# Australia OPCAT Network

## Joint Submission to the Australian Human Rights Commission Consultation: OPCAT and Civil Society

### 21 July 2017

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## About the OPCAT Network

The Australia OPCAT Network was formed in 2015, initially as a group of individuals interested in promoting the ratification by Australia of the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT). It has grown significantly since, consisting of individuals, non-government organisations, academics, as well as statutory and oversight agencies. The Network's objectives are to share information about OPCAT and the benefits of preventive monitoring and to promote OPCAT ratification and implementation in Australia.

This submission is made on behalf of the individuals and organisations listed below, and does not purport to represent the views of all participants engaged in the Network.

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Australian Association of Social Workers
Australian Council of Social Service
Australian Child Rights Taskforce
Australian College of Mental Health Nurses
Advocacy for Inclusion, ACT
Anglicare Australia
Asylum Seeker Advocacy Group
*Being* – Mental Health & Wellbeing Consumer Advisory Group
Civil Liberties Australia
Community Mental Health Australia
Disabled People's Organisations Australia
Doctors for Refugees
Federal Loves Refugees
Human Rights Law Centre
Human Rights Council of Australia
Jesuit Social Services
National Aboriginal and Torres Strait Islander Legal Services
National Ethnic Disability Alliance
National Justice Project
NSW Council for Civil Liberties
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# Introduction

The Australia OPCAT Network welcomes the opportunity to provide a submission to the Australian Human Rights Commission (AHRC)'s Consultation on the Optional Protocol to the Convention Against Torture (OPCAT) and Civil Society.

In preparing this submission, we have responded to the questions posed in the discussion paper. Rather than prescribing the 'ideal' National Preventive Mechanism (NPM) for Australia, this submission seeks to elucidate key principles to guide the design and implementation of a NPM in Australia.

One of the most fundamental of these principles is ensuring that discussions and decisions around NPMs are open, transparent and consultative, including with civil society. This consultation and engagement must occur from the outset.

In light of this, we believe that the designation of the "Central Coordinating NPM" must be open to further discussion and engagement with civil society. In particular, while the Commonwealth Government has indicated that the Commonwealth Ombudsman will assume the role of the Central Coordinating NPM, we believe this should be open to further discussion, both in terms of which body should take on the central coordinating role and the precise nature of its role and functions.

Assuming Australia adopts a mixed model NPM[1], in our view it is essential that the Central Coordinating NPM, in addition to adhering to the powers and guarantees required by the OPCAT, have the following features:

(a) Providing and promoting an innovative and dynamic approach to prevention of ill-treatment through OPCAT implementation rather than focusing purely on compliance with the letter of OPCAT or seeking minimal changes to existing monitoring. Australia has an opportunity to provide global leadership in prevention practice;

(b) A willingness to provide strong leadership for all NPMs, including identifying and addressing thematic issues across jurisdictions;

(c) A drive to ensure that monitoring standards and visit methodologies are in line with international human rights standards and consistent across jurisdictions and places of detention, including by undertaking joint visits with other NPMs, and that there are no gaps in oversight; and

(d) A willingness to work with civil society, including an openness to collaborate.

Thus, references to the "Central Coordinating NPM" in this submission should be considered in light of the above.

[1] As proposed by the Commonwealth Government. See Australian Human Rights Commission, (2017), *OPCAT in Australia: Discussion Paper*, para. 38. This approach is consistent with the 2012 report of the Commonwealth Parliament's Joint Standing Committee on Treaties, which noted: "It is anticipated that implementation will involve designating a range of existing inspection regimes at the jurisdictional level, utilising a cooperative approach between the Commonwealth and the States and Territories", Report 125, Chapter 6: OPCAT, (21 June 2012), para. 6.29. The Committee's report further supports Recommendation 2 of the report: Harding, R., Morgan, N., (2008), *Implementing the Optional Protocol to the Convention against Torture: Options for Australia*, Centre for Law and Public Policy, The University of Western Australia.

**Recommendation:**

*To the Commonwealth Government*

Conduct broad and open consultations, particularly with civil society, on the appropriate entity to perform the role of Central Coordinating NPM.

## Question 1. What is your experience of the inspection framework for places of detention in the state or territory where you are based, or in relation to places of detention the Australian Government is responsible for?

1.1 The many existing monitoring bodies in Australia at federal, state and territory level can provide a useful starting point for establishing an OPCAT-consistent monitoring regime. However, the overall framework has a number of shortcomings including:

(a) The existing oversight frameworks for places of detention in Australian states and territories are generally not fully compliant with OPCAT having regard to their scope, coverage, resourcing, the standards they engage and the rigour of their monitoring protocols and processes. Arrangements for independent inspection of places of detention have been found to be inadequate in independent reports – see for example the Risdon Prison Complex Inquiry conducted for the Tasmanian Government by Mick Palmer AO OPM.[2] It is difficult to obtain a clear overview of the situation without a stocktake of all places of detention, the existing monitoring bodies and limitations and overlap in function, but there are many inconsistencies within and between different jurisdictions.

(b) The existing monitoring frameworks generally focus on reactive rather than regular proactive or preventive monitoring. While a reactive response to the reporting of complaints has a necessary and legitimate function, addressing systemic issues requires a proactive, sustained and preventive approach – one which does not rely upon vulnerable and disempowered persons deprived of their liberty to identify, articulate and progress a complaint in circumstances where they are likely subject to a significant power imbalance. These individuals may also face issues such as limited understanding of complaint mechanisms, limited capacity to engage with such mechanisms, communication difficulties and fear of reprisal. Such problems are apparent in the application of anti-discrimination legislation, which represents Australia's most well-developed framework for responding to human rights violations at a federal level. The reliance on a reactive, rather than proactive, approach to responding to human rights violations has been well established as a deficiency in anti-discrimination frameworks in Australia. Several entities, such as the Commonwealth and state/territory Ombudsmen, have own motion powers to review conditions and treatment in detention. These powers are important but are generally activated only in response to known concerns or patterns of complaints being made.

(c) Many monitoring entities lack the mandate for the holistic, systematic and human rights-focused approach necessary for OPCAT-compliant monitoring. For example, some monitors (including some Ombudsmen) tend to focus on maladministration (particularly in response to complaints) or compliance with existing laws rather than employing a holistic, human rights focus, including considerations of compliance with Australia's international human rights obligations. Only two jurisdictions in Australia (the Australian Capital Territory and Victoria) have human rights legislation that directly imports international human rights standards as a benchmark.

(d) Some monitoring bodies lack the functional independence required by OPCAT, as they are located within the Department responsible for the place of monitoring (for example, the Office of Corrective Services Review in Victoria, located within the Department of

[2] M. Palmer, (2011), *Report on the Independent Inquiry into the Risdon Prison Complex*.

Justice). Functional independence of monitoring mechanisms and their staff is a requirement under Article 18(1) of the OPCAT.

(e) Some monitoring bodies are insufficiently resourced to fully perform their functions, or to perform their functions in a manner consistent with the requirements of the OPCAT. The ACT Human Rights Commissioner, for example, has the power to conduct human rights 'audits' of places of detention including juvenile and adult correction, and secure mental health facilities. There is no mandated frequency for these audits, and due to resourcing limitations reviews occur on average every two to three years across all places of detention. One-off or irregular audits are not sufficient to meet OPCAT requirements as they provide a snapshot of a point in time rather than creating an ongoing mechanism to monitor, analyse and address risk.

(f) Many monitoring bodies lack the functions and powers required under the OPCAT, including the authority to undertake regular visits; the ability to conduct unannounced visits; unhindered access to staff, those deprived of their liberty, and all relevant documentation and information; the ability to conduct private interviews with persons deprived of their liberty; and the power to report publicly on their findings.

(g) Staff of some existing monitoring bodies may lack sufficient professional and personal diversity, and often do not include professionals with specific expertise (such as medical professionals), skilled advocates with experience in the area, people with lived experience of places of detention, gender/ethnic diversity, people with child/adolescent health expertise in places where children are detained, people with a disability and Aboriginal or Torres Strait Islander peoples. Diversity is crucial, although it is important to ensure members are, and are seen to be, fully independent of the place being monitored. As an example, monitoring bodies charged with responsibility for institutions where persons with psycho-social impairment are detained should ideally include a mix including persons with professional expertise in mental illness, persons with lived experience of mental illness and skilled advocates with experience working with people with mental illness.

(h) There are currently gaps in preventive oversight across all places where persons are deprived of their liberty. In many jurisdictions, there is little or no OPCAT-compliant oversight of places such as police cells and lock ups, police and court transport vehicles, transfer between jurisdictions, secure mental health facilities and closed disability residences.

(i) There is a need for greater accountability and visibility of visiting methodology. Good practice examples of transparency around standards are the Western Australian Office of the Inspector of Custodial Services (WA OICS) and the New South Wales Inspector of Custodial Services, who have both published their own standards, including standards specific to vulnerable groups of Aboriginal and Torres Strait Islander detainees and young people.[3] However, at present, many monitoring bodies in Australia do not publish or reference the methodology and reports from visits (which should illustrate, for example, the standards used for assessing places of detention; the analysis of the evidence gathered and an assessment of whether those standards were met; the process followed during a visit; the expertise of the visiting team etc.). The Commonwealth Ombudsman, for

[3] See, e.g., WA OICS, (2007), *Code of Inspection Standards for Adult Custodial Services*; WA OICS, (2008), *Inspection Standards For Aboriginal Prisoners;* WA OICS, (2010), *Code of Inspection Standards For Young People in Detention;* NSW Inspector of Custodial Services (2014), *Inspection standards For adult custodial services in New South Wales*, NSW Department of Justice; NSW Inspector of Custodial Services (2014), *Inspection standards for juvenile justice custodial services in New South Wales*, NSW Department of Justice.

example, has a role monitoring immigration detention, yet few reports are published. This results in lack of clarity in basic areas such as the standards used, the performance against standards, and trends over time. Detailed international detention standards and guides for detention monitors exist, varying from the general[4] to the specific[5], from which Australian monitoring bodies could draw upon to produce standards tailored to local conditions.

(j) There is often a lack of public reporting on the issues identified during visits. At present, some monitoring bodies publish reports of monitoring visits and some do not. There is currently scant good practice guidance around the publication of and protocols around visit reports specific to closed environments in Australia. When it comes to publishing visit reports, there are a range of options available to monitoring bodies – for example publishing summary visit reports or reports from certain types of visit. For example, the WA OICS publishes reports on its inspections, making these available online, and these form an important part of the policy debates in Western Australia. The French NPM has adopted the practice of publishing recommendations from visits, and since 2016 has published thematic reports about issues arising from visits.[6]

(k) There is also a general lack of rigour and consistency in the way detaining authorities respond to the findings and recommendations of inspection bodies. To make a real difference, an effective inspection regime should require full and public responses by authorities to the recommendations of inspection bodies.[7]

(l) In some cases, there is a lack of formal and consistent engagement with civil society, particularly organisations working with and advocating for the rights of people in detention. It is instructive to note that although at an international level States are not required to publish reports from the United Nations Subcommittee on Prevention of Torture (SPT) and their own responses to them, it is regarded as best practice to do so.[8]

(m) In some cases, there is a lack of coordination among existing oversight mechanisms which can result in confusion, inefficiencies, duplication of roles, and gaps that are not filled. Many jurisdictions have multiple entities with oversight responsibilities for the same place of detention. In one jurisdiction, for example, entities responsible for oversight or complaint-handling in relation to adult corrections include eight different statutory office holders. Adding a new entity as the NPM, or expanding an existing entity's function to include the NPM role may add further complexity. For all jurisdictions, ensuring multiple oversight entities have clearly defined roles with limited overlap, and that they function in a complementary way is crucial for effective oversight. For jurisdictions where there

[4] An example of a general set of standards around prisons is the revised *Standard Minimum Rules for the Treatment of Prisoners* (Mandela Rules), A/RES/70/175, Adopted 17 December 2015.

