OPCAT in Australia
Stage 2

Submission by Queensland Advocacy Incorporated

Australian Human Rights Commission

14 September 2018

About Queensland Advocacy Incorporated

Queensland Advocacy Incorporated (QAI) is an independent, community-based systems and individual advocacy organisation and a community legal service for people with disability. Our mission is to promote, protect and defend, through systems and individual advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland.

QAI has an exemplary track record of effective systems advocacy, with thirty years' experience advocating for systems change, through campaigns directed to attitudinal, law and policy reform and by supporting the development of a range of advocacy initiatives in this state. We have provided, for almost a decade, highly in-demand individual advocacy through our three individual advocacy services – the Human Rights Legal Service, the Mental Health Legal Service, the Justice Support Program and, more recently, the NDIS Appeals Support Program. Our expertise in providing legal advocacy support for individuals within these programs has provided us with a wealth of knowledge and understanding about the challenges, issues, needs and concerns of individuals who are the focus of this inquiry.

QAI deems that all humans are equally important, unique and of intrinsic value and that all people should be seen and valued, first and foremost, as a whole person. Further, QAI believes that all communities should embrace difference and diversity, rather than aspiring to an ideal of uniformity of appearance and behaviour. Central to this, and consistent with our core values and beliefs, QAI will not perpetuate use of language that stereotypes or makes projections based on a particular feature or attribute of a person or detracts from the worth and status of a person with disability. We consider that the use of appropriate language and discourse is fundamental to protecting the rights and dignity, and elevating the status, of people with disability.

QAI congratulates the Australian Human Rights Commission ("Commission") for the broad and in depth consultation it has engaged in with civil society regarding OPCAT in Australia and applaud the Commission for continuing this active consultation. We were very pleased to be part of the first stage of this process and are thankful for the opportunity to make written submissions on the second stage of the consultation. We would appreciate the opportunity to be involved in further discussions around the implementation of OPCAT in Australia.

QAI's recommendations

QAI makes the following submissions:

1. OPCAT should be implemented in accordance with the following principles:
   (a) a proactive, preventive approach must be taken;
   (b) the NPMs must:
      (i) be vested with broad powers;
      (ii) have structural and functional independence;
      (iii) be transparent and accountable;
      (iv) be staffed by a diverse panel of persons with varied experience and expertise, including lived experience of detention;
   (c) there must be adequate focus on the provision of education and information to all relevant persons, agencies and stakeholders;
   (d) a systemic, holistic approach must be taken to identifying and addressing issues of concern.
2. The most urgent risks of harm should be identified and prioritised through risk assessments, pursuant to an agenda collaboratively established by the Australian NPM network, by taking a thematic approach that is informed by the experiences and expertise of those with lived experience of vulnerability, disempowerment and detention, torture and ill-treatment.
3. Under OPCAT in Australia, 'places of detention' should include:
   (a) mainstream places of detention;
   (b) informally imposed detention; and
   (c) practices that detain people (including the use of Restrictive Practices on people with disability that can deprive them of their liberty, such as mechanical restraint, chemical restraint and seclusion), irrespective of whether those practices are applied in recognised detention facilities or in social and residential settings.
4. A framework should be implemented to ensure co-ordination between NPM bodies at a state/territory and federal level.
5. The involvement of people with lived experience, particularly those with lived experience of detention and pre-existing vulnerability, such as disability or mental illness, and the advocacy and other organisations that provide support for them, is critical at all stages of the design and implementation of OPCAT.
6. Education about OPCAT and CAT is vital. The provision of appropriate education and training, developed with input from civil society, should be within the mandate of all NPMs, with legislated targets.
7. OPCAT must be implemented by a strong legislative framework, which vests NPMs with functional, structural, financial and operational independence and with jurisdiction over all places of detention.
8. NPMs must be adequately funded and resourced.
9. As detailed in this submission, QAI supports all of the proposals in the Interim Report.

Consultation questions

1. How should OPCAT be implemented to prevent harm to people in detention? How should the most urgent risks of harm be identified and prioritised? The NPM may, for example, include a focus on particular:

- **categories of detainees — such as children and young people, people with disability, Aboriginal and Torres Strait Islander people and people held in immigration detention**
- **detention practices — for example, solitary confinement or disciplinary sanctions**
- **places of detention**
- **jurisdictions.**

QAI submits that the following key principles should guide the implementation of OPCAT in Australia:

1. a proactive, preventive (rather than a complaints-based) approach must be taken;[1]
2. the National Preventive Mechanisms (NPMs) must:
   (a) be vested with appropriate powers, including powers to:
      (i) compel relevant persons to cooperate with reasonable requests;
      (ii) obtain and take copies of all relevant information;
      (iii) conduct inspections without notice, at any time of the day or night;[2]
      (iv) access relevant persons, include employees of facilities and detainees;
      (v) conduct private and privileged interviews with all relevant persons;
      (vi) protect all relevant persons from reprisals;
      (vii) report on its work and findings with autonomy;
      (viii) make public and unfettered comment.
   (b) be established with functional and structural independence;

