



public interest
ADVOCACY CENTRE

**Submission to Australian Human Rights
Commission re OPCAT in Australia
Consultation Paper**

21 July 2017

1. Introduction

1.1 The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in New South Wales. Established in 1982, PIAC tackles systemic issues that have a significant impact on disadvantaged and marginalised people. We ensure basic rights are enjoyed across the community through litigation, public policy development, communication and training.

Our work addresses issues such as:

- homelessness;
- access for people with disability to basic services like public transport, education and online services;
- Indigenous disadvantage;
- discrimination against people with mental health conditions;
- access to energy and water for low-income and vulnerable consumers;
- the exercise of police power;
- the rights of people in detention, including the right to proper medical care; and
- government accountability, including freedom of information.

PIAC is funded from a variety of sources. Core funding is provided by the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government for its Energy and Water Consumers Advocacy Program and from private law firm Allens for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, donations and recovery of costs in legal actions.

1.2 PIAC's work on OPCAT

PIAC has long advocated for the ratification of the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT) by the Australian Government. We believe that ratification has the potential to provide a range of benefits, including:

- improved oversight and accountability in the conditions in juvenile justice centres, prisons and immigration detention centres;
- new and/or improved oversight in other places of detention, such as police custody, places of mental health detention, places of alcohol and other drug detention, aged care facilities and facilities for people with disabilities;
- with the aim of ensuring better treatment for people detained in Australia, irrespective of their place of detention.

In making this submission, PIAC draws on its extensive experience on this subject, including:

- In February 2011, PIAC identified the need to ratify OPCAT in its submission to the Attorney-General's Department regarding a National Human Rights Action Plan for Australia.¹
- In December 2011, PIAC wrote to the Attorney-General with 28 other organisations, seeking the ratification of OPCAT.
- In March 2012, PIAC provided a submission to the Joint Standing Committee on Treaties recommending ratification of OPCAT.²
- In March 2012, PIAC recommended the ratification of OPCAT in its submission regarding the National Human Rights Action Plan Exposure Draft.³
- In January 2014, PIAC recommended the ratification of OPCAT in its submission to the Australian Law Reform Commission regarding equality, capacity and disability in Commonwealth laws.⁴
- In September 2014, PIAC was one of 64 bodies urging the ratification of OPCAT in joint correspondence to the Attorney-General.
- In March 2016, PIAC recommended the ratification of OPCAT in its submission regarding the Open Government Partnership and Australia's National Action Plan.⁵
- In May 2016, PIAC made a submission to the Australian Human Rights Commission's consultation on OPCAT and Youth in Custody.⁶

Within our casework, PIAC assists people in civil claims for police behaviour and for treatment while detained in custody, with a particular emphasis on young people (aged 25 and under) and Aboriginal and Torres Strait Islander people. Between 2014 and 2016, PIAC settled 22 cases against the State of NSW: 21 related to treatment by NSW Police and one related to treatment by Juvenile Justice. This included at least 16 people aged 25 or under, and at least 14 people who were Indigenous. We provide advice to many more people on policing issues.

In PIAC's Asylum Seeker Health Rights Project, we are seeking to ensure that medical services in Australian immigration detention centres – including offshore centres – are commensurate with the quality of health services afforded to the general Australian community.

This includes:

- Early-identification and intervention for high needs clients
- Timely access to services

¹ Brenda Bailey, PIAC, Submission to the Attorney-General's Department re the *Human Rights Action Plan for Australia*, 11 February 2011, available at https://www.piac.asn.au/wp-content/uploads/11.02.11_Piac_Sub_National_Action_Plan_Plan.pdf

² Peter Dodd, PIAC, Submission to Joint Standing Committee on treaties, *OPCAT – preventative, proactive and non-punitive*, 30 March 2012, available at https://www.piac.asn.au/wp-content/uploads/12.03.30_opcat_preventative_proactive_and_non-punitive_submission.pdf

³ Chris Hartley et al, PIAC, Submission re *National Human Rights Action Plan Exposure Draft*, 5 March 2012, available at https://www.piac.asn.au/wp-content/uploads/12.03.05_national_human_rights_action_plan_exposure_draft.pdf

⁴ PIAC, Submission to Australian Law Reform Commission Inquiry into Equality, Capacity and Disability in Commonwealth Laws, *Equality before the law for people with disabilities*, 20 January 2014, available at https://www.piac.asn.au/wp-content/uploads/14.01.20_equality_before_the_law_for_people_with_disability_-_submission_to_alrc_issues_paper.pdf

⁵ Emily Mitchell, PIAC, Submission re *Open Government Partnership and Australia's National Action Plan*, 31 March 2016, available at https://www.piac.asn.au/wp-content/uploads/16.3.31_piac_ogp_submission.pdf

⁶ Emily Mitchell, PIAC, Submission to Australian Human Rights Commission, *OPCAT and Youth in Custody*, 25 May 2016, available at https://www.piac.asn.au/wp-content/uploads/16.5.25_opcat_and_youth_in_custody.pdf

- Coordination of care between various service providers within the immigration detention system
- Access to health information in a culturally/language-appropriate form.

Fundamental to maintaining an appropriate model for health care services in immigration detention is robust monitoring and oversight mechanisms.

2. Summary

PIAC welcomes the Australian Government's commitment to ratify OPCAT by December 2017, as well as the consultation being undertaken by the Australian Human Rights Commission (AHRC) to help identify gaps that need to be addressed in the ratification, and implementation, process. We are confident that this process will contribute to Australia realising more of the potential benefits of OPCAT ratification.

In this submission, we answer six of the seven questions posed in the AHRC Consultation Paper. This includes identifying places of detention that require OPCAT compliant inspection and oversight bodies (including police detention, mental health and alcohol and other drugs places of detention, aged care facilities and facilities for people with disabilities).

We also suggest several issues that could be subject to thematic review, including young people and Aboriginal and Torres Strait Islanders in police custody, access to and timeliness of health care for people in immigration detention, places of mental health detention, the use of strip searches, isolation and restraint, and the treatment of people with disability in all types of detention.

We also comment on the potential role of NGOs and civil society bodies in the implementation of OPCAT, and provide additional comments on the subject of resourcing for the national coordinating mechanism and other NPM bodies. The full recommendations are as follows:

2.1 Recommendations

Recommendation 1 – Inspection of places of detention by NSW Police

Consideration should be given to whether sufficient powers and responsibilities exist for the oversight of places of detention operated by NSW Police, including police cells.

Recommendation 2 – Inspection of mental health places of detention

All jurisdictions ensure that appropriately-resourced NPM inspection bodies are authorised to inspect all mental health places of detention.

Recommendation 3 – Inspection of alcohol and other drug places of detention

All jurisdictions will need to ensure that appropriately-resourced NPM inspection bodies are authorised to inspect all alcohol and other drug places of detention.

Recommendation 4 – Inspection of aged care facilities

Consideration should be given to the issue of detention in aged care facilities and whether an OPCAT compliant body exists to undertake inspection and oversight of these places.

Recommendation 5 – Inspection of facilities for people with disabilities

Consideration should be given to the issue of detention in facilities for people with disabilities and whether OPCAT compliant bodies exist to undertake inspection and oversight of these places.

Recommendation 6 – Inter-governmental agreement setting out inspection responsibilities and reporting requirements

There should be a formal agreement between the Australian Government and the States and Territories setting out:

- the relevant jurisdiction that has primary responsibility for each place of detention;
- the reporting requirements from each coordinating mechanism and NPM inspection body to the Commonwealth Ombudsman as the national coordinating mechanism; and
- national standards for inspections, and for conditions of detention.

Recommendation 7 – Formal agreements between coordinating mechanisms and NGOs

There should be formal agreements between coordinating mechanisms and the relevant NGOs in their jurisdiction that are likely to be involved in inspections, setting out the rights and responsibilities of the NGOs. This should be facilitated by the drafting of a model formal agreement by the national coordinating mechanism (the Commonwealth Ombudsman).

