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# OPCAT: How an international treaty regarding torture is relevant to the Australian mental health system

**Calina Ouliaris[1,2*], Neeraj Gill[3,4,5*], Melissa Castan[6,7,8] and Suresh Sundram[9,10,11]**

## Abstract

The United Nations Subcommittee on the Prevention of Torture visits signatory nations to the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). Its role is to monitor and support signatory nations in implementing and complying with the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). In October 2022, the United Nations Subcommittee on the Prevention of Torture visited Australia but was barred from visiting mental health wards in Queensland and all detention facilities in New South Wales leading to the termination of its visit. This breach of Australia's obligations under the OPCAT presents a significant setback for the rights of people with mental illness and other involuntarily detained populations. This piece sets out to demonstrate the relevance of OPCAT to the mental health system in Australia. Individuals who are detained for compulsory treatment in locked facilities such as acute psychiatric inpatient wards and forensic mental health facilities are deprived of their liberty, often out of public view. Thus, it highlights the ethical and professional obligations of all mental health professionals, especially psychiatrists, to safeguard the human rights of individuals being detained in mental health facilities as enshrined in Australia's international legal obligations under the OPCAT. Adhering to these obligations diminishes the risk of future human rights violations of people with mental illness.

## Keywords

OPCAT, human rights law, mental health services, mental illness, restrictive practices

[1]Faculty of Medicine, Health and Human Sciences, Macquarie University, Sydney, NSW, Australia
[2]Training Program, The Royal Australian & New Zealand College of Psychiatrists, Melbourne, VIC, Australia
[3]Mental Health Policy Unit, Health Research Institute, University of Canberra, Canberra, ACT, Australia
[4]School of Medicine and Dentistry, Griffith University, Gold Coast, QLD, Australia
[5]Mental Health and Specialist Services, Gold Coast Health, Southport, QLD, Australia
[6]Faculty of Law, Monash University, Clayton, VIC, Australia
[7]Castan Centre for Human Rights Law, Monash University, Clayton, VIC, Australia
[8]Australian Academy of Law, Sydney, NSW, Australia
[9]Department of Psychiatry, School of Clinical Sciences, Faculty of Medicine, Nursing and Health Sciences, Monash University, Clayton, VIC, Australia
[10]Mental Health Program, Monash Health, Clayton, VIC, Australia
[11]Cabrini Outreach, Malvern, VIC, Australia

*Joint first authors.

**Corresponding author:**
Suresh Sundram, Department of Psychiatry, School of Clinical Sciences, Faculty of Medicine, Nursing and Health Sciences, Monash University, P-Block, Level 3, 246 Clayton Road, Clayton, VIC 3168, Australia.
Email: suresh.sundram@monash.edu

## Introduction

The United Nations (UN) Subcommittee on the Prevention of Torture (SPT) undertakes planned and unannounced visits to signatory nations of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). This is to monitor and support a signatory nation in implementing and complying with the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). On 23 October 2022, the headline of a UN press release read, '*UN torture prevention body suspends visit to Australia citing lack of cooperation*' (Office of the United Nations High Commissioner for Human Rights, 2022). Specifically, the SPT had been barred from visiting mental health wards in Queensland and all detention facilities in New South Wales. This effectively obstructed it from carrying out its mandate under OPCAT which Australia signed on 19 May 2009 and ratified on 21 December 2017 (Office of the United Nations High Commissioner for Human Rights, 2023a).

A spokesperson of Queensland Health told The Guardian that '*while it supported the subcommittee's visit, it was bound by the Mental Health Act 2016 to limit inpatient unit access to "certain categories of visitors" for the safety of patients*' (Gillespie and Rose, 2022). The barring of the SPT from New South Wales remains officially unexplained to our knowledge.

On 20 February 2023, a follow-up UN press release reported:

> *Despite the good cooperation the Subcommittee has with the Australian Federal Authorities following our initial mission, there is no alternative but to terminate the visit as the issue of unrestricted access to all places of deprivation of liberty in two states has not yet been resolved, said Suzanne Jabbour, the newly re-elected Chairperson of the SPT.* (Office of the United Nations High Commissioner for Human Rights, 2023b)

The SPT has only had to terminate its visit to one other signatory nation, Rwanda, for similar reasons of obstruction (Office of the United Nations High Commissioner for Human Rights, 2023a).

This piece discusses the relevance of OPCAT to the mental health system in Australia and mental health professionals, including psychiatrists, in relation to our international human rights obligations.

