The case for a National Preventive Mechanism to implement the Optional Protocol to the Convention Against Torture (OPCAT)

About Queensland Advocacy for Inclusion

Queensland Advocacy for Inclusion (**QAI**) (formerly Queensland Advocacy Incorporated) is an independent, community-based advocacy organisation and community legal service that provides individual and systems advocacy for people with disability. Our purpose is to advocate for the protection and advancement of the fundamental needs, rights and lives of people with disability in Queensland. QAI's Management Committee is comprised of a majority of persons with disability, whose wisdom and lived experience is our foundation and guide.

QAI has been engaged in systems advocacy for over thirty years, advocating for change through campaigns directed at attitudinal, law and policy reform. QAI has also supported the development of a range of advocacy initiatives in this state. For over a decade, QAI has provided highly in-demand individual advocacy services. These services are currently provided through our four advocacy practices: the Human Rights Advocacy Practice (which provides legal advocacy in the areas of guardianship and administration, disability discrimination and human rights law and non-legal advocacy support with the Disability Royal Commission and the justice interface); the Mental Health Advocacy Practice (which supports people receiving involuntary treatment for mental illness); the NDIS Advocacy Practice (which provides support for people challenging decisions of the National Disability Insurance Agency and decision support to access the NDIS); and the Disability Advocacy Practice (which operates the Pathways information and referral line, and provides non-legal advocacy support with Education and other systems that impact young people with disability).

From 1 January 2022, we have been funded by the Queensland Government to establish and co-ordinate the Queensland Independent Disability Advocacy Network (QIDAN), which includes operating the Disability Advocacy Pathways Hotline, a centralised phone support providing information and referral for all people with disability in Queensland. We have also been funded to provide advocacy for young people with disability as part of the QIDAN network, which we provide in addition to our non-legal education advocacy for Queensland students with disability. Our individual advocacy experience informs our understanding and prioritisation of systemic advocacy issues.

The objects of QAI's constitution are:

- To advocate for the protection and advancement of the needs, rights and lives of people with disability in Queensland;
- To protect and advance human rights including the Convention on the Rights of Persons with Disabilities (CRPD);
- To be accountable to the most disadvantaged people with disability in Queensland; and
- To advance the health, social and public wellbeing of disadvantaged people with disability.

QAI's recommendations

QAI calls on the Queensland and Australian Governments to fulfil their OPCAT obligations and establish National Preventive Mechanisms (NPM) consistent with the following principles:

1. A National Preventive Mechanism should monitor and report on all places of detention in Queensland

2. The Australian Human Rights Commission and the Queensland Human Rights Commission should be appointed to lead and coordinate the National Preventive Mechanisms for Australia and Queensland respectively

3. The National Preventive Mechanisms should provide for representation from, and formal collaborations with, Civil Society Organisations

4. The National Preventive Mechanisms should be designed to ensure OPCAT monitoring activities are informed and guided by people with lived experience of detention

5. Providing culturally- and disability-inclusive information to people in detention about their rights and available complaints mechanisms should be a key priority of the National Preventive Mechanisms

6. The Australian and Queensland Governments should pass legislation to give full effect to the key provisions of the Convention Against Torture and OPCAT around Australia and in Queensland.

Introduction

QAI holds grave concerns for the human rights and physical and psychological safety of people with disability who are detained in Queensland Government-funded institutions.

People with disability are over-represented in all places of detention and experience higher rates of violence in these settings. They are subject to disability-specific types of detention, such as in mental health and forensic disability facilities, and disability-specific types of ill-treatment, such as seclusion and isolation and chemical restraint where they are medicated to control behaviours rather than to treat a diagnosed medical condition.

The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) presents a unique opportunity to strengthen oversight for all sites of detention in Queensland, but particularly disability-specific and disability-dominated institutions, many of which currently lack any meaningful inspection framework and facilitate conditions that either constitute, or lead to, violence, abuse, neglect and exploitation of people with disability.

There is a critical need for disability to be held centrally to Australia's OPCAT's implementation. However, QAI considers that Australia's current approach fails to fulfil its obligations under OPCAT, and we are concerned that practices of torture and cruel, inhuman and degrading treatment may occur in the absence of sufficient scrutiny.

Background

In 2017, the Australian Government ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). Under the Convention and the OPCAT, Australia is obligated to take legislative, administrative and other measures to prevent acts of torture in its territory, including making acts of torture criminal offences.[i]

Australia must establish independent National Preventive Mechanisms[ii] — systems for regular visits to places where people are deprived of their liberty,[iii] to monitor their treatment and make recommendations to improve their treatment and change laws to better protect them.[iv]

Current proposals by the Australian and Queensland Governments will deliver less than the minimum required to fulfil their obligations under the OPCAT. We want Queenslanders deprived of their liberty to have the most robust protections against torture and other inhumane treatment.

