

# **Response of the Australian National Preventive Mechanism**

Report of the Subcommittee on  
Prevention of Torture – 2022 visit  
to Australia



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# Introduction

We are members of the Australian National Preventive Mechanism (NPM):

- Australian Capital Territory (ACT) Human Rights Commission
- ACT Office of the Inspector of Correctional Services
- ACT Ombudsman
- Commonwealth NPM
- Northern Territory (NT) Principal Community Visitor, Community Visitor Program
- NT Ombudsman
- Office of the Children's Commissioner NT
- South Australian (SA) Training Centre Visitor
- Jo Battersby, SA official visitor
- Tasmanian NPM
- Western Australian (WA) Office of the Inspector of Custodial Services
- WA Ombudsman

We have been appointed or nominated by Australian governments as part of Australia's implementation of the *United Nations Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)*.

We have prepared this response to both the Subcommittee on Prevention of Torture's (SPT) Report of its 2022 visit to Australia, and Australia's state party reply to that Report. We take the opportunity to provide this response to the SPT and to all Australian governments, in the spirit of communication and cooperation which underpins OPCAT.

The SPT's Report is addressed to the state party, not to the Australian NPM. As such, rather than respond to the entirety of the SPT's Report, we have chosen instead to focus in our response on Parts II and III concerning the SPT visit and OPCAT implementation respectively.

While we have focused only on some parts of the Report, we welcome the SPT's broad range of observations, findings, and recommendations on detailed facets of their 2022 visit. The SPT's observations and findings relating to substantive detention matters and the prevention of torture and other ill treatment, expressed in the Report, provide valuable information for government, for the Australian NPM, and for civil society. We will continue to consider and apply this information, including to inform our own visit activity and areas of future focus.

We hope that all Australian governments and detaining authorities will carefully consider the Report's findings and recommendations, in meeting their ongoing obligations towards people deprived of their liberty in all situations.

# The SPT mandate

OPCAT creates a system of preventive visits, consisting of both NPM and SPT activity, to places where people are deprived of their liberty. This system relies on its two parts being able to perform their respective roles consistent with the OPCAT mandate. Like any system, this is undermined if either part is unable to fulfil its role. While we have been primarily focused on our own implementation challenges as an NPM, we are only one part of achieving a robust preventive system.

We thus recognise the critical importance of the SPT being able to exercise its full mandate as provided by OPCAT when undertaking its visit activity. We recognise that in accordance with Article 12(a) and (b) of OPCAT this includes states parties undertaking to:

- grant the SPT access to places of detention as defined by Article 4; and
- provide it with all relevant information it may request.

As the SPT's Report observes, this did not occur during their 2022 visit. While some jurisdictions had legislation in place, and another has since passed legislation, there remain legislative gaps to guaranteeing the SPT can exercise its full powers across Australia with regards to all places falling within scope of Article 4 of OPCAT.

## The 2022 SPT visit to Australia

We are grateful for the SPT's commitment to visiting Australia after the postponement of its planned 2020 visit. We are pleased that, notwithstanding the shortened time and the barriers faced, the delegation was able to visit a significant number of places of deprivation of liberty and engage with the numerous stakeholders noted in Annex III to their Report.

We are particularly grateful for the close engagement between the SPT Secretariat and the NPM Coordinator in the lead-up to and during the visit, and for the visit delegation's meetings with us. We are also grateful that despite the visit suspension, the Secretariat was nonetheless able to organise a separate training workshop for us with the SPT delegation. These interactions were valuable not only for our ongoing relationship, but for our developing understanding of OPCAT and the NPM mandate.

We were disappointed that the SPT's visit ultimately had to be terminated, and Australian NPM members [made a public statement](#) at the time expressing this. As well as undermining the purpose and function of OPCAT, the failure to enable a complete visit was a missed opportunity for further cooperative engagement between the SPT, the state party and others towards strengthening protections for people deprived of their liberty.

