Australia and overseas.

Proposal 9

The Commission proposes the Australian Government incorporate OPCAT's core provisions in a dedicated federal statute.

Proposal 10

If Proposal 9 is not adopted, the Commission proposes the Australian Government identify another way of incorporating OPCAT's requirements into domestic law, including by:

- giving legislative force to national OPCAT standards (as per Proposal 7 and Proposal 8)
- additional legal means, such as an intergovernmental agreement that sets out the structure of the NPM model, the scope of its application, how the agreement will be governed and provides for periodic review.

Proposal 11

The Commission proposes the federal agency responsible for NPM co-ordination establish formal arrangements with civil society representatives, such as an advisory committee, during the early stages of OPCAT implementation.

Proposal 12

The Commission proposes that federal, state and territory governments assign overarching policy responsibility for OPCAT compliance and detention policy, as well as co-ordination, to the department or agency in each jurisdiction that has responsibility for overseeing human rights compliance and that has a broad mandate in relation to detention.

Proposal 13

The Commission proposes that immediately after ratification, the Australian Government coordinate with state and territory governments to commence implementation of OPCAT, including by:

- publicly releasing targets for implementation of the treaty which set out timeframes for achieving key milestones over the initial 3-year period

- completing a stocktake of all place of detention and monitoring bodies by state and territory governments
- conducting education and awareness raising about the implementation of OPCAT
- commencing engagement with the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT)
- establishing an advisory council for NPM activities
- identifying data sources, gaps and inconsistencies regarding detention in Australia.

3. Background

1. The *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT) provides for independent inspections of all places of detention in the jurisdictions that ratify and implement it.¹ On 9 February 2017, the Australian Government committed to ratify OPCAT by December 2017, working closely with the states and territories.¹⁰
2. The Australian Government has outlined some ways in which it intends OPCAT to operate in Australia, but there are many details still to be determined.¹¹
3. The Government explicitly provided for a period of public consultation. The Commonwealth Attorney-General asked the Human Rights Commissioner at the Australian Human Rights Commission to conduct consultations, focusing on civil society, and to help the Australian Government facilitate the effective implementation of OPCAT in Australia.¹²
4. This interim report (Interim Report) makes proposals to the Australian Government on OPCAT implementation. The Interim Report focuses on five key issues that the Government has indicated it intends to resolve prior to ratifying OPCAT in December 2017. The proposals contained in the Interim Report are informed by the consultation carried out to date, as well as the Commission's extensive work on OPCAT over the past decade.¹³ In particular, this consultation builds on the National Children's Commissioner's 2016 report on OPCAT and custodial detention of children and young people.¹⁴
5. The Commission will continue its broader consultation process following publication of this Interim Report. In the latter part of 2018, the Commission intends to produce a final report that will cover a broader range of issues regarding the implementation of OPCAT in Australia, including the identification of early priorities.

3.1. Key features of OPCAT

6. OPCAT is an international human rights treaty that aims to prevent ill treatment in places of detention through a regime of preventive inspections, recommendations and responses.
7. OPCAT is an optional protocol to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (CAT).¹⁵ As a treaty in its own right, OPCAT is open to signature and ratification. Australia signed OPCAT on 19 May 2009. Australia ratified CAT in 1989.
8. Under CAT, Australia must do a range of things to prevent torture and other acts of cruel, inhuman or degrading treatment or punishment. Countries that ratify OPCAT must also introduce a system of regular inspections to all places where people are deprived of their liberty in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.
9. Many state and territory inspection bodies adopt a complaints-based approach.

10. Systemic problems can be inferred after the complaints body receives a number of relatable complaints. By contrast, OPCAT is preventive in nature. It operates through a proactive and regular system of inspections and recommendations. The aim is to effect change before harm becomes widespread.
11. OPCAT requires places of detention to be monitored through two complementary and independent bodies:
 - the National Preventive Mechanism (NPM), which is the domestic Australian entity or network responsible for inspections and oversight; and
 - the UN Sub-committee on the Prevention of Torture (SPT), which is the United Nations (UN) body of independent experts responsible for conducting visits to places of detention in jurisdictions that have ratified OPCAT and providing guidance to NPMs to assist in the performance of their duties.
12. The issues addressed in this Interim Report primarily relate to the establishment of the NPM.

3.2. Commission's consultation methodology

13. The Commission published a consultation document (the Consultation Paper) in May 2017.¹⁶ The Consultation Paper summarised OPCAT's core provisions and asked questions that were designed to assist stakeholders to provide informed input to assist in the process of implementing OPCAT in Australia.
14. The Commission particularly encouraged input from civil society representatives with experience and expertise regarding conditions of detention, such as medical professionals, lawyers, social workers, academics, human rights bodies, religious and faith-based groups and organisations representing people with lived experience of detention. The Commission has also engaged with state and territory human rights agencies, ombudsman's offices and other independent government agencies. Stakeholder expertise covered a range of sectors, including criminal justice, aged care, disability, Indigenous justice and immigration.
15. While the Australian Government is consulting separately with state and territory governments, the Commission also welcomed the participation in its process of representatives from federal, state and territory governments who will be, or who are currently involved with, the OPCAT implementation process in their jurisdiction (including human rights bodies, corrective services, oversight bodies and justice policy specialists).
16. With the support of the Asia Pacific Forum of National Human Rights Institutions, the Commission has held roundtables with key stakeholders in Canberra, Melbourne, Sydney and Adelaide in June and July 2017. 99 key stakeholder representatives attended those roundtables.
17. The Commission also invited written submissions and received 48 written submissions by 2 August 2017. Taking account of submissions written jointly, a total of 125 organisations and individuals contributed to these submissions.¹⁷

18. The Commission is grateful to all stakeholders who have participated in the Commission's consultations. The Commission especially acknowledges the generous support provided on a pro bono basis by law firms MinterEllison, Henry Davis York and Hall & Wilcox.
19. Following OPCAT ratification, the Commission will commence a more detailed analysis of the much larger list of issues that all governments in Australia will need to resolve during the initial three-year implementation period. This will involve further consultation with stakeholders in government and civil society.
20. This Interim Report is intended solely for Australian governments. The Commission intends to publicise its proposals and analysis in due course, as part of its next consultation phase on OPCAT implementation.
21. Ultimately, the Commission will prepare a detailed final report, which will cover the full range of issues taking into account consultation responses that have not formed the focus of this Interim Report and any further consultation it undertakes on the details of how OPCAT is implemented in Australia. A final report will be published, most likely in the latter part of 2018.

4. Support for OPCAT ratification and implementation

22. The Commission has taken the Government's commitment to ratify OPCAT as resolved for the purposes of the current consultation process. Hence, the consultation has focused on how OPCAT should be implemented in Australia, not whether it should be ratified at all.
23. Nevertheless, many stakeholders also took this opportunity to emphasise their strong support for the Australian Government ratifying OPCAT, and working cooperatively with the states, territories and all stakeholders to implement OPCAT.¹⁸ While one stakeholder emphasised that OPCAT ratification will fail to achieve its aims unless certain additional steps are taken,¹⁹ no individual or body told the Commission that they opposed ratification.
24. Civil society representatives welcomed the opportunity to contribute to ratification and implementation through the Commission's consultation process,²⁰ and expressed strong interest in continuing to be actively consulted as implementation proceeds.²¹ Stakeholders emphasised OPCAT's value to Australia – especially to improve conditions of detention and the protection of detainees' human rights.²² There was a strong, pragmatic understanding of what OPCAT represents – a means of improving oversight and accountability in respect of Australian places of detention, as well as identifying good detention practices with a view to lifting standards nationwide.
25. In addition, stakeholders observed that implementing OPCAT presents an opportunity to initiate cross-sector collaboration on common areas of concern. For example, seclusion is used to manage challenging behaviour in both the criminal justice and mental health contexts. Similarly, the same vulnerable individuals often move between different closed environments.²³ If OPCAT is implemented effectively, it will allow for expertise to be shared across different sectors with a view to addressing these types of cross-sector issues that have tended to be dealt with in isolation.

26. Many civil society representatives also stressed the urgency of ratifying and implementing OPCAT as soon as possible.²⁴ Some stakeholders emphasised the importance of the Australian Government ratifying OPCAT by its stated deadline of December 2017,²⁵ and encouraged the states and territories to assist their federal colleagues in achieving this outcome.²⁶
27. Noting the Australian Government has indicated its intention to trigger a three-year implementation period under Article 24 of OPCAT, the clear view of stakeholders and the Commission is that OPCAT ratification by December 2017 remains very realistic and achievable. Any delay or departure from that commitment almost certainly would prompt strong concern from civil society and jeopardise the broad co-operation that is necessary to realise the aims of ratifying and implementing OPCAT in Australia.

Proposal 1

Noting the very strong community support for Australia ratifying OPCAT, the Commission proposes that the Australian Government ratify OPCAT by December 2017, in accordance with its timetable.

5. Decisions to be made prior to OPCAT ratification

28. The Attorney-General's Department indicated to the Commission, after the publication of its Consultation Paper, that the Australian Government wishes to resolve the following five questions prior to ratifying OPCAT in December 2017:
- (i) What will be the overarching NPM model?
 - (ii) How will NPM activities be resourced?
 - (iii) Should a process be undertaken, after ratification, to develop two sets of national standards in this area? The first would set out how inspections of places of detention should be carried out. The second would set out minimum conditions of detention.
 - (iv) How should OPCAT be incorporated in Australian law and practice?
 - (v) Which federal, state and territory government bodies should have policy oversight for issues arising through the detention inspection process?
29. The primary purpose of this Interim Report is to make proposals that respond to these five questions. In formulating these proposals, the Commission has emphasised the submissions and other feedback received in this initial round of consultation.
30. Appendix 1 summarises how four jurisdictions that have implemented OPCAT – namely, New Zealand, the United Kingdom, France and Germany – have approached the five questions above.

5.1. NPM model

31. The text of OPCAT provides States Parties with a wide margin of appreciation regarding how the NPM should be established. Article 3 states that States Parties 'shall set up, designate or maintain at the domestic level one or several visiting bodies'. Article 17 provides for the designation of multiple NPM bodies to carry out the preventive inspectorate function.
32. A range of NPM models have been adopted in the many jurisdictions that have ratified OPCAT. As set out in Appendix 1, the UK designated 21 pre-existing regional bodies by way of ministerial statement, nominating one of those bodies as the co-ordinating NPM body. In Germany, two new independent institutions, at the federal and provincial levels, were established to be the NPM.²⁷ One national body was designated as the NPM in each of Switzerland, Norway and Mexico; while Austria created a new federal body with authority and co-ordination functions in relation to five provincial bodies.²⁸
33. The Australian Government has proposed a diffuse NPM model: a national network of bodies fulfilling the NPM function, made up primarily of existing inspectorates with the Commonwealth Ombudsman tasked with facilitation and co-ordination.²⁹ This gives significant autonomy to state and territory governments to decide which body or bodies will perform the NPM in their respective jurisdictions.
34. A number of stakeholders submitted that there should be further consideration, engagement and consultation on the designation of the co-ordinating body and in relation to the state/territory NPM bodies.³⁰ While not critical of the role of the Commonwealth Ombudsman, some stakeholders noted that, given OPCAT is a human rights treaty, human rights commissions at the Commonwealth and state/territory level would be the most appropriate co-ordinating bodies in an NPM network.³¹ Other stakeholders noted the importance of the NPM bodies having access to human rights expertise that currently vests in relatively few inspecting bodies across Australia.³² One way of ensuring NPM bodies are properly informed would be to formalise the input of human rights expertise to the NPM framework, such as by way of a memorandum of understanding.
35. Several stakeholders saw benefit in harnessing the existing expertise in the current inspection bodies.³³ However, stakeholders considered many of the existing inspectorate bodies are not OPCAT compliant and they identified amendments that will need to be made to a number of the existing inspectorate bodies in relation to their powers, functions and how they are resourced.³⁴
36. Some stakeholders noted that certain inspectorate bodies operate near to OPCAT compliance. The Western Australian Office of the Inspector of Custodial Services (WA OICS), for example, was cited by several stakeholders as best practice in Australia, given it is set up by statute and is structurally independent; has a broad jurisdiction and includes within its scope areas that may not be considered 'primary' places of detention, such as prison transport; is preventive in its approach, undertaking regular inspections rather than basing its work on complaints; and tables its reports in parliament that are then made available to the public.³⁵ Nevertheless some changes might still be needed to make the WA OICS OPCAT compliant.

