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OF CUSTODIAL SERVICES

ACT Ombudsman

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4 July 2023

Committee Secretary
Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: human.rights@aph.gov.au

Dear Committee Secretary

Australian National Preventive Mechanism members' joint submission to the Parliamentary Joint Committee on Human Rights – Inquiry into Australia's Human Rights Framework

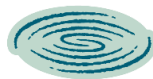
In December 2017, the Australian Government ratified the United Nations (UN) Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). Australia's National Preventive Mechanism (NPM) under the OPCAT comprises a network of Commonwealth, state and territory bodies responsible for visiting places of detention. These bodies have been designated as members of the Australian NPM by their respective governments.

This submission was prepared and endorsed by the following NPM members:

- Commonwealth Ombudsman
- Australian Capital Territory (ACT) Human Rights Commission
- ACT Ombudsman
- Office of the Children's Commissioner (Northern Territory (NT))
- Ombudsman NT
- Training Centre Visitor (South Australia (SA))
- Office of the Inspector of Custodial Services (Western Australia (WA)).

We welcome the opportunity to provide a submission to the Parliamentary Joint Committee on Human Rights' (the Committee) inquiry into Australia's Human Rights Framework. Although visiting places of detention where people are, or may be, deprived of their liberty is the core function of NPM bodies, NPMs also have an advisory, education and cooperation function, including:

*Submitting proposals and observations concerning existing or draft legislation and **relevant human rights action plans (our emphasis)**, and submitting to the Government, the parliament and any other competent body on an advisory basis, either at the request of the authorities concerned or through the exercise of the mechanism's powers under the Optional Protocol,*

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opinions, recommendations, proposals and reports on any matters concerning the situation of detainees and any other issues within the mandate of the mechanism;...¹

The Committee's inquiry into Australia's Human Rights Framework includes consideration of Australia's 2010 Human Rights Framework (the Framework) and the 2012 National Human Rights Action Plan (the Action Plan), both of which refer to commitments the Australian Government made regarding signing, ratifying and implementing the OPCAT. This submission focuses on the status of OPCAT implementation in Australia, including what has been achieved to date and steps that should be taken to progress implementation.

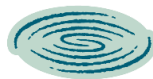
We consider that properly implementing Australia's obligations under the OPCAT would be an important means through which to strengthen Australia's human rights framework, particularly for individuals deprived of their liberty in detention settings around Australia.

The Convention against Torture and the OPCAT

Australia ratified the UN *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) in September 1989. The purpose of the CAT is to establish substantive obligations on State parties to take judicial, legislative and other measures to prohibit torture and other cruel, inhuman, or degrading treatment or punishment. The CAT is one of the seven core UN human rights treaties to which Australia is a party.

The OPCAT builds on the CAT by creating a system of international and domestic monitoring for the purpose of preventing torture specifically in places where individuals are deprived of their liberty, such as prisons, detention centres (pre-trial detention centres, immigration detention centres, youth justice establishments), psychiatric institutions, hospitals, aged care facilities and disability group homes. The OPCAT is designed to strengthen protections for people deprived of their liberty because they are especially vulnerable to breaches of their human rights, including through torture or ill-treatment. Australia's commitment to the OPCAT highlights that a person must never be exposed to torture or ill-treatment, irrespective of the fact they are detained and the purposes for which they are detained. Where people have been convicted of an offence and then detained, their punishment is to be deprived of their liberty – the conditions and treatment of detention are not additional punishment, and they must not be subjected to torture or cruel and inhumane treatment. Furthermore, many people detained in Australia have not been convicted of any offence, and many are detained for reasons that have no connection to the criminal justice system.

¹ [Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – Analytical assessment tool for national preventive mechanisms](#) (CAT/OP/1/Rev.1), paragraph 9(c).

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Status of OPCAT implementation

The Framework and Action Plan

The Framework notes various actions the Australian Government has taken to reinforce commitment to international human rights, including signing the OPCAT, which occurred in May 2009. The Action Plan identifies a range of priority areas for actions to improve human rights in Australia. The first priority area identified is 'international human rights commitments' under which the first priority action is related to OPCAT, including:

- introduction and passage of model legislation in all jurisdictions to enable visits by the UN Subcommittee on Prevention of Torture (SPT) in 2012-13
- ratification of the OPCAT by 2013, and
- lodging a declaration under Article 24 of the OPCAT to delay commencement of NPM obligations for up to 3 years.