[5] An example of a guide for monitoring a specific type of detention is: The Association for the Prevention of Torture, (2013), *Monitoring Police Custody: a practical guide*.

[6] See, e.g., Association for the Prevention of Torture website, *France – NPM Reports and Recommendations*. http://www.apt.ch/en/opcat_pages/reports-recommendations-26/

[7] This is consistent with Article 22 of OPCAT which states: "The competent authorities of the State Party concerned shall examine the recommendations of the national preventive mechanism and enter into a dialogue with it on possible implementation measures."

[8] Just under half of SPT reports have been made public by states and western democratic countries; e.g., New Zealand, Germany, Sweden, Netherlands and Italy have all made the SPT visit reports and the state responses public. In a regional context, there is a similar situation with respect to the work of the European Committee on the Prevention of Torture (CPT). Under Article 11 of the *European Convention for the Prevention of Torture and Inhuman or Degrading Treating or Punishment*, the report relating to a visit remains confidential until the authorities of the state concerned request its publication. There is no legal obligation for the state to publish the report. However, most states request publication of the CPT visit report.

are too many entities mandated to perform similar roles, the process of designating the NPM(s) represents an opportunity to simplify or streamline oversight practices.

With a limited number of exceptions, these deficiencies place Australia well below the minimum standards required for OPCAT compliance.

1.2 There are also significant coverage gaps within the monitoring framework. While some of these gaps relate to settings that fall under the jurisdiction of state and territory governments, there are also monitoring gaps affecting some of the most vulnerable in the custody and care of the Commonwealth Government. These gaps in Australia's monitoring framework include:

(a) court custody;

(b) prisoner and detainee transport;

(c) congregate care and segregated facilities for people with intellectual disabilities;

(d) psychiatric treatment facilities;

(e) compulsory drug and alcohol treatment centres;

(f) military detention;

(g) immigration detention; and

(h) aged care.

**Recommendations:**

*To all stakeholders*

The NPM should be designed with a broad and comprehensive framework of monitoring bodies covering all places of detention in Australia.

The bodies must:

- take a holistic, forward-looking, systemic approach to improving human rights compliance;
- have functional independence (including absolute discretion to determine how its budget is spent, fully independent staff, reporting to Parliament or Legislative Assembly);
- be adequately resourced, and appropriately staffed with diverse and appropriately trained professionals in accordance with internationally accepted best practice;[9]
- be empowered to exercise all requisite functions and powers that are set out in law;
- be required to comply with an appropriate visiting methodology in discharging their functions;
- be required to meet mandatory reporting requirements that are sufficiently timely and comprehensive.

*To the Commonwealth Government*

The Commonwealth Government should implement a new framework of monitoring bodies that is OPCAT compliant;

[9] See, e.g., Association for the Prevention of Torture, (2013), *Membership of National Preventive Mechanisms: Standards and Experiences*, OPCAT Briefing Series.

The Commonwealth Government should prepare a comprehensive stocktake of places and settings that fall within the ambit of OPCAT, corresponding monitoring bodies, and the extent to which these existing monitoring bodies are OPCAT compliant. This should not cause significant delay to the NPM deliberation process as it can build on work undertaken in this area to date by civil society and others.

## Question 2. How should the key elements of OPCAT implementation in Australia be documented?

2.1 With much of the detail of OPCAT implementation yet to be finalised, it is crucial the key elements and steps involved in establishing NPMs are documented through clear statutes, regular public reporting on implementation progress, intergovernmental agreements and formalised implementation plans.

2.2 The involvement of civil society is essential throughout this process, and consideration should also be given to developing Memoranda of Understandings to formalise the involvement of non-government organisations.

### *The importance of legislation to give effect to the OPCAT*

> *The mandate and powers of the NPM should be clearly set out in a constitution or legislative text.*
>
> — SPT Guidelines on national preventive mechanisms (2010)[10]

> *A comprehensive Commonwealth statute should be enacted to enshrine OPCAT and to set out the processes through which it will be implemented across Australia. Complementary State and Territory legislation should follow.*
>
> — Richard Harding and Neil Morgan (2008)[11]

2.3 To guarantee that monitoring bodies comply with the requirements of OPCAT, it is imperative their mandate, powers and independence are anchored in legislation.

2.4 The SPT affirms that such legislation is essential, and recommends that in addition to describing the body's specific NPM mandate and powers, implementing legislation should also include provisions regarding appointment processes for staff and members, its terms of office, its funding and its lines of accountability.[12] Legislation to give effect to OPCAT should include the following features:

(a) A mandate to undertake regular preventive visits;

(b) Organisational and functional independence from government, including independence of NPM members and staff and financial autonomy;

(c) Multidisciplinary and diverse expertise, including gender balance and representation of ethnic and minority groups;

(d) Free and unfettered access (to all places of detention, whether announced or unannounced; to all relevant documents and information; and to all persons including public employees and privately engaged contractors, including the right to conduct private interviews);

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[10] SPT Guidelines on national preventive mechanisms, (2010), CAT/OP/12/5, para. 7.

[11] Harding, R., Morgan, N., (2008), *Implementing the Optional Protocol to the Convention against Torture: Options for Australia*, Centre for Law and Public Policy, The University of Western Australia.

[12] Subcommittee on Prevention of Torture, (2008), *First annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, February 2007 to March 2008*. See also: Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (2010), *Guidelines on national preventive mechanisms*, Twelfth session, 15–19 November 2010: Geneva.

(e) The power to make recommendations to authorities, accompanied by a corresponding obligation for authorities to examine recommendations and enter into dialogue about their implementation;

(f) The power to submit proposals and observations to Parliament or the public concerning existing or proposed legislation;

(g) Appropriate privileges and immunities (no sanctions or reprisals for communicating with the NPM; confidential information should be privileged); and

(h) Ability to directly contact the SPT.

2.5 Legislation in New Zealand provides an example of how OPCAT provisions can be incorporated into law.[13]

2.6 Providing statutory definition of the role, expectations and powers of the NPM can be particularly important for monitoring bodies that have a broad institutional remit. In the AHRC's Consultation Paper, it is proposed that a "mixed model" be adopted for the NPM in Australia, with an overarching national coordinating mechanism at the Commonwealth level, and subsidiary NPMs that will enable "states and territories to harness and adapt existing inspection mechanisms." While this mixed model is suitable in the context of Australia's federal political structure, it is crucial that existing monitoring bodies are *not* designated as NPMs *without* supporting legislation for all jurisdictions. Given the likelihood that Australia's ratification of OPCAT would be subject to a declaration under Article 24 to delay obligations regarding the NPM for three and potentially a further two years[14], a legislative basis for NPMs in all jurisdictions post-ratification – but prior to NPMs becoming operational – is a feasible proposition.

2.7 For example, in some jurisdictions, the designation of an Ombudsman or Human Rights Commission may be an obvious choice, but it will still require changes to legislation and practice. While these bodies may already have statutory independence and some of the powers required under OPCAT, they are not necessarily mandated to operate according to the specific NPM features detailed in Part IV of OPCAT. For example, existing bodies such as the Commonwealth Ombudsman may have several of the requisite statutory powers, independence and guarantees, but this does not automatically guarantee compliance with the provisions of OPCAT. As Richard Harding has noted, the Commonwealth Ombudsman has been created to cover a "multiplicity of functions and activities", and its principal expertise and statutory mandate "does not necessarily lie in inspecting closed institutions against international human rights standards"[15]. Nor does the Commonwealth Ombudsman have the power to enter unannounced all places of detention under the jurisdiction of the Commonwealth. While there is variation in the scope and powers of state and territory Ombudsmen offices, most tend to be complaints-focused, with administrative law and fair process the primary point of reference (rather than a whole-of-system preventive approach

[13] New Zealand ratified OPCAT in 2007, and designated five existing institutions as its NPM through amendments to the *Crimes of Torture Act 1989* (NZ). Section 27 states the functions of an NPM include examining the conditions of detention and treatment of detainees, and making recommendations to improve conditions and treatment and prevent torture or other forms of ill treatment. Sections 28-30 set out the powers of NPMs, ensuring they have all powers of access required under OPCAT. In addition, section 32 sets out the functions of the Central NPM, which include coordinating the activities of the NPMs and maintaining effective liaison with the UN Subcommittee on Prevention of Torture.

[14] See: National Interest Analysis, (2012), *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on 18 December 2002.*

[15] Harding, R., (2012), *Proposal for Australia to Ratify OPCAT: Submission to the Joint Standing Committee on Treaties*, 28 February 2012.

drawing on international human rights norms which is best practice), although the legislative adoption of international human rights principles in Victoria and the ACT means that monitoring in those jurisdictions operates within this broader framework.

2.8 The importance of legislation has been illustrated in countries such as the Netherlands that have adopted a 'minimalist approach' in relation to implementing legislation. In these instances, existing bodies (often Ombudsmen-type bodies) have been designated as NPMs either via executive decree, formal declaration on ratification, or the insertion of a brief statement into legislation to indicate that the institution would become the NPM.[16] Without detailed legal provisions giving effect to the NPM mandate, these monitoring bodies have tended to maintain the existing (reactive) approach to oversight. They typically lack the holistic and preventive approach to monitoring and oversight required by the OPCAT. As the Association for the Prevention of Torture (APT) notes:

> *In some cases… the NPM mandate of NHRIs has no legal basis… This can create challenges in terms of protecting the permanence and independence of the NPM as well as ensuring that the authorities understand and accept the NPM's mandate and powers. In addition, it is important to provide the NPM mandate with the same status as the other functions performed by the NHRI to avoid it being diluted as a priority within the institution.*[17]

Without legislation that clearly sets out the powers of NPMs, they may have difficulty accessing places of detention and talking to persons deprived of their liberty, particularly in non-traditional places. Clearly setting out the powers of NPMs in statute from the outset is a means to avoid this problem.