In paragraph 14 of their Report, the SPT states they observed a fundamental lack of understanding among authorities of OPCAT and its requirements. We share the SPT's disappointment, particularly given the passage of time since OPCAT was signed and

ratified. We agree that all actors in Australia have much still to learn about OPCAT, including Australian NPM members ourselves. We see addressing this as a priority incumbent on all relevant actors, including government authorities. In accordance with our mandate, we will continue to explore our own educative contribution towards a greater understanding of OPCAT and a greater degree of human rights awareness in Australia.

# The Australian NPM

## Current status

We acknowledge the SPT's observations in paragraphs 17 and 19 of the Visit Report that the Australian NPM had not been designated at the time of writing, and that Australia has an "emerging NPM structure".

Australia's three most populous states still have not nominated a member for the Australian NPM. Current Australian NPM members also have varying status. All are people or bodies which also perform functions other than that of an NPM under OPCAT. Multiple members are yet to receive any OPCAT-specific funding or legislative authority, or even formal confirmation of their nomination or appointment by their respective government. To perform any kind of OPCAT work, many are reliant on existing powers which may be incomplete from an OPCAT perspective, and reliant on existing funding allocated to other functions which in most cases they cannot spare. This has resulted in only a minority of members commencing specific OPCAT activity.

Not only are there gaps in NPM coverage in entire jurisdictions, even among Australian NPM members, there are also varying levels of:

- clarity from applicable governments as to confirmation of bodies' status;
- legislative authority specifically for OPCAT activity;
- funding and other necessary resourcing from government;
- practical capacity to undertake OPCAT activity; and
- maturity and familiarity with preventive visit requirements and other functions of an NPM.

By no means are these difficulties the result of a lack of commitment on the part of Australian NPM members to work towards operationalising and implementing our responsibilities. On the contrary, members remain committed to OPCAT but are constrained by governments' incomplete implementation action. At the same time, we acknowledge that a number of detaining authorities do facilitate visits for Australian NPM members in some jurisdictions.

Five years after ratification and 14 years after signing, despite being bound by the terms of the treaty, Australian governments continue to grapple with domestic implementation. There has been ample time for Australian governments to address matters of domestic implementation, yet key issues remain outstanding.

All current Australian NPM members hold concurrent roles. For this approach to work in a way that fulfils the NPM mandate, it must, among other requirements, allow for necessary adjustments and key structural separation requirements, including as noted by the SPT in paragraphs 20 and 25-6.

We suggest a multi-body arrangement, particularly in a country such as Australia with its geographic diversity and federal structure, can bring significant practical advantages. But we recognise that for a multi-body arrangement to work effectively, particularly where there are many members, each member must be able to execute their functions with legal certainty in a manner consistent with the requirements of OPCAT, so that the collective entity as a whole meets OPCAT's preventive mandate.

The SPT in paragraph 19 of their Report states that a coordinating body at the federal level should set the NPM's strategic vision. Our NPM Coordinator has no power to direct members, and it is important for each NPM body to be able to set its own strategic cadence in their respective jurisdiction. However, strategic forward planning – including towards a common direction based on key principles that are overarching among all bodies in the Australian NPM – is currently a matter of further discussion within the Australian NPM for all members to contribute to. We remain committed to OPCAT implementation and to fulfilment of the NPM mandate; we do however stress the difficulties with common forward planning while implementation roadblocks remain in place.

## Legislation

We note the difficulties the SPT faced during their visit as noted in paragraphs 4 and 13 of their Report, ultimately leading to the visit's termination. We agree there is value in having clear domestic legal authority to undertake all OPCAT work. Therefore, we will continue to call for all Australian jurisdictions to ensure there is legislation in place to enable the SPT to exercise its full powers across Australia when visiting all places falling within scope of Article 4 of OPCAT.

The SPT's experience indicates how critical legislative authority is to minimising the risk that our own visit activity could be frustrated. OPCAT also contains minimum necessary requirements which parties must enable for NPMs, namely to:<sup>1</sup>

- regularly examine the treatment of persons in places of detention;
- make recommendations to the relevant authorities with the aim of improving the treatment and conditions of people detained;
- submit proposals and observations on existing or draft laws;
- access all information on the number of places of detention and their locations;
- access all information on the number of people detained;

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<sup>1</sup> See OPCAT Arts 19-20, 35.

