



Australian
Human Rights
Commission

Implementing OPCAT in Australia

2020



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2020

Australian Human Rights Commission



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Edward Santow

*Human Rights Commissioner
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Commissioner's Foreword

When an individual is detained, their human rights must continue to be respected. This is true regardless of whether the person is detained for committing a crime, or through no fault of their own—for reasons as diverse as their migration status, their mental health or through quarantine to stop the spread of communicable disease.

In December 2017, the Australian Government ratified the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). In so doing, Australia became bound under international human rights law to take additional practical steps to uphold the inalienable rights of people who are deprived of their liberty. Specifically, Australia has committed to establish and run a coordinated system of independent inspections for all Australian places of detention, with oversight from the United Nations.

The aim of the OPCAT inspection system is to identify practices that can cause mistreatment of people in detention. This will give Australia a more effective 'early warning system', so that governments can *prevent* human rights abuses arising or worsening.

Australia takes human rights seriously. However, we have also seen too many preventable deaths in detention, and too many people harmed unnecessarily. Just months before the Australian Government committed to ratifying OPCAT, we were reminded of its importance as images of serious mistreatment were published from inside the Don Dale Youth Detention Centre.

Now, four years later, Black Lives Matter protests are taking place around the world. The protests highlight the disproportionate number of people of colour who are arrested and detained; and that too many of these people continue to suffer harm, even death, while in custody or detention. Here in Australia, many protesters have focused especially on the extraordinary levels of incarceration and harm experienced in detention by Aboriginal and Torres Strait Islander people.

In February 2017, the then Attorney-General invited me to lead a consultation on how Australia should implement OPCAT. The Commission's interim report was presented to the Attorney-General in September 2017. This document, *Implementing OPCAT in Australia*, is the final step in our consultation process, and reflects input primarily from civil society, as well as from inspectorate and monitoring bodies, and a number of state and territory governments and independent agencies. I am grateful to the many individuals and organisations that gave so generously of their expertise.

Through two phases of consultation, we have recorded strong community and civil society support for seizing this historic opportunity to shine a more powerful light on all Australian places of detention, so that human rights can be more effectively protected.

Detention carries inherent risks of harm, and the Australian Government should be commended for confronting this difficult reality through its ratification of OPCAT. The treaty presents a practical means for Australia's federal, state and territory governments to improve how we as a nation protect the basic rights of people in all places of detention.

Since our interim report, some important progress has been made. The Australian Government has appointed the Commonwealth Ombudsman to undertake inspections of federal places of detention under OPCAT, and to coordinate the state and territory government bodies that are ultimately tasked with inspections in those jurisdictions. The Ombudsman has already made vital headway, by exercising its new OPCAT inspection functions, analysing current inspection arrangements throughout Australia, and consulting with key stakeholders and experts. To date, Western Australia is the only state or territory to announce its OPCAT inspection arrangements.

The ratification of OPCAT is a once-in-a-generation opportunity to improve how we protect the basic rights of people who are deprived of their liberty. The immediate challenge for all Australian governments is to accelerate their work to implement OPCAT. Drawing on the views of stakeholders, *Implementing OPCAT in Australia* makes a number of recommendations to support Australian governments rising to that challenge.

Broadly, the Commission recommends the National Preventative Mechanism (NPM) network be formally established as soon as possible, in a way that ensures all places of detention are subject to independent oversight. Implementation should be informed by human rights expertise and ensure Australia complies with its treaty obligations.

The Commission recommends an OPCAT implementation strategy, with clear and realistic timeframes. *Implementing OPCAT in Australia* outlines the four key elements for this strategy.

The first element focuses on the network of Australian inspection bodies, known as the NPM. The effectiveness of the NPM bodies will be the most critical factor in determining how successful OPCAT is in Australia.

The Commission makes a number of recommendations to ensure these NPM bodies will be able to fulfil their mandate most effectively. This will involve steps to resource and support their activities, and to safeguard their independence. The Commission also proposes ways to support the Commonwealth Ombudsman's existing work as NPM Coordinator.

Secondly, the Commission recognises that transparency is at the heart of OPCAT. To this end, we recommend ways of promoting open reporting of the NPM bodies' inspection work. As well as identifying potential mistreatment or worse, such measures would also bring attention to good detention practices that can be applied more widely in Australia.

Thirdly, the Australian Government should undertake a process to develop national principles that guide how detention inspections should take place, and on the minimum conditions of detention. These national principles would reflect existing international and Australian human rights law and practice.

Fourthly, the Commission recommends ways of ensuring the ongoing involvement of civil society organisations, other experts and people with lived experience of detention.

Finally, *Implementing OPCAT in Australia* is published as Australia's federal, state and territory governments grapple with the COVID-19 pandemic. Anyone who is detained, or who works in a detention facility, is more vulnerable to this virus—not least because communicable diseases can spread more rapidly in closed spaces. Some conventional ways of inspecting places of detention will need to be adapted to reflect current concerns, and to ensure inspections do not inadvertently increase the risk of spreading disease. All of this will be made even more difficult given the unprecedented list of urgent demands faced by Australia's federal, state and territory governments.

However, I have confidence in Australia's ability to implement OPCAT effectively, notwithstanding these challenges. In previous times of national crisis, Australia has a proud record of taking a principled stand, by treating everyone in our country as worthy of protection.

By effectively implementing OPCAT, Australia would once again show its commitment to this fundamental principle that underpins our liberal democracy.



Edward Santow,
Human Rights Commissioner

June 2020

List of recommendations

Recommendation 1

Each National Preventive Mechanism should ensure:

- relevant officers receive human rights training on a regular and ongoing basis
- relevant officers receive training and education regarding the needs of vulnerable people in places of detention, including the impact of intersectional disadvantage
- inspection teams can access technical expertise on human rights in the exercise of their NPM functions, as well as specific expertise and knowledge related to vulnerable detainees.

Recommendation 2

The Australian Government, in consultation with the state and territory governments, should support the development of a human rights education and training strategy for NPMs, detention authorities and their staff.

Recommendation 3

In assessing whether each Australian jurisdiction is appropriately fulfilling its NPM function, special attention should be given to ensuring:

- each NPM body has a preventive mandate
- there are clear lines of communication between the various entities designated as NPM bodies
- each NPM body has the necessary powers and independence to fulfil its mandate, set out in legislation
- each NPM body has the requisite human rights expertise, including by engaging with civil society organisations and human rights institutions, including by way of training and education
- each NPM body has the requisite expertise to identify the needs of vulnerable cohorts of detainees
- each NPM body is transparent in its operation, including by publishing its reports and recommendations
- each NPM adopts mechanisms and processes to identify and prevent ill treatment of vulnerable cohorts of detainees, such as establishing thematic committees, and accessing the views of detainees, for example, by directly surveying people with lived experience of detention.

Recommendation 4

The Australian federal, state and territory governments should appoint the Commonwealth Ombudsman as Australia's OPCAT expert adviser, to assist in the establishment of NPM bodies in each jurisdiction.

Each Australian state and territory government should consult with the Commonwealth Ombudsman on the steps it is taking to fulfil the NPM functions in its jurisdiction.

Over a 12-month period, the Commonwealth Ombudsman should provide advice to each jurisdiction, advising of any further steps it considers necessary for the jurisdiction to take to ensure it complies with OPCAT.

By mid-2021, the Commonwealth Ombudsman should publish a report on the progress made by each Australian jurisdiction to fulfil the NPM function in accordance with OPCAT.

Recommendation 5

All NPM bodies should be required to report annually on activities undertaken to fulfil the NPM mandate. The Commonwealth Ombudsman, as NPM Coordinator, should publish an annual report on the activities of the NPM Network.

Recommendation 6

Public reporting by each NPM on OPCAT activities should:

- be informed by human rights expertise and consider how human rights are being protected in places of detention inspected
- report on the extent to which the recommendations it has made as the NPM have been implemented.

Recommendation 7

In consultation with state and territory NPMs, the Commonwealth Ombudsman should undertake a periodic review to evaluate the implementation of NPM recommendations, especially those with national significance. The first review should take place as soon as practicable—for example, when

an NPM has been appointed by each state and territory government, or when a majority of state and territory NPMs have been appointed.

Recommendation 8

Australia's federal, state and territory governments should agree to provide sufficient resources necessary to ensure NPM bodies can meet the initial costs of undertaking new NPM responsibilities, so that all NPM bodies can comply with OPCAT. This resourcing should be provided in a way that:

- enables NPM bodies to fulfil OPCAT's core inspection functions
- respects the functional, structural and personal independence of NPM bodies
- ensures effective liaison with, and involvement of, civil society representatives and people with lived experience of detention in the OPCAT inspection process.

Recommendation 9

Following consultation with each state and territory NPM, the Commonwealth Ombudsman should identify any reforms to detention policy and practice that may be necessary in more than one Australian jurisdiction, and monitor the implementation of any recommended changes. The Commonwealth Ombudsman should report publicly on this activity through its annual report or any public reports specific to OPCAT. The Commonwealth Ombudsman should undertake this process regularly, from a time when an NPM has been appointed by each state and territory government, or when a majority of state and territory NPMs have been appointed.

Recommendation 10

In implementing OPCAT, Australian Governments should ensure NPMs have the power to inspect all places of detention, in accordance with Articles 1 and 4 of OPCAT. In determining which places of detention should be prioritised for inspection, it is appropriate for NPM bodies to assign the highest priority to locations where serious breaches of human rights are most likely to occur.

Recommendation 11

As soon as practicable, the Commonwealth Ombudsman should develop guidance to assist NPMs to prioritise the OPCAT inspection function. Guidance should be developed in close consultation with human rights institutions and civil society.

Recommendation 12

The Australian Government should adopt national principles that guide *how detention inspections should take place* by the bodies performing the NPM function (National Inspection Principles). These principles should:

- provide for NPM independence and the full range of inspection and information access powers available under OPCAT
- require transparent publication of detention inspection reports
- provide for community members to identify concerning detention practices
- provide for good practice and national consistency in the collection and analysis of data related to detention
- ensure appropriate expertise among inspectors, including by working with specialists and civil society representatives.

Recommendation 13

The Australian Government should adopt national principles regarding *minimum conditions of detention* to protect the human rights of detainees (National Conditions Principles). These principles should deal with issues including:

- the protection of particularly vulnerable detainees, such as children and young people, people with disability, Aboriginal and Torres Strait Islander peoples, LGBTI people and immigration detainees
- complaints processes and consequences for unlawful or improper conduct
- restrictive practices, seclusion, strip searches and the use of force
- the safe transport of detainees

- the material condition of places of detention
- the provision of essential services (eg health care, legal services and education).

Recommendation 14

The Australian Government should incorporate the core provisions of OPCAT in a dedicated federal statute. Australia's state and territory governments should also consider the need for dedicated legislation to give effect to OPCAT in their respective jurisdictions.

Recommendation 15

If the Australian Government does not establish the proposed NPM mechanism in dedicated legislation, an intergovernmental agreement should be agreed as soon as practicable to guide establishment and operation of NPMs.

Recommendation 16

The Commonwealth Ombudsman should continue to support the involvement of civil society organisations, other experts and people with lived experience of detention, in the operation of OPCAT in Australia. This could occur through the Ombudsman's existing OPCAT Advisory Group, and other mechanisms of engagement.

Recommendation 17

The Australian Government should adopt an OPCAT implementation strategy, which includes:

- a measurable timeframe for implementation, identifying key dates and milestones
- the process for ensuring that each body designated with an NPM function is OPCAT compliant
- an education and awareness-raising program for the general public, relevant civil society organisations and also targeted at the bodies responsible for places of detention
- areas or issues of priority focus for OPCAT inspections.

1. Introduction

The *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT) aims to improve how people's human rights are protected when they are detained. It does this by providing for a rigorous process of independent inspections of all places of detention in a country's jurisdiction. In so doing, OPCAT enables a light to be shone on the conditions experienced by people in detention.

On 21 December 2017, the Australian Government ratified OPCAT.¹ By ratifying OPCAT, Australia agreed to be bound by the treaty, and signalled to the world that it will comply with it.

The Commission's focus here is on *implementing* OPCAT. That process involves incorporating the terms of the treaty into Australian law, policy and practice. The Australian Government Attorney-General's Department has recently indicated that it intends for a federated model of National Preventive Mechanisms (NPMs) to be established by January 2022.²

Some progress in implementing OPCAT has been made since ratification. However, many critical questions, including the designation and operation of NPM bodies (Australia's domestic detention inspection bodies), are only partially resolved. The Commission considers, however, that progress towards implementation of OPCAT to date has been too slow.

This has been despite the expression of public concern about conditions and treatment of people in different detention settings, ranging from police watch houses, juvenile detention facilities, immigration detention facilities, aged care and secure disability facilities.

Indeed, concerns relating to the treatment of people detained have been the subject of three Royal Commissions, two of which are ongoing at the time of writing.

There needs to be greater momentum towards implementation. The Commission's recommendations are focused on the inspection systems required under OPCAT being fully operational and compliant by January 2022 at the absolute latest.

This document brings together the Commission's work in this area. The recommendations made here are informed by the Commission's consultation process, which has included face-to-face meetings and receipt of written submissions. It is also informed by the Commission's extensive work on OPCAT over more than a decade, including the Commission's 2017 interim report on implementing OPCAT and the National Children's Commissioner's 2016 report on the application of OPCAT to the custodial detention of children and young people.³

2. Background

2.1 About OPCAT

Australia is a party to the *Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment* (CAT).⁴ CAT sets out substantive rules prohibiting torture and other forms of mistreatment.

OPCAT provides a means of monitoring how a state is complying with the substantive rules in CAT in the specific context of places of detention. Recognising that torture and other forms of serious mistreatment are more likely to occur in places where people are deprived of their liberty, OPCAT aims to prevent torture and other forms of ill treatment by establishing a regime for independent visits of places of detention.⁵ Each country that ratifies OPCAT must introduce a system to inspect or visit all places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

OPCAT embodies a preventive approach.⁶ It does not rely on affected individuals first making complaints of torture or ill treatment. Instead, OPCAT focuses on identifying and addressing problems at an early stage.⁷ It operates through a proactive and regular system of inspections and recommendations. A primary aim is to identify and address harm in detention before this harm becomes more serious, widespread or systemic.



OPCAT requires places of detention to be monitored through two complementary types of independent body:

- one or more NPMs, which would be the Australian entity or network of entities responsible for inspections and oversight⁸
- the UN Subcommittee on the Prevention of Torture (SPT), which is the United Nations (UN) body of independent experts responsible for conducting visits to places of detention in jurisdictions that have ratified OPCAT and providing guidance to NPMs to assist in the performance of their duties.⁹

Under Article 24, upon ratification, States Parties are permitted to make a declaration postponing the implementation of their obligations for a maximum of three years. When Australia ratified OPCAT on 21 December 2017, it also made a declaration invoking Article 24 in relation to its obligations to establish an NPM.¹⁰

2.2 Implementing OPCAT in Australia

Australia has discretion or flexibility in determining precisely how to implement OPCAT. This allows local conditions to be taken into account, and for consultation with affected groups.

When announcing its intention to ratify OPCAT, the Australian Government outlined some ways in which it intended OPCAT to operate in Australia. However, it expressed an intention to work cooperatively to determine many elements that were unresolved.¹¹

The Australian Government is itself consulting with the states and territories, especially via the Council of Attorneys-General.¹² As the vast majority of Australia's places of detention are run by state and territory governments, the Australian Government has taken the view that this cooperation was critical to implementing OPCAT effectively within Australia's federation.¹³



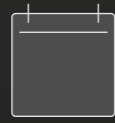
The Australian Government also acknowledged that, in order to achieve the aims of the treaty, it would be necessary to consult with people outside government, especially in civil society. To this end, the Attorney-General asked the Human Rights Commissioner of the Australian Human Rights Commission to lead a consultation process with civil society organisations and others regarding how OPCAT should be implemented in Australia.¹⁴

2.3 What decisions have been made regarding OPCAT implementation in Australia?

The Australian Government has indicated that multiple bodies from the federal, state and territory governments will fulfil the NPM inspection function in Australia. Each Australian jurisdiction will be responsible for determining which body or bodies will undertake this function in respect of its own places of detention.

The work of the various inspection bodies will be supported by a national body responsible for coordination and capacity building among all the federal, state and territory bodies that fulfil the NPM function.

The Australian Government announced that the Commonwealth Ombudsman will perform the national coordinating function as the 'NPM Coordinator'. It will also act as the NPM for federal places of detention. The Ombudsman has commenced its work as NPM Coordinator; the role formally began on 1 July 2018.¹⁵ While the SPT had initially planned to visit Australia in March and April 2020, the precise timing of this visit will depend on, among other things, precautions necessary as a result of the COVID-19 pandemic.



TIMELINE

2017
May

AHRC's first OPCAT consultation paper published

1987
June

CAT enters into force worldwide

2017
September

AHRC's OPCAT Interim Report communicated to the Commonwealth Attorney-General

1989
September

Australia ratifies CAT

2017
December

Australia ratifies OPCAT and makes a declaration under Article 24 to postpone implementing the NPM for a maximum of three years

2006
June

OPCAT enters into force worldwide

2018
June

AHRC's second OPCAT consultation paper published

2009
May

Australia signs OPCAT

2018
July

Commonwealth Ombudsman appointed as NPM Coordinator and NPM for Commonwealth places of detention

2016
November

National Children's Commissioner's annual Children's Rights Report considers OPCAT implementation in the context of youth justice

2019
September

Commonwealth Ombudsman publishes baseline assessment of Australia's OPCAT readiness

2017
February

Australia commits to ratify OPCAT

2020

UN Subcommittee on Prevention of Torture (SPT) plans to visit Australia

3. The Commission's consultation

The Commission's OPCAT consultation took place in two phases.

The first consultation occurred before Australia ratified OPCAT, commencing with the publication of the Commission's first consultation paper in May 2017. In 2017, the Attorney-General's Department indicated informally to the Commission that there were a number of issues about which the Australian Government wanted feedback prior to ratifying OPCAT. These issues related to:

- the overarching NPM model that Australia should adopt
- how the NPM should be resourced
- the possible development of national standards for OPCAT inspections and minimum conditions of detention
- which Australian Government department should have primary responsibility for policy issues arising from the inspection and related processes required by OPCAT
- how best to incorporate OPCAT into Australian law and practice.¹⁶

The Commission's initial consultation focused primarily on these issues. In September 2017, the Commission communicated its Interim Report to the Attorney-General, setting out its preliminary views on these issues. The Interim Report set out the Commission's provisional views, informed by its initial round of consultation. That Interim Report was made public in June 2018, together with a second consultation paper.¹⁷

The second stage of the Commission's consultation took place in late 2018 and early 2019. In addition to inviting feedback on the proposals in the Interim Report, the Commission asked additional questions about how OPCAT should be implemented in Australia.

The Commission invited anyone with an interest in this issue to participate in its consultation processes. The Commission particularly encouraged input from civil society representatives with experience and expertise regarding conditions of detention.

The Commission heard from medical professionals, lawyers, social workers, academics, human rights bodies, religious groups and organisations representing people with lived experience of detention. The Commission also engaged with state and territory human rights agencies, ombudsman offices and other independent government agencies. Stakeholder expertise covered a range of sectors, including criminal justice, aged care, disability, Indigenous justice and immigration.



While the Australian Government has been consulting separately with state and territory governments, the Commission also welcomed the participation in its process of representatives from federal, state and territory governments. Given the Commonwealth Ombudsman's role as NPM Coordinator, the Commission has worked closely with the Ombudsman's office throughout this consultation process.

With the support of the Asia Pacific Forum of National Human Rights Institutions, the Commission has held several roundtables with key stakeholders in Adelaide, Brisbane, Canberra, Darwin, Hobart, Melbourne, Perth and Sydney in 2017–2019.

The Commission also received 122 submissions across the two consultation stages. Taking account of submissions written jointly, a total of 148 organisations and individuals contributed to these submissions.¹⁸

4. The importance of OPCAT in Australia

Many stakeholders took the opportunity of the Commission's consultation process to emphasise their strong support for the Australian Government ratifying OPCAT, and working cooperatively with the states, territories and all stakeholders to implement the treaty.¹⁹ The Commission did not receive any submissions that opposed ratifying or implementing OPCAT.

Civil society representatives welcomed the opportunity to provide input in support of ratification and to help frame implementation through the Commission's consultation process.²⁰ Many also expressed strong interest in continuing to be actively consulted as implementation proceeds.²¹

Stakeholders emphasised OPCAT's value to Australia—especially to improve how human rights are protected for people in detention.²² There was a strong, pragmatic understanding of what OPCAT represents: a means of improving oversight and accountability for Australian places of detention, as well as identifying good detention practices with a view to improving practices nationwide.

