

## OPCAT: Monitoring and safeguarding consumer rights in mental health services

### Context

Australia ratified the Optional Protocol to the Convention on the Prevention Against Torture (OPCAT) in 2017. OPCAT provides for two separate but related components: firstly, it establishes the Subcommittee on the Prevention of Torture and other cruel, inhuman, or degrading treatment or punishment (the 'SPT'); and secondly it creates an obligation on the State parties to implement a National Preventive Mechanism (NPM).

The SPT has a mandate to travel to state parties and conduct unannounced visits to places of detention to monitor and safeguard the human rights of people who are being detained. It may then make recommendations to the state party based on its findings from the visit. Mental health facilities are included in the SPT's mandate as places of detention.

The NPM is tasked with a similar role – the NPM should be a domestic independent monitoring mechanism that conducts regular visits to places of detention with a focus on identifying human rights breaches, ill-treatment and shortcomings in rules, procedures and practices that may lead to ill-treatment.<sup>1</sup> As Australia is a federation, each state is required to establish and implement its own Preventive Mechanism. This has been patchy at best – the Commonwealth, WA, Tasmania, and the ACT have all designated and implemented at least one Preventive Mechanism. Victoria, Queensland, and NSW have not. The deadline for the implementation of the NPM is currently 20 January 2023, after having been extended multiple times.

Given the recent suspension of the SPT's visit to Australia in October 2022, it is even more critical that Victoria take steps to establish its Preventive Mechanism if the Government is truly committed to protecting the human rights of Victorians. A failure to take this obligation seriously calls into question the commitment of the Victorian Government to the Charter of Human Rights and Responsibilities 2006 – while the Charter may be a step above the human rights protections afforded in some other states, without any real mechanisms for enforcement, it becomes tokenistic.

### Problem

Safeguarding and monitoring of mental health services in Victoria is currently both ineffective and insufficient to protect consumer rights or address systemic issues as they arise. This has been affirmed by the UN Committee Against Torture in its recent concluding observations, where it noted that as well as failing to establish a nationally consistent network of NPMs, there is a general lack of effective, independent and accessible oversight or complaints bodies.<sup>2</sup>

The Mental Health Complaints Commissioner (MHCC) is largely reactive in nature and has proven its inability to prevent harm to consumers from occurring by failing to use its power to issue a compliance order during the

<sup>1</sup> Steven Caruana, 'Shining a Light in Dark Places' (2022) 2 *Policy Futures: A Reform Agenda* 31, 32.

<sup>2</sup> Committee Against Torture, *Concluding Observations on the Sixth Periodic Report of Australia*, 1970<sup>th</sup> & 1971<sup>st</sup> mtgs, CAT/C/AUS/CO/6 (22<sup>nd</sup> & 23<sup>rd</sup> November 2022, adopted 31 – 25 November 2022) para 39 – 40.

entirety of its operation.<sup>3</sup> It uses dispute resolution to manage complaints made by consumers which is entirely inappropriate in a situation where a consumer has experienced harm.

Previous UN Special Rapporteurs have concluded that the use of forced treatment and restrictive practices under the guise of 'best interests' or 'medical necessity' is in violation of the Convention on the Rights of Persons with Disabilities<sup>4</sup> and 'may well amount to torture.'<sup>5</sup> Given that severe mental suffering based on discrimination of any kind is sufficient for a finding of torture, it is clear that mental health facilities and any decisions made under mental health legislation must be subject to a high level of scrutiny. Victorian mental health legislation is explicitly discriminatory, in that it permits the use of forced treatment and restrictive practices on people because they have a 'mental illness.'

In 2020, the Special Rapporteur also stated any failure or complacency of oversight mechanisms to uphold the rule of law and redress systemic failings at a Governmental level 'can cause severe mental suffering... and constitute as or contribute to psychological torture.'<sup>6</sup> It is clear there is an immense need for better monitoring and safeguarding of mental health facilities, and the establishment of an NPM would be a welcome step.

As organisations that advocate for and support consumers, we constantly hear from them about the harm that can be caused by forced treatment or restrictive interventions. Consumers have also told us that their experiences with the MHCC has been inconsistent, with some saying the MHCC has told them it can't assist with their complaints. Other consumers have reported feeling traumatised at the conclusion of processes with the MHCC.

We hope the new Mental Health and Wellbeing Commission will foster increased trust and satisfaction among consumers. However, it remains that the power psychiatrists are granted under both the current Mental Health Act 2014 and the recently passed Mental Health and Wellbeing Act 2022 is significant. They are the only people in Victoria other than a judge who are permitted to detain a person for up to 28 days with almost no oversight. These powers include the power to assess capacity, make treatment decisions, detain, and forcibly treat consumers.

Oversight from the Mental Health Tribunal (MHT) is only available when a consumer knows enough about their rights (and feels strong enough) to challenge the decisions made by psychiatrists, and even then, treatment decisions are rarely overturned.<sup>7</sup> Given this context we need better monitoring and safeguarding of our mental health system to protect consumers from breaches of their human rights, ill treatment, and torture.

## Recommendations

1. The Victorian Government to immediately establish an interim NPM and ensure it has the power to visit all places of detention and publicly report on human rights compliance.
2. The Victorian Government immediately begin consultations with civil society and advocacy groups in relation to establishing an NPM and to identify what is needed for it to be effective and safeguard detained people from human rights breaches.

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<sup>3</sup> Adeshola Ore & Melissa Davey, 'No action taken against Victorian mental health services despite more than 12,000 complaints', *The Guardian* (online) 26 May 2022 <<https://www.theguardian.com/society/2022/may/26/no-action-taken-against-victorian-mental-health-services-despite-more-than-12000-complaints>>

<sup>4</sup> Juan E Mendez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, GA res 16/23, UN GAOR, 22<sup>nd</sup> sess, agenda item 3, A/HRC/22/53 (1 February 2013) paras 34 – 35; Nils Melzer, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, GA res 34/19, UN GAOR, 43<sup>rd</sup> sess, agenda item 3, A/HRC/43/49 (20 March 2020) para 37.

<sup>5</sup> Nils Melzer, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, GA res 34/19, UN GAOR, 43<sup>rd</sup> sess, agenda item 3, A/HRC/43/49 (20 March 2020) para 37.

<sup>6</sup> Nils Melzer, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, GA res 34/19, UN GAOR, 43<sup>rd</sup> sess, agenda item 3, A/HRC/43/49 (20 March 2020) paras 61 – 63.

<sup>7</sup> Mental Health Tribunal, '2020-21 Annual Report' (17 August 2021) 14 <<https://www.mht.vic.gov.au/>>

3. The Victorian Government establish the NPM after appropriate consultation by way of legislation that will ensure it has all the powers that are necessary for it to fulfill its mandate. The NPM must include divisions specialising in mental health and disability, as to better understand the way mental health and disability status may affect the treatment of prisoners.
4. The Victorian Government give the SPT full access to any, and all places of detention, should it decide to resume its visit.

## About VMIAC

The Victorian Mental Illness Awareness Council (**VMIAC**) is the peak body for mental health consumers in Victoria. Our vision is a world where all mental health consumers stand proud, live a life with choices honoured, rights upheld, and these principles are embedded in all aspects of society. VMIAC is run and governed by people who have lived experiences of mental health challenges and undertake individual and systems advocacy.

