Submission of the NSW Council for Civil Liberties on Australia's Accession to the Optional Protocol against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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1 Executive summary & recommendations

The NSW Council for Civil Liberties[1] submits that accession to the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("**OPCAT**") is in the interests of Australia and its citizens.

Accession to the OPCAT has the potential to ensure consistent humane treatment not only for detainees in the general prison system, but also for individuals in immigration detention, remand detention and a range of involuntary care facilities. A rigorous and consistent system of supervision in accordance with the OPCAT will ensure that all citizens who find themselves detained, including the most vulnerable, are assured of appropriate treatment.

Full implementation of the OPCAT will also allow the Australian Government to legitimately claim to be leading by example in ensuring consistent and verified compliance with international expectations on the prevention of torture and inhuman treatment.

1.1 Summary of recommendations

We recommend that the Government:

1. Accede to the OPCAT;

2. Enact legislation adopting the OPCAT & providing appropriate implementation mechanisms, including:

   (a) Adopting the definition of places of detention from Article 4 of the OPCAT;

   (b) Establishing or designating an appropriate National Preventative Mechanism ("**NPM**") or Mechanisms;

   (c) Guaranteeing the independence of any NPM including with respect to:

      (i) appointment of members of the NPM;

      (ii) tenure of members of the NPM; and

      (iii) funding of the NPM;

   (d) Granting the NPM power to:

      (i) determine, subject to Federal Court review, whether a facility is a "place of detention" under the act;

      (ii) visit, with or without notice, any facility within Australia's jurisdiction or control that is determined to be a place of

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detention in order to inspect all physical facilities and interview any detainees and staff; and

(iii) refer appropriate matters to the DDP for possible prosecution;

(e) Providing for the appointment of NPM members with an appropriate and diverse range of experience and expertise;

(f) Providing for publication of Subcommittee and NPM reports except in so far as such publication would conflict with the obligation to protect personal information; and

(g) Providing that the NPM must comply with appropriate ethical guidelines for reporting of information so as to protect the rights and privacy of detained persons.

3 Implement or amend legislation and related policy to clarify the obligation of all relevant government employees and contractors to fully co-operate with the Subcommittee of the Committee Against Torture ("**Subcommittee**") and the NPM. The government must also ensure that employees and their supervisors are made aware of these obligations.

4 The NPM should be equipped with members having appropriate expertise, skills and life experience, considering the range of social service sectors involved, including mental health, allied health and community workers.

5 Provide the NPM with accurate and complete information in relation to the location of possible detention facilities and the numbers people detained at detention facilities.

2 Obligations created by the OPCAT

2.1 The Convention

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("**Convention**") was ratified by Australia on 8 August 1989.

The Convention defines torture in Article 1 as:

> *the intentional infliction of severe mental or physical pain and suffering, at the instigation of, or with the consent of, a public official or another person acting in an official capacity, for the purposes of punishment, intimidation or coercion, obtaining information, or for reasons based on discrimination*.

Under Article 2(2), no national security justification can be invoked as a justification for torture. Further, following an order from a superior officer or a public authority is not justification for torture (Art 2 (3)).

Broadly, the Convention requires each State Party to prevent acts of torture in any territory under its jurisdiction (Art 2(1)), and prohibits "refoulement", that is, returning an individual to a State where that person would be in danger of torture (Art 3). Where torture has not been effectively prevented, States must investigate allegations of torture (Arts 6, 12 & 13), and either prosecute or extradite (Arts 7 & 8) those who have committed or attempted to commit acts of torture.

The Convention imposes various obligations to support the core commitments of prevention and punishment. It specifically imposes obligations regarding detention facilities. States Parties must educate their officials regarding the prohibition against torture, including all persons involved in the custody, interrogation or treatment of detained individuals (Art 10). States Parties must also systematically review their arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment (Art 11).