Recommendation 8 – Issues for thematic or systemic review

The following issues should be considered for thematic or systemic review by the National Preventive Mechanism:

- Young people, and Aboriginal and Torres Strait Islander people, in police custody
- Access to, and timeliness of, health care for people in immigration detention
- Places of mental health detention
- The use of strip searches, especially for women and children
- The use of isolation
- The use of restraint, and
- Treatment of people with disability in all types of detention.

Recommendation 9 – Regular open forums with NGO representatives

The national coordinating mechanism, and the coordinating mechanisms in each state and territory, should convene regular open forums with representatives from relevant NGOs to support the free exchange of information between these parties.

Recommendation 10 – Ability for NGOs to raise issues with coordinating mechanisms outside regular forums

Further consideration should be given to how to allow NGOs to identify issues for investigation throughout the year. This could include an 'issues log' that is published annually by the coordinating mechanism in each jurisdiction.

Recommendation 11 – Direct involvement of NGOs in inspections

NGOs and experts from civil society bodies should be directly involved in inspections of places of detention.

Recommendation 12 – Involvement of NGOs and other bodies in research, including surveys of people in detention

NGOs and civil society bodies, including universities and other research institutions, could be involved in research projects under OPCAT to help identify issues, including by conducting surveys of people in detention (such as people in immigration detention).

Recommendation 13 – NSW parliamentary committee for OPCAT matters

The NSW Parliament should amend, and expand, the responsibilities of either the Legislation Review Committee, or the Ombudsman, the Law Enforcement Commission and the Crime Commission Committee, to enable it to receive and consider reports from the NSW coordinating mechanism.

Recommendation 14 – National standards for data collection

The national coordinating mechanism should set national standards for data collection, for State and Territory coordinating mechanisms and all NPM inspection bodies, including data on specific geographic regions (such as data on a police Local Area Command basis).

Recommendation 15 – Consultation processes with vulnerable groups

Consideration should be given to how to consult with six vulnerable groups (prisoners, Aboriginal and Torres Strait Islander peoples, children and young people, persons with a disability, people in immigration detention and people in places of mental health detention). This could include formal mechanisms:

- *to consult with people directly from those groups and/or*
- *to consult with NGOs and civil society groups who represent, and (legally) advocate on behalf of those groups, where there may be a fear of discussing their concerns directly with a government organisation (such as people in immigration detention).*

Recommendation 16 – Financial independence of coordinating mechanisms

All NPM bodies, and especially coordinating mechanisms (at Commonwealth, State and Territory level), should have sufficient additional funding provided to ensure they can perform their roles under OPCAT, and that this funding should be ‘ring-fenced’ or ‘earmarked’ so that it is not subsumed in the overall budget of the organisation.

3. Identifying Gaps Prior to OPCAT Ratification and Implementation

PIAC welcomes the 9 February 2017 announcement by the Australian Government that it intends to ratify OPCAT by December 2017, and the current consultation being undertaken by the Australian Human Rights Commission (AHRC) to identify gaps that need to be addressed in the ratification, and implementation, process.

In this submission, we will respond to six of the seven questions outlined in the AHRC Consultation Paper,⁷ as well as provide additional comments in relation to the issue of resourcing. The comments in this submission are not comprehensive, but instead identify what we believe are some of the major priorities for consideration by the AHRC, and the Government more broadly, to help ensure that Australia realises the full benefits of ratifying OPCAT.

4. What is your experience of the inspection framework for places of detention in the state or territory where you are based, or in relation to places of detention the Australian Government is responsible for? (Question 1)

The Consultation Paper invites further comment on:

- whether there are any crucial gaps or overlap in the inspection framework
- the staffing or relevant professional expertise you consider important for inspection, such as the need for mental health professionals to be included on visiting teams
- significant legislative, regulatory or policy changes that would be required for a relevant inspection body for it to be OPCAT compliant.

In concentrating on the first dot point, we submit that there are at least five possible gaps in the inspection framework which leave some places of detention without adequate oversight.

4.1 Police Detention

In NSW, the primary OPCAT-compliant inspection body for detention in the criminal justice system is the Inspector of Custodial Services (ICS). Under section 6 of the *Inspector of Custodial Services Act 2012* (NSW), the ICS is provided a range of functions, including:

- (a) to inspect each custodial centre (other than juvenile justice centres and juvenile correctional centres) at least once every 5 years,
- (b) to inspect each juvenile justice centre and juvenile correctional centre at least once every three years,
- (c) to examine and review any custodial service at any time, [and]
- (d) to report to Parliament on each such inspection, examination or review.

However, these broad powers are limited by the definition of 'custodial centre' in section 3 of the Act:

⁷ We do not propose to comment on question 6: How can Australia benefit most from the role of the SPT?

custodial centre means the following:

- (a) a correctional centre (including a juvenile correctional centre, a managed correctional centre and a periodic detention centre),
 - (b) a residential facility,
 - (c) a transitional centre,
 - (d) a juvenile justice centre,
- but does not include any police station or court cell complex that is not managed by Corrective Services NSW or Juvenile Justice.

As a result, some places of detention by NSW Police fall outside the scope of review and oversight by the ICS. Significantly, this includes detention of people in police cells.

The recently-established NSW Law Enforcement Conduct Commission (LECC) does have responsibility with respect to police misconduct, administrative employee misconduct and Crime Commission officer misconduct.⁸ Importantly, the *Law Enforcement Conduct Commission Act 2016* also empowers the LECC to investigate ‘agency maladministration’, which is described in section 11(1) in the following way:

agency maladministration means any conduct (by way of action or inaction) of the NSW Police Force or the Crime Commission other than excluded conduct:

- (a) that is unlawful (that is, constitutes an offence or is corrupt conduct or is otherwise unlawful), or
- (b) that, although it is not unlawful:
 - (i) is unreasonable, unjust, oppressive or improperly discriminatory in its effect, or
 - (ii) arises, wholly or in part, from improper motives, or
 - (iii) arises, wholly or in part, from a decision that has taken irrelevant matters into consideration, or
 - (iv) arises, wholly or in part, from a mistake of law or fact, or
 - (v) is conduct of a kind for which reasons should have (but have not) been given, or
- (c) that is engaged in in accordance with a law or established practice, being a law or practice that is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its effect.

This definition, and especially sub-sections (1)(b)(i), and (1)(c), with their respective focus on ‘unreasonable, unjust, oppressive or improperly discriminatory’ impacts, may cover some of the areas for which a NPM inspection body would ordinarily be responsible. These issues can be investigated by the LECC under Part 6 of the Act, and in doing so it can exercise a range of coercive powers to assist with such investigations (including to obtain information, obtain documents, and to enter public premises).⁹

However, the ability of the LECC to initiate investigations is limited by section 51. Specifically, subsection (2) of the Act provides that ‘[t]he investigation powers may be exercised: (a) on any complaint made or referred to the Commission under this or any other Act, or (b) on the Commission’s own initiative on the basis of misconduct information provided to it in a report or of which it otherwise becomes aware.’

⁸ *Law Enforcement Conduct Commission Act 2016* (NSW) s 9.

⁹⁹ *Law Enforcement Conduct Commission Act 2016* (NSW), Part 6, Division 2, ss 54, 55 and 58.

This confirms that the LECC is primarily a complaints and/or misconduct driven oversight body. Even though subsection (3)(a) allows the LECC ‘to investigate conduct that could be, but is not, the subject of a complaint’ and subsection (4) allows the LECC to investigate a matter ‘if the misconduct is (or could be) indicative of a systemic problem involving the NSW Police Force generally, or of a particular area of the NSW Police Force’, these are still premised on identifying misconduct or potential misconduct in the first instance before commencing an investigation.

PIAC believes this does not meet the preventive purpose of the OPCAT, as outlined in Article 1:

The objective of the present Protocol is 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.

It also appears to fall short of the role for the NPM identified by the AHRC on page 5 of the Consultation paper: ‘[t]he NPM takes a preventive rather than a reactive complaints-driven approach. Through regular and unannounced visits, the NPM identifies problematic detention issues before ill treatment occurs or before it escalates.’