## Australia's international legal obligations under OPCAT

The CAT was adopted by the UN General Assembly in 1984 and entered into force in 1987 (United Nations, 1984). The definition of torture is broad and includes any act by which severe physical or mental suffering is intentionally inflicted on a person by, or with the consent or acquiescence of, a public official (United Nations, 1984: Article 1). As conditions that give rise to ill-treatment are thought to 'facilitate torture', the CAT regards prevention of both ill-treatment and torture to be non-derogable human rights (Committee against Torture, 2012). Arguably, individuals deprived of their liberty and detained in locked wards for care and treatment may be viewed as being subject to conditions that potentially give rise to ill-treatment and facilitate torture.

The OPCAT was developed to improve practical implementation of the CAT. OPCAT entered into force on 22 June 2006 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*' (United Nations, 2003: Article 1). The mandate to visit places where people are 'deprived of their liberty' is broad and applies to '*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*' (Art. 4(2)). This includes acute psychiatric inpatient wards and forensic mental health facilities where people are detained against their will and preference. It also includes aged care, justice and immigration detention facilities in which there is a high burden of mental illness (The Australia OPCAT Network, 2020).

Distinct from the CAT, the OPCAT's mandate is preventive in nature and seeks to implement non-judicial measures in the interests of individuals who are detained. Part III of the OPCAT creates an independent international monitoring body (the SPT) with wide-ranging powers and simultaneously creates under Part IV an obligation for signatories to establish a domestic treaty-monitoring body, National Prevention Mechanisms (NPM) (United Nations, 2003).

### *The subcommittee on prevention of torture*

The SPT has several unique powers that reflect its preventive function. Individuals who are deprived of their liberty are often held in environments out of public view and monitoring has been proven to be one of the most effective mechanisms for preventing torture (Carver and Handley, 2016). To achieve its key working mechanism of monitoring, the SPT may make unannounced supervisory visits to places of detention, conduct private interviews with detainees and other relevant personnel and have unrestricted access to all relevant documentation (United Nations, 2003: Article 11).

The SPT may also provide advice to States on establishing a NPM and collaborating with it and other international bodies with similar aims. The

SPT is able, when necessary, to have confidential communications with the NPM for the purposes of capacity-building. This enables the SPT to support the NPM to function as an independent body, without undue influence from the State. Similarly, SPT reports are shared only with the State, which may choose to make it public. By contrast, reports of NPMs must be publicly available (United Nations, 2003: Article 23). Unlike the CAT (and most treaties), there is no function for individuals to report alleged violations.

Thus, the SPT focuses on facilitating collaboration between the State, the NPM and international bodies to ensure compliance with the OPCAT. The focus is on cooperation rather than condemnation, and prevention rather than reaction. As Fletcher (2012) notes, the OPCAT holds States accountable in a '*non-confrontational way which is more likely to be effective than an aggressive, politically-oriented approach (because such an approach invariably makes governments defensive)*' (p. 234).

### *National Preventive Mechanisms*

National Preventive Mechanisms (NPMs) must have operational independence (Art. 18(1)), requisite statutory powers (Art. 19) and be adequately resourced to carry out its functions (Art. 18(3)). Similar to SPTs, NPMs have broad powers to access places of detention and aside from monitoring, function to provide advice to States, enhance cooperation among relevant stakeholders (including the State, the NPM and the SPT) and educate professionals, including medical personnel regarding the prohibition of torture and ill-treatment (Office of the United Nations High Commissioner for Human Rights, 2019).

Although Australia ratified OPCAT on 21 December 2017, it declared it would postpone its obligations relating to NPMs (United Nations, 2023), including the obligation to establish NPMs within a year of ratification (United Nations, 2003: Article 17).

## Understanding Australia's breach of the OPCAT

Australia has a dualist legal system; international legal obligations are not enforceable within Australia until incorporated into domestic legislation (Australian Law Reform Commission, 2014). This is distinct from a monist system, where international conventions become part of the domestic legislation once ratified by the State (Series, 2019). Therefore, for OPCAT to have legislative force in Australia, its standards must be incorporated into domestic legislation in each jurisdiction.

By January 2022, only three jurisdictions had introduced independent domestic legislation to enact OPCAT: the Australian Capital Territory with the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018, the Northern Territory with the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018 and Tasmania with the OPCAT Implementation Act 2021.

South Australia passed the Correctional Services (Accountability and Other Measures) Amendment Act 2021 in April 2021 which made provisions for OPCAT obligations but were specific to correctional facilities. The OPCAT Implementation Bill 2021 (SA) had broader powers which included prescribed mental health facilities (s3(1)). In January 2022, it had been passed in the House of Assembly and awaiting debate in the Legislative Council. However, this did not occur before the SA state election in March 2022 and, to date, has not been re-introduced.

