

14 February 2022

Level 11, 257 Collins Street
Melbourne VIC 3000
PO Box 38
Flinders Lane VIC 8009
T: (03) 8662 3300

Mr Robert Bradshaw
Director, Policy Coordination
Department of Attorney-General and Justice
Northern Territory Government
GPO Box 1722
Darwin NT 0801

Via email: robert.bradshaw@nt.gov.au

Dear Robert,

Australian Psychological Society submission to the Consultation of Northern Territory Legislation for National Preventive Mechanism – Optional Protocol to the Convention Against Torture

The Australian Psychological Society (APS) welcomes the opportunity to provide feedback on the *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Amendment Bill 2022*.

The Australian Psychological Society (APS) is Australia's largest and pre-eminent psychological association with more than 27,000 members. We are dedicated to advancing the scientific discipline and ethical practice of psychology in the communities we serve, in order to promote their mental health and wellbeing. We strive to realise the full human potential of individuals, organisations and their communities through the application of psychological science and knowledge.

The APS is very supportive of the ratification of Optional Protocol to the Convention Against Torture (OPCAT) and the implementation of a National Preventive Mechanism (NPM). We have long been concerned with human rights issues, particularly regarding the conditions, treatment and psychological harm experienced by people in detention. The APS has reviewed the *Amendment Bill 2022* in consultation with its members who have expertise in the criminal justice system and forensic psychology.

The APS aligns itself with the United Nations Sustainable Development Goals (SDG's), which are "a universal call to action to end poverty, protect the planet and improve the lives and prospects of everyone, everywhere" (<https://www.un.org/sustainabledevelopment/development-agenda/>). Of the 17 SDGs, this submission relates to SDG 3 (Good Health and Wellbeing), SDG 10 (Reduced Inequalities) and SDG 16 (Peace, Justice and Strong Institutions).

Should any further information be required from the APS, I may be contacted through my office on (03) 8662 3300 or by email at z.burgess@psychology.org.au

Kind regards

Dr Zena Burgess FAPS FAICD
Chief Executive Officer

APS submission to the Consultation – Northern Territory Legislation for National Preventive Mechanism – Optional Protocol to the Convention Against Torture

Introduction

The APS appreciates the invitation received from the Northern Territory Department of THE ATTORNEY-GENERAL AND JUSTICE to consult on the Legislation for National Preventive Mechanism – Optional Protocol to the Convention Against Torture (OPCAT). We have previously raised human rights concerns about the conditions and treatment of people in detention, pointing to the psychological harm experienced by those detained.^{1 2 3} The APS also has a dedicated refugee issues and psychological health interest group. Further, in July 2017, the APS welcomed the Australian Government's decision to ratify OPCAT.⁴ This was consistent with the APS' support for strong safeguards against maltreatment and torture. Along with other peak bodies, the APS has previously advocated for the Government to undertake a commitment to protecting people in detention.

As a member of the International Union of Psychological Science, the APS fully endorsed the United Nations Declaration and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987). The APS also declared its unequivocal condemnation of the use of torture or other inhuman or degrading procedures in all situations in a statement against psychologist involvement in torture and other inhuman treatment.⁵ This statement outlined the type of conduct expected of psychologists in accordance with the core ethical principle of respect, and acts as a counterpoint against other forces and influences that can result in inhuman treatment and torture.

The APS understands that the ratification of OPCAT in Australia intends to introduce a greater level of transparency and accountability, as well as improve oversight and conditions for the treatment of people who are in detention facilities. OPCAT requires that a monitoring system for places of detention is to occur through two types of complementary and independent bodies:

1. A National Preventive Mechanism (NPM): the domestic Australian entity or network responsible for inspections and oversight; and
2. The UN Sub-committee on the Prevention of Torture (SPT): the UN body of independent experts responsible for conducting visits to places of detention in jurisdictions that have ratified OPCAT and provide guidance to NPMs to assist in the performance of their duties.⁶

The APS also understands that upon ratification of OPCAT, under Article 24, States Parties are permitted to make a declaration postponing the implementation of their obligations for a maximum of three years. Australia made a declaration invoking Article 24 in relation to its obligations to establish an NPM on 21 December 2017.

The current consultation of the Northern Territory (NT) *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Amendment Bill 2022* intends to augment current legislative provisions and establish an NPM to deal with independent inspections of Northern Territory places of detention by local bodies.

