

24 June 2016

Ms Megan Mitchell  
National Children's Commissioner  
Australian Human Rights Commission  
GPO Box 5218  
SYDNEY NSW 2001

**Sent via email: [kids@humanrights.gov.au](mailto:kids@humanrights.gov.au)**

Dear Ms Mitchell

**Victorian Ombudsman submission - Optional Protocol to the Convention against Torture (OPCAT) in the context of Youth Justice Detention Centres**

Thank you for your email dated 24 March 2016 about your project into how the special needs and interests of children and young people in youth justice detention centres could be considered and monitored in a National Preventative Mechanism (NPM) under OPCAT. I am pleased to assist in this project and provide you with my submission below.

Australian Parliamentary Ombudsmen have been involved in the conversation about OPCAT for a number of years, and in 2012 provided a joint submission to the Joint Standing Committee on Treaties that their offices are well placed to fulfil a NPM role under a 'mixed model' as outlined in the National Interest Analysis Summary<sup>1</sup>.

Before I address some of your questions, I thought it might be useful to provide you with some background information about the role of my office.

***About the Victorian Ombudsman***

1. As an independent officer of the Victorian Parliament I have the principal function and broad remit of enquiring into or investigating administrative actions taken by or in an authority and making recommendations for administrative or legislative change.

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<sup>1</sup> Available online at:  
[http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=jct/28february2012/treaties/torture\\_nia.pdf](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jct/28february2012/treaties/torture_nia.pdf).

2. My jurisdiction encompasses actions taken by or on behalf of authorities such as government departments, public statutory bodies, municipal councils and actions by private sector entities when delivering services on behalf of government. This includes youth justice detention centres such as the Parkville and Malmsbury Youth Justice Precincts, Secure Welfare Services and adult public and private prisons. I also have a role under the *Terrorism (Community Protection) Act 2003* to make representations in relation to a person's treatment in connection with their detention under the preventative detention order. I note that there is a specific wing at Parkville for the purpose of this Act.
3. The majority of matters considered by my office are dealt with using my enquiry powers<sup>2</sup> as a means of informal resolution. Following my enquiry, a matter may be resolved where an authority offers an appropriate solution to address the concerns in question or accepts my proposals to resolve the matter. I can conduct a formal investigation on a complaint; on my own motion (proactively, without a complaint); on a referral by Parliament; or following a 'protected disclosure complaint' referred from the Independent Broad-based Anti-corruption Commission<sup>3</sup>. At the completion of an investigation I may form an opinion that the action under investigation was, amongst other things, contrary to law, unreasonable or wrong.<sup>4</sup> Accordingly I can make recommendations to remedy the error<sup>5</sup>. I can also request to be notified of any steps taken (or proposed to be taken) to give effect to my recommendations<sup>6</sup> and report to the Parliament on any matter relevant to my investigation or recommendations that I think fit<sup>7</sup>. To ensure accountability, my office also reports on authorities' implementation of recommendations<sup>8</sup>.
4. In conducting an investigation I have the powers of a Royal Commission, including the ability to summons documents and witnesses, take sworn evidence, enter the premises of an authority and inspect anything therein. I understand that such powers would be necessary for a NPM to meet the requirements of the OPCAT. In the context of youth justice detention, my investigation powers allow me:
  - unfettered access to all categories and places of detention
  - access to data relating to the number and location of detainees and all information about their treatment as well as their conditions of detention

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<sup>2</sup> See *Ombudsman Act 1973*, section 13A.

<sup>3</sup> Ibid, sections 15B, 15C, 16, 16A.

<sup>4</sup> Ibid, section 23(1).

<sup>5</sup> Ibid, section 23(2).

<sup>6</sup> Ibid, section 23(4).

<sup>7</sup> Ibid, section 23(6).

<sup>8</sup> See 'Report on recommendations – June 2016' available online at: <https://www.ombudsman.vic.gov.au/getattachment/0f691af2-e66c-47db-a55e-8134ab0782d7//publications/parliamentary-reports/report-on-recommendations.aspx>.

- private interviews with detainees and other persons who I believe can supply relevant information
  - to prepare and publish reports of inspections.
5. The introduction of the Victorian *Charter of Human Rights and Responsibilities Act 2006* (the Charter) amended the Ombudsman Act to provide me with the express function to enquire into or investigate whether an administrative action is incompatible with a human right set out in the Charter. I am the only body with this express function.
  6. The conferral of a specific human rights complaint-handling function utilises my office's independence, accessibility, Royal Commission style investigation powers and ability to make (and follow up on) remedial recommendations for administrative improvement.
  7. In my experience, the Charter and my human rights function is not widely known or understood by members of the public. In the interest of achieving greater public awareness, I recently recommended that the Charter be amended to expressly refer to the Ombudsman's function to deal with human rights complaints<sup>9</sup>.
  8. The institution of the Ombudsman was created in response to the imbalance of power between the individual and the state, an imbalance that is at its most stark when people are deprived of their freedom by the state.

### ***Current oversight, complaints and monitoring mechanisms***

9. The first Victorian Ombudsman, Sir John Dillon, commented in his first annual report some 40 years ago that he was surprised at the large number of complaints from people in custody. This is no longer surprising.
10. Over time, our focus on the conditions and treatment of persons held in custody or in secure facilities has necessitated regular site inspections. While this function is not expressly in the Ombudsman Act, or separately funded, routine inspections of places of detention have become an important element of Ombudsman work.
11. Our most recently conducted inspections of Parkville and Malmsbury were on 14 and 18 April 2016 respectively. My staff aim to inspect these facilities every six months and meet with staff, photograph relevant areas, speak with clients, and prepare a written report. Any identified concerns are raised with the General Manager of the centre and / or the Secretary of the Department of Health and Human Services.

