Australian National Preventive Mechanism (NPM) Members' Joint Submission on the UN SPT Draft General Comment No. 1 on Places of Deprivation of Liberty (Article 4)

April 2023

Contents

Word Count (excluding footnotes and contents): 2,883

We acknowledge the traditional custodians of the lands where we work and live, and Elders both past and present. We recognise Aboriginal and Torres Strait Islander Peoples' ongoing connection to Country and Culture.

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1. Members of the Australian National Preventive Mechanism (NPM)

In 2017, Australia ratified the UN *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**). The coordinating body for the Australian National Preventive Mechanism (**NPM**) is the Commonwealth Ombudsman, and a number of bodies have been designated members of the NPM by Federal, State and Territory Governments. Not all governments have nominated or established bodies as an NPM member.

This submission has been prepared and endorsed by the following NPM members:

- Commonwealth Ombudsman
- Australian Capital Territory (**ACT**) Inspector of Correctional Services
- ACT Ombudsman
- Northern Territory (**NT**) Office of the Ombudsman
- NT Office of the Children's Commissioner
- NT Community Visitor Program
- Western Australian Office of the Inspector of Custodial Services
- South Australia (**SA**) Training Centre Visitor

We wish to express interest in participating in the public discussion during the half day of general discussion taking place during the 50th session of the SPT, in June 2023 (5 to 16 June).

2. Feedback on General Comment

We congratulate the SPT on drafting this General Comment, which will provide much needed guidance to NPMs, governments, detaining authorities and civil society, to better understand the meaning of "place of deprivation of liberty". This improved understanding will, in turn, assist States parties to meet their obligations, and facilitate OPCAT achieving its intended objectives and full potential.

Due to the word limit, we have been unable to highlight the aspects of the General Comment that we have found particularly helpful, instead focusing on recommendations with regards to clarification and enhancement, for the SPT's consideration.

I. Introduction

In **footnote 2 on page 1**, it is noted that the English version of OPCAT refers to any place under a State party's "jurisdiction *and* control", whereas the French version refers to "any place under its jurisdiction *or* control". Although this issue is addressed in the body of the General Comment, in paragraphs 24 and 25, of section 'B. Jurisdiction or control', given the importance of this issue and the interpretation being preferred, this distinction could be addressed more prominently within the text of the General Comment, early on, rather than in a footnote.

Recommendation 1: The General Comment could address, earlier and in a more prominent manner, the difference between the French and English versions of Article 4(1) of the OPCAT, and the preferred interpretation of Article 4(1), namely, a place under a State party's jurisdiction *or* control.

Paragraph 4 refers to the definition of places of deprivation of liberty including both "public and private settings and *situations*". It would be useful if the General Comment could expand on what is meant by "situations".

Recommendation 2: The General Comment could expand on what is meant by "situations" that might fall within the definition of "place of deprivation of liberty".

Paragraph 5 discusses the difficulties or restrictions that some NPMs have faced with regards to visiting places of deprivation of liberty, particularly citing the following examples:

- national law that is contrary to the international obligations of the State;
- practical difficulties in entering certain places of deprivation of liberty owing to an incorrect or limited understanding by the State party of the definition of places of deprivation of liberty;
- States parties imposing more restrictions on NPMs' access to places of deprivation of liberty than the SPT.

While we certainly appreciate that this is an issue unique to Australia, we would welcome the inclusion of a clear statement that there should be no distinction made by States parties between "primary" and "secondary" places of detention, as has been made by the Australian Government.[1] This interpretation is at odds with the Government's obligations under OPCAT, and we welcomed the UN Committee against Torture's (**"the Committee"**) Concluding Observations on Australia, in which the Committee noted "with concern that the State party has adopted a "primary versus secondary" approach to places of deprivation of liberty, which leaves several places in which persons are deprived of their liberty outside the scope and the mandate of the network of national preventive mechanisms, which runs counter to the provisions of article 4 of the Optional Protocol."[2] We note the guidance from the Office of the High Commissioner for Human Rights[3] that NPMs must be given the autonomy to determine which places of detention to prioritise, the frequency of visits and the length of the visit. The breadth of an NPM's visit mandate means the NPM needs to determine the frequency of its visits, based upon the NPM's assessment of relative risk, and this should be acknowledged.

