

**AMNESTY
INTERNATIONAL**



SUBMISSION TO THE AUSTRALIAN HUMAN RIGHTS COMMISSION
'OPCAT IN AUSTRALIA'
CONSULTATION PAPER STAGE 2 - JUNE 2018

Date: 14 September 2018

Contact: Emma Bull

Title: Advocacy & External Affairs Manager, Amnesty International Australia

Email: emma.bull@amnesty.org.au

Phone: (02) 8396 7649

About Amnesty International

Amnesty International is the world's largest independent human rights organisation, comprising more than seven million supporters in more than 160 countries.

Amnesty International is a worldwide movement to promote and defend all human rights enshrined in the Universal Declaration of Human Rights (UDHR) and other international human rights instruments. Amnesty International undertakes research focused on preventing and ending abuses of these rights.

Amnesty International is impartial and independent of any government, political persuasion or religious belief. Amnesty International Australia does not receive funding from governments or political parties.

1. Summary

- 1.1 Amnesty International Australia (Amnesty International) welcomes the opportunity to provide this submission to the Australian Human Rights Commission's (*the Commission*) *Consultation Paper on Stage 2 of OPCAT*.
- 1.2 Amnesty International is supportive of the Commission's work in this area and commends it for engaging civil society on the implementation of the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). Similarly, Amnesty International reiterates its commendation of the Australian Government for ratifying OPCAT. Having campaigned for many years for ratification of OPCAT in Australia, Amnesty International celebrates this event as a historical milestone in the country's commitment to upholding and protecting human rights. This is this first step in a major advancement in human rights protection in Australia.
- 1.3 In determining how OPCAT should be implemented in Australia, the National Preventive Mechanism (NPM) process should follow a preventive approach, as distinct from a reactive, complaints-driven approach.
- 1.4 Through regular and unannounced visits, the NPM should identify problematic high risk detention issues before ill-treatment occurs, before it escalates or becomes systemic.
- 1.5 Amnesty International's substantive responses to key questions in the Commission's current consultation process are set out below.

2. Responses to key questions

- 2.1 *Question 1: How should OPCAT be implemented to prevent harm to people in detention? How should the most urgent risks of harm be identified and prioritised?*

2.2 It is noted that the Australian Attorney-General recently remarked that:

“OPCAT is primarily about prevention and it’s about oversight so it creates mechanisms whereby problems can be anticipated before they arise and if they emerge they can be dealt with more swiftly. Had the OPCAT been operational at the time the events of the Don Dale Youth Detention Centre in Northern Territory emerged, then it may well be, that either they wouldn’t have happened at all or they would have been arrested at a much earlier time.”¹

2.3 Recent revelations concerning the treatment of detainees throughout various jurisdictions in Australia demonstrate that there are systemic problems with the administration of detention facilities. The implementation of OPCAT presents an important opportunity to protect human rights that guarantee a dignified life - even when a person is detained in a detention facility.

2.4 Amnesty International has developed the attached checklist which sets out minimum standards that NPMs should meet². The checklist is consistent with the United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment *Guidelines on national preventive mechanisms* which were adopted on 15–19 November 2010.

RECOMMENDATION 1: Amnesty believes that OPCAT should be implemented with a view to achieving the following objectives:

- A. Giving civic society additional assurances regarding the consistency of care and standards in detention settings;
- B. Providing a framework to help create and implement systems and processes that improve operational effectiveness and advance positive outcomes;
- C. Strengthening interdisciplinary team effectiveness (including health, education, trauma specialists);
- D. Demonstrating credibility and a commitment to quality and accountability;
- E. Mitigating the risk of adverse events and the use of restrictive practices, seclusion, separation and/or isolationstrip, searches and the use of force;
- F. Enhancing the continuum of care and the provision of essential services including health care, legal services and education;
- G. Improving detention organisation’s reputation in civil society and enhancing their awareness and perception of quality;
- H. Using an evidence based risk assessment triage approach which targets detainees at high risk; and
- I. Stimulating sustainable quality improvement efforts and continuously raising the bar with regard to quality improvement initiatives, policies, and processes.

RECOMMENDATION 2: NPMs should be required to meet the minimum standards in the attached checklist which is consistent with the United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment *Guidelines on national preventive mechanisms* which were adopted on 15–19 November 2010.

RECOMMENDATION 3: OPCAT should target vulnerable detainees including children and young people (especially those in adult detention facilities), people with disability (including FASD), Aboriginal and Torres Strait Islander people, immigration detainees, LGBTI people and people with mental health issues.

¹ Attorney-General for Australia, Joint doorstep interview [media], National Museum of Australia, Canberra, 9 February 2017.

² Amnesty International Australia, Checklist for the Effective Implementation of the OPCAT -Establishment of National Preventive Mechanisms (NPMs), accessed 13 September 2018, <https://www.amnesty.org/download/Documents/8000/ior500012014en.pdf>

RECOMMENDATION 4: The risk profile of detainees should be determined through a triage assessment process at the time of admission (using criteria outlined in recommendation 2 above) and high-risk detainees should be proactively targeted for services upon admission.

RECOMMENDATION 5: All Australian Governments should commit to the development and implementation of national standards that set minimum conditions of detention to protect the human rights of detainees in the various detention settings covered by OPCAT.

2.5 *Question 2: What categories of 'place of detention' should be subject to visits by Australia's NPM bodies?*

2.6 OPCAT specifically focuses on detention and closed environments, where a person may be deprived of liberty, which is defined as "...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

2.7 Amnesty International supports this definition and would recommend a broad definition is applied when determining which places of detention should be subject to visits by Australia's NPM bodies.

