SUBMISSION BY THE MENTAL HEALTH COMMISSIONS OF AUSTRALIA TO THE AUSTRALIAN HUMAN RIGHTS COMMISSION ON THE OPCAT IN AUSTRALIA, CONSULTATION PAPER – MAY 2017

1. What is your experience of the inspection framework for places of detention in the state or territory where you are based, or in relation to places of detention the Australian Government is responsible for?

NSW experience from the NSW Mental Health Commission

Official Visitors are appointed by the NSW Minister for Mental health to visit people in mental health inpatient facilities. Their functions are prescribed under the *Mental Health Act 2007 (NSW)*, and include:

- to refer matters raising any significant public mental health issues or patient safety or care or treatment issues to the Principal official visitor or any other appropriate person or body
- to act as an advocate for patients to promote the proper resolution of issues arising in the mental health system, including issues raised by the carer of a person detained under the Mental Health Act
- to inspect mental health facilities as directed by the Principal official visitor.

Official Visitors make regular visits to all inpatient psychiatric facilities across NSW, with or without notice, they talk to patients, inspect records and registers, and report on the standard of facilities and services. They liaise with staff about any issues or concerns and report any problems to the Principal Official Visitor and/or the Minister.

Patients, carers, family, friends, staff and other people with an interest in the care or treatment of people with a mental illness can contact the Official Visitors directly.

However, the provisions relating to their functions and powers would need to be strengthened in some important ways to ensure transparency and independence:

- Currently, Official Visitors report directly to the Minister for Mental Health, they do not make public reports or annual reports.
- There needs to be clear power to make recommendations, and to track any response/implementation of the recommendations.
- There would need to be a mechanism for the work of the Official Visitors to feed into the broader OPCAT inspection framework to ensure that systemic issues are adequately identified and responded to, and to ensure a coordinated response to those issues.
- As noted in the discussion paper, appropriate training will need to be provided, and a separate NPM unit may need to be established within the existing Official Visitors framework to ensure functional independence from other activities.

Western Australian Experience from the WA Mental Health Commission

The *Mental Health Act 2014* (WA) (the Act) came into operation on 30 November 2015. One of the key objects of the Act is to ensure that people who have a mental illness are provided the best possible treatment and care:

- with the least possible restriction of their freedom; and

- with the least possible interference with their rights; and
- with respect for their dignity;

Part 20 of the Act provides for the independent role of the Chief Mental Health Advocate, responsible for the provision of mental health advocacy services to 'identified persons', who include people subject to an involuntary treatment order, either on:

- an inpatient treatment order; or
- a community treatment order (CTO).

The Chief Mental Health Advocate appoints mental health advocates who are responsible for visiting all identified persons within certain timeframes to ensure compliance with the Act, as well as promoting compliance with the Charter of Mental Health Care Principles. Amongst other things, mental health advocates are responsible for inquiring into or investigating:

- any matter relating to the conditions of mental health services that may be adversely affecting the health, safety and wellbeing of identified persons;
- the extent to which identified persons have been informed by mental health services of their rights and the extent to which those rights have been observed;
- seeking to resolve complaints about the detention, or the treatment or care, of identified persons by mental health services; and
- referring any issues arising from these investigations to the appropriate bodies or persons.

Part 19 of the Act enables persons subject to the Act, their families and carers to also make complaints about mental health services to the Health and Disability Services Complaints Office (HaDSCO). HaDSCO is an independent Statutory Authority providing an impartial resolution service for complaints relating to health, disability and mental health services provided in Western Australia and the Indian Ocean Territories.

HaDSCO is able to undertake investigations into broad systemic issues related to the provision of health, disability or mental health services in Western Australia.
The investigations undertaken by HaDSCO are governed by the *Health and Disability Services (Complaints) Act 1995*, Part 6 of the *Disability Services Act 1993* and Part 19 of the Act. These Acts provide guidelines to which HaDSCO investigations must adhere to. It explains who has the authority to request and undertake investigations, how they must be managed and the powers of the Director.

The Chief Psychiatrist is an independent statutory officer who holds powers and duties as prescribed by the *Mental Health Act 2014*. The powers invested in the Chief Psychiatrist impose a governance responsibility over any Mental Health Service and other specified agencies that seek to influence the delivery of mental health treatment and care to the Western Australian Community.

The Chief Psychiatrist may visit a private psychiatric hospital, whenever he or she reasonably suspects that proper standards of treatment and care have not been, or are not being maintained by the mental health service.

The Chief Psychiatrist may review any decision of a private psychiatrist about the provision of treatment to an involuntary patient, either detained in a private general hospital or under a CTO and either affirm, vary, revoke or substitute another treatment decision.

