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Mr Steven Caruana

[redacted]

Commissioner The Honourable Richard Tracey AM RFD QC

Commissioner Ms Lynelle Briggs AO

The Royal Commission into Aged Care Quality and Safety

ACRCenquiries@royalcommission.gov.au

Dear Commissioners,

Submission to Royal Commission into Aged Care Quality and Safety

Thank you for the opportunity to make a submission to the Royal Commission into Aged Care Quality and Safety. This submission focuses upon the distinct term of reference of actions to be taken in response to 'mistreatment and all forms of abuse' and the 'causes of any systemic failures.'[1] It additionally responds to what the Australian Government can do to 'strengthen the system of aged care services to ensure that the services provided are of high quality and safe.'[2] This submission explores Australia's obligations under the recently ratified Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and makes recommendations for independent, regular and preventive oversight visits to aged care facilities. This submission is made in an entirely private capacity and all views and recommendations are solely those of the author unless otherwise noted.

About the Author

Steven Caruana is an Inspections and Research Officer with the Office of the Inspector of Custodial Services Western Australia. Steven is a former Immigration Detention Inspector with the Office of the Commonwealth Ombudsman and in 2018 undertook a Winston Churchill Memorial Trust Fellowship to explore best practice inspection methodologies and implementation experiences under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).[3] Steven is an expert member of the External Prison Oversight and Human Rights Network with the International Corrections and Prisons Association.

[1] Royal Commission into Aged Care Quality and Safety (2018). Terms of Reference (a)
[2] Ibid (d)
[3] Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx)

Steven writes, consults and presents on the OPCAT and is a Sociology and Migration Law graduate currently studying Disability and Inclusion.

The oversight of aged care facilities in Australia

Australia's population is rapidly ageing and there is an increasing demand for aged care facilities and services. According to the Productivity Commission's Report on Government Services 2019[4], 234,798 people were permanently situated in residential care and 60,278 in respite care over 2017-2018.

This increase inevitably has led to significant strain upon existing aged care workers. One study identified that intensive time pressures, the physical demands of the role, inadequacies in management support and a lack of recognition are some of the key problems facing industry workers.[5] Whilst most people entering the aged care industry do so because they have a disposition to care for the elderly, these pressures can undermine the quality of care provided to consumers; and in the most extreme cases lead to gross neglect and mistreatment.

The Australian Law Reform Commission has identified that '…there is evidence that people who suffer elder abuse are more likely to be dependent on others and have significant disability; poor physical health; mental disorders, such as depression; low income or socioeconomic status; cognitive impairment; and social isolation.'[6] Aged care residents are a particularly vulnerable group because as explained by Associate Professor Edward Strivens, placement into aged care facilities is often the result of progressive cognitive decline, progressive chronic disease or more commonly medical comorbidity.[7] Families may look to aged care facilities because they are not be able to meet the increasing dependency for the completion of daily tasks and/or complex health care needs.

Regardless of the reasons for entering aged care facilities, older persons and their families should expect that they be treated with dignity, respect and be provided quality care. In accordance with the wide range of international human rights treaties both binding and non-binding that Australia has ratified; the assurance of those expectations requires legal protections and adequate oversight.

The adequacy (or inadequacy) of existing aged care oversight

The responsibility for oversight of Australia's aged care facilities lies with the newly formed Australian Aged Care Quality and Safety Commission which commenced operation on the 1st of January 2019. The Commission replaced the Australian Aged Care Quality Agency and the Aged Care Complaints Commissioner, effectively combining the regulatory and complaints functions.

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[4] Productivity Commission (2019). *Report of Government Services 2019*, Chapter 14 Aged Care Services, 14.6. Accessed on the 07 February 2019 from https://www.pc.gov.au/research/ongoing/report-on-government-services/2019/community-services/aged-care-services/rogs-2019-partf-chapter14.pdf

[5] HESTA (2018). *Transforming aged care: Reimaging the aged care workforce of tomorrow*. Accessed on the 07 February 2019 from https://www.hesta.com.au/content/dam/hesta/Documents/Aged-care-report.pdf

[6] Australian Law Reform Commission (2017). *Elder Abuse – A National Legal Response (ALRC Report 131)*, p20. Accessed on 7 February 2019 from https://www.alrc.gov.au/sites/default/files/pdfs/publications/elder_abuse_131_final_report_31_may_2017.pdf

[7] Royal Commission into Aged Care Quality and Safety (2019). *Transcript of Proceedings: Wednesday 13 February 2019*, p196. Accessed on 13 February 2019 from https://agedcare.royalcommission.gov.au/hearings/Documents/transcripts-2019/transcript-13-february-2019.pdf

The newly formed Commission can attribute its genesis in part to the various independent reviews that resulted from the 'Oakden Report.[8]' The South Australian Chief Psychiatrist, Dr Aaron Groves, led a review of the Oakden Older Persons Mental Health Service in 2016/7 at the request of the Chief Executive Officer of the Northern Adelaide Local Health Network. The review, among other things, recommended that the facility be closed and that the failings of Oakden should never occur again.

Parts of the Oakden Older Persons Mental Health Service operated as a Commonwealth-regulated residential aged care facility. Despite the significant historical failings described in the Oakden Report, the Commonwealth accredited sections of this facility were assessed as meeting 44 of the 44 expected outcomes of the Accreditation Standards in 2010, 2013 and 2016 by the Australian Aged Care Quality Agency. The reaccreditation visits did identify risks and issues with the facility but did not determine on any occasion that the expected outcomes were 'not met'.

The Senate Community Affairs Reference Committee commented in its Interim Report on the effectiveness of the aged care quality assessment and accreditation framework in 2018 that '… if a situation like that at Oakden can occur for many years under the eyes of the regulators, then there are serious concerns about the quality of oversight for the broader aged care sector, and the quality of care being provided to vulnerable aged Australians.'[9]

The recently appointed Australian Aged Care Quality and Safety Commissioner, Janet Anderson and the Australian Government has from all appearances sought to reassure the Australian Community that the lessons of Oakden have been learnt and will not be repeated.

In March 2018, the Aged Care Minister, Ken Wyatt AM introduced 'unannounced' quality and safety audits to '…strengthen the oversight of aged care services to provide greater assurance that standards of care are consistently maintained, not just at re-accreditation times.'[10]

In response to questions on notice from the Senate Community Affairs Committee; The Australian Aged Care Quality Agency stated that as of 6 December 2018, all reaccreditation audits of residential aged care services would also be unannounced.[11]

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[8] Government of South Australia (2017). *The Oakden Report*. Accessed on 7 February 2019 from https://www.sahealth.sa.gov.au/wps/wcm/connect/4ae57e8040d7d0d58d52af3ee9bece4b/Oakden+Report+Final+Email+Version.pdf?MOD=AJPERES&CACHEID=4ae57e8040:d7d0d58d52af3ee9bece4b

[9] The Senate Community Affairs Reference Committee (2018). *Effectiveness of the Aged Care Quality Assessment and accreditation framework for protecting residents from abuse and poor practices, and ensuring proper clinical and medical care standards are maintained and practiced, Interim Report*, p66. Accessed on 8 February 2019 from https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/AgedCareQuality/~/media/Committees/clac_ctte/AgedCareQuality/Interim_Report/report.pdf

[10] Wyatt, K (2018). *Taking action: Strengthening aged care homes quality compliance, Media Release*. Accessed on 8 February 2019 from http://www.health.gov.au/internet/ministers/publishing.nsf/Content/health-mediarel-yr2018-wyatt035.htm

[11] Senate Community Affairs Committee (2018). *Answers to questions on notice: Health Portfolio Supplementary Budget Estimate, 2018-2019, 24 October 2018 (SQ180001004)*. Accessed on 8 February 2019 from https://www.aph.gov.au/api/qon/downloadattachment?attachmentId=399dc2b2-22f0-4330-9640-8ca692bc5de4

Commissioner Anderson has also promised that 'unannounced re-accreditation audits of aged care homes will triple in 2019, compared with 2018 and there will be an increase in unannounced inspections, to more than 3000 this year.'[12]

To understand the significance of these announcements it is important to comprehend how the Australian Aged Care Quality and Safety Commission's 'auditing' function operates and the powers that underpin it.