PIAC therefore suggests that the issue of whether there is adequate oversight of detention by NSW Police, by the LECC or another body, should be considered as part of the OPCAT ratification process.

Recommendation 1 – Inspection of places of detention by NSW Police

Consideration should be given to whether sufficient powers and responsibilities exist for the oversight of places of detention operated by NSW Police, including police cells.

4.2 Mental Health Places of Detention

OPCAT covers places of mental health detention such as:

- the sections of hospitals and other mental health facilities where people are compulsorily detained and treated for mental health issues; and
- hospitals or correctional facilities where forensic patients are detained and treated.

PIAC believes that all places of detention should receive comparable attention through inspection and other forms of scrutiny under OPCAT. However, for several reasons, but mainly because such places of detention have not been traditionally subject to the kinds of scrutiny and inspection that has occurred in the corrections or immigration detention areas, mental health places seem to get comparatively limited attention when OPCAT is discussed.

Compulsory treatment is scrutinised by the legal system, but places of mental health detention are not usually subject to direct inspection or scrutiny. If there is any scrutiny of facilities, this usually takes place through ‘official visitor schemes’ that are poorly resourced, complaints focussed and staffed by part-time ‘visitors’.

For example, in NSW the Mental Health Review Tribunal has power under the *Mental Health Act 2007* (NSW) to conduct reviews of the status of both compulsorily detained ‘civil’ patients and forensic patients. They have no power to determine where people are detained and treated, to

question the nature of their treatment and medication, or to deal with concerns about conditions of detention.

The Health Care Complaints Commission (HCCC) in NSW deals with complaints about the quality and standards of health care in NSW. Issues regarding the standard of health care provided to compulsory patients under the *Mental Health Act 2007*, including questioning medication levels and diagnoses, come under this category. The HCCC does not deal with issues regarding resourcing and access to health care, but rather with specific complaints about health care, as well as issues about the competence and ethical behaviour of health professionals. A complaint that a particular patient was being administered a too high dose of medication could be dealt with by the HCCC, but a complaint that a patient was not receiving a particular medication because of funding cuts could not.

The *Ombudsman Act 1974* (NSW) creates power for the NSW Ombudsman to investigate complaints about the 'conduct' of public authorities and their employees. Some limited concerns about the detention of a person in a psychiatric facility could come under this category, and the NSW Ombudsman certainly does deal with complaints about prisoners' access to health care.

However, there is no body or authority in NSW which has independent oversight over all the conditions of detainees in NSW places of mental health detention. As far as PIAC is aware, this situation is replicated in other Australian jurisdictions.

Therefore, in implementing OPCAT, all Australian Governments will need to provide an adequate level of funding, and regulatory authority, so that a designated NPM inspection body can carry out regular and thorough inspections of places of mental health detention. This should be complemented by the involvement of persons of appropriate expertise and experience in the scrutiny of such facilities.

PIAC believes the involvement of the NGO sector and other parts of civil society through an 'Ombudsman-plus' model of OPCAT inspections has the potential to meet this need by involving independent health professionals directly in the inspection process or in providing advice to those directly involved in the inspection process (see discussion under heading 6, below).

Recommendation 2 – Inspection of mental health places of detention

All jurisdictions ensure that appropriately-resourced NPM inspection bodies are authorised to inspect all mental health places of detention.

4.3 Alcohol and Other Drug Places of Detention

Similar issues exist with respect to alcohol and other drug places of detention. In NSW, this includes facilities where people are detained for involuntary treatment for substance dependency under the *Drug and Alcohol Treatment Act 2007*.

Under this Act, people assessed by a medical practitioner can be compulsorily detained for up to 28 days (a period which can be extended), and be subjected to involuntary medical treatment, including the administration of medication without consent. While this detention is subject to review by a Magistrate, and can be appealed to the Civil and Administrative Tribunal, neither body reviews the conditions in which a person is being detained.

As with mental health places of detention, places of alcohol and other drug detention are 'overseen' by official visitors schemes (under Part 4 of the Act), however PIAC expresses similar concerns about the level of resourcing, and expertise, enjoyed by such schemes. We also understand that they are primarily complaints focused, rather than undertaking systemic reviews.

Therefore, NSW (and, presumably, other jurisdictions) will need to ensure that a designated NPM inspection body is resourced and authorised to engage in inspections of alcohol and other drug places of detention, assisted by the involvement of or advice from independent health professionals from the NGO sector.

Recommendation 3 – Inspection of alcohol and other drug places of detention

All jurisdictions will need to ensure that appropriately-resourced NPM inspection bodies are authorised to inspect all alcohol and other drug places of detention.

4.4 Aged Care Facilities

Another place of detention that may not commonly be considered in terms of the need for OPCAT inspection and oversight is aged care facilities. However, these facilities are clearly places of detention for many 'residents', fitting the definition in Article 4 of the Protocol¹⁰ because of the complete deprivation of liberty that they may impose.

They are sanctioned both by common law (necessity would be a defence to any claim of false imprisonment because of the necessity to prevent serious injury or harm if the residents of such facilities were to be allowed freedom to come and go) and by the accreditation process, which implicitly sanctions locked wards in high care aged facilities. The fact that usually, but not always, this form of detention is consented to by a family member or guardian does not prevent it being a deprivation of liberty under OPCAT.

PIAC is unaware of the existence of a fully OPCAT compliant inspection body with responsibility for the oversight of aged care facilities (under Commonwealth, State or Territory law) and therefore suggests that this potential gap be considered as part of this consultation process.

Recommendation 4 – Inspection of aged care facilities

Consideration should be given to the issue of detention in aged care facilities and whether an OPCAT compliant body exists to undertake inspection and oversight of these places.

4.5 Facilities for people with disabilities

Similarly, places where people with disabilities (especially cognitive disability) may be detained should be considered as part of the implementation of OPCAT in Australia. While there has been a generally welcome trend towards more housing in the community in recent years (with a

¹⁰ '(1) ...[A]ny place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereafter referred to as places of detention).' (2) For the purposes of the present Protocol, deprivation of liberty means 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.'

correlated decrease in 'institutional' living), there remain a variety of circumstances in which people with disabilities may be detained¹¹ and consequently fall within the definition in Article 4 of the Protocol.

As with aged care facilities, PIAC is unaware of whether there are OPCAT compliant inspection and oversight bodies for these facilities under Commonwealth, State and Territory law and therefore suggests that this issue be considered further.

Recommendation 5 – Inspection of facilities for people with disabilities

Consideration should be given to the issue of detention in facilities for people with disabilities and whether OPCAT compliant bodies exist to undertake inspection and oversight of these places.

5. How should the key elements of OPCAT implementation in Australia be documented? (Question 2)

'Noting that the Australian Government has indicated that it does not intend to create new legislation to implement OPCAT into federal law' the Consultation Paper invites further comment on:

- whether it is necessary to have a formal agreement (or other such document) that sets out the core elements of how OPAT will operate
- whether the roles of the various government and non-government bodies involved in OPCAT should be documented and, if so, how this should take place.

Despite the Australian Government's stated preference not to create new legislation to implement OPCAT federally, PIAC reiterates its view that the introduction of such legislation would be beneficial.

This legislation could help ensure that the national coordinating mechanism (in this case, the Commonwealth Ombudsman) has all necessary powers to fulfil its responsibilities, such as clarifying that it has residual authority to visit and inspect all places of deprivation of liberty (including private places of detention and 'unofficial' places of detention, such as locked aged care facilities¹²) as well as guaranteeing the financial independence of the Ombudsman specifically with respect to the functions it will be exercising under the OPCAT (see discussion under heading 10, below).

The introduction of this legislation at the federal level could also act as a model law for the implementation of similar legislative regimes by the states and territories (and in particular clarifying that each state and territory coordinating mechanism also has residual power with respect to all places of detention in their jurisdiction, including places of mental health detention and alcohol and other drug detention, as discussed under 4.2 and 4.3 above).

¹¹ This can include group homes where people with a disability potentially enjoy greater autonomy but nevertheless are subjected to some restrictions on freedom of movement.