37. Stakeholders in some jurisdictions identified gaps in the current inspection framework and noted the consequent need for inspectorate bodies to be created, or for legislation to be amended to extend the scope of inspecting bodies to include all places of detention.³⁶ A number of stakeholders, for example, noted there is minimal or no independent oversight of police custody cells or transport arrangements for those in custody or in prison.³⁷ This is consistent with findings of the National Children's Commissioner that no state, territory or Commonwealth inspectorate body for places of juvenile detention is fully compliant with OPCAT.³⁸ Conversely, in a few areas a number of stakeholders noted areas of overlap.³⁹

38. As summarised below, a number of stakeholders provided detailed analysis of current inspectorate bodies, identifying both their strengths and weaknesses. It is clear that in order to make the existing inspectorate system OPCAT compliant, focus would need to be given to the following areas.

- **The NPM body must be functionally and structurally independent.** A number of stakeholders considered current inspectorate arrangements not to be independent, or noted that improvements will have to be made to bolster their functional independence.⁴⁰ The lack of independence of oversight bodies has, in some jurisdictions, led to detainee distrust and reluctance to make a complaint.⁴¹ As noted in Part 5.2 below, the NPM bodies must be sufficiently resourced not only to undertake any additional functions,⁴² but also protect their independence.⁴³
- **The NPM body should have a *preventive and proactive, rather than complaints-based and reactive, approach.*** Stakeholders noted that many inspectorate mechanisms respond to individual complaints, rather than having a mandate to perform regular proactive inspections with a view to preventing mistreatment.⁴⁴
- **The NPM body must have sufficient powers** to undertake regular, unannounced visits with unimpeded access to detainees, staff and records,⁴⁵ as well as the power to access all places of detention that may be relevant to the preventive mandate under OPCAT.⁴⁶ It is also important that the NPM body is able to engage in parliamentary processes and comment on relevant draft policy and law.⁴⁷ These features could be incorporated in national standards or guidelines, as discussed in Part 5.3 below.
- **The NPM body should retain experts for visits and reporting.** Stakeholders noted the importance of inspecting bodies retaining the required breadth of expertise or culturally-appropriate inspectors to assess detention conditions and identify systemic problems, particularly in respect of vulnerable detainees.⁴⁸ Some stakeholders suggested the incorporation of relevant expertise could be secured by an ancillary agreement with civil society organisations.⁴⁹ Some stakeholders also submitted there should be Aboriginal and Torres Strait Islander representation in the NPM body or its visits to places of detention.⁵⁰ Other stakeholders noted the importance of the NPM being disability aware and inclusive of people with disability.⁵¹ Other stakeholders urged that the NPM body include psychological and

psychiatric expertise and advice.⁵² As discussed further in Part 5.2, it is vital that NPM bodies are sufficiently resourced to retain relevant expertise.

- **The NPM body's processes and operations should be transparent.** Stakeholders commented that there is often a lack of transparency regarding inspection methodology and findings of existing inspectorate bodies and/or a failure to make public inspection reports or recommendations.⁵³
- **There should be clear parameters for reporting.** The co-ordinating and state/territory NPM bodies should be required to report periodically to Parliament and publish periodic or thematic reports where relevant.⁵⁴ Stakeholders recommended that co-ordinating NPM and state and territory NPM body reports generally should be made public, as should any reports and recommendations made by the SPT.⁵⁵ There should also be a timeframe mandating a response from government to recommendations made by the local or national NPM body.⁵⁶
- **The NPM body must follow up on the recommendations it makes.** Some stakeholders commented that there is often no transparent or timely response to recommendations for improvements made by current inspectorate bodies,⁵⁷ or tracking conducted of any implementation of recommendations made.⁵⁸ The importance of providing resources to implement recommendations is discussed further in Part 5.2.
- **There must be clear and formal communication** between the co-ordinating NPM and the state/territory NPM bodies and among all state/territory NPM bodies.⁵⁹ This could build on some of the existing formal and informal ways that inspectorate bodies share information.⁶⁰
- **The NPM bodies should actively and formally engage with civil society.** The most effective NPM bodies will work collaboratively with civil society organisations and individual experts,⁶¹ as well as people with lived experience of the places of detention that are being inspected.⁶² Some suggested formalising the relationship between civil society organisations and the NPM bodies, such as by way of an advisory council, memorandum of understanding or a formal agreement setting out how civil society will feed in to the NPM process.⁶³
- **The NPM bodies must have access to relevant information.** A number of stakeholders noted there is currently insufficient access to information for inspectorate bodies.⁶⁴ How information is stored, shared and accessed by the co-ordinating and state/territory NPM bodies will need to be carefully articulated in any legislation or agreement documenting the NPM structure. There should also be safeguards in place to protect the privacy of detainees.

39. The Australian Government has proposed the Commonwealth Ombudsman not be given authority over other inspectorates or conduct secondary inspections; it will instead 'work with existing bodies to share experience, undertake research, identify gaps and overlaps and co-ordinate interactions' with the SPT.⁶⁵ OPCAT's success will rest, in part, on how well this function is performed.⁶⁶ Several

stakeholders made recommendations directed at this part of the implementation structure. A number of stakeholders, for example, recommended there be an independent, specialised NPM body appointed in each jurisdiction to be co-ordinated by one federal NPM body.⁶⁷ Stakeholders also recommended that thematic subcommittees be established, made up of representatives across all NPM bodies, similar to the approach taken by the UK NPM.⁶⁸

40. A number of stakeholders noted that each state and territory will need time to map the existing inspectorate bodies, identify places of detention that are not currently inspected and identify the changes that will need to be made to existing inspection mechanisms to make them OPCAT compliant.⁶⁹ Some jurisdictions have already commenced this work. The Victorian Ombudsman, for example, is undertaking an own-motion investigation to support Victoria's implementation of OPCAT. This investigation will scope the type and number of current places of detention in Victoria, consider the compliance of monitoring bodies with OPCAT, pilot an OPCAT-style inspection and examine the legal, resourcing and operational implications of OPCAT in Victoria.⁷⁰

41. The NT Government has already consulted on draft legislation⁷¹ that it considers to be necessary for the purposes of implementation.⁷² On 24 August 2017, the ACT Government introduced a bill to parliament to facilitate implementation of OPCAT in that jurisdiction.⁷³

Proposal 2

The Commission proposes that the Australian Government establish an NPM system that:

- **has a preventive mandate**
- **has clear lines of communication between the various entities designated as NPM bodies**
- **requires NPM bodies be given sufficient powers and independence to fulfil their mandate, if necessary by legislative amendment**
- **sets up formal paths of engagement with civil society organisations and human rights institutions**
- **is transparent in its operation, including publication of its reports and recommendations.**

Proposal 3

The Commission proposes that all state and territory governments map their respective current inspection frameworks, reviewing these against OPCAT requirements, identifying any gaps or overlap in how they apply to places of detention, and proposing any law changes needed to make existing inspection bodies OPCAT compliant.

5.2. Resourcing of NPM activities

42. Article 18(3) of OPCAT requires that States Parties provide adequate resourcing to fulfil the NPM functions. This is crucial to OPCAT's success.
43. The approach to resourcing will depend, at least in part, on the model adopted to fulfil the NPM function. As noted above, the Australian Government favours a 'mixed-model', or diffuse, NPM that relies on each of the state, territory and federal governments to undertake NPM functions, and then to collaborate effectively as a national network. This would vest significant autonomy in each of the state, territory and federal governments to determine how best to fulfil its own OPCAT functions.
44. Most Australian jurisdictions have indicated informally that they are planning to adapt existing bodies to fulfil the NPM functions. The scope of that adaptation, and the consequent additional resource expenditure, will vary depending on the extent to which those existing inspection bodies already comply with OPCAT. Some jurisdictions will need to commit additional resources.
45. As with any field in which the state, territory and federal governments are all involved, those governments must decide between themselves the most appropriate way of apportioning the costs needed to comply with OPCAT. Generally, stakeholders did not express a view on that issue.⁷⁴ Other countries that have ratified OPCAT tend to resource NPM activities either through their central government in unitary systems, or by sharing the cost burden between provincial and national governments in federal systems.⁷⁵
46. Stakeholders emphasised a number of key principles that should guide decision-making in relation to resourcing. They are as follows.
47. First, stakeholders observed that adequate funding is needed to fulfil the core inspection functions.⁷⁶ Those functions include co-ordination between multiple bodies performing NPM functions,⁷⁷ obtaining necessary specialist expertise (both internally and externally),⁷⁸ conducting detailed inspections and enquiries,⁷⁹ and ongoing training for inspectors and detaining authorities.
48. Secondly, as the SPT has made clear,⁸⁰ resourcing and administration of NPM bodies must be carried out in a way that respects the functional, structural and personal independence required by OPCAT.⁸¹
49. Thirdly, special funds, resources and training need to be made available in the first few years after ratification to help bodies fulfilling NPM functions to become NPM compliant.⁸² This need appears especially acute in those jurisdictions where the inspection system is less developed, but could also extend to jurisdictions that have more developed inspection bodies like NSW and WA – especially if their mandate expands.⁸³
50. For some jurisdictions, it may be necessary or desirable to establish one or more new NPM bodies, or to consolidate similar and overlapping functions in a single inspection body or network.⁸⁴ Some stakeholders have cautioned against vesting NPM responsibilities in entities and individuals that are functionally incapable of complying with OPCAT.⁸⁵

51. Fourthly, government and non-government stakeholders emphasised the importance of ensuring effective liaison with, and involvement of, civil society representatives and people with lived experience of detention in the OPCAT implementation and inspection process.⁸⁶ There was strong support for civil society and human rights organisations being involved in developing NPM priorities, identifying current detention problems and solutions, and having regular meetings with the bodies fulfilling NPM functions.
52. Fifthly, there needs to be sufficient resources available to implement recommendations for detention reform, arising through the NPM and SPT inspection processes. A number of stakeholders pointed to the failure of governments to implement recommended detention reforms, notwithstanding often strong public support.⁸⁷ An oft-cited example is the recommendation from the 1991 Royal Commission into Aboriginal Deaths in Custody to remove asphyxiation or ‘hanging’ points from prisons.⁸⁸ More than a quarter of a century later, inadequate progress has been made to address this problem.⁸⁹
53. Some stakeholders emphasised that, while the OPCAT process is likely to identify localised problems that need to be fixed, governments should prioritise implementing recommendations to remedy problems that arise across more than one jurisdiction or that might otherwise have national significance.
54. Finally, while resourcing the implementation of OPCAT involves some new government expenditure, the Joint Standing Committee on Treaties emphasised that this must be balanced against two very important benefits: first, the inherent good in protecting the human rights of detainees; and, secondly, the experience in overseas jurisdictions which points to OPCAT’s ‘potential to minimise ... costs ... including avoiding litigation costs and compensation payments’.⁹⁰ A number of stakeholders emphasised a similar point.⁹¹

Proposal 4

The Commission proposes Australia’s federal, state and territory governments provide adequate resources to support NPM activities. This should be determined by reference to:

- **the need to fulfil the core NPM inspection functions**
- **the need to implement recommendations made by NPM bodies**
- **the inherent good in protecting the human rights of people in detention and the cost savings in undertaking detention activities in accordance with international human rights law.**

Proposal 5

The Commission proposes Australia’s federal, state and territory governments should provide resources to support NPM activities in a way that:

- **respects the functional, structural and personal independence required by OPCAT**

- **enables any existing inspection body that is designated as an NPM body to become OPCAT compliant**
- **ensures effective liaison with, and involvement of, civil society representatives and people with lived experience of detention in the OPCAT inspection process.**

5.3. National standards

55. OPCAT focuses on how state parties should inspect places of detention. As such, OPCAT is designed as a tool of accountability, to ensure that State Parties fulfil their substantive human rights obligations contained in CAT and in other areas of international human rights law relevant to conditions of detention.

56. OPCAT and CAT are human rights treaties. Such treaties adopt what is known as principles-based regulation.⁹² This means they are expressed in broad or general terms, and they set out overarching requirements. Unlike most ordinary domestic legislation, treaties tend not to go into the precise detail of how those requirements should be fulfilled.

57. In incorporating human rights treaties into domestic legislation, governments sometimes deal with this difference by adopting a multi-layered regulatory strategy.

58. For example, the Disability Discrimination Act 1992 (Cth) generally sets out a small number of broad, overarching requirements that prohibit discrimination on the basis of a person's disability, as well as exemptions. However, the Act also makes provision for the development of Disability Standards and guidelines, which provide more detailed explanation of the rights and responsibilities that arise in specific contexts. These standards are legally-binding regulations. They are set by the Attorney-General. The Commission is required under s 67 of the Act to report to the Minister relating to the development of those standards and monitor their operation. There are currently standards under the Act regarding access to education, public transport and premises. In addition, the Commission also issues guidelines to assist people to understand their rights and obligations in this area. Unlike the standards, Commission-issued guidelines are not legally binding.