Australian Aged Care Quality and Safety Commission – Accreditation, Re-accreditation and Review Audits

Accreditation

Upon approval of a new application an aged care facility is given accreditation for 12 months. Within the first two months of residents entering the facility an 'assessment contact' is undertaken and an 'unannounced assessment contact' is made prior to the end of the initial accreditation period.

It is important to note that an 'assessment contact' is defined as 'any form of contact other than a site audit, review audit or quality review between the Commission or a quality assessor and the provider of the service' and may therefore take the form of 'phone discussions, emails or a visit.'[13]

As a minimum, unannounced assessment contacts are conducted once every financial year for residential aged care services.

Re-accreditation

Upon receiving an application for re-accreditation, the Commissioner appoints an assessment team to conduct an unannounced site audit of the service. The audit can occur over one or several days depending on the size and complexity of the facility and the assessment team conducts interviews, makes observation and views documentation in accordance with the Commissions Audit Methodology.

If the facility is re-accredited the Commission will publish its assessment report on the Commission's website. Should a facility not be re-accredited it can have its accreditation reconsidered. The review decision along with the assessment report is also published on the Commission's website.

Re-accreditation periods can range between months and years depending on the risk management approach of the Commission and a facility's prior assessments. According to the Productivity Commission's Report on Government Services 2019[14], as of 30 June 2018, 96.9 per cent of the 2669 re-accredited residential aged care services had been given three year accreditation.

Review Audits

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[12] Australian Ageing Agenda (January 10, 2019) Work's get underway at aged cares new quality regulator. Accessed on 8 February 2018 from https://www.australianageingagenda.com.au/2019/01/10/works-gets-underway-at-aged-cares-new-quality-regulator/

[13] Aged Care Quality and Safety Commission (2019). *Regulatory Bulletin Issue No 2019-2 Assessment contacts in residential aged care*. Accessed on 6 February 2019 from https://www.agedcarequality.gov.au/sites/default/files/media/Regulatory%20Bulletin%20-%20Assessment%20contacts%20in%20residential%20aged%20care.docx

[14] Productivity Commission (2019). *Report on Government Services 2019*, Chapter 14 Aged Care Services, 14.19. Accessed on 7 February 2019 from https://www.pc.gov.au/research/ongoing/report-on-government-services/2019/community-services/aged-care-services/rogs-2019-partf-chapter14.pdf

The Commission may at any time conduct a review audit as a result of intelligence that may indicate that a facility is at risk and may not be meeting the applicable standards. The Commission may also be directed by the Department of Health to undertake a Review Audit or a facility may request a review following a negative re-accreditation outcome.[15]

According to the former Australian Aged Care Quality Agency's 2017-2018 Annual Report[16] 72 review audits were undertaken in the relevant period, with non-compliance against the standards found in 67 of the audits. 12 decisions to revoke accreditation were made as a result.

The above processes allow for the possibility of aged care facilities to be physically visited only at re-accreditation. Given the statistical average re-accreditation period of three years, it is concerning when one considers the depth to which a facility is assessed on a regular basis. In realty however this is unlikely to be the case given the policy directive for at least one unannounced visit per financial year. Despite this, as one commentator indicates 'audits can never eliminate risk of poor care, and can only establish whether, at a particular point in time, a facility has the systems and processes in place to minimise that risk.[17]

Whilst the decision to move to 'unannounced assessments' for reaccreditation is welcome, more important will be the increase in 'unannounced inspections.' The fact that in the 2017-18 year the Agency found non-compliance in 67 of the 72 reviews is indicative that more regular physical visits are necessary. Although publicly available information on how these inspections will occur is limited, the fact that the Commissioner has committed to over 3000 unannounced inspections in 2019 is noteworthy.

Notwithstanding the above, any increase in quantity of inspections may yield little benefit to the overall quality of the aged care system if it is not matched with an increase in the quality of inspections. A criticism of the existing system made in the Carnell-Patterson Review was that it had an '…excessive emphasis on processes, with insufficient focus on consumers and outcomes.'[18]

Whilst reforms are being put into place as a result of the various recommendations made in the Carnell-Patterson Review and the Nous Group Report[19], The Australian Aged Care Quality and Safety Commission could be strengthened still by taking not only a regulatory and reactive approach to its work, but a preventive approach which could be achieved through designation under the OPCAT.

The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

[15] Aged Care Quality and Safety Commission (2019). Review Audits. Accessed on 7 February 2019 from https://www.agedcarequality.gov.au/providers/assessment-processes/review-audits
[16] Aged Care Quality Agency (2018). Annual Report 2017-2018, p25
[17] White, M (2016). *He Ara Tika: A pathway forward*, p42. Accessed on 8 February 2019 from https://www.hrc.co.nz/files/9314/7251/4226/He_Ara_Tika_Report_2016.pdf
[18] Carnell, K & Paterson, R (2017). *Review of National Aged Care Quality Regulatory Processes*, p44. Accessed on 8 February 2019 from https://agedcare.health.gov.au/sites/default/files/documents/10_2017/review_report_final_23_october_2017.pdf
[19] NOUS Group (2017). *External Independent Advice Australian Aged Care Quality Agency*. Accessed on 7 February 2019 from https://www.agedcarequality.gov.au/sites/default/files/media/aacqa_nous_report_accessible_version.pdf

'Ensuring that residential aged care facilities are compliant with OPCAT will provide important additional oversight of human rights standards in aged care.' – Australian Law Reform Commission[20]

Adopted in 2002 and coming into force in 2006, the OPCAT gives life to the obligations set out in the UN Convention against Torture in the most tangible of fashions. The OPCAT does this by introducing a two-tiered system of regular, independent, preventive visits to all places where people are deprived of their liberty.

'The term 'deprivation of liberty' employed in Article 4(2) of the OPCAT extends to places where people are held by an order of a public authority or at its instigation or with its consent or knowledge. It therefore covers both 'traditional places of detention' such as prisons and police cells as well as less traditional ones such as, but not limited to, social care homes, psychiatric hospitals and centres for children.'[21]

'OPCAT is premised on the belief that preventing torture and ill-treatment can be facilitated by a collaborative process between national authorities and national and international mechanisms working together in a constructive and forward-looking fashion.'[22]

Firstly, at an international level, OPCAT necessitates the acceptance of periodic visits by the United Nations Subcommittee on Prevention of Torture (SPT). The SPT is composed of 25 independent multi-disciplinary expert members elected for a four-year term (with the possibility of renewal for an additional four years) from countries that have ratified or acceded to the OPCAT. The SPT's mandate is three-fold: to visit places of detention; to advise and assist States and National Preventive Mechanism's (NPM) concerning their establishment and functioning; and to co-operate with other organisations and institutions working to strengthen protections against torture and ill-treatment.