2.2 The OPCAT

The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("**OPCAT**") was adopted on 18 December 2002 and entered into force on 22 June 2006.

The intention of the OPCAT is to strengthen protections against torture and cruel, inhuman and degrading treatment, for people who have been detained by or on behalf of the State. To achieve this goal, the OPCAT establishes a system of regular visits to places of detention, undertaken by both "national preventive mechanisms" ("**NPMs**"), established by the State Party, and also by members of the Committee Against Torture's (**CAT**) Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("**Subcommittee**").

(a) The scope of the OPCAT

At the heart of the OPCAT is the obligation on the State Party to open up its "places of detention" to monitoring by the NPM and the Subcommittee. The OPCAT defines "places of detention" widely as "any place under [the State Party's] jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an

order given by a public authority, at its instigation, or with its consent or acquiescence" (Art 4(1)). It defines "deprivation of liberty" to include "any form of detention or imprisonment, or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority" (Art 4(2)).

The extent of the jurisdiction is not limited to places of punitive detention, and could include preventative detention, immigration detention and certain involuntary care arrangements. The obligation extends to all places under the State Party's "jurisdiction and control", rather than just those within its "territory". The inclusion of private as well as public custodial settings, should be regarded as extending to home detention and to control orders.

(b) Protections

The OPCAT prohibits any sanctions imposed on any person for cooperation with the NPM (Art 21) or the Subcommittee (Art 15). It should be noted that this may have a variety of impacts on the Government's relationships with its employees and contractors, in particular in relation to any requirements as to confidentiality.

The Subcommittee members must be accorded privileges and immunities necessary for their work (Art 35).

(c) The National Preventative Mechanism

Each State Party to the OPCAT must "set up, designate or maintain" an NPM, empowered to perform regular visits to places of detention (Art 3). Details of how the obligations under the OPCAT in respect of NPMs would affect Australia are set out in section 3.2 (b) below.

(d) The Subcommittee

Articles 12 and 14 set out the full scope of a State Party's obligations in relation to the Subcommittee. Details of how the obligations under the OPCAT in respect of the Subcommittee would affect Australia are set out in section 3.2(a) below.

Recommendation: The Australian Government should accede to the OPCAT.

3 Implementation in Australia

3.1 Implementation of Treaties in Australia

In order to implement the OPCAT the Government will be required to create legislation adopting the OPCAT and containing specific provisions for implementation.

Recommendation: The Australian Government should enact legislation adopting the OPCAT & providing appropriate implementation mechanisms.

3.2 Domestic mechanisms required by the OPCAT

Australia would be required to implement domestic legal and regulatory mechanisms to comply with obligations in relation to:

1 the Subcommittee, and

2 the NPM(s).

(a) Subcommittee

The Subcommittee has two functions which would directly impact on Australia, as follows:

- its ability to visit any place where "persons are or may be deprived of their liberty"; and
- its ability to make recommendations to States Parties concerning the protection of detained persons, as well as to advise Australia on the establishment and strengthening of NPMs.

The Subcommittee is mandated to establish a programme of regular visits to States Parties. There is no minimum or maximum number of visits specified per state party in any defined time period. Australia would be obliged to:

- grant the Subcommittee access to any place of detention;
- provide all relevant information requested by the Subcommittee; and
- encourage and facilitate contacts between the Subcommittee and the NPMs (Arts 4 & 12).

By acceding to OPCAT, Australia would undertake to grant the Subcommittee:

- unrestricted access to information concerning the treatment of detainees,[2] their conditions of detention, the number of detainees, the number of places of detention and their location;
- unrestricted access to all places of detention and their installations and facilities;[3]
- the opportunity to conduct private interviews with Detainees and any other person who the Subcommittee believes may supply relevant information;[4] and
- the liberty to choose the places it wants to visit and the persons it wants to interview (Art 14).