The APS has an interest in places of detention, with expertise relating to the mental health of those detained, and practices which restrict or enhance their wellbeing. As such, our submission is based on psychological knowledge, ethical principles, and empirical evidence.

Mental health professionals

The APS observes that *Part 2A Local Inspections. Division 1 NT NPM; Division 2 NPM Inspectors; and Division 3 Inspections* of the Amendment Bill 2022 sets out the legislative requirements associated with the NT NPM functions, independence, staffing, appointment of NPM Inspectors, inspections, reporting and other matters, protections, and offences. The APS believes that the proposed legislation appropriately recognises the overarching purpose and intent of OPCAT.

Regarding implementation of the NPM, the APS has a strong view that mental health professionals can play an important role in inspections of detention facilities, and as such, suggests that psychologists and psychiatrists be included in the visiting teams that form part of the OPCAT and NPM implementation. Further, psychologists involved with inspections should have specific knowledge of, and experience in, post-traumatic stress disorder, trauma informed integrated care, mental illness, cognitive disabilities, delirium, and other conditions which may be associated with underlying challenging behaviours within institutional settings.

Psychologists and psychiatrists who have been part of existing or previous inspection processes, such as Community Visitor programs or the Detention Health Advisory Group (DeHAG) and its successor, the Immigration Health Advisory Group (IHAG), report that mental health professionals are aware of risks and dangers within these environments that may be overlooked by those without such experience.⁴ They are also aware of resilience or strengthening factors that can be highlighted and enhanced. The capacity of psychologists and psychiatrists to interview detainees and staff in a manner that is unlikely to traumatised those concerned should be considered in relation to *Part 2A Local Inspections. Division 3 Inspections. 35 - Interview of persons*.

In relation to *Part 2A Local Inspections. Division 3 Inspections. 34 - Access to information*, the APS agrees that visiting teams from inspection bodies must have access to all documentation concerning the treatment of detained persons. This information is likely to include medical files, injuries and deaths, treatment administered in the context of managing challenging behaviours, and documentation of seclusion and restraint incidents and methods of restraint used. Visiting teams must have access to senior staff at the institution at each visit to discuss outcomes of previous visits, raise issues about staff performance and to follow up on other issues of concern.

Part 2A Local Inspections. Division 1 NT NPM. 19 - Staff of NT NPM (1) specifies that for the purposes of enabling the NT NPM to exercise its functions, the NT NPM may “(c) make arrangements with another oversight body to make use of the services of any employee of the oversight body”. The APS considers it vital that when health and mental health professionals are involved, that they act under the auspices of their professional body. This ensures protection for the professional and appropriate communication channels with Government if necessary.

It is also important to note that, regardless of review outcomes, professional bodies must remain a part of OPCAT. Only through formal documentation and agreements can such ongoing involvement be assured. These arrangements would likely need to be agreed as per the requirements set out under *Part 2A Local Inspections. Division 1 NT NPM. 19 - Staff of NT NPM. (2) an arrangement under subsection (1) is made on the terms agreed to by the parties*.

Collaboration and vulnerable groups

A key principle behind OPCAT is maintaining a constructive relationship between NPMs and detaining authorities. The NPM’s role is to engage with the detaining authorities, identify risk factors that can lead to ill-treatment, and devise recommendations to address those risks.

Indeed, the effectiveness of a “preventive mandate” for NPMs, in places of detention, is reportedly contingent on workforce training and capacity building, adequate funding and resourcing, and collaborative engagement of relevant government bodies and other stakeholders.⁶ Further, the need for collaborative problem solving is also aligned with recommendations by the Australian Human Rights Commission (AHRC, 2020) that the “Australian Government, in consultation with the state and territory governments, should support the development of a human rights education and training strategy for NPMs, detention authorities and their staff.”^{6(p27)}

The APS believes that it is critical that the Amendment Bill 2022, and its implementation, complies with these objectives and recommendations, particularly in respect to vulnerable groups. It is therefore vital that the NPM work collaboratively with other government departments and detaining authorities, such as:

- Human Services Departments, including those with oversight of juvenile justice and disability,
- Immigration Department,
- Aboriginal Affairs Units, and
- Children and Family Services (including Child Protection).