Secondly, and arguably more importantly, the OPCAT requires States to establish and maintain a similar domestic visiting body termed the NPM. The NPM can be established through the creation of a new organisation(s) or be designated to pre-existing organisation(s). The OPCAT sets out fundamental principles for States which are essential to the creation or designation of an NPM but with enough flexibility to consider each State's circumstances. 'National Mechanisms are the 'front line' of torture prevention'[23] in that they are able to visit places of detention in a State much more frequently than the SPT.

Both NPMs and the SPT work with detaining agencies and other government authorities in a non-adversarial manner, recognising that cooperation is pivotal to safeguarding human rights and creating a culture of human rights. To evidence this relationship, one only needs to consider the

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[20] Australian Law Reform Commission (2017). Elder Abuse – A National Legal Response (ALRC Report 131), p156. Accessed on 7 February 2019 from https://www.alrc.gov.au/sites/default/files/pdfs/publications/elder_abuse_131_final_report_31_may_2017.pdf

[21] University of Bristol Human Rights Implementation Centre (2011). *Deprivation of liberty as per Article 4 of the OPCAT: the scope,* p3. Assessed on 15 February 2019 from https://www.bristol.ac.uk/media-library/sites/law/migrated/documents/deprivationofliberty.pdf

[22] Evans, M. (October 23, 2012). *Statement by Malcolm Evans, Chairperson, Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* 3rd Comm, 67th sess, Agenda Item 69(a). Accessed on 7 February 2019 from https://tbinternet.ohchr.org/Treaties/CAT-OP/Shared%20Documents/1_Global/INT_CAT-OP_STA_7157_E.docx

[23] Evans, M. (October 20, 2015). *Statement by Malcolm Evans, Chairperson Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 3rd Comm, 70th sess, Agenda Item 69(a).* Accessed on 10 February 2019 from https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16717&LangID=E

experience of our neighbour New Zealand whose NPM has been in place since 2007. Commenting on their progression between 2007-2012, the New Zealand NPM noted:

> 'Implementation of the OPCAT system has made the human rights standards relating to detention more visible, and with greater awareness has come improved understanding and application of those standards. NPMs have identified issues that may not otherwise have come to light. Because detaining agencies have been so receptive and responsive to OPCAT, there have been many improvements in both the conditions of detention and the way detainees are treated.'[24]

'Preventive' Inspections

In addition to its cooperative approach, what distinguishes the OPCAT from other forms of external oversight including that of the Australian Aged Care Quality and Safety Commission, is its 'preventive' focus and nature.

The Association for the Prevention of Torture, an NGO specialising in OPCAT implementation, suggests 'the NPM's preventive approach revolves around identifying and analysing factors that may directly or indirectly increase or decrease the risk of torture and other ill-treatment. It seeks to systematically mitigate or eliminate risk factors and to reinforce protective factors and safeguards.'[25]

'Preventive' inspections are therefore not merely about compliance with standards and regulations but are about identifying issues that are not so easily quantifiable. It is essentially about understanding the 'lived experience' of those who are institutionalised and of those who work within detention and attempting to make pragmatic recommendations or at the least raising awareness of issues that are or could potentially lead to mistreatment and torture that would otherwise not be picked up.

As articulated by Ms Jacki Jones, Chief Inspector OPCAT for the New Zealand Ombudsman, 'you're not coming in to check that they've ticked boxes… It's about what is happening on a day to day basis… it's really about what's it like for that person on a day to day basis' and 'our role is to try and assist the agents [detaining agents] that we monitor… not just for the residence or the prisoners but for the staff as well. It's about staff because if you can't get staff to engage nothing's ever going to change is it?'[26]

The approach goes directly to concerns that have been raised by several witnesses to the Royal Commission thus far. As articulated by Professor Deborah Parker '…it's much easier to measure concrete things like did you fall, didn't you fall, do you have a wound, don't you have a wound, and much harder to measure experience.'[27] Also as Mr Ian Yates AM raised ' …you can do a number of

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[24] New Zealand Human Rights Commission (2013). *OPCAT in New Zealand 2007-2012*, p15. Accessed on 8 February 2019 from https://www.hrc.co.nz/files/2214/2398/7100/Opcat-2013_web.pdf

[25] The Association for the Prevention of Torture and Inter-American Institute for Human Rights (2010). Optional Protocol to the Convention against Torture Implementation Manual Chapter V Operational Functioning of NPM; 3. Working Methods, p231

[26] Caruana, S (2018). *Enhancing best practice inspection methodologies doe oversight bodies with an OPCAT focus: Churchill Fellowship Report*, p22. Accessed on 8 February 2019 from .https://www.churchilltrust.com.au/media/fellows/Caruana_S_2017_inspection_methodologies_for_oversight_bodies_with_an_OPCAT_focus.pdf

[27] Royal Commission into Aged Care Quality and Safety (2019). *Transcript of Proceedings: Wednesday 13 February 2019*, p235. Accessed on 13 February 2019 from https://agedcare.royalcommission.gov.au/hearings/Documents/transcripts-2019/transcript-13-february-2019.pdf

measures in terms of dignity and respect, but in the end the people who know whether they're being treated with dignity and respect are the people who are receiving the care.'[28] Further emphasising the point, the testimony of Ms Barbara Spriggs suggested '…it's not just about what things have been ticked off, what they've got, what they haven't got; people should be going with their gut feeling.'[29]

As noted by Professor Sir Malcolm Evans, Chair of the SPT:

> 'Inspectorates should be picking up on systemic issues where systems are failing, what the preventative approach should be is picking up on what the experience is of those who are living within that system, because the system could be working perfectly and still letting people down. It's only by actually understanding what the lived experience within the place is that you actually work out what actually is generating the potential for ill treatment and therefore what needs to be done about it."[30]

The work of NPMs is also not merely limited to undertaking visits but as articulated by the SPT:

> 'there is more to the prevention of torture and ill-treatment than compliance with legal commitments. In this sense, the prevention of torture and ill-treatment embraces – or should embrace – as many as possible of those things which in a given situation can contribute towards the lessening of the likelihood or risk of torture or ill-treatment occurring. Such an approach requires not only that there be compliance with relevant international obligations and standards in both form and substance but that attention also be paid to the whole range of other factors relevant to the experience and treatment of persons deprived of their liberty and which by their very nature will be context specific.'[31]

The NPM undertakes an *advisory function*, commenting on legislation and putting forward proposals to government. It also has an *educative function*, ensuring awareness is raised on issues of mistreatment and torture and assisting detaining agencies to more fully comply with their human rights obligations. It additionally has a *cooperative function* working with other inspection bodies both domestically, regionally and internationally.