Australia would have to guarantee that no authority or official shall order or tolerate any sanction against any person or organisation for having communicated to the Subcommittee any information, and that person or organisation must not be prejudiced in any way (Art 15).

Australia may object to the Subcommittee visiting a particular place only on "urgent and compelling grounds of national defence, public safety, natural disaster or disorder in the place to be visited". However, a declared state of emergency cannot be invoked as a reason to preclude a visit (Art 14(2)).

2 Eg access to disciplinary rules.

3 Eg dormitories, dining facilities, kitchens, isolation cells, bathrooms, exercise areas, and hospitals.

4 Eg security or medical staff and family members of Detainees.

Recommendation: Implementing legislation and related policy should make clear that all relevant government employees and contractors are obliged to fully co-operate with the Subcommittee and the NPM. The government must also ensure that employees and their supervisors are made aware of these obligations.

We note that it is unclear whether, under the OPCAT, the Subcommittee can visit places of detention outside a State Party's territory. Article 12 provides that States Parties undertake to receive the Subcommittee "in their territory" and grant access to places mentioned in Article 4. However, Article 4 refers more broadly to places under a State's "jurisdiction and control" (Art 4(1)). The Vice Chairperson of the Subcommittee, Ms Silvia Casale, recently stated that the issue was a "tricky legal question" and "it might be possible to visit an official military base under the control of one State in a foreign country, but not some other places".[5]

Recommendation: Implementing legislation should provide the NPM with access to all facilities within Australia's jurisdiction or control.

Recommendations and reports

The Subcommittee is obliged to report its recommendations to the Australian Government and to the NPM.

- Subcommittee reports will be confidential and need only be published at the request of the State Party, or if the State Party makes public a part of the report (Art 16(1)(2)).
- Personal data shall only be published with the express consent of the individual concerned (Art 16(2)).
- The Subcommittee shall also present a public annual report. Such reports have previously detailed which States have been visited, and made general comments on the reception the Subcommittee received in the States.[6]
- If a State Party refuses to cooperate with the Subcommittee, the Subcommittee may publish a statement to that effect (Art 16(4)).
- Once it has received the Subcommittee's report, each State Party must examine its recommendations and enter into dialogue with the subcommittee on possible implementation measures (Art 12(d)).

Recommendation: Implementing legislation should:

1 provide for publication of Subcommittee and NPM reports except to the extent that publication would conflict with the confidentiality of personal information; and

2 provide for the creation of guidelines on the appropriate use of personal data.

5 Subcommittee on Prevention of Torture Presents First Public Annual Report to Committee Against Torture (13 May 2008) (http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/82434520DFD727EEC12574480055FE4A?OpenDocument).

6 First Annual Report ¶22.

(b) National Preventive Mechanisms

Australia would be required, at the latest one year after its accession to OPCAT, to set up, designate or maintain at least one NPM. The NPM may be an existing body, as long as it complies with the requirements of the OPCAT.

The OPCAT requires that the NPM be empowered to, at a minimum:

- regularly examine the treatment of detainees, with a view to strengthening, if necessary, detainees' protection against torture and other cruel, inhuman or degrading treatment or punishment;
- make recommendations with the aim of improving the treatment and the conditions of detainees and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the norms of the UN; and
- submit proposals and observations concerning existing or draft legislation.

The NPM must be functionally and financially independent, with independent and appropriately qualified members. Australia would be obliged to strive for gender balance and representation of Australia's ethnic and minority groups when selecting members. It has been recommended by the Subcommittee that the financial resources of the NPM should be used only for pre-approved purposes.[7] In its first annual report, the Subcommittee set out some preliminary guidelines concerning the process of establishing NPMs, including:

- that the mandate of the NPM should be clearly and specifically established in national legislation, and the OPCAT definition of "places of deprivation of liberty" should be reflected in that text;[8]
- that the NPM should also be established or designated by a public, inclusive and transparent process and its work programme should cover all potential and actual places of deprivation of liberty; and
- that the development of NPMs should be considered an ongoing obligation.

