

AUSTRALIAN HUMAN RIGHTS COMMISSION

HUMAN RIGHTS COMMISSIONER CONSULTATION

OPCAT IN AUSTRALIA

SUBMISSION BY TOWNSVILLE COMMUNITY LEGAL SERVICE INC.

TO: Human Rights Commissioner

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PART 1: INTRODUCTORY MATTERS

1. Townsville Community Legal Service Inc. (TCLS) is a community-based, non-profit legal centre. TCLS was established in 1991 as a voluntary service and funded by the Commonwealth in 1992.
2. TCLS is funded by the Queensland Government to provide a Seniors Legal and Support Service (SLASS). This services focuses on clients who are at risk of or are suffering elder abuse. TCLS has a decade of dealing with clients experiencing and affected by elder abuse.
3. The Commissioner's consultation includes important definitional issues that might bring a large group of Australians within the scope of OPCAT, namely those in aged care. The recent 2016 Australian Census contended "85 is the new 65" and 63% of those aged 85 or older are women.¹ 69% of aged care residents are women.²
4. Some key figures about aged care include:
 - 283,268 operational aged care places
 - 949 approved providers of care
 - 350,000 workers in the aged care sector
 - 11.4 Billion on residential care alone (of a total 16.2 Billion)³
5. The Committee against Torture has interpreted the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT) as prohibiting a variety of forms of violence committed by both State and non-State actors, in classical law enforcement and detention contexts, as well as in other circumstances including some aged care settings.
6. This will provide some protection for older persons in situations covered by the Convention if the treatment involved amounts to cruel, inhuman or degrading treatment or torture and was inflicted by, at the instigation, or with the consent or acquiescence of State officials.
7. The Optional Protocol to the Convention against Torture (OP-CAT) has the potential to help prevent torture and other cruel, inhuman or degrading treatment or punishment of older persons in aged care as well as all other forms of State or State-authorized detention. However, the application of OPCAT is potentially limited in its scope since it may not apply to in-home care, even if the care worker is employed by a service provider who also provides residential care.

¹ <http://www.abs.gov.au/ausstats/abs@.nsf/mf/2024.0>

² <http://www.aihw.gov.au/aged-care/>

³ https://agedcare.health.gov.au/sites/g/files/net1426/f/documents/12_2016/2015-16_report-on-the-operation-of-the-aged-care-act-1997.pdf

PART 2: HUMAN RIGHTS FRAMEWORKS & OLDER PERSONS

8. Older persons lack a dedicated international human rights Convention. This is despite the trend that will see older persons will be one quarter of the Australian population by 2050. They are of course covered under the guise of “other status” and through other normative frameworks such as CRPD and CEDAW. Older persons have no parallel protections to CAT in the same way children and others do.
9. Accordingly, it is essential to use existing human rights frameworks to protect their rights.
10. Human rights are fundamental to older persons. They are the largest group with disability. 35% of older persons in residential aged care experience depression and anxiety.
11. Dementia is the third largest cause of death in Australia, affecting one in four over 85. By 2050, almost 1 million Australians will have dementia with 7,500 new cases diagnosed weekly. Around 50% of all aged care residents had a diagnosis of dementia.
12. A Convention on the Rights of Older Persons has been mooted for some time and its feasibility and possible content is subject of mandates⁴ within the Open-ended Working Group on Ageing. We annex a recent paper setting out the history of this debate. (Annexure 1)
13. The Australian Government does not support a new multilateral instrument at this time and has instead suggested other avenues of human rights protections for older Australians. Consequently, the Government should not resile from the application of OPCAT to aged care.
14. The Australian Government’s statement of 5 July 2017 to the United Nations Open-ended Working Group on Ageing’s 8th Working Session provided:

At the outset, we would like to reiterate our view that the Working Group on Ageing should focus efforts on seeking new and innovative ways to mobilise the extant body of human rights protections for older persons. We believe that this is the most efficient way to protect the rights of older persons, whilst also ensuring that we avoid placing additional pressure on the already overstretched international human rights architecture. In this regard we welcomed the important discussions that will be held during this session. (Emphasis added) (Annexure 2)

⁴ General Assembly, 65th Session, *Follow-up to the Second World Assembly on Ageing*, A/RES/65/182, 4 February 2011; General Assembly, 67 Session, *Towards a comprehensive and integral international legal instrument to promote and protect the rights and dignity of older persons*, A/RES/67/139, 13 February 2013; General Assembly, 70 Session, *Measures to enhance the promotion and protection of the human rights and dignity of older persons*, A/RES/70/164, 22 February 2016.