Australia's National Preventive Mechanism

[28] Royal Commission into Aged Care Quality and Safety (2019). *Transcript of Proceedings: Monday 11 February 2019*, p74. Accessed on 13 February 2019 from https://agedcare.royalcommission.gov.au/hearings/Documents/transcripts-2019/transcript-11-february-2019.pdf

[29] Ibid, p42

[30] Caruana, S (2018). *Enhancing best practice inspection methodologies doe oversight bodies with an OPCAT focus: Churchill Fellowship Report*, p21 Accessed on 8 February 2019 from .https://www.churchilltrust.com.au/media/fellows/Caruana_S_2017_inspection_methodologies_for_oversight_bodies_with_an_OPCAT_focus.pdf

[31] UN Subcommittee on Prevention of Torture (December 30, 2010). The approach of the Subcommittee on Prevention of Torture to the concept of prevention of torture and other cruel, inhuman or degrading treatment or punishment under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/OP/12/6, p2. Accessed on 7 February 2019 from http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsquBlBCPFD%2BXLNadyD9hiZ4R2ifOm%2FkPeiu3sYGHOmGMsGCei%2FqxK3MyHYEY%2BGl%2B0olrf33FTl4nDSkhMm0WAHWDw1BE%2FFCFsu8qp2vhJ5DM

Australia's ratification of the OPCAT occurred in December 2017 as a result of a voluntary pledge by the Federal Government in its campaign for a seat on the United Nations Human Rights Council.[32]

At the time of ratification, the Australian Government exercised its right under Article 24 of the OPCAT to delay the formal establishment of the Australian NPM for three years. In a federated State such as Australia it is not unreasonable for such a decision to be made to allow for the Federal, State and Territory governments to negotiate the NPM's legislative basis, its resourcing and its designation.

The Australian NPM will be a multibody entity arranged along jurisdictional lines with the Federal and Co-ordinating NPM being announced as the Office of the Commonwealth Ombudsman. Whilst external oversight mechanisms for places of detention already exist in Australia, their mandates, powers, resourcing and independence vary between jurisdictions. The provisions of the OPCAT look to strengthen rather than replace this existing oversight and therefore it is more than likely that some or all existing oversight bodies will be bolstered rather than new ones created to make up the NPM.

The Australian Government has indicated already that the NPM will focus on what it deems 'primary places of detention' such as prisons, youth justice, immigration detention, military detention, closed psychiatric facilities and police custody.[33] In response to this, organisations such as the Australian Lawyers Alliance,[34] The Law Council of Australia[35] and the ACT Inspector of Correctional Services[36] have all urged that there be no limit or restriction regarding the categories of 'place of detention' that should be subject to visits by Australia's NPM bodies.

The open-ended scope of the OPCAT provides the benefit of ensuring that places not traditionally seen as detention but with evidence of mistreatment, can be subject to the same rigorous monitoring as would be expected of a correctional facility or immigration detention.

Can aged care facilities be places of deprivation of liberty?

"For many years we didn't really see care homes as places of deprivation of liberty, we saw them as places were the poor vulnerable folk go who can't look after themselves. I think there's a much

[32] United Nations Generally Assembly (24 July 2017). *Note verbale dated 14 July 2017 from the Permanent Mission of Australia to the United Nations addressed to the President of the General Assembly, A/72/212.* Accessed on 8 February 2019 from http://undocs.org/en/A/72/212

[33] Human Rights Legal Centre (February 22, 2017). *Torture Convention - the Australian Government OPCAT announcement.* Accessed on 9 February 2019 from https://www.hrlc.org.au/bulletin-content/2017/2/22/torture-convention-the-australian-government-opcat-announcement

[34] Australian Lawyers Alliance (2018). *OPCAT in Australia Consultation Paper: Stage 2 Submission to the Australian Human Rights Commission*. Accessed on 9 February 2019 from https://www.lawyersalliance.com.au/documents/item/1307

[35] Law Council of Australia (2017). *Response to Consultation Paper OPCAT in Australia Australian Human Rights Commission.* Accessed on 9 February 2019 from https://www.lawcouncil.asn.au/docs/fb556d1c-1f73-e711-93fb-005056be13b5/3314%20%20Response%20to%20Consultation%20Paper%20OPCAT%20in%20Australia.pdf

[36] ACT Inspector of Correctional Services (2018). *Submission to Stage 2 Consultation on the implementation of the Optional Protocol to the Convention against Torture (OPCAT).* Accessed on 9 February 2019 from https://www.ics.act.gov.au/__data/assets/pdf_file/0019/1251037/ACT-Inspector-of-Correctional-Services-Submission-to-AHRC-OPCAT-Stage-2-Consultation.pdf

sharper idea that these are part of the role more than ten years ago." – Mat Kinton, Care Quality Commission of England [37]

The OPCAT obligates State parties to establish a national system of preventive visits to all places where people are deprived of their liberty, but it does not explicitly list what those places of deprivation are. The SPT in elaborating on this point indicates 'the preventive approach underpinning the Optional Protocol means that as extensive an interpretation as possible should be made in order to maximize the preventive impact of the work of the national preventive mechanism' and 'therefore takes the view that any place in which persons are deprived of their liberty, in the sense of not being free to leave, or in which the Subcommittee considers that persons might be being 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.'[38]

'Aged care facilities and disability residences can, in certain circumstances, be considered closed environments: environments where individuals are dependent on others for the basic necessities of life and where their freedom of choice or movement can be limited or taken away. In other words, where people are not permitted to leave at will. Although providers might not intend to deprive resident of their liberty, such deprivation can often be the case, due to the high level of care that residents need.'[39]

Are aged care facilities inspected abroad under the OPCAT?

Austria

Austria ratified the OPCAT in 2012 and designated the Austrian Ombudsman Board as its NPM. The Austrian NPM inspects all places envisioned in the wide definition of detention including aged care facilities. In 2017 the Austrian Ombudsman Board made 100 unannounced visits to aged care facilities.[40] Whilst this may seem a low number of visits in comparison to the Aged Care Quality and Safety Commission, it is important to note the Austrian Ombudsman Board takes a 'quality over quantity' approach to its work:

'The preventive activity of the NPM serves to protect against violations of and intrusions into human rights. "Prevention" is defined as measures and strategies to minimise risks and anticipatory action to protect human rights. Therefore, the improvement of general quality standards is not a central responsibility of monitoring and control activities. The focus on preventive monitoring and control to protect against violations of human rights determines the core activities of targeted, unannounced

[37] Caruana, S (2018). *Enhancing best practice inspection methodologies doe oversight bodies with an OPCAT focus: Churchill Fellowship Report*, p43 Accessed on 8 February 2019 from .https://www.churchilltrust.com.au/media/fellows/Caruana_S_2017_inspection_methodologies_for_oversight_bodies_with_an_OPCAT_focus.pdf

[38] Subcommittee on the Prevention of Torture (2016*). Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/57/4*, p19. Accessed on 9 February 2019 from https://www.refworld.org/docid/576cd6b74.html

[39] White, M (2016). *He Ara Tika: A pathway forward*, p46. Accessed on 8 February 2019 from https://www.hrc.co.nz/files/9314/7251/4226/He_Ara_Tika_Report_2016.pdf

[40] Austrian Ombudsman Board (2017). *Annual Report on the activities of the Austrian National Preventive Mechanism (NPM),* p23. Accessed on 9 February 2019 from https://volksanwaltschaft.gv.at/downloads/ctjmf/aob-npm-report-2017.pdf

visits in selected facilities and institutions and of confidence-building communication on-site with persons in all roles.'[41]

For further reading on the significant work and outcomes the Austrian Ombudsman Board has achieved in aged care facilities over 2017, please see pages 23-41 of their 2017 Annual Report.[42]

European Committee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (CPT)

The CPT predates the SPT and whilst not part of the OPCAT operates in a similar manner. The CPT was set up under the Council of Europe's "European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment", which came into force in 1989. CPT's members are independent and impartial experts from a variety of backgrounds, including lawyers, medical doctors and specialists in prison or police matters. One member is elected by the Council of Europe's Committee of Ministers in respect of each State Party. The members serve in their individual capacity.

