



Submission to the Australian Human Rights Commission

Consultation Paper 2 on the Implementation of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) September 2018

1 Introduction

The Commission for Children and Young People (Commission) welcomes the opportunity to make a submission to the second round of consultation by the Australian Human Rights Commission (AHRC).

The Commission contributed to the first AHRC consultation process in July 2017. In that submission, the Commission stated that it is well placed to become a National Preventative Mechanism (NPM) for OPCAT for locations in which young people are detained, including juvenile justice and secure welfare facilities.¹ The Commission currently monitors youth justice centres and secure welfare services and coordinates the Independent Visitor Program in youth justice centres.²

The Commission maintains an interest in becoming an NPM for places of detention involving children and young people in Victoria, acknowledging that this decision will be made by the Victorian Government. The aims of the Commission's existing oversight and monitoring role align with the aims of OPCAT, however this work is currently undertaken without the full complement of powers of an NPM. Additional legislative powers would be needed to enable the Commission to undertake OPCAT compliant inspections.

2 Key issues

This submission seeks to answer the questions posed in the Consultation Paper from the perspective of a potential NPM. In the Commission's view, salient issues relevant to OPCAT's implementation include the need for:

- implementation to reflect OPCAT's application to all places of detention
- a planning process to identify and prioritise risks of harm across states and territories
- coordination of OPCAT monitoring, through coordination of NPMs within and between each state, particularly those with oversight of similar places of detention, and between state and Commonwealth NPMs
- clarity on the permissibility of information sharing between NPMs
- consideration to be given to how to monitor NPMs' recommendations for changes to detention practices
- tracking identified learnings from OPCAT monitoring approaches to improve NPM strategies and practices.

¹ Commission submission (July 2017) pg 2.

² Ibid, pg 3.

3 Responses to consultation 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.*

Use existing bodies with ongoing complementary functions

As per our previous submission, we suggest there is value in using existing bodies with expertise in overseeing and monitoring places of detention to undertake the NPM role.³

Utilising existing bodies with complementary functions will provide NPMs' inspection teams with access to current and detailed information about risks, conditions and concerns in places of detention. Existing bodies also hold institutional knowledge about particular places of detention that can be valuable to inform OPCAT inspections.

Use existing bodies with experience working with vulnerable populations

The effective oversight of the management and treatment of children and young people requires a unique lens to appreciate that this cohort of detainees is not fully developed physiologically or psychologically, and has a fundamentally different experience of detention, compared to adults.

The Commission's 2017 systemic inquiry into the use of isolation in the Victorian youth justice system, *The Same Four Walls*, provided an overview of the unique vulnerabilities of children and young people in places of detention. The inquiry identified that two thirds of children and young people in youth justice detention were victims of violence, abuse or neglect. A similar proportion were, or had been, subject to a child protection order. Almost a third had reported mental health conditions. One in five had a history of self-harm and suicidal ideation and almost a quarter had below-average intellectual functioning.⁴

Evidence suggests that early and persistent trauma affects the structure and functioning of the brain. When a child's brain is focused on survival, this impacts the developing cortex.⁵ An underdeveloped cortex is associated with poor impulse control and difficulties with higher level thinking and feeling tasks.⁶ These factors can lead to children and young people being involved in criminal behaviour for which they are detained.⁷

The effects of trauma on a child's brain also influences a child's response to being detained. Loss of liberty, being isolated, unclothed searches, threats and conflict with peers can act as triggers, activating a 'fight or flight' response that frequently takes the form of aggressive or self-harming behaviour. It is important that NPM inspections of places of detention housing children and young people are conducted by a body with an understanding of these unique characteristics.

³ Commission submission (July 2017) pg 4.

⁴ Commission for Children and Young People, *The same four walls: inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system* (Melbourne: Commission for children and Young People, 2017) at pg 35.

⁵ Child Welfare Information Gateway, *Understanding the effects of maltreatment on brain development*.

⁶ Ibid.

⁷ P Mendes, S Baidawi and P Snow, *Good Practice in Reducing the Over-Representation of Care Leavers in the Youth Justice System (Leaving Care and Justice—Phase Three Report)* (Melbourne: Monash University, 2014).



It is also important to ensure that a consistent staff group with expertise in working with children is tasked with conducting regular inspections. This will ensure that children and young people in longer term detention develop familiarity with staff and a relationship of trust may be built over time. In light of the multiple vulnerabilities of detained children, it is also crucial for the NPM for young people to have a good understanding of the intersection between child protection and youth justice services.⁸

Support OPCAT agencies to employ Aboriginal and Torres Strait Islander staff

The over-representation of Aboriginal and Torres Strait Islander children and young people in youth justice makes it imperative that inspections and monitoring be conducted by an agency that employs Aboriginal and Torres Strait Islander staff at all levels and holds expertise in the experiences of Aboriginal and Torres Strait Islander communities.