Stakeholders observed that implementing OPCAT presents an opportunity to initiate cross-sector collaboration on common areas of concern. For example, seclusion is used to manage challenging behaviour in both the criminal justice and mental health contexts. Similarly, the same vulnerable individuals often move between different forms of detention.²³ If OPCAT is implemented effectively, it will allow for expertise to be shared across different sectors with a view to addressing these types of cross-sector issues that have tended to be dealt with in isolation.

OPCAT expressly recognises a link between inspecting places of detention and improving the situation of those detained, with the Preamble stating that 'the protection of persons deprived of their liberty ... can be strengthened by non-judicial means of a preventive nature, based on regular visits to places of detention'. In a similar way, civil society stakeholders emphasised that implementing OPCAT must focus on improving how places of detention are inspected, with a view to improving the conditions in which people are detained.²⁴

The Commission endorses this approach. Merely adjusting the current processes for detention inspections cannot be an end in itself. Instead, the changes required by OPCAT should be pursued in a way that promotes stronger and more consistent human rights protections for people who are detained across all jurisdictions.

This might be described as a ‘human rights approach’. A human rights approach to measuring, and preventing, the ill treatment of individuals held in places of detention has been adopted by recent Royal Commissions investigating significant ill treatment of individuals in places of detention and care.

The Royal Commission into the protection and detention of children in the Northern Territory (the NT Royal Commission) recommended a human rights-based approach to legislative change in the NT to protect the rights of children in detention. The Commission made detailed recommendations regarding OPCAT-compliant oversight to prevent abuse of children’s human rights in places of detention in the NT.²⁵

The implementation of OPCAT also provides a distinct opportunity to address the implications of detention for particularly vulnerable or marginalised groups. As noted by the Children’s Commissioner in her 2016 report, for example, OPCAT ‘provides a positive framework’ to better safeguard the rights of children and young people.²⁶ Stakeholders also noted the importance of recognising, within the OPCAT implementation process, the needs of particular groups including women, Aboriginal and Torres Strait Islander peoples, people with disability and children and young people.²⁷

Stakeholders to the Commission’s consultation strongly supported the implementation of OPCAT as a means of better protecting the human rights of those deprived of their liberty.²⁸



5. NPM model

This section considers how Australia’s NPM should be structured and the key characteristics that any entity performing the NPM function should have.

Under Article 3 of OPCAT, Australia must ‘set up, designate or maintain at the domestic level’ an NPM. However, OPCAT gives some discretion about the particular NPM model that each State Party adopts. For example, Article 17 makes clear that one or multiple bodies can carry out this NPM function.

A range of NPM models have been adopted in the many jurisdictions that have ratified OPCAT. As set out in Appendix 1, the UK designated 21 pre-existing regional bodies by way of ministerial statement, nominating one of those bodies as the coordinating NPM body. In Germany, two new independent institutions, at the federal and provincial levels, were established to be the NPM.²⁹ One national body was designated as the NPM in each of Switzerland, Norway and Mexico; while Austria created a new federal body with authority and coordination functions in relation to five provincial bodies.³⁰

5.1 Australia’s NPM model

A national NPM network

The Australian Government has committed to a diffuse NPM model: a national network of bodies fulfilling the NPM function, made up primarily of existing inspectorates.

Since 1 July 2018, the Commonwealth Ombudsman has been responsible for facilitating and coordinating that network, as well as inspecting federal places of detention.³¹

Under the Australian Government’s approach, the state and territory governments are responsible for determining which body or bodies will perform the NPM function in their respective jurisdictions, and how they will carry out their work. The Commonwealth Ombudsman will not oversee state and territory inspectorates, nor will it conduct secondary inspections. Instead, it will ‘work with existing bodies to share experience, undertake research, identify gaps and overlaps and coordinate interactions’ with the SPT.³² At the time of writing, Western Australia is the only state or territory government to have nominated formally a body to fulfil the required inspection functions, as an NPM, for places of detention within its jurisdiction.³³

Australia's diffuse NPM model will rely on good coordination between the various bodies performing the NPM function. To this end, some stakeholders recommended there be an independent, specialised NPM body appointed in each jurisdiction to be coordinated by one federal NPM body.³⁴ In addition, a state or territory NPM coordinator could coordinate the work of other inspectorate bodies, or there could be multiple NPMs nominated in each jurisdiction. The Australian Government has created a statutory instrument that refers to the 'National Preventive Mechanism Network' as

the persons and bodies separately appointed or established by the Commonwealth and each State and Territory to give effect to Australia's obligations under OPCAT.³⁵

Human rights expertise

CAT and OPCAT are human rights treaties. Fulfilling the NPM functions, therefore, requires human rights expertise. A number of stakeholders emphasised that NPMs require expertise specifically in the particular needs of vulnerable groups who are detained.

Some stakeholders were disappointed that the public was not consulted on the overarching NPM model committed to by the Australian Government in February 2017, and in particular about which body or bodies should be assigned the NPM role.³⁶

While not critical of the role that has been assigned to the Commonwealth Ombudsman, some stakeholders took the position that, given OPCAT is a human rights treaty, human rights commissions at the Commonwealth and state and territory level would be the most appropriate NPMs.³⁷ Other stakeholders noted the importance of the NPM bodies having access to human rights expertise that currently vests in relatively few inspecting bodies across Australia.³⁸

In addition to overarching comments that OPCAT will require human rights expertise for effective implementation, some submissions identified specific aspects of implementation that would benefit from the involvement of human rights experts from government and civil society. Stakeholders identified, for example, the importance of developing national inspection standards informed by international human rights law,³⁹ and the development of human rights informed risk methodologies to identify vulnerable groups or individuals in places of detention who should be prioritised by the NPM.⁴⁰

Stakeholders also referred to examples in other jurisdictions where there are formal structures in place to ensure NPMs are informed by human rights law and practice.⁴¹ In Denmark, for example, formal arrangements ensure the work of the NPM is informed by relevant human rights expertise (see below).

Denmark's NPM model

Denmark ratified OPCAT in 2004, designating the Danish Parliamentary Ombudsman as its NPM in 2007. Amendments were made to the Ombudsman's founding legislation to empower the Ombudsman to undertake its NPM function.

In 2009, the Ombudsman formed a formal tripartite arrangement with the Danish Institute for Human Rights and non-government organisation Dignity (formerly the Rehabilitation and Research Center for Torture Victims). These two organisations have an advisory function for the Ombudsman as NPM.

The formal arrangement has two parts. First, the OPCAT Council: the three organisations meet several times a year to consider guidelines for NPM operations, the NPM annual report and joint press releases. Secondly, the OPCAT Work Group is constituted by permanent staff appointed in each institution who work on inspection activities, as planned by the Ombudsman.⁴²



The Commission has worked in close collaboration with the Commonwealth Ombudsman throughout the Commission's consultation, and continues to share its expertise and experience with the Ombudsman. In its recent report on OPCAT implementation, the Commonwealth Ombudsman stated its intention for this collaborative approach to continue, in order to meet its NPM mandate.⁴³

One way to ensure all NPM bodies are properly informed with human rights expertise would be to formalise the input of this expertise to the NPM framework, such as by way of a memorandum of understanding. This would normally be with the relevant national (or sub-national) human rights institution, or another body with human rights expertise. Formalising human rights input in this way would ensure that NPM inspections focus on the matters that are within the scope of CAT and OPCAT.

At the federal level, the Commission continues to work with the Ombudsman as NPM Coordinator. To support and deepen this ongoing collaboration, the option of formalising the arrangement is being considered.

Human rights protection for vulnerable cohorts

NPM bodies should also retain expertise and receive training, on the needs of vulnerable people in places of detention. Stakeholders identified a number of vulnerable groups which require specific knowledge and expertise in order to identify and prevent ill treatment, including:

- **Children and young people**, whose developmental needs and experiences of detention differ from adults. The 2019 UN Global Study on Children deprived of their liberty found that children are often subjected to detention conditions—such as isolation, detention alongside adults, and abuse and neglect—that may amount to cruel, inhuman and degrading treatment *because* they are children. A lack of independent and skilled oversight for children in places of detention is a contributing factor to the continuation of these conditions.⁴⁴ NPMs should, accordingly, retain technical expertise about child development, children's rights, trauma and how detention can affect children.

- **Aboriginal and Torres Strait Islander peoples**, who have long been over-represented in many forms of detention and are affected by conditions of detention in distinct ways due to numerous factors including ongoing social and historical marginalisation and disadvantage, over-policing and experience of police bias, and intergenerational trauma. Aboriginal and Torres Strait Islander peoples in places of detention also have specific cultural requirements that differ from other people deprived of their liberty, such as the need to maintain strong cultural identity and connection to culture, country and community.⁴⁵
- **People with intellectual, cognitive and psychosocial disabilities**, including those who also identify as Aboriginal or Torres Strait Islander, are also significantly overrepresented in places of detention.⁴⁶ The Commission's research has found that prisoners with disability have been subjected to a range of harmful practices, including being physically shackled, medically restrained, segregated for long periods of time, and denied family visits or support persons as punishment.⁴⁷ The impact of such treatment is compounded for people with disability who have been declared unfit to stand trial, when detention can be indefinite.⁴⁸

As outlined in further detail below, group-specific expertise should be retained to inform inspection visits and other work of NPMs, such as thematic investigations or reviews.

Human rights education and training

Given that some NPM bodies do not have a specific grounding in human rights law or policy, it is necessary to consider how to provide the requisite human rights training and education.

The importance of education about OPCAT, and how to apply a human rights framework to inspecting, monitoring and preventing ill treatment in places of detention, has been recognised by the SPT⁴⁹ and experts in preventive detention inspections.⁵⁰ The Association for the Prevention of Torture regularly conducts training for NPMs and detaining authorities in jurisdictions that have ratified OPCAT.⁵¹

The Commission emphasises the value of NPMs undertaking education and training on the human rights framework of which OPCAT is a part. This should be practical, in the sense that it should be tailored to the specific task of inspection and monitoring of places of detention. Training should focus on the objectives of OPCAT, the concept of preventive monitoring, what type of treatment and practices may constitute torture, cruel, inhuman or degrading treatment, and the characteristics and needs of different groups of detainees, many of whom will have intersectional issues (for example, children with disability).

Stakeholders also considered that education will be important to underpin the relationship between an NPM and a detaining authority, arguing that successful OPCAT inspections will rely on support from management and staff.⁵² The importance of a constructive, positive relationship between the NPM and detaining authorities to support implementation has also been noted in other jurisdictions.⁵³

Human rights institutions, or civil society organisations and individuals with expertise in human rights and preventive detention, would be well placed to deliver this kind of training, in partnership with the NPM Coordinator. A schedule of training and education should be developed as part of OPCAT implementation.

Recommendation 1

Each National Preventive Mechanism should ensure:

- relevant officers receive human rights training on a regular and ongoing basis
- relevant officers receive training and education regarding the needs of vulnerable people in places of detention, including the impact of intersectional disadvantage
- inspection teams can access technical expertise on human rights in the exercise of their NPM functions, as well as specific expertise and knowledge related to vulnerable detainees.

Recommendation 2

The Australian Government, in consultation with the state and territory governments, should support the development of a human rights education and training strategy for NPMs, detention authorities and their staff.



5.2 Key features of NPM bodies

Taking into account the features, functions and resources of Australia's current inspectorate bodies, it is clear that change will be needed—to varying degrees—in order to comply with OPCAT.

Part IV of OPCAT sets out the features each NPM must have to comply with the treaty. Considering these requirements, international best practice and input from stakeholders, the Commission considers that the following areas should be of particular focus in bringing Australia to OPCAT compliance in how inspections of places of detention are carried out.

OPCAT requires each NPM body to be functionally and structurally independent.⁵⁴

A number of stakeholders considered many of the current inspectorate arrangements not to be independent, or noted that improvements will have to be made to bolster their functional independence.⁵⁵ Stakeholders submitted that certain oversight bodies lack independence, which has, in some jurisdictions, led to detainee distrust and reluctance to make a complaint.⁵⁶ As noted in section 7 below, the NPM bodies must be sufficiently resourced not only to undertake any additional functions,⁵⁷ but also to protect their independence.⁵⁸

The NPM bodies should have a *preventive and proactive, rather than complaints-based and reactive, approach.* Article 1 of OPCAT states the objective of the treaty is to establish a system of oversight, in order to prevent ill treatment; this is reinforced throughout the operational provisions of the treaty.⁵⁹ Stakeholders noted that many inspectorate mechanisms respond to individual complaints, rather than having a mandate to perform regular proactive inspections with a view to *preventing* mistreatment.⁶⁰ In the case of children and young people, for example, OPCAT implementation should be informed by international instruments that establish the need for non-punitive, educative and therapeutic approaches within places of detention in order to prevent ill treatment.⁶¹

The NPM body must have sufficient powers to examine treatment of individuals in places of detention, to make recommendations and to comment on draft legislation.⁶² NPMs should also be able to access relevant information, be able to have private interviews, have unfettered access to places of detention and have the liberty to choose its visiting schedule.⁶³ Stakeholders agreed that NPMs should be able to undertake regular, unannounced visits, with unimpeded access to detainees, staff and records,⁶⁴ as well as the power to access all places of detention that may be relevant to the preventive mandate under OPCAT.⁶⁵ It is also important that the NPM body is able to engage in parliamentary processes and comment on relevant draft policy and law.⁶⁶ These features could be incorporated in national principles or guidelines, as discussed in section 9 below.

Under Article 18(2), the NPM body should retain independent experts for visits and reporting. Stakeholders noted the importance of inspecting bodies retaining the required breadth of expertise or culturally appropriate inspectors to assess detention conditions and identify systemic problems, particularly in respect of vulnerable detainees.⁶⁷

Some stakeholders suggested the incorporation of relevant expertise could be secured by an ancillary agreement with civil society organisations.⁶⁸ Some stakeholders also submitted there should be Aboriginal and Torres Strait Islander representation in the NPM body or its visits to places of detention.⁶⁹ Other stakeholders noted the importance of the NPM being disability aware and inclusive of people with disability.⁷⁰ Other stakeholders urged that the NPM body include psychological and psychiatric expertise and advice.⁷¹ As discussed further in section 7, it is vital that NPM bodies are sufficiently resourced to retain relevant expertise.

In addition to retaining relevant expertise, NPMs should adopt mechanisms and processes to ensure the needs of vulnerable cohorts in places of detention are identified, with consequent recommendations, to prevent ill treatment.

Some stakeholders proposed that thematic subcommittees be established by the coordinating NPM, made up of representatives across all NPM bodies, similar to the approach taken by the UK NPM.⁷² The National Children's Commissioner has also recommended that a children's sub-committee be established as part of Australia's NPM network to ensure those with expertise and experience of working with children can provide specialist advice, information and recommendations.⁷³

There are also helpful examples from other countries regarding how NPMs can access the views of those with lived experience of places of detention. In the United Kingdom, for example, the prisons inspectorate body conducts extensive surveys of children and young people in places of detention. Survey data is used to support analysis of their perception and treatment within custodial settings (see below).

Surveys of young people and children in custodial settings in the UK

HM Inspectorate of Prisons (HMIP) uses surveys to support its regular inspections, including unannounced visits of secure training centres and young offender institutions.

Survey participants are asked about their experience within these custodial environments, such as whether they feel safe in that environment and whether they are treated respectfully. Surveys also ask about their treatment, such as whether they have been restrained. The focus is on how children and young people perceive the environment they are in, which has been linked, for example, to good behaviour and the overall safety of a custodial environment.

Survey data informs inspection teams and is used to judge the treatment and conditions experienced by children and young people in these secure environments. The data is part of a matrix of information from numerous sources, which HMIP then uses to address systemic issues, identify trends and support thematic reporting.⁷⁴ The intention of HMIP in conducting the 2016–17 survey was to support the provision of 'safe, respectful and purposeful custody for children', noting the importance of their perceptions in custody given these 'will, for them, be the reality of what is happening'.⁷⁵

The NPM body's processes and operations should be transparent. Stakeholders commented that there is often a lack of transparency regarding inspection methodology and findings of existing inspectorate bodies and/or a failure to make public inspection reports or recommendations. Opaque operations and findings were considered to limit the dissemination of good practice, the identification of systemic issues—including across sectors—and to pose an obstacle for organisations set up to advocate on behalf of vulnerable detainees.⁷⁶ The Commission considers transparency of how NPMs operate is an important mechanism to ensure accountability, both of the NPM and authorities for places of detention.

There should be clear parameters for reporting. While OPCAT does not expressly require NPMs to publish reports of their visits, or recommendations to government, it does require States Parties to publish annual reports.⁷⁷ Stakeholders considered the NPM bodies should be required to report periodically to Parliament and publish periodic or thematic reports where relevant.⁷⁸ Stakeholders recommended that the NPM Coordinator and state and territory NPM body reports generally should be made public, as should any reports and recommendations made by the SPT.⁷⁹ Submissions also maintained there should be a timeframe mandating a response from government to recommendations made by the local or national NPM body.⁸⁰

The NPM body must follow up on the recommendations it makes. Some stakeholders commented that there is often no transparent or timely response to recommendations for improvements made by current inspectorate bodies,⁸¹ or tracking conducted of any implementation of recommendations made.⁸² Article 22 of OPCAT states competent authorities should examine NPM recommendations and enter into a dialogue with the State Party regarding possible implementation measures. The importance of providing resources to implement recommendations is discussed further in section 7, below.

There must be clear and formal communication between the NPM Coordinator and the state and territory NPM bodies and among all state and territory NPM bodies.⁸³ This could build on some of the existing formal and informal ways that inspectorate bodies share information.⁸⁴

The NPM bodies should actively and formally engage with civil society. A key factor in NPM bodies operating effectively will be their practices in working with civil society organisations (CSOs) and individual experts,⁸⁵ as well as people with lived experience of the places of detention that are being inspected.⁸⁶

Some stakeholders suggested formalising the relationship between CSOs and the NPM bodies, such as by way of an advisory council, memorandum of understanding or a formal agreement setting out how civil society will feed in to the NPM process.⁸⁷

Given the considerable expertise in civil society related to issues pertinent to NPM inspections, as well as longstanding experience working with people in detention, the Commission agrees that all NPMs should actively and constructively engage with civil society to support their work. This is supported by SPT guidance, which recommends NPMs 'establish sustainable lines of communication' with CSOs, given their value and role in preventing, monitoring and combating ill treatment, and assisting victims.⁸⁸

The NPM bodies must have access to relevant information, as required under Article 20 of OPCAT. A number of stakeholders noted there is currently insufficient access to information for inspectorate bodies.⁸⁹ How information is stored, shared and accessed by the coordinating and state and territory NPM bodies will need to be carefully articulated in any legislation or agreement documenting the NPM structure. There should also be safeguards in place to protect the privacy of detainees.



Recommendation 3

In assessing whether each Australian jurisdiction is appropriately fulfilling its NPM function, special attention should be given to ensuring:

- each NPM body has a preventive mandate
- there are clear lines of communication between the various entities designated as NPM bodies
- each NPM body has the necessary powers and independence to fulfil its mandate, set out in legislation
- each NPM body has the requisite human rights expertise, including by engaging with civil society organisations and human rights institutions, including by way of training and education
- each NPM body has the requisite expertise to identify the needs of vulnerable cohorts of detainees
- each NPM body is transparent in its operation, including by publishing its reports and recommendations
- each NPM adopts mechanisms and processes to identify and prevent ill treatment of vulnerable cohorts of detainees, such as establishing thematic committees, and accessing the views of detainees, for example, by directly surveying people with lived experience of detention.

5.3 Assessing current detention inspection arrangements

In September 2019, the Commonwealth Ombudsman published a 'baseline assessment of Australia's OPCAT readiness', which involved an assessment of 55 federal, state and territory bodies that currently inspect places of detention.⁹⁰ This analysis is helpful in identifying the relative merits of these logical candidates for performing NPM functions, as well as showing gaps in current inspection coverage for places where people are detained in Australia.