[1] Senate Standing Committee on Legal and Constitutional Affairs, Additional Estimates 2019–20 question on notice LCC-AE20-50 - OPCAT obligations (Attorney-General's Department) (3 March 2020) available here.
[2] United Nations Committee against Torture, Concluding Observations on the Sixth Periodic Report of Australia, adopted by the Committee at its seventy-fifth session (31 October–25 November 2022) (15 December 2022) CAT/C/AUS/CO/6; available here.
[3] UN Office of the United Nations High Commissioner for Human Rights, Preventing Torture: The Role of National Preventive Mechanisms, A Practical Guide. Professional Training Series No. 21. (2018) available here

Recommendation 3: The General Comment could clearly state that there is no 'hierarchy' of places of detention, such as "primary" or "secondary" places of detention, and it is for the NPMs to prioritise which places of deprivation of liberty they will visit, with what frequency, and for what length of time.

The Committee also recommended that the Australian Government "[t]ake all necessary measures" so that "each of [the NPM] member bodies has the necessary resources and functional and operational independence to fulfil its preventive mandate in accordance with the Optional Protocol, including access to all places of deprivation of liberty as prioritized by the bodies themselves."[4] While we appreciate that the General Comment is intended to be a technical guidance document, its impact could be strengthened by also highlighting that State parties have an obligation under Article 18(3) "to make available the necessary resources for the functioning of the national preventive mechanisms".[5]

Recommendation 4: The General Comment could emphasise that States parties must make available the necessary resources for the functioning of NPMs, in accordance with the scope of their obligations under OPCAT. With inadequate NPM funding, State parties effectively exclude "places of deprivation of liberty from benefiting from the important preventive actions of the [NPM]".[6]

General Observations

The General Comment, especially the Introduction, is quite dense and technical. While the reasons for this are self-evident, the SPT could reach its target audiences, including detaining authorities and NPMs, more effectively by preparing:

- an accompanying plain language summary of the key points and/or
- a summary of key points at the beginning of the General Comment.

This would improve accessibility for individuals without legal backgrounds, with disabilities or who do not have capacity to dedicate the time required to read and understand the General Comment in its entirety. This, in turn, would make the General Comment, on a practical level, more impactful.

Recommendation 5: The SPT could consider preparing an accompanying plain language summary of the key points and/or a summary of key points at the beginning of the General Comment, with the view to make the General Comment more accessible, and thus more impactful.

[4] United Nations Committee against Torture, Concluding Observations on the Sixth Periodic Report of Australia, adopted by the Committee at its seventy-fifth session (31 October–25 November 2022) (15 December 2022) CAT/C/AUS/CO/6; available here.
[5] *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, available here.
[6] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Draft General Comment No. 1 on Places of Deprivation of Liberty (article 4) [5].

Under **paragraph 11**, it would be useful if the General Comment expanded on what is meant by "not being free to leave", and included some examples (e.g. where there might be an "element of coercion" that is "indicative of a deprivation of liberty",[7] threat of use of force or a penalty for leaving). Particularly, the General Comment should emphasise that "[d]eprivation of personal liberty is without free consent",[8] and the "fact that a person is not handcuffed, put in a cell or otherwise physically restrained does not constitute a decisive factor in establishing the existence of a deprivation of liberty."[9]

Recommendation 6: The General Comment could expand on what is meant by "not being free to leave", and include some examples.

Under **paragraph 11**, it would be useful if the General Comment could clarify what is meant by a "regulatory function" that a State "exercises or might be expected to exercise" ("any place… in which the Subcommittee considers that persons might be deprived of their liberty, should fall within the scope of the Optional Protocol, *if the deprivation of liberty relates to a situation in which the State either exercises or might be expected to exercise a regulatory function*").

It would be particularly helpful to have guidance on whether "regulatory function" would encompass, or inadvertently exclude, deprivation of liberty that is not permissible under law, but that occurs at the State's instigation, or by its consent or acquiescence. It could be foreseeably argued by States that where the function exercised is not conferred under law, or is not connected to or generally identified with functions of government, it would not fall within the scope of OPCAT (e.g. where there exists a State practice of unlawfully detaining people and/or detention occurs in secret locations, as a counter-terrorism measure[10]). "Regulatory functions" could be interpreted, in the absence of further guidance from the SPT to, perversely, exclude those places of detention where the risk of torture is highest.

[7] European Court of Human Rights, *Krupko and Others v. Russia* (2014), available here. In that case, "the Government denied that the applicants had been deprived of their liberty or restricted in their movements. In their submission, the police had merely invited a few participants of the religious meeting, including the applicants, to the Lyublino police station with a view to obtaining statements about the unlawful gathering and identifying its organisers." "The applicants objected to the misleading use by the Government of the word "invite". An "invitation" implies the freedom to accept or to refuse, but no such choice was given to them. The police separated them from the other believers and loaded them into police vehicles. A refusal to comply or an attempt to resist would have been taken as violence against a police officer and exposed them to the risk of receiving heavy penalties." The Court found that the applicants had been deprived of their liberty.