2.9 The problems encountered by the Netherlands' NPM underscore the importance of implementing legislation. The Netherlands ratified the OPCAT in 2010, and subsequently designated six existing bodies as the NPM via a letter to the SPT. Four additional institutions were nominated as "associates" to the NPM. No legislative provisions were made to give effect to this designation or to detail the NPM-specific functions of the designated bodies. As a result, the NPM has remained largely invisible, and the bodies designated with NPM functions have not consistently undertaken OPCAT-complaint monitoring and oversight. In 2014, the Netherlands' National Ombudsperson's Office withdrew from the NPM, criticising the functioning and structure of the mechanism and its insufficiently independent monitoring visits. In a visit to the Netherlands in 2016, the SPT identified the lack of a legal basis (along with commensurate resourcing) to be the central obstacles in the implementation of the OPCAT:

> *While acknowledging the existence of legal provisions providing the foundational basis for each individual institution within the NPM, a striking weakness in the current functioning of the NPM is the absence of a separate legislative text regulating NPM-specific functions, an NPM mandate, the relationship between NPM members and other bodies, such as observer institutions and the Netherlands Institute for Human Rights, and other issues that ought to be regulated, in line with part IV of the OPCAT…*
>
> *While the institutional format of the NPM is left to the State Party's discretion, it is imperative that the State Party enact NPM legislation which guarantees an NPM in full compliance with OPCAT*

[16] Steinerte, E., Murray, R., (2009), 'Same but different? National human rights commissions and ombudsman institutions as national preventive mechanisms under the Optional Protocol to the UN Convention Against Torture', *Essex Human Rights Law Review* 6(1):54-72.

[17] Association for the Prevention of Torture (APT), (2013), *National Human Rights Institutions as National Preventive Mechanisms: Opportunities and challenges*, APT Briefing Series.

*and the NPM Guidelines. Indeed, the SPT deems the adoption of a separate NPM law as a crucial step to guaranteeing this compliance.*[18]

2.10 The SPT observed that lack of legislation meant that each of the monitoring bodies that comprised the Netherlands' NPM lacked institutional stability and had divergent powers, unequal access to information, and insufficient functional and financial independence.

2.11 Simple designation of existing institutions without accompanying legislation can also have implications in terms of the resourcing of NPMs and the impetus for institutional reform. In the example of the Netherlands, each body already undertook various compliance and complaints-based oversight, and no additional funding was provided to undertake NPM-related functions.[19] This is despite Article 18(3) of the OPCAT containing a positive obligation for States Parties to provide both the necessary resources and adequate funding for the effective functioning of NPMs. In the absence of such funding and any legislative requirements, most of the designated NPMs in the Netherlands did not incorporate the broader preventive mandate and visiting methodology required by OPCAT. To ensure full compliance with OPCAT and NPM Guidelines, the SPT recommended that the Netherlands include in its implementing legislation a requirement for a separate line in the Government's budget for the funding of the NPM. This legislation should, furthermore, require that such funding be ring-fenced from other functions, thereby guaranteeing financial and operational authority for NPM-related functions within monitoring bodies with wider institutional mandates.

2.12 Given Australia's federated political structure, it is likely that the mixed model NPM in Australia will consist of many monitoring bodies. Having a legislative framework that covers these key OPCAT requirements across all jurisdictions is an important way of clarifying the entities and their role and function, and would help promote consistency of approach across jurisdictions. It would not be necessary to enact this legislation prior to ratification of OPCAT, but it should be enacted prior to the NPM commencing functioning.

**Recommendation:**

*To the Commonwealth, and State and Territory governments*

The role and functions of the NPMs, as required by OPCAT, should be enshrined in legislation in all jurisdictions.

### *Ensuring existing laws do not override NPM functions*

2.13 In addition to enacting legislation to give full effect to the features and requirements of NPMs, a further consideration is ensuring that other statutes do not impede their operation. For example, a fundamental requirement of OPCAT is that individuals can communicate freely with the NPM without fear of sanctions or reprisals. Further, implementing legislation should also permit an NPM to disclose or publish data about individuals when they give their express consent. These requirements, however, would not be met under current laws that apply to immigration detention. Public officials, consultants and contractors who work at immigration detention facilities can be criminally liable under Commonwealth laws (such as the *Australian Border Force*

[18] UN Subcommittee for the Prevention of Torture, (2016), *Visit to the Netherlands for the purpose of providing advisory assistance to the national preventive mechanism: recommendations and observations addressed to the State party*, CAT/OP/NLD/1, paras. 24-26.

[19] Association for the Prevention of Torture, (2016), *OPCAT Country Update: Netherlands*.

*Act 2015 (Cth)* (ABF Act) and *Crimes Act 1914 (Cth)*) if they disclose certain information. To clarify the scope of the secrecy provisions in the ABF Act, a rule was legislated (the *Australian Border Force (Secrecy and Disclosure) Rule 2015 (Cth))* that authorises disclosure by immigration detention staff and consultants to a large number of government agencies. However, this Rule does not authorise disclosure to the Commonwealth Ombudsman or the Australian Human Rights Commission.

2.14 To ensure the NPM can access all necessary information (such as medical records, commercial-in-confidence contractual details, etc.), and without repercussions for individuals providing such information, further consideration may also need to be given to existing statutory and common law duties and responsibilities and contractual arrangements regarding privacy and security.

**Recommendation:**

*To the Commonwealth, and State and Territory governments*

Ensure that all necessary measures be taken, including legislative amendment of existing statutes if required, to ensure that NPMs can fully and effectively perform their functions in accordance with OPCAT, including in relation to privacy provisions and protections against reprisals for persons who report or raise issues with the NPM.

### *Ensure laws allow for the visiting powers and mandate of the SPT*

2.15 Current legislation across jurisdictions will need to be reviewed and, if necessary, new legislation enacted to guarantee the SPT has the necessary powers and protections should they visit Australia. According to the National Interest Analysis (NIA) that was undertaken in 2012, existing law provides for the required privileges and immunities of Subcommittee members performing their duties in Australia. Specifically, the *Convention on the Privileges and Immunities of the United Nations* is given effect in Australia by the *International Organisation (Privileges and Immunities) Act 1963 (Cth)* and the *United Nations (Privileges and Immunities) Regulations 1986*. The NIA indicates that "some changes to Commonwealth, State and Territory laws and policies will be required to clearly enable the Subcommittee to carry out its functions in the context of other statutory, and common law duties and responsibilities and contractual arrangements, for example, about privacy and security".[20]

**Recommendation:**

*To the Commonwealth, and State and Territory governments*

Review and, if necessary, amend existing legislation and/or other regulatory or contractual arrangements to ensure the SPT can exercise its visiting functions in Australia, as required by the OPCAT.

[20] National Interest Analysis, (2012), *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on 18 December 2002*, para. 29. In 2012, an inter-jurisdictional working group developed model legislation for jurisdictions to allow the SPT to visit to places of detention and access necessary information. In 2013, several jurisdictions introduced Bills based on this model legislation.

### *Intergovernmental agreement*

2.16 The nature of Australia's federal system and its constitutional underpinning means that intergovernmental cooperation on implementing the OPCAT is essential. The Australian Government has already indicated that a 'mixed model' will be adopted for the preventive monitoring framework, whereby the Commonwealth creates or empowers a national coordinating NPM and the States and Territories create subsidiary NPMs to cover places of detention within their own jurisdictional authority.

2.17 It is crucial, however, that arrangements are formalised and documented to drive national coordination and consistency and ensure momentum in the implementation process is maintained across jurisdictions. The Council of Australian Governments (COAG) provides an appropriate avenue for developing this intergovernmental agreement, building on existing work that has been undertaken by the Law, Crime and Community Safety Council (LCCSC).

### *Formal implementation plan*

2.18 We recommend that Australia develop a clear implementation plan, including ways to address potential challenges arising from federalism, as early as possible. This implementation plan should include clear timeframes, responsibilities, budget, and milestones against which progress can be monitored.

### *Periodic reporting*

2.19 To support implementation, there should be regular reporting on the progress of OPCAT implementation, with reports provided on progress across jurisdictions. As the SPT has highlighted in its *Guidelines on National Preventive Mechanisms:*

> *The effective operation of the NPM is a continuing obligation. The effectiveness of the NPM should be subject to regular appraisal by both the State and the NPM itself taking into account the views of the SPT, with a view to it being reinforced and strengthened when necessary.*[21]

To support regular appraisals and reporting, consideration could be given to the use of the SPT self-assessment tool and matrix as a way of documenting progress and evaluating the compliance of designated NPMs with different aspects of the OPCAT mandate.[22] These tools encourage NPMs to engage in dialogue regarding their ongoing development and their effectiveness across a range of areas including: internal organisation; planning; working strategy; visiting methodology; visit reports; prevention of reprisals; legislative issues; cooperation and communications; systematisation of experiences; budget prioritisation; internal capacity building; and annual reporting.

2.20 The self-assessment process has been used successfully in other countries that have ratified the OPCAT. For example, the United Kingdom (UK) NPM conducted a self-assessment process in 2014. In a context where there are multiple monitoring bodies that comprise the NPM, the UK's self-assessment process prompted NPM members to evaluate how they integrated OPCAT requirements into their work and to identify specific areas on which they needed to make progress, as well as highlighting common issues that could be addressed across the NPM. For an NPM made up of multiple pre-existing bodies, this approach has been useful to reinforce members'

[21] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2010), *Guidelines on national preventive mechanisms.* Twelfth session, 15–19 November 2010: Geneva.

[22] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2016), *Analytical assessment tool for national preventive mechanisms*.

understanding of what the OPCAT requires, and has been subsequently adopted on an annual basis to support continuous improvement and to chart the NPM's progress.[23]

**Recommendation:**

*To the Commonwealth, and State and Territory governments (as appropriate)*

Ensure that appropriate planning, documentation and accountability measures are in place – including intergovernmental agreements, formal implementation plans and a reporting framework – to ensure timely progress towards functioning and OPCAT-compliant NPMs within 3 years of ratifying the OPCAT.

### *Protocols to support establishment and operation of NPMs*

2.21 The Central Coordinating NPM should play an important role in coordination and strategic direction for other NPMs. Protocols and guidelines issued by the Coordinating NPM can assist in setting direction, and bringing consistency in approach across jurisdictions.

**Recommendation:**

*To the Central Coordinating NPM*

In consultation with civil society, the SPT and relevant Government agencies, develop guidelines and protocols to support jurisdictions in establishing and operating NPMs.

### *Memoranda of Understanding and cooperation agreements*

2.22 Where appropriate, memoranda of understanding (MOUs) or formal cooperation agreements could be used to facilitate cooperation and information exchange between the NPM and civil society or government entities.

2.23 In overseas jurisdictions, some NPMs have developed cooperation agreements to support the involvement of non-government organisations (NGOs) and academic institutions in an advisory capacity or in relation to specific areas of expertise. For example, in Denmark, the Parliamentary Ombudsman (the designated NPM) has entered into formal agreements with the Danish Institute of Human Rights and the non-government organisation DIGNITY (formerly known as the Rehabilitation and Research Centre for Torture Victims). These bodies provide direct practical assistance and advice to the NPM through specialist medical and human rights expertise.[24]

2.24 In some countries, NGOs have entered into formal agreements to become a part of the NPM. While this approach has worked in some settings, it poses distinct drawbacks and risks, such as undermining the credibility and independence (both perceived and actual) of the NPM and the NGO involved.[25]

[23] United Kingdom National Preventive Mechanism, (2015), *Factsheet: Self-assessment of the UK NPM*.

