

STANDARD BRIEFING NOTE #10

Optional Protocol to the Convention Against Torture: Impact and Implementation in South Australia

This Briefing Note contains key points, key terms, background information and examples of practical application as well as links to further information and local contacts. It does not contain legal advice and should be used as a starting point for further research rather than an authoritative source. Feedback on its contents is welcome. It was initially prepared by Chynae Gibson.

Key Points

- South Australia has systems designed to detain and punish individuals for wrongdoing (such as prisons) as well as institutions designed to safeguard those who are in vulnerable situations including those in the child protection system, aged care and mental health institutions. These systems are designed to keep individuals and the community safe but can also have a significant impact on individual human rights, particularly where failures in system design or management lead to abuse and neglect. Some of these failures can be described as cruel, inhuman or degrading treatment.
- In order to protect all South Australians from cruel, inhuman or degrading treatment, monitoring systems have been designed to monitor our state's closed facilities, but these have not always proved to be sufficient when it comes to upholding human rights standards for those who are in care or detention.

Every jurisdiction in Australia is currently in the process of establishing new or revised oversight mechanisms for places of detention and closed care facilities because, after abuses at the NT's Don Dale Youth Detention Centre received international attention, the federal Coalition government ratified an international agreement, the *Optional Protocol to the Convention against Torture* (OPCAT), in late 2017. Upon ratification, Australia exercised its right to make a formal declaration under Article 24 of OPCAT to delay the commencement of its obligations for three years.

OPCAT is designed to complement our existing state mechanisms such as the Ombudsman SA which investigates, in a reactive manner, complaints made by those in detention.

- Article 1 of OPCAT states that the objective of the Protocol is to establish a system of monitoring mechanisms in order to prevent mistreatment in all places of detention. OPCAT establishes a system of regular preventative visits undertaken by independent international and national bodies known as National Preventive Mechanisms (or NPMs) to all Australian places of detention, with oversight from the United Nations Subcommittee on the Prevention of Torture. The objective of this system is to identify practices that can cause mistreatment of people in detention, and to use non-judicial means of a preventative nature, based on regular visits.

- The hope is that the implementation of OPCAT in South Australia will ensure the welfare and human rights of detainees continue to be respected and to prevent unnecessary harm and death in places of detention.
- The Federal Government has nominated the Commonwealth Ombudsman as the NPM to coordinate oversight across Australia but each jurisdiction must set their own preferred NPM system. South Australia does not currently have a regular, preventive prison inspection system with independent institutional capability. Although, there are oversight and inspection regimes that have the ability to either become an NPM or play a role in an NPM network.
- In order to implement the OPCAT locally, the South Australian Government will need to determine what oversight bodies will monitor places of detention; how these bodies will be properly resourced, and whether legislation, such as the *Correctional Services (Accountability and Other Measures) Amendment Act 2020* will be needed.

<i>Correctional Services (Accountability and Other Measures) Amendment Act 2020</i>
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- In mid-May 2020, the South Australia government introduced the *Correctional Services (Accountability and Other Measures) Amendment Bill 2020* which passed the House of Assembly on 22 July 2020 and the Legislative Council on 2 February 2021.
- The bill proposes a plethora of changes to the Correctional Services Act and the Public Sector Act, including amendments purportedly designed to implement some requirements under OPCAT. The primary objective of the bill is the promotion of community and prisoner safety.
- The key feature of the bill is the Official Visitors Scheme that it introduces. The Official Visitors Scheme appoints a diverse group of visitors that will ensure the oversight body is adequately caring for detainees.
The bill ensures that –
 - (a) at least 1 official visitor for each correctional institution is an Aboriginal or Torres Strait Islander person; and
 - (b) at least 1 official visitor for each correctional institution is a legal practitioner; and
 - (c) at least 1 official visitor for each correctional institution is a woman.

The Official Visitors Scheme proposed in the Bill is designed to form part of the preventative mechanism required under the OPCAT.

Under the visitor scheme, the Governor will appoint a diverse group of remunerated visitors including at least one legal practitioner, one woman and one Aboriginal or Torres Strait Islander person (it excludes only those persons who become a member of an Australian parliament, become bankrupt or who is convicted for an offence or serving a prison sentence).