[1] As Carauna notes, OPCAT is different from other forms of external oversight in its preventive focus and nature. Its function is not only to respond to and provide redress for torture, but also to prevent further torture and other forms of ill-treatment: Carauna, S. (2017). Enhancing best practice inspection methodologies for oversight bodies with an Optional Protocol to the Convention against Torture focus. Report to the Winston Churchill Memorial Trust of Australia – showcasing learning from Greece, Switzerland, Norway, Denmark, UK, Malta and New Zealand, 11.
[2] The Annual Report of the Norway NPM reported details of a psychiatric hospital in which different standards co-existed within the same institution (between day and night shift staff). Norwegian Parliamentary Ombudsman (30 March 2017). Annual Report 2016-2017, Document 4:1 (2017-2018): National Preventive Mechanism against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Available from: https://www.sivilombudsmannen.no/wp-content/uploads/2017/05/SIVOM_FOREBYGGENH_A%CC%8ARSMLD_ENGELSK_2016_WEB.pdf (accessed 30 August 2018).

(c) have transparency and accountability in all of their work (including in reporting the results of their inspections);

(d) be provided with broad access to all places of detention (including places where people are informally detained or deprived of their liberty);

(e) by staffed by a diverse panel of persons with varied experience and expertise, including persons with lived experience of vulnerabilities including disability and mental illness, persons with lived experience of detention and torture, persons from Aboriginal, Torres Strait and CALD backgrounds, advocates, civil society, medical practitioners, lawyers, social workers and mental health practitioners.

3. as discussed further below, significant educative work should be undertaken around the implementation of OPCAT to help agencies understand the benefits of compliance and to create a culture of respect and protection of human rights within all places where a person's liberty and security of person is at risk;

4. a systemic, holistic approach must be taken to identifying and addressing issues of concern.

The most urgent risks of harm should be identified and prioritised pursuant to the following principles:

1. By the outcome of risk assessments conducted by NPMs. QAI submits that adequate assessment and planning, prior to the conduct of assessments, is critical to their success.

2. Pursuant to an agenda collaboratively established by the Australian NPM network, with independence from the state and federal governments. The central coordinating NPM(s) should be vested with authority to develop a national agenda of inspections, with input from the state and territory NPMs. This is essential to ensure co-ordination at a state and territory level, between and across state/territory and federal, as well as off-shore, jurisdictions.

3. Identifying detainees with multiple vulnerabilities and taking a thematic approach to prioritise identifying and addressing systemic issues negatively impacting on them. For example, people with disability are a particularly vulnerable group who are over-represented across all types of detention settings, and are over-represented in the criminal justice system. As a recent Human Rights Watch report into the experience of persons with disabilities in the Australian criminal justice system documented: "People with disabilities, particularly a cognitive or psychosocial disability, are overrepresented in the criminal justice system in Australia – comprising around 18 percent of the country's population, but almost 50 percent of people entering prison."[3] As recently noted by Lea and associates: "…the NPM must not treat disability as an 'add-on' feature, but instead recognise that people with disability have an overt representation within many sites of detention, and therefore represent a core feature of all monitoring activity."[4] It is vitally important that the NPM mandate is disability aware and responsive, informed by the voices of people with disability, particularly those with disability and lived experience of detention and/or torture.

[3] Human Rights Watch (2018). "I Needed Help, Instead I Was Punished" Abuse and Neglect of Prisoners with Disabilities in Australia, 1.

[4] Lea, M et al (2018). A disability aware approach to torture prevention? Australian OPCAT ratification and improved protections for people with disability, Australian Journal of Human Rights, 18.

4. Requiring that NPMs include those with expertise on identifying and understanding torture. As the Association for the Prevention of Torture (APT) has stated:

   'NPMs should be multidisciplinary and include independent experts drawn from fields relevant to deprivation of liberty (such as human rights, healthcare and the administration of justice); at least some members should have prior experience in monitoring places of detention.'[5]

The three-year implementation period offers significant opportunity for energy and resources to be invested in building understanding and awareness of the relevance, importance and scope and potential for positive development in the future work of the NPM. This opportunity must be exercised, to ensure places of detention are well informed about, and receptive to, OPCAT inspections prior to the commencement of operation. Detention facilities and agencies, as well as communities and civil society, are more likely to buy in to a system that they understand and can appreciate the positive benefits of, and buy in is integral to the successful implementation of OPCAT.

As the UN Sub-Committee for the Prevention of Torture (SPT) has noted:[6]

> *The Subcommittee is of the view that a national preventive mechanism should also be empowered and able to deliver the whole "preventive package", including examining patterns of practices from which risks of torture may arise; advocacy, such as commenting on draft and implementing legislation; providing public education; undertaking capacity building; and actively engaging with State authorities.*

This requires a focus on structural and systemic issues. The NPMs should be equipped with adequate and diverse expertise and sufficiently resourced to effectively undertake this work.