Australia would be obliged to provide the NPM with the same access and rights as the Subcommittee (see 3.2(a) above). Information provided to the NPM would be confidential, and no personal data could be published without the express consent of the person concerned (Art 21). Australia would be obliged to publish the NPM's annual reports (Art 23).

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7 First Annual Report ¶28(g).

8 First Annual Report ¶28.

Recommendation: The Government should implement legislation:

(a) Establishing or designating an appropriate NPM;

(b) Guaranteeing the independence of the NPM including with respect to: appointment of members of the NPM; tenure of members of the NPM; and funding of the NPM; and

(c) Granting the NPM power to:

(i) determine, subject to Federal Court review, whether a facility is a "place of detention" within the meaning specified in the OPCAT;

(ii) visit, with or without notice, any facility within Australia's jurisdiction or control that is determined to be a place of detention in order to inspect all physical facilities and interview any detainees and staff.

(iii) refer appropriate matters to the DDP for possible prosecution.

(d) Providing for the appointment of NPM members with an appropriate and diverse range of experience and expertise.

4 Implications for criminal justice system

The aim of the OPCAT is to protect the rights of people being held in "places of detention" against "torture and other cruel, inhuman or degrading treatment and cruelty." (Article 1). The prison system is one of the most significant examples of such detention, and the risk of torture and degrading treatment require the implementation of an unfettered inspection regime.

Legally, there is currently no adequate protection of prisoners and people detained in prisons. Australia, on a national level, has neither a constitutional nor statutory bill of rights. Outside of Victoria and the ACT, no individual state has a bill of rights, either. Although Australia has ratified parts of the International Covenant on Civil and Political Rights ("ICCPR")[9], those sections prohibiting torture and inhumane treatment have not been adopted. This oversight requires both a legal and an institutional fix: the OPCAT provides the institutional means of inspection.

4.1 Prisons

Currently prisons are run by the individual states, and the federal government does not have a national system in place to either inspect prisons or require appropriate changes in them. This inconsistent and at times inadequate system of oversight has

9 International Covenant on Civil and Political Rights, adopted 16 Dec 1966, entered into force 23 May 1976, GA Res 2200A (XXI), UN Doc A/6316 (1966), 999 UNTS 171, reprinted at 6 ILM 368.

led to lapses in Australia's adherence to human rights standards and poor reviews from domestic and international observers.

In May 2008, the CAT considered the 3rd periodic report of Australia under the Convention Against Torture and raised many concerns about the prison system in Australia. The CAT's findings included, but were not limited to:

- disproportionately high numbers of Indigenous Australians in prison, especially among women and children;
- continued reports of deaths of Indigenous Australians in custody without satisfactory explanations;
- overcrowding in the prison system, especially in Western Australia.

In the same report, a paragraph was devoted to Australia's "supermax prisons": the High Risk Management Unit at Goulburn Correction Centre in NSW (HRMU) and the Melaleuca High Security Unit in Victoria. International observers and domestic civil rights groups have noted these facilities hold detainees in inhumane conditions for indefinite periods of time. Prisoners detained at these facilities have sometimes not been convicted of any crime, but are merely awaiting trial. It is unacceptable to put people who have not been convicted of a criminal offence in potentially inhumane and degrading detention without adequate inspection or oversight.

The HMRU in NSW is of particular concern, as it is not covered by any statutory bill of rights to protect its prisoners. There have been incidents of mistreatment and even death in the HMRU that caused HREOC to note that treatment of prisoners at the facility was "inconsistent with the right to be treated with humanity and dignity within article 10(1) and the prohibition on inhuman and degrading treatment and punishment within article 7 of the ICCPR."[10] These types of violations need to be dealt with, not merely via ex-post compensation and reform, but ex-ante, through a system of inspection and oversight that prevents abuses and holds prisons accountable. Inspectors should have the ability to enter prisons and inspect their physical condition, as well as interview detainees and employees.