59. In implementing OPCAT, there is a question whether a similar, multi-layered regulatory strategy should be adopted regarding detention. One way of furthering that aim would be to develop national standards that:

- govern how detention inspections should take place by the bodies performing the NPM function and/or
- set minimum requirements for conditions of, and treatment in, detention to protect the human rights of detainees in the various detention settings covered by OPCAT.

60. Some countries, such as France, have introduced national standards for OPCAT, based on international and domestic human rights law. Others, such as the UK and New Zealand, have moved to a partially standardised system. Still others,

such as Germany, have not introduced national standards, instead relying on domestic and international human rights law.

61. In Australia, there are some standards that deal with certain issues that are relevant in this context. Examples include standards focusing on youth justice⁹³ or prisons.⁹⁴ The existing standards – taken individually or when added together – are not comprehensive or binary and do not address, on a national basis, all the issues relevant to OPCAT. Nevertheless, the existing standards could help inform the development of new national standards.

62. At the Commission’s roundtable consultations, there was very strong support for developing national standards. Submissions that addressed this issue endorsed the idea.⁹⁵ No stakeholder consulted by the Commission was opposed to developing national standards.

63. It will be important to develop national standards through an effective and transparent process. Many stressed that this process should seek the views of a broad range of experts and others affected.⁹⁶ The process should also be undertaken by a body that is expert in human rights and independent of those parts of government responsible for detaining people.⁹⁷

64. Stakeholders suggested that national standards on *how* detention inspections should take place could deal with issues including the following:

- independence of NPM bodies and the full range of inspection powers available⁹⁸
- the transparent publication of detention inspection reports⁹⁹
- the reporting of concerning practices from the community (noting that OPCAT is not a complaint-based mechanism)¹⁰⁰
- good practice and national consistency in the collection and analysis of data related to detention¹⁰¹
- engagement with specialists and civil society.¹⁰²

65. National standards setting out minimum conditions of detention would be more complex, because they would need to be tailored to the differing detention environments covered by OPCAT. Stakeholders suggested that such standards could be based on relevant international human rights law sources,¹⁰³ including:

- CAT
- the *Convention on the Rights of the Child*
- *Convention on the Rights of Persons with Disabilities*
- UN *Standard Minimum Rules for the Treatment of Prisoners* (the ‘Mandela Rules’)

- *UN Rules for the Protection of Juveniles Deprived of their Liberty* (the Havana Rules)
- OHCHR's 1999 *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the 'Istanbul Protocol')
- *UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (the 'Bangkok Rules').

66. The national standards could also draw on existing models such as those developed by the SPT, the Association for the Prevention of Torture and the Commission itself.¹⁰⁴

67. Stakeholders recommended that national standards on conditions of detention could deal with issues such as the following:

- protecting especially vulnerable detainees, such as children and young people, people with disability, Aboriginal and Torres Strait Islander people, LGBTI people and immigration detainees¹⁰⁵
- the availability of complaints processes and consequences for unlawful or improper conduct¹⁰⁶
- restrictive practices, seclusion, strip searches and the use of force¹⁰⁷
- the safe transport of detainees¹⁰⁸
- the material condition of places of detention, as well as minimum standards for essential services (eg health care, education and legal services).¹⁰⁹

68. A number of stakeholders suggested that national standards should have the force of law.¹¹⁰ If the Australian Government opts not to introduce a dedicated statute to incorporate OPCAT into domestic law, there would be even greater imperative to legislate the proposed national standards. This would also respond, at least in part, to the SPT's recommendation that 'the mandate and powers of the NPM should be clearly set out in a constitution or legislative text'.¹¹¹

69. It is worth noting that each of the countries referred to in **Appendix 1** has incorporated relevant international human rights law into its domestic law – something that only two Australian jurisdictions (Victoria and the ACT) have done comprehensively through human rights statutes. This further heightens the importance of Australia adopting national standards with legislative effect.

Proposal 6

The Commission proposes that the Australian Government commit to the development of national standards that govern *how detention inspections should take place* by the bodies performing the NPM function. Those standards should have legislative force and, among other things:

- **provide for NPM independence and the full range of inspection and information access powers available under OPCAT**
- **require transparent publication of detention inspection reports**
- **provide for community members to identify concerning detention practices**
- **provide for good practice and national consistency in the collection and analysis of data related to detention**
- **ensure appropriate expertise among inspectors, including by working with specialists and civil society representatives.**

Proposal 7

The Commission proposes the Australian Government commit to the development of national standards that set *minimum conditions of detention* to protect the human rights of detainees in the various detention settings covered by OPCAT. Those standards should have legislative force and should deal with issues including:

- **the protection of particularly vulnerable detainees, such as children and young people, people with disability, Aboriginal and Torres Strait Islander people, LGBTI people and immigration detainees**
- **complaints processes and consequences for unlawful or improper conduct**
- **restrictive practices, seclusion, strip searches and the use of force**
- **the safe transport of detainees**
- **the material condition of places of detention**
- **the provision of essential services (eg health care, legal services and education).**

Proposal 8

The Commission proposes the Australian Government should engage an independent body to lead the development of the national standards referred to in Proposals 6 and 7 above. This independent body should:

- **be expert in human rights and independent of those parts of government responsible for detaining people;**
- **seek the views of experts, detainees and others affected**
- **develop the standards by reference to Australia's domestic and international human rights law obligations, as well as existing good-practice standards and guidelines in Australia and overseas.**

5.4. Incorporating OPCAT requirements in Australian law and practice

70. The Commission notes that the Australian Government has stated it does not intend to enshrine the NPM model in legislation, nor does it consider it necessary to legislate to enable inspections by the SPT.

71. Many attendees at the roundtables expressed concern that the Commonwealth Government does not intend to introduce legislation to enshrine the NPM model. A number of stakeholders strongly urged the Australian Government to introduce a dedicated statute to implement OPCAT.¹¹² This accords with SPT guidance that conclusively states that it is best practice for NPMs to be implemented through legislation:

While the institutional format of the NPM is left to the State Party's discretion, it is imperative that the State Party enact NPM legislation which guarantees an NPM in full compliance with OPCAT and the NPM Guidelines. Indeed, the SPT deems the adoption of a separate NPM law as a crucial step to guaranteeing this compliance.¹¹³

72. Stakeholders considered setting up the NPM structure in legislation to be necessary for a number of reasons, including that it would:

- clearly define the roles and structure of the NPM model as well as its mandate¹¹⁴
- guarantee unfettered NPM and SPT access to all places of detention¹¹⁵
- ensure inspections are culturally appropriate¹¹⁶ and rely on relevant expertise¹¹⁷
- secure adequate funding for the federal co-ordinating and state/territory NPM bodies¹¹⁸
- enshrine the functional and structural independence of the co-ordinating NPM body¹¹⁹
- signal that the NPM model is intended to survive changes of government and has equivalent status to other independent statutory bodies¹²⁰
- establish the relationship with the SPT and provide for the co-ordinating NPM body directly to access the SPT¹²¹
- protect individuals from reprisals as a result of making a complaint or providing information to the NPM bodies,¹²² as well as setting out the privacy protections for information accessed by the NPM bodies to fulfil their functions.¹²³

73. Some stakeholders also stated that if the proposed diffuse model is adopted, where a state or territory inspection body will be required to carry out additional OPCAT-related functions, these additional functions should be set out in legislation.¹²⁴ This could simply be done by amending the body's statutory

functions. A complaints-handling body, for example, that does not undertake proactive inspections will require its founding legislation to be amended to reflect the additional function.

74. Some stakeholders were of the opinion that this type of amendment need not occur prior to ratification, rather it would more sensibly occur post-ratification following a more detailed mapping of how inspectorate bodies are currently operating in each state and territory.¹²⁵ The Commission considers that the requirements for ratification under Article 17 of OPCAT will be satisfied by the nomination of a co-ordinating NPM body, with a view to determining the details of which state/territory bodies will carry out the OPCAT functions, and what amendments are necessary for them to do so, in the post-ratification implementation period contemplated in Article 24.

75. Jurisdictions that have created the NPM structure without legislation have encountered significant challenges. The independent chair of the UK NPM, for example, recently criticised the establishment of the UK NPM by ministerial statement, noting the lack of a legislative framework has resulted

in there being no guarantee of independence, no system of accountability, and Parliament having no role in setting out its mandate or its objectives. ... The lack of legislation undermines our legitimacy nationally and internationally, fails to protect our independence and functions from interference and does not assist us to deliver on our day to day tasks as an NPM.¹²⁶

76. If the Australian Government maintains its position that legislation is not necessary to implement the NPM model, other steps could be taken to strengthen the proposed NPM model and go some way to address the significant concerns raised by civil society about the lack of legislative foundation for the NPM.

77. A key step would be to give legislative force to the proposed national guidelines, as stated in above. Not only would this provide for a robust set of standards, it would also ensure parity across jurisdictions, a consistent approach to inspection, open up the communication channels across all jurisdictions and ensure that existing bodies are actively engaged in a new approach to oversight of places of detention.

78. The Australian Government could also explore whether some other legal arrangement, such as an intergovernmental agreement, could go some way to fulfilling the relevant requirements.¹²⁷ The terms of this agreement should clearly articulate the mandate and powers of NPM bodies and cover the various aspects of the NPM model set out in Part 5.1 above.

79. If the intergovernmental agreement seeks to define 'place of detention', this will be very important. A wide range of places of detention potentially fall within the scope of OPCAT. The term 'places of detention' is not defined; the treaty only states that it applies to places where 'people are deprived of their liberty'.¹²⁸

80. The Australian Government has already indicated that the implementation of OPCAT in Australia will focus on "primary" places of detention, such as prisons, juvenile detention, police cells and immigration facilities', noting that these environments pose the most 'acute' challenges for people deprived of their

liberty.¹²⁹ Some stakeholders objected to such a narrow approach to the definition of a 'place of detention', noting there are a wide variety of places where individuals are deprived of their liberty that do not fall into this concept of a 'primary' place of detention. A number of stakeholders suggested that aged-care facilities, for example, needed OPCAT oversight.¹³⁰ Other examples requiring oversight include the restraint of individuals in hospital emergency departments;¹³¹ places of residential care for people with disability;¹³² and the placing of voluntary mental health patients in locked wards.¹³³

81. Some of the more acute human rights issues arise in environments that are not traditionally considered a 'primary' place of detention. While the precise list of places of detention that OPCAT will cover need not be determined prior to ratification, any definition adopted in legislation or an intergovernmental agreement of what falls within scope should be sufficiently flexible to allow for all places of detention to be considered for both the immediate implementation phase and on an ongoing basis after the NPM is established. Co-ordinating and assisting the scoping work to identify all places of detention in each state and territory will be an important part of the initial work undertaken by the co-ordinating NPM body during the implementation phase.

82. In addition to establishing the NPM framework and the scope of its application, any intergovernmental agreement should set out how any disputes between the parties to the agreement will be resolved. Finally, any intergovernmental agreement should identify periodic reviews to assess progress of implementation and, in the post-implementation period, the functioning of the NPM in Australia.

Proposal 9

The Commission proposes the Australian Government incorporate OPCAT's core provisions in a dedicated federal statute.

Proposal 10

If 0 is not adopted, the Commission proposes the Australian Government identify another way of incorporating OPCAT's requirements into domestic law, including by:

- **giving legislative force to national OPCAT standards (as per 0 and 0)**
- **additional legal means, such as an intergovernmental agreement that sets out the structure of the NPM model, the scope of its application, how the agreement will be governed and provides for periodic review.**

83. In addition to the intergovernmental agreement, other relevant documentation could establish a formal relationship with civil society organisations. This could be approached in a number of ways. In other jurisdictions, co-operation agreements, formal agreements and memorandums of understanding between the NPM bodies and civil society set out both how civil society organisations can feed into the inspection process and how the NPM bodies can rely on civil society expertise.¹³⁴

84. Some stakeholders, for example, suggested that NPM bodies directly involve civil society and individual professional experts in their inspections.¹³⁵ Other stakeholders suggested that an advisory council, or panel of experts, be established to provide information and advice, particularly about vulnerable detainees, to the NPM bodies,¹³⁶ or a federal co-ordinating NPM body should facilitate access to such expertise.¹³⁷ In addition, attendees at the roundtables generally supported formal, regular roundtables to bring together stakeholders from civil society, government and inspectorate bodies.