Victoria passed the Monitoring of Places of Detention by the United Nations Subcommittee on Prevention of Torture (OPCAT) Act 2022 on 11 October 2022, 5 days before the SPT's scheduled arrival on 16 October.

Western Australia was the first state to establish a NPM in 2019 but did not provide these designations with legislative foundation. Queensland passed the Inspector of Detention Services Act in September 2022; the prevention of torture is stated as one of its main purposes (ss 3(1)(b)), but it does not refer to OPCAT or designate any NPMs.

NSW did not engage in any consultation regarding OPCAT during the 4-year period, reportedly in a stalemate with the federal government for funding to carry out its mandate (Grenfell and Caruana, 2022: 56).

In October 2022, The Australian Human Rights Commission (2022) set out a 'roadmap' for implementation, highlighting the activities required to expedite Australia's patchy and tardy approach to implementing the OPCAT. A key recommendation was that the Australian Government introduces dedicated primary legislation to give full effect to OPACT's key provisions and enable national coordination of Australia's OPCAT response.

Some progress has been made since the SPT suspended its visit to Australia in October 2022. In December 2022, the Monitoring of Places of Detention (Optional Protocol to the Convention of Torture) Bill 2022 was tabled in the Queensland Parliament and subsequently passed in May 2023. Consistent with the Public Advocate (QLD) (2022: 51–52) recommendations for improving the State's delivery of acute mental health services, the Bill includes Authorised Mental Health Services where involuntary patients are detained as a 'place of detention' for OPCAT purposes. It does not, however, expressly include places where the use of restrictive practices amounts to detention of the individuals involved, such as disability and aged-care settings where there is a high burden of mental illness (Chesterman, 2022: 2). This limited definition of 'places of detention' reflects the Commonwealth

Government's gradated approach to implementation of OPCAT which prioritises 'primary' places of detention including correctional facilities and authorised mental health facilities but not aged care or disability group homes (Australian Human Rights Commission, 2023).

At the time of writing, in contrast to other States, there is no legislation before the NSW Parliament regarding OPCAT.

Australia's implementation of NPMs was described as 'bare bones' and '*a major embarrassment for a first world nation*' (Grenfell and Caruana, 2022: 55). In contrast, New Zealand, an early adopter of the OPCAT, made amendments to the Crimes of Torture Act 1989 (New Zealand) to provide for visits by the SPT and establishment of NPMs prior to ratification (New Zealand Human Rights Commission, 2016: 43). As a federal state, Australia's progression may be more complex; however, it is worth noting that other federal states such as Germany, Mexico and Argentina have not been impeded to the same extent (Harding, 2019). Regardless of the reasons for Australia's breach, one thing is clear: at the time of the SPT's visit in October 2022, Australia was not able to present any coherence in the legislative frameworks that applied to OPCAT and would have benefitted from facilitating the SPT's visit to access their advisory expertise.

## How the *Mental Health Act 2016* (QLD) became implicated

Of central relevance to mental health care professionals is how the *Mental Health Act 2016* (QLD) ('MHA') came to be instrumental in obstruction of the SPT's visit. As noted above, Queensland did not have domestic legislation for the specific purpose of enacting OPCAT provisions at the time of the SPT visit in October 2022. While the *Inspector of Detention Services Act 2022* (QLD) was passed in September 2022, it specifically excluded public sector health service facilities, including authorised mental health services (ss5(2)). This means that the SPT was not empowered with legislative function in Queensland.

The MHA specifies categories of persons that may visit authorised mental health services such as acute and forensic inpatient units. This includes support persons (s281), legal or other advisers (s283) and an inspector who is an appointed public or health service employee or other persons prescribed by regulation (Chapter 14). The MHA does not expressly exclude other visitors who are not within these categories; however, a strict interpretation of these provisions would exclude the SPT which is what happened in October 2022. A human rights–based interpretation would have considered that the categories of permitted visitors are listed within Chapter 9, entitled 'Rights of patients and others', and that consumers have the non-derogable right (albeit under international human law) to be visited by the SPT. This is particularly when considering the MHA's principles of administration, which include a person's right to respect for his or her human rights (part 2).

It was argued that by allowing an external body such as the SPT, visitation rights may violate a person's right to privacy and confidentiality (s5(m)); however, such paternalistic positions are not sustainable. An individual has the right to decline to engage with the SPT, but it is not tenable for the authorised detaining entity to decline to engage on behalf of individuals which it has detained. It is also worth noting that confidentiality is safeguarded as a key principle of operation of the SPT (United Nations, 2003: Article 2(3)). Moreover, section 2(a) of the MHA notes the importance of safeguarding the rights of persons in a manner that is least restrictive of their liberties. These principles appear to support an interpretation that includes, rather than excludes the SPT, a body which exists to support the spirit of the MHA.