The inspection system of the OPCAT applies to each stage and to all forms of detention. From the moment any citizen is arrested, they come under the control and constraining power of the state; an arrested citizen is no longer free to leave and is being deprived of liberty in a public "custodial setting", as delineated in Article 4(2) of the OPCAT. All stages of criminal arrest, trial and punishment are to be covered: initial arrest and jail, remand in the absence of bail, prison after conviction, and various forms of prisoner transport. The facilities where these activities and detentions are located should be under the jurisdiction of the inspector and should be freely accessible.

As such, all aspects of inspection which apply to prisons should apply equally to any facility in Australia's jurisdiction or control where terrorist suspects are detained. The OPCAT does not discriminate between detention on the basis domestic criminal law and detention on any other basis, and Australia's obligations to each individual detainee should not change. In order to maintain a strong moral voice on issues of international terrorism and criminal justice, the treatment of suspected terrorists must not fall below the standards of the international community.

10 Human Rights and Equal Opportunity Commission, Written Submissions to the NSW Coroner's Inquest into the Death of Scott Simpson (27 June 2006) <http://www.humanrights.gov.au/legal/submissions_court/intervention/simpson.html>, [4.16].

Recommendation: NPM and Subcommittee officials must have the power to visit all prisons, remand and military detention facilities in order to inspect physical facilities and interview any inmates or staff.

4.2 Inspection

Australia should develop a dedicated NPM to oversee and inspect the prison system. Inspectors must be allowed full access to all prisons, especially the supermax prisons. They should be able to go when they choose, without requiring advanced notice, inspect all parts of the prison, and talk to detained individuals.

To implement the OPCAT in the prison system, a new office of inspection could be opened under the purview of an existing organisation such as HREOC, or a separate NPM could be established. Inspectors could be state-based provided that they are independent of the departments they are required to report on. It is important that any state-level inspection regimes work with the national oversight agency and HREOC to develop consistent procedural standards. The inclusion of local experts as well as national officials could assist in developing appropriate guidelines for categorising and defining detention facilities and preparing reports.

The required infrastructure to set up such a domestic inspection system may to a large extent already be in place. In NSW for example the Office of the Ombudsman has the power of investigation in relation to administrative matters within the correctional system, where the internal investigation process within the corrective centre has reached its conclusion, and the outcome remains unsatisfactory. This type of oversight could be altered from a passive acceptance of complaints to a more active inspection process, where delegates are sent to inspect prisons and other detention facilities. The expense of such a system would be low; with a basic infrastructure already in place, it merely needs a shift in focus and a slight increase in size to take care of the necessary inspections.

Recommendation: The Government should establish an appropriate and independent national regime for the inspection of prison facilities in accordance with the OPCAT.

5 Implications for immigration detention

People in immigration detention are a special category of people to whom Australia already owes obligations under the United Nations Convention Relating to the Status of Refugees ("**Refugee Convention**"). However, Australia's system of immigration detention (and in particular its lack of transparency under the Howard Government) has been widely criticised, both domestically and internationally. Accession to the OPCAT and acceptance of its transparency and reporting measures would represent significant progress for Australia in this area.

5.1 Immigration detention

As of 13 June 2008, there were 418 people in some form of immigration detention under Australia's control.[11] 'Immigration detention' includes detention at an immigration detention centre (IDC), residential detention, transit accommodation, community detention, and people restricted on board vessels in port or in correctional facilities. In order to be effective, the mechanisms proposed by the OPCAT would

11 "Immigration Detention Statistics Summary" Detention and Offshore Services Division, DIAC, 13 June 2008.

need to include 'offshore' detention facilities under Australia's control, such as the Christmas Island IDC and the Nauru facility operated by the Howard Government.

