



Public Health Association
AUSTRALIA

**Public Health Association of Australia
submission on the Optional Protocol to
the Convention against Torture and Other
Cruel, Inhuman or Degrading Treatment
or Punishment (OPCAT) in Australia
consultation**

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Introduction

The Public Health Association of Australia

The Public Health Association of Australia (PHAA) is recognised as the principal non-government organisation for public health in Australia working to promote the health and well-being of all Australians. It is the pre-eminent voice for the public's health in Australia. The PHAA works to ensure that the public's health is improved through sustained and determined efforts of the Board, the National Office, the State and Territory Branches, the Special Interest Groups and members.

The efforts of the PHAA are enhanced by our vision for a healthy Australia and by engaging with like-minded stakeholders in order to build coalitions of interest that influence public opinion, the media, political parties and governments.

Health is a human right, a vital resource for everyday life, and a key factor in sustainability. Health equity and inequity do not exist in isolation from the conditions that underpin people's health. The health status of all people is impacted by the social, cultural, political, environmental and economic determinants of health. Specific focus on these determinants is necessary to reduce the unfair and unjust effects of conditions of living that cause poor health and disease. These determinants underpin the strategic direction of the Association.

All members of the Association are committed to better health outcomes based on these principles.

Vision for a healthy population

A healthy region, a healthy nation, healthy people: living in an equitable society underpinned by a well-functioning ecosystem and a healthy environment, improving and promoting health for all.

Mission for the Public Health Association of Australia

As the leading national peak body for public health representation and advocacy, to drive better health outcomes through increased knowledge, better access and equity, evidence informed policy and effective population-based practice in public health.

Preamble

PHAA welcomes the opportunity to provide input to the consultation on the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) in Australia. The reduction of social and health inequities should be an over-arching goal of national policy and recognised as a key measure of our progress as a society. The Australian Government, in collaboration with the States/Territories, should outline a comprehensive national cross-government framework on reducing health inequities. All public health activities and related government policy should be directed towards reducing social and health inequity nationally and, where possible, internationally.

PHAA Response to the consultation paper

The PHAA welcomes Australia's long overdue ratification of OPCAT. This demonstrates a commitment to improving conditions of detention in Australia, and protecting against torture and other cruel, inhuman or degrading treatment or punishment. The recent examples of abuse within youth justice detention centres in Australia highlight the fact that despite the existence of complaints mechanisms and oversight bodies, there is much work to be done in this area. The ratification of OPCAT provides an opportunity to establish a transparent, national, co-ordinated system of standards-based oversight, reporting and response. Moving from a largely complaints-based system, to one which also includes a participatory, rights-based approach inclusive of prevention and risk reduction strategies is an important step in identifying and responding to the systemic issues and cultures which allow abuses to occur.

Is Australia ready for OPCAT?

The OPCAT requires a system of regular visits undertaken by independent international and national bodies (Article 1), to strengthen, if necessary, the protection of those in detention (Article 4.1). In scope for the visits are places with 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 (Article 4.2).

The national bodies are National Preventive Mechanisms (NPM), which must:

- be functionally independent (Article 18.1)
- strive for a gender balance and adequate representation of ethnic and minority groups (Article 18.2)

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- have the power to regularly examine treatment of people in detention, make recommendations to relevant authorities and submit proposals and observations concerning existing or draft legislation (Article 19)
- have access to all relevant information, to all places of detention, to private interviews with detainees without witnesses or anyone else they request to speak with, the right to choose where to visit and who to speak with (Article 20) and
- make recommendations to be examined by Australia and enter into dialogue on possible implementation measures (Article 22).

Three questions arise from this in terms of Australia's readiness for OPCAT to be operationalised here: (1) which closed settings will fall under the remit of OPCAT, (2) do these settings have existing oversight mechanisms, (3) and do the existing oversight mechanisms comply with the requirements of OPCAT?

The broad definition of places of detention, means that settings which may not be included in remit of current oversight mechanisms will be required to be visited and reported on, under OPCAT. These include:

- Police cells
- Court cells
- In-custody transport
- Secure mental health facilities
- Immigration detention centres
- Secure wards in aged care facilities
- Closed disability residences in supported accommodation
- Compulsory alcohol and other drug treatment centres

Therefore, even if the current oversight bodies meet the requirements of a National Preventive Mechanism (NPM), they will be inadequate under their current operations to meet the requirements of OPCAT. Either additional oversight bodies will be required, or the functions of the existing ones will need to be adjusted.

The first attempt to assess the readiness of current oversight bodies for the operationalisation of OPCAT was done by the National Children's Commissioner in 2016. This report found that no jurisdiction currently meets all the requirements in their oversight of youth detention facilities¹. It is likely that the situation is similar for other settings with current oversight mechanisms such as prisons. Many of the existing oversight bodies deal with a broad range of issues, and a greater focus and specialisation may be required for OPCAT².