- access all information relating to the treatment and conditions of people detained;
- access all places of detention and their installations and facilities;
- have private interviews with people detained and anyone else they consider may be relevant;
- choose the places they want to visit and the persons they want to interview;
- have contact with the SPT and the ability to share information with it; and
- have the necessary privileges and immunities for the independent exercise of their functions.

Parties must also ensure that there are protections from reprisal in place to safeguard those who speak with an NPM.

We consider that whatever the source of legislation, all enabling legislation must guarantee these minimum requirements to ensure access to the full range of powers and protections. We also consider that anything less than legislative authority for these does not adequately support OPCAT’s object and purpose towards the effective prevention of torture and other ill treatment. We also recall the SPT’s guidelines on NPMs which indicate that NPMs’ mandate and powers should be in legislation or the constitution.<sup>2</sup>

We further believe legislation must also enshrine a clear declaration of each member’s functional independence, to preserve the common thread of NPMs’ independent status reflected in various parts of OPCAT.<sup>3</sup> We note the SPT previously stated that while states parties can choose for themselves the specific NPM model to establish, *“independence constitutes the key feature that every mechanism, irrespective of its form, must possess”*.<sup>4</sup>

Critically, clear and unambiguous legislative authority also has a significant educative function: it is a powerful tool to help explain the NPM role and requirements and what must be done to facilitate NPMs’ preventive activity. We hope that as well as focusing on why legislation is necessary, governments will also consider this great potential of legislation in reflecting on the SPT’s observations on the level of awareness of OPCAT in Australia.

## Resourcing

We consider that a clear legislative framework for all members is a necessary, but in isolation not sufficient, means to ensure each member can fulfil their NPM role. Committed staff with a robust legislative basis for the mandate will be frustrated in the mandate’s fulfilment where they do not have the resourcing – financial, human, and material – to

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<sup>2</sup> Subcommittee on Prevention of Torture, *Guidelines on national preventive mechanisms*, UN Doc CAT/OP/12/5 (9 December 2010) para 7. See also OPCAT Article 18(4); *Principles relating to the Status of National Institutions* (Paris Principles), GA Res 48/134, UN Doc A/RES/48/134 (4 March 1994, adopted 20 December 1993) para 2.

<sup>3</sup> See OPCAT Arts 1, 17, 18(1), 35.

<sup>4</sup> Subcommittee on Prevention of Torture, *Report of the Subcommittee – Visit to United Kingdom of Great Britain and Northern Ireland undertaken from 9 to 18 September 2019: recommendations and observations addressed to the national preventive mechanism*, UN Doc CAT/OP/GBR/RONPM/1 (16 December 2020) para 47.

perform their role. This does not mean minimal, or time-limited resourcing; rather, it means resourcing that is:

- adequate to perform regular preventive visits to places of detention within their scope of activity on the basis of members' own risk assessments and prioritisation;
- adequate to perform NPMs' other advisory, educational, and cooperation functions;
- benchmarked based on empirical analysis and data evaluation to avoid funding for failure;
- based on a systems approach to enable coordination and leveraging resourcing opportunities; and
- ongoing, secure, and predictable, to enable longer-term planning, security of tenure, and development of corporate knowledge and expertise.

Resourcing disputes between levels of government regarding NPMs continue at the time of writing, despite ample time for their resolution since Australia's signing of OPCAT in 2009. Different levels of government each consider it is for another to provide adequate, ongoing funding for NPMs.

While all Australian NPM members have resourcing challenges and a majority significantly so, not all members are in the same position. Some received some funding, or may be in more of a position to leverage other resources. Nonetheless, Australia as a whole committed to OPCAT's obligations, and those obligations apply equally to all parts of Australia in accordance with Article 29. As long as at least one part of the multi-body Australian NPM has resourcing or mandate challenges, so too does the Australian NPM as a whole.