2. How should the key elements of OPCAT implementation in Australia be documented?

Given the Australian Government preference not to introduce legislation to support OPCAT, it is vital OPCAT is supported by a robust engagement strategy where the core elements of how it will operate and the roles of the various bodies involved are formally agreed, documented and well publicised.

A formal agreement administered by the Commonwealth Ombudsman is required to provide clarity around the boundaries and/or complementarity of the NPM bodies and other essential mechanisms that speak to quality assurance/risk management, particularly relevant in the mental health context given clinical governance requirements.

NPM bodies need to be given the mandate to gain access to *all* places where people are detained and deprived of their liberty. If this is not going to be legislated, the government needs to ensure that a formal agreement exists to provide NPM bodies with the power and freedoms to undertake meaningful inspection visits. Additional powers and instructions need to be documented to include all elements of the inspection process including, for example, the requirement of conducting interviews in private.

If existing institutions are used as NPM bodies, they will need to reflect on and change their directives to accommodate this new role. This will ensure providers do not just see OPCAT as a layer of regulation, but also as a mechanism to influence cultural change.

The government needs to commit to adequately resourcing NPM bodies. This will require significant budget considerations and should be communicated from the outset.

The Commonwealth Ombudsman should champion the work of NPM bodies and ensure that it is well publicised in order to gain trust in the community and hold the government to account in meeting its international obligations.

3. What are the most important or urgent issues that should be taken into account by the NPM?

Detentions settings

The Mental Health Commissions of Australia support the use of OPCAT as a vehicle to implement best practice within detention settings in order to improve existing systems and prevent conduct that constitutes ill-treatment (paragraph 53). Places of detention concerning mental health patients must include:

- psychiatric facilities;
- prisons, police holding cells, court holding cells, forensic mental health services;

- vehicles used to transport detained people, including ambulances when being transported under a Mental Health Act, Royal Flying Doctor Service when chemically restrained and shackled and transfers from hospital to an Adult Mental Health Service;
- hospitals, including emergency departments and mental health units;
- aged care facilities, including secure dementia care units;
- disability residences; and
- Children's centres.

This list is non-exhaustive.

Seclusion and restraint

Of particular interest to the Mental Health Commissions of Australia is the issue of seclusion and restraint. National and international research has revealed that the use of seclusion and restraint in mental health services has resulted in physical and emotional harm. Their use is known to hinder recovery and traumatise or re-traumatise people – not only consumers but staff who are frequently distressed and injured by the process as well.

Although a national approach to monitoring and reporting on seclusion and restraint is only at an early stage, principles to support a consistent best practice approach in all mental health services in Australia to eliminate the use of mechanical and physical restraint were launched at the recent 'Towards Elimination of Restrictive Practices' forum. The principles re-iterate that the use of restrictive practices is a last resort in managing behavioural emergencies, and the dignity and rights of people accessing mental health services should be respected and supported at all times.

NPM bodies will need to consider the jurisdictional challenges that exist in this area. It is trusted that NPM bodies would work closely with relevant stakeholders to assist in establishing a common approach and reporting framework across jurisdictions for the elimination of seclusion and restraint.

In Western Australia, robust measures are imbedded in the Act to ensure that appropriate care and follow up is monitored when an individual is subject to either a Seclusion Order or Bodily Restraint Order. Part 14 of the Act details requirements around the making and revoking of a Seclusion Order, the examination of a person released from seclusion, the making and revoking of a Bodily Restraint Order and the examination of a person released from a bodily restraint. Each seclusion and bodily restraint event is notified to the Mentally Impaired Accused Review Board and the Chief Psychiatrist. The Chief Psychiatrist monitors events to ensure compliance with the requirements of the Act.

NPM inspection teams

In order to be fully effective, there needs to be an adequate skill mix within NPM inspection teams that includes psychiatric representation. A mental health lens and competency needs to be applied to all inspections across the full range of settings, not only inspections of psychiatric facilities. For example, the high rates of mental illness experienced by people in correctional centres and juvenile justice are well documented. This means those responsible

for inspections of those facilities need to have the requisite skill and mind set to be aware of the overlay of mental health concerns in the justice context.

The Mental Health Commissions of Australia would strongly recommend drawing on the experience of the New Zealand Ombudsman who identified that NPM bodies lacked access to independent experts, particularly medical and mental health experts.[1]
Consultation with relevant mental health professionals and bodies is crucial in ensuring coordinated mechanisms across states and territories and in the identification of best practice. Ongoing mental health training should be provided to NPM members and bodies that do not have relevant mental health experience.

