



Australian
Human Rights
Commission

Draft General Comment on Article 4 of Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)

Submission to United Nations Subcommittee on Prevention of
Torture

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1 Introduction

1. The Australian Human Rights Commission (Commission) welcomes the opportunity to provide this submission to the United Nations Subcommittee on Prevention of Torture (UN SPT) consultation on its Draft General Comment on Article 4 of OPCAT.¹
2. The Commission is Australia’s National Human Rights Institution, with recognised independent status and roles in United Nations human rights fora. The Commission’s purpose is to provide independent and impartial services to promote and protect human rights and fundamental freedoms.
3. The Commission undertakes a range of policy development and research tasks that aim to promote compliance with Australia’s human rights obligations, while also investigating and conciliating complaints of unlawful discrimination and breaches of human rights.
4. While the Commission is not a designated National Preventive Mechanism (NPM) or NPM-coordinator (and therefore has no formal implementation responsibilities), continuing to promote OPCAT compliance and providing an independent perspective on the actions Australia needs to take to ensure compliance with its international human rights obligations under OPCAT falls within the Commission’s broad statutory mandate.
5. The Commission has long advocated for Australia’s full compliance with OPCAT, noting that ‘merely adjusting the current processes for detention inspections cannot be an end in itself. Instead, the changes required by OPCAT should be pursued in a way that promotes stronger and more consistent human rights protections for people who are detained across all jurisdictions.’²
6. The Commission supports the UN SPT’s objective ‘to clarify and address’ misconceptions about the definition of places of deprivation of liberty and places of detention; and by doing so, fortifying ‘the essential purpose of the Optional Protocol’ [paragraph 6].

7. The Commission can provide further assistance to the UN SPT in its consideration of these important matters and can be contacted at humanrights.commissioner@humanrights.gov.au

2 A comprehensive approach to defining 'deprivation of liberty'

8. The Commission supports the Draft General Comment's comprehensive approach to defining 'deprivation of liberty' which:
 - [includes] both public and private settings and situations in which there is State instigation of or consent or acquiescence to the deprivation of liberty. [paragraph 4]
 - cannot restrict the definition of places of deprivation of liberty so as to leave out places where persons could be deprived of liberty and where torture could be taking place. [paragraph 9]
 - [includes] any private institution, and institutions operated by private actors as a result of outsourcing or by non-State officials, from which a person is not permitted to leave at will. [paragraph 21]
 - [includes deprivation] for any period of time, even in transit, and the place itself can be any type of facility or any type of terrain (land, sea or air). [paragraph 37]
 - [included deprivation in which a person] may have entered voluntarily or involuntarily [paragraph 37]
 - is not fixed or limited and should allow for novel circumstances of deprivation of liberty that may arise in new contexts. [paragraph 41]
9. The Commission supports the position adopted in the Draft General Comment that 'any restrictive interpretation would impair the mechanism enshrined in the Optional Protocol and thus be contrary to its spirit' [paragraph 8]. The Commission also supports the notion that 'a good faith interpretation cannot restrict the definition of places of deprivation of liberty so as to leave out places where persons could be deprived of liberty and where torture could be taking place' [paragraph 9].
10. These explanatory points are significant to the Australian implementation of OPCAT. The Australian Government has opted for a 'progressive realisation', whereby NPMs will prioritise activities in 'primary' places of detention, as

opposed to all places where people may be deprived of their liberties.
Primary places of detention are defined as including:

- (a) adult prisons
- (b) juvenile detention facilities (excluding residential secure facilities)
- (c) police lock-up or police station cells (where people are held for equal to, or greater than, 24hrs)
- (d) closed facilities or units where people may be involuntarily detained by law for mental health assessment or treatment (where people are held for equal to, or greater than, 24hrs)
- (e) closed forensic disability facilities or units where people may be involuntarily detained by law for care (where people are held for equal to, or greater than, 24hrs)
- (f) immigration detention centres, and
- (g) military detention facilities.³

11. The Australian Government has argued that OPCAT implementation is 'an iterative process' and 'mindful of the principle of proportionality when determining prioritisation and focus, consistent with advice from the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment'.⁴ The Australian Government has also confirmed that it arrived at its list of primary places of detention 'in consultation with State and Territory governments'.⁵

12. The United Nations Committee Against Torture has already confirmed the Australian Government's approach 'runs counter to the provisions of article 4 of the Optional Protocol'.⁶ The Commission has consistently stated that 'the best approach for Australia is simply to adopt an inclusive approach, consistent with articles 1 and 4 of OPCAT'.⁷ The Commission has also noted 'there is no temporal limitation on the concept of detention in OPCAT. Therefore, places where people are routinely detained for periods of less than 24 hours, should be included in the places open to inspection by NPMs'.⁸

13. The United Nations Committee Against Torture rightly identifies that the Australian Government's restrictive approach 'leaves several places in which persons are deprived of their liberty outside the scope and the mandate of the network of national preventive mechanisms'.⁹ For example, the Australian