Disappointingly, Australia has not met the commitments outlined in the Action Plan, even after delaying commencement of NPM obligations for 5 years after ratifying OPCAT in 2017, and as of June 2023, the requirements of the OPCAT are still yet to be fully implemented in Australia.

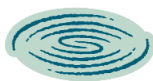
Ratification

Australia ratified the OPCAT in December 2017 and made a declaration under Article 24 to delay commencement of the establishment of an NPM until January 2022. In December 2021, the then Commonwealth Attorney-General wrote to the Chair of the SPT requesting a 12-month extension for NPM establishment until 20 January 2023. The SPT transmitted this request to the Committee against Torture for consideration. At its 73rd session (19 April – 13 May 2022), the Committee against Torture accepted the Australian Government's request to extend postponement of its obligations to establish an NPM until 20 January 2023.

Establishing an NPM

In addition to creating an international monitoring regime carried out by the SPT, the OPCAT also requires signatory States to establish a system of regular preventive visits to places of detention by a domestic independent body known as an NPM. Visits under the OPCAT are preventive rather than reactive. An NPM exists to prevent torture and mistreatment occurring in the first place, by acting as a deterrent and helping to mitigate risk, including through constructive dialogue. In addition to conducting preventive visits, the NPM also has advisory, education and cooperative functions to promote the OPCAT, provide advice to detaining authorities and governments about the OPCAT, and work constructively with all relevant stakeholders to progress the objectives of the OPCAT.

On ratifying the OPCAT, the Australian Government foreshadowed that Australia's NPM would be established as a cooperative network of Commonwealth, state and territory bodies responsible for visiting places of detention, to be coordinated by an NPM Coordinator. This means that NPM oversight of Australian Government-controlled places of detention such as immigration detention facilities, and



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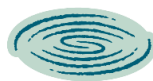


Australian Defence Force and Australian Federal Police places of detention falls within scope of the Commonwealth NPM (this function is performed by the Commonwealth Ombudsman), while oversight of state and territory-controlled places of detention such as adult prisons, juvenile detention, and closed mental health and forensic disability facilities falls within scope of state and territory NPMs. As the NPM Coordinator, the Commonwealth Ombudsman is tasked with coordinating and facilitating collaboration between members of Australia's NPM Network.²

While the deadline for Australia to establish its NPM was 20 January 2023, as of June 2023, only 6 of Australia's 9 jurisdictions have appointed or nominated NPMs.

NPM bodies	Nominated/appointed
Commonwealth	
Office of the Commonwealth Ombudsman (as NPM Coordinator and Commonwealth NPM)	July 2018
Australian Capital Territory (ACT)	
ACT Human Rights Commission	January 2022
ACT Inspector of Correctional Services	
ACT Ombudsman	
New South Wales	
<i>No NPM(s) yet appointed/nominated</i>	
Northern Territory (NT)	
Ombudsman NT (as interim Coordinating NPM)	April 2021
NT Children's Commissioner (<i>proposed only; expected to be appointed for places where persons under 18 are detained</i>)	Not yet nominated/appointed
Principal Community Visitor (<i>proposed only; expected to be appointed for disability care facilities and mental health treatment facilities</i>)	Not yet nominated/appointed
Queensland	
<i>No NPM(s) yet appointed/nominated</i>	

² Members of Australia's NPM Network meet regularly to share information, collaborate and support one another in implementing our OPCAT obligations. Members of Australia's NPM have also produced joint statements and submissions on a range of OPCAT-related matters. See the Commonwealth Ombudsman's OPCAT website [here](#) to find NPM Network meeting communiques, and joint statements and joint submissions prepared by the NPM Coordinator and members of Australia's NPM.