Nil resourcing, or inadequate resourcing that fails to meet the practical needs of NPMs, will frustrate their activity and act as a powerful, practical means of fettering NPM functions and independence. This undermines what we consider to be Australia's long-standing, resolute commitment to eliminating torture and inhuman treatment. It also fundamentally undermines the enormous impact that international practice shows NPMs can have on the prevention of torture and other ill treatment, and on broader human rights improvements for vulnerable cohorts.

## Requirements from governments

We believe that bodies with existing mandates can successfully fulfil the NPM mandate. However, this can only occur where critical requirements of legislative authority and necessary funding for NPM activity are met.

We believe that Australian governments must:

- where they have not yet done so, appoint bodies for their jurisdiction to be members of the Australian NPM, and legislate for their mandate, independence, powers, and protections;



- ensure the members of the Australian NPM collectively have jurisdiction over all places of deprivation of liberty within scope of Article 4 of OPCAT;
- enable all members of the Australian NPM to decide and prioritise what type of place of detention to visit, and when;
- ensure that members of the Australian NPM have all necessary privileges and immunities;
- ensure all necessary protections from reprisal activity; and
- provide all members of the Australian NPM with secure, adequate, and ongoing resourcing so that the Australian NPM can discharge its full preventive mandate under OPCAT.

We also recognise that Australia is at risk of being placed on the SPT’s public list of states parties whose establishment of an NPM is substantially overdue. Completion of the NPM designation process in Australia, along with the necessary legal authority and funding, would help to address this risk.

## The state party reply

We are concerned that the state party reply to the SPT Visit Report gives an incomplete or decontextualised picture of the status and challenges of the Australian NPM. We are also disappointed that the state party reply is brief in its discussion of governments’ outstanding requirements to establish the Australian NPM, given this is a key aspect of OPCAT implementation and one that the SPT criticised.

We are pleased that the state party reply explicitly indicates in paragraph 10 that Australia’s multi-body NPM structure is based on mechanisms being established in each jurisdiction through legislation. We note, however, that the state party reply includes no detail about what such legislation must provide, and we reiterate that legislation merely ‘establishing’ mechanisms is insufficient. All legislation establishing the members of the Australian NPM must reflect the mandate, independence, powers, and protections required under OPCAT, as detailed above.

We are also greatly disappointed that NPM resourcing, a fundamental barrier to effective OPCAT implementation, is addressed so briefly in paragraph 16 of the reply. As we have stated above, resourcing disputes remain ongoing despite the significant time all Australian governments have had to resolve this. Resourcing must be adequate and ongoing, and is fundamental to being able to discharge our OPCAT mandate.

We further draw attention to the following:

- A majority of Australian NPM members have not commenced work specifically as an NPM, with some having an uncertain designation status.
- Joint work of the Australian NPM has generally been completed despite barriers to implementation from governments.

- Where joint work has involved any input from members, it has been done out of goodwill and despite many members having minimal or zero capacity for OPCAT work.
- By not acknowledging the challenges faced by Australian NPM members, the state party reply (by omission) risks presenting a misleadingly positive picture of OPCAT implementation.

We hope that this response to the SPT Visit Report provides a more holistic update on the intractable challenges continuing to undermine OPCAT implementation in Australia.

## Additional context for the SPT's consideration

The SPT's Report is of great interest to us and, while it was not specifically directed to us, this is an important opportunity to comment on certain matters regarding OPCAT implementation in Australia and our work as the Australian NPM. We have intentionally focused our response on the broader issues that are of interest to the Australian NPM, but for completeness, also wish to clarify some details related to the following two points raised in the Report.

### Access to healthcare and supports

We note the comments in paragraph 84 of the Report that people in prisons and detention centres in Australia are unable to access private health insurance. Australia's health system is a 'hybrid' public and private health system underpinned by Medicare. Medicare is Australia's federal government-funded scheme which provides basic access to hospital services, rebates for medical services provided by community practitioners, and various prescription medications subsidised under the Pharmaceutical Benefits Scheme (PBS). However, neither Medicare nor the PBS are available to people in corrections. Instead, within correctional environments healthcare is provided by state and territory governments.

