



public guardian

Australian Human Rights Commission

Submission to the Optional Protocol
to the Convention Against Torture
Consultation Paper

July 2017

About the Office of the Public Guardian

The Office of the Public Guardian (OPG) is an independent statutory office which promotes and protects the rights and interests of adults with impaired decision-making capacity, and children and young people in care or staying at a visitable site.

The purpose of OPG is to advocate for the human rights of our clients.

For our adult clients, this means advocating for their rights, access to services, independence and choice as part of a supported decision-making model.

For our clients who are children and young people, this means advocating for their rights, access to services and where appropriate, their independence and choice.

The OPG provides an important protective role in Queensland by administering a Community Visitor Program (CVP), which provides statewide visiting services to:

- adults with impaired decision-making capacity residing in government funded facilities, authorised mental health services, forensic mental health facilities, disability facilities, some private hostels, and
- children and young people in out-of-home care (foster care, kinship care, residential care) or at a visitable site (residential facilities, detention centres, corrective services facilities, authorised mental health services, disability facilities).

The Public Guardian views the Optional Protocol to the Convention Against Torture (OPCAT) as fundamental to the administration of this role as:

- *oversight extends to children and young people in held in Queensland youth detention centres*
- *both oversight and guardianship functions are exercised for adults held in forensic detention services and in adult correctional facilities, and*
- *the decision maker for people who have restrictive practices such as containment and seclusion applied to them in a community setting.*

These functions and powers are embedded in the *Public Guardian Act 2014* (PGA) and the *Guardianship and Administration Act 2000*. The Public Guardian also exercises powers and functions under the *Disability Services Act 2006* and the *Powers of Attorney Act 1998*.

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Background to OPCAT

The United Nations *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the Convention) sets out the obligations of State Parties to prevent acts of torture or other cruel, inhuman or degrading treatment or punishment. It also establishes the Committee against Torture to monitor implementation of the Convention. On 8 August 1989, Australia ratified the Convention.

On 22 June 2006, OPCAT came into force. The OPCAT provides for the establishment of 'a system of regular visits to be 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'. Implementation of the OPCAT requires each state party to establish an independent National Preventative Mechanism (NPM) and identify suitable bodies to conduct inspections at all places of detention.

On 19 May 2009, the OPCAT was signed by Australia; ratification and implementation is currently being considered by the Australian Government.

Position of the Public Guardian

The Public Guardian welcomes the opportunity to provide a submission to the OPCAT consultation paper. The Public Guardian has considered the questions raised by the discussion paper and has addressed them generally in the information below.

The key recommendations of the Public Guardian are as follows:

- The NPM should draw on existing oversight mechanisms in Queensland, such as the OPG's CVP to maximise its inspectorate of all people in detention.
- A focus on information exchange to determine the location of individuals that are detained needs to be at the forefront of the planning to establish the NPM.
- The NPM should incorporate staff with multi-disciplinary expertise to aid the identification of potential abuse and torture.
- Places of residence where authorised and unauthorised restrictive practices such as containment and seclusion are used, should be subject to OPCAT.

- That places in which children and young people are detained fall within the scope of OPCAT. These include:
 - youth detention centres
 - authorised mental health facilities
- That the NPM specifically contemplates and seeks to address the overrepresentation of Aboriginal and Torres Strait Islander children and young people in detention.
- Adults detained in secure aged care facilities should fall within the scope of the NPM.
- That the Mental Health Court work collaboratively with the NPM to establish systems to expedite the determination of a person’s criminal responsibility when they are in detention.

The Public Guardian would be pleased to lend any additional support as the discussion around implementation of OPCAT progresses. Should clarification be required regarding any of the issues raised, the Public Guardian would be happy to make representatives available for further discussions.

Many clients of the OPG live in settings that are potentially in the scope of OPCAT, and include:

- **Children and young people**
 - Children and young people who live in authorised mental health units and receive visits from a community visitor and/or receive legal child advocacy services.
 - Children and young people in the care of Department of Communities, Child Safety and Disability Services (DCCSDS) who reside in disability care facilities and receive visits from a community visitor, and/or receive legal child advocacy services.
 - Children and young people who live in youth detention and 17 year olds living in adult correctional facilities who receive visits from a community visitor, and/or receive legal child advocacy services.
- **Adults**
 - Adults detained in correctional facilities who have the Public Guardian appointed as guardian.
 - Adults who are subject to authorised and unauthorised restrictive practices and have the Public Guardian appointed as guardian, and/or receive visits from a community visitor.
 - Adults who are held in authorised mental health services and have the Public Guardian appointed as Guardian and/or receive visits from a community visitor.
 - Adults who are held in forensic disability or forensic mental health services and have the Public Guardian appointed as guardian, and/or receive visits from a community visitor.
 - Adults, including young adults, who live in aged care facilities and have the Public Guardian appointed as guardian.

Existing oversight mechanisms

The Public Guardian has statutory oversight functions in relation to certain places of detention for adults with impaired capacity and children and young people through its CVP and guardianship program. The Public Guardian’s current oversight functions could potentially form part of the NPM. Furthermore, the OPG could exchange information with the NPM, which would assist to identify places of detention. Information exchange is critical to ensure that the NPM is notified of the use or potential use of authorised and unauthorised restrictive practices and needs to be at the forefront of

planning to establish an NPM. A memorandum of understanding between established oversight mechanisms, relevant federal and state bodies and the NPM, regarding the exchange would be vital in identifying places of detention. Relevant bodies would include the National Disability Insurance Agency (NDIA), the Department of Health and DCCSDS.