While only the Australian and WA Governments have designated NPM bodies, some jurisdictions have already started to prepare to undertake inspections under OPCAT. The Victorian Ombudsman, for example, has undertaken two own-motion investigations using the OPCAT framework.⁹¹

Some stakeholders saw benefit in harnessing the existing expertise in current inspection bodies.⁹² However, many emphasised a need to increase or otherwise change the powers, functions and resourcing arrangements of a number of the existing inspectorate bodies in order to make them OPCAT compliant.⁹³



Some stakeholders stated that certain inspectorate bodies already operate at or near OPCAT compliance. The Western Australian Office of the Inspector of Custodial Services (WA OICS), for example, was cited by several stakeholders as best practice in Australia, given that: it is established by statute and is structurally independent; has a broad jurisdiction and includes within its scope areas that may not be considered 'primary' places of detention, such as prison transport; is preventive in its approach, undertaking regular inspections rather than basing its work on complaints; and tables its reports in parliament that are then made available to the public.⁹⁴

Other bodies require more significant change. The South Australian Ombudsman, for example, outlined that if it were designated as an NPM, changes would be necessary to its legislative mandate, such as the need for unfettered, unrestricted access to places of detention.⁹⁵

Stakeholders in some jurisdictions identified gaps in the current inspection framework and noted the consequent need for inspectorate bodies to be created, or for legislation to be amended to extend the scope of inspecting bodies to include all places of detention.⁹⁶ Several experts noted, for example, that there is minimal or no independent oversight of police custody cells or transport arrangements for those in custody or in prison.⁹⁷ This is consistent with findings of the National Children's Commissioner that no state, territory or Commonwealth inspectorate body for places of juvenile detention is fully compliant with OPCAT.⁹⁸ Conversely, there are also some forms of detention that are inspected by multiple different bodies.⁹⁹

5.4 Ensuring NPM bodies comply with OPCAT

In its Interim Report, the Commission proposed that federal, state and territory governments 'map their respective current inspection frameworks, reviewing these against OPCAT requirements, identifying any gaps or overlap in how they apply to places of detention, and proposing any law changes needed to make existing inspection bodies OPCAT compliant'.¹⁰⁰

Some progress has been made in achieving this aim, especially through the Commonwealth Ombudsman's report on Australia's current OPCAT readiness, published in September 2019.¹⁰¹ The Ombudsman's report partially mapped how certain places of detention are currently subject to oversight and inspection. Given the complexity and breadth of a comprehensive mapping exercise of all places where people are, or could, be deprived of their liberty in Australia, the report focused on which entities are able to visit and inspect prisons, juvenile detention facilities, police cells and various psychiatric facilities.¹⁰²

OPCAT readiness varies across Australia. Some Australian jurisdictions have been more active than others in undertaking the work needed to ensure existing inspectorate bodies implement the changes necessary to meet the requirements of OPCAT. Other jurisdictions, particularly those with human rights charters, such as the ACT, already have inspectorate bodies established with a preventive focus, and actively consider human rights compliance within their detention environments.¹⁰³



ACT inspections of adult prisons

The *Human Rights Act 2004* (ACT) establishes rights for people in places of detention, including the right to humane treatment when deprived of their liberty, and the right to be free from torture and cruel, inhuman or degrading treatment. This framework informs the management of prisons in the ACT. Legislation governing corrective services requires, for example, detaining authorities to respect and protect the detainee's human rights and establishes minimum standards in order to protect a detainee's human rights.¹⁰⁴

Following the 2016 Moss Review into the treatment and care of a detainee in the ACT's adult prison, the Alexander Maconochie Centre, the ACT Government established the ACT Inspector of Correctional Services (the ACT Inspector). The ACT Inspector was established as a preventive oversight mechanism, with a key role in identifying systemic issues and thereby preventing ill treatment.¹⁰⁵

In January 2019, the ACT Government released the *Human rights principles for ACT correctional centres*. The principles adopt a human rights framework to measure correctional centre management, noting human rights must be 'embedded in all aspects of good prison management'.¹⁰⁶

In contrast to jurisdictions with bodies close to OPCAT compliance, other jurisdictions need to make more significant changes in relation to OPCAT implementation. In these jurisdictions, creating new inspection bodies or shifting current inspection and monitoring mechanisms to the preventive focus required by OPCAT, and ensuring that all places of detention are subject to some form of scrutiny, will take greater time and effort.

In its report on implementation, the Commonwealth Ombudsman identified a number of changes for inspection and monitoring bodies that perform the NPM function. For example, the Ombudsman noted that while some bodies in some jurisdictions have a legislated power to access facilities, this may only be for a specific purpose such as investigating a complaint:

Such bodies may require a change in scope, objective and inspection methodology if designated as an NPM with a regular, preventive focus.¹⁰⁷

In order to assist Australian governments in assigning the NPM functions in accordance with both the requirements of OPCAT and the timeframe for implementation, the Commission recommends that three steps be followed.

First, through the Council of Attorneys-General, or some other coordination framework,¹⁰⁸ the federal, state and territory governments should request that the Commonwealth Ombudsman advise and assist Australian governments in identifying and implementing reforms necessary for designated NPM bodies to comply with OPCAT. The Ombudsman could share its expertise and experience, especially in the operation of OPCAT, to support the implementation of OPCAT by state and territory governments. The SPT's advisory capability could also be drawn upon to implement this function.

The appointment of the Ombudsman to undertake this advisory role should take place as soon as practicable, and should be accompanied by the resourcing needed to perform this function.

Secondly, each of the state and territory governments should consult the Ombudsman about how they plan to assign the NPM function within their respective jurisdictions.

At a minimum, this would involve each jurisdiction nominating a new or existing body or bodies that will perform the NPM role and the steps they plan to take to ensure that body complies with OPCAT.

Thirdly, the Ombudsman should provide practical advice directly to each Australian jurisdiction over a 12-month period. By mid-2021, the Ombudsman should report publicly via the Council of Attorneys-General, or its successor body, on the progress made in each of the Australian jurisdictions. This advice should be published in time to enable each jurisdiction to have made all necessary changes to law, policy and practice so that they are fully operationally compliant with OPCAT by January 2022.

Recommendation 4

The Australian federal, state and territory governments should appoint the Commonwealth Ombudsman as Australia's OPCAT expert adviser, to assist in the establishment of NPM bodies in each jurisdiction.

Each Australian state and territory government should consult with the Commonwealth Ombudsman on the steps it is taking to fulfil the NPM functions in its jurisdiction.

Over a 12-month period, the Commonwealth Ombudsman should provide advice to each jurisdiction, advising of any further steps it considers necessary for the jurisdiction to take to ensure it complies with OPCAT.

By mid-2021, the Commonwealth Ombudsman should publish a report on the progress made by each Australian jurisdiction to fulfil the NPM function in accordance with OPCAT.

6. Reporting on NPM activities

The Commission considers that the principal measure of OPCAT's success should be whether human rights are better protected and promoted in Australia's places of detention as a result of ratifying OPCAT. Human rights should inform all aspects of OPCAT implementation, including inspections, prioritisation of NPM activities and to evaluate the impact of NPMs.

One way to measure and enhance the human rights impact of OPCAT would be through the public reporting function of the Commonwealth Ombudsman, as NPM Coordinator. Reporting on OPCAT implementation and NPM inspections is addressed in section 6 below. The Ombudsman's new functions as the federal NPM include reporting to the public, and Commonwealth, State and Territory Ministers, on:

- the implementation of OPCAT
- the activities of all NPMs across the states and territories.¹⁰⁹

However, the regulations which vested these functions in the Ombudsman do not *require* public reporting, they do not specify how often public reports must be released, and they do not specify with any detail what the content of any reports should be.



While OPCAT requires States Parties to undertake to publish and disseminate annual reports of NPMs, it does not prescribe the content or structure of those reports.¹¹⁰ The Commission considers all OPCAT reporting should adopt a human rights framework, which requires, at a base level, consideration of whether NPM activities and outcomes have better protected human rights in places of detention. Reporting should also be regular and comprehensive across all NPMs.

Accordingly, the Commission recommends that:

- NPM bodies should be required to report publicly on the extent to which governments and relevant authorities implement the recommendations made by the NPM. This requirement could be part of annual or periodic reports that many inspecting bodies are already required to undertake.¹¹¹
- There should be a regular, but periodic, review to evaluate the implementation of recommendations made by all NPMs, especially where those recommendations have national significance. These reviews could be conducted approximately every five years by the Commonwealth Ombudsman.

There are helpful examples of how the proposed periodic review could be conducted in a way that measures practices against human rights standards. The ACT Inspector of Custodial Services, for example, undertakes a 'healthy prison review' every two years, which measures conditions of adult correctional facilities in the ACT against international human rights law and domestic human rights standards.¹¹²

The Commission also considers that all reporting by the NPMs should be made public. SPT guidance suggests that States Parties should publish and widely disseminate annual reports of the NPM, ensure these reports are discussed in parliament, and be transmitted to the SPT to be published on its website. The guidance also suggests that NPM reports should contain recommendations to relevant authorities.¹¹³ The Commission supports the guidance in these two respects, with publicly available reports with clear recommendations to state and territory governments, detaining authorities and the Commonwealth NPM.

Recommendation 5

All NPM bodies should be required to report annually on activities undertaken to fulfil the NPM mandate. The Commonwealth Ombudsman, as NPM Coordinator, should publish an annual report on the activities of the NPM Network.

Recommendation 6

Public reporting by each NPM on OPCAT activities should:

- **be informed by human rights expertise and consider how human rights are being protected in places of detention inspected**
- **report on the extent to which the recommendations it has made as the NPM have been implemented.**

Recommendation 7

In consultation with state and territory NPMs, the Commonwealth Ombudsman should undertake a periodic review to evaluate the implementation of NPM recommendations, especially those with national significance.

The first review should take place as soon as practicable—for example, when an NPM has been appointed by each state and territory government, or when a majority of state and territory NPMs have been appointed.

7. Resourcing of NPM activities

Article 18(3) of OPCAT requires that States Parties provide adequate resourcing to fulfil the NPM functions. This is crucial to OPCAT's success.

While it is important to acknowledge that implementing OPCAT will require some new government expenditure, the Joint Standing Committee on Treaties emphasised that this must be balanced against two important benefits: first, the inherent good in protecting the human rights of detainees; and, secondly, the experience in overseas jurisdictions which points to OPCAT's potential to minimise costs, including avoiding litigation costs and compensation payments.¹¹⁴ A number of stakeholders emphasised a similar point.¹¹⁵

Under the Australian Government's collaborative model, each Australian jurisdiction will undertake its own NPM functions. That raises important questions about how the necessary resources to achieve this will be determined as between the federal, state and territory governments. Such questions have been under discussion between these governments for some time.

Most Australian jurisdictions have indicated informally that they are planning to adapt existing bodies to fulfil the NPM functions. The scope of that adaptation, and the consequent additional resource expenditure, will vary depending on the extent to which those existing inspection bodies already comply with OPCAT. Some jurisdictions will need to commit additional resources.

Generally, stakeholders did not express a view on how Australia's federal, state and territory governments should apportion the necessary costs between them.¹¹⁶ OPCAT itself does not mandate that the national or sub-national governments provide resources in any particular way. This matter will require resolution by state, territory and federal governments.

Nevertheless, some broad principles should guide Australian governments in resolving these questions about resourcing. The Commission considers that it would be useful to consider these principles at three key points: the initial NPM establishment phase; the ongoing operation of NPM bodies; and the implementation of recommendations from NPM bodies.

7.1 Establishment phase

The Commission considers that properly resourcing the establishment phase—when new NPM responsibilities are assigned—is critical to OPCAT's success. Several stakeholders submitted that special funds, resources and training need to be made available in the first few years after ratification to help bodies fulfilling NPM functions to become OPCAT compliant.¹¹⁷ This need appears especially acute in those jurisdictions where the inspection system is less extensive, but could also extend to jurisdictions that have more developed inspection bodies like NSW and WA, especially if their respective mandates expand.¹¹⁸

Some jurisdictions are considering the establishment of one or more new NPM bodies, or the consolidation of similar and overlapping functions in a single inspection body or network.¹¹⁹ This could involve a one-off allocation of funding to assist with the transition, albeit that there might be some cost savings in any consolidation of functions.

Finally, it should be noted that this is not solely a question of resources. Some stakeholders have rightly cautioned against vesting NPM responsibilities in entities and individuals that are functionally incapable of complying with OPCAT.¹²⁰ This might be, for example, because they lack the expertise or legal independence to fulfil the functions set out in OPCAT itself.

7.2 Ongoing operation of NPM bodies

The Commission considers that three key principles should guide how resourcing is allocated for the ongoing operation of NPM bodies.

First, as a number of stakeholders observed, adequate funding is needed to fulfil the core inspection functions.¹²¹ Those functions variously include coordination and liaison between multiple bodies performing NPM functions,¹²² ensuring availability of necessary specialist expertise (both internally and externally),¹²³ conducting detailed inspections and enquiries,¹²⁴ and ongoing training for inspectors and detaining authorities.

Secondly, as the SPT has made clear,¹²⁵ resourcing and administration of NPM bodies must be carried out in a way that respects the functional, structural and personal independence required by OPCAT.¹²⁶

Thirdly, there is a need to ensure that NPM bodies liaise with, and involve, civil society representatives, experts and people with lived experience of detention. This point was emphasised by government and non-government stakeholders.¹²⁷ In particular, there was strong support for civil society and human rights organisations being involved in developing NPM priorities, identifying current detention problems and solutions, and having regular meetings with the bodies fulfilling NPM functions. Both the SPT and stakeholders raised the potential benefit of including experts from civil society in NPM inspections.¹²⁸ This will have some resourcing implications.

7.3 Implementing NPM recommendations

There need to be sufficient resources available to implement detention reforms that are found to be necessary through the NPM and SPT inspection processes. The Commission observes that the cost of implementing such change can be far greater than the cost of the OPCAT inspection regime itself.

By way of illustration, a number of stakeholders pointed to previous failures of governments to implement recommended detention reforms, notwithstanding often strong public support.¹²⁹ An example is the recommendation from the 1991 Royal Commission into Aboriginal Deaths in Custody to remove asphyxiation or ‘hanging’ points from prisons.¹³⁰ More than a quarter of a century later, inadequate progress has been made to address this problem,¹³¹ with some using the cost associated with making the necessary change as an explanation for not doing so.¹³²

Some recommendations arising from OPCAT inspections are likely to have national significance or application. This is because there is a high degree of commonality in detention environments across Australia. The importance of taking a thematic approach to reporting, training and policy development was noted by the Commonwealth Ombudsman’s implementation report.¹³³

The Commission considers that governments should prioritise addressing problems that arise across more than one jurisdiction or that might otherwise have national significance. Where the NPM or SPT inspection process identifies detention reform that should take place in more than one Australian jurisdiction, the federal, state and territory governments should agree to work cooperatively to implement such reform. The Commission considers that there would be value in an institutional mechanism to consider such nationally significant change. The Commission proposes that the Commonwealth Ombudsman, as NPM Coordinator, identify any such matters in its annual report, or any public reports specific to OPCAT (as recommended in section 6, above).

Recommendation 8

Australia’s federal, state and territory governments should agree to provide sufficient resources necessary to ensure NPM bodies can meet the initial costs of undertaking new NPM responsibilities, so that all NPM bodies can comply with OPCAT. This resourcing should be provided in a way that:

- enables NPM bodies to fulfil OPCAT’s core inspection functions
- respects the functional, structural and personal independence of NPM bodies
- ensures effective liaison with, and involvement of, civil society representatives and people with lived experience of detention in the OPCAT inspection process.

Recommendation 9

Following consultation with each state and territory NPM, the Commonwealth Ombudsman should identify any reforms to detention policy and practice that may be necessary in more than one Australian jurisdiction, and monitor the implementation of any recommended changes.

The Commonwealth Ombudsman should report publicly on this activity through its annual report or any public reports specific to OPCAT.

The Commonwealth Ombudsman should undertake this process regularly, from a time when an NPM has been appointed by each state and territory government, or when a majority of state and territory NPMs have been appointed.



8. Places subject to inspection

OPCAT applies to all places where people are or may be deprived of their liberty, and it requires that NPMs have access to all such places of detention.¹³⁴ However, this general provision has to be carefully construed to determine what sorts of places and scenarios are considered to be places of detention for the purposes of OPCAT, thereby making them subject to inspections under the treaty.

A large number of stakeholders submitted that OPCAT should apply broadly, taking into account the many and varied settings in which individuals may be deprived of their liberty in Australia. The Commission supports this approach, as consistent with the text and aims of OPCAT itself.

Nevertheless, each jurisdiction that implements OPCAT faces legitimate practical questions about where to prioritise the focus of its NPM activities, particularly in the initial period of OPCAT's operation. This likely will involve some places of detention being scrutinised more closely than others. The Commission accepts this, provided that such decisions are made in good faith in compliance with the letter and spirit of OPCAT; and provided that NPM bodies are not prevented from fulfilling the full breadth of their functions, and that plans are in place to build the full portfolio of facilities over time.

Two relevant contentious issues that have arisen to date are that the Australian Government has stated that it considers aged care facilities and offshore immigration detention facilities fall outside the scope of OPCAT; and it has suggested an incremental approach whereby NPMs prioritise 'primary places of detention'.¹³⁵



8.1 Definition of 'places of detention'

Fundamental to the implementation of OPCAT in any jurisdiction is the definition or scope of places of detention, because this determines where NPM and SPT inspectors will carry out their visits. The term 'place of detention' is not defined by OPCAT; however, the treaty states that it applies to places where 'people are deprived of their liberty', in a place that falls within the jurisdiction and control of the state, and where the deprivation occurs by virtue of an order of a public authority, or with its consent.¹³⁶

Accordingly, OPCAT has broad application to *any* place where an individual cannot leave of their own free will, and where that place of detention is linked, either directly or indirectly, to a public authority.¹³⁷ OPCAT inspections therefore cover not only those settings where there is a locked door, but other settings where a person cannot leave at will, such as a person chemically restrained in a hospital emergency ward or certain residential settings.

The various ways that individuals are restrained in places falling outside custodial detention settings have been examined by oversight bodies in various jurisdictions. Australia's current Royal Commission into Aged Care Quality and Safety, for example, has recognised that physical or chemical restraint may 'significantly inhibit a resident's liberty to move within or outside' an aged care facility, thereby engaging that individual's rights.¹³⁸ In its interim report, the Royal Commission identified 'significant over-reliance on chemical restraint in aged care' as an issue requiring an urgent response from government.¹³⁹

The Australian Government has proposed that NPMs should focus on 'primary' places of detention as their immediate focus when they are first established. In a recent parliamentary committee hearing, the Attorney-General's Department outlined the Australian Government's approach to defining the scope of OPCAT:

The Government considers the implementation of OPCAT to be an iterative process and is mindful of the principle of proportionality when determining prioritisation and focus, consistent with advice from the SPT. The precise scope and functions of both the individual NPM body/ies in each jurisdiction and the overall NPM Network is a matter for discussion among the Commonwealth, state and territory governments. However, aged care facilities do not fit within the concept of 'places of detention' as set out in Article 4 of OPCAT and there is presently no proposal to include them in any list of primary places of detention.¹⁴⁰

On the definition of 'places of detention', the Commonwealth Ombudsman, as the coordinating NPM, has said:

Our initial focus is on 'primary places of detention' as the Australian Government considers the challenges posed by the deprivation of peoples' liberty to be at their most acute in these places, and therefore these will be the first focus of Australia's NPM bodies.¹⁴¹

In its recent report on OPCAT implementation, the Commonwealth Ombudsman approached the concept of 'primary places of detention', which formed the focus of its implementation report, as follows:

The Commonwealth has suggested that, in the first instance, arrangements be put in place to ensure OPCAT compliance at the following places of detention:

- adult prisons
- juvenile detention facilities (excluding residential secure facilities)
- police lock-up or police station cells (where individuals are held for equal to, or greater than, 24 hours)
- closed facilities or units where people may be involuntarily detained by law for mental health assessment or treatment (where people are held for equal to, or greater than, 24 hours, such as a locked ward or residential institution)
- closed forensic disability facilities or units where people may be involuntarily detained by law for care (where people are held for equal to, or greater than, 24 hours), such as a Disability Forensic Assessment and Treatment Service
- immigration detention centres
- military detention facilities.¹⁴²

The concept of 'places of detention', as the phrase is used in OPCAT, and as it has been defined in other jurisdictions, is broad. It is not limited to prisons or other places that one might associate most readily with 'detention'. SPT guidance for NPMs specifies that states should allow the NPM to visit 'all, and any suspected, places of deprivation of liberty as set out in Article 4, with jurisdiction extending to all places over which the state 'exercises effective control'.¹⁴³ The SPT notes:

the preventive approach which underpins the OPCAT means that as expansive an interpretation as possible should be taken in order to maximise the preventive impact of the work of the NPM.¹⁴⁴

Stakeholders supported a broad approach to defining what a place of detention will be for the purpose of NPM inspections. Submissions emphasised that a definition that excludes certain places or facilities from scope would be undesirable and risk non-compliance with the treaty.¹⁴⁵

Enabling legislation for OPCAT in the ACT adopts the definition of 'place of detention' in Article 4 of the treaty.¹⁴⁶ Enabling legislation in the NT similarly adopts the Article 4 definition; the NT law also specifies, without limiting what places might fall within the scope of the Act, four central places where an individual might be deprived of their liberty, including:

- a correctional centre, prison, detention or other similar place
- part of a facility at which health services are provided, or where a person may be held under restraint or in seclusion or isolation
- a police station or court cell complex
- a vehicle used or operated to convey detainees.¹⁴⁷

The Commission considers that the best approach for Australia is simply to adopt an inclusive approach, consistent with Articles 1 and 4 of OPCAT. That is, the Australian Government should ensure that OPCAT applies to all places where people are or may be deprived of their liberty, and all places of detention should be subject to inspection by an NPM. In its recent report on OPCAT implementation, the Commonwealth Ombudsman similarly concluded:

Given that OPCAT is not restricted to primary places of detention it will be necessary over time to consider all places where people are deprived of their liberty in Australia.¹⁴⁸

The Commission further notes that there is no temporal limitation on the concept of detention in OPCAT. Therefore, places where people are routinely detained for periods of less than 24 hours, should be included in the places open to inspection by NPMs.