15. This reiterated the Australian Government's voluntary commitment to the Universal Periodic Review that:

Australia committed to promoting and protecting the rights of older people internationally by modeling and advocating better use of existing United Nations human rights reporting mechanisms. Australia committed to including a dedicated section on the rights of "older Australians" in all relevant human rights treaty and universal periodic review reports. Australia will seek to have the rights of older persons reflected in United Nations resolutions and encourage existing Special Rapporteurs to consider the application of their mandate to older persons in close collaboration with the Special Rapporteur on the enjoyment of all human rights by older persons.⁵

16. Accordingly, OPCAT provides an extant human rights protection for older persons in aged care and should be subject of reporting mechanisms in line with Australia's voluntary UPR commitment.

THE SCOPE OF ARTICLE 4.1.

17. A principal issue for the inclusion of aged care under OPCAT is the scope of art. 4.1.

18. Article 4.1 provides:

Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.
(Emphasis added)

19. How does this apply to older persons in aged care, also called Long Term Care, across a range of settings including residential, community or home care environments? De Wolf contends that less traditional places of detention are a challenge to OPCAT and includes "care homes for the elderly".⁶

20. The New Zealand Human Rights Commission considered this issue in *He Ara Tikja Report 2016* – which proposed the question:

⁵ <https://www.ag.gov.au/RightsAndProtections/HumanRights/United-Nations-Human-Rights-Reporting/Documents/UPR-2015-Opening-Statement.pdf>

⁶ Antenor Hallo de Wolf, Visits to Less Traditional Places of Detention: Challenges under the OPCAT, *Essex Human Rights Review*, 2009, Vol 6:1, 99.

What is important from an OPCAT perspective is whether places in which people are or could be deprived of their liberty (that is, where they are not free to leave) is subject to the regulation or oversight of the State. In cases in which they are, the SPT has confirmed that they will come within the ambit of the OPCAT monitoring framework. In many cases therefore, aged care facilities and disability residences will meet this criteria as they are services either contracted to external parties by the state, funded to some degree by the state, or subject to regulations and some level of governmental oversight. In other cases people are placed in these facilities by an order of the court through some form of guardianship order.⁷

21. The NZHRC reflected on the German and Austrian approach, which brings aged care facilities within the scope of OPCAT monitoring.
22. In our submission, older persons in the aged care system would fall within the scope of article 4.1 because:
 - Aged care (state run, funded or regulated) is within jurisdiction and control;
 - Older persons are or may be deprived of their liberty; and
 - The deprivation is by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence.
23. Each issue is now considered in turn.

Is Aged Care Within Jurisdiction?

24. All aged care facilities in Australia are subject to the *Aged Care Act 1997*, the *Australian Aged Care Quality Agency Act 2013* other federal statutes and a substantial suite of subordinate principles.
25. The Australian Aged Care Quality Agency is responsible for accreditation of Australian Government subsidized aged care homes under the Quality Agency Principles 2013. Compliance with the regime is mandatory for any approved provider of services. It seems obvious that residential settings will be in scope if the further criteria are met.
26. It is yet to be resolved to what extent age care outside a residential setting would fall within scope. In our view the context of ageing in place is of high importance on clarity around this issue. The *Aged Care Act 1997* regulates all forms of care including residential, home and flexible care. Therefore, it may be that the breadth of OPCAT's application depends entirely on the potential for deprivation of liberty in each specific setting.

⁷ M. White, *He Ara Tika, A pathway forward - The scope and role of the Optional Protocol to the Convention against Torture (OPCAT) in relation to Aged care and disability residences and facilities*, New Zealand Human Rights Commission, June 2016, p.29.