This approach can lead to an inability to access some health services. It can also complicate continuity of care when people enter and leave prison. Further, the lack of access to subsidised medications under the PBS can restrict access to certain essential and too often high-cost medications.

Australia's National Disability Insurance Scheme (NDIS), which provides government-funded disability supports to eligible people with disability, also has access limitations for those in prison. NDIS participants commonly have reduced access to NDIS-funded disability supports on entering prisons, with the intention that various facets of disability support in prisons be provided instead through the criminal justice system. However,

divisions of responsibility to determine which supports should be funded by the NDIS can be unclear, meaning that necessary supports for people with disability are often not available. There can also be practical difficulties in accessing NDIS-funded services while in prison even where eligible, and people in prison can experience difficulty applying for the NDIS in the first place.

Further, while there must be adequate access to culturally appropriate healthcare in prisons, this is not always the case. Often there are practical limitations to access and effectiveness of such services.

As part of ongoing attention to matters of healthcare and supports in places of detention, these are particular issues which Australian NPM members expect to consider further. We will continue to push to ensure laws, policies, and practices which can lead to a significantly lesser standard of healthcare and/or other supports for those in corrections are addressed.

## Aboriginal and Torres Strait Islander peoples in mental health places of detention

We also note the comments at paragraph 106 of the Report advising that the visit delegation did not encounter Aboriginal and Torres Strait Islander peoples in any of the mental health facilities visited. We consider that wherever possible, the best place for Aboriginal and Torres Strait Islander peoples to receive mental health support is in their community, in a culturally appropriate manner. This can include community-based forensic mental health services, and traditional healing practices such as Ngangkari that is applied at treatment facilities in Central Australia.

Various programs and services are in place to provide community-based and culturally appropriate support to Aboriginal and Torres Strait Islander peoples in need of mental health treatment, such as kinship programs that enable visits out of treatment facilities and connection to Country. We emphasise the need to strengthen culturally safe opportunities to provide support outside of mental health facilities, and for adequate funding to bodies to do so. In our view, Aboriginal community-controlled organisations with trained Aboriginal Liaison Officers are best placed to provide mental health services to Aboriginal and Torres Strait Islander peoples.

We note that these are the views of the Australian NPM, and we acknowledge they may not represent the diverse perspectives of all Aboriginal and Torres Strait Islander peoples in Australia.

We hope these comments assist with the SPT's future monitoring of circumstances of those deprived of their liberty in Australia.

# Our next steps

The Australian NPM will be releasing its first Annual Report, covering 1 July 2022 to 30 June 2023, in early 2024. In accordance with Article 23 of OPCAT, we will ensure the Report is disseminated widely, and welcome any support from Australian governments and from the SPT in doing so.

We are pleased with the decision of government to request the SPT release its Report and Australia's reply. As well as an important hallmark of transparency, we also recognise the opportunity this decision brings for NPMs, regarding broader potential access to the Special Fund under Article 26 of OPCAT. This is an opportunity we will consider further in early 2024.

To support a greater publicising and awareness of OPCAT we will publish this response publicly, provide it to media outlets, and promote it on social media. We will also consider what further educative opportunities are within our capacity noting the above-mentioned funding challenges.

In the spirit of dialogue and ongoing cooperation with the SPT pursuant to Articles 11(1)(b) and 20(f) of OPCAT, we also look forward to opportunities to meet further with the SPT in coming months, to discuss updates and to help guide our next steps toward implementation.

We remain committed to a cooperative relationship with governments in a manner consistent with NPMs' strict independence under OPCAT. We look forward to ongoing dialogue with governments towards full and ongoing implementation of OPCAT in Australia, and through this, towards the prevention of torture and other ill treatment in places of detention.



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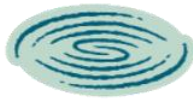
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# Australian National Preventive Mechanism