Recommendation 10

In implementing OPCAT, Australian Governments should ensure NPMs have the power to inspect all places of detention, in accordance with Articles 1 and 4 of OPCAT.

In determining which places of detention should be prioritised for inspection, it is appropriate for NPM bodies to assign the highest priority to locations where serious breaches of human rights are most likely to occur.

The Commission notes that other jurisdictions, such as New Zealand (see below) have adopted a progressive approach to gradually expand the NPM's mandate. Stakeholders to the Commission's consultation also appreciated there may be a need for practical decisions about immediate risk of harm, supporting a progressive approach to implementation.¹⁵²

OPCAT implementation in New Zealand

The New Zealand NPM was established in 2007, following amendment to the *Crimes of Torture Act 1989* (NZ) (COTA).

Section 16 of COTA defines a place of detention to include any place where a person is deprived of their liberty; deprivation of liberty is defined to include where a person is 'not permitted to leave at will by order or agreement of any judicial, administrative or other authority'. COTA sets out examples of what 'place of detention' may include; this list is expressly non-exhaustive.

In June 2018, the NZ Minister of Justice expanded the responsibilities of the NZ Ombudsman to include privately run aged care facilities. A three year program to inspect these facilities was established by the NZ Ombudsman, commencing in July 2019 when funding was received. Following a year of capacity building, orientation visits and the development of an inspection framework, formal inspections and reports will commence in 2021.¹⁵³

8.2 Progressive implementation

The concept of classifying primary and secondary places of detention, as a practical means of guiding the work of NPMs, was proposed by Professors Richard Harding and Neil Morgan in a 2008 report, commissioned by the Commission, on OPCAT implementation.¹⁴⁹ The authors recognised that these proposed categorisations were not static, rather the terms were adopted as 'a matter of analytical convenience' to support progressive implementation and allocation of scarce resources and time.¹⁵⁰

The Commission supports an approach to OPCAT implementation in which NPMs *prioritise* visits to particular places of detention, where the need is likely to be greatest. This accords with SPT advice that the NPM should be 'mindful of the principle of proportionality when determining its priorities and the focus of its work'.¹⁵¹



In the second phase of the Commission's consultation, stakeholders were asked how NPMs should prioritise their work once OPCAT commences. Stakeholders identified particular types of facilities that warrant immediate attention, including youth detention centres,¹⁵⁴ aged care facilities,¹⁵⁵ immigration detention centres,¹⁵⁶ places of residential care for people with disability,¹⁵⁷ and police cells and prisoner transport.¹⁵⁸ Other stakeholders identified specific practices requiring immediate oversight, such as the use of seclusion and restraint, both physical and chemical, of individuals in all places of detention, including aged care facilities, residential homes, and in hospital emergency departments;¹⁵⁹ and the placing of voluntary mental health patients in locked wards.¹⁶⁰

Stakeholders also suggested that particular cohorts of individuals warrant immediate attention from NPMs, including Aboriginal and Torres Strait Islander detainees,¹⁶¹ prisoners with disabilities,¹⁶² and young people.¹⁶³



The Commission supports the prioritisation, where necessary, of specific detention facilities, categories of individuals within places of detention, or specific practices or treatments. While the focus in each jurisdiction may differ, to ensure the NPM focuses on human rights protection of immediate need, there should be consistency regarding the methodology used to prioritise one place of detention over another.

There should also be a coordinated approach to prioritising particular practices or themes across different detention settings. Stakeholders across all jurisdictions, for example, identified the need to look at practices of seclusion and restraint in a range of detention settings, from prisons and juvenile detention centres to residential facilities for aged care and people with disability and hospital emergency wards.¹⁶⁴ This approach could be assisted, or guided, by an expert appointed pursuant to Recommendation 4.

Recommendation 11

As soon as practicable, the Commonwealth Ombudsman should develop guidance to assist NPMs to prioritise the OPCAT inspection function. Guidance should be developed in close consultation with human rights institutions and civil society.

9. A national approach to inspections and detention conditions

OPCAT aims to promote better adherence to the substantive human rights obligations in CAT. Consequently, the inspection processes mandated by OPCAT are directed towards ensuring that *conditions* of detention, wherever people are deprived of their liberty, meet the requirements in CAT.

In other words, CAT and OPCAT combine to create a system of accountability. For this system, as with any other accountability system, there are two critical elements. The first element is normative. That is, there must be a clear set of norms or behavioural standards against which those responsible for places of detention are held to account. In this specific context, those norms relate to the prevention of torture and other forms of ill treatment, and the protection of human rights, for people in detention.

The second element is procedural. For OPCAT, this means that detention inspections should be effective in identifying problems, across all places of detention, that could constitute, or lead to, breaches of these norms.

CAT and OPCAT combine to provide the basic structure of this accountability system. However, each State Party must supplement this basic structure with more detailed rules, practices and other guidance to ensure that this structure is fit for purpose in the relevant jurisdiction. With this in mind, in 2017, the Attorney-General's Department asked the Commission to consult on the following questions:

Should a process be undertaken, after ratification, to develop two sets of national standards in this area? The first would set out how inspections of places of detention should be carried out. The second would set out minimum conditions of detention.¹⁶⁵

The Commission considered these issues across both phases of its consultation. While there was support for a nationally consistent approach, including as a means of replicating best practice across jurisdictions, the views on the role of *standards*, including whether these should be legally binding, were mixed. Stakeholders also identified practical hurdles and potentially negative consequences of creating binding standards. These views are discussed here.

The Commission considers that guidance is needed to ensure consistent and effective inspection methodologies, and acceptable minimum conditions of detention that ensure human rights compliance. However, in recognition of the strength of the views across stakeholder groups about difficulties in crafting appropriate binding standards regulating all aspects of these matters, the Commission instead recommends that there be national principles or guidelines that are framed at a higher level of generality. These matters are discussed below.

9.1 A proposal for national standards

In its Interim Report, the Commission gave preliminary support to the development of what the Commission called ‘National Inspection Standards’ and ‘National Conditions Standards’, proposing an independent process by which they be developed and that both sets of Standards be given the force of law.¹⁶⁶ It was proposed that the National Inspection Standards would govern how detention inspections should take place by the bodies performing the NPM function. The National Conditions Standards would summarise the minimum human rights requirements for conditions of, and treatment in, detention.

Such standards could also draw on existing models, such as those developed by the SPT, the Association for the Prevention of Torture and the Commission.¹⁶⁷ Other government and expert bodies have also developed standards for detention. For example, there are Australian standards focused on youth justice,¹⁶⁸ as well as standards for prisons.¹⁶⁹

Some jurisdictions have also developed standards for specific contexts in which people are deprived of their liberty. The ACT Government, for example, published human rights principles for ACT’s corrective centres in 2019.¹⁷⁰ The existing standards—taken individually or collectively—are not comprehensive in addressing all the relevant human rights issues for places of detention across Australia. Nevertheless, the existing standards could help inform a more consolidated, national approach.

Some countries, such as France, have introduced national standards for OPCAT, based on international and domestic human rights law. Others, such as the UK and New Zealand, have moved to a partially standardised system. Still others, such as Germany, have not introduced national standards, instead relying on domestic and international human rights law.



9.2 Stakeholder feedback on standards

Stakeholders supported a consistent national approach to both how inspections should take place and conditions of detention. There was high-level or general support for the concept of national standards for inspections and conditions of detention.¹⁷¹ Some stakeholders strongly supported these standards having legislative force.¹⁷² Stakeholders also identified a range of matters that could be dealt with in standards (outlined in further detail below).

Conversely, strong arguments were also made against the development of binding national standards.

Stakeholders pointed out the considerable challenges posed by implementing national standards across different jurisdictions, which have their own characteristics, legislative frameworks and conventions, or from one detention context to another.¹⁷³

Some stakeholders pointed to multiple standards that already exist, and stated that a single set of new standards should never replace standards designed for use in particular settings, such as health facilities.¹⁷⁴





Stakeholders, particularly in roundtable discussions, also pointed out the potential adverse consequences of developing binding standards. One stakeholder, for example, considered that standards may discourage or stymie the iterative process between an inspectorate body, detention authority and policy development within government, whereby the objective of constant and adaptable improvements could be lost or minimised.¹⁷⁵

The Commission is mindful of the concerns raised about binding national standards that have legislative force. These include the significant practical obstacles to achieving this goal, and replication of standards already in place.

During the consultation, when the Commission asked detailed questions about how to develop and implement national standards, it became increasingly clear that it would be practically very difficult to achieve binding national standards for detention inspections and conditions. This view was shared among many representatives from civil society, academia and government.

Some stakeholders instead strongly advocated for the development of overarching, guiding principles.¹⁷⁶

9.3 Towards a national approach: guiding principles

The Commission continues to support a national approach to inspections and conditions of detention and endorses what seems to be a broadly-agreed objective—namely, better, more consistent, human rights compliance in how inspections take place and in how people are detained.

As the Commonwealth Ombudsman noted in its implementation report, there are different approaches to detention monitoring of primary places of detention across the states and territories, and the various approaches ‘have been shaped by their respective legislation, traditions and conventions’.¹⁷⁷

Authoritative guidance within the OPCAT framework may also be a way to ensure national consistency in inspections and, importantly, help to ensure that best practice is adopted in all inspectorate bodies in all jurisdictions and so more effectively prevent ill treatment from occurring.

Accordingly, rather than binding national standards, the Commission recommends national principles be developed.

National principles for inspection, and conditions in detention, should use a human rights-based approach and form a national foundation for the prevention of ill treatment in all places where individuals can be deprived of their liberty.

The national principles should be informed by international human rights law, as recommended by stakeholders,¹⁷⁸ such as CAT, the *Convention on the Rights of the Child*, the *Convention on the Rights of Persons with Disabilities*, as well as other human rights instruments, including the *Declaration on the Rights of Indigenous Peoples*.

9.4 Developing national guidelines

Stakeholders suggested that a document focusing on achieving consistency across all jurisdictions through OPCAT, such as national inspection standards or guidelines, could deal with issues including the following:

- guaranteeing the independence of NPM bodies and the range of inspection powers available to them¹⁷⁹
- the transparency of the inspection process and outcomes, including the publication of detention inspection reports¹⁸⁰
- mechanisms that would enable issues of concern to be raised with NPMs, including from experts and civil society (noting that OPCAT is not a complaint-based mechanism)¹⁸¹
- good practice and national consistency in the collection and analysis of data related to detention¹⁸²
- engagement with specialists and civil society.¹⁸³

Stakeholders also pointed to existing international and domestic documents that govern aspects of detention and inspections. For instance, some stakeholders identified international and domestic instruments that relate to prisons, including statements of national intent—such as the *Guiding Principles for Corrections in Australia*—and the UN minimum rules for the treatment of prisoners, known as the *Nelson Mandela Rules*.

These stakeholders submitted these documents should inform the development of national standards in Australia.¹⁸⁴ Stakeholders also pointed to the importance of international human rights law informing any standards and the conduct of OPCAT inspections. This was particularly the case with the principles set out for monitoring and oversight for places where people with disability are deprived of their liberty, as supported in the CRPD.¹⁸⁵ Finally, stakeholders pointed to the need to ensure that systemic recommendations from other processes, such as coronial inquests, inform the development and review of any standards or guidelines.¹⁸⁶

In addition, the consultation suggested that any national approach be developed through a transparent process, incorporating the views of experts and affected people.¹⁸⁷ There was a strong view that such a process should be undertaken by an independent body that is at arms’ length from those parts of government responsible for detaining people, and which has appropriate expertise including in human rights.¹⁸⁸

The development of national principles is also likely to be an effective means of addressing the range of issues that stakeholders recommended that national standards on conditions of inspection and detention could deal with, such as:

- protecting especially vulnerable detainees, such as children and young people, people with disability, Aboriginal and Torres Strait Islander peoples, LGBTI people and immigration detainees, such as by requiring broad expertise in NPM inspections¹⁸⁹
- ensuring people with cognitive and psychosocial disability are not subject to indefinite detention, particularly where there has been a finding of unfitness to stand trial¹⁹⁰
- the availability of complaints processes and consequences for unlawful or improper conduct¹⁹¹
- restrictive practices, seclusion, strip searches and the use of force¹⁹²
- the safe transport of detainees¹⁹³
- the material condition of places of detention, as well as minimum standards for essential services (eg, health care, education and legal services).¹⁹⁴

The principles should be developed by an independent body, informed by human rights expertise. The development of principles should be supported by the Australian Government, in close consultation with the state and territory governments. The body to develop national principles could be the NPM Coordinator.

The Commission notes the *Ombudsman Regulations 2017* (Cth) provide for the Ombudsman, as NPM Coordinator, to consult

with governments and other bodies on the development of standards and principles regarding the treatment and conditions of people deprived of their liberty.¹⁹⁵

If the Australian Government opts to introduce a dedicated statute to incorporate OPCAT into domestic law, as the Commission recommends, it would be logical to include reference to the proposed national principles. This would also respond, at least in part, to the SPT's recommendation that 'the mandate and powers of the NPM should be clearly set out in a constitution or legislative text'.¹⁹⁶

Recommendation 12

The Australian Government should adopt national principles that guide *how detention inspections should take place* by the bodies performing the NPM function (National Inspection Principles).

These principles should:

- provide for NPM independence and the full range of inspection and information access powers available under OPCAT
- require transparent publication of detention inspection reports
- provide for community members to identify concerning detention practices
- provide for good practice and national consistency in the collection and analysis of data related to detention
- ensure appropriate expertise among inspectors, including by working with specialists and civil society representatives.

Recommendation 13

The Australian Government should adopt national principles regarding *minimum conditions of detention* to protect the human rights of detainees (National Conditions Principles).

These principles should deal with issues including:

- the protection of particularly vulnerable detainees, such as children and young people, people with disability, Aboriginal and Torres Strait Islander peoples, LGBTI people and immigration detainees
- complaints processes and consequences for unlawful or improper conduct
- restrictive practices, seclusion, strip searches and the use of force
- the safe transport of detainees
- the material condition of places of detention
- the provision of essential services (eg health care, legal services and education).

10. Incorporating OPCAT into Australian law and practice

10.1 Establishing the NPM in formal legislation

The Australian Government has stated it does not intend to enshrine the NPM model in legislation, nor does it consider it necessary to legislate to enable inspections by the SPT.

There has, accordingly, been limited regulatory activity to support implementation. Following ratification, the following regulatory changes have been made:

- As outlined above, amendments were made to the *Ombudsman Regulations 2017* (Cth) (Ombudsman Regulations) in April 2019: a new Part 4 was added to designate the Commonwealth Ombudsman as the NPM to inspect federal places of detention, and to confer the role of National NPM Coordinator. The Ombudsman Regulations establish the functions of the National NPM Coordinator role.
- Two Australian jurisdictions have enacted legislation to support, and facilitate, visits by the SPT. In April 2018, the Australian Capital Territory government passed the *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018*. Similar legislation was passed by the Northern Territory government in September 2018.¹⁹⁷ Both the ACT and NT legislation facilitates visits of the SPT; each Territory considered such legislation to be necessary for the purpose of implementation.¹⁹⁸





Stakeholders expressed concern that the Australian Government does not intend to introduce legislation to enshrine the NPM model. A number of stakeholders strongly urged the Australian Government to introduce a dedicated statute to implement OPCAT and recommended corresponding state and territory legislation.¹⁹⁹ This accords with guidance from the SPT that legislation is needed to incorporate key OPCAT provisions regarding the position and operation of NPMs:

While the institutional format of the NPM is left to the State Party's discretion, it is imperative that the State [P]arty enact NPM legislation which guarantees an NPM [be] in full compliance with OPCAT and the NPM Guidelines. Indeed, the SPT deems the adoption of a separate NPM law as a crucial step to guaranteeing this compliance.²⁰⁰

Many stakeholders considered setting up the NPM structure in appropriately drafted legislation to be necessary for a number of reasons, including that it would

- clearly define the roles and structure of the NPM model as well as its mandate²⁰¹
- guarantee unfettered NPM and SPT access to all places of detention²⁰²

- ensure inspections are culturally appropriate²⁰³ and rely on relevant expertise²⁰⁴
- secure adequate funding for the federal coordinating and state/territory NPM bodies²⁰⁵
- enshrine the functional and structural independence of the coordinating NPM body²⁰⁶
- signal that the NPM model is intended to survive changes of government and has equivalent status to other independent statutory bodies²⁰⁷
- establish the relationship with the SPT and provide for the coordinating NPM body directly to access the SPT²⁰⁸
- protect individuals from reprisals as a result of making a complaint or providing information to the NPM bodies.²⁰⁹

Some stakeholders also stated that where an existing inspection body is given new OPCAT-related functions, these additional functions should be set out in legislation.²¹⁰

This could be done simply by amending the body's statutory functions. For example, a complaints-handling body that does not undertake proactive inspections will require its founding legislation to be amended to reflect any new functions, to ensure appropriate powers are available to the body in pursuit of those functions.

In its implementation report, the Commonwealth Ombudsman noted that OPCAT implementation 'should not merely involve re-badging existing bodies without also having regard to the resourcing, legislative and operational implications'.²¹¹ Further, to avoid the 'business as usual model', and in order to establish an effective and regular preventive inspection regime,

bodies will require new or expanded methods of operation. These will need commensurate increases in resourcing over time in most, if not all, jurisdictions.²¹²

Jurisdictions that have created the NPM structure without legislation have encountered significant challenges. The independent chair of the UK NPM, for example, criticised the establishment of the UK NPM by ministerial statement. He observed that the lack of a legislative framework has resulted

in there being no guarantee of independence, no system of accountability, and Parliament having no role in setting out its mandate or its objectives. ... The lack of legislation undermines our legitimacy nationally and internationally, fails to protect our independence and functions from interference and does not assist us to deliver on our day to day tasks as an NPM.²¹³

10.2 Alternatives to legislation?

In the Interim Report, the Commission considered a scenario in which the Australian Government decided not to enshrine the key elements of OPCAT or the NPM functions in dedicated OPCAT legislation.

Specifically, the Commission considered what other steps could be taken to strengthen the proposed NPM model and what alternative measures might best address the significant concerns raised by civil society about the lack of legislative foundation for the NPM. Two particular options were canvassed.

First, Parliament could give legislative force to the proposed national standards or principles dealing with inspections and conditions of detention, possibly via subordinate legislation. This would mandate a consistent approach across all Australian jurisdictions.

Secondly, the Australian Government could explore whether another legal arrangement, such as an intergovernmental agreement, could go some way to fulfilling the relevant requirements.²¹⁴ The terms of this agreement could articulate the mandate and powers of NPM bodies and cover the various aspects of the NPM model set out in section 5, above. It could also provide a means of resolving any disputes that arise between Australian jurisdictions in the implementation or application of OPCAT provisions.

The Commission considers that such options could assist in giving effect to OPCAT in Australia. However, they would not present an equivalent, or adequate, alternative to legislation that gives full effect to the key provisions of OPCAT itself. Primary legislation would safeguard the NPM network, guarantee appropriate resourcing and enshrine its independence, and ensure that any changes that would affect how OPCAT operates in Australia would be subject to parliamentary debate. Legislation also would provide for unfettered powers of access to all places of detention by NPMs; provide a clear foundation for SPT visits and ensure SPT access to facilities and information; and secure the continued, long-term and effective operation of OPCAT.

Neither of the alternatives to legislation, outlined above, would do so to the same extent. The Commission, accordingly, recommends that the key provisions from OPCAT dealing with the operation, structure, independence and other central elements of the NPM should be incorporated into primary legislation. Legislation should be drafted and considered by Parliament alongside the ongoing work being undertaken to establish the network of NPMs in each jurisdiction.

The Commission considers that the absence of dedicated OPCAT legislation would not inhibit the establishment or initial operation of NPM bodies. Rather, such legislation would support and bolster NPM activities.

As there are likely to be separate NPM bodies established in each of Australia's federal, state and territory jurisdictions, it will be a matter for each of those governments to determine the legal foundation for the operation of the NPM body or bodies for which they are responsible.

This document is directed primarily towards the Australian Government, and so its primary recommendation is that the Australian Government introduce legislation in respect of the NPM activities within the federal jurisdiction. However, the logic that underpins this recommendation appears applicable also to the states and territories, and so the Commission urges that they also consider the need for dedicated legislation.