Much like the SPT, the CPT take an expansive view of "deprivation of liberty" which is underpinned by the meaning of Article 5 of the European Convention on Human Rights as elucidated by the case law of the European Court and Commission of Human Rights. However, the distinction between "lawful" and "unlawful" deprivation of liberty arising in connection with Article 5 is immaterial in relation to the Committee's competence.[43]

Between the 28 May – 5 June 2018, the CPT conducted a visit to institutions within Norway. As part of the visit the CPT inspected the 'Os Nursing Home', a 155-capacity facility in the vicinity of Bergen. The delegation did not carry out a comprehensive visit but focused on the following issues: treatment by staff, living conditions, use of means of restraint and inspection procedures.[44]

The CPT made the following recommendation:

The CPT recommends that the Norwegian authorities take the necessary steps to ensure that all nursing homes in Norway where persons may be placed on an involuntary basis are regularly visited – including on an unannounced basis – by an independent body empowered to formulate recommendations to the management on ways to improve the care and conditions afforded to residents. Representatives of this body should also talk in private with residents.[45]

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[41] Austrian Ombudsman Board (2016). Monitoring framework, methodology and further action by the Austrian NPM, p1-2. Accessed on 7 February 2019 from https://volksanwaltschaft.gv.at/downloads/934a1/Pr%C3%BCfschema%20Methodik%20und%20Veranlassungen%20ENGLISCH_20160701.pdf

[42] Austrian Ombudsman Board (2017). *Annual Report on the activities of the Austrian National Preventive Mechanism (NPM),* p23-41. Accessed on 9 February 2019 from https://volksanwaltschaft.gv.at/downloads/ctjmf/aob-npm-report-2017.pdf

[43] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (2002). European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment Text of the Convention and Explanatory Report, p25. Accessed on 8 February 2019 from https://rm.coe.int/16806dbaa3

[444444] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (2019). *Report to the Norwegian Government on the visit to Norway carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 28 May to 5 June 2018,* p58-60. Accessed on 10 February 2019 from https://rm.coe.int/1680909713

[45] Ibid, p60

Germany

Germany ratified the OPCAT in 2008 and established a new agency the National Agency for the Prevention of Torture as its NPM. The German NPM inspects all places envisioned in the wide definition of detention including aged care facilities.

Whilst the German NPM's Annual Report for 2017 noted only eight visits to aged care facilities, it also indicated that in 2018 the NPM undertook to 'visit more residential care facilities for the elderly and draw up appropriate standards.'[46] Updated information on the visits and standards is not yet available in English.

New Zealand

New Zealand ratified the OPCAT in 2007 and established a multibody NPM composed of the Office of the Ombudsman New Zealand, New Zealand Human Rights Commission, Office of the Children's Commissioner, the Independent Police Conduct Authority and the Inspector of Service Penal Establishments. The New Zealand NPM inspects all places envisioned in the wide definition of detention including aged care facilities which are visited by the Ombudsman.

Similarly to Australia, prior to OPCAT ratification aged care facilities were overseen by various types of general monitoring, under the auspices of different government agencies. Also, in a similar fashion to Australia, '…monitoring and audits of aged care facilities have been criticised for lacking independence and transparency. It has also been suggested that it is considered a box-ticking exercise for accreditation and other contractual requirements, rather than a way of ensuring standards of care are maintained and improved, and that abuse and ill-treatment is identified and mitigated over time.'[47]

The New Zealand Ombudsman monitors several different places of detention and its designation was extended on 6 June 2018 to include monitoring and inspecting the treatment of detainees in privately run aged care facilities of which there are approximately 180.[48]

On the decision to extend designation, the Chief Ombudsman Peter Boshier stated 'My sense is everyone will welcome it. You have followed anecdotes of incidents that have occurred in privately-run dementia units that have not been good but I don't think we really know the facts efficiently to know if we have a substantial problem and I think this will tell us. It will open a door and shine a light.'[49]

A sentiment similar that of Prime Minister Scott Morrison in calling for the Royal Commission into Aged Care Quality and Safety:

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[46] National Agency for the Prevention of Torture (208). Annual Report 2017, p46, Accessed on 7 February 2019 from https://www.nationale-stelle.de/fileadmin/dateiablage/Dokumente/Berichte/Jahresberichte/ANNUAL_REPORT_2017_National_Agency.pdf

[47] New Zealand Human Rights Commission (2016). *The OPCAT and what it can do for aged care in New Zealand.* Sourced on 9 February 2019 from https://www.hrc.co.nz/news/opcat-and-what-it-can-do-aged-care-new-zealand/

[48] New Zealand National Preventive Mechanism (2018). Submission to the Universal Periodic Review: Executive Summary. Accessed on 8 February 2019 from https://www.hrc.co.nz/files/8215/4145/0979/NPM_submission_to_UPR.docx

[49] Newsroom (2018). *Ombudsman to monitor our most vulnerable*. Accessed on 7 February 2019 from https://www.newsroom.co.nz/2018/06/06/114196/ombudsman-to-monitor-our-most-vulnerable

'You ask the simple question: How widespread is this? How far and wide does it go? Does it touch on the whole sector?... Now, until we can have clear answers to those questions, I think Australians will be unsure."[50]

United Kingdom: A Regulator that is also an NPM

The United Kingdom ratified the OPCAT in 2003 and established a multibody NPM composed of 21 different organisations. One of the NPM bodies is the Care Quality Commission of England (CQC). The CQC monitors, inspect and regulates health and social care services throughout England.

Within the 2017/18 period the CQC inspected 2607 newly registered locations and 8815 re-inspections within the adult social care sector (includes nursing homes and residential homes).[51]

During CQC inspections, nursing and residential homes are given a rating against five questions: is it safe, is it effective, is it responsive, it is caring and is it well led?

Not only does CQC produce individual reports but very much in line with OPCAT principles it looks at issues thematically:

> 'An important feature of the system in England is that the CQC regularly draws attention to poor care. It does this not just through the ratings but also through other reports it produces about care in England, such as the annual State of Care report. The CQC also provides reports on specific issues – for instance, the difficulties older people with dementia face when they move between care homes and hospitals.'[52]

An example of a CQC inspection report can be found here:
https://www.cqc.org.uk/sites/default/files/new_reports/INS2-2665725483.pdf

A point of interest that arises from the *High Peak Residential and Nursing Home* report is that, in addition to the two inspectors, the inspection was undertaken by an 'expert by experience'. An expert by experience is a person who has personal experience of using or caring for someone who uses this type of care service. In this case of older people requiring residential or nursing care.