Use current intelligence holdings to identify the greatest risks to human rights

There is value in undertaking a process of looking broadly at where the most urgent risks of harm exist and considering how they should be prioritised. For example, in Norway, an inter-ministerial working group mapped places of detention and existing supervisory bodies, and the NPM then identified priorities over a six month period before it started OPCAT visits.⁹ A process could be undertaken in Australia at a national or state level to identify the most urgent risks of harm and vulnerable populations in places of detention. The findings could then be used to inform the allocation of resources between NPMs.

Appointed NPMs should prioritise monitoring based on the severity of the human rights issues and the identified risk of harm. For example with respect to monitoring places of detention for children and young people, areas of focus for OPCAT monitoring would be led by an assessment of existing knowledge about facilities, operations, processes, risks, persistent or recurring systemic issues in places of detention, information from continuous incident monitoring functions, information from children and young people and review of departmental data and broader research. Regular consultation with civil society may also inform decisions about priority issues.

The Commission's recent oversight activity suggests areas that will warrant particular attention by the NPM include:

- use of restraint and weapons such as oleoresin capsicum spray and handcuffs
- use of force
- the extent and manner in which children and young people are isolated
- responses to children and young people at risk of self harm or suicidal behaviours.

The Commission's existing knowledge of the youth justice system indicates a number of particularly vulnerable cohorts that would be appropriate areas of priority for the appointed NPM:

- Aboriginal and Torres Strait Islander children and young people in places of detention constitute a particularly vulnerable cohort in Victoria and face significant risks of harm.
- Children and young people of African descent and children and young people with intellectual disabilities are also particularly vulnerable in youth justice settings.

⁸ Commission submission (July 2017) pg 3.

⁹ See 'Experiences of the Norwegian NPM' (October 2, 2017) at <https://www.sivilombudsmannen.no/wp-content/uploads/2017/10/171002-Irland-OPCAT-Roundtable-FINAL-PDF.pdf>; See also Parliamentary Ombudsman Norway 'Annual Report 2014' pg 18, at <https://www.sivilombudsmannen.no/wp-content/uploads/2017/06/NPM-Norway-Annual-Report-2014-low.pdf>.



Question 2: *What categories of 'place of detention' should be subject to visits by Australia's NPM bodies?*

In the Commission's view, it is important to ensure that the categories of 'places of detention' are broadly defined as outlined in the Commission's first submission to the AHRC.¹⁰ Any definition should be non-exhaustive and include reference to 'other places of detention.' Places of detention may include aged care, psychiatric units, drug and alcohol detoxification units and any other locations in which people are deprived of their liberty.

Secure welfare facilities

It is important that secure welfare facilities are included in the definition of places of detention. Secure welfare facilities are used in Victoria to house children in child protection who are considered to be at serious risk of harm. Placement in a secure welfare service can be ordered by the Secretary of the Department of Health and Human Services (DHHS) under section 173(2)(b) of the *Children, Youth and Families Act 2005 (Vic)*, or by the Children's Court under section 263. Admission to a secure welfare service is likely to be precipitated by a significant crisis in a child's life. The aim of the secure welfare service is to keep the child safe whilst a suitable case plan is established to reduce the risk of harm and return the child to the community as soon as possible in a safe and planned way. DHHS provides two 10-bed gender specific residential units that hold children up to 18 years of age for a maximum uninterrupted period of 42 days.

Placement at a secure welfare service is the most restrictive form of protective intervention available to DHHS or the Children's Court. Children are not permitted to leave the premises, visits and telephone calls are managed by staff and both secure welfare facilities include a 'safe room' where children may be isolated by staff.

Children in secure welfare facilities are among the most vulnerable children in the state and are held in a secure environment under decision of a delegate of the Secretary of DHHS. The facilities holding them must be subject to visits by an NPM.

Police cells where people are held for less than 24 hours

We note a recent letter to this office from the Commonwealth Ombudsman, which refers to primary places of detention being:

*'likely to include adult prisons, juvenile detention facilities, police station cells where people are held for more than 24 hours, and closed facilities where individuals are involuntarily detained in accordance with mental health legislation for assessment, treatment or care for more than 24 hours.'*¹¹

The Commission disagrees with the proposal that OPCAT oversight should be limited to police station cells where people are held for more than 24 hours. Article 4.2 of OPCAT does not prescribe a minimum period of detention for it to be invoked and limiting oversight to a specific time period would prohibit scrutiny of children and young people in very vulnerable circumstances.¹² In the Commission's view, the first 24 hours after a person is taken into custody is often the period during which a person is most vulnerable to self-harm.

The proposal to exclude 'police station cells where people are held for less than 24 hours' is inconsistent with the mandate of New Zealand's relevant NPM body, the Independent Police

¹⁰ Commission submission (July 2017) pg 10-11.