The necessity for collaborative problem solving is especially relevant in terms of the urgent requirement to reduce the disproportionate representation of Aboriginal young people in youth detention who have unaddressed complex social and psychological needs. The APS has previously commented on the disproportionate number of Aboriginal and Torres Strait Islander peoples in the criminal justice system and the clear evidence of racism-related disparities in adverse outcomes.¹ Aboriginal young people are significantly overrepresented in detention, and reportedly often present with complex needs, including suicide risk, substance abuse, mental health issues, social disadvantage, and exposure to intergenerational trauma and family violence.⁷

With regard to this, the APS highlights the importance of inspections by independent visitors, together with representatives of the Indigenous families and communities affected. Essential to this is:

- Ensuring Indigenous representation in OPCAT and NPM governance structures,
- Implementing prevention mechanisms to reduce the incarceration rate of Aboriginal and Torres Strait Islander peoples,
- Continuing to address institutional racism through on-going strategies to reduce racism at a systemic level, and
- Ensuring that inspection processes are fully cognisant of Aboriginal and Torres Strait Islander culture(s).

Evidence suggests that youth involved with the justice system reportedly have higher levels of neurocognitive disability which may adversely impact on mental health and psychosocial outcomes and place them at heightened risk of harm in detention environments.⁸ Emerging research also suggests that youth with neurocognitive disability may face a heightened risk of involvement with youth justice services and recidivism. Notably, findings indicate that exposure to complex trauma in childhood may place adolescents and young adults at risk of psychopathology such as post-traumatic stress disorder, depression, suicidality and susceptibility to further trauma, re-victimisation, and a higher propensity for involvement with the justice system.⁹

The APS recommends increasing workforce training to build capacity of all psychological conditions, including the need to respond to neurocognitive diversity and disability, particularly in youth detention. We believe this is consistent with recommendations regarding the implementation of OPCAT by the AHRC in 2020 that the “Australian Government should adopt national principles regarding minimum conditions of detention to protect the human rights of detainees (National Conditions Principles). These principles need to address the protection of particularly vulnerable detainees, such as children and young people, people with a disability, and Aboriginal and Torres Strait Islander peoples”^{6 (p.9)}.

The APS believes that as part of their preventive mandate, NPMs must work collaboratively with youth, youth detention staff and service providers to ensure the screening and identification of vulnerable young people in detention who have complex needs associated with exposure to trauma and neurocognitive challenges. This may facilitate early intervention and prevention of coercive situational factors in youth detention environments that potentially exacerbate criminalisation and adverse outcomes for this vulnerable population; perpetuating systemic abuse practices. Further, doing so aligns with recommendations made by the AHRC in 2020 regarding the implementation of OPCAT. That is, in “assessing whether each Australian jurisdiction is appropriately fulfilling its NPM function, *special attention should be given to ensuring* [that inter-alia]:

- Each NPM body has a preventive mandate,
- Each NPM body has the requisite expertise to identify the needs of vulnerable cohorts of detainees; and
- Each NPM adopts mechanisms and processes to identify and prevent ill treatment of vulnerable cohorts of detainees, such as establishing thematic committees, and accessing the views of detainees, for example, by directly surveying people with lived experience of detention”.^{6 (p.7)}

The APS broadly believes that specific places of detention where vulnerable groups are of immediate concern (i.e., immigration detention, children, Indigenous Australians, people with cognitive disabilities, and older people), must be dealt with sensitively and regarding individual circumstances. In all such cases, the APS highlights the role of inspections both within correctional and human services systems by independent experts, in collaboration with representatives of and/or advocates for the relevant groups, to create transparency and open discussion about health and mental health.

It is also essential that there is engagement with a wide range of stakeholders including community organisations, peak non-government organisations and interest groups, professional associations (including medical, health and social work associations), research institutions and universities, and people with lived experience of detention. In particular, groups and organisations that represent Indigenous Australians, asylum seekers, aged care residents, young people and those with cognitive impairments should be engaged early, and regularly, as a fundamental function of NPM processes.

These groups should also be represented on the governance structures of the NPM. Advisory bodies or working groups can be a valuable means of drawing upon the insights and expertise of diverse social representatives, including people with lived experience of detention. The ex-IHAG is an example of such a group. Civil society representatives could contribute their expertise and insights by also regularly conducting joint visits with the NPM. 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.