5.2 The implications of independent review

If Australia were to accede to the OPCAT, it would be required to:

- establish an NPM with guaranteed independence to oversee its compliance with the OPCAT in relation to immigration detention facilities;
- open any place at which immigration detention occurs on an unrestricted basis to the Subcommittee as well as any NPM;
- guarantee access to immigration detention facilities as well as detainees; and
- provide accurate information about the numbers and treatment of detained persons, and the location of detention facilities, to the NPM and the Subcommittee.

We also consider that the NPM should:

- be able to decide which places are places of immigration detention (subject to Federal Court review); and
- implement training and compliance programs for staff connected with immigration detention facilities.

5.3 The need for independent review

We note that the operation of immigration detention facilities is continually under scrutiny by HREOC, the Commonwealth Ombudsman, the United Nations High Commissioner for Refugees, and the Immigration Detention Advisory Group (IDAG).

However, while these measures are valuable, Australia currently has no review mechanism for immigration detention facilities with the levels of independence and access required by any NPM established in accordance with the OPCAT.

Our primary submission therefore is that the establishment of an NPM in accordance with the OPCAT (or the giving appropriate functions to an existing body such as HREOC or IDAG) would significantly strengthen Australia's commitment to its obligations under the Convention and the Refugee Convention by increasing transparency and lessening the possibility of the breaches of our obligations pursuant to both the Refugee Convention as well as the OPCAT.

In addition, people in immigration detention can be particularly vulnerable due to, for example, a lack of English language skills, financial hardship, or psychological trauma or post traumatic stress disorder. They may also have a variety of special circumstances such as being part of a family with children in detention, having a physical or intellectual disability, or being victims of torture or trauma before entering Australia. The NPM would therefore also have a vital role in ensuring that these particular vulnerabilities are addressed in detention facilities, and that Australia's obligations pursuant to OPCAT are fulfilled. The NPM would also have the necessary range of expertise amongst it members to deal with the issues raised by broad range of experiences and circumstances faced by immigration detainees.

The length of time that a person can spend in immigration detention varies and can be considerable; in fact there is no statutory limit. For this reason, it is also both necessary and appropriate that places of immigration detention should be externally and independently monitored in accordance with obligations imposed under the OPCAT.

We consider that with the correct safeguards in place (such as transparency as to meetings and reporting arrangements) the system set forth by the OPCAT would not be a disproportionate interference with DIAC's affairs and, in particular, its operation of these detention centres. The NPM should also be obliged to comply with appropriate ethical guidelines for reporting of information so as to protect the rights and privacy of detained persons.

In summary, Australia's accession to the OPCAT and its implementation of the OPCAT's mechanisms would contribute positively to the public's and the international community's perception of Australia's immigration detention system. It would also help identify problems and inefficiencies within the system and assist in ensuring that immigration detention facilities are run effectively and in accordance with Australia's existing human rights obligations.

Recommendation: an NPM should be established in accordance with the OPCAT (or those functions should be given to an appropriate existing body such as HREOC or IDAG) with power to inspect all places of immigration detention under Australia's control.

6 Secure residence and vulnerable persons

6.1 Extending monitoring mechanisms to vulnerable people in secure care and residential facilities

The OPCAT definition of 'deprivation of liberty' extends to involuntary detention of individuals pursuant to State and Territory mental health legislation and secure housing of people subject to guardianship orders where their guardian has made this decision about residence on their behalf. The definition also encompasses residence in secure or locked public or private facilities that a person cannot leave at will. This would include secure psychiatric wards to which patients are admitted voluntarily and nursing or other care homes or facilities – such as for the elderly or people with disabilities – containing secure sections. Citizens living in such facilities require protections in line with the OPCAT equal to those to be implemented in other liberty-deprivation contexts, despite the fact that certain mechanisms – generally established at a State or Territory level – are already in place to assess the compliance of such facilities with care standards.