¹² PIAC notes that the Consultation Paper states that "[t]he national coordinating mechanism will have residual inspection powers for places of detention not covered by other NPM bodies" (para 34, on page 7). It is difficult to reconcile this statement with the proposed lack of new legislation to ensure it would be legally able to exercise such powers with respect to bodies created under state and territory law where there is not currently an effective NPM body. At the very least, this suggests the need to amend the *Ombudsman Act 1976* (Cth).

Nevertheless, if the Australian Government maintains its position not to create new legislation, PIAC believes there are ways in which the implementation of OPCAT would benefit from adopting formal agreements, between governments, and between the NPM and NGOs, as well as by creating national standards on key subjects, including inspections and conditions of detention.

5.1 Agreement Between Commonwealth, States and Territories

PIAC submits there should be a formal agreement between the Commonwealth and all States and Territories concerning the implementation of OPCAT. This agreement should set out a number of matters, including:

5.1.1 Clarifying which level of Government has primary responsibility for each place of detention

For some places of detention, it is possible that there will be crossover between jurisdictions in terms of which OPCAT compliant body has the power to undertake visits and inspections. There may also be some circumstances where it is unclear which body is, or should be, the relevant inspection body. For these reasons, the inter-governmental agreement should set out which body has primary responsibility for each place of detention.

PIAC suggests that the Commonwealth Ombudsman, and other federal inspection bodies, should have responsibility for:

- immigration detention facilities
- places of military detention of both military personnel and prisoners of war
- places of detention under anti-terrorism laws
- locked aged care facilities and
- holding cells in Commonwealth Courts.

PIAC suggests that state and territory coordinating mechanisms and NPM inspection bodies should have responsibility for:

- prisons
- prison transport and other forms of transport used by people in detention
- juvenile detention facilities
- police cells and lock ups
- places of mental health detention
- hospitals where forensic patients are detained and treated
- places of alcohol and other drug detention, and
- locked places where people with cognitive or physical disabilities are housed.

5.1.2 Setting out the reporting requirements of all NPMs

Given the Consultation Paper proposes that there will effectively be nine different models to implement OPCAT across the Commonwealth and the State and Territories, with at least nine – but likely many more – NPM inspection bodies, the role of the national coordinating mechanism will be essential in ensuring that all systems meet the standards set out in the Protocol.

As the Consultation Paper notes: ‘the national coordinating mechanism will need to establish working methods that ensure that it is satisfied at the adequacy of the individual inspection frameworks at the state and territory level, and to ensure that they are compliant with the requirements of OPCAT’ (p14[69]).

This will likely require detailed reporting by each State and Territory to the Commonwealth Ombudsman, regarding the policies and processes adopted by each coordinating mechanism and, where relevant, NPM inspection body, in their jurisdiction, as well as the ongoing inspections undertaken to comply with the OPCAT.

PIAC suggests that it would be beneficial to establish these reporting requirements from the outset, clarifying the respective roles and responsibilities of all NPM bodies, and minimising the potential for disputes and differing interpretations of OPCAT in future years.

5.1.3 National standards for inspections and conditions of detention

On a related topic, in implementing OPCAT it will also be important for all jurisdictions, and for all inspection bodies and places of detention within those jurisdictions, to have a clear understanding of what is required under the Protocol.

For coordinating mechanisms, and inspection bodies – as well as those places that they inspect – this should include a framework for how inspections are to be conducted. This could cover a variety of topics including the right of NPM bodies to conduct unannounced inspections, and to have private, unfettered contact with detainees.

More substantively, PIAC suggests that national standards for the conditions of detention should be developed and formally agreed between the Commonwealth, States and Territories. The standards on conditions of detention would clarify what is expected of all places of detention, and help to ensure national consistency in the implementation of OPCAT.

These national standards would also cover a range of subjects, including:

- the material condition of the place of detention, including food quality and quantity, lighting and ventilation, bedding, clothing, hygiene and sanitary facilities
- access to, timeliness of and quality of health care
- access to services such as legal services
- access to others including family visitors
- complaint procedures
- conduct and training of staff
- the density of detainees’ accommodation (ie possible overcrowding), and
- the use of certain practices (including strip searches, isolation and restraint).

Recommendation 6 – Inter-governmental agreement setting out inspection responsibilities and reporting requirements

There should be a formal agreement between the Australian Government and the States and Territories setting out:

- *the relevant jurisdiction that has primary responsibility for each place of detention;*
- *the reporting requirements from each coordinating mechanism and NPM inspection body to the Commonwealth Ombudsman as the national coordinating mechanism; and*
- *national standards for inspections, and for conditions of detention.*

5.2 Formal agreements between coordinating mechanisms and NGOs

As noted in the Consultation Paper, NGOs will likely play a key role in the implementation of the OPCAT in Australia. This includes regular open forums with key NGOs and relevant civil society groups, the ability for NGOs to raise issues of concern with coordinating mechanisms, the involvement of NGOs and groups with expertise in inspections, and the contribution of NGOs and civil society groups through research, including surveys of people in detention (see further discussion under heading 7, below).

However, there is likely to be a range of different policies and processes in place determining whether, and if so how, NGOs and civil society bodies are able to participate in or contribute to the inspection of places of detention in each jurisdiction. This may lead to confusion about when it is and is not appropriate for NGOs to participate, and the legislative restrictions that may apply.

PIAC agrees with the Association for the Prevention of Torture (APT), when it argues that, for an ‘Ombudsman-plus’ model to work effectively:

...clear procedures need to be put in place, either via legislation or formal agreements, to ensure a clear division of roles and responsibilities between the main NPM institution and the civil society organisations with which it shares the NPM mandate.¹³

Consequently, PIAC suggests that there will need to be formal agreements between coordinating mechanisms (both the Commonwealth Ombudsman, and the State and Territory coordinating mechanisms) and the NGOs in their jurisdictions, which clearly set out the rights and responsibilities of NGOs with respect to inspections and other work in implementing OPCAT.

PIAC further suggests that the national coordinating mechanism should draft a model agreement between it and NGOs with respect to places of detention that will be a Commonwealth responsibility, which can then be used as the basis for agreements between the state and territory coordinating mechanisms and NGOs in their respective jurisdictions.

Recommendation 7 – Formal agreements between coordinating mechanisms and NGOs

There should be formal agreements between coordinating mechanisms and the relevant NGOs in their jurisdiction that are likely to be involved in inspections, setting out the rights and

¹³ Association for the Prevention of Torture (APT) and the Inter-American Institute for Human Rights (IHR), *Optional Protocol to the UN Convention against Torture Implementation Manual* (2010), 26.

responsibilities of the NGOs. This should be facilitated by the drafting of a model formal agreement by the national coordinating mechanism (the Commonwealth Ombudsman).

6. What are the most important or urgent issues that should be taken into account by the NPM? (Question 3)

The Consultation Paper invites further comment on:

- specific places of detention that are of immediate concern
- broader systemic issues that the NPM should focus on, such as indefinite detention of people with cognitive disabilities; or
- current practices on seclusion and restraint.

There is a wide range of potential issues that could be subject to thematic or systemic review by the national coordinating mechanism (the Commonwealth Ombudsman) and/or other NPM bodies following ratification of OPCAT. The following list of suggestions is non-exhaustive:

6.1 Review of young people, and Aboriginal and Torres Strait Islanders, in police custody

PIAC reiterates its recommendation, as expressed in our submission to the AHRC's 2016 Inquiry into OPCAT in the context of youth justice detention centres, that 'Australia would benefit from a holistic review of young people in police custody under the OPCAT mandate, similar to the review that occurred in New Zealand.'¹⁴ Specifically:

There is opportunity for the ratification of OPCAT to provide improved monitoring regarding the detention of young people in police custody and remand. This includes:

- Reviewing current procedures regarding data collation and monitoring, regarding young people and Aboriginal and Torres Strait Islanders;
- Making recommendations regarding improving records, statistics and monitoring in relation to young people and Aboriginal and Torres Strait Islander people;
- Increase accountability regarding any mistreatment or unlawful conduct in relation to young people in custody;
- Identifying the adequacy of conditions in custody in rural and regional areas; and
- Identifying any specific Local Area Commands where issues are repeated and ongoing, with recommendations to ensure best practice.¹⁵

This suggestion is based on PIAC's ongoing work in relation to police accountability, and in particular to addressing issues of police misconduct and the inappropriate exercise of powers in relation to young people and Aboriginal and Torres Strait Islander people in NSW.