[24] Association for the Prevention of Torture, (2015), *Denmark – OPCAT Situation.*

[25] Olivier, A., & Narvaez, M., (2009), 'OPCAT Challenges and the Way Forward: The ratification and implementation of the Optional Protocol to the UN Convention against Torture', *Essex Human Rights Review* 6(1):6-14.

2.25 Cooperation agreements between monitoring agencies can be useful to support the implementation of OPCAT, particularly where there may be overlap in their remit and function. For example, formal protocols between several monitoring bodies in the United Kingdom have been established to protect prisoners and detainees from sanctions which might take place because of communicating with the UK NPM.[26,27] These protocols set out each monitoring body's obligations under the OPCAT, and outline joint processes and collaborative arrangements to prevent reprisals and identify and act on any instances where sanctions are applied.

2.26 Such agreements can also help to maintain the distinction between the NPM's preventive monitoring functions and the oversight responsibilities of other agencies, such as complaints handling and investigating instances of professional misconduct. Cooperation agreements can include referral protocols so that individual complaints, for example, are referred to the appropriate agency. Conversely, information from other monitoring bodies can help to inform the ongoing work of the NPM, such as information on the number and types of complaints received in relation to specific places of detention. In such instances, it is important care is taken in defining the role, purpose and modality of information sharing. It may be necessary to protect certain information received by the NPM, for example to ensure the confidentiality of information received by members of the NPM (unless consent is received to transmit the information).

**Recommendation:**

*To the Central Coordinating NPM and other NPMs*

Consider the use of Memorandum of Understanding to clarify and formalise cooperation with other NPMs and with civil society organisations.

[26] National Preventive Mechanism of the United Kingdom, (2015), *Protocol between Her Majesty's Inspectorate of Prisons, Independent Monitoring Boards (IMBs) and the Prisons and Probation Ombudsman (PPO)*.
[27] National Preventive Mechanism of the United Kingdom, (2016), *Protocol between Her Majesty's Inspectorate of Prisons (HMI Prisons) and Her Majesty's Inspectorate of Constabulary (HMIC)*.

## Question 3. What are the most important or urgent issues that should be taken into account by the NPM?

### *Incarceration of Aboriginal and Torres Strait Islander peoples*

3.1 The disproportionately high rates of incarceration of Aboriginal and Torres Strait Islander peoples, and recent dramatic increases in rates of imprisonment of Aboriginal and Torres Strait Islander women,[28] is a matter of pressing concern and must be high on the agenda of all NPMs. Consideration must be given to ways to ensure NPMs are responsive to the issues specific to Aboriginal and Torres Strait Islander detainees and have the appropriate skills, expertise and cultural competencies to address them. An interesting example of general oversight entities with specific expertise in Aboriginal and Torres Strait Islander issues is the Western Australian Office of Inspector of Custodial Services (WA OICS) that has developed monitoring standards specific to Indigenous detainees.[29] In relation to designating NPMs, consideration should be given to whether better outcomes could be achieved in some jurisdictions by designating NPMs with a specific focus on the incarceration of Aboriginal and Torres Strait Islander detainees. Other NPMs around the world include entities with specific focus on a cohort of detainees. For example, the New Zealand Children's Commissioner is one of the five NPMs and focuses on detention of children and young people – although it has joint responsibility with the New Zealand Ombudsman in relation to young persons' residences. In Australia, there are oversight entities that specifically focus on Indigenous detainees – for example, there is an Aboriginal and Torres Strait Islander Official Visitor for adult corrections in the ACT.

### *Other individuals in a situation of vulnerability*

3.2 People with disability are vastly overrepresented in all places of detention, including traditional sites such as prisons, forensic mental health centres, aged care facilities and juvenile detention centres.[30] In addition, people with disability are overrepresented in less traditional, often disability-specific places of detention, such as locked psychiatric wards, closed community-based residences for people with disability and compulsory care facilities. As such, all NPMs must be responsive to the needs of this cohort in the range of settings in which they are deprived of their liberty.

3.3 The NPM must be mindful of other persons or groups in situations of vulnerability that can arise in closed environments, and ensure monitoring is sensitive to particular needs. These groups may include, for example, children; women; Lesbian, Gay, Bisexual, Transgender, Intersex and Queer detainees; those from non-English speaking backgrounds; survivors of torture or trauma; non-citizens; and minority groups.[31]

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[28] The imprisonment rate of Aboriginal and Torres Strait Islander women has increased 148 per cent since the Royal Commission into Aboriginal Deaths in Custody in 1991. See Human Rights Law Centre and Change the Record Coalition, (2017), *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment.*

[29] See Western Australia Office of Inspector of Custodial Services, (2008), *Inspection Standards for Aboriginal Prisoners.*

[30] Baldry, E., (2014), 'Disability at the Margins: Limits of the Law', *Griffith Law Review* 23(3):370-388; People With Disability Australia, (2014), *Consideration of the 4th and 5th Reports of Australia by the Committee to the Convention Against Torture*.

[31] The Association for the Prevention of Torture's *Detention Focus* website (http://www.apt.ch/detention-focus) is a useful tool for monitoring bodies as it covers key issues in treatment and care of detainees, including specific considerations for the groups at risk mentioned.

### *Specific places of detention that are of immediate concern*

3.4 Specific places of detention that are of immediate concern include:

(a) Disability-specific institutions: these must be specifically included within the monitoring framework. This is crucial given that the current oversight framework has been shown to be fundamentally inadequate in protecting people with disability from violence, abuse and neglect.

(b) Secure mental health facilities: the National Mental Health Commission and the circumstances prompting the current NSW Government's Review of seclusion, restraint and observation of consumers with a mental illness in NSW Health facilities have drawn attention to the need for urgent reform in this sector.

(c) Police detention: A person arrested by the police is in a situation of vulnerability, and the hours in detention post-arrest can be highly traumatic and disorientating. Detainees may have specific and acute health needs, be suffering withdrawal from drugs, have concerns about children or others they have caring responsibility for, as well as uncertainty over potential charges that they may face. There have been a number of highly concerning cases of ill-treatment in police custody. This includes the tragic death of Ms Dhu in Western Australia, in relation to which the Western Australian Coroner made several recommendations with the objective of better recognising risk factors for persons in police custody.[32] There is generally no preventive monitoring of police detention in Australia; this should thus be a focus of NPM activities.

(d) Youth justice detention centres: recent acute examples of mistreatment in youth justice facilities in the Northern Territory (Don Dale), Queensland (Cleveland), and Victoria (Barwon Prison), NSW (Reiby) and allegations about abuses of children in the ACT (Bimberi) are emblematic of a number of pressing concerns around the country. Specific issues of concern include: the use of solitary confinement in youth justice centres, contrary to international human rights law; excessive use of restraints and strip searching; housing children in adult prison facilities; use of dogs to intimidate children; cruel and unusual practices such as hog-tying and sedating children; depriving children of food and medicine as punishment; and the incarceration of children considerably younger than the internationally accepted minimum age of 12 years.

(e) Aged care facilities: recent cases of abuse and ill-treatment in aged care facilities have highlighted the pressing need for preventive oversight. The Australian Law Reform Commission recently recommended "further safeguards in relation to the use of restrictive practices in residential aged care".[33] The OPCAT, and preventive monitoring, should be considered as part of these broader discussions in oversight of aged care. Although the scope of monitoring under the OPCAT framework in New Zealand does not currently cover aged care, a recent report by the New Zealand Central Coordinating NPM recommended that the New Zealand Government:

*Designate a body under the Crimes of Torture Act to ensure that those aged care and disability residences where a person is or may be prevented from leaving at their will are monitored.*[34]

(f) Immigration detention: for more than a decade there has been a succession of investigations, reviews, reports, inquiries, and whistle-blower accounts that have highlighted significant and systemic abuse in places of immigration detention. These

[32] See http://www.coronerscourt.wa.gov.au/I/inquest_into_the_death_of_ms_dhu.aspx?uid=1644-2151-2753-9965.

[33] Australian Law Reform Commission, (2017), *Elder Abuse – A National Legal Response*, Final Report, 11.

[34] M. White, (2016), *He Tiki Ara – A Pathway Forward,* New Zealand Human Rights Commission, 6.

various reports and inquiries have provided a snapshot of deplorable conditions and treatment in detention, either at a given point in time or retrospectively. However, they do not provide the basis for oversight agencies to constructively and continuously engage with detaining authorities to reduce risk and act on identified problems on an ongoing basis. The Commonwealth Ombudsman's oversight has generally been conducted out of public view, making it very difficult to comment on whether its visit methodology is OPCAT-compliant, or to evaluate the impact its visits have had on conditions and treatment. Onshore detention, including on Christmas Island, is clearly within the NPM's mandate. In addition, offshore detention is arguably the responsibility of the Commonwealth Government[35], and the Commonwealth should work closely with the governments of Papua New Guinea and Nauru to implement OPCAT-compliant monitoring of offshore immigration detention, or wherever else Australia exercises effective control over the treatment of asylum seekers and refugees. Nauru ratified the OPCAT in 2013 but is yet to establish an NPM.

3.5 The above are outlined as six examples of places of detention that are of immediate concern. By highlighting the extreme vulnerability of persons within these settings, we do not seek to detract from the many other areas requiring urgent attention. We note that current inquiries, Commissions and/or policy reforms being undertaken in these areas provide an ideal opportunity to embed the OPCAT within a new monitoring framework.

### *Broader systemic issues that the NPM should focus on*

3.6 Broader systemic issues that the NPM should focus on include:

(a) indefinite and arbitrary detention;

(b) lack of access to appropriate services whilst incarcerated, including education, healthcare and therapeutic rehabilitation;

(c) the use of Restrictive Practices (including seclusion and restraint), including on children in educational settings;

(d) adequacy of staffing (including sufficient numbers of medical practitioners) at places of detention, the training of staff, and the procedures for assessment of detainees.[36]

3.7 To explore systemic issues, we propose that a thematic approach be taken, with consideration given to the application of principles across all affected groups and across different places where people are deprived of their liberty. It is crucial that the specific and unique needs and vulnerabilities of certain groups are fully considered. However, a narrow or siloed approach can obscure important linkages or cross-cutting themes, and may reinforce the differential and adverse treatment of certain groups. For example, rather than focusing on the indefinite detention of people with cognitive disabilities, there should be a focus on indefinite detention across all

[35] M. Foster, (2007). 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State', *Michigan Journal of International Law* 28(223):261–262; UN Human Rights Committee, (2009), *Recommendation: Communication No. 1539/2006*, 96th sess, UN Doc CCPR/C/96/D/1539/2006 (July 2009) ('Munaf v Romania') 14.2; Human Rights Committee, Views: Communication No. 829/1998, 78th sess, UN Doc CCPR/C/78/D/829/1998 (2003), ('Judge v Canada') 10.6; M. Gleeson, (2015), *Offshore processing: Australia's responsibility for asylum seekers and refugees in Nauru and Papua New Guinea*, Kaldoor Centre Factsheet; UN, (2008), *Responsibility of States for Internationally Wrongful Acts*, UN General Assembly resolution 62/61, A/RES/62/61, 8 January 2008.