[8] UN Human Rights Committee, General Comment No. 35 - Article 9 (Liberty and security of person) (2014) CCPR/C/GC/35 [6], available here.

[9] European Court of Human Rights, Guide on Article 5 of the European Convention on Human Rights - Right to Liberty and Security, available here.

[10] Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; the Working Group on Arbitrary Detention represented by its Vice-chair, Shaheen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances represented by its Chair, Jeremy Sarkin (2010) A/HRC/13/42, available here: "In many contexts, intelligence agencies operate in a legal vacuum with no law, or no publicly available law, governing their actions. Many times,

Recommendation 7: The General Comment could expand on what is meant by regulatory function, and explicitly state that included in "places of detention" are places where individuals are unlawfully detained and secret places of detention.

Recommendation 8: The General Comment could reiterate that States must provide NPMs with comprehensive information with regards to all places of detention, in compliance with Article 20(a) OPCAT.[11]

In **paragraph 12**, there is reference to "any form of placement in a setting that a person is not *permitted* to leave at will" (additional to the previous reference of being "free to leave"). In **paragraph 18**, in the following section, there is reference to the Inter-American Court of Human Rights having established that a measure of deprivation of liberty is the fact that people "cannot or are *unable* to leave or abandon at will the place or establishment where they have been placed." It would be of assistance if the SPT could clarify whether the preferred test is permission to leave or ability to leave, or if both are within scope (e.g. in *Tarak and Depe v. Turkey*, "the Court considered that it was not necessary to assess whether he had been kept in closed and guarded premises from which any unauthorised exit was prohibited, since [the 8 year old boy] could not have been expected to leave the police station alone"[12]).

There is an opportunity to canvass both particular vulnerabilities/power imbalances, and mechanisms of restraint used in deprivation of liberty that affect an individual's ability to leave a place of detention:

- Vulnerabilities that can lead to significant power imbalances, including age, disability, gender identity, and whether an individual is Aboriginal and/or Torres Strait Islander;
- Types of restraint/restrictive interventions, including physical, mechanical, chemical and coercive (e.g. psychotropic medication used to manage behaviour in aged care facilities, or removing someone's mobility aid, such as a wheelchair).

although intelligence bodies are not authorized by legislation to detain persons, they do so, sometimes for prolonged periods. In such situations, oversight and accountability mechanisms are either absent or severely restricted, with limited powers and hence ineffective."
Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin, Follow-up report to the joint study on global practices in relation to secret detention in the context of countering terrorism (2022) A/HRC/49/45, available here: "Mass detention without legal process has been normalized by certain States."

[11] *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, available here, Article 20(a): "In order to enable the national preventive mechanisms to fulfil their mandate, the States Parties to the present Protocol undertake to grant them access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location."

[12] European Court of Human Rights, Arbitrary detention of an 8-year-old child in a police station, available here.
"Without dwelling on whether or not this had represented formal police custody, the Court concluded that the child, aged eight at the time, had been taken to the police station by police officers and detained there alone, at least from 27 to 28 October 2001, when his mother had arrived. His position was characterised by his very young age and the fact that he had been unaccompanied after his arrival at the police station. He had thus been left to himself in the police premises and had been in a vulnerable situation. In those circumstances, the Court considered that it was not necessary to assess whether he had been kept in closed and guarded premises from which any unauthorised exit was prohibited, since he could not have been expected to leave the police station alone." European Court of Human Rights, *Tarak and Depe v. Turkey* (2019) available here (in French only).

Recommendation 9: The SPT could clarify whether the preferred test for "deprivation of liberty" is whether an individual has permission to leave, or the ability to leave, or if both are within scope.

Recommendation 10: The General Comment could canvass what might prevent an individual from being able to leave, including particular vulnerabilities/power imbalances, and the types of restraint mechanisms that might be used.

C. Broad definition in international law

Paragraph 14 raises a similar question as to that in paragraph 11, in potentially limiting deprivation of liberty to lawful deprivation: "The Human Rights Committee has explained that, under the International Covenant on Civil and Political Rights, the prohibition of torture applies in all institutions where persons are lawfully held against their will" (noting that the Human Rights Committee General Comment 21 referred to "any one deprived of liberty under the laws and authority of the State"[13]).