Proposal 11

The Commission proposes the federal agency responsible for NPM co-ordination establish formal arrangements with civil society representatives, such as an advisory committee, during the early stages of OPCAT implementation.

5.5. Departmental policy oversight

85. A large number of state, territory and federal government bodies share responsibility for inspecting places of detention in Australia. The proliferation of inspection bodies is partly due to the many different types of detention facility – spanning prisons, mental health facilities, immigration detention and many more. Given the serious impact of detention on a person's basic human rights, it is unsurprising that numerous bodies with overlapping jurisdiction inspect the various places where people are detained.

86. While there is significant variety in the issues that arise in Australian places of detention, there is also commonality – especially in the basic principles that guide how detention should take place. As a result, Australian jurisdictions sometimes assign overarching responsibility for detention policy and co-ordination to a single government department or agency, such as the Attorney-General's Department or Department of Prime Minister and Cabinet (or their state equivalents). Given that OPCAT presents opportunities to harmonise detention policy and move towards national best practice, there is a heightened need to focus on policy co-ordination and oversight in this area.

87. Assuming that each Australian jurisdiction assigns a department or agency with overarching policy responsibility, the question then becomes: which departments or agencies? The options include departments or agencies with primary responsibility for human rights, justice, corrections, health or central policy co-ordination.

88. In relation to the two most well-developed inspection bodies in Australia – the respective Inspectors of Custodial Services in Western Australia (WA) and New South Wales (NSW) – oversight rests with the WA Department of Justice and the NSW Department of Justice respectively. It should also be noted that in the UK, New Zealand and France, the justice ministry oversees policy matters relevant to OPCAT.

89. The Consultation Paper did not specifically ask which department or agency should have overarching responsibility for detention policy in each Australian

jurisdiction. However, the Commission raised this issue in its formal roundtable meetings and other consultations.

90. Stakeholders generally expressed a preference for the department or agency in each jurisdiction that has responsibility for overseeing human rights compliance and that has a broad mandate in relation to detention issues.¹³⁸ In most Australian jurisdictions, this would be the relevant justice or attorney-general's department, or the department of premier and cabinet.
91. Submissions did not generally express a view on the narrow question of which department or agency should co-ordinate OPCAT-related policy. However, several emphasised that good co-ordination between these government departments or agencies is vital.¹³⁹ This could occur through the Council of Australian Governments, noting that there are similar arrangements in federal states that have ratified OPCAT, such as Germany. Relatedly, some stakeholders suggested that an appropriate parliamentary committee (or committees) should oversee issues arising from OPCAT inspections.¹⁴⁰

Proposal 12

The Commission proposes that federal, state and territory governments assign overarching policy responsibility for OPCAT compliance and detention policy, as well as co-ordination, to the department or agency in each jurisdiction that has responsibility for overseeing human rights compliance and that has a broad mandate in relation to detention.

6. Immediate post-ratification focus

92. This Interim Report focuses on issues the Australian Government wishes to resolve prior to ratification. However, it is clear from the Commission's consultation process that there are actions that should be taken in the immediate post-ratification period to support implementation and build on the momentum created by the process of ratification.

93. Such actions could include:

- the establishment of a measurable timeframe for implementation, identifying key dates and milestones
- the comprehensive mapping of all places of detention and monitoring bodies by state and territory governments, including the identification of any changes that would have to be made to existing monitoring bodies to make them OPCAT compliant, a process that should be supported by the co-ordinating NPM
- the commencement of an education and awareness-raising program for the general public, relevant civil society organisations and also targeted at the entities and service providers that run places of detention
- engaging with all inspection bodies by the co-ordinating NPM

- early and informal engagement with the SPT, including to seek assistance during the implementation phase
- the establishment of an advisory panel of civil society experts to support the implementation of the NPM model
- the identification of data sources and gaps in data collection to support the development of any urgent thematic approaches that could be adopted by the co-ordinating NPM in the early phases of its operation.

Proposal 13

The Commission proposes that immediately after ratification, the Australian Government coordinate with state and territory governments to commence implementation of OPCAT, including by:

- **publicly releasing targets for implementation of the treaty which set out timeframes for achieving key milestones over the initial 3-year period**
- **completing a stocktake of all place of detention and monitoring bodies by state and territory governments**
- **conducting education and awareness raising about the implementation of OPCAT**
- **commencing engagement with the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT)**
- **establishing an advisory council for NPM activities**
- **identifying data sources, gaps and inconsistencies regarding detention in Australia.**

7. Further issues

94. As noted above, the focus of this Interim Report is on issues the Australian Government wishes to resolve prior to ratification. The second phase of the Commission's consultation will focus on a broader range of issues connected with implementing OPCAT in Australia.

95. The Commission's civil society consultation to date has helped to identify some of the issues that will be of primary importance in the second phase of the Commission's work. Those issues include:

- ensuring the protection of vulnerable detainees – especially children and young people, people with disability, Aboriginal and Torres Strait Islander people and immigration detainees
- whether facilities housing asylum seekers offshore, which have a significant connection to Australia, should fall within the scope of

Australia's OPCAT responsibilities. Civil society stakeholders expressed particular concern about the facilities at Nauru and Manus Island, Papua New Guinea

- the definition or scope of places of detention (eg whether aged-care facilities should be considered within the scope of OPCAT)
- Australian governments' processes for designating NPM bodies and their consultation with civil society on this issue
- ensuring good co-ordination between NPM bodies
- the identification of places of detention, as well as detention practices, where there is particular concern
- the need for ongoing engagement with civil society organisations and people with lived experience of detention
- the means to ensure OPCAT is implemented progressively
- issues that are of particular concern in specific states and territories
- the need for education that promotes human rights protection within detention places
- engagement with the SPT and interaction with the United Nations.

96. The Commission intends to address these and other issues in a second phase of consultation after ratification in December 2017.

¹ *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006). At <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx> (viewed 21 April 2017).

¹⁰ Commonwealth Attorney-General, 'Media Release - Improving oversight and conditions in detention', 9 February 2017. At <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FirstQuarter/Improving-oversight-and-conditions-in-detention.aspx> (viewed 7 April 2017).

¹¹ Commonwealth Attorney-General, 'Media Release - Improving oversight and conditions in detention', 9 February 2017. At <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FirstQuarter/Improving-oversight-and-conditions-in-detention.aspx> (viewed 7 April 2017).

¹² Commonwealth Attorney-General, 'Media Release - Improving oversight and conditions in detention', 9 February 2017. At <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FirstQuarter/Improving-oversight-and-conditions-in-detention.aspx> (viewed 7 April 2017).

¹³ See especially National Children's Commissioner, Australian Human Rights Commission, *Children's Rights Report 2016* (October 2016). Available at <http://www.humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-report-2016> (Viewed 24 August 2017).

¹⁴ National Children's Commissioner, Australian Human Rights Commission, *Children's Rights Report 2016* (October 2016). Available at <http://www.humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-report-2016> (Viewed 24 August 2017).

¹⁵ *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987). At

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=en (viewed 21 April 2017).

¹⁶ Australian Human Rights Commission, 'OPCAT in Australia' (Consultation Paper, May 2017). At <http://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/opcat-australia-consultation-paper-2017> (viewed 4 August 2017).

¹⁷ A list of submissions received is set out at Appendix 2.

¹⁸ Victorian Legal Aid, Submission No 4, 1; Advocacy for Inclusion, Submission No 6, 4; Royal Australian College of Physicians (RACP), Submission No 10, 1; Public Interest Advocacy Centre, Submission No 15, 1; Australian Lawyers for Human Rights, Submission No 16, 2; Refugee Council of Australia, Submission No 18, 1; Being, Submission No 19, 1; Association for the Prevention of Torture, Submission No 26, 1; Law Council of Australia, Submission No 27, 5; Victorian Equal Opportunity and Human Rights Commission, Submission No 28, 1; Public Health Association of Australia, Submission No 31, 4; Commission for Children and Young People (Victoria) Submission No 34, 1; Disabled People's Organisations Australia and People With Disabilities Australia, Submission No 38, 1; Liberty Victoria, Submission No 39, 1; Professor Bronwyn Naylor, Submission No 40, 1; Australian Child Rights Taskforce, Submission No 41, 1; Sisters Inside, Submission No 42, 2; Asylum Seekers Resource Centre, Submission No 43, 1; Jesuit Social Services (JSS), Submission No 46, 4; Legal Aid New South Wales, Submission No 48, 3; Australian Psychological Society, Submission No 32, 1.

¹⁹ Justice Action, Submission No 17, 2.

²⁰ Legal Aid NSW, Submission No 48, 3; Australian Lawyers for Human Rights, Submission No 16, 14; Victorian Equal Opportunity and Human Rights Commission, Submission No 28, 9; Jesuit Social Services, Submission No 46, 4; Association for the Prevention of Torture, Submission No 26, 1; Confidential Submission No 20, 2; Advocacy for Inclusion, Submission No 6, 1; Victoria Legal Aid, Submission No 4, 4; Alzheimer's Australia, Submission No 11, 1; Public Health Association of Australia, Submission No 31, 4; Australian Child Rights Taskforce, Submission No 41, 1; Commission for Children and Young People (Victoria), Submission No 34, 1.

²¹ Australia OPCAT Network, Submission No 44, 25; Public Interest Advocacy Centre, Submission No 15, 28; Victorian Equal Opportunity and Human Rights Commission, Submission No 28, 9; Law Council of Australia, Submission No 27, 42; Royal Australian College of Physicians, Submission No 10, 2; National Aboriginal and Torres Strait Islander Legal Services, Submission No 47, 18; Disabled People's Organisations Australia and People With Disabilities Australia, Submission No 38, 1, 64; Victoria Legal Aid, Submission No 4, 1; Sisters Inside, Submission No 42, 10; Public Health Association of Australia, Submission No 31, 10; Australian Psychological Society, Submission No 32, 14; Queensland Advocacy Incorporated (QAI), Submission No 9, 18; Australian Child Rights Taskforce, Submission No 41, 11; Commission for Children and Young People (Victoria), Submission No 34, 2.

²² Victorian Legal Aid, Submission No 4, 1; Advocacy for Inclusion, Submission No 6, 4; Townsville Community Legal Service Incorporated, Submission No 8, 2; Royal Australian College of Physicians (RACP), Submission No 10, 1; Submission 4 at 1; Public Interest Advocacy Centre, Submission No 15, 1; Australian Lawyers for Human Rights, Submission No 16, 2; Being, Submission No 19, 1; Law Council of Australia, Submission No 27, 5; Law Council of Australia, Submission No 27, 5; Victorian Equal Opportunity and Human Rights Commission, Submission No 28, 1; Public Health Association of Australia, Submission No 31, 4; Commission for Children and Young People (Victoria) Submission No 34, 1; Disabled People's Organisations Australia and People With Disabilities Australia, Submission No 38, 1; Liberty Victoria, Submission No 39, 1; Australian Child Rights Taskforce, Submission No 41, 1; Jesuit Social Services (JSS), Submission No 46, 4; Legal Aid New South Wales, Submission No 48, 3.

²³ Jesuit Social Services, Submission No 46, 13.

²⁴ See, for example Advocacy for Inclusion, Submission No 6, 4; Public Health Association of Australia, Submission No 31, 4; Queensland Family & Child Commission, Submission No 37, 5.

²⁵ See, for example: Victorian Legal Aid, Submission No 4, 1; Royal Australian College of Physicians (RACP), Submission No 10, 1; Public Interest Advocacy Centre, Submission No 15, 1; Association for the Prevention of Torture, Submission No 26, 1.

²⁶ See, for example Australian Child Rights Taskforce, Submission No 41, 1.

²⁷ See Appendix 1. See also Association for the Prevention of Torture, Submission No 26, 2; Australian Lawyers for Human Rights, Submission No 16, 7.

²⁸ Association for the Prevention of Torture, Submission No 26, 2; People with Disabilities Australia, Submission No 38, 21.

²⁹ Commonwealth Attorney-General, Senator the Hon George Brandis QC, '2017 DFAT-NGO Forum on Human Rights' (Speech delivered at 2017 DFAT-NGO Forum on Human Rights, National Museum₉

of Australia, Canberra, 9 February 2017). At <https://www.attorneygeneral.gov.au/Speeches/Pages/2017/FirstQuarter/2017-dfat-ngo-forum-on-human-rights-national-museum-of-australia-canberra.aspx> (viewed 4 August 2017).