This will replace the previous volunteer based visitor scheme that has been described as underperforming in reviews by Ombudsman SA.¹

Official visitors conduct visits and inspections of correctional institutions (which covers adult prisons, ‘police prisons’ and police transport vehicles) and ‘inquire into, investigate and provide advice to the Minister or the Chief Executive of the Department of Correctional Services on any matter relating to the management of the correctional institution, or the care, treatment of control of the prisoners’. The official visitors can also make recommendations relating to the ‘care, treatment and control of prisoners’ in these institutions. They can speak with prisoners and consider information and materials ‘in private’.

- However, the visitor scheme proposed in the Bill has been strongly criticised by human rights expert Associate Professor Laura Grenfell, including on the grounds that the Bill was not subject to consultation with key stakeholders in the state despite the amendments being described in the second reading speech as ‘significant’ and that it does not sufficiently guarantee the independence of the official visitors.² For example, under the Bill the Chief Executive of the Department of Correctional Services (DCS) determines the resources and ‘remuneration, allowances and expenses’ of the official visitors – meaning that the visitors will be resourced and remunerated by the same body they are tasked with monitoring. By way of contrast, in Western Australia the OPCAT monitoring role has been given to its Ombudsman and its Office of the Inspector of Custodial Services (an independent statutory department receiving its budget direct from Treasury). In WA, both oversight bodies report directly to Parliament unlike SA’s proposed mechanism.

Associate Professor Grenfell is also concerned that the proposed official visitor scheme muddles the proactive and preventive components of the OPCAT by requiring that official visitors double up on existing functions, potentially diluting their ability to effectively monitor our correctional institutions. Under the proposed scheme, official visitors have functions as advocates for prisoners, as well as complaints investigation functions (which are also already held by the Ombudsman). Under the OPCAT, the functions of monitoring, complaint handling and advocacy should not be mixed. Unless amended, the new scheme will burden official visitors with too many functions, particularly already those covered by existing bodies, dilute their role and impede their ability to effectively monitor our correctional institutions. In addition, Associate Professor Grenfell notes that under the Bill, the official visitors do not have adequate powers to fulfil their monitoring function, particularly when it comes to attending places of detention ‘unannounced’. This undermines one of the key aims of the OPCAT mechanism which is to increase transparency and reduce the cover-up culture which can thrive in our places of detention because they are out of public sight.

¹ Ombudsman SA, *An Audit of Prisoner Complaint Handling in the SA Department for Correctional Services* (June 2012) p37.

² Laura Grenfell, ‘Half-baked prison oversight Bill sets inspectors up for failure’ *InDaily*, 11 August 2020 <https://indaily.com.au/opinion/2020/08/11/half-baked-prison-oversight-bill-sets-inspectors-up-for-failure/>

A number of the concerns flagged by Associate Professor Grenfell were addressed (or partially addressed) as amendments when the Bill was debated in the Legislative Council, improving the overall compliance of the legislation with OPCAT.³

Impact on Juvenile Care

- Adelaide Youth Training Centre (Kurlana Tapa) is South Australia's only youth detention centre. There are currently only two oversight bodies for South Australian juvenile detention centres, SA Ombudsman and Training Centre Visitor. These bodies, however, are not regular, preventive or proactive bodies but rather hold a complaints-based and reactive approach.
- OPCAT will positively impact the juvenile care at Kurlana Tapa by providing a rights-based approach that seeks to safeguard the rights of children and young people in detention.
- A key feature that will promote the protection of Australia's children is the NPM bodies. These bodies will impact juvenile care providing a preventative and proactive approach, rather than a complaints-based and reactive approach. Lack of NPMs for children in detention is a significant factor to the ongoing abuse and neglect that children face in detention centres across Australia.
- In order to comply with Article 1 of OPCAT, the Australian Human Rights Commission recommends non-punitive, educative and therapeutic approaches within places of detention in order to prevent mistreatment.
- NPMs will prevent this abuse and neglect by seeking to retain technical expertise about child development, children's rights, trauma and how detention can affect children.
- OPCAT can assist in the design and implementation of Youth Treatment Orders. There have been concerns surrounding the Draft Model of Care for Phase 1 of the Youth Treatment Orders. The orders will subject vulnerable children and young people who are detained within the Kurlana Tapa Youth Justice Centre to mandatory coercive drug treatment programs for a period of up to 12 months. These programs will be enforced without consent and on an experimental basis, which raises human rights concerns, contrary to the principles set out in the *Convention on the Rights of the Child* and the United Nations Standard Minimum Rules for treatment of Prisoners.

OPCAT can assess the program against cultural safety standards, which is critical given the disproportionate impact the scheme has on Aboriginal youth.