It could also be useful to briefly explain the distinction between deprivation of liberty and security of persons,[14] referred to in **paragraph 14**, as this has been a query raised by civil society actors with whom Australian NPM members have consulted.

Recommendation 11: The General Comment could briefly address the difference between deprivation of liberty and security of persons.

III. Places of deprivation of liberty under article 4

C. In which persons are or may be deprived of their liberty

Under **paragraph 29**, there is reference to "any place, facility or setting" where people are deprived of their liberty. The General Comment could clarify what is meant by settings, through the use of examples (e.g. the use of kettling (also known as containment or corralling) as a crowd control measure during a protest[15]). Noting also the above recommendation regarding "situations".

[13] UN Human Rights Committee, General Comment No. 21 - Article 10 (Humane Treatment of Persons Deprived of Their Liberty) (1992) [2], available here.
[14] UN Human Rights Committee, General comment No. 35 - Article 9 (Liberty and security of person) (2014) CCPR/C/GC/35 [9], available here: "The right to security of person protects individuals against intentional infliction of bodily or mental injury, regardless of whether the victim is detained or non-detained. For example, officials of States parties violate the right to personal security when they unjustifiably inflict bodily injury."
[15] European Court of Human Rights, Guide on Article 2 of Protocol No. 4 to the European Convention on Human Rights - Freedom of Movement (31 August 2022) available here: "Regarding the use of containment and crowd-control techniques, it cannot be excluded that, in particular circumstances, they could give rise to an unjustified deprivation of liberty in breach of Article 5 § 1 [of the European Convention on Human Rights]. In each case, Article 5 § 1 must be interpreted in a manner which takes into account the specific context in which the techniques are deployed, as well as the responsibilities of the police to fulfil their duties of maintaining order and protecting the public, as they are required to do under both national and Convention law".

Recommendation 12: The General Comment could clarify what might constitute a "setting" where people might be deprived of their liberty, as opposed to a place or facility.

While **paragraph 29** asserts that the "length of time of the deprivation of liberty is irrelevant for the determination of" a place where individuals are, previously were, or potentially may be, deprived of their liberty. This is a crucial issue for some Australian NPM members, and we would recommend this be given more attention in the General Comment.

Recommendation 13: The General Comment could give greater prominence and attention to the assertion that the "length of time of the deprivation of liberty is irrelevant for the determination of" a place, facility or setting of deprivation of liberty.

D. In which persons are not permitted to leave at will

Under **paragraph 30**, the General Comment could also address the distinction between what amounts to merely a restriction of movement, as opposed to deprivation of liberty.

For example:

> The difference between a deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance… In order to determine whether someone has been "deprived of his or her liberty"… the starting-point must be his or her specific situation, and account must be taken of a whole range of factors such as the type, duration, effects and manner of implementation of the measure in question… Where several measures are in issue, they must be analysed cumulatively and in combination.[16]

Also:

> Relevant objective factors to be considered include the size and characteristics of a restricted area to which a person's movement is confined, the possibility to leave this area, the degree of supervision and control over the person's movements, the extent of isolation and the availability of social contacts.[17]

Examples and/or links to key case law regarding what amounts to a restriction of movement, but not deprivation of liberty, could assist.

Recommendation 14: The General Comment could briefly address the distinction between what amounts to merely a restriction of movement, as opposed to deprivation of liberty, and provide some guidance/case law.

[16] European Court of Human Rights, Key Theme - Article 5 The Notion of Deprivation of Liberty (15 September 2022) available here.

[17] European Court of Human Rights, Guide on Article 2 of Protocol No. 4 to the European Convention on Human Rights - Freedom of Movement (31 August 2022) available here

E. By virtue of an order given by a public authority or at its instigation or with its consent or acquiescence

Under **paragraph 32**, it would be helpful to clarify what might constitute "other public authority", that could deprive someone of their liberty (e.g. medical doctor or psychiatrist, police officer etc[18]).

Recommendation 15: The General Comment could clarify what might constitute "other public authority", and provide examples of judicial, administrative and other authorities that may deprive someone of their liberty.