³⁰ Australia OPCAT Network, Submission 44, 4; Being, Submission 19, 5; Public Health Association of Australia, Submission 15, 7; ACT Human Rights Commission, Submission No 13, 5, 7; Australian Child Rights Taskforce, Submission No 41, 2; Australian Psychological Society, Submission No 32, 12; Association for the Prevention of Torture, Submission No 26, 14; Commission for Children and Young People (Victoria), Submission No 34, 2, 4; Victorian Equal Opportunity and Human Rights Commission, Submission No 28, 8; Disabled People's Organisations Australia and People With Disabilities Australia, Submission No 38, 64; Australian Child Rights Taskforce, Submission No 41, 2.

³¹ Northern Territory Anti-Discrimination Commission, Submission 1, 1; Refugee Council of Australia, Submission 18, 3; ACT Human Rights Commission, Submission No 13, 6; Queensland Advocacy Incorporated, Submission No 9, 17; Australian Lawyers for Human Rights, Submission No 16, 12; Law Council of Australia, Submission No 27, 9.

³² Professor Bronwyn Naylor, Submission No 40, 4; Victorian Equal Opportunity and Human Rights Commission, Submission No 28, 8; National Aboriginal and Torres Strait Islander Legal Services, Submission No 47, 17; Commission for Children and Young People (Victoria), Submission No 34, 4; Victorian Ombudsman, Submission No 30, 2; Australian Lawyers for Human Rights, Submission No 16, 13; People with Disabilities Australia, Submission No 38, 57; Liberty Victoria, Submission No 39, 7; Asylum Seekers Resource Centre, Submission No 43, 3; Australian Child Rights Taskforce, Submission No 41, 10.

³³ Public Health Association of Australia, Submission 31, 6; Professor Bronwyn Naylor, Submission No 40, 1; Legal Aid New South Wales, Submission No 48, 3; Australian Lawyers for Human Rights, Submission No 16, 11; Victorian Equal Opportunity and Human Rights Commission, Submission No 28, 2; Jesuit Social Services, Submission No 46, 4; Being, Submission No 19, 4; Queensland Advocacy Incorporated (QAI), Submission No 9, 17.

³⁴ Australia OPCAT Network, Submission 44, 6; North Australian Aboriginal Justice Agency, Submission 45, 2; Sisters Inside, Submission 42, 4; Mental Health Commission of NSW, Submission 7, 4; Professor Bronwyn Naylor, Submission No 40, 3; Office of the Public Advocate, Submission No 14, 11; Criminal Lawyers Association of the Northern Territory, Submission 21, 1; Victorian Ombudsman, Submission No 30, 5; Legal Aid NSW, Submission No 48, 3; Public Interest Advocacy Centre, Submission No 15, 6; Association for the Prevention of Torture, Submission No 26, 3; People with Disabilities Australia, Submission No 38, 64; Disabled People's Organisations of Australia, Submission No 38, 3; Liberty Victoria, Submission No 39, 4; Asylum Seekers Resource Centre, Submission No 43, 2; Mental Health Commission of NSW, Submission No 7, 4; Australian Child Rights Taskforce, Submission No 41, 4; Mental Health Commission, Submission No 29, 1.

³⁵ Liberty Victoria, Submission No 39, 9; Professor Bronwyn Naylor, Submission No 40, 2; Australian Child Rights Taskforce, Submission No 41, 4; National Aboriginal and Torres Strait Islander Legal Services, Submission No 47, 3; Victorian Equal Opportunity and Human Rights Commission, Submission No 28, 4; Jesuit Social Services, Submission No 46, 14

³⁶ Public Interest Advocacy Centre, Submission No 15, 8; Public Health Association of Australia, Submission No 31, 5; Refugee Council of Australia, Submission No 18, 6; Queensland Family and Child Commission, Submission No 37, 2; Queensland Advocacy Incorporated, Submission No 9, 4, 9; Criminal Lawyers of the Northern Territory, Submission No 21, 1; Mental Health Commission, Submission No 29, 3.

³⁷ Australia OPCAT Network, Submission No 44, 7; Public Interest Advocacy Centre, Submission No 15, 7; Professor Bronwyn Naylor, Submission No 40, 4; ACT Human Rights Commission, Submission No 13, 4; Mental Health Advocacy Service, Submission No 12, 4; Legal Aid New South Wales, Submission No 48, 7; Commission for Children and Young People (Victoria), Submission No 34, 11; Law Council of Australia, Submission No 27, 14; Victoria Legal Aid, Submission No 4, 3.

³⁸ National Children's Commissioner, Australian Human Rights Commission, *Children's Rights Report 2016* (October 2016). Available at <http://www.humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-report-2016> (Viewed 24 August 2017).

³⁹ Australia OPCAT Network, Submission No 44, 8-9; Refugee Council of Australia, Submission No 18, 4; ACT Human Rights Commission, Submission No 13, 5; Law Council of Australia, Submission No 27, 13.

⁴⁰ Australia OPCAT Network, Submission No 44, 6; North Australian Aboriginal Justice Agency, Submission No 45, 2; Sisters Inside, Submission No 42, 3; Professor Bronwyn Naylor, Submission No 40, 3; Queensland Family and Child Commission, Submission No 37, 6; Mental Health Advocacy Service, Submission No 12, 4; Legal Aid New South Wales, Submission No 48, 5, 10; Australian Child Rights Taskforce, Submission No 41, 4; Australian Psychological Society, Submission No 32, 6;

Australian Lawyers for Human Rights, Submission No 16, 5; Association for the Prevention of Torture , Submission No 26, 4, 12; Australian Lawyers for Human Rights, Submission No 16, 10; Disabled People's Organisations Australia and People With Disabilities Australia, Submission No 38, 14.

⁴¹ North Australian Aboriginal Justice Agency , Submission No 45, 2; Sisters Inside, Submission No 42, 3; Australian Child Rights Taskforce, Submission No 41, 5; National Aboriginal and Torres Strait Islander Legal Services , Submission No 47, 5.

⁴² Australia OPCAT Network, Submission No 44, 6; Liberty Victoria, Submission No 39, 6, 7; Sisters Inside, Submission No 42, 3; Public Interest Advocacy Centre, Submission No 15, 8; Public Health Association of Australia , Submission No 31, 6; Refugee Council of Australia, Submission No 18, 4; Professor Bronwyn Naylor , Submission No 40, 2; Legal Aid New South Wales, Submission No 48, 3; Australian Psychological Society, Submission No 32, 6; Queensland Advocacy Incorporated, Submission No 9, 4; Association for the Prevention of Torture, Submission No 26, 11; People with Disabilities Australia , Submission No 38, 14, 25, 39.

⁴³ Liberty Victoria, Submission No 39, 6; Public Interest Advocacy Centre, Submission No 15, 8; Professor Bronwyn Naylor , Submission No 40, 3; ACT Human Rights Commission, Submission 13, 3; Mental Health Advocacy Service, Submission No 12, 3; Legal Aid New South Wales, Submission No 48, 5; Australian Psychological Society, Submission No 32, 6; Queensland Advocacy Incorporated, Submission No 9; Australian Lawyers for Human Rights, Submission No 16, 5; Law Council of Australia, Submission No 27, 10.

⁴⁴ Victorian Ombudsman, Submission No 30, 2; Australian Lawyers for Human Rights, Submission No 16, 12; Association for the Prevention of Torture , Submission No 26, 4; Legal Aid New South Wales, Submission No 48, 4; People with Disabilities Australia , Submission No 38, 14; Liberty Victoria, Submission No 39, 7, 9; Australian Psychological Society , Submission No 32, 6.

⁴⁵ Australia OPCAT Network, Submission No 44, 7; Liberty Victoria, Submission No 39, 8; Office of the Advocate for Children and Young People (ACYP), Submission No 20, 2; Queensland Family and Child Commission, Submission No 37, 6; Mental Health Advocacy Service, Submission No 12, 3; Legal Aid New South Wales, Submission No 48, 7; Victorian Equal Opportunity and Human Rights Commission , Submission No 28, 3; National Aboriginal and Torres Strait Islander Legal Services , Submission No 47, 6; Association for the Prevention of Torture , Submission No 26, 4; Association for the Prevention of Torture , Submission No 26, 13; Law Council of Australia, Submission No 27, 10; Australian Psychological Society , Submission No 32, 6.

⁴⁶ Public Interest Advocacy Centre, Submission No 15, 8,9; Queensland Family and Child Commission, Submission No 37, 6; Legal Aid New South Wales, Submission No 48, 7; Commission for Children and Young People (Victoria), Submission No 34, 5; Office of the Public Advocate, Submission No 14, 11; Mental Health Commission, Submission No 29, 3.

⁴⁷ Association for the Prevention of Torture, Submission No 26, 13; Australia OPCAT Network, Submission No 44, 12.

⁴⁸ Australia OPCAT Network, Submission No 44, 7; North Australian Aboriginal Justice Agency , Submission No 45, 3; Liberty Victoria, Submission No 39, 4, 9; Refugee Council of Australia, Submission No 18, 6; National Mental Health Commission (NHMC), Submission No 29, 4; Legal Aid New South Wales, Submission No 48, 7; Australian Child Rights Taskforce, Submission No 41, 5; Association for the Prevention of Torture , Submission No 26, 5, 8; Asylum Seekers Resource Centre, Submission 43, 3; Office of the Public Guardian (Qld), Submission No 36, 5; Commission for Children and Young People (Victoria), Submission No 34, 1; Australian Lawyers for Human Rights, Submission No 16, 5; Jesuit Social Services, Submission No 46, 5; Public Interest Advocacy Centre, Submission No 15, 23; Law Council of Australia, Submission No 27, 12; Disabled People's Organisations Australia and People With Disabilities Australia, Submission No 38, 14; Victoria Legal Aid, Submission No 4, 1.

⁴⁹ Victorian Equal Opportunity and Human Rights Commission, Submission No 28, 3; National Aboriginal and Torres Strait Islander Legal Services, Submission No 47, 6.

⁵⁰ National Aboriginal and Torres Strait Islander Legal Services , Submission No 47, 7; Commission for Children and Young People (Victoria), Submission No 34, 6, 13; Jesuit Social Services, Submission No 46, 6, 7; Law Council of Australia, Submission No 27, 12; Commission for Children and Young People (Victoria), Submission No 34, 6.

⁵¹ Disabled People's Organisations Australia, Submission No 38, 2; Advocacy for Inclusion, Submission No 6, 9.

⁵² Commission for Children and Young People (Victoria), Submission No 34, 6; Jesuit Social Services, Submission No 46, 6; Law Council of Australia, Submission No 27, 12; Australian Psychological Society , Submission No 32, 1, 16; Mental Health Commission, Submission No 29, 4.

⁵³ Australia OPCAT Network, Submission 44, 8; Liberty Victoria, Submission 39, 4; Sisters Inside, Submission 42, 3; Asylum Seeker Resource Centre , Submission 43, 2; Refugee Council of Australia, Submission 18, 4; Professor Bronwyn Naylor , Submission No 40, 4; National Mental Health

Commission (NHMC), Submission No 29, 1; Victorian Equal Opportunity and Human Rights Commission, Submission No 28, 9.

⁵⁴ OPCAT Australia Network, Submission No 44, 31; National Aboriginal and Torres Strait Islander Legal Services, Submission No 47, 8, 17; Public Interest Advocacy Centre, Submission No 15, 25; Association for the Prevention of Torture, Submission No 26, 9; Law Council of Australia, Submission No 27, 11; Mental Health Advocacy Service, Submission No 12, 4; Disabled People's Organisations Australia and People With Disabilities Australia, Submission No 38, 23.

⁵⁵ Australia OPCAT Network, Submission No 44, 33.

⁵⁶ National Aboriginal & Torres Strait Islander Legal Services, Submission No 47, 3, 17

⁵⁷ Asylum Seeker Resource Centre, Submission 43, 6; Mental Health Commission of NSW, Submission 7, 4; Refugee Council of Australia, Submission 18, 3; National Mental Health Commission (NHMC), Submission No 29, 1; Australian Child Rights Taskforce, Submission No 41, 4; Professor Bronwyn Naylor, Submission No 40, 9.

⁵⁸ National Mental Health Commission (NHMC), Submission No 29, 1; Australia OPCAT Network, Submission No 44, 8; Mental Health Commission of NSW, Submission No 7, 4.

⁵⁹ National Mental Health Commission (NHMC), Submission No 29, 1; Anonymous, Confidential Submission No 2, 2; Legal Aid New South Wales, Submission No 48, 5; Australian Child Rights Taskforce, Submission No 41, 10; Office of the Public Guardian (Qld), Submission No 36, 4; Queensland Advocacy Incorporated, Submission No 9, 9; Association for the Prevention of Torture, Submission No 26, 4; People with Disabilities Australia, Submission No 38, 29; Mental Health Commission, Submission No 29, 5; Confidential Submission No 2, 3.