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

QAI submits that it is vital that the term 'place of detention' is interpreted broadly and non-exhaustively. It should include:

1. mainstream places of detention;
2. informally imposed detention; and
3. practices that detain people (including the use of Restrictive Practices on people with disability that can deprive them of their liberty, such as mechanical restraint, chemical restraint and seclusion[7]), irrespective of whether those practices are applied in recognised detention facilities or in social and residential settings.

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[5] The Association for the Prevention of Torture and Inter-American Institute for Human Rights (2010). Optional Protocol to the Convention against Torture Implementation Manual Chapter IV OPCAT Ratification and NPM Designation: Domestic Challenges; 5. Prerequisites for NPM selection, p195

[6] Subcommittee of the Prevention of Torture (2018). Eleventh annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/63/4, V. Reflections on the year under review, A. Capacity of national preventive mechanisms to work effectively in a preventive manner and the "preventive package", Article 54, p10. Sourced on the 5 June 2018 from http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2f63%2f4&Lang=en

[7] Meredith Lea, Fleur Beaupert, Ngila Bevan, Danielle Celermajer, Piers Gooding, Rebecca Minty, Emma Phillips, Claire Spivakovsky, Linda Steele, Dinesh Joseph Wadiwel & Penelope June Weller (2018) A disability aware approach to torture prevention? Australian OPCAT ratification and improved protections for people with disability, Australian Journal of Human Rights, 24:1, 70-96, DOI: 10.1080/1323238X.2018.1441611

OPCAT does not define the term 'places of detention'. Article 4 of the OPCAT is very broad and a wide range of detention settings are potentially captured by it – the threshold for application of OPCAT is places where 'people are deprived of their liberty'.

The APT has noted that, of the 67 States that have implemented OPCAT to date, none of the states that have designated an NPM have placed restrictions on the categories of places that their NPMs can visit.[8] QAI submits that Australia should follow this well-established precedent.

QAI proposes that the NPMs be vested with broad and unfettered power, autonomy and independence to visit all institutional, community and residential places. Further, we recommend that implementation legislation include a non-exhaustive, open-ended list[9] that provides a diverse range of examples to guide the work of the NPMs, including but not limited to:

- prisons;
- forensic detention centres;
- immigration detention facilities;
- hospitals;
- residential aged care facilities;
- authorised mental health facilities;
- educational institutions;
- hostels and boarding houses;
- specialist disability accommodation; and
- private residential settings.

There **is precedent** for a broad interpretation of Article 4 – in Austria, NPMs are empowered to monitor protests and riots,[10] in the UK, the scope of the NPM's power extends to offshore monitoring.[11]

There **is no precedent** for restricting the powers of NPMs to certain categories of places of detention.

Case study # 1 – the Forensic Disability Service

David's* initial forensic order (FO) was made in 1998 and he was subsequently found permanently unfit for trial and ultimately placed in the Forensic Disability Service in Queensland following its opening in 2011. In 2016, David's five-yearly review under s 141 of the *Forensic Disability Act* (Qld) found, among other things, that David had not benefited from his time at the FDS and that the environment and service model were unlikely to provide him with a benefit in the future.

In 2018, David remains within the FDS. He has limited access to the community and plans to transition him from the FDS remain academic. His current accommodation is a multi-dwelling reinforced unit in which he is the only occupant. There is a concern that this could amount to indefinite detention with the review process limited to identifying issues with the system without

[8] Information provided by Ben Buckland, Independent Oversight Adviser, Association for the Prevention of Torture.
[9] This is consistent with the practice advocated by the APT.
[10] Association for the Prevention of Torture. https://apt.ch/en/opcat_pages/
[11] Association for the Prevention of Torture. https://apt.ch/en/opcat_pages/

addressing the practicalities of care and support needs.

Case study # 2 – the Forensic Disability Service

Mark* was diagnosed with an intellectual disability at a young age and placed under the care of Disability Services Queensland (DSQ) since he was 11 years old for public safety with the aim of helping him to develop more socially acceptable and less dangerous patterns of behaviour.

Mark was placed on two consecutive Forensic Disability Orders and ultimately found permanently unfit for trial. Mark was placed in the Forensic Disability Service in Queensland following its opening in 2011. The current living conditions consist of a dual occupancy reinforced unit with a secure perimeter fence. Mark is the only resident in this unit and is subject to 24 hour periods of seclusion. Mark's interactions are limited to clinicians and staff working with him. The majority of these interactions occur through a servery window. Within the living area of the unit there are seven CCTV cameras that monitor Mark. This includes a camera in the toilet and shower.

Independent oversight and monitoring of institutions like the FDS would be beneficial to ensure that rights and freedoms are observed in environments with limited community access.

* names have been changed to protect identity

'Practices' of detention

Restrictive Practices are practices used by funded disability service providers to respond to the behaviour of an adult with an intellectual or cognitive disability that causes harm to the adult or others. Restrictive Practices include mechanical, physical and chemical restraint, seclusion, containment and restricting access to objects.