Government has advised that it considers that ‘aged care facilities do not fit within the concept of ‘places of detention’ as set out in Article 4 of OPCAT and there is presently no proposal to include them in any list of primary places of detention’.¹⁰

14. Former Special Rapporteur on Torture, Professor Manfred Nowak, has pointed out that Australia’s approach ‘excludes a number of places where human beings in fact are or may be deprived of liberty, such as old peoples’ homes and a variety of “institutions” where children are or may be deprived of liberty for various reasons, including educational supervision, drug or alcohol rehabilitation, for their own care as orphans, children living in the streets, indigenous children, etc’.¹¹ Nowak further emphasised that ‘deprived of liberty in these types of ‘institutions’, where the risks of corporal punishment, sexual exploitation, and mental and physical violence are particularly high’¹², reinforcing the need to include them within the mandate of the Australian NPM.
15. While not all Australian states and territories have chosen to adopt the Australian Government’s narrow definition, they are restricted by it. For example, in debating the *OPCAT Implementation Bill 2021 (Tasmania)* it was acknowledged that,

without the Commonwealth establishing a legislative framework we will have in the state of Tasmania our Tasmanian NPM which has no jurisdiction to go into an aged care setting, as I understand it, and to investigate those settings to see what needs to change in those settings to make sure that people are not exposed to cruel and degrading treatment or indeed to punishment.¹³
16. On the topic of broadening the scope of places of detention which the UN SPT could visit in the *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022 (Queensland)*, the Queensland Department of Justice and Attorney-General (DJAG) acknowledged:

residential aged care facilities (and secure dementia units) are regulated and funded by the Commonwealth Government; and in relation to disability group homes and accommodation settings, DJAG understands the Commonwealth Government has responsibility for registration of the majority of these settings through its role in delivering the National Disability Insurance Scheme. A nationally consistent approach could be beneficial for facilitating Subcommittee access to these facilities; noting also the vast majority of residential aged care services are operated by for-profit organisations and non-government organisations.¹⁴
17. It has been recognised by the Special Rapporteur on the rights of persons with disabilities that ‘persons with disabilities extensively experience unique, disability specific forms of deprivation of liberty’¹⁵ and that they are ‘exposed

to additional human rights violations, such as forced treatment, seclusion and restraints.¹⁶ The Independent Expert on the enjoyment of all human rights by older persons, has also reported that ‘Older persons are exposed to heightened risks of violence, abuse and neglect when they are forcibly placed and deprived of their liberty. This may take several forms, including... prolonged use of physical, mechanical and/or chemical restraints.’¹⁷

18. The Commission has advocated that an NPM must be ‘disability-inclusive to safeguard against risks which are unique to people with disability in all forms of detention.’¹⁸ Any examination of the ‘place, facility or setting’ that constitutes deprivation of liberty must needfully include an examination of practices which are applied to people with disability, including:

- (a) non-consensual treatments and practices;
- (b) behaviour modification methods;
- (c) the use of restrictive practices, such as physical, chemical and mechanical restraints, and seclusion; and
- (d) indefinite detention.

19. **Recommendation 1: The Commission recommends the Draft General Comment incorporate within paragraphs 8–9, the advice of the SPT that the ‘principle of proportionality’ when determining visiting priorities, is the express responsibility of the NPM and not of the State.**¹⁹

20. **Recommendation 2: The Commission acknowledges the list at paragraph 38 of Draft General Comment is non-exhaustive. However, recommends it also includes:**

- (a) **disability group homes and closed community-based accommodation and residences for people with disability**
- (b) **special schools and ‘time out’ and seclusion rooms and segregated areas in any educational settings**
- (c) **emergency departments and hospitals.**

21. **Recommendation 3: The Commission recommends the final example in paragraph 37 be broadened to ‘persons with disabilities’ and a more overt reference to the use of ‘restrictive practices’ imposed by service providers be made.**