QAI calls on the Queensland and Australian Governments to fulfil their OPCAT obligations and establish National Preventive Mechanisms (NPM) consistent with the following principles:

1. A National Preventive Mechanism should monitor and report on all places of detention in Queensland

To be OPCAT compliant Queensland's NPM needs to provide for regular visits and monitoring of all places of detention in Queensland.[v]

The United Nations Subcommittee for the Prevention of Torture (UN SPT) has expressed concern about the Australian Government's 'primary versus secondary' approach to places of deprivation of liberty, and recommended that it establish NPMs with access to all places where people are deprived of their liberty.[vi]

That should include:

- adult prisons
- juvenile detention facilities
- secure youth residential facilities
- police lockups and police station cells
- closed facilities or units where people may be detained for mental health assessment or treatment
- forensic disability facilities or places where people are detained for care
- immigration detention centres
- military detention facilities
- places used for health quarantine detention, such as hotels
- disability group homes
- other mental health facilities
- locked units in aged care facilities, such as dementia units; and
- any other place where a person is detained.

To provide for anything less would result in the Queensland Government failing to fulfil its obligations under the OPCAT, and people subject to detention in Queensland would have fewer protections from torture and other inhumane treatment.

2. The Australian Human Rights Commission and the Queensland Human Rights Commission should be appointed to lead and coordinate the National Preventive Mechanisms for Australia and Queensland respectively

The already-established Human Rights Commissions are the obvious bodies to lead and coordinate the NPMs in Australia. This is consistent with the approach recommended by the United Nations.[vii]

The Queensland Human Rights Commission (QHRC) has been established, among other things, to deal with human rights complaints, review the effect of various laws on human rights, review the compatibility of public entities' policies, practices and services with human rights and provide the community with information and education about human rights. This legislative mandate explicitly includes protection from torture and other inhumane treatment.[viii]

There is no agency more appropriate to fulfil the role of the NPM for Queensland and oversee and report on implementation of the OPCAT and the protection of rights under the Convention against Torture than the QHRC.

The United Nations High Commissioner for Human Rights has identified the 'creation of additional/competing institutions' as a potential threat to national human rights institutions such as Human Rights Commissions, and views such actions as an early warning sign of efforts to undermine their ability to function effectively.[ix] The appointment of an agency other than the QHRC as the NPM for Queensland could be viewed as such an action.

3. The National Preventive Mechanisms should provide for representation from, and formal collaborations with, Civil Society Organisations

Civil Society Organisations (CSOs) are non-government, non-profit citizens' groups that promote a common interest, and can include professional associations, trade unions, educational institutions and faith-based groups.[x]

The Paris Principles require that national institutions established to promote and protect human rights, such as the Australian Human Rights Commission and the QHRC, should be established with a composition and procedures that ensure pluralism, through the:

> pluralist representation of the social forces (of civilian society) … which will enable effective cooperation … or through the presence of representatives of … non-governmental organizations responsible for human rights ...[xi]

CSOs can help strengthen the capacity and effectiveness of NPMs by sharing first-hand knowledge and expertise about indicators of risk for specific groups deprived of their liberty, which can inform best practice inspection and monitoring processes. NPMs can also collaborate with CSOs on specific projects or establish formal coalitions where the NPM integrates the CSOs into their work, including in formal advisory or policy-making roles.[xii]

We call for the formal inclusion of CSOs in the Queensland NPM framework as recommended by the Subcommittee on Prevention of Torture and The Paris Principles. This should be supported by funding for CSOs to participate in OPCAT monitoring and to prepare a shadow report to Parliament.

4. The National Preventive Mechanisms should be designed to ensure OPCAT monitoring activities are informed and guided by people with lived experience of detention

People who have personal experience of services and institutions gain powerful insights into their operations and the way they treat their clients, patients or inmates. It follows that people who have personal experience in sites of detention gain valuable knowledge about the potential for torture or inhuman treatment to occur in these settings.

People with this experiential knowledge are referred to as 'experts by experience'. Their first-hand experience of places of detention, gives them intimate knowledge of rhythms and routines of these places, how policies and practices are implemented 'on the ground' and what questions to ask to get as much information as possible from a visit. People in detention find it easier to communicate with, and express concerns to, 'experts by experience' rather than government officials.[xiii]

The health, mental health and domestic and family violence service systems have a history of using experts by experience in service development and delivery. The UK Care and Quality Commission includes an expert by experience in its visiting and inspection program and on all of its regulatory inspections.[xiv] The Queensland Mental Health Commission has a model for ensuring mental health, alcohol and other drug policy, program and service development is informed by the lived experience of people, families and their carers. These approaches could serve as models for the Queensland NPM for the use of experts by experience to inform its work.

We call for the establishment of a transparent, legislated model for the involvement of people with lived experience of detention in the development of the NPM's monitoring activities in places of detention, including the setting of clear targets for engagement, including the establishment of an Experts by Experience Panel to inform the development of the NPM's monitoring and visiting program.

5. Providing culturally- and disability-inclusive information to people in detention about their rights and available complaints mechanisms should be a key priority of the National Preventive Mechanisms

To make OPCAT real for those who most need its protections, people in detention need accessible communication to understand their human rights and to realise them through appropriate complaint processes. Culturally appropriate and disability-informed communication and information for people in detention must be a priority of the NPM.