There are high rates of the unauthorised use of Restrictive Practices, notwithstanding the legislation. There is a need for greater transparency around the use of these practices, and compliance with stringent reporting requirements.

We understand that the OPA is currently exploring options for legal and practice reform in this area with a view to creating a framework for regulating what are currently informal deprivations of liberty. In order to support Australia's OPCAT obligations and bring greater transparency and accountability to existing practices, the proposed framework would involve some mechanism to ensure formal recording of all deprivations of liberty and the places in which they occur.

QAI supports the submissions by the Victorian Office of the Public Advocate to the first stage of the Commission's inquiry emphasising the importance of ensuring that deprivations of liberty and places of detention are understood to include informally imposed detention and Restrictive Practices in social care and residential settings.[12]

In 2014, QAI made submissions to the 53rd session of the United Nations Committee against Torture on the need for the use of Restrictive Practices on people with disability, and the use of involuntary treatment for mental illness, to be recognised as forms of government-sanctioned torture. QAI agrees that it is vital that the NPM has jurisdiction to inspect and report on informal types of detention and deprivations of liberty that people with disability and mental illness are widely subjected to, which may occur in private residential settings, in group homes, in

[12] Submission by Office of the Public Advocate, Victoria. Submission to Australian Human Rights Commission: Australia's implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, July 2017.

residential aged care facilities, in mental health facilities and in educational facilities. It is now well-recognised that many people with disability experience violence, abuse and neglect in these settings.[13]

Case study – the use of Restrictive Practices in a residential setting

At the age of 5, Jane* contracted herpes encephalitis. This had a significant effect on her intellectual functioning and also resulted in seizures which required medication. A side effective of one of the medications prescribed for Jane was the development of behavioural changes including increased agitation and aggression.

As a young adult, Jane was subjected to physical, sexual and psychological abuse whilst in a care placement. The person alleged to have committed these acts against Jane was a person responsible for her care and welfare. One effect of this abuse was that Jane came to prefer her own company and to disengage from her supports/carers. Jane has low distress tolerance and emotional regulation which means that the coping strategies available to her are limited.

To manage Jane's behaviours, the use of Restrictive Practices has been approved. Restrictive Practices that have been implemented include physical restraint, chemical restraint and restricted access to objects. The use of these Restrictive Practices occur in Jane's home in the community.

Living under Restrictive Practices has had a significant, detrimental impact on Jane's life. QAI is of the view that these practices, if applied to a person without disability, would constitute contraventions of the *Criminal Code 1899* (Qld).

* name has been changed to protect identity

In Australia, there have been clear instances where the human rights contained in the CAT have been breached by the application of unspecified, unsanctioned and illegal use of Restrictive Practices to students within the educational setting. In recent years, allegations of physical and emotional abuse and deprivation of liberty of a child with disability include the caging of a 10 year old boy with autism in a Canberra classroom,[14] locking a child with autism in a dark cupboard at a Newcastle school,[15] tying a child with special needs to a chair with a seat belt,[16] and constraining an autistic boy in a cell-like room.[17]

Case study – the use of Restrictive Practices in a Queensland state school

QAI and another community organisation supporting people with disability supported a parent to share the experience of her child and the use of restrictive practices in schools at our recent human rights forum: *Walk the Talk: Realising the 2010-2020 National Disability Strategy and our human rights promises* in March 2017. The mother spoke about the experiences of her son who, then eight years old and attending a state primary school in Queensland, was on numerous occasions put into a withdrawal room (her son called this 'the

[13] Commonwealth of Australia. Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability. 25 November 2015.
[14] Rachel Browne, 'Children with autism caged and abused at school', *The Sydney Morning Herald* (online), 2 April 2015 <http://www.smh.com.au/nsw/children-with-autism-caged-and-abused-at-school-20150331-1mbt48.html.
[15] http://mobile.abc.net.au/news/2015-12-16/police-investigate-schools-treatment-of-autistic-child/7032038?section=nsw.
[16] http://www.scribd.com/doc/287809156/Parents-Claim-Special-Needs-Student-Tied-to-Chair-With-Seat-Bel.
[17] http://www.scribd.com/doc/287338662/School-Puts-Autistic-Boy-in-Cell-Like-Room-QLD.

dark room'). Her son was not provided with any form of education or support during the lengthy periods in which he was contained in the withdrawal room and suffered significant, adverse effects from this, including experiencing feelings of fear while left alone in the room, stigma and denial of ordinary educational opportunities.

The mother spoke of her belief that such 'behaviour management' may constitute psychological abuse, deprivation of liberty, physical abuse and assault. The state school, she said, did not provide quality inclusive education and made no reasonable accommodation for her son's support requirements. The mother felt that the actions of the school were in breach of the Convention Against Torture.

Her son went on to thrive without any such restrictions in an inclusive and supported learning environment in another state school in Queensland.