CQC regularly use 'experts by experience' as part of their inspections noting that '…many people find it easier to talk to an Expert by Experience rather than an inspector.'[53]

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[50] ABC News (2018). *Scott Morrison announces royal commission into aged care; advocates expect 'appalling' cases of mistreatment to surface*. Accessed on 7 February 2019 from https://www.abc.net.au/news/2018-09-16/scott-morrison-announces-royal-commission-into-aged-care-sector/10252850

[51] Care Quality Commission (2018). *Annual report and accounts 2017/18*, p33. Accessed on 8 February 2019 from https://www.cqc.org.uk/sites/default/files/20180711_annualreport201718.pdf

[52] Trigg, L (2018). Four lessons for Australia from England's system of rating its aged care homes, *The Conversation.* Accessed on 8 February 2019 from http://theconversation.com/four-lessons-for-australia-from-englands-system-of-rating-its-aged-care-homes-103688

[53] Care Quality Commission (2018). *Monitoring the Mental Health Act in 2016/17*, Appendix A: Involving People, p46. Accessed on 9 February 2019 from http://www.cqc.org.uk/sites/default/files/20180227_mhareport_web.pdf

Recommendation One: That the Australian Government designate aged care facilities as places of deprivation of liberty to be inspected by the National Preventive Mechanism.

Is the Australian Aged Care Quality and Safety Commission compliant with the OPCAT?

'They don't see, they're not looking. They're just coming in and they're checking the things in the system, and it's almost like if they can tick their box, they're out. They're not asking the right questions, and staff aren't comfortable to be able to go to accreditation and say, "look, this is what actually is going on,' For fear of repercussion, for fear of losing their job.' - Melanie Whiteley, Four Corners: Who Cares? Part Two[54]

In its submission to the Australian Law Reform Commissions Elder Abuse Inquiry, the ACT Human Rights Commission noted that 'while aged care is overseen by the federal Aged Care Commissioner, it would be important to consider how this jurisdiction would need to be expanded or complemented to fulfil the function of a preventive mechanism under the OPCAT.'[55]

The following assessment of the Australian Aged Care Quality and Safety Commission is based on elements of the United Kingdom's NPM Self-Assessment Tool[56], The OPCAT Principles and the 'Principles of Oversight' as expounded in the Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory.[57]

The assessment is by no means exhaustive and is reliant on publicly available information. Where relevant information is not known to the author it is clearly indicated as such.

FUNDAMENTAL PRINCIPLES	
Its function, jurisdiction and powers are clearly articulated in a legislative basis	*The Aged Care Quality and Safety Commission Act 2018 (the Act)* provides for the establishment of the Aged Care Quality and Safety Commission and outlines its functions, jurisdictions and powers.

[54] Four Corners (2018). *Who Cares? Part Two – Transcript.* Accessed on 9 February 2019 from https://www.abc.net.au/4corners/who-cares-part-two/10300264

[55] ACT Human Rights Commission (2017). *ALRC Discussion Paper 83: Elder Abuse,* p5. Accessed on 9 February 2019 from https://www.alrc.gov.au/sites/default/files/subs/337._act_human_rights_commission_acthrc.pdf

[56] UKNPM (2015). *Self-assessment of the UK NPM.* Accessed on 9 February 2019 from https://s3-eu-west-2.amazonaws.com/npm-prod-storage-19n0nag2nk8xk/uploads/2015/08/UK-NPM-self-assessment-write-up.pdf

[57] White, M & Gooda, M (2017). *The Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, Vol 4, Chapter 40 – A Commission for Children and Young People, p7. Accessed on 9 February 2019 from http://content.webarchive.nla.gov.au/gov/wayback/20180615083628/https://childdetentionnt.royalcommission.gov.au/Documents/Royal-Commission-NT-Final-Report-Volume-4.pdf

	The Aged Care Quality and Safety Commission Rules 2018 (the Rules) give operational effect to the processes of the Commission.
It is guaranteed functional and legal independence from Government and the entities it oversees	*The Aged Care Quality and Safety Commission Act 2018 (the Act)* sets out the requirements of the Aged Care Quality and Safety Commission with regards to its relationship with the Minister. Section 16 (1) (1) - The Commissioner must provide at the request of the Minister, advice in relation to any of its functions Section 22 (1) and (2) - The Minister may give direction to the Commissioner by way of legislative instruction regarding the performance of the Commissioners function. The Commissioner must comply with direction. Section 24 (1) - The Commissioner is appointed by the Minister Section 38 (b) - The Advisory Council, at the request of the Minister is to provide advice about the functioning of the Commission. Section 41 (1) - The Advisory Council is appointed by the Minister Section 54 (1) (2) and (3) - The Commission must give an annual operational plan to the Minister setting out its work priorities, resourcing etc. Section 58 (1) (2) and (3) - The Minister may require the Commissioner to prepare reports or give information *The Aged Care Quality and Safety Commission Rules 2018 (the Rules)* Division 6 Subdivision A 70 (2) – The Commission must conduct a review audit if the Secretary (Department of Health) request it.
It is guaranteed the necessary financial resources to undertake its work	$300 million over four year/ $48.2 million specifically to expand monitoring and compliance teams, continue unannounced inspections, better identify sub-standard care

	and to develop options for a Serious Incident Response Scheme.[58]
All aspects of its work are carried out in a way that avoids perceived or actual conflicts of interest	*The Public Service Act 1999 (Public Service Act)* Section 13 (7) sets out the APS Code of Conduct regarding conflicts of interests real or perceived *Public Governance, Performance and Accountability Act 2013 (PGPA Act)* Section 29 requires disclosure of personal material interests *The Aged Care Quality and Safety Commission Rules 2018 (the Rules)* Section 92(1)(a) - A quality assessor must comply with obligations including adhering to the Quality Assessor Code of Conduct and taking reasonable steps to avoid any conflict of interest, real or apparent, and disclose details of any material personal interests which could influence, or could reasonably be seen to influence, the decisions they take or the advice they give. Obligations are notified during every registration period. Subsection 32(2) and 71(2) - Require decision makers to consider real and apparent conflicts of interest when appointing assessments team
It is able to make proposals and observations concerning existing and draft legislation	*The Aged Care Quality and Safety Commission Act 2018 (the Act)* Section 16 (2) The Commissioner has the power to do all things necessary or convenient to be done for, or in connection with, the performance of the Commissioner's functions Power may be implied but requires additional information for clarification.
It is able to conduct regular visits without impediment and at its own initiative	*The Aged Care Quality and Safety Commission Act 2018 (the Act)* Section 68 provides the power to enter premises and exercise search powers for

[58] Wyatt, K (2018). *New Era in Aged Care Begins with First Quality and Safety Commissioner Announced.* Accessed on 8 February 2019 from http://www.health.gov.au/internet/ministers/publishing.nsf/Content/health-mediarel-yr2018-wyatt150.htm

	regulatory purposes. This is however limited by subsection (3) in that the regulatory official is not authorised to enter premises unless the occupier of the premises has consented to the entry. Section 69 outlines that consent may be voluntary and may be withdrawn at any time.
It is able to make recommendations to the relevant authorities with the aim of continuous improvement	Where there is an assessment against the standards, the assessment contact report will contain the assessment team's recommendations against the relevant expected outcomes of the standards. The approved provider will have an opportunity to respond to the report. Within 21 days after an assessment contact, the Commission notifies the approved provider in writing of any areas in which improvements must be made to meet the standards, including the timetable for making improvements. The notification details future assessment contact arrangements if these have been varied. The Commissioner may identify that there is a need for a review audit of the service, if the Commissioner considers on reasonable grounds that the service is not complying with the standards.[59]
It is able to publish its annual report	*The Aged Care Quality and Safety Commission Act 2018 (the Act)* Section 52 stipulates that an annual report is to be prepared by the Commissioner and given to the Minister under section 46 of the Public Governance, Performance and Accountability Act 2013 for a period.
It is able to communicate with the Subcommittee for the Prevention of Torture	*The Aged Care Quality and Safety Commission Act 2018 (the Act)* Section 16 (2) The Commissioner has the power to do all things necessary or convenient to be done for, or in connection with, the performance of the Commissioner's functions Power may be implied but requires additional information for clarification.