In the alternative, the Commission recommends an intergovernmental agreement be reached as soon as possible, building on negotiations that have already taken place between the state, territory and federal governments. Any such intergovernmental agreement should be published; contain sufficient detail to establish the operation of an independent NPM Network that will prevent ill treatment in places of detention; and establish a timeframe for implementation.

Recommendation 14

The Australian Government should incorporate the core provisions of OPCAT in a dedicated federal statute. Australia's state and territory governments should also consider the need for dedicated legislation to give effect to OPCAT in their respective jurisdictions.

Recommendation 15

If the Australian Government does not establish the proposed NPM mechanism in dedicated legislation, an intergovernmental agreement should be agreed as soon as practicable to guide establishment and operation of NPMs.

11. Ongoing involvement of civil society

Throughout the Commission's consultation, a strong theme has been the importance of ongoing involvement in the OPCAT process of civil society organisations, academic and other experts and people with lived experience of detention.

Stakeholders considered the benefits of civil society involvement to include providing the NPM access to:

- relevant expertise related to specific cohorts of detainees, including psychiatric and experience working with detainees with mental health and psychosocial trauma²¹⁵
- longstanding experience in inspecting places of detention²¹⁶
- individuals with trusted, ongoing relationships with detainees and detaining authorities²¹⁷
- cultural expertise and understanding, including of different languages spoken by Aboriginal and Torres Strait Islander detainees.²¹⁸

Some progress has been made to involve civil society in the ongoing task of OPCAT implementation. For example, the Commonwealth Ombudsman recently established an OPCAT Advisory Group, which includes civil society representatives, to provide guidance and insight on the implementation of OPCAT. This is consistent with Proposal 11 in the Commission's Interim Report.



There is also a case for deepening civil society involvement with the operation of OPCAT. As noted above, the SPT has recommended strong and formal relationships be established with the NPM and civil society organisations. In some other jurisdictions, formal cooperation agreements between the NPM bodies and civil society organisations set out both how civil society organisations can feed into the inspection process and how the NPM bodies can rely on civil society expertise.²¹⁹

Some stakeholders, for example, suggested that NPM bodies directly involve civil society and individual professional experts in their inspections.²²⁰ Other stakeholders suggested that a formal arrangement between civil society and the NPM should be established to underpin civil society involvement in the work of NPMs.

This could take the form of an advisory council, or panel of experts, that would provide information and advice, particularly about vulnerable detainees, to the NPM bodies,²²¹ or a federal coordinating NPM body should facilitate access to such expertise.²²² In addition, attendees at the roundtables generally supported formal, regular roundtables to bring together stakeholders from civil society, government and inspectorate bodies.

Recommendation 16

The Commonwealth Ombudsman should continue to support the involvement of civil society organisations, other experts and people with lived experience of detention, in the operation of OPCAT in Australia. This could occur through the Ombudsman's existing OPCAT Advisory Group, and other mechanisms of engagement.

12. OPCAT implementation strategy

As noted above, the Australian Government has invoked Article 24 of OPCAT, which permits a state party to postpone, on ratification, its obligation to establish an NPM under Part IV of the treaty.

Some progress has been made since the Government announced its intention to ratify OPCAT by December 2017. For example, the Commonwealth Ombudsman's baseline assessment of the operation of current detention inspection bodies provides a clearer starting picture. Similarly, the forthcoming visit of the SPT provides an opportunity to draw on its unparalleled OPCAT expertise.²²³

However, many of the issues dealt with in the Commission's Interim Report remain unaddressed, and there are further issues that need attention. The Commission considers that the Australian Government should take practical steps, in close consultation with state and territory governments, to ensure that full implementation of OPCAT occurs in a timely way, to ensure it complies with its obligations within the required timeframe.

This could be centred on an OPCAT implementation strategy that includes:

- establishing a measurable timeframe for implementation, identifying key dates and milestones
- identifying a process to ensure that each body designated with an NPM function is OPCAT-compliant
- establishing an education and awareness-raising program for the general public, relevant civil society organisations and also targeted at authorities responsible for the administration of places of detention
- areas or issues of priority focus for OPCAT inspections, by reference to evidence collected by relevant experts, government bodies and civil society organisations.

Recommendation 17

The Australian Government should adopt an OPCAT implementation strategy, which includes:

- a measurable timeframe for implementation, identifying key dates and milestones
- the process for ensuring that each body designated with an NPM function is OPCAT compliant
- an education and awareness-raising program for the general public, relevant civil society organisations and also targeted at the bodies responsible for places of detention
- areas or issues of priority focus for OPCAT inspections.

Appendix 1 – Comparison with other OPCAT jurisdictions

This table summarises the respective approaches of New Zealand, the United Kingdom, France and Germany in implementing OPCAT.

Question	New Zealand	United Kingdom	France	Germany
<p>Question 1: What is this country's overarching NPM model?</p>	<p>National, multiple body NPM framework.</p> <p>NZ Human Rights Commission co-ordinates four other NPM bodies that have specific mandates: the Independent Police Conduct Authority; the Office of the Children's Commissioner; the Office of the Ombudsman; and the Inspector of Service Penal Establishments.</p>	<p>A single national body co-ordinating the work of multiple statutory bodies.</p> <p>Her Majesty's Inspectorate of Prisons carries out the co-ordination and communication function of the NPM.</p> <p>21 organisations throughout England, Scotland Wales and Northern Ireland comprise the NPM.</p>	<p>Single national body – 'Contrôleur Général des Lieux de Privation de Liberté' (General Controller of Places of Deprivation of Liberty) (CGLPL).</p>	<p>National body – constituted by two monitoring bodies operating at a Federal and State level.</p> <p>The two monitoring bodies are the Federal Agency for the Prevention of Torture (Federal Agency) and the Joint Commission of the States (Commission). Together they constitute the National Agency for the Prevention of Torture (Nationale Stelle zur Verhütung von folter) (National Agency).</p>
<p>Question 2: How are NPM activities resourced? Does the national government pay for the inspection functions, or are these costs shared by the national/provincial governments?</p>	<p>The five NPM bodies (four monitoring NPM bodies and one coordinating NPM body) are funded by the NZ Ministry of Justice.</p>	<p>England – Ministry of Justice, Home Office.</p> <p>Scotland, Northern Ireland and Wales – funded by devolved administration (national Parliaments) with some funding from the Home Office.</p>	<p>Funded by the national government.</p>	<p>One third of the National Agency's funds are provided by the Federation and two thirds are provided by the States.</p> <p>Funds are administered and allocated to the Commission and the Federal Agency by the Ministry of Justice, Integration and European Affairs.</p>

Question	New Zealand	United Kingdom	France	Germany
<p>Question 3: Did this country undertake a process to develop national standards regarding:</p> <p>(a) how inspections of places of detention should take place; and</p> <p>(b) the minimum conditions necessary in places of detention to comply with relevant human rights obligations?</p>	<p>There are no uniform national standards in respect of inspection procedures and minimum conditions. However, the NZ Human Rights Commission adapted international standards (such as UN guidelines) to produce a chart of standards given to each of the NPM bodies. Each NPM has tailored these to the institutions they visit. There is a substantial level of interaction and consultation between the various NPM bodies in formulating their relevant ‘standards’.</p>	<p>Each NPM body has different monitoring responsibilities depending on the detention setting. The minimum conditions will also depend on the detention setting.</p> <p>HMIP has published ‘Expectations’ – ie the standards of treatment and conditions expected of a custodial establishment. They refer to international human rights standards and the regulations by which the establishment is run. It includes expectations for: prisons, children & young people, Close Supervision Centres, immigration detention, police custody, court custody, UK Armed Forces, and Border Force.</p>	<p>Implemented through national legislation (loi 2007/1545) and drawing on decisions by the European Court of Human Rights, relevant French laws, as well as the <i>Declaration of the Rights of Man and of the Citizen of 1789</i>.</p>	<p>No uniform national standards. The Federal Agency has had regard to relevant domestic case law, the case law of the European Court of Human Rights and the recommendations of the CPT and the SPT. It has also consulted with NGOs and detention facilities.</p>
<p>Question 4: Did the country pass national, state/provincial legislation to implement OPCAT into domestic law and practice? If so, what did the legislation broadly cover? If not, did this country undertake a different process to ensure that OPCAT would be complied with?</p>	<p>New Zealand passed national legislation to implement OPCAT into domestic law.</p> <p>Legislation passed in 2006 amended the <i>Crimes of Torture Act 1989 (COTA)</i>.</p>	<p>Designation of NPM was by way of Ministerial statement.</p> <p>Subsequent legislation has dealt with the specific powers of NPM and the implementation of OPCAT.</p>	<p>The OPCAT Ratification Law was approved by the Senate on 30 July 2008.</p> <p>On 17 December 2008, President Sarkozy passed a decree whereby the text of the protocol officially became the law of France.</p>	<p>An “approval statute” (which renders international laws binding under German national law) was passed by the Bundestag on 26 August 2008, implementing OPCAT in its entirety.</p>
<p>Question 5: In this country, which government bodies have policy oversight for issues arising through the detention inspection process?</p>	<p>The New Zealand Ministry of Justice, as the coordinating government agency, has oversight for issues arising through the detention inspection process.</p> <p>Representatives of the Ministry of Justice have monthly meetings with the NPM, and the Ministry also assists to follow up recommendations of the NPM bodies.</p> <p>The Commission and the other designated NPM bodies also make submissions to Parliament on draft legislation.</p>	<p>England and Wales: Ministry of Justice Scotland: Cabinet Secretary for Justice Northern Ireland: Department of Justice</p>	<p>The Ministry for Justice</p>	<p>The National Agency makes recommendations in reports created after each visit and these are presented to the relevant controlling federal or state authority, as well as the individual facility visited.</p>

Appendix 2 – Submissions received to Consultation Paper 1

The following organisations and individuals made submissions to the Commission. Non-confidential submissions have been published on the Commission website in accordance with the Commission's Submission Policy.

1. Northern Territory Anti-Discrimination Commission
2. CONFIDENTIAL
3. Dr Niall McLaren
4. Victorian Legal Aid
5. Arthur Marcel
6. Advocacy for Inclusion
7. Mental Health Commission of NSW
8. Townsville Community Legal Service Inc.
9. Queensland Advocacy Incorporated
10. Royal Australian College of Physicians
11. Alzheimer's Australia
12. Mental Health Advocacy Service (WA)
13. ACT Human Rights Commission
14. Office of the Public Advocate
15. Public Interest Advocacy Centre
16. Australian Lawyers for Human Rights
17. Justice Action
18. Refugee Council of Australia
19. Being
20. CONFIDENTIAL
21. Criminal Lawyers Association of the Northern Territory
22. CONFIDENTIAL
23. Ms Initially No
24. Glenn Floyd
25. Johnnybe Realgood
26. Association for the Prevention of Torture
27. Law Council of Australia
28. Victorian Equal Opportunity and Human Rights Commission
29. National Mental Health Commission
30. Victorian Ombudsman
31. Public Health Association of Australia
32. The Australian Psychological Society Limited
33. NSW Ombudsman
34. Commission for Children and Young People (Victoria)
35. ACT Council of Social Service
36. Office of the Public Guardian (QLD)
37. Queensland Family & Child Commission
38. Disabled People's Organisations Australia and People With Disabilities Australia
39. Liberty Victoria
40. Professor Bronwyn Naylor
41. Australian Child Rights Taskforce: UNICEF Australia; Human Rights Law Centre; NATSILS; SNAICC; James McDougall; National Children's and Youth Law Centre
42. Sisters Inside
43. Asylum Seekers Resource Centre
44. Australia OPCAT Network (signatories listed below)

45. North Australian Aboriginal Justice Agency
46. Jesuit Social Services
47. National Aboriginal & Torres Strait Islander Legal Services
48. Legal Aid New South Wales

OPCAT Network Signatories

Organisations

1. Amnesty International Australia
2. Australian Association of Social Workers
3. Australian Council of Social Service
4. Australian Child Rights Taskforce
5. Australian College of Mental Health Nurses
6. Advocacy for Inclusion, ACT
7. Anglicare Australia
8. Asylum Seeker Advocacy Group
9. Being – Mental Health & Wellbeing Consumer Advisory Group
10. Civil Liberties Australia
11. Community Mental Health Australia
12. Disabled People's Organisations Australia
13. Doctors for Refugees
14. Federal Loves Refugees
15. Human Rights Law Centre
16. Human Rights Council of Australia
17. Jesuit Social Services
18. National Aboriginal and Torres Strait Islander Legal Services
19. National Ethnic Disability Alliance
20. National Justice Project
21. NSW Council for Civil Liberties
22. Public Health Association of Australia
23. People With Disability Australia
24. Queensland Advocacy Incorporated
25. Refugee Council of Australia
26. St Vincent de Paul Society National Council
27. Women With Disabilities Australia

Individuals

1. Allan Asher
2. Dr Bijou Blick
3. Danielle Celermajer, Prof of Sociology and Social Policy, University of Sydney
4. Nick Collyer
5. Prof Caroline de Costa, Obstetrics and Gynaecology, James Cook University College of Medicine
6. Corinne Dobson
7. Dr Helen Driscoll, Consultant Child and Adult Psychiatrist

Appendix 3 – Submissions received to Consultation Paper 2

8. Dr Michael Dudley, co-chair of the Asylum Seeker Advocacy Group; UNSW School of Psychiatry
 9. Prof Elizabeth Elliott, Prof of Paediatrics and Child Health, Sydney Medical School, University of Sydney; NHMRC Practitioner Fellow; Director, Australian Paediatric Surveillance Unit
 10. Dr John Falzon, CEO, St Vincent de Paul Society National Council
 11. Paula Farrugia
 12. Adam Fletcher, Lecturer, Graduate School of Business and Law, RMIT
 13. Kirsten Gibbs
 14. Dr Michael Gliksman
 15. Adj Assoc Prof Amanda Gordon, Clinical Psychology, University of Canberra
 16. Dr Hasantha Gunasekera, Sub-Dean and paediatrician, CHW Clinical School, University of Sydney
 17. Dorothy Hoddinott AO
 18. Prof David Isaacs, Clinical Professor, Paediatrics and Child Health, Children's Hospital, Westmead
 19. Prof Jon Jureidini, Critical and Ethical Mental Health research group, Robinson Research Institute, University of Adelaide
 20. Dr Nick Kowalenko
 21. Prof Michael Levy, Public health and clinical forensic physician
 22. Dr Sarah Mares, Infant Child and Family Psychiatrist; Conjoint senior lecturer, School of Psychiatry, UNSW
 23. Alanna Maycock; Clinical Nurse Consultant
 24. Peta Marks
 25. Rebecca Minty
 26. George Newhouse; Principal Solicitor, National Justice Project; Adj Prof of Law at Macquarie University
 27. Prof Louise Newman AM, co-chair of the Asylum Seeker Advocacy Group; Director, Centre for Women's Mental Health, The Royal Women's Hospital
 28. Michelle O'Flynn
 29. Dr Barri Phatarfod, Convenor, Doctors for Refugees
 30. Emma Phillips
 31. Assoc Prof Carolyn Quadrio, Consultant Psychiatrist, School of Psychiatry, UNSW
 32. Prof Alan Rosen, AO
 33. Kim Ryan, CEO, Australian College of Mental Health Nurses; Adj Assoc Prof Sydney University
 34. Dr John-Paul Sanggaran
 35. Chris Sidoti, Adj Prof, University of Western Sydney; Griffith University; University of the Sunshine Coast; Australian Catholic University
 36. Dr Claire Spivakovsky, Senior Lecturer in Criminology, Monash University
 37. Dr Jane Tubby, Child and Adolescent Psychiatrist
 38. Assoc Prof Nesrin Varol, Director, Sydney Gynaecology & Endometriosis Centre
 39. Viktoria Vibhakar, Licensed clinical social worker; Research Associate, Faculty of Medicine, RECOVER Injury Research Centre, University of Queensland
 40. Dr Dinesh Joseph Wadiwel, Senior Lecturer, Socio-legal studies and human rights, University of Sydney
 41. Dr Choong-Siew Yong
 42. Dr Peter Young
1. Bridget Phillips
 2. Australian Lawyers Alliance
 3. Refugee Council of Australia
 4. Victorian Equal Opportunity and Human Rights Commission
 5. Dr Anita Mackay, Lecturer La Trobe Law School
 6. Steven Caruana, 2017 Churchill Fellow
 7. The Royal Australian and New Zealand College of Psychiatrists
 8. Amnesty International Australia
 9. Queensland Advocacy Incorporated
 10. Ombudsman (South Australia)
 11. Sisters Inside Inc.
 12. People with Disability Australia
 13. Human Rights Law Centre
 14. New South Wales Council for Civil Liberties
 15. Office of the Public Advocate (Victoria)
 16. Legal Aid (New South Wales)
 17. Jesuit Social Services
 18. Law Council of Australia
 19. Australian Lawyers for Human Rights
 20. Commission for Children and Young People
 21. Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd
 22. Commissioner for Children and Young People Tasmania
 23. Equal Opportunity Tasmania