PHAA recommends a comprehensive audit of all closed settings in Australia be undertaken in order to determine a complete list of settings, current oversight mechanisms, and the extent to which they comply with OPCAT requirements. Government departments and relevant detaining authorities should be included in the OPCAT process from the beginning to ensure an institutional commitment is developed.

How should NPMs operate in Australia?

Given that the existing mechanisms will be insufficient in their current form to meet the requirements of OPCAT, NPMs will need to be established here. This presents a clear opportunity to establish NPMs to suit the Australian context, in a transparent and manageable way, rather than having to make compromises hoping to make the existing mechanisms fit. With the Federation system of governance in Australia, and the breadth of closed settings coming under the jurisdiction variously of both the Commonwealth and States and Territories, a mixed model with a Central Coordinating NPM supporting State and Territory based Subsidiary NPMs makes sense. Before deciding who should take on these roles, it is important to consider how Australia can best make use of the opportunity provided by OPCAT to improve our places of detention.

Monitoring and oversight of closed environments is bi-directional, with community values brought in (for example as a standard to measure against), and observations and knowledge taken out (for example through complaints)³. The National Preventive Mechanisms should live up to their names through a clear focus on being proactive rather than reactive; some of the existing oversight mechanisms are, in their current form, primarily/exclusively responding to complaints. They should promote transparency, knowledge sharing and best practice, and investment in research to explore system performance and promote human rights in systemic and effective ways. OPCAT provides an opportunity to raise standards through the identification of risk factors and cooperation². There is a need for objective measures of wellbeing appropriate to the various contexts of closed settings, to include some of the less obvious ways in which harm is caused such as through institutionalisation, the mental health effects of incarceration, and loss of social and emotional wellbeing.

Regular visits are required in order to properly assess and address risk and build cooperative and collaborative relationships between the NPMs and the institutions themselves. OPCAT also allows for targeting particular issues across all sectors and jurisdictions, highlighting variations in practices and norms. Systemic issues such as staffing, indefinite detention, solitary confinement, and the use of seclusion and restraints are potential examples of issues which could be targeted under a thematic approach. Similarly, establishing national standards and guidelines for visits and assessments will provide consistency and enable differences among jurisdictions to be highlighted in a way which has not previously occurred on a routine basis in Australia.

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The question of which organisation should become the Central Coordinating NPM is a complex one, and deserves due consideration. The role will be crucial to the success of OPCAT in Australia – it must be able to operate in an independent and robust manner. While the Commonwealth Government has indicated that the role will be taken by the Commonwealth Ombudsman’s Office, PHAA believes that other possibilities should be investigated. For example, establishing a separate entity as the Central Coordinating NPM would both clearly define its roles, functions and autonomy, and demonstrate a recognition of the importance of OPCAT in Australia.

Similarly, the issue of how many subsidiary NPMs there will be requires careful consideration. The Commonwealth Government has indicated that this will largely be a decision of each State and Territory Government. If one jurisdiction nominated a single NPM and another nominated one for each sector, would that affect the consistency of outcomes? If the sources of information for reporting are very different across the country, would that hinder the ability of the National Coordinating NPM to synthesise it? Some founding principles and decisions will be required if there is to be consistency among the jurisdictions, for the full potential of OPCAT to be realised.

Documentation

The multiple sectors encompassed within the OPCAT remit combines with the federal system of governance in Australia, to ensure that there will be layers of complexity involved in operationalising OPCAT here. Clarity will be required on issues including the roles and responsibilities of each NPM, how NPMs are represented at State/Territory and National level, how reporting to the central coordinating NPM will work, what reporting requirements the central coordinating NPM will have to government and the public, and who will have responsibility for implementing recommendations of the NPMs. How frequent will reporting cycles be? What will be the minimum requirements of the content of reports? Will all findings be made public? What level of granularity will be required in the reporting? For example, the number of self-harm incidents in youth detention and what proportion was dealt with in a way that is considered adequate? What authority will be given to NPMs to compel agencies to provide information? Will Australia decide to give the central coordinating NPM powers that extend beyond the requirements of OPCAT? Protocols and guidelines for the subsidiary NPMs, to ensure consistency in their functions and operations, will be required. Formal agreements or memorandums of understanding with the individual NPMs will be required to clearly delineate their responsibilities under OPCAT with any other roles and functions, and for information sharing, referrals systems and reporting requirements and mechanisms.

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At a higher level, there will need to be legislative backing to ensure NPMs are able to, and actually do, comply with OPCAT requirements, and that findings and recommendations are responded to. Simply nominating NPMs and tasking them with complying with OPCAT will be insufficient. Legislation at the federal and State/Territory may be required to provide an equal footing for multiple NPMs which would otherwise be likely to have unequal power and access.