[36] See, e.g., the recommendations of the Tasmanian Coroner into the deaths in custody of Troy Colin Monson, Robin Michael and Scott Clifford Mitchell.

sectors, including forensic disability, mental health, aged care, corrective services and immigration detention facilities. This broadening of focus would serve a dual purpose – it would ensure that there are no gaps in coverage and would help to highlight the differential and discriminatory treatment applied to different subsets of society. This is exemplified in the case of the Forensic Disability Service Unit in Queensland. While this service was ostensibly set up to provide specialised services and support for persons with an intellectual or cognitive disability, in reality it has reinforced a siloed approach that artificially separates the lives of people with a disability and their exercise of rights. Since it commenced operation in 2011 all residents, who are persons with an intellectual or cognitive disability and forensic issues, have been indefinitely detained – a practice that is not consistent with the treatment of any other people in Queensland.[37]

3.8 In addressing systemic issues, the NPM must know what to look for. It is not sufficient for visits to focus solely on the physical conditions of detention and the presence or absence of abuse. Monitoring bodies must consider whether there is a sufficient focus on moving people out of detention, including evidence of appropriate therapeutic habilitation and rehabilitation. For example, with input from appropriate professionals, the NPM could ensure that visits include sampling and reviewing files to assess whether places and systems of detention are developing appropriate and tailored rehabilitation plans.

3.9 The role of the NPMs is to monitor all closed environments regardless of whether they are owned and operated by the government or outsourced to the private sector.[38] **Privatisation** is increasingly common for adult corrections and immigration detention. NPMs should be mindful of the trend toward increasing privatisation of disability services, and other services, such as aged care services, where people with disabilities most frequently experience abuse.

### *Current practices on solitary confinement, seclusion and restraint*

3.10 The inappropriate use of solitary confinement/seclusion/segregation, and chemical and physical restraint, is a prominent and cross-cutting concern across a range of settings, including aged care, mental health facilities, institutional and residential disability settings, forensic mental health facilities, immigration detention, juvenile detention and prisoner/detainee transportation. Considerable work has been undertaken on this issue in certain sectors. However, there is a lack of regular and independent monitoring to support the implementation of standards and principles.

3.11 There is a dearth of data about the use of solitary confinement and restraints because of inadequate collection and recording of information about these practices. This means that governments, independent inspectorates and civil society organisations do not have a comprehensive understanding of the magnitude of these issues and are therefore not equipped to respond to them appropriately. There are gaps and inconsistencies across jurisdictions in terms of policy and legislation that supports the prevention of ill-treatment in places where people are deprived of their liberty. For example, there is considerable variation in the terms of the legislation governing the use of seclusion and restraint in mental health facilities.

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[37] See, e.g., Queensland Advocacy Incorporated, (2017), *Submission to the Commonwealth Parliament Joint Standing Committee on the National Disability Insurance Scheme: Inquiry into the provision of services under the NDIS for people with psychosocial disabilities related to a mental health condition*, 20.

[38] Article 4(1) of OPCAT states "For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person 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."

3.12 A good-practice example of an NPM taking a thematic, cross-cutting approach to the use of solitary confinement, seclusion and restraint is the recent initiative of the New Zealand NPM, which commissioned an expert report on the use of seclusion and restraint.[39] Dr Sharon Shalev, an international expert in the practice of solitary confinement and seclusion, visited New Zealand to examine practices in prisons, health and disability units, children and young persons' care and protection residences and youth justice residences, and police custody suites. Importantly, having an independent expert with experience in a range of settings and countries enabled the review of New Zealand practices against international standards. Australian practices would benefit from a similar examination, using an OPCAT approach that emphasises prevention.

### *Involuntary psychiatric treatment*

3.13 NPMs should be open to considering evolving areas of international law and practice as they relate to monitoring and oversight. For example, monitoring practices around involuntary psychiatric treatment in the community is a critical issue in Australia. Victoria reportedly has the highest rates of involuntary psychiatric treatment *in the community* per capita, in the world.[40] Whilst it has not always been regarded as a traditional site of detention, preventive mechanisms should give attention to involuntary psychiatric interventions more generally, including their inherent legitimacy following developments around the Convention on the Rights of Persons with Disabilities.[41] The UN Special Rapporteur for Torture has called on all countries to:

> *Impose an absolute ban on all forced and non-consensual medical interventions against persons with disabilities, including the non-consensual administration of psychosurgery, electroshock and mind-altering drugs such as neuroleptics, the use of restraint and solitary confinement, for both long- and short- term application.*[42]

This issue is an evolving area of international human rights law, but it is one that a NPM ought to be cognisant of.

**Recommendation:**

*To all stakeholders:*

The following key issues should be considered in all aspects of NPM designation and operation:

- Ensuring NPMs are designated and operate in a way that is effective in addressing specific issues around the incarceration of Aboriginal and Torres Strait Islander peoples;
- Ensuring appropriate oversight over places of detention where detainees have particular vulnerabilities including: disability-specific institutions; secure mental health facilities; police custody; youth justice centres; aged care facilities and immigration detention.

[39] S. Shalev, (2017), *Thinking outside the box? A review of seclusion and restraint practices in New Zealand*, New Zealand Human Rights Commission.

[40] E. Light et al, (2012), 'Community Treatment Orders in Australia: Rates and Patterns of Use', *Australasian Psychiatry* 20(6):478.

[41] Minkowitz, T., (2012), *OPCAT monitoring of psychiatric institutions and related issues in other forms of detention: CRPD Framework*, Center for the Human Rights of Users and Survivors of Psychiatry; O'Mahony, C., (2012), 'Legal capacity and detention: implications of the UN disability convention for the inspection standards of human rights monitoring bodies', *The International Journal of Human Rights* 16(6):883-901.

[42] J. Méndez, UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (2013), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1 February 2013*, UN Doc A/HRC/22/53, para. 81.

- Closely consider systemic issues including: indefinite and arbitrary detention; lack of access to appropriate services whilst incarcerated, including education, healthcare and therapeutic rehabilitation; and the use of restrictive practices (including seclusion and restraint), including on children in educational settings.

## Question 4. How should Australian NPM bodies engage with civil society representatives and existing mechanisms (e.g., NGOs, people who visit places of detention etc)?

4.1 Active engagement with civil society is essential to the credibility and effectiveness of NPMs. Civil society organisations can contribute in a range of ways including:

(a) increasing awareness about the meaning and relevance of OPCAT;

(b) helping to sustain momentum and focus towards operational NPMs. Civil society advocacy can help avoid drift, deferral or a 'business-as-usual' approach to NPM designation and operation;

(c) bringing expertise and knowledge in the design and operation of the NPM;

(d) enhancing legitimacy and credibility of the NPM. As noted by the Association for the Prevention of Torture, civil society involvement in NPMs is an important way to "help to legitimize both an NPM's mandate and its credibility as an institution, not least because civil society organisations are often structurally independent from government";[43]

(e) alerting NPMs to issues of concern in relation to closed environments and working collaboratively with them to address issues;

(f) holding both government(s) and the NPMs themselves to account; and

(g) supporting the NPM, including by creating pressure for NPM recommendations to be implemented.

4.2 It is important to stress that such engagement should be meaningful, not tokenistic or an afterthought, and should be taken into active consideration in decision-making. Engagement with civil society must be central from the outset – including in the designation of NPMs. Genuine consultation will add legitimacy and credibility to both the process of determining the NPM(s) and ultimately the institution itself. This point was underscored in the first annual report of the SPT, which stated that:

> *The national preventive mechanism should be established by a public, inclusive and transparent process, including civil society and other actors involved in the prevention of torture; where an existing body is considered for designation as the national preventive mechanism, the matter should be open for debate, involving civil society.*[44]

4.3 While we welcome the AHRC's current consultations, we are concerned that, to date, civil society has not been consulted in determining which NPMs should be designated (including the National Coordinating NPM). Indeed, input into which bodies should be designated as the NPM has not be expressly sought as part of the current consultation. As the Association for the Prevention of Torture notes, the more transparent and open the process of establishing the NPM is, the more credibility and legitimacy it will ultimately have:

> *In order to enhance the credibility of the NPM, the process of determining it should assume the form of an open exchange and should genuinely take into account the opinions and suggestions of the relevant stakeholders, including civil society. Governments should therefore not only proactively*

[43] The Association for the Prevention of Torture, (2010), *The Optional Protocol to the Convention Against Torture: Implementation Manual*, 215.
[44] UN Subcommittee for Prevention of Torture, (2008), *First Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, May 2008, CAT/C/40/2 para. 28.

*publicise the opportunities for participation in the process of determining the NPM, but also be genuinely willing to consider alternative concepts and models advanced by all those involved in that process.*[45]

Once NPMs have been designated, civil society should have ongoing input into the development and functioning of monitoring bodies. To maximise the input of civil society, both the NPMs and civil society should be open and responsive to feedback.

**Recommendation:**

*To the Commonwealth, and State and Territory governments:*

Involve civil society in the process of designating the Central Coordinating NPM and State and Territory NPMs.

4.4 It is also essential that engagement with civil society is *inclusive*, encompassing a wide range of actors including community organisations, peak NGOs and interest groups, professional associations (including medical, health and social work associations), research institutions and universities, and people with lived experience of detention. To facilitate the involvement of this diversity of actors, the NPM must be *visible and accessible* (and not reliant on an intermediary agency), and open and transparent in the way it operates. *Awareness-raising and public education* – and particularly how they differ from complaints-based mechanisms – are part of the NPM's remit under OPCAT and are a precursor for effective engagement.

**Recommendation:**

*To the Central Coordinating NPM and other NPMs:*

Undertake awareness-raising and public education among civil society and the wider community to increase understanding of OPCAT and the role of the NPM.

4.5 To support ongoing engagement with civil society, the NPMs must adopt work practices that are *transparent and accessible*, including sharing relevant information and findings in a timely and accessible manner. The NPMs should be directly accessible, and not reliant on an intermediary for engagement with civil society.

4.6 To be effective, credible and accountable, NPMs must engage with civil society on a range of levels, both formally and informally. Several options for engaging with civil society are considered below.

### *Representation on advisory bodies or working groups*

4.7 Advisory bodies or working groups, either with a general or thematic focus, can be a valuable means of drawing upon the insights and expertise of diverse civil society representatives, including people with lived experience of detention. In overseas jurisdictions, some NPMs have established advisory bodies on a permanent basis to enable ongoing discussion of the NPM's work,

[45] The Association for the Prevention of Torture, (2008), *Civil Society and National Preventive Mechanisms under the Optional Protocol to the Convention against Torture.*

while others have established working groups on an ad hoc basis to deal with specific topics. These advisory bodies can either be composed exclusively of civil society representatives or, alternatively, involve both civil society and representatives from government agencies. Permanent advisory bodies can oversee and advise on various aspects of the NPM operations including reviewing visiting protocols and methods; advising on monitoring priorities; and supporting or evaluating the implementation of the NPM's recommendations.