The relevance of the Convention to residence in secure care and residential facilities becomes clear in light of evidence of inappropriate use of psychotropic medication in nursing homes,[12] and reports by mental health service users and carers of concerning outcomes including suicide due to inadequate supervision, assaults on patients by other patients, and essential facilities like bathrooms being in a state of disrepair.[13]

12 NSW Health, Public Health Division, 'Psychotropic Medication Use in Nursing Homes – Report of the NSW Ministerial Taskforce', May 1997 <http://www.health.nsw.gov.au/public-health/psymed/psymed1.html#extent>t accessed 1 July 2008.

13 Mental Health Council of Australia, Not For Service: Experiences of Injustice and Despair in Mental Health Care in Australia, the Council, 2005, Canberra, p 245.

We note that the CAT recommended in *Australia's Fourth Report under the Convention Against Torture* that:

> *The State party keep under constant review the use of instruments of restraint that may cause unnecessary pain and humiliation, and ensure that their use is appropriately recorded.*[14]

The Scottish Royal College of Psychiatrists has pointed out that national mechanisms involving *regular unannounced* visits to places where involuntary patients are detained pursuant to mental health legislation are needed to ensure compliance with OPCAT, stressing the heightened vulnerability of this group.[15] The European Court of Human Rights has stated:

> *The position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals call for increased vigilance in reviewing whether [Article 3, prohibiting inhuman and degrading treatment, of] the convention has been complied with.*[16]

The majority of citizens who live in secure care or residential facilities are extremely vulnerable and at a disadvantage when it comes to protecting their right to freedom from torture, whether owing to mental illness, physical or intellectual disability, limited mobility or other (apparent) limitation on capacity. Indeed, such limitation is generally what has led them to be deprived of liberty in the course of their daily lives in the first instance.

6.2 The Sub-Subcommittee National Preventive Mechanism

The Subcommittee should be granted access to secure care and residential facilities. In relation to the NPM requirement, existing statutory regimes may amount to partial compliance. The UK government considers that '[s]ome form of national mechanism covers all places of detention in the UK'.[17] However, we are of the view that additional mechanisms coordinated at a federal level should be introduced to ensure that Australia fully meets OPCAT requirements in this context. Existing state and territory mechanisms to monitor such facilities fall short of the dedicated inspection and reporting requirements envisaged by the OPCAT.[18] Pre-existing UK mechanisms considered to meet the OPCAT requirements include a range of Care Commissions.[19] We note that Australia has not established Mental Health or Care Commissions at federal or local levels charged with comprehensive inspection and reporting functions

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14 Australian Government, <http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_AustraliasFourthReportundertheConventionAgainstTorture-June1997-October2004> accessed 1 July 2008.

15 The Mental Health Act Commission of England has pointed out that patients detained pursuant to mental health legislation 'may experience no physical disability through their illness, and yet be confined, even by force, within a building with little access to exercise or fresh air': Mental Health Act Commission, Key Findings about the use of the Mental Health Act 1983, p 10 < http://www.mhac.org.uk/?q=node/430> accessed 1 July 2008.

16 Herczegfalvy v Austria (1992) 15 EHRR 437, para 82.

17 Foreign and Commonwealth Office, 'Explanatory Memorandum on the Optional Protocol to the United Nations Convention against Torture'. <http://www.fco.gov.uk/en/about-the-fco/publications/treaty-command-papers-ems/explanatory-memoranda/explanatory-memoranda-2003/torture> accessed 1 July 2008.

18 A list of some of these mechanisms is contained in Australia's Fourth Report under the Convention Against Torture - June 1997 - October 2004: Australian Government, Appendix 2 (Appendix 2.6 Public Medical Officers and Appendix 2.7 Residential Carers) <http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_AustraliasFourthReportundertheConventionAgainstTorture-June1997-October2004> accessed 1 July 2008.