Skills required by an NPM

The NPM inspection framework requires a skill set which will be able to identify the impact of detention on individuals. For example, clinicians trained in positive behaviour support strategies will be able to identify functions of behaviour that lead to individuals in detention being subject to restrictive practices such as mechanical and physical restraint, and containment and seclusion. This oversight coupled with staff training of positive behaviour support in places of detention, could potentially act as a preventative mechanism.

In order for the NPM to be preventative in nature, those who form the NPM will require experience in identifying the precursors to abuse and torture in detention. The prevalence of precursors are indicators of the potential for abuse, neglect, and exploitation. Precursors can become normalised behaviours and attitudes over a period of time. This can occur for a number of reasons, including trying to cope with current difficulties such as staff shortages, inadequate supervision, lack of procedural frameworks, lack of training and inexperienced staff.

Examples of precursors or actual abuse include:

- leaving individuals in isolation or seclusion longer than the legally permitted time
- contempt towards an individual, verbally and through actions (including fail to act), which then causes the individual to react and the other party to use the further reaction as evidence of the need for harsher treatment, and
- not reporting unethical or questionable practices.

Restrictive practices

OPCAT prohibits cruel, inhuman and degrading treatment or punishment that falls short of the legal definition of torture. This may include the unauthorised and authorised use of restrictive practices. The Public Guardian's CVP conducts visits specifically to report on the use of restrictive practices and to inform QCAT about the need for a guardian for restrictive practices, for an adult.

The authorised and excessive application of restrictive practices presents one of the greatest concerns for the Public Guardian, given that the application of restrictive practices to people with disabilities or mental illness is one of the greatest potential infringements of human rights the OPG deals with. The Public Guardian is concerned that even greater vigilance will be required in relation to the use of restrictive practices by service providers under the NDIS. Even with the advent of the National Quality and Safeguards Framework and the National Complaints Commission, potentially, some adults who are subject to restrictive practices will no longer fall under the visiting jurisdiction of the Public Guardian. The OPCAT would therefore need to encompass locations (including private dwellings) where individuals are subject to containment and seclusion.

Observations of the CVP are that the use of unregulated restrictive practices is prevalent in residential care facilities for children and young people, forensic disability services for adults and sites where adults with disabilities reside.

Children and young people in Queensland are also subject to unregulated detention and restrictive practices. The examples below highlight the unregulated use of restrictive practices in residential facilities.

Overrepresentation of Aboriginal and Torres Strait Islander people

Aboriginal and Torres Strait Islander people are a priority population group for the OPG. In Queensland, and in Far North Queensland in particular, Aboriginal and Torres Strait Islander people are overrepresented in the child protection and youth justice systems. The NPM framework should specifically contemplate and seek to address the overrepresentation of Aboriginal and Torres Strait Islander people in detention.

Aged care facilities

A significant number of clients of the Public Guardian (including young adults) reside in aged care facilities. Aged care facilities fall outside the visiting jurisdiction of the CVP. These facilities are often locked with no free ingress or egress. The observation of the OPG's guardianship program is that the use of unregulated restrictive practices is prevalent in aged care facilities. Currently, there is no national framework for the oversight of restrictive practices in the aged care sector. The NPM should provide oversight for the increasing number of people with dementia who find themselves at risk of harm as a result of ad hoc or poorly applied restrictive practices.

The Mental Health Court process and forensic detention services

The indefinite detention of individuals who find themselves in the mental health system, particularly in the forensic system should be a priority for the NPM. These individuals are extremely vulnerable as they find themselves under layers of sanctioned detention and have comparatively little input into their transition into the community. It is imperative that the Judiciary are engaged by NPM to consider ways of expediting outstanding criminal matters for people with impaired capacity who find themselves in detention—in particular as a result of unfitness to plead. The example below highlights the excessive detention of people within the mental health system who have been found not to be criminally responsible.

Samuel

Samuel has the Public Guardian appointed as guardian for all personal matters. Samuel has schizophrenia and is subject to a Treatment Authority. Samuel is currently on remand and his outstanding criminal matters have been suspended due to his involuntary treatment status, pending determination by the Mental Health Court. Samuel's mental health has deteriorated in custody and he has been transferred to a mental health facility. There have been four unsuccessful bail applications made for Samuel and he has been waiting for a hearing date in the Mental Health Court for approximately two years.

Further direction required

The Public Guardian seeks definitional direction in relation to what is considered to be torture and whether restrictive practices are included in the context of the OPCAT.

The Public Guardian seeks definitional direction in relation to what facilities are to be included in an Australian context. The Public Guardian recommends that facilities such as the Forensic Services and high security mental health services are included.

Universal/agreed definitions of what constitutes containment, seclusion, chemical restraint and other types of restrictive practices are required, as these terms attract different meanings in different settings (corrective services vs mental health facilities for example). It was noted by the Public Guardian's representative at the last roundtable discussion, which took place in Sydney in May 2017, that different participants were using the same terms but giving them different meanings due to the sector that they were representing. This could be potentially problematic for the NPM.