4.8 An example of this approach is the Austrian NPM, which is supported by a Human Rights Advisory Council (HRAC). The Council comprises a chairperson, a deputy chairperson and 32 members, 16 of which are nominated by ministries and Austrian provincial governments, and 16 by NGOs. While it does not form part of the NPM, the Council provides advice in all areas of the NPM's activities, particularly in overseeing the NPM's preventive competencies, determining monitoring priorities and identifying any gaps, and providing guidance on how to ensure a coordinated course of action. It also cooperates with the Austrian NPM through various thematic working groups. This has included a working group to discuss pending problems and possible solutions in police detention; a working group to discuss the treatment of mentally ill offenders in preventive custody; and a working group established by a state (Länder) Government on social care homes for juveniles.[46]

4.9 As the Austrian example illustrates, thematic working groups can enable specific issues to be explored in greater depth. Such working groups could be formed to provide advice into specific categories of detention (such as aged care or immigration detention), or could investigate specific themes that cut across different places where people are deprived of their liberty (such as the use of seclusion and restraint or engaging with Aboriginal and Torres Strait Islander peoples).

4.10 Advisory or working bodies can also focus specifically on the implementation of NPM recommendations. A regular and institutionalised forum that includes *both* government and non-government representatives can be valuable in following up the recommendations of the NPM, developing concrete steps for their implementation, and generating "more responsibility from the authorities to engage in a proactive dialogue with the NPM".[47] While the risk of ineffective oral exchanges without outcome remains, "working groups with a clearly defined goal and composed of the relevant and competent stakeholders and experts have proven to be a useful forum to jointly develop concrete plans and solutions for complex problems, and to assign responsibilities among the different actors".[47]

### *Participation in the NPM nomination or appointment process*

4.11 According to the SPT Guidelines, the "process for the selection and appointment of members of the NPM should be open, transparent and inclusive and involve a wide range of stakeholders, including civil society."[48] The appointment of members to the NPM should not be directly decided by the Executive branch of government, although the Executive may formally appoint members after the substantive decision has been taken by a separate body or following a transparent and consultative process. The creation of a special appointment body, including

[46] Brinek, G., (2016), *Collaboration with civil society – Austrian views,* Presentation to the 11th International Ombudsman Institute World Conference, Bangkok, November 2016.
[47] Birk, M., Zach, G., Long, D., Murray, R., Suntinger, W., (2015), *Enhancing impact of National Preventive Mechanisms. Strengthening the follow-up on NPM recommendations in the EU: strategic development, current practices and the way forwar,* Ludwig Boltzmann Institute of Human Rights: Vienna.
[48] Subcommittee for the Prevention of Torture, (2010), *Guidelines for NPMs,* (CAT/OP/12/5), para.16.

representatives from civil society groups, is one model that has been adopted in some overseas jurisdictions, such as Benin, Moldova and Paraguay.

### *Periodically visiting sites with NPM*

4.12 Civil society representatives could contribute their expertise and insights by periodically conducting joint visits with the NPM, including visits with a thematic focus. This would enable the NPM to tap into the breadth of expertise and experience that civil society provides, and achieve the "multidisciplinary" approach that the SPT indicates is necessary to undertake holistic, preventive monitoring. Involving trusted organisations and individuals that have established relationships with detainees can increase the capacity of the NPM to engage with more vulnerable groups, and to gain a better understanding of the contextual nuances and more subtle factors that may give rise to ill-treatment.

### *Formal representation on NPM*

4.13 In some countries, civil society has been formally represented in the membership of the NPM. While this approach can allow the NPM to build on a wider base of existing expertise, we believe it requires careful consideration of both the potential strengths and drawbacks. A crucial feature of the NPM is its independence, both perceived and actual. While NGOs, by definition, are structurally independent from Executive Government, directly incorporating them into the NPM may be perceived as weakening the independence and impartiality of the NPM compared to other statutory oversight agencies. Civil society organisations may also find that NPM responsibilities and obligations are difficult to reconcile with other public advocacy activities:

> *[C]ertain civil society actors may have difficulties reconciling a critical attitude to authority with the cooperative dialogue approach required by the OPCAT. By becoming a formal part of the NPM, the statutory authority, power, structure and finances may bring with it responsibilities, a lack of flexibility and a requirement to act independently of the interests of the NGO itself that certain civil society entities may find difficult to accept.*[49]

4.14 Another option is for civil society representatives to participate in NPMs in a personal capacity, providing their expertise as a qualified individual with proven experience in relevant fields, or as a person with a detailed understanding based on their own lived experience of detention. Such participation may evade some of the problems, referred to above, that may arise from civil society's formal participation in the NPM in an organisational form.[49]

**Recommendation:**

*To the Commonwealth, and State and Territory governments:*

Establish an open and transparent process for appointing members to the NPM(s), including input from civil society, and with consideration given to the appointment of civil society representatives with the appropriate experience and expertise (including people with lived experience of detention).

[49] Association for the Prevention of Torture, (2008), *Civil Society and National Preventive Mechanisms under the Optional Protocol to the Convention Against Torture*.

### *Civil society roundtables and seminars*

4.15 NPMs should convene regular roundtables with civil society to facilitate communication and information sharing on issues of concern. In addition to organising regular meetings on an ad hoc basis and in response to particular issues of concern, we recommend that, at a minimum, roundtables be instituted on an annual basis and involve a broad cross-section of civil society.

### *Informal communications and/or meetings*

4.16 Informal relations and lines of communication are also important, such as intelligence gathering before and after visits, and opportunities for NGOs and individuals to raise issues with the NPM as they arise. In particular, organisations and individuals with specific expertise or access to places of detention can provide valuable information to NPMs. In addition to providing substantive information on the conditions in detention, civil society organisations that have experience working with specific groups or monitoring places of detention can advise on the NPM's visiting methodology.

4.17 The NPM should complement rather than replace existing systems of oversight and its establishment should not preclude the creation or operation of other such complementary systems.

**Recommendation:**

*To the Central Coordinating NPM and other NPMs:*

Establish a range of measures to ensure meaningful and regular engagement with civil society, with consideration given to:

- convening formal advisory bodies or working groups, either with a general or thematic focus;
- hosting regular civil society roundtables or seminars;
- undertaking periodic visits with civil society representatives;
- maintaining informal relations and lines of communication with civil society organisations and individuals, to gather information and help identify issues before and after visits.

## Question 5. How should the Australian NPM bodies work with key government stakeholders?

### *Engaging with detaining authorities*

5.1 A key principle behind OPCAT is a constructive relationship between NPMs and detaining authorities. The NPM's role is to identify risk factors that can lead to ill-treatment, engage with the detaining authorities and devise recommendations to address those risks. This constructive dynamic is not a 'guaranteed'. It may take time and effort on the part of both the NPM and the detaining authorities, and is one of the most crucial factors in meeting the OPCAT's objective of closed environments that are healthy and constructive. Key considerations in developing such a relationship include:

(a) A clear legislative basis for the NPM in carrying out its activities, as noted in Question 2 above, is a precursor to a constructive relationship. This clarifies and cements the role of the NPM.

(b) NPMs (as well as government) must take steps to raise awareness about OPCAT and the role and function of the NPM within detaining authorities. This should cover departmental as well as operational staff. Without awareness about the NPM's role and how it differs from other oversight mechanisms, there is a risk of misinformation or misconceptions that could reduce NPM effectiveness. For example, staff within detaining authorities may form a view that oversight functions are being duplicated with the addition of the NPM, that engaging with the NPM would place an unnecessary administrative burden on their agencies (for example, in assisting to facilitate visits, responding to requests for information, and following up on recommendations), or that the NPM somehow diverts resources from detaining authorities. Awareness-raising would help prevent such misconceptions. NPMs can emphasise that through their work they can assist detaining authorities better perform their functions – for example, arguing that detaining authorities need additional funding for certain activities.

(c) It is important to identify all relevant government departments and detaining authorities (including private sector detention service providers and contractors) at the outset of NPM designation and engage all entities in the process. For example, at the Commonwealth level, the coordinating NPM will need to work effectively with a range of agencies including the Department of Immigration and Border Protection, the Australian Federal Police, the Department of Defence, the Attorney-General's Department, and the Department of Health (Aged Care). The agencies should share information appropriately, and not operate in silos.

(d) After NPM designation, best practice entails NPMs and detaining authorities working together to develop operational protocols or MoUs that could cover matters such as visit practices, visit reports, following up on recommendations, modes of communication, and issues pertaining to confidentiality. These could be revisited and updated as necessary. Developing operational protocols or MoUs from the outset could help clarify understanding and expectations early in the relationship. The SPT notes that to facilitate communications between the NPM and government stakeholders:

> *The NPM should establish: (a) a mechanism for communicating and cooperating with relevant national authorities on the implementation of recommendations, including urgent action procedures, (b) a means for addressing and resolving any operational difficulties encountered during the exercise of its duties, including during visits; (c) a policy for publicising reports, or*

*parts of reports including the main findings and recommendations, and (d) a policy regarding the production and publication of thematic reports.*[50]

(e) A legislative requirement for detaining authorities to cooperate with the NPM in the performance of its functions, including the obligation for governments (state/territory and Commonwealth) to formally respond to the NPM recommendations within six months (for example, as per the reporting back requirements for the Federal Government in relation to Federal Parliamentary Committee Inquiries) would be helpful. Whilst articulating this in legislation is not strictly required by OPCAT, it would serve to raise the profile and priority of the NPM's work with key interlocutors.

(f) All necessary steps should be taken to ensure relationships between detaining authorities and NPMs are institutionalised, rather than dependent on selected individuals. There is a need to develop a real, institutional commitment to implementation of OPCAT.

**Recommendation:**

*To the Commonwealth, and State and Territory governments:*

Establish measures to promote constructive engagement between the NPM and the detaining authorities including:
- awareness-raising amongst detaining authorities about the role and function of the NPM;
- protocols or MoUs between NPMs and detaining authorities be established early to clarify understanding on key issues, and revised as necessary;
- enactment of legislation requiring detaining authorities to cooperate with the NPM.

### *Engaging with Parliament*

5.2 The NPM is required to prepare annual reports, and additionally may prepare ad hoc or thematic reports from time to time. A requirement for NPMs to report directly to Parliament would be a feature that would support functional independence. A useful linkage could be made between the Central Coordinating NPM and the Parliamentary Joint Committee on Human Rights (Committee), by requiring the latter to consider and report on the reports of the NPM. The Committee is established by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) and its main functions are to examine Bills and legislative instruments for compatibility with human rights, and to report to both Houses of Parliament on its findings. It also has the power "to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter."[51] The Attorney-General could refer to the Committee a general role in considering Central NPM reports.

**Recommendation:**

*To the Commonwealth government*

The Commonwealth Attorney-General refer to the Commonwealth Parliament Joint Committee on Human Rights a general role of considering and reporting on reports of the NPM.