³ See *Parliamentary Debates*, Parliament of South Australia, Legislative Council, 2 February 2021 <http://hansardpublic.parliament.sa.gov.au/Pages/HansardResult.aspx#/docid/HANSARD-10-31653>

Australia's obligations under OPCAT will urge the government to revisit the design of the scheme to ensure the rights and interests of the children and young people subject to these orders are more robustly protected.

Case Study from Don Dale Youth Detention Centre

In July 2016 images of serious mistreatment and abuse were published from inside Don Dale Youth Detention Centre in Australia's Northern Territory. Juveniles were being subjected to disturbing unlawful corporal punishment, the children, some as young as 15, were put in instances that included battery as well as the unlawful use of tear gas. Children were also kept in locked cells for almost 24 hours a day with no running water, little natural light, and were denied educative resources.

Implementation of the OPCAT in South Australia would help articulate clear human rights standards for places of juvenile detention based on international best practice. The OPCAT is guided by the purposes and principles of the United Nations concerning the treatment of people deprived of their liberty. In particular, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1987 and the Convention on the Rights of the Child 1990. NPM's will be responsible for protecting the human rights of juveniles in detention, particularly their right to be protected from inhumane or degrading treatment.

The OPCAT in South Australia will also ensure regular, independent monitoring and inspect places of detention with systematic focus. NPM's main objective is prevention of harm, NPM bodies can conduct regular unannounced preventative visits to all places of detention. Their functions also include rights to unfettered access to information and persons, including staff.

Finally, the OPCAT will not exist purely in reliance on individuals making complaints, it will be preventive in terms of addressing issues before they become disasters. The focus of OPCAT is to examine places of detention and prevent the harm prior to it existing, whereas the bodies that currently exist in South Australia respond once the harm already occurred.

Impact on Immigration Detention

- Australia's OPCAT obligations extend its oversight bodies to 'any place under its jurisdiction and control where persons are or may be deprived of their liberty' (Vienna Convention of the Law of Treaties, Art 4). Therefore, Australia's obligations continue after asylum seekers are transferred from Australia to Nauru or Papua New Guinea. OPCAT extends Australia's jurisdiction and obligations under various human rights treaties and requires Australia to exercise power, control and authority in relation to people transferred to Nauru and Papua New Guinea.

- OPCAT's preventive function would best prevent mistreatment if Australian NPMs were permitted to monitor centres in Nauru and Papa New Guinea. Australia would best fulfil their obligations if it were to negotiate access to centres in Nauru and Papa New Guinea to work together with NPMs and to collaboratively fulfill their respective obligations.
 - This approach would ensure that countries do not outsource or circumvent their obligations under OPCAT and international law and thereby undermine the preventive purpose.
- Australia's obligations under OPCAT also extend to detention at sea. The *Maritime Powers Act 2013* (Cth) allows Australian officers to detain people and take them to any place, in or outside Australia (ss 72,74). Subsection 40 and 41 authorise maritime officers to detain people in Australia's waters and, in some circumstances in other countries. Australia's obligations therefore extends to any place that Australian maritime officers detain people.
- OPCAT will act as an essential preventative measure for torture and inhuman and degrading treatment. Australia currently has two main government bodies that visit and monitor places of immigration detention, the Australian Human Rights Commission and the Commonwealth Ombudsman. These two bodies regularly visit immigration detention facilities either with approval from the Department, or to investigate complaints and launch inquiries. These bodies currently exercise administrative power rather than preventative.
- OPCAT will give NPM bodies the power to inspect and monitor places of immigration detention. NPM bodies will be able to complete frequent, unannounced, preventative visits that will prevent torture and inhuman and degrading treatment from occurring in places of immigration detention. OPCAT will redress and rehabilitate victims of torture.

Impact on Persons with Disabilities
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- People with intellectual, cognitive and psychosocial disabilities, including those who identify as Aboriginal and Torres Strait Islander, are significantly overrepresented in places of detention. The Australian Human Rights Commission's research concluded that prisoners with disabilities have been subjected to a range of harmful practices, including being physically shackled, medically restrained, segregated for long periods of time, and denied family visits or support persons as punishment.
- Persons with disabilities deprived of their liberty are more likely to be placed into extremely vulnerable situations. They experience a higher risk of being subjected to

torture and inhuman and degrading treatment. OPCAT will adequately monitor these facilities where persons with disabilities are deprived of their liberty.