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NPM bodies	Nominated/appointed
South Australia	
Official visitors (for adult prisons)	February 2022
Principal Community Visitor (for closed mental health and closed forensic disability facilities)	February 2022
Training Centre Visitor (for training centres)	February 2022
Tasmania	
Mr Richard Connock (as Tasmanian NPM)	February 2022
Victoria	
<i>No NPM(s) yet appointed/nominated</i>	
Western Australia (WA)	
WA Office of the Inspector of Custodial Services (for justice-related facilities, including police lockups)	July 2019
WA Ombudsman (for mental health and other secure facilities)	July 2019

New South Wales (NSW), Victoria and Queensland are yet to nominate their NPMs. However, Queensland's *Inspector of Detention Services Act 2022* (IDS Act) creates a new inspector position, held concurrently by the Queensland Ombudsman.³ While not an NPM, the Queensland Government indicated this role is designed to address key features of an NPM.⁴ Some provisions of the IDS Act commenced in December 2022 including the development of inspection standards by the IDS.

Recommendation 1

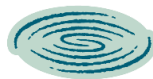
Where they have not yet done so, we recommend that Australian governments nominate NPMs as soon as possible to ensure that Australia has a fully established and functioning NPM, and to ensure that people in detention in all jurisdictions have the benefit of the important preventive oversight and preventive work that an NPM undertakes.

Resourcing

Article 18(3) of the OPCAT provides that States Parties should undertake to make available the necessary resources for the functioning of NPMs. However, funding issues remain a key barrier to most Australian NPM bodies properly performing their functions. Some Australian governments have suggested that it is the Australian Government's responsibility to fully fund NPM bodies and that those states yet to nominate an NPM will not do so without full funding from the Australian Government.

³ [Inspector of Detention Services Act 2022 \(Qld\)](#), ss 7(1), 33.

⁴ Queensland Parliament, [Hansard](#) (30 August 2022) p. 2254.

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We understand that there have been protracted discussions between the Australian, state, and territory governments regarding the source of funding of state and territory NPMs. These funding issues have not yet been resolved. While this is a matter for governments, we note that the costs of resourcing NPMs represent a tiny proportion of the costs of running the detention facilities that each Australian government funds and operates.

In August 2021, the Australian Government, through the National Indigenous Australians Agency, announced funding to support its *Closing the Gap Implementation Plan*.⁵ This included an offer of one-off funding to states and territories for two years, to assist those jurisdictions with their initial costs in implementing the OPCAT, and acknowledging the overrepresentation of First Nations people in the criminal justice system. This funding is still available for states and territories should they choose to accept it. To date, only the ACT Government has accepted this funding.

It is vital that – whatever the source – sufficient, ongoing funding is available to NPMs in accordance with Article 18(3) of the OPCAT to ensure that they can carry out the entirety of their OPCAT mandate, including to conduct visits, have access to, and make use of specialist expertise, and to perform an NPM's other advisory, educational and cooperation functions.

Recommendation 2

We recommend that, as a matter of urgency, Australian, state and territory governments work together to ensure that all NPMs are provided adequate, ongoing funding to perform their functions in accordance with their mandate under OPCAT.

'Primary' and 'secondary' places of detention

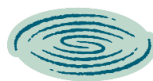
From the lead-up to OPCAT ratification in 2017, the Australian Government proposed that the Australian NPM would initially focus on what it called 'primary places of detention'⁶ to allow time for NPM bodies to establish themselves. It was also based on the approach taken in other countries where NPM activity expanded over time as experience and capability developed.

The Australian Government defines 'primary places of detention' as:

- adult prisons
- juvenile detention facilities (excluding residential secure facilities)
- police lock-up or police station cells (only where people 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 (only where people are held for equal to, or greater than, 24 hours)

⁵ See National Indigenous Australians Agency, [Closing The Gap – Commonwealth Implementation Plan](#) (5 August 2021) p 50.

⁶ See Senate Standing Committee on Legal and Constitutional Affairs, [Additional Estimates 2019–20 question on notice LCC-AE20-50](#) (Attorney-General's Department), 3 March 2020.

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- 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)
- immigration detention facilities, and
- military detention (ADF) facilities.