The preliminary views expressed by the Federal Government are not promising. In 2017, then Attorney-General George Brandis stated in his Department of Foreign Affairs Non-Government Organisation Forum address that 'in implementing OPCAT, our focus will be on what might be termed 'primary places of detention, such as prisons, juvenile detention, police cells and immigration facilities.'[18]

However, he went on to recognise: 'Any environment in which the state deprives a person of his or her liberty poses unique challenges; such challenges are perhaps at their most acute in such places.'[19]

The SPT issues the following guidelines:[20]

> *[T]he State should allow the NPM to visit all, and any suspected, places of deprivation of liberty, as set out in Articles 4 and 29 of the Optional Protocol, which are within its jurisdiction… should ensure that the NPM is able to carry out visits in the manner and with the frequency that the NPM itself decides.'*

Carauna summarises the rationale for broadly defining places of detention:[21]

> *The benefit of commencing with such an expansive approach is educative as much as it is about the functioning of the NPM. Speaking of non-traditional places of detention Professor Evans mentioned "…you need it simply to let people realise that in fact they are places of detention. Many countries have been discovering all sorts of places that they now appreciate are places of detention that they never actually conceived of in that way before... You try telling people running a hospital or medical staff that they are involved in torture and ill*

[18] Human Rights Law Centre (2017). Torture Convention - the Australian Government OPCAT announcement (edited extract from Senator the Hon George Brandis QC's announcement the Australian Government will ratify the Optional Protocol to the Convention against Torture). Sourced on the 05 June 2018 from https://www.hrlc.org.au/bulletin-content/2017/2/22/torture-convention-the-australiangovernment-opcat-announcement.

[19] Human Rights Law Centre (2017). Torture Convention - the Australian Government OPCAT announcement (edited extract from Senator the Hon George Brandis QC's announcement the Australian Government will ratify the Optional Protocol to the Convention against Torture). Sourced on the 05 June 2018 from https://www.hrlc.org.au/bulletin-content/2017/2/22/torture-convention-the-australiangovernment-opcat-announcement.

[20] Subcommittee on the Prevention of Torture (2010). Guidelines on national preventive mechanisms, CAT/OP/12/5, p10. Sourced on the 3 June 2018 from http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/OP/12/5&Lang=en

[21] Carauna, S. (2017). Enhancing best practice inspection methodologies for oversight bodies with an Optional Protocol to the Convention against Torture focus. Report to the Winston Churchill Memorial Trust of Australia – showcasing learning from Greece, Switzerland, Norway, Denmark, UK, Malta and New Zealand, 43.

treatment or even detention full stop, they just don't get it and there is a learning curb to be gone through there that in fact they are."

Dr Adam Fletcher explains:

…implementing legislation which creates the NPM (and sets the parameters for SPT visits) may limit the scope to institutions deemed to present the highest risk of ill-treatment, but this should not necessarily exclude the less obvious candidates such as aged care homes. This is inadvisable not only because it interprets the OPCAT too narrowly, but because of the documented human rights abuses occurring across a broad range of closed environments.[22]

QAI supports this position and calls for a broad, non-exhaustive definition of places of detention to be legislatively established in Australia.

3. What steps should be taken to ensure that measures to implement OPCAT in Australia are consultative and engage with affected stakeholders? This might include processes for:

- **co-ordination between NPM bodies**
- **civil society organisations and people with lived experience of detention to provide ongoing input to the NPM bodies**
- **education that promotes human rights protection within detention places**
- **engaging with the UN Sub-committee on the Prevention of Torture.**

QAI congratulates the Commission for the extensive work it has undertaken to date, and is continuing to engage in, to consult with civil society. This is important work and is helping to inform the government from a broad evidence base.

We note that OPCAT is, by its design and drafting and its status as a United Nations treaty, collaborative in nature – successful implementation and ongoing compliance requires a collaborative approach, both domestically and as between Australia and the UN SPT.

QAI submits that Australia must learn from the experience of other states where OPCAT has been successfully implemented and mirror protocols for developing effective lines of communication between the central co-ordinating NPM and the SPT.

Within Australia, our federalist organisation necessitates that a framework is implemented for co-ordination between NPM bodies at a state/territory and federal level. QAI submits this framework should be legislatively established.

QAI reiterates that it is critically important to involve people with lived experience in the work of the NPMs. They have the expertise on the experience of detention and are best placed to provide guidance in the development of standards and protocols. The involvement of people with lived experience and the advocacy and other organisations that provide support for them, particularly those with lived experience of detention and pre-existing vulnerability, such as disability or mental illness, is critical at all stages of the design and implementation of OPCAT in Australia, with active input into:

1. development of implementation legislation;
2. informing awareness, education and training; and
3. inclusion on inspection teams.

[22] Fletcher, A (2012). Australia and the OPCAT, Alternative Law Journal, Vol 37, Iss 4, p236.