[59] Aged Care Quality and Safety Commission (2019). *Regulatory Bulletin Issue No 2019-2 Assessment contacts in residential aged care*. Accessed on 6 February 2019 from https://www.agedcarequality.gov.au/sites/default/files/media/Regulatory%20Bulletin%20-%20Assessment%20contacts%20in%20residential%20aged%20care.docx

PRIORITISATION OF WORK	
It has an inventory of all places of detention within its remit	All aged care facilities receiving government subsidies need to meet accreditation standards and are therefore known to the Australian Aged Care Quality and Safety Commission.
It has criteria for the selection of places to be visited that ensures all places are visited regularly, taking into account the type and size of the institution and the level of known human rights problems	Unannounced assessment contacts are conducted once every financial year for residential aged care services. However, additional unannounced assessment contacts may be conducted depending on the performance of the service and risk information available to the Commission. An unannounced assessment contact may not be conducted where there has been an unannounced review audit.[60] Additional information needed to clarify "risk-based approach" to be adopted by the Australian Aged Care Quality and Safety Commission and information on regularity of visits is not available to the author.
VISITING TEAM COMPOSITION	
Its visiting team's composition brings the necessary knowledge, skills and experience	The Aged Care Quality and Safety Commission Assessors come from a range of backgrounds including but not limited to Systems auditors; Human service managers, e.g. disability services, indigenous services, services delivered to culturally and linguistically diverse consumers; Quality improvement managers; Health professionals; Professional standards or human services investigators; Complaints managers; Aged Care professionals including home care, community care and residential care; and Educators and trainers. All new assessors are provided with a training program that is in internationally accredited by the International Society for Quality in Healthcare, (ISQua) leading to registration as a Quality Assessor. NOTE: Additional training and expertise would be required to inspect from a 'preventive' human rights-based approach.

[60] Ibid

Its visiting team has the necessary human resources to carry out its tasks	$48.2 million specifically to expand monitoring and compliance teams[61] An implication that human resources is or will be enough is made in the budget allocation however further information is required to confirm adequacy.
It has a gender balance and adequate representation of ethic and minority groups	Information is not known to author
Its visiting team works to a code of conduct	Registered quality assessors must adhere to the Assessor Code of Conduct[62]
VISITING METHADOLOGY	
Its visiting methodology includes guidelines for conducting private interviews, dealing with vulnerable groups and ensuring information from all available sources is collected	Information is not known to author
It assesses records including registers, case files, activities and services	*The Aged Care Quality and Safety Commission Act 2018 (the Act)* Section 70 (1) (b) – any documents or records may be requested by the official. Section 71 (2) (e) and (f) - the power to inspect any document on the premises and to take extracts from, or make copies of, any such document;
It ensures a debrief is held with authorities at the end of the visit	The visit ends with a meeting between the assessment team and the person in charge of the service. The meeting focuses on key issues identified during the visit and the next steps in the process, including follow-up actions and relevant timelines. Key issues may identify gaps, positive feedback and results of care recipient interviews. The assessment team will not provide the service with their findings or recommendations.[63]
Its has clear guidelines for reporting individual cases of deliberate ill-treatment	Information is not known to the author
PROTECTIONS FROM REPRAISAL	

[61] Wyatt, K (2018). *New Era in Aged Care Begins with First Quality and Safety Commissioner Announced*. Sourced on 8 February 2019 from http://www.health.gov.au/internet/ministers/publishing.nsf/Content/health-mediarel-yr2018-wyatt150.htm

[62] Aged Care Quality and Safety Commission (2019). Quality assessor registration information sheet. Accessed on 8 February 2019 from https://www.agedcarequality.gov.au/sites/default/files/media/Quality%20assessor%20registration%20information%20sheet.docx

[63] Aged Care Quality and Safety Commission (2019). *Regulatory Bulletin Issue No 2019-2 Assessment contacts in residential aged care*. Accessed on 6 February 2019 from https://www.agedcarequality.gov.au/sites/default/files/media/Regulatory%20Bulletin%20-%20Assessment%20contacts%20in%20residential%20aged%20care.docx

It has developed a strategy for the prevention of reprisals or threats against people interviewed or who provide information during visits	Care recipients and their representatives can provide feedback anonymously or confidentially. The 'assessment team is required to take all reasonable steps to meet privately with any care recipient or their representative that asks to meet with them'[64] Despite the procedural strategy above further information is required to access whether an effective strategy is in place for protection from reprisal and interview safeguards. Despite the lack of information above there does not appear to be anything within *The Aged Care Quality and Safety Commission Act 2018 (the Act)* or *The Aged Care Quality and Safety Commission Rules 2018 (the Rules)* that provides for legislative protections from reprisals or remedy to concerns about reprisal actual or perceived.
It acts upon information giving rise to concerns about possible or actual reprisals	Information is not known to the author
It seeks to ensure that disciplinary or criminal investigation is initiated in cases of alleged reprisal	Information is not known to the author
PUBLIC REPORTS AND RECOMMENDATIONS	
It is able to produce and publish reports following its visits	*Aged Care Quality and Safety Commission Rules 2018* Subdivision G—Section 48 - The Commissioner must publish decisions relating to accreditation Subdivision C—Section 80 - The Commissioner must publish decisions relating to accreditation following review audit
It is able to produce and publish thematic reports	*The Aged Care Quality and Safety Commission Act 2018 (the Act)* Section 16 (2) The Commissioner has the power to do all things necessary or convenient to be done for, or in connection with, the performance of the Commissioner's functions Power may be implied but requires additional information for clarification.

[64] Aged Care Quality and Safety Commission (2019). Site Audit frequently asked questions. Accessed on 9 February 2019 from https://www.agedcarequality.gov.au/providers/assessment-processes/accreditation-and-re-accreditation/re-accreditation-of-residential-services/frequently-asked-questions

	Section 17 The Commission should in consultation with consumers look to develop best practice models and promote these models.
Its reports analyse good practice as well as cases of ill-treatment to identify gaps in protections of people deprived of their liberty.	Where there is an assessment against the standards, the assessment contact report will contain the assessment team's recommendations against the relevant expected outcomes of the standards. The approved provider will have an opportunity to respond to the report.[65] The audit process looks at evidence of compliance with the standards and may note good practice and gaps. It is reasonable to assume it would not assessment deprivation of liberty in depth however recent media suggest restrictive practices will be a feature of audits.
Its recommendations are well founded, preventive in focus and feasible in practice	The assessment team will continue to be objective and fair and will make their findings based on evidence gathered during the audit.[66] Recommendations would most likely be reactive to non-compliance with standards and in some ways preventive of further non-compliance but would require development.
Its recommendations are examined by the relevant authorities and dialogue is undertaken about their implementation	If the provider wishes to respond to the audit report they will have 14 calendar days to do so after they receive the report. The provider will have an opportunity to detail any concerns in its response to the team's recommendations. That is the appropriate avenue for providers to raise concerns about process, evidence and findings. The audit report and the provider's response to the report, along with other relevant information, will be taken into account in making the accreditation decision by the Commission.
It verifies the implementation of recommendations regularly through follow up visits	Providers must have a written plan for continuous improvement that explains how the