[50] Subcommittee on Prevention of Torture, (2012), *Analytical self-assessment tool for National Prevention Mechanisms* (NPM), CAT/OP/1, para. 31.
[51] *Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)*. Section 7

### *Communication across different State and Territory NPMs*

5.3 Whilst the mechanism for effective communicating between NPMs will depend on the nature and number of NPMs established/designated, formulating a communication mechanism provides an opportunity to facilitate information-sharing, supporting consistency, amd promote creative and innovative approaches. This submission does not seek to prescribe one approach, but notes a number of ideas for initial consideration, such as:

(a) establishing a "Jurisdictional-level Coordinating NPM" for each jurisdiction, which can act as a focal point between the Central Coordinating NPM and other NPMs in the jurisdiction. In addition to ensuring information flows and consistency of approach, the Jurisdictional-level Coordinating NPM could play an active role vis-à-vis the Central Coordinating NPM (for example, sitting on an advisory board). This would mitigate against a Central Coordinating NPM operating in a vacuum, facilitate coordination at the national level, and help ensure the Central Coordinating NPM's reports are grounded in the experiences across all jurisdictions and places of detention;

(b) building a practical, cloud-based platform for use by NPMs. This could act as a repository for information, guidance, monitoring standards and methodological tools such as checklists; and provide space for discussion, exchange and networking;

(c) developing thematic working groups across all jurisdictions and places of detention;

(d) instigating regular face-to-face exchanges, for example, an annual conference and thematic workshops for networking and capacity building; and

(e) developing a regular program of joint visits between NPMs to bring new perspectives, enhance consistency of monitoring approach, and build the capacity of NPM staff. Australian NPMs could approach monitoring bodies with experience in preventive oversight (elsewhere in Australia and overseas) to train and mentor those new to preventive monitoring.

## Question 6. How can Australia benefit most from the role of the SPT?

6.1 Australia stands to benefit from the SPT, and expertise of its members, on becoming an OPCAT State Party. Several features of the way the SPT is constituted, and its member expertise is provided, is instructive in the Australian context.

6.2 The SPT consists of experts from a range of professional backgrounds (currently including, for example, lawyers, judges, civil society leaders, academics and doctors in forensic medicine, psychology and psychiatry). The inclusion of medical experts in visiting mechanisms is crucial across different settings it in order to identify potential risks to health, assess the general conditions, and consider the needs of individuals with complex and chronic health needs. Health and medical expertise is also crucial in when visiting specific closed environments such as psychiatric institutions; or reviewing medical notes, assessing adequacy of treatment or care, evaluating the use of medications, assessing clinical governance, and identifying problems arising from dual loyalties for medical and caring professionals working in closed settings.[52]

6.3 SPT members are drawn from 25 countries, many with extensive experience visiting places of detention both in their home country and internationally through their role with the SPT. When visiting Australia, the SPT will therefore bring an instructive comparative insight into detention practices, as well as policy considerations around the establishment and functioning of the NPM.

6.4 It is likely visits from the SPT will be infrequent. As noted in the AHRC's discussion paper and reflected in the SPT's current practice, Australia could expect a visit once every seven to ten years. The discussion paper notes that in countries like Australia, SPT visits focus on NPM capacity building. This should be the preferable approach in the Australian context given that there are very few oversight agencies in Australia that currently conduct OPCAT-style monitoring visits and there is a need to develop an understanding of the theory and practice of preventive visits.

6.5 A general country visit would not be preferable for an initial visit, given the SPT would only be able to visit a few places of detention in each jurisdiction during the one to two week period typical for SPT visits. Such a short visit may not capture the range of issues across jurisdictions, making it difficult for the SPT to produce concrete recommendations of broad relevance across Australia.

6.6 Regardless of the type of visit conducted by the SPT, the Federal Government should, as a matter of public policy and in the interests of transparency, commit to making SPT visit reports public.[53]

6.7 Australia would benefit most from an initial visit soon after ratification, focusing on training and capacity strengthening of NPMs. The Central Coordinating NPM could request that the visit from the SPT include some of the following:

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[52] Slama, S., Wolff, H., & Loutan, L., (2009), *The Right to Health in Prisons: Implications in a Borderless World*. 185-211; Augustin, Y. S., Birch, M., & Bodini, C. (2011), *Preventing torture: the role of physicians and their professional organisations: principles and practice*; Pont, J., Stöver, H., & Wolff, H., (2012), Dual loyalty in prison health care, *American Journal of Public Health*, 102(3):475-480.

[53] Just under half of SPT reports have been made public by States and western democratic countries; New Zealand, Germany, Sweden, Netherlands and Italy have all made the SPT visit report and the State response public.

(a) training on preventive detention monitoring practices targeted at Federal NPMs as well as all jurisdictions to promote consistency across jurisdictions and places of detention;

(b) undertaking joint visits with representatives of NPMs to provide practical guidance on preventive monitoring – ideally this should be disseminated further, for example, a train-the-trainer model;

(c) contributing to national discussions about NPM designation and functioning (particularly through providing comparative examples on topics such as how to devise a nationally consistent approach to monitoring, best practices for visit reporting, and follow up);

(d) providing insights into issues of thematic importance in Australia – examples could include, but would not be limited to, the incarceration of Aboriginal and Torres Strait Islander persons; practices around seclusion and restraint; as well as tailoring monitoring to specific settings such as psychiatric institutions or police stations.

6.8 After the SPT has visited Australia – and providing the Australian Government chooses to make the SPT visit report public – Australian entities (including government, civil society groups and NPMs) would be eligible to apply to the SPT Special Fund. This fund was established to support projects implementing SPT recommendations after a country visit. As noted above, the New Zealand NPM has utilised this fund to commission an expert report into practices around seclusion and restraint across a range of closed environments, which has provided a tool to compare practices across the country, and describes New Zealand practices in relation to international standards.

6.9 Ongoing cooperation between the SPT and NPM is expressly supported by OPCAT and should be considered a guiding principle. SPT procedures have been established to promote cooperation and communication between the SPT and NPMs, such as the establishment of regional teams and a country focus for its members. These avenues for dialogue and exchange of information should be used proactively by the Central Coordinating NPM.

6.10 To benefit from the SPT's expertise, Australia's Coordinating NPM should:

(a) where appropriate, obtain information and advice on technical issues relating to NPM designation and function, and draw on SPT advice to strengthen the effective functioning of NPMs in Australia;

(b) advocate for an initial visit from the SPT soon after ratification, focusing on training and capacity strengthening of NPMs;

(c) develop expertise on technical issues relating to NPM designation and functioning, including through drawing on the legal, policy and operational guidance published by the SPT – for example the 'Analytical self-assessment tool', and the 'Guidelines, Assessment Matrices' etc;

(d) closely follow and disseminate within Australia international best practices in prevention, as set out by the SPT in visit reports and communications, and by other treaty bodies, UN Mechanisms and leading civil society entities.

**Recommendations**

*To the Central Coordinating NPM*

Where appropriate, obtain information and advice on technical issues relating to NPM designation and function, and draw on SPT advice to strengthen the functioning of NPMs in Australia.

Advocate for an initial visit from the SPT soon after ratification, focusing on training and capacity strengthening of NPMs.

Develop expertise on technical issues relating to NPM designation and functioning, including through drawing on the legal, policy and operational guidance published by the SPT, for example the 'Analytical self-assessment tool', and the 'Guidelines, Assessment Matrices' etc.

Closely follow and disseminate international best practices in prevention, as set out by the SPT in visit reports and communications, and by other treaty bodies, UN Mechanisms and leading civil society entities.

*To the Commonwealth Government*

Commit, as a matter of good public policy, to make public the visit report of the SPT and the official government response.

## Question 7. After the government formally ratifies OPCAT, how should more detailed decisions be made on how to apply OPCAT in Australia?

***Progressive implementation***

7.1 We recognise that, in terms of existing monitoring mechanisms and their legislative and institutional powers, some jurisdictions are more developed than others. In some jurisdictions, certain places of detention have relatively well-developed oversight mechanisms and a monitoring architecture, such as adult prisons and in some jurisdictions juvenile detention. While these existing monitoring bodies may not be fully OPCAT-compliant, many can be readily adapted to ensure they have the necessary powers, mandate and scope required under OPCAT. In certain other places, however, the monitoring infrastructure is absent or less developed. In such places, more work may have to be undertaken to establish an OPCAT compliant monitoring body (e.g. congregate or institutional care for people with a disability).

7.2 Progressive implementation is a desirable approach. In practical terms, this means that OPCAT obligations would be taken on with an understanding that steps will be taken progressively to ensure that there is appropriate coverage and arrangements in place, with a targeted plan for how full coverage would be achieved.

7.3 This will enable jurisdictions to learn from initial implementation activities and share practices and experiences between jurisdictions to make the task as efficient as possible. The capacity under article 24 of OPCAT to postpone implementation by three years, and then a further two years after ratification, supports the progressive implementation approach. It is clearly envisaged that countries will take time to bring their jurisdictions into full compliance with the OPCAT mechanisms.

7.4 In practice, countries like Germany have ratified the OPCAT based on progressive implementation. Germany consists of a federal government and 16 Länder (states). Germany ratified to the extent that some of its Länder complied and those that did not would be progressively working towards compliance. Several participants at the AHRC-convened roundtables have advocated for the adoption of a progressive implementation approach in Australia.

7.5 While allowing for a progressive approach, it is vital there are jurisdictional and intergovernmental mechanisms to support implementation, backed up by realistic timeframes and institutional commitments to implementation.

7.6 It is also imperative that an incremental approach is not adopted that precludes certain places of detention. For example, while state and territory governments have expressed a commitment to implementing OPCAT in prisons and juvenile detention, places such as residential disability, police custody and secure aged care facilities have not been given prominence in official discussions. It is crucial these so-called ‘non-traditional’ closed environments are prioritised from the outset, and that the underdevelopment of monitoring mechanisms in certain domains should not be used as a justification for inaction. States and territories must consider how well they are placed to comply with OPCAT, and develop a plan to work towards progressive implementation of OPCAT.

7.7 A roadmap for OPCAT implementation in Australia that articulates the vision for a fully functioning OPCAT-compliant NPM, milestones in reaching that vision, and the roles for relevant stakeholders across all relevant policy sectors is crucial. Some guiding principles to inform the development and implementation of this roadmap include:

(a) **Staged**: as the 'roadmap' approach suggests, it is important that shortly after ratification there is agreement amongst stakeholders on a plan for the long, medium and short term in achieving a system of OPCAT compliant NPMs. It is crucial that the development of a preventive mechanism for so-called 'non-traditional' places of detention is on the agenda from the outset, with an accompanying framework and timelines;

(b) **Consultative and collaborative**: the process and result should engage all relevant stakeholders, including civil society and affected communities, in a deep and meaningful way;

(c) **Principled**: the NPM core powers and guarantees as contained in the text of OPCAT should always be the minimum standard, but a broad and progressive approach should be encouraged. This is an important consideration when determining appropriate resourcing for the NPM;

(d) **Educative**: each step along the way towards the vision should have an educative function to inform all stakeholders about the benefits of prevention and the OPCAT approach (this may require specifically setting aside resources to conduct training, roundtables, and other activities);

(e) **Focused on continual improvement**: once the NPM is operational, there should be a mandatory review built in (preferably set out in legislation) after a specified period – for example, five years into operation – that would assess effectiveness against the objectives, consider any weaknesses, identify lessons learned across jurisdictions, and compare experiences from overseas. Use of regular NPM self-assessment tools and associated reporting processes should also be considered (see the discussion of periodic reporting above, under Question 2).