19 Foreign and Commonwealth Office, 'Explanatory Memorandum on the Optional Protocol to the United Nations Convention against Torture'.

comparable to those performed by equivalent UK bodies such as the Scottish Commission for the Regulation of Care.[20]

Recommendation: one of two approaches should be taken to meet the OPCAT requirements in this context:

- The central coordinating NPM (either a new body or an existing body such as HREOC) should include a function to visit and report on this category of facilities;[21] or

- A separate federal body, such as a Care Commission, should be established to perform the relevant functions in liaison with the central NPM.

The NPM should be equipped with members having appropriate expertise, skills and life experience, considering the range of social service sectors involved, including mental health, allied health and community workers.[22] It is equally important that the NPM include consumer representation, such as consumer advocates, and that procedures are developed to ensure that service users and people in their close social networks have input into the NPM decision-making processes.[23]

6.3 People with mental illnesses and disabilities detained in prisons and prison hospitals

People with mental illnesses and disabilities detained in prisons, prison hospitals and other correctional facilities are at heightened risk of abuse and exploitation. The current NSW Government policy of subjecting inmates in Long Bay Prison Hospital to solitary confinement in their cells for 18 hours a day is one example of a policy which would fall within the purview of the proposed NPM,[24] given concerns that 'the extended lockdown will exacerbate the patients' mental health symptoms and reduce the number of contact hours with doctors and nurses'.[25] Treatment of prisoners with disabilities is an area in urgent need of enhanced monitoring mechanisms to ensure citizens are not deprived of their right to freedom from torture. Ratifying the OPCAT would give Australia a clear mandate, and a structured framework within which, to fulfil relevant obligations to protect its citizens' civil, political and human rights.

<http://www.fco.gov.uk/en/about-the-fco/publications/treaty-command-papers-ems/explanatory-memoranda/explanatory-memoranda-2003/torture> accessed 1 July 2008.

20 The Scottish Commission for the Regulation of Care established under the Regulation of Care (Scotland) Act 2001 (UK) is dedicated to regulating and inspecting Scottish care services, including independent hospitals, private psychiatric hospitals, independent clinics, independent medical agencies and secure accommodation services.

21 In New Zealand the Human Rights Commission is the Central National Preventive Mechanism with a coordinating role in implementing the NPM, including inspection of mental health facilities.

22 See, for example, Scottish Royal College of Psychiatrists: Health and Social Care Bill, 'Royal College of Psychiatrists: Proposed amendment to the Health and Social Care Bill at Grand Committee in the House of Lords - Expertise' <http://www.rcpsych.ac.uk/pressparliament/aboutourparliamentarywork/legislationandresponses/healthandsocialcarebill.aspx> accessed 1 July 2008, as to the need for mental health expertise in bodies charged with inspecting mental health facilities.

23 See Scottish Royal College of Psychiatrists: Health and Social Care Bill, 'College of Psychiatrists: Proposed amendment to the Health and Social Care Bill at Grand Committee in the House of Lords – Involving Service Users, Carers and Families' <http://www.rcpsych.ac.uk/pressparliament/aboutourparliamentarywork/legislationandresponses/healthandsocialcarebill.aspx> accessed 1 July 2008.

24 See Jonathan Dart, 'Jail strike: officers protest lockdown procedures' July 1, 2008 < http://www.smh.com.au/news/national/jail-strike-officers-protest-lockdown-procedures/2008/06/30/1214677912760.html> accessed 1 July 2008; Networked Knowledge, Media Report, prepared by Dr Robert N Moles, 5 June 2008, 'NSW Legislative Council - Long Bay Correctional Complex Hospital Regime' <http://www.netk.net.au/Prisons/Prison63.asp> accessed 1 July 2008.

25 Jordan Baker, Chief Police Reporter, 'No butts edict raises harm risk for patients' April 26, 2008 <http://www.smh.com.au/news/national/no-butts-edict-raises-harm-risk-for-patients/2008/04/25/1208743249022.html> accessed 1 July 2008.