Endnotes

- 1 Australia signed OPCAT on 19 May 2009. On 9 February 2017, the Australian Government announced it intended to ratify OPCAT, working closely with the states and territories on implementation: Commonwealth Attorney-General, 'Media Release – Improving oversight and conditions in detention', 9 February 2017, <<http://pandora.nla.gov.au/pan/21248/20171220-1246/www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FirstQuarter/Improving-oversight-and-conditions-in-detention.html>>.
- 2 Attorney General's Department *Senate Standing Committee on Legal and Constitutional Affairs, Supplementary Budget Estimates 2019-20* (LCC-SBE19-141-OPCAT-National Preventive Mechanism) (4 November 2019).
- 3 National Children's Commissioner, Australian Human Rights Commission, *Children's Rights Report 2016* (October 2016), <<http://www.humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-report-2016>>.
- 4 *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987), <<https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtid=9&chapter=4&clang=en>>.
- 5 Preamble, OPCAT.
- 6 Article 1, OPCAT.
- 7 The Preamble to OPCAT recalls 'that the world Conference on Human Rights firmly declared that efforts to eradicate torture should first and foremost be concentrated on prevention'.
- 8 Part IV 'National Preventive Mechanisms', OPCAT.
- 9 Part III 'Mandate of the Subcommittee on Prevention of Torture', OPCAT.
- 10 United Nations, United Nations Treaty Collection: 'Declarations and Reservations: 9. b Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations' (18 December 2002), <<https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtid=9-b&chapter=4&clang=en#EndDec>>.
- 11 Commonwealth Attorney-General, 'Media Release – Improving oversight and conditions in detention', 9 February 2017, <<http://pandora.nla.gov.au/pan/21248/20171220-1246/www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FirstQuarter/Improving-oversight-and-conditions-in-detention.html>>.
- 12 The Commission notes that on 29 May 2020, the Prime Minister announced the formation of the National Federation Reform Council and the cessation of the Council of Australian Governments model, of which the Council of Attorneys-General was a part. In that announcement, the Prime Minister notes that '[i]mportant taskforces will continue in areas that are critical to our National Agenda', and so it is anticipated that either through the Council of Attorneys-General or another mechanism, there will continue to be a means of progressing cooperation between the federal, state and territory governments on the implementation of OPCAT. See Prime Minister, 'Media Release – Update following National Cabinet meeting', 29 May 2020, <<https://www.pm.gov.au/media/update-following-national-cabinet-meeting>>.
- 13 Attorney-General's Department Senate Standing Committee on Legal and Constitutional Affairs, *Supplementary Budget Estimates 2019-20* (LCC-SBE19-141-OPCAT-National Preventive Mechanism) (4 November 2019).
- 14 Commonwealth Attorney-General, 'Media Release – Improving oversight and conditions in detention', 9 February 2017, <<http://pandora.nla.gov.au/pan/21248/20171220-1246/www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FirstQuarter/Improving-oversight-and-conditions-in-detention.html>>.
- 15 Note: while the Commonwealth Ombudsman will undertake inspections of federal places of detention for the purpose of OPCAT, the Commission will continue to undertake its own inspections of federal places of detention—especially in immigration detention centres—in accordance with its legislative functions.
- 16 Australian Human Rights Commission *OPCAT in Australia, Consultation Paper, Stage 2* (June 2018), 21, <<https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/opcat-australia-consultation-paper-stage-2>>.
- 17 Australian Human Rights Commission *OPCAT in Australia, Consultation Paper, Stage 2* (June 2018), <<https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/opcat-australia-consultation-paper-stage-2>>. The Interim Report was initially provided in confidence to the Attorney-General in September 2017, prior to ratification, in order to support Government deliberations on how to implement OPCAT in Australia.
- 18 A list of submissions received is set out at Appendix 2.
- 19 Submissions to Consultation Paper 1 (CP 1): Victorian Legal Aid, 1; Advocacy for Inclusion, 4; Royal Australian College of Physicians (RACP), 1; Public Interest Advocacy Centre, 1; Australian Lawyers for Human Rights, 2; Refugee Council of Australia, 1; Being, 1; Association for the Prevention of Torture, 1; Law Council of Australia, 5; Victorian Equal Opportunity and Human Rights Commission, 1; Public Health Association of Australia, 4; Commission for Children and Young People (Victoria), 1; Disabled People's Organisations Australia and People With Disabilities Australia, 1; Liberty Victoria, 1; Professor Bronwyn Naylor, 1; Australian Child Rights Taskforce, 1; Sisters Inside, 2; Asylum Seekers Resource Centre, 1; Jesuit Social Services (JSS), 4; Legal Aid New South Wales, 3; Australian Psychological Society, 1. Submissions to Consultation Paper 2 (CP 2): Commissioner for Children and Young People, 2; Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd, 2; Law Council of Australia, 5; Royal Australian and New Zealand College of Psychiatrists (RANZCP), 1; Australian Lawyers Alliance, 4; Amnesty International Australia, 2; Refugee Council of Australia, 1; Human Rights Law Centre, 2; Jesuit Social Services, 4; Australian Lawyers for Human Rights, 3.
- 20 Submissions to CP 1: Legal Aid NSW, Submission No 48, 3; Australian Lawyers for Human Rights, 14; Victorian Equal Opportunity and Human Rights Commission, 9; Jesuit Social Services, 4; Association for the Prevention of Torture, 1; Confidential Submission No 20, 2; Advocacy for Inclusion, 1; Victoria Legal Aid, 4; Alzheimer's Australia, 1; Public Health Association of Australia, 4; Australian Child Rights Taskforce, 1; Commission for Children and Young People (Victoria), 1. Submissions to CP 2: Commission for Children and Young People (Tas), 2; Law Council of Australia, 5; Australian Lawyers Alliance, 4; Amnesty International Australia, 2; Refugee Council of Australia, 1.
- 21 Submissions to CP 1: Australia OPCAT Network, 25; Public Interest Advocacy Centre, 28; Victorian Equal Opportunity and Human Rights Commission, 9; Law Council of Australia, 42; Royal Australian College of Physicians, 2; National Aboriginal and Torres Strait Islander Legal Services, 18; Disabled People's Organisations Australia and People With Disabilities Australia, 1, 64; Victoria Legal Aid, 1; Sisters Inside, 10; Public Health Association of Australia, 10; Australian Psychological Society, 14; Queensland Advocacy Incorporated (QAI), 18; Australian Child Rights Taskforce, 11; Commission for Children and Young People (Victoria), 2. Submissions to CP 2: Human Rights Law Centre, 11; Australian Lawyers for Human Rights, 3.
- 22 Submissions to CP 1: Victorian Legal Aid, 1; Advocacy for Inclusion, 4; Townsville Community Legal Service Incorporated, 2; Royal Australian College of Physicians (RACP), 1; Public Interest Advocacy Centre, 1; Australian Lawyers for Human Rights, 2; Being, 1; Law Council of Australia, 5; Law Council of Australia, 5; Victorian Equal Opportunity and Human Rights Commission, 1; Public Health Association of Australia, 4; Commission for Children and Young People (Victoria), 1; Disabled People's Organisations Australia and People With Disabilities Australia, 1; Liberty Victoria, 1; Australian Child Rights Taskforce, 1; Jesuit Social Services (JSS), 4; Legal Aid New South Wales, 3. Submissions to CP 2: Law Council of Australia, 7. Jesuit Social Services, Submission to CP 1, 13.
- 23 Submissions to CP 2: Aboriginal and Torres Strait Islander Legal Service (Qld), 2; The Royal Australian and New Zealand College of Psychiatrists, 1; Steven Caruana, 23; Australian Lawyers Alliance, 4.
- 24 Royal Commission into the Protection and Detention of Children in the Northern Territory, 'Volume 1', *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (November 2017), 2, Chapter 4, <<https://www.royalcommission.gov.au/sites/default/files/2019-01/rcnt-royal-commission-nt-final-report-volume-1.pdf>>.
- 25 National Children's Commissioner, Australian Human Rights Commission, *Children's Rights Report 2016* (October 2016), 128, <<http://www.humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-report-2016>>.
- 26 Submissions to CP1: Victoria Legal Aid, 1; Advocacy for Inclusion, 4; Townsville Community Legal Service, 2; Queensland Advocacy Incorporated, 4; Alzheimer's Australia, 6; Mental Health Advocacy Service (WA), 4, 5; ACT Human Rights Commission, 6; Office of the Public Advocate, 10; Public Interest Advocacy Centre, 3, 15-20; Being, 1; Law Council of Australia, 27; Australian Psychological Society, 2, 7; OPCAT Network, 19; Northern Australian Aboriginal Justice Agency, 4; NATSILS, 2.
- 27 Submissions to CP 1: Victoria Legal Aid, 1; Advocacy for Inclusion, 6; Queensland Advocacy Incorporated, 12; Royal Australian College of Physicians, 1; Office of the Public Advocate, 9; Australian Lawyers for Human Rights, 2; Being, 2; Law Council of Australia, 5; Victorian Equal Opportunity and Human Rights Commission, 1; Public Health Association Australia, 4.
- 28 See Appendix 1. See also, submissions to CP 1: Association for the Prevention of Torture, 2; Australian Lawyers for Human Rights, 7. Association for the Prevention of Torture 'Switzerland – NPM Structure' (Webpage) <https://www.ap.t.ch/en/opcat_pages/npm-internal-organisation-21/>; Parliamentary Ombudsman, Norway, 'Mandate' (Webpage) <<https://www.sivilombudsmannen.no/en/torturforebygging/mandate/>>; La Comisión Nacional de los Derechos Humanos (CNDH) (National Human Rights Commission, Mexico), 'Designation of the CNDH as the National Mechanism for the Prevention of Torture' <<https://www.cndh.org.mx/documento/designacion-de-la-cndh-como-mecanismo-nacional-de-prevencion-de-la-tortura>>; Austrian Ombudsman Board, 'Preventive human rights monitoring' (Webpage) <<https://volksanwaltschaft.gv.at/en/preventive-human-rights-monitoring#anchor-index-2315>>. See also submissions to CP 1: Association for the Prevention of Torture, 2; People with Disabilities Australia, 21.
- 29 Commonwealth Attorney-General, Senator the Hon George Brandis QC, '2017 DFAT-NGO Forum on Human Rights' (Speech delivered at 2017 DFAT-NGO Forum on Human Rights, National Museum of Australia, Canberra, 9 February 2017). At <https://www.attorneygeneral.gov.au/Speeches/Pages/2017/FirstQuarter/2017-dfat-ngo-forum-on-human-rights-national-museum-of-australia-canberra.aspx> (viewed 4 August 2017).
- 30 Commonwealth Attorney-General, Senator the Hon George Brandis QC, '2017 DFAT-NGO Forum on Human Rights' (Speech delivered at 2017 DFAT-NGO Forum on Human Rights, National Museum of Australia, Canberra, 9 February 2017).
- 31 Commonwealth Ombudsman *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), Baseline Assessment of Australia's OPCAT readiness* (September 2019), 3, <<https://www.ombudsman.gov.au/what-we-do/monitoring-places-of-detention-opcat>>.
- 32 Submissions to CP 1: Liberty Victoria, 9; ACT Council of Social Service, Submission, 4; ACT Human Rights Commission, 5; Association for the Prevention of Torture, 3; Victorian Ombudsman, 5; Australian Lawyers for Human Rights, 13; Association for the Prevention of Torture, 3; People with Disabilities Australia, 57; ACT Council of Social Services, 4.
- 33 Regulation 5, *Ombudsman Regulations 2017* (Cth).
- 34 Submissions to CP 1: Australia OPCAT Network, 4; Being, 5; Public Health Association of Australia, 7; ACT Human Rights Commission, 5, 7; Australian Child Rights Taskforce, 2; Australian Psychological Society, 12; Association for the Prevention of Torture, 14; Commission for Children and Young People (Victoria), 2, 4; Victorian Equal Opportunity and Human Rights Commission, 8; Disabled People's Organisations Australia and People With Disabilities Australia, 64; Australian Child Rights Taskforce, 2. Submissions to CP 2: Amnesty International Australia, Appendix, 1.
- 35 Submissions to CP 1: Northern Territory Anti-Discrimination Commission, 1; Refugee Council of Australia, 3; ACT Human Rights Commission, 6; Queensland Advocacy Incorporated, 17; Australian Lawyers for Human Rights, 12; Law Council of Australia, 9. Submissions to CP 2: Refugee Council of Australia, 2; Steven Caruana, 66; Law Council of Australia, 23.
- 36 Submissions to CP 1: Professor Bronwyn Naylor, 4; Victorian Equal Opportunity and Human Rights Commission, 8; National Aboriginal and Torres Strait Islander Legal Services, 17; Commission for Children and Young People (Victoria), 4; Victorian Ombudsman, 2; Australian Lawyers for Human Rights, 13; People with Disabilities Australia, 57; Liberty Victoria, 7; Asylum Seekers Resource Centre, 3; Australian Child Rights Taskforce, 10.
- 37 Submissions to CP 2: Ombudsman (South Australia), 3; Law Council of Australia, 24.
- 38 Submissions to CP 2: Victorian Equal Opportunity and Human Rights Commission, 2, 5; Law Council of Australia, 24.
- 39 Refugee Council of Australia, submission to CP2, 9.
- 40 Parliamentary Ombudsman, Denmark *OPCAT Annual Report 2009* (2010), 2, 3, <<https://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/DenmarkAnnualReport2009.pdf>>.
- 41 Commonwealth Ombudsman *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), Baseline Assessment of Australia's OPCAT readiness* (September 2019), 20, <<https://www.ombudsman.gov.au/what-we-do/monitoring-places-of-detention-opcat>>.
- 42 United Nations *Report of the Independent Expert leading the global study on children deprived of their liberty, Manfred Nowak, submitted pursuant to General Assembly resolution 72/245 (A/74/136)* (11 July 2019), 18, <<https://undocs.org/A/74/136>>.
- 43 Victorian Equal Opportunity and Human Rights Commission, submission to CP2, 5.
- 44 Eileen Baldry, 'Disability at the margins: limits of the law', (2014) 23(3) *Griffith Law Review* 370; Australian Human Rights Commission, *Equal before the Law – Towards Disability Justice Strategies* (February 2014) <<https://www.humanrights.gov.au/our-work/disability-rights/publications/equal-law>>; Law Council of Australia, 'The Justice Project Final Report – Part 1 – People with Disability' (August 2018) <<https://www.lawcouncil.asn.au/justice-project/final-report>>; Human Rights Watch, "'I Needed Help, Instead I Was Punished' – Abuse and Neglect of Prisoners with Disabilities in Australia' (Report 6 February 2018) <https://www.hrw.org/sites/default/files/report_pdf/australia0218_web.pdf>; Bernadette McSherry et al, above n 39, 13-14; Australia OPCAT Network, 'The Implementation of OPCAT in Australia', Submission to the Subcommittee on Prevention of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (SPT) and the United Nations Working Group on Arbitrary Detention (WGAD), January 2020, 78.
- 45 Australian Human Rights Commission, *Equal before the Law – Towards Disability Justice Strategies* (February 2014) <https://www.humanrights.gov.au/our-work/disability-rights/publications/equal-law>, 29-30.

- 48 Senate Community Affairs Reference Committee, 'Chapter 9, Recommendations' *Indefinite detention of people with cognitive and psychiatric impairment in Australia* (29 November 2016) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/IndefiniteDetention45/Report>; Australian Human Rights Commission, *Information for List of Issues Prior to Reporting – Australia* (Submission to the UN Committee on the Rights of Persons with Disabilities) (June 2017), [33]-[34], <<https://www.humanrights.gov.au/our-work/legal/submission/crpd-information-list-issues-prior-reporting-australia-2017>>; Australian Human Rights Commission, 'Information Relating to Australia's Joint Fifth and Sixth Report under the Convention on the Rights of the Child, Second Report on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, and Second Report on the Optional Protocol on the Involvement of Children in Armed Conflict' (1 November 2018) [354], <<https://www.humanrights.gov.au/our-work/childrens-rights/publications/report-un-committee-rights-child-2018>>; Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples (Discussion Paper 84)* (July 2017), <https://www.alrc.gov.au/publication/incarceration-rates-of-aboriginal-and-torres-strait-islander-peoples-dp-84/11-access-to-justice-issues/indefinite-detention-when-unfit-to-stand-trial/#_ftn86>; Piers Gooding et al, 'Unfitness to Stand Trial and the Indefinite Detention of Persons with Cognitive Disabilities in Australia: Human Rights Challenges and Proposals for Change' 40 *Melbourne University Law Review* 816. Australia OPCAT Network, 'The Implementation of OPCAT in Australia', Submission to the Subcommittee on Prevention of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (SPT) and the United Nations Working Group on Arbitrary Detention (WGAD), January 2020, 94.
- 49 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment *Guidelines on National Preventive Mechanisms*, 12th Session, UN Doc CAT/OP/12/5 (9 December 2010) 5, <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT/OP/12/5&Lang=en>.
- 50 Professors Richard Harding and Neil Morgan (Centre for Law and Public Policy, The University of Western Australia) *Implementing the Optional Protocol to the Convention Against Torture: Options for Australia* (2008), 35, <<https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/implementing-optional-protocol-convention-against-torture>>.
- 51 Association for the Prevention of Torture 'OPCAT: What we do' (Webpage), <<https://www.apt.ch/en/apt-and-the-opcat/>>.
- 52 Submissions to CP 2: Law Council of Australia, 10; Steven Caruana, 50.
- 53 New Zealand Human Rights Commission, *OPCAT in New Zealand 2007-2012, A review of OPCAT implementation by New Zealand's National Preventive Mechanisms* (July 2013), 18, <https://www.hrc.co.nz/files/2214/2398/7100/Opocat-2013_web.pdf>.
- 54 Article 18, OPCAT.
- 55 Submissions to CP 1: Australia OPCAT Network, 6; North Australian Aboriginal Justice Agency, 2; Sisters Inside, 3; Professor Bronwyn Naylor, 3; Queensland Family and Child Commission, 6; Mental Health Advocacy Service, 4; Legal Aid New South Wales, 5, 10; Australian Child Rights Taskforce, 4; Australian Psychological Society, 6; Australian Lawyers for Human Rights, 5; Association for the Prevention of Torture, 4, 12; Australian Lawyers for Human Rights, 10; Disabled People's Organisations Australia and People With Disabilities Australia, 14.
- 56 Submissions to CP 1: Australia OPCAT Network, 6; North Australian Aboriginal Justice Agency, 2; Sisters Inside, 3; Australian Child Rights Taskforce, 5; National Aboriginal and Torres Strait Islander Legal Services, 5.
- 57 Submissions to CP 1: Australia OPCAT Network, 6; Liberty Victoria, 6, 7; Sisters Inside, 3; Public Interest Advocacy Centre, 8; Public Health Association of Australia, 6; Refugee Council of Australia, 4; Professor Bronwyn Naylor, 2; Legal Aid New South Wales, 3; Australian Psychological Society, 6; Queensland Advocacy Incorporated, 4; Association for the Prevention of Torture, 11; People with Disabilities Australia, 14, 25, 39.
- 58 Submissions to CP 1: Liberty Victoria, 6; Public Interest Advocacy Centre, 8; Professor Bronwyn Naylor, 3; ACT Human Rights Commission, 3; Mental Health Advocacy Service, 3; Legal Aid New South Wales, 5; Australian Psychological Society, 6; Queensland Advocacy Incorporated; Australian Lawyers for Human Rights, Submission No 16, 5; Law Council of Australia, Submission No 27, 10.
- 59 Article 19(1), for example, requires NPMs to have the power to regularly examine the treatment of persons deprived of their liberty 'with a view to strengthening, if necessary, their protection' against ill treatment.
- 60 Submissions to CP 1: Victorian Ombudsman, 2; Australian Lawyers for Human Rights, 12; Association for the Prevention of Torture, 4; Legal Aid New South Wales, 4; People with Disabilities Australia, 14; Liberty Victoria, 7, 9; Australian Psychological Society, 6.
- 61 United Nations, '19. Lease possible use of institutionalisation', *Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)* (Adopted by GA res 40/33 of November 1985), Article 19, OPCAT.
- 62 Article 20, OPCAT.
- 63 Submissions to CP 1: Australia OPCAT Network, 7; Liberty Victoria, 8; Office of the Advocate for Children and Young People (ACYP), 2; Queensland Family and Child Commission, 6; Mental Health Advocacy Service, 3; Legal Aid New South Wales, 7; Victorian Equal Opportunity and Human Rights Commission, 3; National Aboriginal and Torres Strait Islander Legal Services, 6; Association for the Prevention of Torture, 4; Association for the Prevention of Torture, 13; Law Council of Australia, 10; Australian Psychological Society, 6.
- 65 Submissions to CP 1: Public Interest Advocacy Centre, 8, 9; Queensland Family and Child Commission, 6; Legal Aid New South Wales, 7; Commission for Children and Young People (Victoria), 5; Office of the Public Advocate, 11; Mental Health Commission, 3.
- 66 Submissions to CP 1: Association for the Prevention of Torture, 13; Australia OPCAT Network, 12.
- 67 Submissions to CP 1: Australia OPCAT Network, 7; North Australian Aboriginal Justice Agency, 3; Liberty Victoria, 4, 9; Refugee Council of Australia, 6; National Mental Health Commission (NHMC), 4; Legal Aid New South Wales, 7; Australian Child Rights Taskforce, 5; Association for the Prevention of Torture, 5, 8; Asylum Seekers Resource Centre, 3; Office of the Public Guardian (Qld), 5; Commission for Children and Young People (Victoria), 1; Australian Lawyers for Human Rights, 5; Jesuit Social Services, 5; Public Interest Advocacy Centre, 23; Law Council of Australia, 12; Disabled People's Organisations Australia and People With Disabilities Australia, 14; Victoria Legal Aid, 1.
- 68 Submissions to CP 1: Victorian Equal Opportunity and Human Rights Commission, 3; National Aboriginal and Torres Strait Islander Legal Services, 6.
- 69 Submissions to CP 1: National Aboriginal and Torres Strait Islander Legal Services, 7; Commission for Children and Young People (Victoria), 6, 13; Jesuit Social Services, 6, 7; Law Council of Australia, 12; Commission for Children and Young People (Victoria), 6.
- 70 Submissions to CP 1: Disabled People's Organisations Australia, 2; Advocacy for Inclusion, 9.
- 71 Submissions to CP 1: Commission for Children and Young People (Victoria), 6; Jesuit Social Services, 6; Law Council of Australia, 12; Australian Psychological Society, 1, 16; Mental Health Commission, 4.
- 72 Submissions to CP 1: Australian Lawyers for Human Rights, 7; Association for the Prevention of Torture, 4; Commission for Children and Young People (Victoria), 12.
- 73 Australian Human Rights Commissioner, Australian Human Rights Commission *National Children's Report 2019*, 210 <<https://www.humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-report-2019>>.
- 74 See HM Inspectorate of Prisons *Children in Custody 2017-18, An analysis of 12-18 year olds' perceptions of their experiences in secure training centres and young offender institutions* (2019), <https://www.justiceinspectorates.gov.uk/hmprisons/wp-content/uploads/sites/4/2019/01/6.5164_HMI_Children-in-Custody-2017-18_A4_v10_web.pdf>.
- 75 HM Chief Inspector of Prisons 'Foreword', HM Inspectorate of Prisons *Children in Custody 2017-18, An analysis of 12-18 year olds' perceptions of their experiences in secure training centres and young offender institutions* (2019) <https://www.justiceinspectorates.gov.uk/hmprisons/wp-content/uploads/sites/4/2019/01/6.5164_HMI_Children-in-Custody-2017-18_A4_v10_web.pdf>.
- 76 Submissions to CP 1: Australia OPCAT Network, 8; Liberty Victoria, 4; Sisters Inside, 3; Asylum Seeker Resource Centre, 2; Refugee Council of Australia, 4; Professor Bronwyn Naylor, 4; National Mental Health Commission (NHMC), 1; Victorian Equal Opportunity and Human Rights Commission, 9.
- 77 Article 22, OPCAT.
- 78 Submissions to CP 1: OPCAT Australia Network, 31; National Aboriginal and Torres Strait Islander Legal Services, 8, 17; Public Interest Advocacy Centre, 25; Association for the Prevention of Torture, 9; Law Council of Australia, 11; Mental Health Advocacy Service, 4; Disabled People's Organisations Australia and People With Disabilities Australia, 23.
- 79 Australia OPCAT Network, submission to CP 1, 33.
- 80 National Aboriginal & Torres Strait Islander Legal Services, submission to CP 1, 3, 17.
- 81 Submissions to CP 1: Asylum Seeker Resource Centre, 6; Mental Health Commission of NSW, 4; Refugee Council of Australia, Submission 18, 3; National Mental Health Commission (NHMC), 1; Australian Child Rights Taskforce, 4; Professor Bronwyn Naylor, 9.
- 82 Submissions to CP 1: National Mental Health Commission (NHMC), Submission No 29, 1; Australia OPCAT Network, Submission No 44, 8; Mental Health Commission of NSW, Submission No 7, 4.
- 83 Submissions to Consultation Paper 1: National Mental Health Commission (NHMC), Submission No 29, 1; Anonymous, Confidential Submission No 2, 2; Legal Aid New South Wales, Submission No 48, 5; Australian Child Rights Taskforce, Submission No 41, 10; Office of the Public Guardian (Qld), Submission No 36, 4; Queensland Advocacy Incorporated, Submission No 9, 9; Association for the Prevention of Torture, Submission No 26, 4; People with Disabilities Australia, Submission No 38, 29; Mental Health Commission, Submission No 29, 5; Confidential Submission No 2, 3.
- 84 In the ACT, for example, there are regular oversight agency meeting relation to some of the larger places of detention. See ACT Human Rights Commission, submission to CP 1, 3.
- 85 Submissions to CP 1: Victorian Equal Opportunity and Human Rights Commission, 9; Public Interest Advocacy Centre, 21; Disabled People's Organisations Australia and People With Disabilities Australia, 4; Being, 1; Advocacy for Inclusion, 8; Victoria Legal Aid, 1; Queensland Family & Child Commission, 1; Queensland Advocacy Incorporated (QAI), 12.
- 86 Submissions to CP 1: Office of the Public Advocate, 10; Mental Health Advocacy Service, 5; Australian Child Rights Taskforce, 10; Victorian Equal Opportunity and Human Rights Commission, 9; Queensland Advocacy Incorporated, 10; Australian Lawyers for Human Rights, 8; Victorian Equal Opportunity and Human Rights Commission, 3, 9; Public Interest Advocacy Centre, 23; ACT Council of Social Service, 3.
- 87 Submissions to CP 1: Public Interest Advocacy Centre, 14; Refugee Council of Australia, 9; Victorian Equal Opportunity and Human Rights Commission, 9; Commission for Children and Young People (Victoria), 12; Victorian Equal Opportunity and Human Rights Commission, 8, 9; Jesuit Social Services, 15; Law Council of Australia, 39; Disabled People's Organisation of Australia, 2, 3; People with Disabilities Australia, 9, 57. Two stakeholders submitted that the role of civil society organisations should not be prescribed in any agreement: Sisters Inside, 4; Australian Psychological Society, 7, 12.
- 88 United Nations *Preventing Torture: The Role of National Preventive Mechanisms* (A Practical Guide: Professional Training Series No. 21) (2018), 16, <https://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/NPM_Guide.pdf>.
- 89 Submissions to CP 1: ACT Human Rights Commission, 4; Australian Child Rights Taskforce, 4; Australian Psychological Society, 7; Association for the Prevention of Torture, 5; Queensland Family and Child Commission, 6; Commission for Children and Young People (Victoria), 5.
- 90 Commonwealth Ombudsman, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)*, Report No. 3 of 2019, <https://www.ombudsman.gov.au/_data/assets/pdf_file/0025/106657/Ombudsman-Report-Implementation-of-OPCAT.pdf>.
- 91 The Victorian Ombudsman has undertaken two investigations, at its own motion, within the OPCAT framework. The first was a pilot OPCAT inspection of Victoria's main women's prison; the second was a thematic review of practices related to solitary confinement of children and young people. See: Victorian Ombudsman *Implementing OPCAT in Victoria – report and inspection of Dame Phyllis Frost Centre* (30 November 2017); Victorian Ombudsman *OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people* (5 September 2019); <<https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/>>.
- 92 Submissions to CP 1: Public Health Association of Australia, 6; Professor Bronwyn Naylor, 1; Legal Aid New South Wales, 3; Australian Lawyers for Human Rights, 11; Victorian Equal Opportunity and Human Rights Commission, 2; Jesuit Social Services, 4; Being, 4; Queensland Advocacy Incorporated (QAI), 17.
- 93 Submissions to CP 1: Australia OPCAT Network, 6; North Australian Aboriginal Justice Agency, 2; Sisters Inside, 4; Mental Health Commission of NSW, 4; Professor Bronwyn Naylor, 3; Office of the Public Advocate, 11; Criminal Lawyers Association of the Northern Territory, 1; Victorian Ombudsman, 5; Legal Aid NSW, 3; Public Interest Advocacy Centre, 6; Association for the Prevention of Torture, 3; People with Disabilities Australia, 64; Disabled People's Organisations of Australia, 3; Liberty Victoria, 4; Asylum Seekers Resource Centre, 2; Mental Health Commission of NSW, 4; Australian Child Rights Taskforce, 4; Mental Health Commission, 1.
- 94 Submissions to CP 1: Liberty Victoria, 9; Professor Bronwyn Naylor, 2; Australian Child Rights Taskforce, 4; National Aboriginal and Torres Strait Islander Legal Services, 3; Victorian Equal Opportunity and Human Rights Commission, 4; Jesuit Social Services, 14.
- 95 Ombudsman (SA), submission to CP 2, 2.
- 96 Submissions to CP 1: Public Interest Advocacy Centre, 8; Public Health Association of Australia, 5; Refugee Council of Australia, 6; Queensland Family and Child Commission, 2; Queensland Advocacy Incorporated, 4, 9; Criminal Lawyers of the Northern Territory, 1; Mental Health Commission, 3.
- 97 Submissions to CP 1: Australia OPCAT Network, 7; Public Interest Advocacy Centre, 7; Professor Bronwyn Naylor, 4; ACT Human Rights Commission, 4; Mental Health Advocacy Service, 4; Legal Aid New South Wales, 7; Commission for Children and Young People (Victoria), 11; Law Council of Australia, 14; Victoria Legal Aid, 3.
- 98 National Children's Commissioner, Australian Human Rights Commission, *Children's Rights Report 2016* (October 2016), <<http://www.humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-report-2016>>.
- 99 Submissions to CP 1: Australia OPCAT Network, 8, 9; Refugee Council of Australia, 4; ACT Human Rights Commission, 5; Law Council of Australia, 13.
- 100 Australian Human Rights Commission, 'Proposal 3', Interim Report, in *OPCAT in Australia, Consultation Paper, Stage 2* (June 2018), <<https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/opcat-australia-consultation-paper-stage-2>>.
- 101 Commonwealth Ombudsman, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)*, Report No. 3 of 2019, <https://www.ombudsman.gov.au/_data/assets/pdf_file/0025/106657/Ombudsman-Report-Implementation-of-OPCAT.pdf>.
- 102 Commonwealth Ombudsman, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)*, Report No. 3 of 2019, 30 <https://www.ombudsman.gov.au/_data/assets/pdf_file/0025/106657/Ombudsman-Report-Implementation-of-OPCAT.pdf>.