⁶⁰ In the ACT, for example, there are regular oversight agency meeting relation to some of the larger places of detention. See ACT Human Rights Commission, Submission No 13, 3.

⁶¹ Victorian Equal Opportunity and Human Rights Commission, Submission No 28, 9; Public Interest Advocacy Centre, Submission No 15, 21; Disabled People's Organisations Australia and People With Disabilities Australia Submission No 38, 4; Being, Submission No 19, 1; Advocacy for Inclusion, Submission No 6, 8; Victoria Legal Aid, Submission No 4, 1; Queensland Family & Child Commission, Submission No 37, 1; Queensland Advocacy Incorporated (QAI), Submission No 9, 12.

⁶² Office of the Public Advocate, Submission No 14, 10; Mental Health Advocacy Service, Submission No 12, 5; Australian Child Rights Taskforce, Submission No 41, 10; Victorian Equal Opportunity and Human Rights Commission, Submission No 28, 9; Queensland Advocacy Incorporated, Submission No 9, 10; Australian Lawyers for Human Rights, Submission No 16, 8; Victorian Equal Opportunity and Human Rights Commission, Submission No 28, 3, 9; Public Interest Advocacy Centre, Submission No 15, 23; ACT Council of Social Service, Submission No 35, 3.

⁶³ Public Interest Advocacy Centre, Submission 15, 14; Refugee Council of Australia, Submission 18, 9; Victorian Equal Opportunity and Human Rights Commission, Submission No 28, 9; Commission for Children and Young People (Victoria), Submission No 34, 12; Victorian Equal Opportunity and Human Rights Commission, Submission No 28, 8, 9; Jesuit Social Services, Submission No 46, 15; Law Council of Australia, Submission No 27, 39; Disabled People's Organisation of Australia, Submission No 38, 2, 3; People with Disabilities Australia, Submission No 38, 9, 57. One stakeholder submitted that the role of civil society organisations should not be prescribed in any agreement: Sisters Inside, Submission No 42, 4; Australian Psychological Society, Submission No 32, 7, 12.

⁶⁴ ACT Human Rights Commission, Submission No 13, 4; Australian Child Rights Taskforce, Submission No 41, 4; Australian Psychological Society, Submission No 32, 7; Association for the Prevention of Torture, Submission No 26, 5; Queensland Family and Child Commission, Submission No 37, 6; Commission for Children and Young People (Victoria), Submission No 34, 5.

⁶⁵ Commonwealth Attorney-General, Senator the Hon George Brandis QC, '2017 DFAT-NGO Forum on Human Rights' (Speech delivered at 2017 DFAT-NGO Forum on Human Rights, National Museum of Australia, Canberra, 9 February 2017). At

<https://www.attorneygeneral.gov.au/Speeches/Pages/2017/FirstQuarter/2017-dfat-ngo-forum-on-human-rights-national-museum-of-australia-canberra.aspx> (viewed 4 August 2017).

⁶⁶ See, for example Association for the Prevention of Torture, Submission No 26, 2.

⁶⁷ Liberty Victoria, Submission 39, 9; ACT Council of Social Service, Submission 35, 4; ACT Human Rights Commission, Submission No 14, 5; Association for the Prevention of Torture, Submission No 26, 3; Victorian Ombudsman, Submission No 30, 5; Australian Lawyers for Human Rights, Submission No 16, 13; Association for the Prevention of Torture, Submission No 26, 3; People with Disabilities Australia, Submission No 38, 57; ACT Council of Social Services, Submission No 35, 4

⁶⁸ Australian Lawyers for Human Rights, Submission No 16, 7; Association for the Prevention of Torture, Submission No 26, 4; Commission for Children and Young People (Victoria), Submission No 34, 12.

⁶⁹ Association for the Prevention of Torture , Submission No 26, 3, 14; Law Council of Australia, Submission No 27, 11

⁷⁰ Victorian Ombudsman, Submission No 30, 4

⁷¹ Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) (National Uniform Legislation) Bill 2013 (Northern Territory).

⁷² Department of the Attorney-General and Justice, Northern Territory Government, *Consultation paper for the purposes of the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) (National Uniform Legislation) Bill 2013 (Northern Territory)* (May 2013). Available at <https://justice.nt.gov.au/attorney-general-and-justice/law/opcat-monitoring-of-places-of-detention> (viewed 22 August 2017).

⁷³ Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2017 (Australian Capital Territory).

⁷⁴ However, one submission stated that the Federal Government should have ultimate funding responsibility for the NPM: Disabled People's Organisations Australia and People With Disabilities Australia, Submission No 38, 49.

⁷⁵ See **Appendix 1** for a summary of how New Zealand, the UK, France and Germany has each approached this issue.

⁷⁶ Northern Territory Anti-Discrimination Commission, Submission No 1, 3; ACT Human Rights Commission, Submission No 13, 3-4; Public Interest Advocacy Centre , Submission No 15, 28; Australian Lawyers for Human Rights , Submission No 16, 5; Association for the Prevention of Torture , Submission No 26, 4-5; Law Council of Australia , Submission No 27, 10; Victorian Equal Opportunity and Human Rights Commission , Submission No 28, 3; National Mental Health Commission , Submission No 29, 3; The Australian Psychological Society Limited , Submission No 32, 6; Disabled People's Organisations Australia and People With Disabilities Australia, Submission No 38, 55; Liberty Victoria, Submission No 39, 10; Sisters Inside, Submission No 42, 4; Australia OPCAT Network, Submission No 44, 39; Legal Aid New South Wales, Submission No 48, 5.

⁷⁷ Confidential Submission No 2, 2-3; Queensland Advocacy Incorporated (QAI), Submission No 9, 9; ACT Human Rights Commission, Submission No 13, 3; Refugee Council of Australia, Submission No 18, 7; Association for the Prevention of Torture , Submission No 26, 5; Victorian Equal Opportunity and Human Rights Commission , Submission No 28, 3; Queensland Family & Child Commission, Submission No 37, 4.

⁷⁸ Confidential Submission No 2, 2-3; Queensland Advocacy Incorporated (QAI), Submission No 9, 10; Public Interest Advocacy Centre , Submission No 15, 21; Australian Lawyers for Human Rights , Submission No 16, 5; Association for the Prevention of Torture , Submission No 26, 5; Law Council of Australia , Submission No 27, 12; The Australian Psychological Society Limited , Submission No 32, 6; NSW Ombudsman, Submission No 33, 1; Commission for Children and Young People (Victoria), Submission No 34, 1, 4; Office of the Public Guardian (QLD), Submission No 36, 5; Disabled People's Organisations Australia and People With Disabilities Australia, Submission No 38, 59.

⁷⁹ ACT Human Rights Commission, Submission No 13, 3; Public Interest Advocacy Centre, Submission No 15, 9; Disabled People's Organisations Australia and People With Disabilities Australia, Submission No 38, 59; Liberty Victoria, Submission No 39, 9.

⁸⁰ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on National Preventive Mechanisms*, 12th Session, UN Doc CAT/OP/12/5 (9 December 2010) 4. At <http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/NationalPreventiveMechanisms.aspx> (viewed 24 August 2017).

⁸¹ Royal Australian College of Physicians (RACP), Submission No 10, 1; Mental Health Advocacy Service (Western Australia), Submission No 12, 4; Public Interest Advocacy Centre , Submission No 15, 29; Australian Lawyers for Human Rights , Submission No 16, 5, 9-10; Refugee Council of Australia, Submission No 18, 7-8; Association for the Prevention of Torture , Submission No 26, 12; Law Council of Australia , Submission No 27, 10-11; Victorian Equal Opportunity and Human Rights Commission , Submission No 28, 3; The Australian Psychological Society Limited , Submission No 32, 6; NSW Ombudsman, Submission No 33, 1; Liberty Victoria, Submission No 39, 9.

⁸² Public Interest Advocacy Centre , Submission No 15, 9, 29; Association for the Prevention of Torture , Submission No 26, 4; Law Council of Australia , Submission No 27, 10-11; National Mental Health Commission , Submission No 29, 1; Public Health Association of Australia , Submission No 31, 5; Australia OPCAT Network, Submission No 44, 6-9; Commission for Children and Young People (Victoria), Submission No 34, 5; Queensland Family & Child Commission, Submission No 37, 6; Disabled People's Organisations Australia and People With Disabilities Australia, Submission No 38, 59.

⁸³ Northern Territory Anti-Discrimination Commission, Submission No 1, 3; Mental Health Commission of New South Wales, Submission No 7, 3-4; Public Interest Advocacy Centre, Submission No 15, 8; Australian Lawyers for Human Rights, Submission No 16, 10; Law Council of Australia, Submission No 27, 13; Commission for Children and Young People (Victoria), Submission No 34, 5; Legal Aid New South Wales, Submission No 48, 5.

⁸⁴ ACT Human Rights Commission, Submission No 13, 3; Law Council of Australia, Submission No 27, 13-14; Liberty Victoria, Submission No 39, 9; North Australian Aboriginal Justice Agency, Submission No 45, 3.

⁸⁵ See, for example Association for the Prevention of Torture, Submission No 26, 6; Legal Aid New South Wales, Submission No 48, 6-10.

⁸⁶ Queensland Advocacy Incorporated (QAI), Submission No 9, 10, 17; Mental Health Advocacy Service (Western Australia), Submission No 12, 3; Office of the Public Advocate, Submission No 14, 10; Public Interest Advocacy Centre, Submission No 15, 21, 26-27; Refugee Council of Australia, Submission No 18, 6; Being, Submission No 19, 4-5; Association for the Prevention of Torture, Submission No 26, 7-8; Law Council of Australia, Submission No 27, 39; Victorian Equal Opportunity and Human Rights Commission, Submission No 28, 3; Public Health Association of Australia, Submission No 31, 8; Queensland Family & Child Commission, Submission No 37, 10; Disabled People's Organisations Australia and People With Disabilities Australia, Submission No 38, 1-2, 55-56; Australian Child Rights Taskforce, Submission No 41, 10.

⁸⁷ Refugee Council of Australia, Submission No 18, 3; National Mental Health Commission, Submission No 29, 7; The Australian Psychological Society Limited, Submission No 32, 12; NSW Ombudsman, Submission No 33, 1; Commission for Children and Young People (Victoria), Submission No 34, 12; ACT Council of Social Service, Submission No 35, Attachment A; Australian Child Rights Taskforce, Submission No 41, 9-10.

⁸⁸ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National report* (1991) vol 3, 291 and vol 5 [Recommendation 165].

⁸⁹ John Taylor, 'Coroner finds prisoner access to hanging point 'tragic' after royal commission recommended removal', ABC News (online), 29 May 2015. At <http://www.abc.net.au/news/2015-05-28/queensland-coroner-finds-prisoner-death-near-ipswich-tragic/6503814> (viewed 4 August 2017); Inga Ting, Deaths in custody: authorities ignore warnings on hanging points, Crikey (online), 15 June 2011. At <https://www.crikey.com.au/2011/06/15/deaths-in-custody-authorities-ignore-warnings-on-hanging-points/> (viewed 4 August 2017). But see James Haughton, *The 25th Anniversary of the Royal Commission into Aboriginal Deaths in Custody* (15 April 2016) Flagpost, Parliamentary Library, Parliament of Australia. At

http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2016/April/RCADIC-25 (viewed 4 August 2017); Edith Bevan, 'Shan Tennent, first woman to be appointed Supreme Court Judge in Tasmania, to retire', ABC News (online), 2 April 2017. At <http://www.abc.net.au/news/2017-04-03/shan-tennent-tasmanian-supreme-court-judge-to-retain/8412050> (viewed 4 August 2017).

⁹⁰ Joint Standing Committee on Treaties, Parliament of Australia, *Report 125: Review into Treaties tabled on 7 and 28 February 2012* (2012) [6.8].

⁹¹ Public Interest Advocacy Centre, Submission No 15, 28; Disabled People's Organisations Australia and People With Disabilities Australia, Submission No 38, 49; Australia OPCAT Network, Submission No 44, 39.

⁹² Julia Black, *Principles Based Regulation: Risks, Challenges and Opportunities* (2007) London School of Economics and Political Science, 3. At <http://eprints.lse.ac.uk/62814/> (viewed 4 August 2017).

⁹³ See, for example Australasian Juvenile Justice Administrator's *Juvenile Justice Standards* (2009) and *Principles of Youth Justice in Australia* (2014); Australian Children's Commissioners and Guardians, *Human rights standards in youth detention facilities in Australia: the use of restraint, disciplinary regimes and other specified practices* (2016).