¹¹ Letter from the Commonwealth Ombudsman, received on 17 July 2018.

¹² See for example, the Crime Statistics Australia web site, which states that 188 people died in police custody in Victoria between 1980 and 2015. See http://crimestats.aic.gov.au/NDICP/2_police-custody/.



Conduct Authority, which can monitor 'anything that's used to hold or transport prisoners e.g. a cell in a Police station or a court or a vehicle such as a Police van or car.'¹³

It is imperative that any child or young person detained for any period in any place of detention has their rights protected by OPCAT oversight given the possible deleterious impact of even relatively brief periods of detention.

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*
- *engaging with the UN Sub-committee on the Prevention of Torture.*

Clearly establish and enable points of coordination between NPM bodies

Coordination between NPMs is essential to ensure that oversight is effectively discharged across all places of detention, monitoring takes place in a coordinated fashion and information can be shared in the interests of meeting OPCAT obligations. For clarity, the roles of NPMs in each jurisdiction should be clearly identified in legislation or by regulation.

Coordination and information sharing will allow NPMs to identify common problematic practices and examples of best practice. Cross-sector collaboration is particularly valuable in light of the fact that places of detention are often required to respond to challenging behaviour and the same vulnerable individuals often move between different closed environments.¹⁴ Coordination should be enabled and supported:

- within each state and territory
- across states and territories to enable NPMs that oversee similar places of detention to share information. In the context of youth justice, this could be achieved through the Australia and New Zealand Children's Commissioners and Guardians (ANZCCG) alliance
- between state and federal NPMs.¹⁵

Mutual reinforcement of recommendations has been identified as one of the ways in which implementation of NPM recommendations can be promoted. This requires effective coordination, noting that:

*'[r]ecommendations are more likely to be implemented if they are mutually reinforced by other bodies at the national, regional and international levels, including by visiting bodies, courts and human rights mechanisms.'*¹⁶

A number of coordination points should be considered, including regular meetings of all NPMs, thematic sub-groups, strategic and operational plans, online information sharing portals and the distribution of regular NPM newsletters.

¹³ See <https://www.ipca.govt.nz/Site/about-us/OPCAT-factsheet.aspx>.

¹⁴ As noted in AHRC, *OPCAT in Australia: Interim Report to the Attorney General* (September 2017) pg 20.

¹⁵ We note the Commonwealth Attorney General's Department has indicated to the Commission via email of 17 August 2018 that 'there is no intention that the Commonwealth Ombudsman will be responsible for inspecting state and territory places of detention in which federal offenders are held... it is more practical for state NPMs to monitor those places of detention.'

¹⁶ Association for the Prevention of Torture, *The Global Forum on the OPCAT: Preventing Torture, Upholding Dignity: From Pledges to Actions – Outcome Report* pg 50, at https://www.apt.ch/content/files_res/APT_OPDAT_Global_Forum_Report_En.pdf



Coordination activities in the UK, which has 21 bodies fulfilling NPM duties, are summarised in the recent report of the NPM¹⁷ and include the creation of a strategic plan and the establishment of several specialist sub-groups, including one focused on children and young people. These allow NPMs to exchange information and intelligence, and consider joint work on issues affecting detained children.

New Zealand has five NPM bodies, with the Human Rights Commission acting as a coordinating body. As part of this coordination, it publishes the NPM annual report (which includes thematic reports on issues such as use of restraints or prisoners' risk of suicide), coordinates policies and procedures, maintains a secure online workspace for NPM information sharing, initiates regular meetings of the NPMs (usually roundtable meetings), and organises training activities.¹⁸

The Commission is also aware of several examples of regional collaboration. In 2009, the Council of Europe and the European Union set up the European NPM Project to create an active network and promote cooperation between the UN Subcommittee for the Prevention of Torture (SPT), the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and NPMs. As part of this project, a bimonthly European NPM Newsletter is released and provides information relevant to the NPMs in the region.¹⁹ Such regional collaboration may also be valuable as the system of NPMs in Australia develops.

Clearly establish capacity for information sharing between NPM bodies

Clear guidance will be required as to NPM's capacity to share information, such as unpublished findings and reports, with other NPMs for the purpose of meeting OPCAT objectives.

Ensure education that promotes human rights protection is provided within detention places

Education would be needed for young people and for staff in places of detention about:

- the human rights of children and young people in detention
- when those rights can reasonably be limited
- what young people can do if their rights are unreasonably limited
- the role of the NPM in preventing breaches of human rights.

Such education would need to be informed by the practice experience of the NPM.