IV. Scope of places of deprivation of liberty

Under **paragraph 36**, the SPT makes clear that it does not intend to provide an exhaustive list of places of deprivation of liberty, an approach that we support. However, we would particularly draw the SPT's attention the following examples of deprivation of liberty that might be included:

- while police cells are frequently cited as places of deprivation of liberty, police stations could also be included (e.g. when children who have absconded from residential care are arrested by police under safe custody warrants[19]);
- restraint and seclusion in schools generally, not just boarding or religious schools,[20] including safe transportation of children with disabilities;[21]
- supported bail accommodation for children in contact with the criminal legal system;[22]
- remote 'boot camps' or youth camps;[23]
- residential care for children in out-of-home-care;[24]
- protective custody regimes, whereby individuals are detained for being intoxicated in a public place;[25]

[18] Defence for Children International, Practical Guide - Monitoring places where children are deprived of liberty (2016) available here.
[19] Victorian Commission for Children and Young People, 'Urgent action needed as Victoria's most vulnerable children and young people go absent or missing from residential care at alarming rates' (June 2021), available here: "In the 18 months to 31 March 2020, 388 warrants were granted each month on average authorising police to take absent or missing children into 'safe custody'". Children are arrested under s598(1)(b) *Children, Youth and Families Act 2005* (Vic), available here: "If a magistrate is satisfied by evidence on oath or by affirmation or by affidavit by the Secretary or by a police officer that a child is absent without lawful authority or excuse from the place in which the child had been placed under an interim accommodation order or by the Secretary under section 173 or from the lawful custody of a police officer or other person the magistrate may issue a search warrant for the purpose of having the child placed in emergency Care."
[20] Victorian Government, School Operations: Restraint and Seclusion, available here.
[21] Victorian Government, School Operations: Restraint and Seclusion, available here.
[22] Northern Territory Office of the Children's Commissioner, Saltbush Social Enterprises Monitoring Visits – Final Report (2021) available here.
[23] Northern Territory Government, Youth Camp Programs, available here.
[24] Both secure and general residential care (e.g. *Children, Youth and Families Act 2005* (Vic), Division 8—Secure welfare services— security measures, available here).
[25] E.g. s128 *Police Administration Act* (Northern Territory), available here.
Circumstances in which a person may be apprehended
(1) A member may, without warrant, apprehend a person and take the person into custody if the member has reasonable grounds for believing:
(a) the person is intoxicated; and
(b) the person is in a public place or trespassing on private property; and

- mandatory alcohol rehabilitation centres, which previously existed in the NT;[26]
- detention in private homes under guardianship legislation;[27]
- respite care; [28]
- extraterritorial processing arrangements for asylum-seekers, where people are deprived of their liberty, not within a State party's territory, but within its effective power or control (such as Manus Island and Nauru Regional Processing Centres);
- detention during military training;
- post-sentence administrative detention.[29]

Recommendation 16: The SPT might consider including further examples of deprivation of liberty in the General Comment's non-exhaustive list, as proposed by Australian NPM members.

Under **paragraph 39**, it would be useful if the SPT could clarify whether the General Comment is intended to reflect a high threshold in determining detention; namely whether an individual is able to de facto exercise their right to leave without being exposed to "serious human rights abuses". It is foreseeable that less serious consequences would suffice to coerce an individual to remain, especially in the context of significant power imbalances between State authorities and citizens. Potentially in those cases, this might amount to deprivation of liberty, rather than confinement/restriction of movement, even in cases where the consequences would not amount to serious human rights abuses.

Recommendation 17: The General Comment could clarify whether the intended threshold for deprivation of liberty,

- in circumstances where an individual is in a place that does not constitute a place of deprivation of liberty (examined separately),
- but the individual is de facto unable to exercise the right to leave,
- without exposing themselves to consequences,

those consequences must amount to "serious human rights violations".

(c) because of the person's intoxication, the person:
(i) is unable to adequately care for himself or herself and it is not practicable at that time for the person to be cared for by someone else; or
(ii) may cause harm to himself or herself or someone else; or
(iii) may intimidate, alarm or cause substantial annoyance to people; or
(iv) is likely to commit an offence.

[26] s12 *Alcohol Mandatory Treatment Act 2013* (Northern Territory) Mandatory residential treatment order, available here: "A mandatory residential treatment order is an order in relation to a person that: (a) authorises the admission of the person to, and the detention of the person at, a specified treatment centre."

[27] Australian Senate Standing Committees on Community Affairs, Disability, Guardianship and Aged-care Detention, Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia, available here: "detention that occurs from provisions within disability or guardianship legislation can occur in a range of locations from large hospitals or disability-specific therapeutic facilities, through to smaller disability accommodation units, aged care facilities or even in private homes."

[28] Including respite for children in statutory home-based out-of-home care (e.g. see here); and respite for aged care (e.g. see here).

[29] Victorian Post Sentence Authority, Detention Orders, available here: "The law in Victoria says that if a serious sex offender or serious violent offender is considered by a court to be an unacceptable risk to the community after they have completed their prison sentence, a detention order can be used to keep them detained."