¹⁴ Emily Mitchell, PIAC, Submission to Australian Human Rights Commission, *OPCAT and Youth in Custody*, 25 May 2016, p1, available at https://www.piac.asn.au/wp-content/uploads/16.5.25_opcat_and_youth_in_custody.pdf

¹⁵ Ibid, page 8.

As noted above, between 2014 and 2016, PIAC settled 22 cases against the State of NSW: 21 related to treatment by NSW Police and one related to treatment by Juvenile Justice. This included at least 16 people aged 25 or under, and at least 14 people who were Indigenous.

PIAC with law firm Maurice Blackburn also represented more than 56 young people for unlawful detention claims in NSW in *Amon v State of New South Wales*. The case started after PIAC became aware that many children and young people were being arrested and detained as a result of a flaw in the NSW Police computer database. In 2015, the class action reached a settlement of more than \$1.85 million.¹⁶

6.2 Review of access to, and timeliness of, health care for people in immigration detention

There are currently no standards in the *Migration Act 1958* (Cth) to regulate the provision of health care in immigration detention. The Federal Court has described this issue as a 'legislative vacuum.'¹⁷

In a correctional setting, all prisoners have the right to medical care consistent with the quality of health services afforded to the general Australian community. For example, a maximum-security prisoner in Victoria has the right, guaranteed in legislation, to reasonable medical care and treatment. If they have a mental illness, they have a specific right to special care and treatment.

An asylum seeker in an Australian immigration detention centre has no such legislative rights. Despite the high levels of trauma suffered by asylum seekers and the damage to mental health caused by long-term, indefinite detention, conditions in immigration detention are unregulated. People are suffering without the basic care they need.

This affects the 1,400 people held in secure immigration detention facilities in Australia, as well as the further 1,200 asylum seekers held in offshore immigration detentions centres in Nauru and Papua New Guinea (as at 31 May 2017).

And the impacts are compounded by the extended length of detention; while the average length of immigration detention is 32 days in the United States and 25 days in Canada, immigration detainees in Australia can expect to be held in detention centres for an average of 443 days¹⁸, with close to a quarter being held for over two years.

Asylum seekers are already a unique, vulnerable population that suffers from high levels of trauma. We also know that prolonged and indefinite detention can cause or exacerbate serious physical and mental illness. In a recent review of 754 asylum seekers in long-term detention, the

¹⁶ For more information, see PIAC, 'Register of class action on behalf of falsely imprisoned young people' 3 August 2015, available at <https://www.piac.asn.au/2015/08/03/register-for-class-action-on-behalf-of-falsely-imprisoned-young-people/> (accessed 10 July 2017).

¹⁷ *Mastipour v Secretary, Department of Immigration and Multicultural & Indigenous Affairs (DIMIA)* [2004] FCAC 93, 2 (Finn J).

¹⁸ Department of Immigration and Border Protection, *Immigration Detention and Community Statistics Summary*, 31 May 2017, 11, available at <https://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-31-may-2017.pdf> (accessed 17 July 2017).

Commonwealth Ombudsman found 62.5% suffered from a mental health issue,¹⁹ with the risk of self-harm or suicide identified in relation to almost one quarter of individuals.

PIAC therefore believes that the access to and timeliness of health care for people held in immigration detention is an issue that warrants specific consideration in the implementation of OPCAT.

6.3 Review of places of mental health detention

As discussed at 4.2 above, PIAC is concerned by a lack of existing OPCAT-compliant oversight organisations with respect to people held in places of mental health detention. Given the absence of such bodies may lead to breaches of the standards set out in the Protocol, as well as the vulnerability of people detained in these circumstances (such as people subject to involuntary treatment orders), PIAC suggests that this area would also benefit from systemic review.

6.4 Review of use of particular practices, across all types of detention, including strip searches, isolation and restraint

There are several practices that exist across different types of detention that may warrant detailed examination as part of the implementation of OPCAT in Australia. These include:

6.4.1 Use of strip searches, especially for women and children

Strip searches are a highly invasive procedure even where the search itself is conducted lawfully – where it is not, it would likely constitute assault, or even sexual assault, in many cases. They can have a particular impact on vulnerable groups, especially those that may already be traumatised because of high rates of sexual assault, and child sexual abuse.

Strip searches are used by a number of different authorities, for a variety of purposes. This includes searches conducted by police, such as strip searches of persons in public places following an indication by a drug detection dog (with the majority of those failing to find any illicit substances),²⁰ as well as searches of individuals held in police cells.

Strip searches are also commonly used in prisons and juvenile justice facilities. This can extend well beyond targeted use based on ‘reasonable suspicions’ of unlawful activity, to instead be used with indiscriminate, and unjustifiable, frequency – with a Queensland Ombudsman report into the Townsville Women’s Correctional Centre finding that ‘at least 18 prisoners prescribed Schedule 8 medicines – or ‘controlled drugs’ with the potential for addiction and abuse – were

¹⁹ Commonwealth Ombudsman, *Suicide and Self-Harm in the Immigration Detention Network*, May 2013, 61, available at http://www.ombudsman.gov.au/_data/assets/pdf_file/0022/30298/December-2013-Suicide-and-self-harm-in-the-Immigration-Detention-Network.pdf (accessed 17 July 2017).

²⁰ Amy Corderoy, ‘Police in doghouse over strip searches’, *Sydney Morning Herald*, 2 December 2014, available at <http://www.smh.com.au/nsw/police-in-doghouse-over-strip-searches-20141201-11xpzh.html> (accessed 19 July 2017).

strip searched both prior to and after they received their medication'.²¹ This meant that some 'prisoners who received S8 medication twice a day were subject to four strip searches a day.'²²

The use, and potential misuse, of strip searches by correctional facilities can also impact family members and other visitors of people held in detention, with strip searches often conducted prior to the exercise of visitation rights.

All of these circumstances hold the possibility for the abuse of this procedure, and therefore the potential for 'cruel, inhuman or degrading treatment'. For these reasons, PIAC suggests that the issue of strip searches across all places of detention should be subject to thematic review, with a particular emphasis on its impact on women and children.

6.4.2 Use of isolation and lockdown

Another practice that involves the risk of 'cruel, inhuman or degrading treatment' is the use of isolation and lockdown of people in places of detention. While there may be circumstances where the use of temporary seclusion is necessary for the safety of detainees or other persons, its routine use, including as part of risk management strategies, for punishment or for behaviour modification, potentially constitutes prohibited conduct under the Protocol.

In 2011, the *Interim Report of the Special Rapporteur of the United Nations Human Rights Council on torture and other cruel, inhuman or degrading treatment of punishment*²³ focused on the use of segregation and solitary confinement in places of detention.

The report found that:

... where the physical conditions and the prison regime of solitary confinement cause severe mental and physical pain or suffering, when used as a punishment, during pre-trial detention, indefinitely, prolonged, on juveniles or persons with mental disabilities, it can amount to cruel, inhuman or degrading treatment or punishment and even torture. In addition, the use of solitary confinement increases the risk that acts of torture and other cruel, inhuman or degrading treatment or punishment will go undetected and unchallenged.²⁴

The report also found that:

Negative health effects can occur after only a few days in solitary confinement, and the health risks rise with each additional day spent in such conditions. Experts who have examined the impact of solitary confinement have found three common elements that are inherently present in solitary confinement – social isolation, minimal environmental stimulation and “minimal opportunity for social interaction.” Research further shows that solitary confinement appears to cause “psychotic disturbances”, a syndrome that has been described as “prison psychoses”. Symptoms can include

²¹ Cameron Atfield, 'Ombudsman blasts prison strip searches', *Brisbane Times*, 30 September 2014, available at <http://www.brisbanetimes.com.au/queensland/ombudsman-blasts-prison-stripsearches-20140930-10o9xy.html> (access 19 July 2017).