Deprivation of Liberty

27. When are older persons deprived of their liberty?
28. We submit that this might occur in the following circumstances:
- The aged care assessment process
 - The operation of guardianship orders
 - The operation of enduring documents
 - The operation of mental health orders
 - By virtue of cognitive impairment and the operation of policy
 - The operation of restrictive practice or intervention
29. Entrants into residential aged care do so through an assessment process with the Aged Care Assessment Team (ACAT). ACAT assessments often reveal a level of need for decision-making support or more generally complex aged care needs. This determines the level and type of care that the older person needs and ultimately receives. It is a starting point for how and where an older person may or will be deprived of their liberty, particularly by virtue of cognitive impairment and the operation of policy and through the operation of restrictive practice or intervention.
30. Some entrants are subject of orders under state and territory guardianship laws which evidence that the older persons lack decision-making capacity or have a cognitive impairment. In such cases this would satisfy the requirements of art. 4.1. Some analysis needs to be done around the nature of orders in respect of domain and decision specific details. There may be nuances here that mean some are outside the scope of OPCAT even if orders are place.
31. Alternatively older persons in aged care may have given enduring documents to another party. In fact some aged care providers (unlawfully) insist on enduring documents as condition of entry. This is a complex issue but given that enduring powers continue beyond the loss of capacity, and cannot then be altered other than by an order, means that these cases may also be caught by art. 4.1.
32. It is important to note that an enduring document given is not revoked by the impaired capacity of the principal. It generally remains exercisable until such time as a prescribed event occurs or the document is revoked or the attorney removed or replaced by Court or Tribunal order. Therefore the effect is the same as if the person was under a guardianship or administration order. This process may equate to consent or acquiescence.
33. The fact that the laws require certain principles to be upheld (including principles for adults with impaired capacity) ensures that the deprivation of liberty is state sanctioned and regulated. Whether authorities intervene to change of the nature of an enduring document requires a positive act, usually in response to a complaint of abuse or neglect.

34. Alternatively older persons may be under mental health treatment or forensic orders, which would have the effect of depriving them of liberty by order of law. The Limitations of actions statutes in Australia already describe the legal incapacity for those who are under such orders. There is of course a myriad of other instances where a lack of capacity affects legal status.
35. Alternatively older persons may have cognitive impairment without guardianship order or enduring document in place but be assessed by ACAT or other authority as lacking decision-making capacity and treated accordingly by service providers. This is very common for older persons with dementia. It is the application of aged care policy that deprives older persons of their liberty in an actual or real sense. The World Health Organization summarised these concerns:

It is widely recognized that people living with dementia are frequently denied their human rights both in the community and in care homes. In many countries people living with dementia are often physically and chemically restrained, even when regulations are in place to uphold their rights. Furthermore, people living with dementia can also be victims of abuse. For example, they may be beaten for being "stubborn" or exhibiting challenging behaviour. Third parties may also use a diagnosis of dementia to their own benefit, such as using deceit to acquire a person's assets. This reflects the ethical challenges inherent in the support and protection of people living with dementia...⁸

36. Alternatively older persons may be subjected to restrictive practices or interventions that deprive them of liberty. Restrictive practices are "the deliberate or unconscious use of coercive power to restrain or limit an individual's freedom of action or movement." Older persons with disability who show "behaviours of concern" are very likely to be administered a form of chemical restraint.
37. International jurisprudence says that restrictive interventions must strike a lawful, appropriate balance between public interest and personal liberty. Restrictive practices used in care include:
- Seclusion;
 - Surveillance;
 - Close observation;
 - Exclusionary time out;
 - Consequence-driven restrictive practices;
 - Restraints: physical, chemical, mechanical, psycho-social, environmental.
38. Reported outcomes of restrictive practices include:
- Serious injury: bruises, cuts, entrapment, strangulation and suffocation;

⁸ <http://www.ohchr.org/Documents/Issues/OlderPersons/Dementia/ThematicBrief.pdf>

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- Changes in body systems: poor circulation, constipation, incontinence, weak muscles and bone structure, pressure sores, agitation, depressed appetite, infections, or death; and
 - Changes in quality of life: reduced social contact, withdrawal, loss of autonomy, depression, disrupted sleep, agitation, or loss of mobility.
39. In cases where the effect of the restrictive practice is to deprive of liberty, OPCAT will be in scope.
40. The practical inability of older persons to leave aged care homes is also seen as a key match for aged care homes and OPCAT.⁹

PART 4: DOMESTIC MECHANISMS

41. Domestic mechanisms need to be carefully vetted to ensure they are appropriate.
42. The Commission should add older persons to the list set out at para 64 of the consultation paper.
43. Whether the existing aged care regulatory regime fits the criteria set out in OPCAT requires further consideration.
44. For example, the Australian Law Reform Commission has recently recommended that aged care legislation regulate restrictive practices. The form of regulation should include OPCAT monitoring. The Commission also noted:

*Ensuring that residential aged care facilities are compliant with OPCAT will provide important additional oversight of human rights standards in aged care.*¹⁰

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Wednesday, July 19, 2017

Bill Mitchell, Principal Solicitor
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⁹ http://www.apr.ch/en/blog/living-with-dignity-in-the-golden-years-will-anyone-be-watching/#.WW3k2sZL0_U

¹⁰ Australian Law Reform Commission, Elder Abuse – A National legal Response Final Report, ALRC Report 131, May 2017, paragraph 4.234.