⁹⁴ Australian Institute of Criminology, *Standard Guidelines for Corrections in Australia* (revised 2012). At http://www.aic.gov.au/media_library/aic/research/corrections/standards/aust-stand_2012.pdf (viewed 24 August 2017).

⁹⁵ See, for example Advocacy for Inclusion, Submission No 6, 7; Alzheimer's Australia, Submission No 11, 3-4; Public Interest Advocacy Centre, Submission No 15; Refugee Council of Australia, Submission No 18, 5; Queensland Family & Child Commission, Submission No 37, 6; Professor Bronwyn Naylor, Submission No 40, 4; Australian Child Rights Taskforce, Submission No 41, 3.

⁹⁶ See, for example Professor Bronwyn Naylor, Submission No 40, 4; Australian Child Rights Taskforce, Submission No 41, 2.

⁹⁷ As noted at the Australian Human Rights Commission roundtables on the implementation of OPCAT in Australia: Canberra (1 June 2017), Melbourne (5 June 2017), Sydney (8 June 2017) and Adelaide (24 July 2017).

⁹⁸ Public Interest Advocacy Centre, Submission No 15, 13; National Mental Health Commission, Submission No 29, 3; The Australian Psychological Society Limited, Submission No 32, 6.

⁹⁹ Refugee Council of Australia, Submission No 18, 4; Law Council of Australia, Submission No 27, 11; The Australian Psychological Society Limited, Submission No 32, 6; Queensland Family & Child Commission, Submission No 37, 6; Professor Bronwyn Naylor, Submission No 40, 4; Australian Child Rights Taskforce, Submission No 41, 3.

¹⁰⁰ Advocacy for Inclusion, Submission No 6, 7.

¹⁰¹ Advocacy for Inclusion, Submission No 6, 8; Public Interest Advocacy Centre, Submission No 15, 26; Queensland Family & Child Commission, Submission No 37, 6.

¹⁰² Refugee Council of Australia, Submission No 18, 5; Victorian Equal Opportunity and Human Rights Commission, Submission No 28, 7-8.

¹⁰³ Advocacy for Inclusion, Submission No 6, 8; Refugee Council of Australia, Submission No 18, 5; Law Council of Australia, Submission No 27, 42; Professor Bronwyn Naylor, Submission No 40, 4; Australian Child Rights Taskforce, Submission No 41, 4; Sisters Inside, Submission No 42, 10. One stakeholder said that these proposed national standards should be derived wholly from international human rights law: Sisters Inside, Submission No 42, 10.

¹⁰⁴ See, for example Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on National Preventive Mechanisms*, 12th Session, UN Doc CAT/OP/12/5 (9 December 2010). At

<http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/NationalPreventiveMechanisms.aspx> (viewed 24 August 2017); Association for Prevention of Torture, *Monitoring places of detention - a practical guide* (April 2004); Australian Human Rights Commission, *Human rights standards for immigration detention* (2013).

¹⁰⁵ Advocacy for Inclusion, Submission No 6, 6-7; Queensland Advocacy Incorporated (QAI), Submission No 9, 4-7; Alzheimer's Australia, Submission No 11, 3-4; Public Interest Advocacy Centre, Submission No 15, 16; National Mental Health Commission, Submission No 29, 3-5; The Australian Psychological Society Limited, Submission No 32, 9-12; Australian Child Rights Taskforce, Submission No 41, 2, 8.

¹⁰⁶ Public Interest Advocacy Centre, Submission No 15, 13; Australian Child Rights Taskforce, Submission No 41, 3.

¹⁰⁷ Advocacy for Inclusion, Submission No 6, 6-7; Queensland Advocacy Incorporated (QAI), Submission No 9, 11, 16-17; Alzheimer's Australia, Submission No 11, 3-4; Office of the Public Advocate, Submission No 14, 8-9; Public Interest Advocacy Centre, Submission No 15, 13, 17-19; National Mental Health Commission, Submission No 29, 4; The Australian Psychological Society Limited, Submission No 32, 7; Office of the Public Guardian (QLD), Submission No 36, 5; Queensland Family & Child Commission, Submission No 37, 7; Australian Child Rights Taskforce, Submission No 41, 3.

¹⁰⁸ Australian Child Rights Taskforce, Submission No 41, 4.

¹⁰⁹ Public Interest Advocacy Centre, Submission No 15, 13.

¹¹⁰ Queensland Advocacy Incorporated (QAI), Submission No 9, 11; Public Interest Advocacy Centre, Submission No 15, 14; Australian Child Rights Taskforce, Submission No 41, 3.

¹¹¹ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on National Preventive Mechanisms*, 12th Session, UN Doc CAT/OP/12/5 (9 December 2010) 7. At

<http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/NationalPreventiveMechanisms.aspx> (viewed 24 August 2017).

¹¹² Australia OPCAT Network, Submission No 44, 11; Victorian Equal Opportunity and Human Rights Commission, Submission No 28, 2, 3; National Aboriginal and Torres Strait Islander Legal Services, Submission No 47, 6; Public Interest Advocacy Centre, Submission No 15, 11; Association for the Prevention of Torture, Submission No 26, 6; Law Council of Australia, Submission No 27, 26; Northern Australian Aboriginal Justice Agency, Submission No 45, 3; National Mental Health Commission, Submission No 29, 3; Professor Bronwyn Naylor, Submission No 40, 5; Queensland Family & Child Commission, Submission No 37, 4; Sisters Inside, Submission No 42, 4; Public Health Association of Australia, Submission No 31, 8; Asylum Seekers Resource Centre, Submission No 43, 7; Queensland Advocacy Incorporated (QAI), Submission No 9, 11; Refugee Council of Australia, Submission No 18, 9; Australian Child Rights Taskforce, Submission No 41, 2, 6; Mental Health Commission, Submission No 29, 3.

¹¹³ UN Subcommittee for the Prevention of Torture, *Visit to the Netherlands for the purpose of providing advisory assistance to the national preventive mechanism: recommendations and observations addressed to the State party*, CAT/OP/NLD/1, (2016) [24]-[26].

¹¹⁴ Australia OPCAT Network, Submission No 44, 11; Victorian Equal Opportunity and Human Rights Commission, Submission No 28, 3; Public Interest Advocacy Centre, Submission No 15, 11; National Mental Health Commission, Submission No 29, 3; National Aboriginal and Torres Strait Islander Legal Services, Submission No 47, 6; Professor Bronwyn Naylor, Submission No 40, 9; Public Health Association of Australia, Submission No 31, 10; Asylum Seekers Resource Centre, Submission No 43, 7; Refugee Council of Australia, Submission No 18, 9.

¹¹⁵ Australia OPCAT Network, Submission No 44, 11; Victorian Equal Opportunity and Human Rights Commission, Submission No 28, 3; Public Interest Advocacy Centre, Submission No 15, 11; National Mental Health Commission, Submission No 29, 3; National Aboriginal and Torres Strait Islander Legal Services, Submission No 47, 6; Queensland Family and Child Commission, Submission No 37, 4; Public Health Association of Australia, Submission No 31, 8; Asylum Seekers Resource Centre, Submission No 43, 7.

¹¹⁶ A number of submissions, for example, noted that it is vital for adequate representation of Aboriginal and Torres Strait Islander people within the NPM structure. North Australian Aboriginal Justice Agency, Submission No 45, 4; Law Council of Australia, Submission No 27, 12; National Aboriginal and Torres Strait Islander Legal Services, Submission No 47, 6.

¹¹⁷ See, for example Australia OPCAT Network, Submission No 44, 11.

¹¹⁸ Victorian Equal Opportunity and Human Rights Commission, Submission No 28, 3; National Mental Health Commission, Submission No 29, 3; Asylum Seekers Resource Centre, Submission No 43, 7; Refugee Council of Australia, Submission No 18, 9.

¹¹⁹ Australia OPCAT Network, Submission No 44, 11; Victorian Equal Opportunity and Human Rights Commission, Submission No 28, 3; Public Interest Advocacy Centre, Submission No 15, 11; National Aboriginal and Torres Strait Islander Legal Services, Submission No 47,6; Queensland Family & Child Commission, Submission No 37, 4; Asylum Seekers Resource Centre, Submission No 43, 7.

¹²⁰ Australia OPCAT Network, Submission No 44, 13; National Aboriginal and Torres Strait Islander Legal Services, Submission No 47, 6.

¹²¹ This is required by Articles 11 and 20 of OPCAT. Australia OPCAT Network, Submission No 44, 12; Association for the Prevention of Torture, Submission No 26, 9; Law Council of Australia, Submission No 27, 26; National Aboriginal and Torres Strait Islander Legal Services, Submission No 47, 6.

¹²² Association for the Prevention of Torture, Submission No 26, 6; Australia OPCAT Network, Submission No 44, 16; National Aboriginal and Torres Strait Islander Legal Services, Submission No 47, 6; Refugee Council of Australia, Submission No 18, 9.

¹²³ Australia OPCAT Network, Submission No 44, 16.

¹²⁴ Australia OPCAT Network, Submission No 44, 12; Law Council of Australia, Submission No 27, 11; National Aboriginal and Torres Strait Islander Legal Services, Submission No 47, 7; Disabled People's Organisations of Australia, Submission No 38, 3.

¹²⁵ Australia OPCAT Network, Submission No 44; Law Council of Australia, Submission No 27, 11; People with Disabilities Australia, Submission No 38, 58; Professor Bronwyn Naylor, Submission No 40, 3.

¹²⁶ UK National Preventative Mechanism, Submission No 69 to the Justice Committee of the Justice Committee of the House of Commons of the United Kingdom Parliament, *Prison Reform*, 23 January 2017. At

https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/1150/115008.htm#_idTextAnchor034 (viewed 17 August 2017).

¹²⁷ OPCAT Australia Network, Submission No 44, 16; Victorian Equal Opportunity and Human Rights Commission, Submission No 28, 3; Public Interest Advocacy Centre, Submission No 15, 12.

¹²⁸ Article 1 OPCAT.

¹²⁹ Commonwealth Attorney-General, 'Media Release - Improving oversight and conditions in detention', 9 February 2017. At

<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FirstQuarter/Improving-oversight-and-conditions-in-detention.aspx> (viewed 7 April 2017).

¹³⁰ National Mental Health Commission, Submission No 29, 4; Office of the Public Advocate, Submission No 14, 4; Townsville Community Service Inc (TCLS), Submission No 8, 3; Victoria Legal Aid, Submission No 4, 2; Office of the Public Guardian, Submission No 36, 6. One stakeholder did not consider that aged care facilities do not necessarily fall within scope, but noted that certain practices in these settings, including the use of restraints, would require OPCAT oversight: Alzheimer's Australia, Submission No 11, 7; Australian Psychological Society, Submission No 32, 7.

¹³¹ National Mental Health Commission, Submission No 29, 4, 5; Mental Health Advocacy Service, Submission No 12, 4; Law Council of Australia, Submission No 27, 8; Law Council of Australia, Submission No 27, 20; Being, Submission No 19, 2.

¹³² Office of the Public Advocate, Submission No 14, 4; People with Disability Australia, Submission No 38, 13, 50; Disabled People's Organisations Australia, Submission No 38, 2; Victoria Legal Aid, Submission No 4, 2; Queensland Advocacy Incorporated (QAI), Submission No 9, 12.

¹³³ Mental Health Advocacy Service, Submission No 12, 3, 4; Disabled People's Organisations Australia, Submission No 38, 2; Victoria Legal Aid, Submission No 4, 2.

¹³⁴ OPCAT Australia Network, Submission No 44, 17; Law Council of Australia, Submission No 27, 40.

¹³⁵ Public Interest Advocacy Centre, Submission No 15, 9, 14; Refugee Council of Australia, Submission No 18, 11; Australian Psychological Society, Submission No 32, 6; Australian Psychological Society, Submission No 32, 12; Queensland Advocacy Incorporated, Submission No 9, 10.

¹³⁶ Public Health Association, Submission No 31, 8; Queensland Family and Child Commission, Submission No 37, 10; Mental Health Advocacy Service, Submission No 12, 6; Australian Child Rights Taskforce, Submission No 41, 10; Australian Psychological Society, Submission No 32, 12; Australian Lawyers for Human Rights, Submission No 16, 5; Association for the Prevention of Torture, Submission No 26, 7.

¹³⁷ ACT Human Rights Commission, Submission No 13, 6; Association for the Prevention of Torture, Submission No 26, 5, 7.

¹³⁸ As noted at the Australian Human Rights Commission/Asia Pacific Forum roundtables on the implementation of OPCAT in Australia: Canberra (1 June 2017), Melbourne (5 June 2017), Sydney (8 June 2017) and Adelaide (24 July 2017).