²² Ibid.

²³ J E Mendez, *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/66/268 (5 August 211).

²⁴ Ibid, 2.

anxiety, depression, anger, cognitive disturbances, perceptual distortions, paranoia and psychosis and self-harm.²⁵

Given the seriousness of the consequences of isolation and lockdown, PIAC suggests that its use – across different places of detention – should be subject to thematic review.

6.4.3 Use of restraint

The third practice that raises issues across different types and places of detention is restraint. As was graphically observed in the *Four Corners* episode that led to the establishment of the Royal Commission into the Detention and Protection of Children in the Northern Territory, this includes the use of physical restraints in juvenile justice facilities.

However, it can also refer to other types of restraint (such as chemical or mechanical), as well as a range of places of detention. This includes places of detention for people with a disability, an issue that was addressed in the *Australian Law Reform Commission Inquiry into Equality, Capacity and Disability in Commonwealth Laws*.²⁶

As outlined in Chapter 8 of its Final Report:

While restrictive practices are used in circumstances to protect from harm the person with disability or others around them, there are concerns that such practices can also be imposed as a “means of coercion, discipline, convenience, or retaliation by staff, family members or others providing support.” Many stakeholders raised systemic issues across various sectors which result in inappropriate or overuse of restrictive practices. A key explanation for the use of restrictive practices may be the lack of resources for positive behaviour management and multi-disciplinary interventions for “challenging behaviours.”²⁷

The restraint of people with disability who display such behaviour can be particularly common: ‘Between 50-60% of people presenting challenging behaviour in the United Kingdom are subject to physical restraint; those with multiple impairments and complex support needs may experience much higher levels of restrictive practices.’²⁸ In 2013, the Special Rapporteur on Torture examined this issue and called for an ‘absolute ban on all coercive and non-consensual measures, including restraint and solitary confinement.’²⁹

PIAC therefore suggests that the issue of restraint should be investigated further, and that this should extend beyond ‘traditional’ places of detention and include other places such as facilities where people with a disability are detained.

²⁵ Ibid, 17-18.

²⁶ Australian Law Reform Commission, ‘Equality, Capacity and Disability in Commonwealth Laws’, ALRC Report 124, Chapter 8, available here: <https://www.alrc.gov.au/publications/use-restrictive-practices-australia> (accessed 19 July 2017).

²⁷ Ibid, [8.11]-[8.12].

²⁸ Ibid, [8.9].

²⁹ J E Mendez, ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment’, 1 February 2013. A/HRC/22/53 para 63, available: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf

6.5 Review of treatment of people with disability in all types of detention

The final issue PIAC would like to suggest that warrants particular attention by the national preventive mechanism in implementing OPCAT is the treatment of people with disability (including both physical and cognitive impairment) in all types of detention.

This is an issue that PIAC has worked on in the past, including by acting for the First Peoples Disability Network Australia (FPDN) with respect to their contributions to the Royal Commission into the Protection and Detention of Children in the Northern Territory (the Royal Commission).

As part of that role, PIAC helped to prepare the preliminary, and final, submissions by the FPDN to the Royal Commission. These submissions identified a wide range of issues of relevance for people with a disability, including:

- The disproportionate representation of people with disability (and specifically Aboriginal and Torres Strait Islander people with disability) in juvenile detention in the Northern Territory
- The particular needs of people with disability in detention, including screening and access to appropriate health care, and
- The particular impact of certain practices in detention on people with a disability (including where incorrect responses to challenging behaviour simply exacerbates the issues experienced by people with disability).

PIAC submits that these issues – disproportionate representation, particular needs and particular impacts of detention – are not restricted to the Northern Territory. Nor are they limited to juvenile detention, and are likely to be replicated across not just the criminal justice system (including detention in adult prisons³⁰ and police custody) but across other places of detention, including places of mental health detention and alcohol and other drug detention.

Recommendation 8 – Issues for thematic or systemic review

The following issues should be considered for thematic or systemic review by the National Preventive Mechanism:

- *Young people, and Aboriginal and Torres Strait Islander people, in police custody*
- *Access to, and timeliness of, health care for people in immigration detention*
- *Places of mental health detention*
- *The use of strip searches, especially for women and children*
- *The use of isolation*
- *The use of restraint, and*
- *Treatment of people with disability in all types of detention.*

³⁰ Eileen Baldry, 'Disability at the Margins: Limits of the Law', *Griffith Law Review*, 2014, Vol 23, No 3, 370-388.

7. How should Australian NPM bodies engage with civil society representatives and existing inspection mechanisms (eg NGOs, people who visit places of detention etc)? (Question 4)

The Consultation Paper invites further comment on issues such as how:

- best to arrange regular consultation and liaison
- civil society representatives can identify problems in places of detention and how they can work with the NPM process to develop solutions.

As outlined in our 2012 submission to the Joint Standing Committee on Treaties National Interest Analysis:

NPMs under OPCAT have also been proactive in involving community organisations and NGOs in the preventive mechanisms under OPCAT. The model where community organisations and NGOs play an active role in inspections and other monitoring under OPCAT in collaboration with the NPM has been described as the ‘Ombudsman-plus’ model. Both government, and the NPMs when established, have the potential to draw on a broad range of experience and expertise; for example, by involving civil society in the preventive mechanisms set up under OPCAT.³¹

PIAC continues to support this collaborative ‘Ombudsman-plus’ model, and believes that its benefits can be realised through the following four processes:

7.1 Regular open forums with representatives from relevant NGOs

One way the coordinating mechanisms at Commonwealth, and State and Territory level can take advantage of the expertise of NGOs and civil society groups is by convening regular open forums with the representatives of key NGOs and civil society groups that have expertise on relevant issues.

Many Australian NGOs, community legal centres and other organisations already have considerable expertise in visiting and scrutinising places of detention. For example, the Australian Red Cross, through its Immigration Detention Program, has been visiting immigration detention facilities under formal and informal arrangements with federal governments since 1993. ‘Red Cross’ Humanitarian Observers assess and monitor the general conditions of detention as well as the treatment of people in the detention network. PIAC also has relevant expertise on the issue of health care in immigration detention facilities, as discussed at 6.2 above.

As well as experienced Australian-based community organisations and NGOs being involved, Australian affiliates of organisations such as the International Committee of the Red Cross, Amnesty International and the Association for the Prevention of Torture could call on the

³¹ Peter Dodd, PIAC, Submission to Joint Standing Committee on treaties, *OPCAT – preventative, proactive and non-punitive*, 30 March 2012, p6 available at https://www.piac.asn.au/wp-content/uploads/12.03.30_opcat_preventative_proactive_and_non-punitive_submission.pdf

expertise of their international bodies with regard to the development of OPCAT NPMs in overseas jurisdictions and with regard to civil society participation in the OPCAT mechanisms.

The meetings of these forums should allow for a free flow of information between the coordinating mechanisms and NGOs, with the former sharing information about the status, process and findings of thematic reports, and the latter sharing potential issues that they have identified with respect to detention in that jurisdiction, as well as research and recommendations for action.

Recommendation 9 – Regular open forums with NGO representatives

The national coordinating mechanism, and the coordinating mechanisms in each state and territory, should convene regular open forums with representatives from relevant NGOs to support the free exchange of information between these parties.

7.2 Ability for NGOs to raise issues with coordinating mechanisms outside formal meetings

In addition to the regular open forums identified above, there should be a process for NGOs and civil society bodies to identify issues and suggest possible areas for investigation to the respective coordinating mechanisms throughout the year.

As part of the overall collaborative approach, and noting that the aim of OPCAT is to prevent torture and other mistreatment, this should not be a complaints-based mechanism,³² but instead a pro-active way for issues – and potential issues – to be identified.

Further consideration should be given to how such an informal ‘issue-identification’ system could operate, especially the need to balance the benefits that may be obtained by allowing these issues to be raised in a de-identified³³ or confidential way, versus the general principle that, as government bodies, the work of the coordinating mechanisms and NPM inspection bodies should be as transparent as possible.