RECOMMENDATION 6: Categories of 'place of detention' should include any setting in which a person is deprived of liberty including, but not limited to, youth detention centres, immigration detention centres (including Alternative Places of Detention and regional processing centres for which Australia has legal responsibility on Nauru and Manus Island), Navy vessels, airlines when removals overseas occur, police lock-ups and police stations, court custody centres and holding cells, transport for young people detained or arrested or any other person travelling to or from a place of detention, involuntary psychiatric unit placement, secure care facility and young people in statutory out of home care.

2.8 *Question 3: What steps should be taken to ensure that measures to implement OPCAT in Australia are consultative and engage with affected stakeholders?*

2.9 It is noted from page 5 of the Commission's *OPCAT in Australia, Consultation Paper, Stage 2* that the Australian Government has explicitly recognised the importance of other stakeholders in contributing to the success of OPCAT, especially civil society organisations that undertake inspections.

2.10 The Australian Government is commended for this consultative approach and is encouraged to facilitate genuine and regular coordination between NPM bodies and civil society organisations and people with lived experience of detention to provide ongoing input to the NPM bodies.

RECOMMENDATION 7: The Australian Government should facilitate co-ordination between NPM bodies and civil society organisations and people with lived experience of detention to provide ongoing input to the NPM bodies.

2.11 *Question 4: What are the core principles that need to be set out in relevant legislation to ensure that each body fulfilling the NPM function has unfettered, unrestricted access to places of detention in accordance with OPCAT?*

³ *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 18 December 2002, tendered 11 October 2016, Article 4 (2).

- 2.12 The core principles should be to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.
- 2.13 This should include unrestricted access to all places of detention, their installations and facilities and to all relevant information relating to the treatment of persons and to conditions of detention.
- 2.14 It is noted from page 32 of the Commission's *OPCAT in Australia, Interim Report – September 2017* that the Australian Government has stated it does not intend to enshrine the NPM model in legislation, nor does it consider it necessary to legislate to enable inspections by the United Nations Sub-committee on the Prevention of Torture (the SPT).
- 2.15 Amnesty International is concerned that the Commonwealth Government does not intend to introduce legislation to enshrine the NPM model. Amnesty recommends that the Australian Government act in accordance with the SPT guidance that conclusively states that it is best practice for NPMs to be implemented through legislation.
- 2.16 Legislation to enshrine the NPM model should be based on section 29 of the New Zealand *Crimes of Torture Act 1989* (COTA) which provides every person must permit a National Preventive Mechanism to have unrestricted access to—
- (a) any place of detention for which it is designated, and to every part of that place; and
 - (b) any person in a place of detention for which it is designated.
- 2.17 Legislation should also include provisions similar to section 30 of COTA which provides that every person must permit a National Preventive Mechanism to interview, without witnesses, either personally or through an interpreter,—
- a. any person in a place of detention for which it is designated; and
 - b. any other person who the National Preventive Mechanism believes may be able to provide relevant information.
- 2.18 If the Australian Government maintains its position that legislation is not necessary to implement the NPM model, other steps should be taken to strengthen the proposed NPM model.
- 2.19 Alternative, and less comprehensive, options include giving legislative force to the proposed national guidelines or executing an intergovernmental agreement which specifies the mandate and powers of NPM bodies and cover the various aspects of the NPM model. Alternatively, other options should be pursued including giving legislative force to the proposed national guidelines or executing an intergovernmental agreement which specifies the mandate and powers of NPM bodies and cover the various aspects of the NPM model.

RECOMMENDATION 8: The Australian Government should enshrine the NPM model in legislation based on the New Zealand *Crimes of Torture Act 1989* to enable inspections by the SPT.

- 2.20 *Question 5: The Commission's Interim Report (see Appendix) contains a number of preliminary views, expressed as Proposals, regarding how OPCAT should be implemented in Australia. Do you have any comments about these proposals to ensure Australia complies with its obligations under OPCAT?*
- 2.21 Amnesty International strongly supports the Commission's proposals, particularly proposal 2 which recommends that the Australian Government establish an NPM system that:
- a. has a preventive mandate;
 - b. has clear lines of communication between the various entities designated as NPM bodies;
 - c. requires NPM bodies be given sufficient powers, independence and sufficient tenure of to fulfil their mandate, if necessary by legislative amendment;
 - d. sets up formal paths of engagement with civil society organisations and human rights institutions; and

e. is transparent in its operation, including publication of its reports and recommendations.

2.22 Amnesty International also strongly supports the Commission's proposal 4 which recommends that Australia's federal, state and territory governments provide adequate resources to support NPM activities. This should be determined by reference to:

- a. the need to fulfil the core NPM inspection functions;
- b. the need to implement and monitor recommendations made by NPM bodies; and
- c. the inherent good in protecting the human rights of people in detention and the cost savings in undertaking detention activities in accordance with international human rights law.

RECOMMENDATION 9: The Australian Government should adopt the Commission's proposals, particularly proposals 2 (concerning the features of the NPM system) and 4 (concerning adequate resourcing to support NPM activities).

3. **Conclusion**

- 3.1 Torture and other forms of ill treatment have no place in Australia. If the implementation of OPCAT is done with regard to the recommendations of civil society, Australia is set to take real steps to prevent torture and ill treatment in places of detention.
- 3.2 It is critical that NPM systems have sufficient powers and resources to perform their functions efficiently and effectively so that Australians can have confidence that we are fulfilling our obligations under OPCAT.