¹³⁹ ACT Human Rights Commission, Submission No 13, 4, 7; Australian Lawyers for Human Rights, Submission No 16, 12-13; Association for the Prevention of Torture, Submission No 26, 9; Law Council of Australia, Submission No 27, 40; The Australian Psychological Society Limited, Submission No 32, 13; Queensland Family & Child Commission, Submission No 37, 4.

¹⁴⁰ Public Interest Advocacy Centre, Submission No 15, 25; Refugee Council of Australia, Submission No 18, 13.

Appendix 1– Comparison with other OPCAT jurisdictions

This table summarises the respective approaches of New Zealand, the United Kingdom, France and Germany in implementing OPCAT.

Question	New Zealand	United Kingdom	France	Germany
Question 1: What is this country's overarching NPM model?	<p>National, multiple body NPM framework</p> <p>NZ Human Rights Commission co-ordinates four other NPM bodies that have specific mandates: the Independent Police Conduct Authority; the Office of the Children's Commissioner; the Office of the Ombudsman; and the Inspector of Service Penal Establishments.</p>	<p>A single national body co-ordinating the work of multiple statutory bodies.</p> <p>Her Majesty's Inspectorate of Prisons carries out the co-ordination and communication function of the NPM.</p> <p>21 organisations throughout England, Scotland Wales and Northern Ireland comprise the NPM.</p>	<p>Single national body – 'Contrôleur Général des Lieux de Privation de Liberté' (General Controller of places of deprivation of liberty) (CGLPL)</p>	<p>National body – constituted by two monitoring bodies operating at a Federal and State level.</p> <p>The two monitoring bodies are the Federal Agency for the Prevention of Torture (Federal Agency) and the Joint Commission of the States (Commission). Together they constitute the National Agency for the Prevention of Torture (Nationale Stelle zur Verhütung von folter) (National Agency).</p>
Question 2: How are NPM activities resourced? Does the national government pay for the inspection functions, or are these costs shared by the national/provincial governments?	<p>The five NPM bodies (four monitoring NPM bodies and one co-ordinating NPM body) are funded by the NZ Ministry of Justice.</p>	<p>England – Ministry of Justice, Home Office.</p> <p>Scotland, Northern Ireland and Wales – funded by devolved administration (national Parliaments) with</p>	<p>Funded by the national government.</p>	<p>One third of the National Agency's funds are provided by the Federation and two thirds are provided by the States.</p> <p>Funds are administered and allocated to the Commission and the Federal Agency by the Ministry of Justice,</p>

Question	New Zealand	United Kingdom	France	Germany
		some funding from the Home Office.		Integration and European Affairs.
<p>Question 3: Did this country undertake a process to develop national standards regarding:</p> <p>(a) how inspections of places of detention should take place; and</p> <p>(b) the minimum conditions necessary in places of detention to comply with relevant human rights obligations?</p>	<p>There are no uniform national standards in respect of inspection procedures and minimum conditions. However, the NZ Human Rights Commission adapted international standards (such as UN guidelines) to produce a chart of standards given to each of the NPM bodies. Each NPM has tailored these to the institutions they visit. There is a substantial level of interaction and consultation between the various NPM bodies in formulating their relevant 'standards'.</p>	<p>Each NPM body has different monitoring responsibilities depending on the detention setting. The minimum conditions will also depend on the detention setting.</p> <p>HMIP has published 'Expectations' – ie the standards of treatment and conditions expected of a custodial establishment. They refer to international human rights standards and the regulations by which the establishment is run. It includes expectations for: prisons, children & young people, Close Supervision Centres, immigration detention, police custody, court custody, UK Armed Forces, and Border Force.</p>	<p>Implemented through national legislation (loi 2007/1545) and drawing on decisions by the European Court of Human Rights, relevant French laws, as well as the <i>Declaration of the Rights of Man and of the Citizen of 1789</i></p>	<p>No uniform national standards. The Federal Agency has had regard to relevant domestic case law, the case law of the European Court of Human Rights and the recommendations of the CPT and the SPT. It has also consulted with NGOs and detention facilities.</p>
<p>Question 4: Did the country pass national, state/provincial legislation to implement OPCAT into domestic law and practice? If so, what did the legislation broadly cover? If not, did this country undertake a different</p>	<p>New Zealand passed national legislation to implement OPCAT into domestic law.</p>	<p>Designation of NPM was by way of Ministerial statement.</p> <p>Subsequent legislation has dealt with the specific powers</p>	<p>The OPCAT Ratification Law was approved by the Senate on 30 July 2008.</p> <p>On 17 December 2008, President Sarkozy passed a decree whereby the text of</p>	<p>An "approval statute" (which renders international laws binding under German national law) was passed by the Bundestag on 26 August 2008, implementing OPCAT in its entirety</p>

Question	New Zealand	United Kingdom	France	Germany
<p>process to ensure that OPCAT would be complied with?</p>	<p>Legislation passed in 2006 amended the <i>Crimes of Torture Act 1989 (COTA)</i>.</p>	<p>of NPM and the implementation of OPCAT.</p>	<p>the protocol officially became the law of France.</p>	
<p>Question 5: In this country, which government bodies have policy oversight for issues arising through the detention inspection process?</p>	<p>The New Zealand Ministry of Justice, as the co-ordinating government agency, has oversight for issues arising through the detention inspection process.</p> <p>Representatives of the Ministry of Justice have monthly meetings with the NPM, and the Ministry also assists to follow up recommendations of the NPM bodies.</p> <p>The Commission and the other designated NPM bodies also make submissions to Parliament on draft legislation.</p>	<p>England and Wales: Ministry of Justice</p> <p>Scotland: Cabinet Secretary for Justice</p> <p>Northern Ireland: Department of Justice</p>	<p>The Ministry for Justice.</p>	<p>The National Agency makes recommendations in reports created after each visit and these are presented to the relevant controlling federal or state authority, as well as the individual facility visited.</p>

Appendix 2 – Submissions received

The following organisations and individuals made submissions to the Commission. Non-confidential submissions have been published on the Commission website¹⁴¹ in accordance with the Commission's Submission Policy.¹⁴²

1. Northern Territory Anti-Discrimination Commission
2. CONFIDENTIAL
3. Dr Niall McLaren
4. Victorian Legal Aid
5. Arthur Marcel
6. Advocacy for Inclusion
7. Mental Health Commission of NSW
8. Townsville Community Legal Service Inc.
9. Queensland Advocacy Incorporated
10. Royal Australian College of Physicians
11. Alzheimer's Australia
12. Mental Health Advocacy Service (WA)
13. ACT Human Rights Commission
14. Office of the Public Advocate
15. Public Interest Advocacy Centre
16. Australian Lawyers for Human Rights
17. Justice Action
18. Refugee Council of Australia
19. Being
20. CONFIDENTIAL
21. Criminal Lawyers Association of the Northern Territory
22. CONFIDENTIAL
23. Ms Initially No
24. Glenn Floyd
25. Johnnybe Realgood
26. Association for the Prevention of Torture
27. Law Council of Australia
28. Victorian Equal Opportunity and Human Rights Commission
29. National Mental Health Commission
30. Victorian Ombudsman
31. Public Health Association of Australia
32. The Australian Psychological Society Limited
33. NSW Ombudsman
34. Commission for Children and Young People (Victoria)
35. ACT Council of Social Service
36. Office of the Public Guardian (QLD)
37. Queensland Family & Child Commission
38. Disabled People's Organisations Australia and People With Disabilities Australia
39. Liberty Victoria
40. Professor Bronwyn Naylor
41. Australian Child Rights Taskforce: UNICEF Australia; Human Rights Law Centre; NATSILS; SNAICC; James McDougall; National Children's and Youth Law Centre
42. Sisters Inside
43. Asylum Seekers Resource Centre
44. Australia OPCAT Network (signatories listed below)
45. North Australian Aboriginal Justice Agency
46. Jesuit Social Services

47. National Aboriginal & Torres Strait Islander Legal Services
48. Legal Aid New South Wales

OPCAT Network Signatories

Organisations

1. Amnesty International Australia
2. Australian Association of Social Workers
3. Australian Council of Social Service
4. Australian Child Rights Taskforce
5. Australian College of Mental Health Nurses
6. Advocacy for Inclusion, ACT
7. Anglicare Australia
8. Asylum Seeker Advocacy Group
9. Being – Mental Health & Wellbeing Consumer Advisory Group
10. Civil Liberties Australia
11. Community Mental Health Australia
12. Disabled People's Organisations Australia
13. Doctors for Refugees
14. Federal Loves Refugees
15. Human Rights Law Centre
16. Human Rights Council of Australia
17. Jesuit Social Services
18. National Aboriginal and Torres Strait Islander Legal Services
19. National Ethnic Disability Alliance
20. National Justice Project
21. NSW Council for Civil Liberties
22. Public Health Association of Australia
23. People With Disability Australia
24. Queensland Advocacy Incorporated
25. Refugee Council of Australia
26. St Vincent de Paul Society National Council
27. Women With Disabilities Australia

Individuals

1. Allan Asher
2. Dr Bijou Blick
3. Danielle Celermajer, Prof of Sociology and Social Policy, University of Sydney
4. Nick Collyer
5. Prof Caroline de Costa, Obstetrics and Gynaecology, James Cook University College of Medicine
6. Corinne Dobson
7. Dr Helen Driscoll, Consultant Child and Adult Psychiatrist
8. Dr Michael Dudley, co-chair of the Asylum Seeker Advocacy Group; UNSW School of Psychiatry
9. Prof Elizabeth Elliott, Prof of Paediatrics and Child Health, Sydney Medical School, University of Sydney; NHMRC Practitioner Fellow; Director, Australian Paediatric Surveillance Unit
10. Dr John Falzon, CEO, St Vincent de Paul Society National Council
11. Paula Farrugia
12. Adam Fletcher, Lecturer, Graduate School of Business and Law, RMIT
13. Kirsten Gibbs
14. Dr Michael Gliksman
15. Adj Assoc Prof Amanda Gordon, Clinical Psychology, University of Canberra

16. Dr Hasantha Gunasekera, Sub-Dean and paediatrician, CHW Clinical School, University of Sydney
17. Dorothy Hoddinott AO
18. Prof David Isaacs, Clinical Professor, Paediatrics and Child Health, Children's Hospital, Westmead
19. Prof Jon Jureidini, Critical and Ethical Mental Health research group, Robinson Research Institute, University of Adelaide
20. Dr Nick Kowalenko
21. Prof Michael Levy, Public health and clinical forensic physician
22. Dr Sarah Mares, Infant Child and Family Psychiatrist; Conjoint senior lecturer, School of Psychiatry, UNSW
23. Alanna Maycock; Clinical Nurse Consultant
24. Peta Marks
25. Rebecca Minty
26. George Newhouse; Principal Solicitor, National Justice Project; Adj Prof of Law at Macquarie University
27. Prof Louise Newman AM, co-chair of the Asylum Seeker Advocacy Group; Director, Centre for Women's Mental Health, The Royal Women's Hospital
28. Michelle O'Flynn
29. Dr Barri Phatarfod, Convenor, Doctors for Refugees
30. Emma Phillips
31. Assoc Prof Carolyn Quadrio, Consultant Psychiatrist, School of Psychiatry, UNSW
32. Prof Alan Rosen, AO
33. Kim Ryan, CEO, Australian College of Mental Health Nurses; Adj Assoc Prof Sydney University
34. Dr John-Paul Sanggaran
35. Chris Sidoti, Adj Prof, University of Western Sydney; Griffith University; University of the Sunshine Coast; Australian Catholic University
36. Dr Claire Spivakovsky, Senior Lecturer in Criminology, Monash University
37. Dr Jane Tubby, Child and Adolescent Psychiatrist
38. Assoc Prof Nesrin Varol, Director, Sydney Gynaecology & Endometriosis Centre
39. Viktoria Vibhakar, Licensed clinical social worker; Research Associate, Faculty of Medicine, RECOVER Injury Research Centre, University of Queensland
40. Dr Dinesh Joseph Wadiwel, Senior Lecturer, Socio-legal studies and human rights, University of Sydney
41. Dr Choong-Siew Yong
42. Dr Peter Young

¹⁴¹ Australian Human Rights Commission, Submissions to OPCAT in Australia Consultation 2017 (7 August 2017) Rights and Freedoms. At <https://www.humanrights.gov.au/submissions-opcat-australia-consultation-2017> (viewed 24 August 2017).

¹⁴² Australian Human Rights Commission, Submission Policy (August 2014) Legal. At <https://www.humanrights.gov.au/submission-policy> (viewed 24 August 2017).