It is consistent with the practice adopted by established National Preventive Mechanism (NPM) models to argue that people with disability, their representative bodies and other civil society actors must be meaningfully involved in NPM processes, including in the monitoring of sites of detention, and the identification of systemic issues affecting people with disability with lived experience of detention.[23]

QAI supports the submissions of the Victorian Office of the Public Advocate, made during the first stage of the OPCAT in Australia inquiry:[24]

> *People with disabilities and with lived experience of the practices and places of detention will often notice different things and be better able to gain information from the people subject to detention during inspection visits, which increases the validity and effectiveness of the exercise. For this reason, the unique expertise, perspectives and insight of people with lived experience is well recognised in other jurisdictions such as the United Kingdom, where service users are now routinely included in a wide range of review, audit and inspection teams.*

The experience of OPCAT implementation in other jurisdictions has shown that involvement of civil society from the beginning of the implementation process is most beneficial.[25]

As Carauna notes:[26]

> *Whilst civil society involvement in the work of an NPM can take many forms the essential point that all NPM's demonstrated is that there is a place for civil society. Not only in implementation but as part of maintaining an effective NPM, whether directly in adding expertise to monitoring, acting in an advisory role, supporting thematic research aims or in adding voice to the concerns raised by the NPM.*

We note that Carauna's Report to the Winston Churchill Memorial Trust Fellowship: *Enhancing best practice inspection methodologies for oversight bodies with an Optional Protocol to the Convention against Torture focus* contains the following recommendation to the NPM coordinator:[27]

> *It is recommended that the Office of the Commonwealth Ombudsman develops and promotes disability aware and inclusive visiting methodologies and practices both internally and with the wider NPM network in collaboration with people with disability and their representative organisations.*

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[23] Meredith Lea, Fleur Beaupert, Ngila Bevan, Danielle Celermajer, Piers Gooding, Rebecca Minty, Emma Phillips, Claire Spivakovsky, Linda Steele, Dinesh Joseph Wadiwel & Penelope June Weller (2018) A disability aware approach to torture prevention? Australian OPCAT ratification and improved protections for people with disability, Australian Journal of Human Rights, 24:1, 70-96, DOI: 10.1080/1323238X.2018.1441611

[24] Submission by Office of the Public Advocate, Victoria. Submission to Australian Human Rights Commission: Australia's implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, July 2017, 10.

[25] Association for the Prevention of Torture (2016). Putting prevention into practice, 10 years on: the Optional Protocol to the UN Convention against Torture, 19. Sourced from https://www.apt.ch/content/files_res/putting-prevention-into-practice-opcat10.pdf

[26] Carauna, S. (2017). Enhancing best practice inspection methodologies for oversight bodies with an Optional Protocol to the Convention against Torture focus. Report to the Winston Churchill Memorial Trust of Australia – showcasing learning from Greece, Switzerland, Norway, Denmark, UK, Malta and New Zealand, 57.

[27] Carauna, S. (2017). Enhancing best practice inspection methodologies for oversight bodies with an Optional Protocol to the Convention against Torture focus. Report to the Winston Churchill Memorial Trust of Australia – showcasing learning from Greece, Switzerland, Norway, Denmark, UK, Malta and New Zealand, 68.

Education about OPCAT and CAT is vital. QAI supports the development and introduction of training and education for all places of detention (consistent with the expansive definition proposed above). The Commission can play an important role in providing education and information about OPCAT and providing training for staff of places of detention. The provision of education should also be within the mandate of all NPMs, with legislated targets.

Throughout Australia, there is currently significant variation as to the transparency of inspections, methodologies and reporting of outcomes across the existing, disparate inspection bodies. QAI submits that transparency is very important in the implementation of OPCAT. NPMs must be required to publicly report on their inspections – in this way, the work of the NPMs can not only result in improvements to individual facilities but can also lead to systemic change and act as a deterrent to the commission of torture.

4. What are the core principles that need to be set out in relevant legislation to ensure that each body fulfilling the NPM function has unfettered, unrestricted access to places of detention in accordance with OPCAT?

Functional, structural, financial and operational independence of all bodies fulfilling NPM functions is vitally important. NPMs must be independent from government and must be publicly perceived to be independent. Staff of NPMs must be protected from reprisals.

QAI submits that a solid legal basis for the operation of the NPMs is essential to ensuring this, with legislative protection of their powers and autonomy.

Adequate funding and resourcing is also critical to empowering the NPMs to achieve their designated functions.

The inclusion of all relevant places of detention (including places where people are informally detained) is vital to giving the NPM full coverage and authentically implementing OPCAT.

As discussed below, in support of Proposal 9, it is vital that there is a strong legislative framework for OPCAT.

We note the body of expert opinion calling for the powers, scope, rights and guarantees of the NPM to be established in Federal legislation, with corresponding State and Territory legislation.[28]

5. The Commission's Interim Report contains a number of preliminary views, expressed as Proposals, regarding how OPCAT should be implemented in Australia. Do you have any comments about these proposals to ensure Australia complies with its obligations under OPCAT?