3 Jurisdiction or control

22. The Commission supports the Draft General Comment's approach that the scope of 'jurisdiction and control' of article 4 (1) be understood to mean 'jurisdiction or control' [paragraph 24]. The Commission also supports the explanation that 'control' applies 'also to those within the power or effective control of the forces of a State party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained'. [paragraph 27].
23. These explanatory points are particularly relevant to the Australian context. Prior to, and shortly after, OPCAT ratification, the Australian Government asserted that its obligations did not extend to the regional processing arrangements in Nauru and Papua New Guinea.²⁰ The Commission however has consistently maintained that 'there are a number of factors which would support the conclusion that Australia is exercising effective control over the asylum seekers transferred to and detained [in Papua New Guinea and Nauru]'.²¹ The Commission has additionally recommended Australia follow the UN SPT's advice on 'cross-border monitoring'²² and the United Nations Committee Against Torture has expressed its concern about 'a lack of monitoring by independent inspection bodies.'²³
24. The Special Rapporteur on the human rights of migrants has noted that individuals transferred to Nauru by the Australian Government are under the effective control of Australia 'because, inter alia, Australia transferred them to regional processing centres, which are funded by Australia, and with the involvement of private contractors of Australia's choice'.²⁴ This viewpoint has also been repeated by the United Nations Committee against Torture.²⁵
25. The Parliamentary Joint Committee on Human Rights found in 2013 that 'the evidence demonstrates that Australia could be viewed as exercising "effective control" of the arrangements relating to the treatment of persons transferred to Manus Island or Nauru'.²⁶
26. The Senate Legal and Constitutional Affairs References Committee also reported in 2017 that
- the Australian Government must acknowledge that it controls Australia's RPCs [Regional Processing Centres]. Through the department, the Australian Government pays for all associated costs, engages all major contractors, owns all the major assets, and (to date) has been responsible for negotiating all third country resettlement options. Additionally, the department is the final decision-maker for approving the provision of specialist health services and medical transfers (including medical evacuations) and the development of policies and procedures which relate to the operation of the RPCs.²⁷

27. While regional processing arrangements for asylum seekers in Papua New Guinea ceased at the end of 2021, the Commission continues to hold serious concerns that those asylum seekers remaining in Papua New Guinea may be subjected to arbitrary detention and inadequate living conditions. Similar concerns are held about those subjected to regional processing arrangements in Nauru.

28. The Australian Government has argued that ‘transitory persons in Nauru are not in detention and all reside in community accommodation’.²⁸ In reporting on the ‘open centres’ in Nauru, the United Nations High Commissioner for Refugees (UNHCR) stated:

key aspects of conditions are indistinguishable from previous detention arrangements. This includes the number of security guards, the configuration of the fences at the perimeters and the sub-compounds and the overcrowding in accommodation, including the continued use of communal tents (‘marquees’) for protracted periods of time. Individuals remain living in a detention-like setting, which not only has a very detrimental impact on mental health, but also increases the risk of abuse and self-harm.²⁹

29. The Special Rapporteur on the human rights of migrants has also noted:

the geographical and psychological isolation of Nauru, the equatorial heat bearing down on often still non-air-conditioned tent dwellings, the length of the processing (soon to be four years for many of them since their arrival) and the absence of any solution allowing them a durable resettlement in a country where they can imagine a future for themselves and their children makes the unresolved situation extremely difficult to bear.³⁰

30. The Senate Legal and Constitutional Affairs References Committee furthermore reported in 2017 that:

people who choose to leave the RPCs, or who have been housed in the local communities, also live in a challenging environment, and have limited control over their lives. This is starkly apparent in Nauru. The Nauru atoll is tiny, at just 21 square kilometres. It is an isolated island surrounded by ocean. The only way a refugee or asylum seeker can leave the island is by agreeing to be resettled in Cambodia, indicating their interest in being resettled in the USA (and then being found eligible to do so), or by agreeing to return to their country of origin.³¹

31. These factors taken together are demonstrative of the point raised in the Draft General Comment that ‘an individual might be found in a place that – examined separately – does not constitute a place of deprivation of liberty, but does indeed constitute a place of deprivation of liberty when examined in context’; including, ‘if the ability to leave such a place or facility would be limited or would entail exposing a person to serious human rights violations, that place should also be perceived as a place of deprivation of liberty, in accordance with article 4 of the Optional Protocol’. [paragraph 39].

32. Recommendation 4: The Commission recommends the Draft General Comment incorporate within paragraphs 24-28, the advice of the UN SPT regarding 'cross border monitoring.'

33. Recommendation 5: The Commission recommends the Draft General Comment provide further elaboration to paragraph 39, including through examples of known situations where deprivation of liberty has been found as the result of an examination of the wider context.

4 Recommendations

34. The Commission makes the following recommendations:

Recommendation 1: The Commission recommends the Draft General Comment incorporate within paragraphs 8–9, the advice of the SPT that the 'principle of proportionality' when determining visiting priorities, is the express responsibility of the NPM and not of the State.³²

Recommendation 2: The Commission acknowledges the list at paragraph 38 of Draft General Comment is non-exhaustive. However, recommends it also includes:

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- (b) special schools and 'time out' and seclusion rooms and segregated areas in any educational settings
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Recommendation 3: The Commission recommends the final example in paragraph 37 be broadened to 'persons with disabilities' and a more overt reference to the use of 'restrictive practices' imposed by service providers be made.

Recommendation 4: The Commission recommends the Draft General Comment incorporate within paragraphs 24–28, the advice of the UN SPT regarding 'cross border monitoring'.

Recommendation 5: The Commission recommends the Draft General Comment provide further elaboration to paragraph 39, including through examples of known situations where deprivation of liberty has been found as the result of an examination of the wider context.

Endnotes

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