Indefinite detention of people with cognitive and psychiatric impairment

In some jurisdictions, people with cognitive and psychiatric impairment can be detained as forensic patients in a mental health facility, prison, or such other place as the Mental Health Review Tribunal may determine, for indefinite periods of time. The NSW Mental Health Commission has raised this issue in a submission to the Commonwealth in April 2016.

4. How should Australian NPM bodies engage with civil society representatives and existing inspection mechanisms (eg, NGOs, people who visit places of detention etc)?

Given the Attorney-General's preference for multiple bodies from the federal, state and territory governments to be responsible for inspection responsibilities, in NSW, the Official Visitors seem to be the natural fit for an inspection mechanism for mental health units. In WA the Mental Health Advocacy Service and the Chief Psychiatrist appear to be well suited for this purpose.

5. How should the Australian NPM bodies work with key government stakeholders?

NPM bodies will need to remain completely independent from the health system, noting different regulations exist in each jurisdiction.

There is a role for collaboration with jurisdictional mental health tribunals in their capacity to determine the compulsory mental health treatment of a person and matters relating to the security of patients.

NPM bodies could engage directly with their respective state or territory parliaments, governing human rights bodies and detaining authorities with communication fed up to the Commonwealth Ombudsman. The Ombudsman could then collate and disseminate communications to the SPT and the Australia public (if allowed by the Australian government).

[1] New Zealand Human Rights Commission, 'OPCAT in New Zealand 2007-2012' July 2013

6. How can Australia benefit most from the role of the SPT?

First and foremost, the SPT will be vital in supporting the Australian government in the creation of the NPM and in providing training to its members. Some members of the SPT are qualified psychiatrists and have mental health experience that must be drawn on to assist the government with implementing OPCAT in Australia and when establishing the various NPM bodies.

In its capacity to provide guidance to the NPM and encourage public reporting, the SPT will be a valuable trust mechanism for citizens and relevant stakeholders, particularly in the area of mental health. Its expertise in the prevention of torture should be used to identify practices that could increase the risk of ill-treatment in Australia.

7. After the Government formally ratifies OPCAT, how should more detailed decisions be made on how to apply OPCAT in Australia?

Once the government ratifies OPCAT, it is necessary to involve mental health experts in further decision making especially in considering how to apply OPCAT in a mental health context.

Additional comments

Vulnerable persons

The Mental Health Commissions of Australia see a key role of both NPM bodies and the SPT to identify practices that increase the risk of the ill-treatment of persons in places of detention in Australia and prevent further incidents from occurring. It is therefore suggested that people with a mental health condition are included in the list of people with specific vulnerabilities as referred in paragraph 64 of the consultation.

Children in detention

In its report on Australia, the CAT Committee said that it had been made aware that "overrepresentation of Indigenous people in prisons has a serious impact on Indigenous young people and Indigenous women". The Committee recommended that Australia increase its efforts to "address the overrepresentation of Indigenous people in prisons, in particular its underlying causes".

OPCAT is a way for Australia to strengthen its commitment to stamp out torture, and cruel, inhuman or degrading treatment in youth prisons and other places of detention.

Ratifying OPCAT would ensure that youth detention centres and police lock-ups are subject to much stronger independent oversight and monitoring to stop abuse of children in the justice system throughout Australia.

As well as conducting visits to these facilities, the National Preventative Mechanism would be able to:

- conduct confidential interviews with children in detention;
- review and comment on laws and policies (like restraint chairs and spit hooding);
- make recommendations to improve the treatment and conditions of children in detention; and,
- maintain contact with the UN Subcommittee on the Prevention of Torture.

Systemic issues of concern

Recently, Australia has seen cases of abuse resulting in the physical and emotional harm of its citizens. In some instances abusive and neglectful actions have led to death. The recently publicised case of Miriam Merten who died at the Mental Health Unit of Lismore Base Hospital in 2014 has been one example of this.

One of the key benefits of preventive monitoring is that it can lead to the early identification of systemic issues of concern that might result in the mistreatment of people deprived of their liberty.

More than twenty years on from the Royal Commission into Aboriginal Deaths in Custody, the ratification of OPCAT marks a significant step in independently monitoring systemic issues in places of detention. The Mental Health Commissions of Australia are hopeful OPCAT can also make a difference to people with mental illness who are detained in Australia.

Australian Government
National Mental Health Commission

Mental Health Commission of New South Wales

Queensland Government
Queensland Mental Health Commission

Government of South Australia
SA Mental Health Commission

Government of Western Australia
Mental Health Commission

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