We respond to the Commission's Proposals regarding OPCAT implementation as follows:

Proposal 1

[28] See for example: Harding R, & Morgan, N (October 2008). Implementing the Optional Protocol to the Convention against
Torture: Options for Australia, p44-45. Sourced on the 19 May 2018 from https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications; Carauna, S. (2017). Enhancing best practice inspection methodologies for oversight bodies with an Optional Protocol to the Convention against Torture focus. Report to the Winston Churchill Memorial Trust of Australia – showcasing learning from Greece, Switzerland, Norway, Denmark, UK, Malta and New Zealand, 44-5.

Noting the very strong community support for Australia ratifying OPCAT, the Commission proposes that the Australian Government ratify OPCAT by December 2017, in accordance with its timetable.

QAI applauds the Federal Government for ratifying OPCAT in December 2017.

Proposal 2

The Commission proposes that the Australian Government establish an NPM system that:

- *has a preventive mandate*
- *has clear lines of communication between the various entities designated as NPM bodies*
- *requires NPM bodies be given sufficient powers and independence to fulfil their mandate, if necessary by legislative amendment*
- *sets up formal paths of engagement with civil society organisations and human rights institutions*
- *is transparent in its operation, including publication of its reports and recommendations.*

QAI agrees that the NPM system must be preventive, not reactive. This is consistent with the intent and drafting of the treaty. Ensuring that OPCAT is implemented in a way that ensures its preventive focus will help to address systemic issues within places of detention and help to foster a culture of respect and protection for human rights in all places where people may be detained.

Communication between the different NPMs is vital, particularly given Australia's federalist system of government.

QAI agrees that structural and functional independence is essential for NPM bodies to operate effectively. This independence should be legislatively entrenched.

Drawing upon the experience and expertise of civil society, particularly lived experience of detention and of torture and cruel and inhuman treatment or punishment, will ensure OPCAT is implemented in an authentic and effective way. In its Interim Report, the Commission notes the strong desire by civil society to be involved in the implementation of OPCAT.

The Commission has played a significant role in drawing civil society together in the first stage of consultations around OPCAT. The Commission also has extensive experience and expertise in conducting inspections of places of detention and should continue to be empowered to do so.

Accountability and transparency are vital to the successful implementation of OPCAT.

Proposal 3

The Commission proposes that all 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.

QAI agrees with this proposal. We note the importance of ensuring the relevant governments receive appropriate input during this process, from organisations with expertise in torture

prevention such as the APT, from the Commission and from civil society (particularly those with vulnerability and those with lived experience of detention and torture).

Proposal 4

The Commission proposes Australia's federal, state and territory governments provide adequate resources to support NPM activities. This should be determined by reference to:

- *the need to fulfil the core NPM inspection functions*
- *the need to implement recommendations made by NPM bodies*
- *the inherent good in protecting the human rights of people in detention and the cost savings in undertaking detention activities in accordance with international human rights law.*

QAI supports this proposal. Adequate resourcing is essential for the NPM to be effective.

Zeid Ra'ad Al Hussein, UN High Commissioner for Human Rights has emphasised that '…many national preventive mechanisms are under-resourced and not empowered to deliver real results.'[29] Australia should take care to avoid this.

Proposal 5

The Commission proposes Australia's federal, state and territory governments should provide resources to support NPM activities in a way that:

- *respects the functional, structural and personal independence required by OPCAT*
- *enables any existing inspection body that is designated as an NPM body to become OPCAT compliant*
- *ensures effective liaison with, and involvement of, civil society representatives and people with lived experience of detention in the OPCAT inspection process.*

QAI supports this proposal. Ensuring the functional, structural and personal independence of NPM bodies is vital in ensuring it can fulfil its functions. It is also essential to create and maintain public confidence in the role of the NPM.

Proposal 6

The Commission proposes that the Australian Government commit to the development of national standards that govern how detention inspections should take place by the bodies performing the NPM function. Those standards should have legislative force and, among other things:

- *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*

[29] Zeid Ra'ad Al Hussein (26 June 2017). Is International Human Rights Law Under Threat? Grotius Lecture at the Law Society, London. Sourced on the 16 March 2018 from http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21803&LangID=E

QAI supports this proposal. The standards must have legislative force to ensure compliance. We note the significant variation between different jurisdictions that have implemented OPCAT in terms of the publication of the results of inspections and support the proposal to require transparent publication of detention inspection reports – this creates accountability, serves a deterrent purpose and can lead to systemic change.

Proposal 7

The Commission proposes the Australian Government commit to the development of national standards that set minimum conditions of detention to protect the human rights of detainees in the various detention settings covered by OPCAT. Those standards should have legislative force and 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 people, 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).*

QAI supports this proposal. We reiterate that the standards must have legislative force to ensure compliance. In Australia, there is no federal human rights act or charter that establishes and protects the basic human rights of all Australians. The only states and territories with human rights acts or charters are Victoria and the ACT. Given this, OPCAT compliance requires the articulation and protection of a set of minimum standards and rights. This is particularly critical because many people who will benefit from these standards are not only vulnerable by virtue of the fact of their detention, but also because they have vulnerabilities such as being a person with disability, mental illness, from an ATSI or CALD background, and often multiple vulnerabilities.