- 103 Justice and Community Safety Directorate, ACT Government *Human Rights principles for ACT correctional centres* (January 2019), <<http://cdn.justice.act.gov.au/resources/uploads/ACTCS/Human%20Rights%20Principles%20for%20ACT%20Correctional%20Centres.pdf>>.
- 104 Sections 9 and 12, *Corrections Management Act 2007* (ACT).
- 105 Shane Rattenbury MLA, Minister for Corrections *Ministerial Statement, Moss Review Implementation* (The Legislative Assembly for the Australian Capital Territory) (2018), 5.
- 106 Justice and Community Safety Directorate, ACT Government *Human Rights principles for ACT correctional centres* (January 2019), 3, <<http://cdn.justice.act.gov.au/resources/uploads/ACTCS/Human%20Rights%20Principles%20for%20ACT%20Correctional%20Centres.pdf>>.
- 107 Commonwealth Ombudsman, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)*, Report No. 3 of 2019, 34 <https://www.ombudsman.gov.au/_data/assets/pdf_file/0025/106657/Ombudsman-Report-Implementation-of-OPCAT.pdf>.
- 108 As noted above, on 29 May 2020 the Prime Minister announced the formation of the National Federation Reform Council and the cessation of the Council of Australian Governments model, of which the Council of Attorneys-General was a part. The Commission assumes that, whether or not the Council of Attorneys-General continues in its current form, there will remain a mechanism for the federal, state and territory governments to continue to cooperate on the implementation of OPCAT.
- 109 Regulation 17, *Ombudsman Regulations 2017* (Cth).
- 110 Article 23, OPCAT.
- 111 For example, under ss 19-20 of the *Inspector of Custodial Services Act 2003* (WA), the OICS must inspect and report to parliament at least once every three years on 17 prisons, five prison work camps, one juvenile detention centre, all court custody centres and police lockups that have been 'prescribed' to be used as court custody centres.
- 112 These reviews are undertaken by the Inspector of Correctional Services, pursuant to the *Inspector of Correctional Services Act 2017* (ACT) and the *Corrections Management Act 2007* (ACT). Prisons are measured against relevant ACT standards for places of inspection, including the *ACT Standards for Adult Correctional Services*. These standards are based on international human rights standards and informed by the ACT Justice and Community Safety Directorate's *Human Rights Principles for ACT Correctional Centres and the Human Rights Act 2004* (ACT). See ACT Inspector of Custodial Services *Report of a Review of a Correctional Centre, Healthy Prison Review of the Alexander Maconochie Centre 2019* (November 2019), <https://www.ics.act.gov.au/_data/assets/pdf_file/0011/1463681/10606R-ACT-ICS-Healthy-Prison-Review-Nov-2019_FA-TAGGED.pdf>.
- 113 United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on national preventive mechanisms* (Twelfth Session, 15-19 November 2010), CAT/OP/12/5, 9 December 2010, 3.
- 114 Joint Standing Committee on Treaties, Parliament of Australia, *Report 125: Review into Treaties tabled on 7 and 28 February 2012* (2012), [6.8].
- 115 Submissions to CP 1: Public Interest Advocacy Centre, Submission No 15, 28; Disabled People's Organisations Australia and People With Disabilities Australia, Submission No 38, 49; Australia OPCAT Network, Submission No 44, 39. One stakeholder, in a submission to CP 2, cautioned against referring to perceived financial benefits from OPCAT implementation.
- 116 However, one submission stated that the Federal Government should have ultimate funding responsibility for the NPM: Disabled People's Organisations Australia and People With Disabilities Australia, submission to CP 1, 49.
- 117 Submissions to CP 1: Public Interest Advocacy Centre, 9, 29; Association for the Prevention of Torture, 4; Law Council of Australia, 10-11; National Mental Health Commission, 1; Public Health Association of Australia, 5; Australia OPCAT Network, 6-9; Commission for Children and Young People (Victoria), 5; Queensland Family & Child Commission, 6; Disabled People's Organisations Australia and People With Disabilities Australia, 59.
- 118 Submissions to CP 1: Northern Territory Anti-Discrimination Commission, 3; Mental Health Commission of New South Wales, 3-4; Public Interest Advocacy Centre, 8; Australian Lawyers for Human Rights, 10; Law Council of Australia, 13; Commission for Children and Young People (Victoria), 5; Legal Aid New South Wales, 5.
- 119 Submissions to CP 1: ACT Human Rights Commission, 3; Law Council of Australia, 13-14; Liberty Victoria, 9; North Australian Aboriginal Justice Agency, Submission No 45, 3.
- 120 Submissions to CP 1: See, for example Association for the Prevention of Torture, 6; Legal Aid New South Wales, 6-10.
- 121 Submissions to CP 1: Northern Territory Anti-Discrimination Commission, 3; ACT Human Rights Commission, 3-4; Public Interest Advocacy Centre, 28; Australian Lawyers for Human Rights, 5; Association for the Prevention of Torture, 4-5; Law Council of Australia, 10; Victorian Equal Opportunity and Human Rights Commission, 3; National Mental Health Commission, 3; The Australian Psychological Society Limited, 6; Disabled People's Organisations Australia and People With Disabilities Australia, 55; Liberty Victoria, 10; Sisters Inside, 4; Australia OPCAT Network, 39; Legal Aid New South Wales, 5.
- 122 Submissions to CP 1: Confidential Submission No 2, 2-3; Queensland Advocacy Incorporated (QAI), 9; ACT Human Rights Commission, 3; Refugee Council of Australia, 7; Association for the Prevention of Torture, 5; Victorian Equal Opportunity and Human Rights Commission, 3; Queensland Family & Child Commission, 4.
- 123 Submissions to CP 1: Confidential Submission No 2, 2-3; Queensland Advocacy Incorporated (QAI), 10; Public Interest Advocacy Centre, 21; Australian Lawyers for Human Rights, 5; Association for the Prevention of Torture, 5; Law Council of Australia, 12; The Australian Psychological Society Limited, 6; NSW Ombudsman, 1; Commission for Children and Young People (Victoria), 1, 4; Office of the Public Guardian (QLD), 5; Disabled People's Organisations Australia and People With Disabilities Australia, 59.
- 124 Submissions to CP 1: ACT Human Rights Commission, 3; Public Interest Advocacy Centre, 9; Disabled People's Organisations Australia and People With Disabilities Australia, 59; Liberty Victoria, 9.
- 125 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on National Preventive Mechanisms*, 12th Session, UN Doc CAT/OP/12/5 (9 December 2010) 4, <<http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/NationalPreventiveMechanisms.aspx>>.
- 126 Submissions to CP 1: Royal Australian College of Physicians (RACP), 1; Mental Health Advocacy Service (Western Australia), 4; Public Interest Advocacy Centre, 29; Australian Lawyers for Human Rights, 5, 9-10; Refugee Council of Australia, 7, 8; Association for the Prevention of Torture, 12; Law Council of Australia, 10, 11; Victorian Equal Opportunity and Human Rights Commission, 3; The Australian Psychological Society Limited, 6; NSW Ombudsman, 1; Liberty Victoria, 9.
- 127 Submissions to CP 1: Queensland Advocacy Incorporated (QAI), 10, 17; Mental Health Advocacy Service (Western Australia), 3; Office of the Public Advocate, 10; Public Interest Advocacy Centre, 21, 26-27; Refugee Council of Australia, 6; Being, 4-5; Association for the Prevention of Torture, 7, 8; Law Council of Australia, 39; Victorian Equal Opportunity and Human Rights Commission, 3; Public Health Association of Australia, 8; Queensland Family & Child Commission, 10; Disabled People's Organisations Australia and People With Disabilities Australia, 1, 2, 55, 56; Australian Child Rights Taskforce, 10.
- 128 Submissions to CP 1: NATSILS, 16, 18; Jesuit Social Services, 7, 14-15; North Australian Aboriginal Justice Agency, 6; OPCAT Network, 25-29; Asylum Seeker Resource Centre, 9; Sisters Inside, 9; Australian Psychological Society, 6; Public Health Association of Australia, 8; Victorian Equal Opportunity and Human Rights Commission, 8, 9; Law Council of Australia, 39; Association for the Prevention of Torture, 7; Being, 4; Refugee Council of Australia, 11; Justice Action, 5; Public Interest Advocacy Centre, 23; Office of the Public Advocate, 11; Mental Health Association (WA), 6; Queensland Advocacy Incorporated, 17.
- 129 Submissions to CP 1: Refugee Council of Australia, 3; National Mental Health Commission, 7; The Australian Psychological Society Limited, 12; NSW Ombudsman, 1; Commission for Children and Young People (Victoria), 12; ACT Council of Social Service, Attachment A; Australian Child Rights Taskforce, 9-10.
- 130 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National report* (1991) vol 3, 291 and vol 5 [Recommendation 165].
- 131 John Taylor, 'Coroner finds prisoner access to hanging point 'tragic' after royal commission recommended removal', ABC News (online), 29 May 2015, <<http://www.abc.net.au/news/2015-05-28/queensland-coroner-finds-prisoner-death-near-ipswich-tragic/6503814>>; Inga Ting, Deaths in custody: authorities ignore warnings on hanging points, Crikey (online), 15 June 2011, <<https://www.crikey.com.au/2011/06/15/deaths-in-custody-authorities-ignore-warnings-on-hanging-points/>>. But see James Haughton, *The 25th Anniversary of the Royal Commission into Aboriginal Deaths in Custody* (15 April 2016) Flagpost, Parliamentary Library, Parliament of Australia, <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2016/April/RCADIC-25>; Edith Bevan, 'Shan Tennent, first woman to be appointed Supreme Court Judge in Tasmania, to retire', ABC News (online), 2 April 2017, <<http://www.abc.net.au/news/2017-04-03/shan-tennent-tasmanian-supreme-court-judge-to-retire/8412050>>.
- 132 See, for example, evidence given to the NSW Corners Court: *Inquest into the death of L, Findings of Magistrate Elizabeth Ryan, Deputy State Coroner* (2016/214323, 30 April 2019), at 15. <<http://www.coroners.justice.nsw.gov.au/Documents/Findings%20L.pdf>>.
- 133 Commonwealth Ombudsman, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)*, Report No. 3 of 2019, 14, 42 <https://www.ombudsman.gov.au/_data/assets/pdf_file/0025/106657/Ombudsman-Report-Implementation-of-OPCAT.pdf>.
- 134 Articles 1, 4, 19(a), 20(c) OPCAT.
- 135 Attorney General's Department *Senate Standing Committee on Legal and Constitutional Affairs, Supplementary Budget Estimates 2019-20* (LCC-SBE19-141-OPCAT-National Preventive Mechanism) (4 November 2019).
- 136 Article 1, OPCAT.
- 137 Association for the Prevention of Torture and the Inter-American Institute of Human Rights, *Optional Protocol to the UN Convention Against Torture, Implementation Manual (Revised Edition)* (2010) 18, 49.
- 138 Royal Commission into Aged Care Quality and Safety, *Restrictive Practices in Residential Aged Care in Australia, Background Paper 4* (May 2019), 5 <<https://agedcare.royalcommission.gov.au/publications/Pages/default.aspx>>.
- 139 Royal Commission into Aged Care Quality and Safety, *Interim Report: Neglect* (Vol 1) (October 2019), 10, <<https://agedcare.royalcommission.gov.au/publications/Pages/default.aspx>>.
- 140 Attorney General's Department *Senate Standing Committee on Legal and Constitutional Affairs, Supplementary Budget Estimates 2019-20* (LCC-SBE19-141-OPCAT-National Preventive Mechanism) (4 November 2019).
- 141 Commonwealth Ombudsman 'Implementation of OPCAT in Australia – an update', Presentation by the Commonwealth Ombudsman at the 2020 Future Justice and Corrections Summit (19 February 2020, Sydney), 3, <https://www.ombudsman.gov.au/_data/assets/pdf_file/0013/110560/Future-Justice-and-Corrections-Summit-2020.02.pdf>.
- 142 Commonwealth Ombudsman, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)*, Report No. 3 of 2019, 5 <https://www.ombudsman.gov.au/_data/assets/pdf_file/0025/106657/Ombudsman-Report-Implementation-of-OPCAT.pdf>.
- 143 United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment *Guidelines on national preventive mechanisms* (Twelfth Session, 15-19 November 2010), CAT/OP/12/5, 9 December 2010, 5.
- 144 Subcommittee on the Prevention of Torture (SPT), Response to the New Zealand Human Rights Commission's request for interpretative guidance on Article 4.2 of the OPCAT, 2015.
- 145 Submissions to CP 2: Law Council of Australia, 9; Victorian Equal Opportunity and Human Rights Commission, 7; People with Disability Australia, 3; Royal Australian and New Zealand College of Psychiatrists, 7; Australian Lawyers for Human Rights, 6; Bridget Phillips, 47; Office of the Public Advocate, 1; Ombudsman SA, 2; Human Rights Law Centre, 9; NSW Council for Civil Liberties, 6; Steven Caruana, 6; Refugee Council of Australia, 6; Australian Lawyers Alliance, 7; Queensland Advocacy Incorporated, 6. See also Commonwealth Ombudsman, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)*, Report No. 3 of 2019, 9, <https://www.ombudsman.gov.au/_data/assets/pdf_file/0025/106657/Ombudsman-Report-Implementation-of-OPCAT.pdf>.
- 146 Section 7, *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018* (ACT).
- 147 Section 4 *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018* (NT).
- 148 Commonwealth Ombudsman, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)*, Report No. 3 of 2019, 9 <https://www.ombudsman.gov.au/_data/assets/pdf_file/0025/106657/Ombudsman-Report-Implementation-of-OPCAT.pdf>.
- 149 Professors Richard Harding and Neil Morgan (Centre for Law and Public Policy, The University of Western Australia) *Implementing the Optional Protocol to the Convention Against Torture: Options for Australia* (2008), 35, <<https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/implementing-optional-protocol-convention-against-torture>>.
- 150 Professors Richard Harding and Neil Morgan (Centre for Law and Public Policy, The University of Western Australia) *Implementing the Optional Protocol to the Convention Against Torture: Options for Australia* (2008), 9, 10, <<https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/implementing-optional-protocol-convention-against-torture>>.
- 151 Committee Against Torture *Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment (CAT/57/4)* (22 March 2016), 19, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/059/73/PDF/G1605973.pdf?OpenElement>>.
- 152 Submissions to CP 1: OPCAT Network, 36; Sisters Inside, 11; Australian Psychological Society, 14; Public Health Association of Australia, 9; Law Council of Australia, 42; Association for the Prevention of Torture, 10. Submissions to CP 2: Royal Australian and New Zealand College of Psychiatrists, 7; Legal Aid NSW, 6; Australian Lawyers Alliance, 6; Jesuit Social Services, 5; Victorian Equal Opportunity and Human Rights Commission, 4; Commission for Children and Young People (Tasmania), 6.
- 153 NZ Ombudsman *Factsheet OPAT Aged Care Inspections Programme: A three year programme of work* (October 2019), <<https://www.ombudsman.parliament.nz/sites/default/files/2019-11/factsheet-agedcare-outlineandprogress.pdf>>.
- 154 Submissions to CP 2: Aboriginal and Torres Strait Islander Legal Services (Qld) Ltd, 5; Victorian Equal Opportunity and Human Rights Commission, 5; Law Council of Australia, 11; Commission for Children and Young People, 3; Jesuit Social Services, 7; Amnesty International Australia, 3.
- 155 Submissions to CP 1: National Mental Health Commission, 4; Office of the Public Advocate, 4; Townsville Community Service Inc (TCLS), 3; Victoria Legal Aid, 2; Office of the Public Guardian, 6. Submissions to CP 2: Law Council of Australia, 18; Australian Lawyers Alliance, 5; Royal Australian and New Zealand College of Psychiatrists, 8. Other stakeholders did not consider that aged care facilities necessarily fall within scope, but noted that certain practices in these settings, including the use of restraints, would require OPCAT oversight: Alzheimer's Australia, submission to CP 1, 7; Australian Psychological Society, submission to CP 1, 7.
- 156 Submissions to CP 2: Law Council of Australia, 11; Bridget Phillips, 48; NSW Council for Civil Liberties, 7; Jesuit Social Services, 12; Refugee Council of Australia, 3; Australian Lawyers Alliance, 5; Amnesty International Australia, 3; Legal Aid NSW, 5.