The OPCAT does not make any distinction between 'primary' and 'secondary' places of detention. The UN Committee against Torture's Concluding Observations on Australia as part of Australia's sixth periodic report under the CAT, *'noted with concern that the State party has adopted a "primary versus secondary" approach to places of deprivation of liberty, which leaves several places in which persons are deprived of their liberty outside the scope and mandate of the network of national preventive mechanisms, which runs counter to the provisions of article 4 of the Optional Protocol'*.⁷

Guidance from the Office of the High Commissioner for Human Rights provides that NPMs must be given the autonomy to determine which places of detention to prioritise, the frequency of visits, and the length of the visit. The breadth of an NPM's visit mandate means that NPMs must be permitted to decide these matters based on their own assessment of the relative risks associated with each place of detention within their remit.

An NPM's ability to carry out their mandate, including expanding their preventive monitoring activity to cover 'secondary' places of detention, will require appropriate resourcing from relevant Australian governments (see Recommendation 2) and, in some cases, may require additional legislative authority.

Recommendation 3

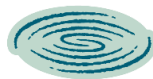
We recommend that the Committee clearly states that there is no 'hierarchy' of places of detention, such as 'primary' and 'secondary' places of detention, and that it is for an NPM to prioritise which places of deprivation of liberty they will visit, with what frequency, and for what length of time.

OPCAT Legislation

SPT legislation

At the time of ratification in 2017, no state or territory government had passed legislation enabling visits by the SPT. The ACT and the NT passed legislation in 2018 based on model legislation previously developed by states and territories. Tasmania passed legislation enabling SPT visits (and establishing an NPM) in 2021, Victoria in 2022, and [Queensland in May 2023](#). The Commonwealth, SA, NSW and WA do not have specific legislation enabling SPT visits.

⁷ United Nations Committee against Torture, Concluding Observations on the Sixth Periodic Report of Australia, adopted by the Committee at its seventy-fifth session (31 October–25 November 2022) (15 December 2022) CAT/C/AUS/CO/6; available [here](#).

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The SPT first visited Australia between 16 and 27 October 2022. The SPT suspended this visit on 23 October 2022 because it was prevented from accessing places of detention in NSW and Queensland, had difficulties carrying out a full visit in other places of detention, and was not being provided all relevant information and documents it requested. On 20 February 2023, the SPT formally terminated its visit to Australia stating that Australia was unable to provide the assurances required to enable the SPT to resume its visit within a reasonable timeframe.⁸ Members of Australia's NPM released a joint statement following the SPT's decision noting that this was a missed opportunity for Australian governments, detaining authorities, civil society organisations and other oversight bodies to work cooperatively with the SPT to achieve the shared goal of protecting the human rights of people in detention.⁹ The SPT has provided its report from the visit to the Australian Government, which can choose whether to publish the report. We encourage the Australian Government to do so.

Recommendation 4

We recommend that the Committee call on the Australian Government to publish the SPT's report of their 2022 visit to Australia.

NPM legislation

The SPT notes that the mandate and powers of an NPM *'should be in accordance with the provisions of the Optional Protocol'* and be *'clearly set out in constitutional or legislative text.'*¹⁰ The SPT considers that relevant legislation should include: the functions and powers of an NPM, the period of office of NPM members and potential reasons for their dismissal, the privileges and immunities for NPM staff to ensure they can exercise their functions, protections against reprisals for members of the NPM, their partners and any person who has communicated with the NPM, the power to submit proposals and observations concerning draft or existing legislation, the power to make recommendations to relevant authorities, and the right to engage with the SPT.¹¹

The following jurisdictions have NPM-related legislation:¹²

- Tasmania – [OPCAT Implementation Act 2021](#), which commenced on 20 January 2022

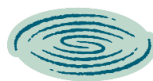
⁸ [UN torture prevention body terminates visit to Australia, confirms missions to South Africa, Kazakhstan, Madagascar, Croatia, Georgia, Guatemala, Palestine, and the Philippines | OHCHR.](#)

⁹ Joint Statement – Subcommittee on Prevention of Torture Decides to Terminate Visit to Australia, [NPM-Network-Joint-Statement-21-February-2023.pdf \(ombudsman.gov.au\)](#)

¹⁰ SPT [Guidelines on national preventive mechanisms](#) (CAT/OP/12/5) (2010), paras 6 and 7, page 3.