Proposal 8

The Commission proposes the Australian Government should engage an independent body to lead the development of the national standards referred to in Proposals 6 and 7 above. This independent body should:

- *be expert in human rights and independent of those parts of government responsible for detaining people;*
- *seek the views of experts, detainees and others affected*
- *develop the standards by reference to Australia's domestic and international human rights law obligations, as well as existing good-practice standards and guidelines in Australia and overseas.*

QAI supports this proposal and submits that the Commission, as an independent statutory organisation with expertise in human rights, should fulfil this function.

Proposal 9

The Commission proposes the Australian Government incorporate OPCAT's core provisions in a dedicated federal statute.

As noted above, QAI submits that the federal government should establish a strong legislative framework for OPCAT. In the UK, implementation of OPCAT was not supported by an adequate legislative framework, which has been reported to have resulted in gaps in terms of necessary powers, lack of common vision/approach and identity issues.[30]

A weight of expert opinion has called for the powers, scope, rights and guarantees of the NPM to be established in Federal legislation, with corresponding State and Territory legislation.[31] QAI supports this approach.

Proposal 10

If Proposal 9 is not adopted, the Commission proposes the Australian Government identify another way of incorporating OPCAT's requirements into domestic law, including by:

- *giving legislative force to national OPCAT standards (as per Proposal 7 and Proposal 8)*
- *additional legal means, such as an intergovernmental agreement that sets out the structure of the NPM model, the scope of its application, how the agreement will be governed and provides for periodic review.*

QAI supports this proposal in lieu of the adoption by the Federal Government of Proposal 9. We support the Commission's proposal that relationships with civil society organisations could be formalised through related agreements. We note that a dedicated federal statute, supported by corresponding State and Territory legislation, is the ideal response and preferable to this proposal.

Proposal 11

The Commission proposes the federal agency responsible for NPM co-ordination establish formal arrangements with civil society representatives, such as an advisory committee, during the early stages of OPCAT implementation.

QAI supports this proposal. As noted above, active involvement by civil society will be key to the success of the NPMs.

Proposal 12

The Commission proposes that federal, state and territory governments assign overarching policy responsibility for OPCAT compliance and detention policy, as well as co-ordination, to the

[30] NPM Chair John Wadham (20 February 2018), National Preventative Mechanism: Chair Of UK Torture Prevention Body Calls For Stronger Government Focus On Eradicating Ill-Treatment Of Detainees. Sourced from: https://s3-eu-west-2.amazonaws.com/npm-prod-storage-19n0nag2nk8xk/uploads/2018/02/NPM-8th-Annual-Report-news-release-Feb18-FINAL.pdf.

[31] See for example: Harding R, & Morgan, N (October 2008). Implementing the Optional Protocol to the Convention against
Torture: Options for Australia, p44-45. Sourced on the 19 May 2018 from https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications; Carauna, S. (2017). Enhancing best practice inspection methodologies for oversight bodies with an Optional Protocol to the Convention against Torture focus. Report to the Winston Churchill Memorial Trust of Australia – showcasing learning from Greece, Switzerland, Norway, Denmark, UK, Malta and New Zealand, 44-5.

department or agency in each jurisdiction that has responsibility for overseeing human rights compliance and that has a broad mandate in relation to detention.

QAI supports this proposal.

Proposal 13

The Commission proposes that immediately after ratification, the Australian Government coordinate with state and territory governments to commence implementation of OPCAT, including by:

- *publicly releasing targets for implementation of the treaty which set out timeframes for achieving key milestones over the initial 3-year period*
- *completing a stocktake of all place of detention and monitoring bodies by state and territory governments*
- *conducting education and awareness raising about the implementation of OPCAT*
- *commencing engagement with the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT)*
- *establishing an advisory council for NPM activities*
- *identifying data sources, gaps and inconsistencies regarding detention in Australia.*

QAI supports this proposal. The implementation process should not be rushed, as is recognised by the three year implementation timeframe allowed for by OPCAT.

It is important that the Federal Government effectively uses this timeframe. We consider that significant energy and resources should be invested into education and awareness raising about OPCAT and its implementation during this initial period, with a view to creating and fostering a positive culture to torture prevention, particularly amongst relevant agencies that will be subject to inspection.

The importance of appropriate education cannot be overstated. As the Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory states: 'oversight is most effective when agencies have a culture that welcomes oversight and monitoring and sees external oversight as an opportunity to improve operations and risk'.[32]

Conclusion

QAI congratulations the Commission for initiating this consultation. We are pleased that the Commission has convened this consultation as the second in a two-phase process for the implementation of OPCAT in Australia.

[32] White, M & Gooda, M (2017). The Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, Vol 4, Chapter 40 – A Commission for Children and Young People, 7.