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<sup>9</sup> See my submission in response to the 2015 review of the Victorian *Charter of Human Rights and Responsibilities Act 2006*, available online at: <https://www.ombudsman.vic.gov.au/Publications/Submissions>.

12. My office also inspects Secure Welfare Services operated by the department. This service accommodates children aged 10-17 years who are considered to be at substantial and immediate risk of harm. We also conduct regular inspections of all public and private prisons in Victoria.
13. Additional visits to places of detention are often conducted in the context of our enquiries and investigations. A small number of my formal investigations are made public when they are tabled in Parliament. A sample of some investigation reports that may be relevant to your consideration of OPCAT, and provide examples of our work concerning places of detention, are available on our website at [www.ombudsman.vic.gov.au/Publications](http://www.ombudsman.vic.gov.au/Publications):
  - *Whistleblowers Protection Act 2001 Investigation into conditions at the Melbourne Youth Justice Precinct – 2010*
  - *Own motion investigation into children transferred from the youth justice system to the adult prison system – 2013*
  - *Investigation into deaths and harm in custody – 2014*
  - *Investigation into the rehabilitation and reintegration of prisoners in Victoria - 2015*

### ***Promoting and safeguarding the rights of children in detention***

14. As you would be aware, Victoria is the only state in Australia with a legislated charter of human rights. Subject to section 38 of the Charter it is unlawful for a public authority, such as a youth justice detention centre, to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. Relevant to the youth justice system, the Charter provides:
  - protection from torture and cruel, inhuman or degrading treatment (section 10)
  - protection of families and children (section 17)
  - the right to liberty and security of person (section 21)
  - the right to humane treatment when deprived of liberty (section 22).
15. Of course, other bodies are involved in the promotion and safeguarding of children's rights in detention facilities. Where my role is to enquire into or investigate human rights breaches, the Victorian Equal Opportunity and Human Rights Commission has an important education function and provides human rights training to the community and public sector alike.
16. The Commissioner for Children and Young People also plays a vital role in operating independent visitor programs at Parkville and Malmsbury, however, it is not clear whether this would satisfy the requirements of a NPM.

17. A system that promotes and safeguards children's rights in detention facilities requires effective communication between the agencies involved. I am pleased that when the *Integrity and Accountability Legislation Amendment (A Stronger System) Act 2016* comes into effect I will be able to share information with the Commission for Children and Young People, something I am currently prevented from doing. This amendment will allow our offices to operate more effectively in this shared space.
18. Telephones in places of detention across Victoria offer an unmonitored free-call line to my office. In addition, my office regularly disseminates posters to be placed by the telephones with information about the role of the Ombudsman and how to contact us. I recognise the importance of using a range of methods, especially for vulnerable groups, to be aware of and access my office. Recently I engaged researchers to consider the barriers to making a complaint to assist in developing strategies to raise awareness of our service and make it easier for vulnerable Victorians to complain.

### ***Ratifying OPCAT and establishing a NPM***

19. New Zealand's experience in ratifying OPCAT and implementing a NPM involving the Ombudsman has demonstrated benefits in safeguarding the rights of children in detention.
20. The 2015 annual report of the New Zealand NPM identifies a number of issues highlighted through inspections, including:
  - lack of access to specialist mental health treatment
  - use of excessive force to restrain
  - inadequate material living conditions
  - excessive periods in lockdown
  - insufficient access to programs and facilities
  - a lack of dedicated youth units in facilities that detain both adults and young persons.
21. The findings and recommendations from the New Zealand NPM reports can be a catalyst for meaningful change and reflect those made by my office and others. As an example, following the Ombudsman's own motion investigation into children transferred from the youth justice system to the adult prison system in 2013, no child has been placed in the adult prison system, despite the legislation still allowing this to occur.
22. In addition to identifying areas of concern and facilitating change through recommendations, a NPM and the associated inspections and public reports will assist in embedding a culture of human rights understanding and compliance.

23. Parliamentary Ombudsman models operate in an array of jurisdictions with significant political, historical and cultural differences. A natural development has been to extend Ombudsman jurisdiction beyond the investigation of maladministration, to the investigation of human rights breaches committed by public authorities.
24. If OPCAT were ratified, its application would extend to other places of detention beyond the youth justice context, many of which are already within my jurisdiction
25. An option worth considering would be to designate the Victorian Ombudsman as a state-based NPM, possibly with a Commonwealth-based NPM coordinating across the various jurisdictions. While further consideration would be required of the extent to which the criteria for a state-based NPM are compatible with my existing functions, it could be an appropriate option. In addition to broad jurisdiction and extensive powers, my office has significant experience and expertise in conducting inspections and investigations into closed environments. Finally, and to some extent most importantly, my office is one of only three bodies<sup>10</sup> in Victorian with constitutional independence<sup>11</sup> and reports directly to the parliament, rather than to a Minister of the Crown.

If you would like to discuss this matter further, or have any queries, please contact my Executive Officer, Mr Andrew Adams on (03) 9613 6202 or [andrew.adams@ombudsman.vic.gov.au](mailto:andrew.adams@ombudsman.vic.gov.au). I would also be happy to arrange a meeting or teleconference if that would be helpful.

Yours sincerely



Deborah Glass  
**Ombudsman**

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<sup>10</sup> The other bodies being the Victorian Audit-General and the Electoral Commissioner.

<sup>11</sup> *Constitution Act 1975* (Vic), section 94E.