¹¹ SPT [Analytical assessment tool for national preventive mechanisms](#) (CAT/OP/1/Rev.1) (2016), para 10 – 12, p. 4. See also Association for the Prevention of Torture, *Optional Protocol to the UN Convention Against Torture, Implementation Manual* (2010), p. 222-225. See also, United Nations Office of the High Commissioner for Human Rights, *The Role of National Preventive Mechanisms: A Practice Guide* (2018), p. 15.

¹² The [OPCAT Implementation Bill 2021](#) (SA) was introduced to the South Australian Parliament in 2021 but lapsed before passing, due to the SA election in May 2022. The legislation would have provided for the establishment of NPMs but not SPT visits. A new Bill is under consideration by the SA Government. Additionally, the Queensland [Inspector of Detention Services Act 2022](#) creates a new inspector position, held by the Queensland Ombudsman. While not an NPM, it could be appointed as one if the Queensland Government decides.

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- NT – [Monitoring Places of Detention \(Optional Protocol to the Convention Against Torture\) Amendment Act 2022](#), which passed Parliament in 2022 but is yet to commence
- Commonwealth – [Ombudsman Regulations 2017](#), which confers on the Commonwealth Ombudsman the functions of Commonwealth NPM (regulation 16) and NPM Coordinator (regulation 17) and commenced on 10 April 2019
- ACT – [Inspector of Correctional Services Act 2017 \(ACT\)](#), which includes most of the powers and guarantees required by OPCAT and commenced on 7 December 2017.¹³

Other jurisdictions, including those which have nominated or appointed NPMs, do not have specific NPM legislation. This means that legislative change to implement the OPCAT in Australia remains incomplete. Some jurisdictions' legislation provides for SPT visits or NPM powers but not both, while some jurisdictions have not legislated for either. This suggests a need to consider further adjustments in legislation, to give effect to OPCAT obligations, particularly to enable NPMs to meet their full OPCAT mandate and enable the SPT to carry out visits.

Recommendation 5

We recommend that Australian, state, and territory governments ensure that legislative frameworks are in place (or if they are not, to develop such frameworks) to:

- enable the work of NPMs consistent with their mandate under OPCAT, and
- facilitates visits by the SPT.

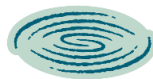
The recommendations outlined above are consistent with the Committee against Torture's recommendations in its Concluding Observations on Australia's sixth periodic report. In particular, the Committee against Torture recommended that Australia '*take all necessary measures to promptly establish its network of National Preventive Mechanisms across all states and territories and ensure that each of its member bodies has the necessary resources and functional and operational independence to fulfil its preventive mandate in accordance with the Optional Protocol, including access to all places of deprivation of liberty as prioritized by the bodies themselves*'.¹⁴

Conclusion

From ongoing concerns about the treatment of children and young people in Banksia Hill Youth Detention Centre in WA to the 2017 report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the NT and the systemic institutional failings identified in the Disability and Aged Care Royal Commissions, there is an urgent need to improve the treatment and

¹³ See *Inspector of Correctional Services Act 2017 (ACT)* Explanatory Statement - [explanatory statement | HTML view \(act.gov.au\)](#)

¹⁴ United Nations Committee against Torture, Concluding Observations on the Sixth Periodic Report of Australia, adopted by the Committee at its seventy-fifth session (31 October–25 November 2022) (15 December 2022) CAT/C/AUS/CO/6; available [here](#).



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conditions for people in a variety of detention settings across Australia. The OPCAT offers a crucial mechanism through which to achieve these improvements.

The Australian, state and territory governments have consistently made commitments to implement the OPCAT as a means of preventing torture and ill-treatment of individuals who are deprived of their liberty. While progress has been made, there is significant work to be done to fully implement the requirements of the OPCAT. The recommendations in this joint submission, if supported by the Committee and implemented by Australian governments, will significantly contribute to fulfilling Australia's obligations under the OPCAT and, ultimately, strengthen protections for all persons who are deprived of their liberty in Australia.

Yours sincerely



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