The UN Subcommittee on the Prevention of Torture (SPT) guidelines on NPMs state that “The mandate and powers of the NPM should be clearly set out in a constitution of legislative text”⁴. Without specific legislation for OPCAT, there is a risk of a ‘business-as-usual’ situation, without the proactive and prevention focus required. The absence of a legislative foundation was specifically cited by the SPT as being a key reason OPCAT was not working to its full potential in the Netherlands⁵.

Another concern is that in the absence of legislation for OPCAT, existing legislation at either Commonwealth or State and Territory level, or commercial contracts (for example in private prisons), could override or dilute the reach and benefits of OPCAT.

PHAA recommends that an implementation plan be developed, possibly through the Commonwealth of Australian Governments (COAG), with timelines for a staged process leading up to the commencement of OPCAT becoming operational.

Involvement of civil society

Civil society includes community organisations, peak non-government organisations and interest groups, professional organisations, research institutions and universities, independent visitor schemes, volunteer and advocacy groups, and people with lived experience of closed settings. This wide representation is required on working groups for the implementation of OPCAT, including NPM nomination and appointment processes, to ensure a wide representation of interests and perspectives. Indeed, the SPT agrees that civil society should be involved from the outset, including in the designation of NPMs⁶.

In the operationalisation of OPCAT, civil society should work with the NPMs. The Association for the Prevention of Torture specifically recommends the involvement of civil society in OPCAT because of the resources and expertise it brings, supplementing those of the existing institutions and formal bodies, and adding legitimacy because of the structural independence from government³. Civil society also brings with it the ability to apply pressure for obligations to be met.

Mechanisms for ongoing, direct involvement of civil society in OPCAT should be established, to ensure that these relationships are maintained.

Urgent issues

As noted previously, OPCAT will encompass a wide range of sectors and issues when fully operationalised. Should a staged approach to implementation be adopted, priorities will need to be identified.

PHAA believes there are a number of urgent issues to be addressed through OPCAT.

Over-representation of Aboriginal and Torres Strait Islanders in prison and youth detention

The ongoing over-representation of Aboriginal and Torres Strait Islander people in prisons⁷ and youth detention centres⁸ in Australia is an urgent concern. In some settings the rates of incarceration are among the highest in the world⁹. Consideration must be given to ways to ensure that NPMs are responsive to Aboriginal and Torres Strait Islander issues and have the appropriate skills, expertise and cultural competencies to address them.

It is essential that adequate advice from Aboriginal and Torres Strait Islander legal and justice organisations is available as part of the Commonwealth and State/Territories governance, planning and NPM allocation processes. There should be close involvement in the benchmarking of standards of good practice, including guidelines and resources to support the implementation of these standards, and accountability, reporting and monitoring arrangements.

Each NPM should have appropriate Aboriginal and Torres Strait Islander representation and be required to consult with local Indigenous communities when visiting sites to gain cultural guidance and understanding. NPMs should be educated in trauma informed care and be encouraged to seek advice from national bodies such as the Healing Foundation and the Australian Indigenous Psychologists Association.

Additionally, PHAA recommends that NPMs include an entity with specific focus on Aboriginal and Torres Strait Islander people, particularly in the criminal justice system. This should include not only prison and youth detention centres but also police and court custody, and in-custody transport. The Aboriginal and Torres Strait Islander NPM should be led and staffed by Aboriginal and Torres Strait Islander people, and be included in any legislation for OPCAT.

Youth detention

The recent spate of allegations and substantiated incidences of abuse within youth detention centres in multiple jurisdictions throughout Australia makes it clear that current oversight mechanisms are insufficient and that improvements are urgently required. Australia also continues to incarcerate children under the internationally accepted minimum age of 12¹⁰.

PHAA recommends that regular and consistent oversight of youth detention centres is prioritised.

Immigration detention

The oversight of immigration detention centres in Australia has been largely out of the public domain, but investigations and reports have highlighted multiple issues of concern, including to the physical and mental health of children and young people, sexual offences, riots and the psycho-social effects of indefinite detention on asylum seekers.

PHAA recommends that the inclusion of immigration detention centres in public reporting through OPCAT be prioritised.

Conclusion

PHAA strongly supports the ratification of OPCAT in Australia. However, we are keen to ensure that the implementation allows the opportunities for improvement provided by OPCAT to be realised, in line with this submission. We are particularly concerned that the following points be highlighted:

- Careful consideration must be given to how NPMs are designated, including the National Coordinating NPM
- Civil society must be involved at all stages of the planning, implementation and continued oversight of OPCAT
- NPMs must be adequately supported in legislation and resources to fulfil their functions effectively

The PHAA appreciates the opportunity to make this submission and the opportunity to contribute to the implementation of OPCAT in Australia.

Please do not hesitate to contact me should you require additional information, or if you have any queries in relation to this submission.



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