¹⁷ *Monitoring places of detention: Eighth Annual Report of the United Kingdom's National Preventive Mechanism, 1 April 2016 – 31 March 2017*, pg 13, at https://s3-eu-west-2.amazonaws.com/npm-prod-storage-19n0nag2nk8xk/uploads/2018/02/6.4122_NPM_AR2016-17_v4_web.pdf

¹⁸ Association for the Prevention of Torture, *New Zealand: OPCAT Situation*, at https://apt.ch/en/opcat_pages/opcat-situation-52/?pdf=info_country

¹⁹ United Nations Human Rights: Office of the High Commissioner, *Preventing Torture: The Role of NPMs – A Practical Guide*, at https://www.ohchr.org/Documents/Publications/NPM_Guide_EN.pdf



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?*

We agree with the key principles required for an NPM to be OPCAT compliant as listed in the AHRC Interim Report.²⁰ It is our view that implementing legislation should make explicit reference to these key principles.

Question 5: *The AHRC's Interim Report 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?*

The Commission commends the Australian Government for ratifying OPCAT in accordance with **Proposal 1**. The Commission notes its broad agreement with **Proposals 2, 3, 5, 8, 10, 11 and 12**. We agree with **Proposal 13**, but note that we are not aware of to what extent this work has commenced.

With respect to **Proposal 4**, the Commission agrees that NPMs should work with government to develop a costing for agencies to undertake the NPM role. We suggest it may be appropriate for governments to commit to a new or existing process for considering, prioritising, resourcing and implementing the most important recommendations of NPM bodies, i.e. those which represent the most urgent risks of harm.

The Commission emphasises the need to give some thought at the planning stage to how implementation of NPM recommendations can be monitored and optimised, noting that '*NPMs should not consider themselves as a watchdog, but rather as a day-to-day interlocutor with the authorities, with recommendations being the basis for this interaction.*'²¹ We note the guidance provided in the Practical Guide to the NPM published by the United National Human Rights Commissioner on the ways in which change can be achieved in incremental fashion.²² We also note a relevant recommendation from the Association for the Prevention of Torture on key ways to resource the implementation of recommendations:

*'Given that a lack of resources is often raised as an obstacle to implementation, torture prevention bodies should obtain information on the budgets of relevant institutions and analyze these. This should inform recommendations regarding budget allocation, made to the right bodies (e.g. the parliament, the relevant ministry) at the right time (i.e. when budgets are being set). Furthermore, there are often recommendations that do not require extra resources and some that can be implemented step by step.'*²³

Such an approach would necessitate access to budget documentation of places of detention.

²⁰ AHRC, *OPCAT in Australia: Interim Report to the Attorney General* (September 2017) at pg 23.

²¹ Association for the Prevention of Torture, *The Global Forum on the OPCAT: Preventing Torture, Upholding Dignity: From Pledges to Actions – Outcome Report* pg 50, at https://www.apr.ch/content/files_res/APT_OPDAT_Global_Forum_Report_En.pdf

²² United National Human Rights Commissioner, "Preventing Torture: the role of national preventative mechanisms, A Practical Guide" *Professional training series number 21*, (2018) pg 45, at https://www.ohchr.org/Documents/Publications/NPM_Guide_EN.pdf.

²³ Association for the Prevention of Torture, *The Global Forum on the OPCAT: Preventing Torture, Upholding Dignity: From Pledges to Actions – Outcome Report* pg 50, at https://www.apr.ch/content/files_res/APT_OPDAT_Global_Forum_Report_En.pdf



With respect to **Proposal 6**, the Commission agrees that the Australian Government should commit to the development of national standards that govern how detention inspections should take place. With respect to bullet point 3, the Commission supports the proposal that NPMs should '*provide for community members to identify concerning detention practices,*' noting that such engagement would not be for the purpose of a complaints based scheme, but rather would be to contribute to decisions about the preventative program.

In our view, it is also important to ensure that people who are in detention have the ability to identify concerning detention practices. For children and young people, this would require the creation of avenues to ensure that young people who are in places of detention have the ability to communicate freely with the NPM, without being monitored by relevant authorities.

The Commission agrees with **Proposal 7**, that '*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*'. We would add additional rights to those listed, including daily access to fresh air, the right to exercise religion, and cultural activities.

The Commission strongly supports **Proposal 9**, that the Australian Government incorporate OPCAT's core provisions in a dedicated federal statute. We note with concern that the Australian Government has indicated that it does not intend to enshrine the NPM model in legislation²⁴ despite the SPT's conclusive guidance that it is best practice for NPMs to be implemented through legislation, and that jurisdictions that have created the NPM structure without legislation have encountered significant challenges.

If the Australian Government does not incorporate OPCAT's core provisions in a dedicated federal statute, the Commission supports **Proposal 10**, that the Australian Government should give legislative effect to OPCAT standards. In the Commission's view, it is also appropriate that powers of NPMs in each state and territory should be established through legislation.

²⁴ AHRC, *OPCAT in Australia: Interim Report to the Attorney General* (September 2017) pg 32.