- OPCAT will provide the essential expertise required to adequately care for persons with disabilities. The *Correctional Services (Accountability and Other Measures) Amendment Act 2020* recognises that additional expertise is necessary for inspection and reviews:

An official visitor must pay particular attention to the needs and circumstances of prisoners in the correctional institution who have a physical, psychological or intellectual disability. [s 20D (2)].

- OPCAT will ensure the facilities and programs developed for the care of persons with disabilities will be evidence based and be individually designed to consider any special needs in order to ensure they are not mistreated.
- The legislative requirement for additional expertise for people with a disability' is a useful approach to consider in nominating a preferred system NPM system. It is appropriate to consult with organisations representing the interest of persons with disabilities.

Impact on Aged Care

- Closed aged care facilities are often informal, unregulated and unlawful. There is an absence of a specific oversight body that regulates and monitors the use of force to manage the specific needs and safety of individuals residing in closed aged care facilities.
- There is currently an inadequate state monitoring scheme in South Australia. The Community Visitor Scheme in South Australia involves a group of volunteers that complete audits of aged care facilities for those with very severe and extreme dementia. These volunteers have limited specific training and no specified qualifications.
- The implementation of OPCAT will ensure that NPMs are guided by particular human rights standards that will prevent and report the use of restrictive practices. In order to do this, the South Australian government will need to set out a national, consistent and mandatory approach to monitoring and prevention.
- There is an absence of regulation of restrictive practices. South Australia's 2018 Chief Psychiatrists gave evidence that the restrictive practises used in SA were the worst that he has seen. OPCAT in South Australia will develop a new state-wide plan that offers services that treat all patients / occupants with dignity and respect. OPCAT will

monitor the use of force to ensure a robust and proactive preventative monitoring system that is consistent with human rights standards.

- OPCAT will monitor and prevent systematic failures of care like those seen in Oaken Older Persons Mental Health Service. The Australian Aged Care Quality Agency failed to detect indications of failures of care. OPCAT will set up a body that routinely monitors aged care facilities that will seek to prevent mistreatment of vulnerable and dependent beings that rely on South Australia's services to care for their safety.

Case Study from Oakden Older Persons Mental Health Service

A review of South Australia's Oakden Older Persons Mental Health Service by Chief Psychiatrist raised a human rights issue. It revealed a set of systematic failures in care, especially when dealing with elderly patients with severe or extreme dementia.

Patients were subject to restrictive practises that included the use of lap belts and jacket restrains that were being used for a periods of more than four hours.

The OPCAT will set clear human rights standards for all private aged care facilities, NPM bodies will consider international best practice and will monitor the treatment of those detained in aged care facilities.

The failures at Oakden highlight the need for a proactive NPM that ensures regular, independent monitoring and the use of human rights standards. The OPCAT will ensure regular, independent monitoring and will monitor aged care facilities with a systematic focus. The current schemes have clear deficiencies and lack specific regulation, aged care facilities will be protected under the OPCAT, and will require NPMs to monitor aged care facilities to prevent any torture or cruel, inhuman or degrading treatment.

Failures like Oakden will be prevented with the ratification of the OPCAT, the convention is proactive and preventative, it will regularly monitor places of detention and not be purely in reliance of responding after a complaint has been made. This approach will be comprehensive and will identify problems that cannot be voiced in the form of a complaint. Finally, The OPCAT will eradicate South Australia's troubling 'cover up' culture because NPM have the right to perform unannounced visits that are guided by human rights standards.

Further Information

- *Correctional Services (Accountability and Other Measures) Amendment Act 2020.*
- *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018.*
- The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
<https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx>
- Ombudsman’s speech to the 8th Annual Prisons Conference, held in Brisbane, July 2019: “Implementing OPCAT”
- Australian Human Rights Commission: Optional Protocol to the Convention against Torture <https://humanrights.gov.au/our-work/rights-and-freedoms/projects/opcat-optional-protocol-convention-against-torture>
- Australian Human Rights Commission, ‘Implementing OPCAT in Australia (2020)’ <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/implementing-opcat-australia-2020>
- Laura Grenfell, ‘OPCAT is coming - and now is the time for SA to set up its monitoring system for all places of detention’, *Bulletin of the Law Society of South Australia*, vol. 42, no. 1, Feb 2020: 38-39.
- Laura Grenfell 'Aged Care, Detention and OPCAT' (2019) 25 *Australian Journal of Human Rights* 248-262
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