One suggestion would be for the coordinating mechanism in each jurisdiction to include a ‘log’ of issues identified by NGOs, civil society bodies (and also via formal consultation with groups of vulnerable persons – see discussion at 8.3, below) through this process each year. The publication of this log would be beneficial in highlighting recurring themes in particular places of detention as well as systemic issues across jurisdictions that may require further investigation.

Recommendation 10 – Ability for NGOs to raise issues with coordinating mechanisms outside regular forums

Further consideration should be given to how to allow NGOs to identify issues for investigation throughout the year. This could include an ‘issues log’ that is published annually by the coordinating mechanism in each jurisdiction.

³² Although the coordinating mechanisms, and NPM inspection bodies in each jurisdiction, should be able to receive formal complaints too.

³³ For example, recording the substance of the issue that is referred, but not the organisation that raised it.

7.3 Involvement of experts from NGOs in inspections

The clearest way in which coordinating mechanisms and NPM inspection bodies can benefit from the expertise of NGOs and civil society bodies is by involving experts from these organisations directly in the inspections.

Such an approach provides multiple advantages, including that the experts will be able to help identify relevant issues for the inspection body to investigate further. The involvement of NGOs in inspections will also heighten trust in the OPCAT process, not just because of the credibility that these organisations hold in the broader community, but also because their involvement in the inspection process demonstrates it is 'open' and provides a buffer against accusations of inappropriate behind the scenes deal-making or closed door fixes to complex issues.

Collaboration with civil society, including in inspections, has worked to greatly improve the effectiveness and credibility of OPCAT overseas. For example, in the United Kingdom:

Inside every prison, immigration removal centre and some short term holding facilities at airports, there is an Independent Monitoring Board (IMB) – a group of ordinary members of the public... IMB members are independent, unpaid and work an average of 3-4 visits per month. Their role is to monitor the day-to-day life in their local prison or removal centre and ensure that proper standards of care and decency are maintained.³⁴

Meanwhile, in Slovenia, NGOs participate directly with the NPM (the Human Rights Ombudsperson's Officer). In 2007, interested organisations were invited through a public tender to submit applications to the Ombudsperson's Office to be considered as part of the NPM. Two NGOs were subsequently selected for this role. It was envisaged that initially visits to places of detention would be undertaken jointly by both the Ombudsperson's Office and the NGO. However, future visits can also be undertaken by either of those NGOs selected as, according to the enacting legislation, all parties have equal powers and authority.

In implementing a model of involving NGOs in inspections of places of detention, there are some issues that would need to be resolved, including any obligations around confidentiality (of information that may be discovered through the inspection process), of privacy (especially of the people in detention) and clarifying the rights and responsibilities of the civil society groups (as discussed under 5.2, above). However, these issues are not insurmountable.

Recommendation 11 – Direct involvement of NGOs in inspections

NGOs and experts from civil society bodies should be directly involved in inspections of places of detention.

7.4 NGOs contributing through research and conducting surveys

The fourth way in which NGOs and civil society bodies could contribute to the work of coordinating mechanisms and NPM inspection bodies is via research reports, including conducting surveys of the experiences of people in detention.

³⁴ Independent Monitoring Boards, <https://www.imb.org.uk/about-us/> (accessed 13 July 2017).

As discussed previously, a range of NGOs have particular expertise in relation to OPCAT, detention issues generally or specific places of detention, and the implementation of OPCAT would benefit from collaborative research between government bodies and experts from NGOs on particular projects.

Specifically, this could include utilising NGOs and civil society bodies, including universities and other research institutions, to conduct surveys of people in detention, including reporting their experiences of detention. This would help overcome issues of distrust between people in detention and the coordinating mechanisms or NPM inspection bodies, especially where people in detention have legitimate concerns about disclosing information to government bodies (such as people in immigration detention).

Recommendation 12 – Involvement of NGOs and other bodies in research, including surveys of people in detention

NGOs and civil society bodies, including universities and other research institutions, could be involved in research projects under OPCAT to help identify issues, including by conducting surveys of people in detention (such as people in immigration detention).

8. How should the Australian NPM bodies work with key government stakeholders? (Question 5)

The Consultation Paper invites further comment on issues such as:

- how the NPM could engage with parliament, government human rights bodies and detaining authorities
- how the NPM could engage with the SPT
- how communication across the different state and territory NPMs could be facilitated and coordinated
- whether specific processes should be developed to address the needs of vulnerable groups of people in detention.

PIAC supports the description of OPCAT in the Consultation Paper on page 5 as both a preventive, and collaborative, mechanism that is ‘designed to increase confidence in the detention environment’ and that ‘[t]he NPM should seek to build trust with detention authorities and work collaboratively to prevent torture and other cruel, inhuman or degrading treatment or punishment.’

This preventive and, especially, collaborative approach should also guide how Australian NPM bodies work with key government stakeholders, in particular in relation to reporting to Parliamentary Committees, information-sharing and specific processes to address the needs of vulnerable groups of people in detention.

8.1 Appropriate Committees of Commonwealth, State and Territory parliaments

The Consultation Paper notes that:

the SPT's guidance is that it would be beneficial for the NPM to:

- publicise opinions and findings including through annual and thematic reports
- make submissions to governments and parliament regarding proposed legislation and policies that are relevant to its mandate... (p6[23]).

PIAC agrees with this guidance, and suggests there should be a Parliamentary Committee in each jurisdiction that has primary responsibility for receiving and considering the reports issued by coordinating mechanisms and inspection bodies (and that, for bicameral parliaments, this committee should be a joint one, to enable review by representatives from both chambers).

For the Commonwealth Parliament, the obvious candidate to perform this role is the Joint Committee on Human Rights (JCHR). As established by the *Human Rights (Parliamentary Scrutiny) Act 2011*, the JCHR's main function is to examine all bills and legislative instruments for compatibility with human rights, and to report to both Houses of Parliament on its findings.

This already includes consideration of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. The JCHR is also able to undertake inquiries into human rights matters referred to it, such as its *Inquiry into Freedom of Speech in Australia* earlier this year (examining section 18C of the *Racial Discrimination Act 1975* and related issues).

In terms of the NSW Parliament, it is less clear which would be the appropriate committee. The Legislation Review Committee is more narrowly-constituted than the JCHR, and appears to only look at legislation and regulations and their impacts on personal rights and liberties (rather than undertaking broader investigations).

Meanwhile, the Joint Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission has parliamentary oversight of some (although not all) of the NPM inspection bodies in NSW (including, in addition to those named in its title, the Inspector of Custodial Services), but it too does not undertake more proactive (or preventive) inquiries.

From PIAC's perspective, the role of one of these NSW Committees should be expanded to accommodate responsibility for receiving and considering annual and thematic reports by the NSW OPCAT coordinating mechanism. This is an issue that could be considered by the current NSW Parliamentary Committee review of the *Legislation Review Act 1987*.³⁵

Recommendation 13 – NSW parliamentary committee for OPCAT matters

The NSW Parliament should amend, and expand, the responsibilities of either the Legislation Review Committee, or the Ombudsman, the Law Enforcement Commission and the Crime Commission Committee, to enable it to receive and consider reports from the NSW coordinating mechanism.

³⁵ NSW Parliament, Legislation Review Committee, Terms of Reference for Inquiry into the *Legislation Review Act 1987*, available at <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2456> (accessed 10 July 2017).

8.2 National standards for data collection

PIAC notes the discussion on page 8 of the Consultation Paper ([35]-[37]), regarding the expected role of the Commonwealth Ombudsman under OPCAT. We welcome commitments that the Ombudsman ‘will promote a collegiate approach between the NPM and other agencies including the [AHRC], to identify systemic issues and highlight areas of concern’, as well as moving ‘to a nationally consistent preventive inspection methodology, constructed on best practice both domestically and abroad.’

In practice, PIAC sees the role of the Commonwealth Ombudsman, as the national coordinating mechanism, extending beyond setting standards for inspection methodology to also identify best practice and set national standards for data collection. This will help ensure that all coordinating mechanisms and NPM inspection bodies are collecting all relevant information, thereby increasing the transparency and accountability of OPCAT implementation in each jurisdiction.