- 157 Submissions to CP 1: Office of the Public Advocate, 4; People with Disability Australia, 13, 50; Disabled People's Organisations Australia, 2; Victoria Legal Aid, 2; Queensland Advocacy Incorporated (QAI), 12. Submissions to CP 2: Law Council of Australia, 11; People with Disabilities Australia, 3; Queensland Advocacy Incorporated, 8; Royal Australian and New Zealand College of Psychiatrists, 9.
- 158 Submissions to CP 2: Law Council of Australia, 19; Aboriginal and Torres Strait Islander Legal Services (Qld) Ltd.
- 159 Submissions to CP 1: National Mental Health Commission, 4, 5; Mental Health Advocacy Service, 4; Law Council of Australia, 8, 20; Being, 2. Submissions to CP 2: Law Council of Australia, 11; Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd, 3; People with Disabilities Australia, 3; Commission for Children and Young People, 3; Jesuit Social Services, 8; Queensland Advocacy Incorporated, 9; Legal Aid NSW, 4.
- 160 Submissions to CP 1: Mental Health Advocacy Service, 3, 4; Disabled People's Organisations Australia, 2; Victoria Legal Aid, 2. Submissions to CP 2: Law Council of Australia, 20; Commission for Children and Young People, 3.
- 161 Submissions to CP 2: Law Council of Australia, 11; Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd 3; Victorian Equal Opportunity and Human Rights Commission, 5; Dr Anita Mackay, 2; Jesuit Social Services, 5; Australian Lawyers Alliance, 5; Amnesty International Australia, 3.
- 162 Submissions to CP 2: Law Council of Australia, 13; Dr Anita Mackay, 3; Australian Lawyers Alliance, 5; Legal Aid NSW, 5.
- 163 Submissions to CP 2: Aboriginal and Torres Strait Islander Legal Services (Qld) Ltd, 6; Australian Lawyers Alliance, 5; Legal Aid NSW, 5.
- 164 Submissions to CP 1: Jesuit Social Services, 10; OPCAT Network, 22, 41; Australian Psychological Society, 10; Public Health Association of Australia, 6; National Mental Health Commission of Australia, 4; Victorian Equal Opportunity and Human Rights Commission, 6; Law Council of Australia, 27; Being, 2; Refugee Council of Australia, 10; Public Interest Advocacy Centre, 15; Office of the Public Advocate, 4; Alzheimer's Australia, 4; Queensland Advocacy Incorporated, 16.
- 165 Australian Human Rights Commission *OPCAT in Australia, Consultation Paper, Stage 2* (June 2018), 21 <<https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/opcat-australia-consultation-paper-stage-2>>.
- 166 Australian Human Rights Commission *OPCAT in Australia, Consultation Paper, Stage 2* (June 2018), 28-31, Proposals 6-8 <<https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/opcat-australia-consultation-paper-stage-2>>.
- 167 See, for example Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on National Preventive Mechanisms*, 12th Session, UN Doc CAT/OP/12/5 (9 December 2010), <<http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/NationalPreventiveMechanisms.aspx>>; Association for the Prevention of Torture, *Monitoring places of detention – a practical guide* (April 2004) <https://www.apt.ch/content/files_res/monitoring-guide-en.pdf>; Australian Human Rights Commission, *Human rights standards for immigration detention* (2013), <<https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/human-rights-standards-immigration-detention>>.
- 168 See, for example Australasian Juvenile Justice Administrator's *Juvenile Justice Standards* (2009) and *Principles of Youth Justice in Australia* (2014); Australian Children's Commissioners and Guardians, *Human rights standards in youth detention facilities in Australia: the use of restraint, disciplinary regimes and other specified practices* (2016).
- 169 Australian Institute of Criminology, *Standard Guidelines for Corrections in Australia* (revised 2012), <http://www.aic.gov.au/media_library/aic/research/corrections/standards/aust-stand_2012.pdf>.
- 170 Justice and Community Safety Directorate, ACT Government *Human Rights principles for ACT correctional centres* (January 2019), <<http://cdn.justice.act.gov.au/resources/uploads/ACTCS/Human%20Rights%20Principles%20for%20ACT%20Correctional%20Centres.pdf>>.
- 171 Submissions to CP 1: Advocacy for Inclusion, 7; Alzheimer's Australia, 3-4; Public Interest Advocacy Centre; Refugee Council of Australia, 5; Queensland Family & Child Commission, 6; Professor Bronwyn Naylor, 4; Australian Child Rights Taskforce, 3. Submissions to CP 2: Commission for Children and Young People (Vic), 20; NSW Council for Civil Liberties, 6; Human Rights Law Centre, 15; Ombudsman (SA), 3; Victorian Equal Opportunity and Human Rights Commission, 3; Dr Anita Mackay, 4; Queensland Advocacy International, 16; Commission for Children and Young People (Tas), 3; RANZCP, 10; Legal Aid, NSW, 8; Ombudsman (SA), 3. Sisters Inside supported national standards for inspections, but rejected the concept of standards establishing minimum conditions of detention, 4.
- 172 Submissions to CP 1: Queensland Advocacy Incorporated (QAI), 11; Public Interest Advocacy Centre, 14; Australian Child Rights Taskforce, 3. Submissions to CP 2: Ombudsman (SA); Victorian Equal Opportunity and Human Rights Commission, 3; Dr Anita Mackay, 4; Queensland Advocacy International, 16.
- 173 Roundtable discussions; submissions to CP 2: RANZCP, 10; Human Rights Law Centre, 15; People with Disability Australia, 2.
- 174 See, for example, Royal Australian and New Zealand College of Psychiatrists, submission to CP 2, 10.
- 175 Roundtable discussion, Perth, November 2018.
- 176 As discussed at the Australian Human Rights Commission roundtables on the implementation of OPCAT in Australia: Canberra (1 June 2017), Melbourne (5 June 2017), Sydney (8 June 2017), Adelaide (24 July 2017), Perth (12 November 2018), Hobart (22 June 2018). Submissions to CP 1: NATSILS, 17; OPCAT Network, 38; Refugee Council of Australia, 5; Sisters Inside, 10; Queensland Advocacy International, 9; Townsville Community Legal Centre, 3. Submissions to CP 2: Victorian Equal Opportunity and Human Rights Commission, 13.
- 177 Commonwealth Ombudsman *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), Baseline Assessment of Australia's OPCAT readiness* (September 2019), 19, <<https://www.ombudsman.gov.au/what-we-do/monitoring-places-of-detention-opcat>>.
- 178 Submissions to CP 1: Advocacy for Inclusion, 8; Refugee Council of Australia, 5; Law Council of Australia, 42; Professor Bronwyn Naylor, 4; Australian Child Rights Taskforce, 4; Sisters Inside, 10. Submissions to CP 2: Royal Australian and New Zealand College of Psychiatrists, 11; Legal Aid NSW, 8; Queensland Advocacy Incorporated, 16; Law Council of Australia, 24. One stakeholder said that any national standards should be derived wholly from international human rights law: Sisters Inside, Submission to Consultation Paper 1, 10.
- 179 Submissions to CP 1: Public Interest Advocacy Centre, 13; National Mental Health Commission, 3; The Australian Psychological Society Limited, 6.
- 180 Submissions to CP 1: Refugee Council of Australia, 4; Law Council of Australia, 11; The Australian Psychological Society Limited, 6; Queensland Family & Child Commission, 6; Professor Bronwyn Naylor, 4; Australian Child Rights Taskforce, 3.
- 181 Advocacy for Inclusion, submission to CP 1, 7.
- 182 Submissions to CP 1: Advocacy for Inclusion, 8; Public Interest Advocacy Centre, 26; Queensland Family & Child Commission, 6.
- 183 Submissions to CP 1: Refugee Council of Australia, 5; Victorian Equal Opportunity and Human Rights Commission, 7-8.
- 184 Submissions to CP 2: Amnesty International Australia, 3; Queensland Advocacy Incorporated, 16; Commissioner for Children and Young People Tasmania, 4; Legal Aid, NSW, 8; Law Council of Australia, 24.
- 185 Submissions to CP 2: Queensland Advocacy Incorporated, 8, 9; Steven Caruana, 35; People with Disability Australia, 2. See also M Lea, F Beaupert, N Bevan, D Celermajer, P Gooding, R Minty, E Phillips, C Spivakovsky, L Steele, D Wadiwel, PJ Weller 'A disability aware approach to torture prevention? Australian OPCAT ratification and improved protections for people with disability' (2018) 24(1) *Australian Journal of Human Rights* 70.
- 186 Submissions to CP 2: Legal Aid NSW; Human Rights Law Centre, 15.
- 187 Submissions to CP 1: Professor Bronwyn Naylor, 4; Australian Child Rights Taskforce, 2. Submissions to CP 2: Commission for Children and Young People (Tasmania), 4; Human Rights Law Centre, 16.
- 188 As noted at the Australian Human Rights Commission roundtables on the implementation of OPCAT in Australia: Canberra (1 June 2017), Melbourne (5 June 2017), Sydney (8 June 2017) and Adelaide (24 July 2017). See also submissions to CP 2: Commission for Children and Young People, 4; Ombudsman (SA), 3.
- 189 Submissions to CP 1: Advocacy for Inclusion, 6-7; Queensland Advocacy Incorporated (QAI), 4-7; Alzheimer's Australia, 3-4; Public Interest Advocacy Centre, 16; National Mental Health Commission, 3-5; The Australian Psychological Society Limited, 9-12; Australian Child Rights Taskforce, 2, 8.
- 190 There is no uniform approach to fitness to plead as it relates to people with disability in Australia, and the effect of a finding of permanent unfitness to plead varies from jurisdiction to jurisdiction. See Senate Community Affairs Committee, *'Indefinite detention of people with cognitive and psychiatric impairment in Australia'* (29 November 2016); Piers Gooding et al, 'Unfitness to Stand Trial and the Indefinite Detention of Persons with Cognitive Disabilities in Australia: Human Rights Challenges and Proposals for Change' 40 *Melbourne University Law Review* 816; Australia OPCAT Network, 'The Implementation of OPCAT in Australia', Submission to the Subcommittee on Prevention of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (SPT) and the United Nations Working Group on Arbitrary Detention (WGAD), January 2020, 94.
- 191 Submissions to CP 1: Public Interest Advocacy Centre, 13; Australian Child Rights Taskforce, 3.
- 192 Submissions to CP 1: Advocacy for Inclusion, 6-7; Queensland Advocacy Incorporated (QAI), 11, 16-17; Alzheimer's Australia, 3-4; Office of the Public Advocate, 8-9; Public Interest Advocacy Centre, 13, 17-19; National Mental Health Commission, 4; The Australian Psychological Society Limited, 7; Office of the Public Guardian (QLD), 5; Queensland Family & Child Commission, 7; Australian Child Rights Taskforce, 3.
- 193 Australian Child Rights Taskforce, submission to CP 1, 4.
- 194 Public Interest Advocacy Centre, submission to CP 1, 13.
- 195 Regulation 17(3), *Ombudsman Regulations 2017* (Cth).
- 196 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on National Preventive Mechanisms*, 12th Session, UN Doc CAT/OP/12/5 (9 December 2010), 7, <<http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/NationalPreventiveMechanisms.aspx>>.
- 197 *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018* (NT).
- 198 Department of the Attorney-General and Justice, Northern Territory Government, *Consultation paper for the purposes of the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) (National Uniform Legislation) Bill 2013 (Northern Territory)* (May 2013). Available at <<https://justice.nt.gov.au/attorney-general-and-justice/law/opcat-monitoring-of-places-of-detention>>.
- 199 Australian Capital Territory, *Presentation Speech*, Legislative Assembly (24 August 2019), Shane Rattenbury MLA, Minister for Justice, Consumer Affairs and Road Safety, 3327.
- 200 UN Subcommittee for the Prevention of Torture, *Visit to the Netherlands for the purpose of providing advisory assistance to the national preventive mechanism: recommendations and observations addressed to the State party*, CAT/OP/NLD/1, (2016) [26].
- 201 Submissions to CP 1: Australia OPCAT Network, 11; Victorian Equal Opportunity and Human Rights Commission, 3; Public Interest Advocacy Centre, 11; National Mental Health Commission, 3; National Aboriginal and Torres Strait Islander Legal Services, 6; Professor Bronwyn Naylor, 9; Public Health Association of Australia, 10; Asylum Seekers Resource Centre, 7; Refugee Council of Australia, 9.
- 202 Submissions to CP 1: Australia OPCAT Network, 11; Victorian Equal Opportunity and Human Rights Commission, 3; Public Interest Advocacy Centre, 11; National Mental Health Commission, 3; National Aboriginal and Torres Strait Islander Legal Services, 6; Queensland Family and Child Commission, 4; Public Health Association of Australia, 8; Asylum Seekers Resource Centre, 7. A number of submissions, for example, noted that it is vital for adequate representation of Aboriginal and Torres Strait Islander peoples within the NPM structure. Submissions to CP1: North Australian Aboriginal Justice Agency, 4; Law Council of Australia, 12; National Aboriginal and Torres Strait Islander Legal Services, 6. See, for example Australia OPCAT Network, submission to CP 1, 11.
- 203 Submissions to CP 1: Victorian Equal Opportunity and Human Rights Commission, 3; National Mental Health Commission, 3; Asylum Seekers Resource Centre, 7; Refugee Council of Australia, 9.
- 204 See submissions to Consultation Paper 1: Australia OPCAT Network, 1; Victorian Equal Opportunity and Human Rights Commission, 3; Public Interest Advocacy Centre, 11; National Aboriginal and Torres Strait Islander Legal Services, 6; Queensland Family & Child Commission, 4; Asylum Seekers Resource Centre, 7. See submissions to Consultation Paper 2: NSW Council for Civil Liberties, 5.
- 205 Submissions to CP 1: Australia OPCAT Network, 13; National Aboriginal and Torres Strait Islander Legal Services, 6.
- 206 This is required by Articles 11 and 20 of OPCAT. Submissions to CP 1: Australia OPCAT Network, 12; Association for the Prevention of Torture, 9; Law Council of Australia, 26; National Aboriginal and Torres Strait Islander Legal Services, 6.
- 207 Submissions to CP 1: Association for the Prevention of Torture, 6; Australia OPCAT Network, 16; National Aboriginal and Torres Strait Islander Legal Services, 6; Refugee Council of Australia, 9.
- 208 See Submissions to CP 1: Australia OPCAT Network, 12; Law Council of Australia, 11; National Aboriginal and Torres Strait Islander Legal Services, 7; Disabled People's Organisations of Australia, 3. See submissions to CP 2: New South Wales Council for Civil Liberties, 5.
- 209 Commonwealth Ombudsman *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), Baseline Assessment of Australia's OPCAT readiness* (September 2019), 3, <<https://www.ombudsman.gov.au/what-we-do/monitoring-places-of-detention-opcat>>.
- 210 Commonwealth Ombudsman *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), Baseline Assessment of Australia's OPCAT readiness* (September 2019), 42, <<https://www.ombudsman.gov.au/what-we-do/monitoring-places-of-detention-opcat>>.
- 211 UK National Preventative Mechanism, Submission No 69 to the Justice Committee of the House of Commons of the United Kingdom Parliament, *Prison Reform*, 23 January 2017, <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/1150/115008.htm#_idTextAnchor034>.
- 212 Submissions to CP 1: OPCAT Australia Network, 16; Victorian Equal Opportunity and Human Rights Commission, 3; Public Interest Advocacy Centre, 12. Submissions to CP 2: Legal Aid NSW, 5; Law Council of Australia, 22.
- 213 Submissions to CP 2: The Royal Australian and New Zealand College of Psychiatry, 1; Jesuit Social Services, 17; Legal Aid NSW, 8. Submissions to CP 2: Commissioner for Children and Young People, Tasmania, 7; Australian Lawyers Alliance, 11; Jesuit Social Services, 13; Human Rights Law Centre, 11; Sisters Inside, 3; Victorian Equal Opportunity and Human Rights Commission, 8; Steven Caruana, 55.

- 216 Submissions to CP 2: Queensland Advocacy Incorporated, 11; Refugee Council of Australia, 7.
- 217 Submissions to CP 2: Legal Aid NSW, 7; Refugee Council of Australia, 7; Australian Lawyers Alliance, 8; Jesuit Social Services, 14.
- 218 Submissions to CP 1: Northern Australian Aboriginal Justice Agency (NAAJA). Submissions to CP 2: Jesuit Social Services, 17; Human Rights Law Centre, 11; Victorian Equal Opportunity and Human Rights Commission, 8.
- 219 The Norway NPM, for example, has established a formal advisory committee, comprising organisations and professionals working with people deprived of their liberty: Ombudsman of Norway, 'Advisory Committee' (Webpage) <<https://www.sivilombudsmannen.no/en/torturforebygging/the-advisory-committee/>>.
- 220 Submissions to CP 1: Public Interest Advocacy Centre, 9, 14; Refugee Council of Australia, 11; Australian Psychological Society, 6; Australian Psychological Society, 12; Queensland Advocacy Incorporated, Submission No 9, 10. Submissions to CP 2: Queensland Advocacy Incorporated, 12; Refugee Council of Australia, 7; Jesuit Social Services, 17.
- 221 Submissions to CP 1: Public Health Association, 8; Queensland Family and Child Commission, 10; Mental Health Advocacy Service, 6; Australian Child Rights Taskforce, 10; Australian Psychological Society, 12; Australian Lawyers for Human Rights, 5; Association for the Prevention of Torture, 7; Refugee Council of Australia, 8; OPCAT Australia Network, 17; Law Council of Australia, 40. Submissions to CP 2: Queensland Advocacy Incorporated, 17; Jesuit Social Services, 14; Human Rights Law Centre, 11; Office of the Public Advocate, 3; People with Disability Australia, 5; Victorian Equal Opportunity and Human Rights Commission, 8; Law Council of Australia, 21; Steven Caruana, 55.
- 222 Submissions to CP 1: ACT Human Rights Commission, 6; Association for the Prevention of Torture, 5, 7; Law Council of Australia, 21; Steven Caruana, 55.
- 223 The SPT's visit to Australia in March 2020 is due to be rescheduled following a postponement due to the Covid-19 global pandemic: Subcommittee on the Prevention of Torture *UN torture prevention body suspends Argentina visit over Covid-19 concerns; Postpones scheduled visits to Bulgaria, Australia and Nauru* (Press Release, 11 March 2020), <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25710&LangID=E>>.