7.8 To progress implementation of the OPCAT post-ratification, this submission does not prescribe any one approach. Implementation will be a continual and iterative process that involves a range of processes, clear governance arrangements, and decision-making within and between different levels of government. However, once the OPCAT is ratified, there are several options that should be considered to support this ongoing implementation process.

7.9 At a federal level, options that could be considered by the **Commonwealth Government** include:

(a) convening a national OPCAT working group that meets regularly to develop and oversee a roadmap for implementation. This working group would consist of representatives from governments, oversight agencies and civil society, and would be representative of all jurisdictions;

(b) exercising a leadership and coordination role at the intergovernmental level through the Council of Australian Governments (COAG). Intergovernmental agreements and governance arrangements, timelines and regular review processes should be established to avoid losing momentum and to avert the risk of drift and deferral. Such arrangements should be formally instituted so that implementation is not derailed when there is a change of government at the state/territory or Commonwealth level;

(c) conducting and publishing an audit of all places of detention within the ambit of OPCAT, and all existing oversight bodies, building on existing work that has already been undertaken in this area;

(d) engaging with the APT, to benefit from their in-depth experience around the world on NPM design, designation and implementation.

7.10 For **State and Territory governments**, options to support implementation include:

(a) designating OPCAT focal points in each jurisdiction to lead jurisdictional consideration of NPM options. These focal points could convene OPCAT working groups to advise on and oversee the development of NPMs and their working methods within jurisdictions.

7.11 For the **Central Coordinating NPM**, consideration could be given to:

(a) liaising with the SPT at the earliest opportunity to plan a strategically timed visit to draw on their expertise in relation to NPM planning and designation;

(b) conducting a needs analysis in relation to guidelines and standards for NPMs, and developing a program of work to develop, promote, and build capacity of NPMs around these guidelines and standards.

***Recommendation:***

*To all stakeholders*

Work cooperatively to develop a roadmap for progressive OPCAT implementation in Australia. The roadmap should articulate the vision of a fully functioning and OPCAT-compliant NPM that is broad in scope and inclusive in coverage, identifies milestones and roles for key actors, and has accountability mechanisms built in.

# Final note

We wish to reiterate the importance of appropriate funding of NPMs, as required by the OPCAT.[54]

It is worthwhile recalling a point noted by the Joint Standing Committee on Treaties. In recommending ratification, it noted:

> *Implementation should minimise instances giving rise to concerns about the treatment and welfare of people detained in places of detention in Australia. In addition to the human rights benefits, monitoring has the potential to minimise the costs of addressing such instances, including avoiding litigation costs and compensation payments.*[55]

Recent Royal Commissions, investigations, inquiries and coronial inquests into treatment and care in closed environments are a significant cost to Commonwealth and State and Territory governments, in addition to the highly significant impact that abuse and ill-treatment has on individuals, families and communities.

The SPT visited New Zealand in 2013 and was deeply concerned about the lack of appropriate resourcing for the NPM. On New Zealand's ratification of OPCAT, most of the NPM components did not receive extra resources to carry out their OPCAT functions, and in the SPT's view, this has 'severely impeded' their ability to perform OPCAT functions.[56] Whilst there are many good practice examples from New Zealand and they have managed to achieve much with little, it is essential that Australia does not follow a similar path to New Zealand in relation to NPM resourcing.

**Recommendation:**

*To the Commonwealth Government, and State and Territory Governments*

Ensure the NPMs are resourced (human and financial) to fully and effectively perform their OPCAT functions.

[54] Article 18(3) of the OPCAT states "The States Parties undertake to make available the necessary resources for the functioning of the national preventive mechanisms."

[55] Joint Standing Committee on Treaties, (2012), *Report 125*, Chapter 6: OPCAT, (21 June 2012), para. 6.8.

[56] Subcommittee for Prevention of Torture, (2014), *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to New Zealand*, 28 July 2014, CAT/OP/NZL/1, para. 12 – 14.

# Summary of Recommendations

## Introduction

*To the Commonwealth Government*

Conduct broad and open consultations, particularly with civil society, on the appropriate entity to perform the role of Central Coordinating NPM.

## Question 1. What is your experience of the inspection framework for places of detention in the state or territory where you are based, or in relation to places of detention the Australian Government is responsible for?

*To all stakeholders*

The NPM should be designed with a broad and comprehensive framework of monitoring bodies covering all places of detention in Australia.

The bodies must:

- take a holistic, forward-looking, systemic approach to improving human rights compliance;
- have functional independence (including absolute discretion to determine how budget is spent, fully independent staff, reporting to Parliament or Legislative Assembly);
- be adequately resourced, and appropriately staffed with diverse and appropriately trained professionals in accordance with internationally accepted best practice;
- be empowered to exercise all requisite functions and powers that are set out in law;
- be required to comply with an appropriate visiting methodology in discharging their functions;
- be required to meet mandatory reporting requirements that are sufficiently timely and comprehensive.

*To the Commonwealth Government*

Implement a new framework of monitoring bodies that is OPCAT compliant.

*To the Commonwealth Government*

Prepare a comprehensive stocktake of places and settings that fall within the ambit of OPCAT, corresponding monitoring bodies, and the extent to which these existing monitoring bodies are OPCAT compliant. This should not cause significant delay to the NPM deliberation process as it can build on work undertaken in this area to date by civil society and others.

## Question 2. How should the key elements of OPCAT implementation in Australia be documented?

*To the Commonwealth, and State and Territory governments*

The role and functions of the NPMs as required by OPCAT should be enshrined in legislation in all jurisdictions.

*To the Commonwealth, and State and Territory governments*

Ensure that all necessary measures be taken, including legislative amendment of existing statutes if required, to ensure that NPMs can fully and effectively perform their functions in accordance with OPCAT, including in relation to privacy provisions and protections against reprisals for persons who report or raise issues with the NPM.

*To the Commonwealth, and State and Territory governments*

Review and, if necessary, amend existing legislation and/or other regulatory or contractual arrangements to ensure the SPT can exercise its visiting functions in Australia, as required by OPCAT.

*To the Commonwealth, and State and Territory governments (as appropriate)*

Ensure that appropriate planning, documentation and accountability measures are in place – including intergovernmental agreements, formal implementation plans and a reporting framework – to ensure timely progress towards functioning and OPCAT-compliant NPMs within 3 years post OPCAT ratification.

*To the Central Coordinating NPM*

In consultation with civil society, the SPT and relevant Government agencies, develop guidelines and protocols to support jurisdictions in establishing and operating NPMs.

*To the Central Coordinating NPM and other NPMs*

Consider the use of Memorandum of Understanding to clarify and formalise cooperation with other NPMs and with civil society organisations.

### Question 3. What are the most important or urgent issues that should be taken into account by the NPM?

*To all stakeholders:*

The following key issues should be considered in all aspects of NPM designation and operation:

- Ensuring NPMs are designated and operate in a way that is effective in addresses specific issues around the incarceration of Aboriginal and Torres Strait Islander persons;
- Ensuring appropriate oversight over places of detention where detainees have particular vulnerabilities including: disability-specific institutions; secure mental health facilities; police custody; youth justice centres; aged care facilities and immigration detention.
- Closely consider systemic issues including: indefinite and arbitrary detention; lack of access to appropriate services whilst incarcerated, including education, healthcare and therapeutic rehabilitation; and the use of restrictive practices (including seclusion and restraint), including on children in educational settings.

### Question 4. How should Australian NPM bodies engage with civil society representatives and existing mechanisms (eg NGOs, people who visit places of detention etc)?

*To the Commonwealth, and State and Territory governments:*

Involve civil society in the process of designating the Central Coordinating NPM and State and Territory NPMs.

*To the Central Coordinating NPM and other NPMs:*

Undertake awareness-raising and public education among civil society and the wider community to increase understanding of OPCAT and the role of the NPM.

*To the Commonwealth, and State and Territory governments:*

Establish an open and transparent process for appointing members to the NPM(s), including input from civil society, and with consideration given to the appointment of civil society representatives with the appropriate experience and expertise (including people with lived experience of detention).

*To the Central Coordinating NPM and other NPMs:*

Establish a range of measures to ensure meaningful and regular engagement with civil society, with consideration given to:

- convening formal advisory bodies or working groups, either with a general or thematic focus;
- hosting regular civil society roundtables or seminars;
- undertaking periodic visits with civil society representatives;
- maintaining informal relations and lines of communication with civil society organisations and individuals, to gather information and help identify issues before and after visits.

### Question 5: How should the Australian NPM bodies work with key government stakeholders?

*To the Commonwealth, and State and Territory governments:*

Establish measures to promote constructive engagement between the NPM and the detaining authorities including:

- awareness-raising amongst detaining authorities about the role and function of the NPM;
- protocols or MoUs between NPMs and detaining authorities be established early to clarify understanding on key issues, and revised as necessary;
- enactment of legislation requiring detaining authorities to cooperate with the NPM.

*To the Commonwealth Government*

The Commonwealth Attorney-General refer to the Commonwealth Parliament Joint Committee on Human Rights a general role of considering and reporting on reports of the NPM.

### Question 6. How can Australia benefit most from the role of the SPT?

*To the Central Coordinating NPM*

Where appropriate, obtain information and advice on technical issues relating to NPM designation and function, and draw on SPT advice to strengthen the functioning of NPMs in Australia;

Advocate for an initial visit from the SPT soon after ratification, focusing on training and capacity strengthening of NPMs;

Develop expertise on technical issues relating to NPM designation and functioning, including through drawing on the legal, policy and operational guidance published by the SPT (for example the 'Analytical self-assessment tool', and the 'Guidelines, Assessment Matrices' etc.);

Closely follow and disseminate within Australia, international best practices in prevention as set out by the SPT in visit reports and communications, and by other treaty bodies, UN Mechanisms and leading civil society entities.

*To the Commonwealth Government*

Commit, as a matter of good public policy, to make public the visit reports of the SPT and the official government response.

### Question 7. After the government formally ratifies OPCAT, how should more detailed decisions be made on how to apply OPCAT in Australia?

*To all stakeholders*

Work cooperatively to develop a roadmap for progressive OPCAT implementation in Australia. The roadmap should articulate the vision of a fully functioning and OPCAT-compliant NPM that is broad in scope and inclusive in coverage, identifies milestones and roles for key actors, and has accountability mechanisms built in.

### Final note

*To the Commonwealth Government, and State and Territory Governments*

Ensure the NPMs are resourced (human and financial) to fully and effectively perform their OPCAT functions.