The standard of data collection should include providing information of sufficient detail in terms of geography so that any emerging trends or local issues are able to be identified, and rectified, quickly. This issue was highlighted by PIAC in our 2016 submission to the AHRC on *OPCAT and Youth in Custody*, which recommended that ‘relevant data should be made available on a police Local Area Command basis, so that any systemic patterns in the detention of young people in custody can be appropriately identified’.³⁶

PIAC believes that other systems and places of detention (including immigration detention, prisons and juvenile justice detention, and places of mental health and alcohol and other drug detention) would similarly benefit from the national coordinating mechanism setting national standards for data collection, which include detailed geographic reporting.

Recommendation 14 – National standards for data collection

The national coordinating mechanism should set national standards for data collection, for State and Territory coordinating mechanisms and all NPM inspection bodies, including data on specific geographic regions (such as data on a police Local Area Command basis).

8.3 Processes to consult vulnerable groups of people in detention

PIAC welcomes the observation in the Consultation Paper, that ‘[i]t is also worth considering what mechanisms the national coordinating mechanism should put in place to consult with groups who are particularly affected by the OPCAT obligations due to the specific vulnerabilities that they experience in different detention environments’ (p14[64]).

We agree that the four groups that are then listed (prisoners, Aboriginal and Torres Strait Islander peoples, children and young people, and persons with a disability) are groups whose experiences should be considered. We would also add two more groups – people in immigration detention, and people in mental health places of detention – as having particular vulnerabilities that warrant additional consideration.

³⁶ Emily Mitchell, PIAC, Submission to Australian Human Rights Commission, *OPCAT and Youth in Custody*, 25 May 2016, available at https://www.piac.asn.au/wp-content/uploads/16.5.25_opcat_and_youth_in_custody.pdf

In terms of potential options to address these needs, this could include:

- Establishing separate standing groups of people drawn from these six categories (including people from within these groups with prior experience of detention), who would then be consulted directly by the national coordinating mechanism, and state and territory coordinating mechanisms. This would mean that in some instances the coordinating mechanism is consulting directly with people where their detention is more directly supervised by a different NPM inspection body – although PIAC sees this as a positive, by ensuring that the respective coordinating mechanisms have an additional avenue of supervision of the standard of treatment being received, and/or
- Establishing formal consultative mechanisms with NGOs and civil society groups that either represent, or (legally) advocate on behalf of, these groups, and who are in a position to receive feedback from the people affected directly to the coordinating mechanisms. This is particularly relevant for groups such as people in immigration detention, who may be fearful of discussing their concerns directly with a government institution such as the national coordinating mechanism.

Recommendation 15 – Consultation processes with vulnerable groups

Consideration should be given to how to consult with six vulnerable groups (prisoners, Aboriginal and Torres Strait Islander peoples, children and young people, persons with a disability, people in immigration detention and people in places of mental health detention). This could include formal mechanisms:

- *to consult with people directly from those groups and/or*
- *to consult with NGOs and civil society groups who represent, and (legally) advocate on behalf of those groups, where there may be a fear of discussing their concerns directly with a government organisation (such as people in immigration detention).*

9. After the Government formally ratifies OPCAT, how should more detailed decisions be made on how to apply OPCAT in Australia? (Question 7)

The Consultation Paper further notes that:

the Australian Government has indicated that it intends to implement OPCAT over a three-year period after ratification in December 2017. It is anticipated that more detailed decisions will be made during that period about how OPCAT will operate in Australia.

PIAC notes the discussion in paragraph 9, that:

The second phase of the Commission's work on OPCAT will involve a more detailed analysis of the much larger list of issues that all Australian governments will need to resolve in the implementation period in the years following ratification. The Commission plans to prepare a more detailed report, which will cover this broader range of issues, to be published in 2018. **The Commission is open to**

undertaking a second round of community and stakeholder consultation in this second phase of its work' [emphasis added].

PIAC would welcome the opportunity to contribute to a second round of consultation on these issues. This consultation could take multiple (non-exclusive) formats, such as a second formal public call for submissions following the release of an issues or discussion paper, the holding of further stakeholder roundtables (similar to those held as part of this consultation), or establishing a standing list of relevant NGOs and civil society bodies and experts to ask more specific or detailed questions around implementation, with short turnarounds.

Given the particular impact of detention on vulnerable groups (such as people in prison and juvenile justice, or immigration detention – see discussion at 8.3) and the recommendation to establish formal consultation mechanisms with people from these groups, we would also suggest that these bodies be constituted as soon as possible during the three-year implementation period, so that their views can be taken into consideration during the implementation phase (and not just once OPCAT is fully operational).

10. Resourcing the NPM, including coordinating mechanisms

In addition to the matters raised in the seven questions outlined in the Consultation Paper, PIAC believes another issue warrants specific attention, and that is the funding provided to NPM bodies and specifically to the coordinating mechanisms at Commonwealth, state and territory level.

As outlined in our submission to the *Joint Standing Committee on Treaties National Interest Analysis* in 2012,³⁷ PIAC submits that the ratification and implementation of OPCAT will be cost effective when considered holistically. For example:

there is a significant cost to government arising from negligent or otherwise unlawful conduct by government departments, agents and employees relating to detention in Australia. Costs also arise from coronial inquests involving deaths in custody ... [W]ith increased scrutiny of places of detention, OPCAT will improve prison environments and practices so that deaths and injuries in detention will be reduced. Consequently, the cost of litigation and inquests should also decline.³⁸

However, these positive outcomes, and this level of cost effectiveness, relies on the provision of sufficient upfront and ongoing funding to NPM bodies, including coordinating mechanisms, to allow them to perform their roles.

Again, as noted in our 2012 submission:

³⁷ Peter Dodd, PIAC, Submission to Joint Standing Committee on treaties, *OPCAT – preventative, proactive and non-punitive*, 30 March 2012, available at https://www.piac.asn.au/wp-content/uploads/12.03.30_opcat_preventative_proactive_and_non-punitive_submission.pdf

³⁸ Ibid, p9-10.

There will be some cost to the Commonwealth, state and territory governments to introduce the inspection and scrutiny of places of detention as required by OPCAT. However, these costs are minimal when compared to the institutions they will be set up to monitor and improve.³⁹

This funding will need to be sufficient to ensure not only that NPM bodies, including the coordinating mechanisms, will have functional independence (as outlined in OPCAT Article 18(1)),⁴⁰ but also that they enjoy financial independence (as implied by Article 18(3)).⁴¹

This has been further clarified in the *Guidelines on national preventive mechanisms*, issued by the SPT in 2010, to mean that the 'NPM should enjoy complete financial and operational autonomy when carrying out its functions under the Optional Protocol.'⁴²

In practical terms, and noting that it is likely that the coordinating mechanisms at both Commonwealth and State and Territory level will be existing organisations provided with new functions and responsibilities (rather than entirely new bodies), this means that:

- There should be sufficient new funding for the body to perform all of its relevant functions under OPCAT
- This role should not be to the detriment of funding to other elements of those bodies, and
- Ideally, funding to the coordinating mechanisms should be 'ring-fenced' or 'earmarked' so that it is not subsumed in the overall budget of an organisation.

Recommendation 16 – Financial independence of coordinating mechanisms

All NPM bodies, and especially coordinating mechanisms (at Commonwealth, State and Territory level), should have sufficient additional funding provided to ensure they can perform their roles under OPCAT, and that this funding should be 'ring-fenced' or 'earmarked' so that it is not subsumed in the overall budget of the organisation.

³⁹ Ibid, p10.

⁴⁰ 'The States Parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel.'

⁴¹ 'The States Parties undertake to make available the necessary resources for the functioning of the national preventive mechanisms.'

⁴² Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 'Guidelines on national preventive mechanisms', 9 December 2010, p4, available at http://www2.ohchr.org/english/bodies/cat/opcat/docs/SPT_Guidelines_NPM_en.doc (accessed 12 July 2017).