In relation to mental health concerns specifically, we believe that relevant risks must be assessed by independent psychologists under the auspices of the APS, with reporting mechanisms that allow for transparent, open discussion of policies, practices, and their consequences; while aiming for improvement over time.

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.¹⁰

Inspections and restrictive practices

In 2011, the APS developed an *Evidence based Restrictive Practices Guidelines for Psychologists*,¹¹ which highlights the need to reduce restrictive practices, particularly in the disability sector, by increasing the use of positive behaviour support programs. A range of factors are identified in this document that the APS believe should be considered in relation to the NPM inspecting and overseeing such practices. In our submission regarding the ratification of OPCAT, the APS identifies a range of factors for consideration by the NPM in relation to inspecting and overseeing restrictive practices.⁴ These include:

- Person-centred planning
- Determining an appropriate physical environment
- Ethical and legal considerations
- Assessment of people with disabilities
- Managing concerns related to staffing
- Implementing a behaviour support plan (BSP)
- Working with an interdisciplinary framework
- Working with people who have persistent self-injurious behaviours
- Legislative and policy issues
- Upholding dignity and respecting the rights and safety of clients and staff

Future NPM regulation

Further NPM regulation development could consider establishing the timing and frequency of visits, along with required documentation. In addition, mandatory NPM staff training and legal reporting obligations should be specified. It would also be worth requiring reports from inspection bodies to be submitted to an independent body which has the power to act on recommendations, complaints, malpractice, and illegal practices.

Conclusion

In conclusion, the APS emphasises that an NPM inspection framework should take a holistic, proactive (rather than reactive), systemic approach to improving human rights compliance, have functional independence (including reporting requirements and appointments to inspection bodies), be adequately resourced, and appropriately staffed with diverse and appropriately trained professionals in accordance with internationally accepted best practice.

The APS is grateful for the opportunity to provide input to this Consultation and would welcome further opportunities to participate in the implementation of OPCAT and the NPM.

References

¹ Australian Psychological Society. (2016). Senate and Legal and Constitutional Affairs Committee Inquiry into serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre. Retrieved from: www.psychology.org.au/Assets/Files/APS-Submission-to-Senate-Inquiry-into-abuse-self-harm-and-neglect.pdf

² Australian Psychological Society. (2016). Submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory (October 2016). Retrieved from: www.psychology.org.au/Assets/Files/20161028_SR_APSubmissionNTRoyalCommission_Final.pdf

³ Young, P. (2014). Mental health screening and outcome measures in immigration detention. Presented at The Royal Australian and New Zealand College of Psychiatrists' annual congress, 13 May 2014.

⁴ Australian Psychological Society. (2017). Submission to OPCAT in Australia Australian Human Rights Commission Consultation Paper (July 2017). Retrieved from: www.psychology.org.au/getmedia/c3b88019-76cc-4c60-ab68-2dc0cbb4e45f/aps_submission_ahrc_opcat_australia_consultation_paper.pdf

⁵ Australian Psychological Society (2015). Australian Psychological Society Statement against psychologist involvement in torture and other inhuman treatment. Retrieved from: <https://www.psychology.org.au/community/public-interest/torture/>

⁶ Australian Human Rights Commission. (2020). Implementing OPCAT in Australia.

⁷ Victoria Legal Aid. (2016). Care not custody. A new approach to keep kids in residential care out of the criminal justice system. Retrieved from: <https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-care-not-custody-report.pdf>

⁸ Baidawi, S., & Piquero, A.R. (2020). Neurodisability among Children at the Nexus of the Child Welfare and Youth Justice System. *Journal of Youth and Adolescence*.

⁹ Mallett, C. (2014). Youthful Offending and Delinquency: The Comorbid Impact of Maltreatment, Mental Health Problems, and Learning Disabilities. *Child and Adolescent Social Work Journal*, 31(4), 369-392.

¹⁰ The Association for the Prevention of Torture. (2008). Civil Society and National Preventive Mechanisms under the Optional Protocol to the Convention against Torture.

¹¹ Australian Psychological Society (2011). Evidence-based guidelines to reduce the need for restrictive practices in the disability sector. Retrieved from: <https://www.psychology.org.au/practitioner/resources/restrictive/>