6. The Australian and Queensland Governments should pass legislation to give full effect to the key provisions of the Convention Against Torture and OPCAT around Australia and in Queensland[xv]

At a minimum, the Queensland legislation should provide for:

- The Queensland Human Rights Commission to be the NPM in Queensland and its legislation amended to reflect the requirements of The Paris Principles, particularly relating to 'Composition and guarantees of independence and pluralism' through cooperation with, or the presence of representatives of civil society organisations involved in the protection and promotion of human rights.

- The NPM to have the authority and responsibility to visit all places of detention in Queensland as outlined in Principle 1 above.
- Visits to places of detention to be undertaken regularly — at least once annually[xvi] and more often if the NPM considers it appropriate.
- The NPM should have the following functions to:
    - Examine the treatment of people deprived of their liberty;
    - Make recommendations to improve their treatment and strengthen protections against torture and other cruel, inhuman or degrading treatment or punishment;
    - Make observations and recommendations for legislative change to strengthen protections;
    - Publish annual reports about the operations of the NPM;
    - Undertake public education and awareness raising about the human rights protected by the Convention against Torture, and capacity building for agencies and staff that are responsible for the treatment and care of people in detention in Queensland.
- The NPM should have the following powers and protections:
    - Access to all information provided for under Article 20 of OPCAT;
    - Access to all places of detention;
    - The opportunity to have private interviews with people deprived of their liberty as provided under Article 20(d) of OPCAT;
    - The right to communicate independently with the Subcommittee on the Prevention of Torture, to provide information and to meet with it as provided under Article 20(f) of OPCAT;
    - Confidential information collected by the NPM shall be privileged.
- When the NPM proposes to report about concerns of torture or ill-treatment of a detainee, the detainee be provided with legal representation and a right of reply to submissions made by the purported responsible person before a decision is made about what further action will be taken.
- The NPM establish a panel of people with lived experience of detention in a variety of settings whose knowledge and experience could be used to inform and guide visits to places of detention and information requests.[xvii]
- The NPM publicly consult on the development of its monitoring tools and the information/materials it proposes to request as part of its monitoring function, publish its monitoring policies and tools and review them at the end of each OPCAT reporting period.

References

[i] Article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
[iiii] Part IV of OPCAT.
[iii] Article 4 of OPCAT defines 'deprivation of liberty' as 'any form of detention or imprisonment … in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority'.
[iv] Article 19 of OPCAT>
[v] This is consistent with the view of the Australian Human Rights Commission. See Recommendation 3 of the Australian Human Rights Commission, *Road Map to OPCAT Compliance,* 17 October 2022.
[vi] United Nations Subcommittee on the Prevention of Torture, *Concluding observations on the sixth periodic report of Australia,* dated 5 December 2022, p 13.
[vii] United Nations, Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Article 18.4 incorporates the Principles relating to the Status of National Institutions (The Paris Principles).
[viii] Section 17 *Human Rights Act 2019.*
[ix] Office of the United Nations High Commissioner for Human Rights, *National Human Rights Institutions: History, Principles, Roles and Responsibilities,* Professional Training Series No. 4(Rev.1), p 48-49.
[x] The United Nations defines a civil society organisation (CSO) or non-government organisation as 'any non-profit, voluntary citizens' group which is organized on a local, national or international level' which is 'task-oriented and driven by people with a common interest.' CSOs can include schools and universities, advocacy groups, churches, cultural organisations and trade unions. They do not include business or for-profit entities.
[xi] United Nations, *Principles relating to the Status of National Institutions (The Paris Principles),* 20 December 1993, 'Composition and guarantees of independence and pluralism', Article 1.
[xii] See discussion of the relevance of civil society organisations to the work of NPMs at the Association for the Prevention of Torture website: https://www.apt.ch/en/knowledge-hub/npm-toolkit/engaging-others/engaging-civil-society, accessed 12 December 2022.
[xiii] Care Quality Commission, Monitoring the Mental Health Act in 2016/17 (Newcastle upon Tyne: Care Quality Commission, 2019), 46.
[xiv] Ibid.
[xv] This principle is consistent with Recommendation 3 of the Human Rights Commission, *Road Map to OPCAT Compliance¸* 17 October 2022. Also see Office of the United Nations High Commissioner for Human Rights, *National Human Rights Institutions: History, Principles, Roles and Responsibilities,* Professional Training Series No. 4(Rev.1), p 24.
[xvi] For facilities in certain categories of places of detention, for example, for some places that present higher risks, such as prisons and secure mental health facilities, visits should be required to each facility in that category at a minimum of once per year and more frequently if the NPM considers it necessary. However, the NPM might not be expected to visit every police watchhouse annually.
[xvii] The Care Quality Commission, which is the independent regulator of health and social care in England and part of the UK NPM has an Experts by Experience Program and establishes Service User Reference Panels that help guide its monitoring and regulatory programs and take part in inspections.