At the State level, this delay in enacting domestic legislation and the subsequent restrictive interpretation of the MHA are suggestive of a lack of understanding of OPCAT's utility, perhaps even viewing it as intrusive to domestic state practices. More broadly, it is reflective of a culture that does not give salience to legal obligations under international human rights law, with domestic policies that do not operate within a rights-based framework of care. It seems even more anomalous in States such as Queensland that has a Human Rights Act 2019 (QLD), which incorporate the framework of human rights law.

As noted above, this has since been resolved in Queensland with the passing of the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022 (QLD) in May 2023, which now includes inpatient units of Authorised Mental Health Services where involuntary patients are detained as a 'place of detention' for OPCAT purposes. However, this was too late to avoid Australia making international headlines for obstructing the SPT in undertaking its mandate.

## Why we should care

The importance of a mechanism that enables prevention of ill-treatment is underscored by recent events. The National Children's Commissioner (2016) report into conditions at juvenile detention centres recognised the need for external monitoring mechanisms and recommended the Australian Government ratify the OPCAT as soon as possible. In 2017, the then Commonwealth Attorney General, the Hon. George Brandis, announced that Australia would ratify OPCAT by December, stating,

> *had the OPCAT been operational at the time the events of the Don Dale Youth Detention Centre in Northern Territory emerged, then it may well be, that either*

> *they wouldn't have happened at all or they would have been arrested at a much earlier time.* (Minister for Foreign Affairs, 2017)

Exposé of the ill-treatment of residents at the Oakden Older Persons Mental Health Service in South Australia in 2016 similarly found a significant failure to appreciate the seriousness of restrictive practices (Government of South Australia, 2017). The then Chief Psychiatrist of South Australia, Dr Aaron Groves, lamented, '*Oakden would not have happened, had we had an NPM in place*'. The Royal Commission into Aged Care Quality and Safety that followed cost over $100 million and made strong recommendations for continuous monitoring (Commonwealth of Australia, 2021). A culture that values human rights with appropriate legislative support to protect such rights in a preventive rather than reactive manner is, in addition to the moral value inherent in upholding human rights, also likely to offer financial savings to compliant jurisdictions.

These incidences are also reflective of a culture in which mental healthcare professionals do not give salience to the positive duty to promote human rights, perhaps viewing it as impinging on existing practices. However, the CAT has not adopted an absolutist position of prohibition of involuntary psychiatric treatment. Instead, it recommends that involuntary treatment be limited and used as a last resort. Similarly, the SPT urges that States develop legal safeguards restricting involuntary treatment (Sveaass and Madrigal-Borloz, 2017: 22–23). These positions are broadly supportive of the existing obligations of authorised officers under State mental health legislation – to provide care and treatment that is least restrictive to patient rights.

Similarly, The Royal Australian & New Zealand College of Psychiatrists (RANZCP) (2018a) unequivocally condemned the use of torture or other cruel, inhuman or degrading treatments. It calls on Australia to cooperate with the SPT to meet OPCAT obligations and further notes:

> *OPCAT's recent decision to suspend its visit to Australia is a significant setback for Australia's record on human rights. The RANZCP supports all Australian states and territories to work with OPCAT to protect human rights and foster trust in Australia's prisons, detention centres and psychiatric facilities.* (RANZCP, 2022)

This echoes our existing ethical obligations as enshrined in the World Psychiatric Association Standing Committee on Ethics and Review (2020) Code of Ethics for Psychiatry (3(10)) and The RANZCP (2018b) Code of Ethics:

> *Psychiatrists shall not participate in the practice of torture or cruel, inhuman or degrading interrogation, treatment or punishment. Psychiatrists who become aware of these situations in their practice shall raise their concerns with relevant authorities and/or publicly.* (6.3)

## Conclusion

Australia's breach of its obligations under OPCAT is a significant setback for the rights of people with mental illness and other involuntarily detained populations. Recent human rights violations such as at Oakden underscore the critical need for all Australian jurisdictions to legislate for the immediate and full introduction of OPCAT and to facilitate SPT visits. Hiding behind veiled paternalistic notions of privacy to enable abrogation of external oversight must be strenuously resisted by mental health practitioners including psychiatrists and their representative bodies such as the RANZCP, and more widely the Australian community.

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## ORCID iDs

Calina Ouliaris https://orcid.org/0000-0002-8395-9959
Neeraj Gill https://orcid.org/0000-0003-2106-9843
Suresh Sundram https://orcid.org/0000-0002-9674-0227

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