[65] Aged Care Quality and Safety Commission (2019). *Regulatory Bulletin Issue No 2019-2 Assessment contacts in residential aged care*. Accessed on 6 February 2019 from https://www.agedcarequality.gov.au/sites/default/files/media/Regulatory%20Bulletin%20-%20Assessment%20contacts%20in%20residential%20aged%20care.docx

[66] Aged Care Quality and Safety Commission (2019). *Site Audit Frequently Asked Questions*. Accessed on 14 February 2019 from https://www.agedcarequality.gov.au/providers/assessment-processes/accreditation-and-re-accreditation/re-accreditation-of-residential-services/frequently-asked-questions

	provider will meet its obligations in relation to the service and the standards. The Commissioner monitors the service's progress in meeting the Standards.
STAKEHOLDER EDUCATION	
It has established lines of communication with the ministry relevant and responsible for the administration of the places of detention within its remit	The Commission is directly accountable to the Minister
It has a strategy for making its work and mandate known	Additional information is required however it would appear the Commission is producing regular media statements, regulatory bulletins, holds a resource library and hosts an annual better practice national conference.
It is accessible, responsive and trusted by the community	The Oakden Report and subsequent reports would suggest this isn't the case however it is too early to make a judgement on the newly operating Commission.
It conducts educational and training activities	*The Aged Care Quality and Safety Commission Act 2018 (the Act)* Section 20 The Education function of the Commission ensures that stakeholders and the general public must be engaged in relation to any function of the Commission and data should be collected, analysed and distributed in relation to any of its functions.
CONTINUOUS SELF IMPROVEMENT	
It monitors and analyses its activities and outcomes to learn lessons and develop practices	*The Aged Care Quality and Safety Commission Act 2018 (the Act)* Section 54 (d) and (e) Set out that the Commissions annual operational plan must include an assessment of risks faced by the Commission with a plan to manage those risks; and include performance indicators appropriate for assessing the performance of the Commissioner during the period. Actions may be implied but requires additional information for clarification.
It has a strategy for ongoing training and development of its working methodology	*The Aged Care Quality and Safety Commission Act 2018 (the Act)* Section 54 (d) and (e) Set out that the Commissions annual operational plan must include an assessment of risks faced by the Commission with a plan to manage those risks; and include performance indicators appropriate

	for assessing the performance of the Commissioner during the period. Actions may be implied but requires additional information for clarification.

Matters of Substantive Non-Compliance

Independence

In their 'Principles of Oversight', Commissioners White and Gooda emphasised that 'a key element in the effectiveness of an oversight body is its independence. It must be independent structurally and be seen to be independent by the community. It must be transparent in all its activities and must report directly to parliament.'[67]

Article 18 (1) of the OPCAT stipulates that 'The States Parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel.'

The Australian Aged Care Quality and Safety Commission through its legislation is accountable to the Minister for Senior Australians and Aged Care and not directly to parliament like other Federal oversight agencies such as the Australian Human Rights Commission and the Commonwealth Ombudsman.

As such the Commissioner and Commission can be directed to undertake work by the Minister, the Minister appoints the Commissioner and the Advisory Council; and regarding audits, the Commission can be directed by the Secretary of the Department of Health to undertake them.

The need for functional independence for an oversight body has recently been raised by both the NSW Legislative Council and the QLD Crime and Corruption Commission in relation to the NSW Inspector of Custodial Services and Office of the Chief Inspector respectively.

The NSW Legislative council proposed a model of moving the NSW Inspector of Custodial Services into the Law Enforcement Conduct Commission as a means of placing the Inspector's office at 'arm's length from the corrections system.'[68]

The arm's length issue was previously raised by the former NSW Inspector for Custodial Services, Dr John Paget prior to his resignation. Given the Inspectorate sits within the Department of Justice which includes the Department of Corrective Services and Juvenile Justice NSW he argued that:

[67] White, M & Gooda, M (2017). *The Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, Vol 4, Chapter 40 – A Commission for Children and Young People, p7. Accessed on 9 February 2019 from http://content.webarchive.nla.gov.au/gov/wayback/20180615083628/https://childdetentionnt.royalcommission.gov.au/Documents/Royal-Commission-NT-Final-Report-Volume-4.pdf

[68] NSW Legislative Council (2018). *Parklea Correctional Centre and other operational issues*, Chapter 6, Onsite monitors and independent oversight, p107. Accessed on 9 February 2019 from https://www.parliament.nsw.gov.au/lcdocs/inquiries/2470/Report%20No%2038%20-%20Parklea%20Correctional%20Centre%20and%20other%20operational%20issues.pdf

'The Inspector considers that the real and perceived independence of this office, which is critical to its credibility with stakeholders, and the intent of Parliament of NSW, is compromised by these governance arrangements.'[69]

The QLD Crime and Corruption Commission in its recent investigation into corruption risks in QLD corrections noted; 'The current Queensland Corrective Services prison inspectorate model does not meet recognised international standards of independence.'[70] The Office of the Chief Inspector, whilst being a statutory officer, is embedded within the QLD Department of Corrections and accountable to its Minster.

The Australian Aged Care Quality and Safety Commission in its current state does not meet the standard of independence required by the OPCAT.

Unfettered access

Article 20 (c) of the OPCAT stipulates that States shall grant the NPM 'access to all places of detention and their installations and facilities.'

In addition the SPT advises that 'the State should allow the NPM to visit all, and any suspected, places of deprivation of liberty, as set out in Articles 4 and 29 of the Optional Protocol, which are within its jurisdiction… should ensure that the NPM is able to carry out visits in the manner and with the frequency that the NPM itself decides.'[71]

Whilst the Australian Aged Care Quality and Safety Commission is required to visit and accredit all aged care facilities; Sections 68 and 69 of *The Aged Care Quality and Safety Commission Act 2018 (the Act)* require the aged care facility to consent to the presence of assessors and can withdraw that consent at any time during an assessment or audit.

Although it is not in the best interest of an aged care facility to do so, the very ability to withdraw consent is not compliant with the purposes of the OPCAT.

Protections from reprisal

Article 21 (1) of the OPCAT stipulates that 'no authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the national preventive mechanism any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.'

An NPM should therefore design specific practices and procedures within its visiting methodology to guard against reprisal or sanctions to anyone who communicates with them in their visiting capacity. Further, the legislation used to enact the NPM should specify protections from reprisal for those

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[69] NSW Inspector of Custodial Services (2015). *Inspector of Custodial Services Annual Report 2014-15*, p14. Accessed on 9 February 2019 from http://www.custodialinspector.justice.nsw.gov.au/Documents/Annual%20Report%202014-15.pdf

[70] QLD Crime and Corruption Commission (2018). Taskforce Flaxton: *An examination of corruption risks and corruption in Queensland prisons,* Chapter 3, p49. Accessed on 9 February 2019 from http://www.ccc.qld.gov.au/research-and-publications/publications/ccc/taskforce-flaxton-an-examination-of-corruption-risks-and-corruption-in-queensland-prisons.pdf

[71] Subcommittee on the Prevention of Torture (2010). *Guidelines on national preventive mechanisms, CAT/OP/12/5*, p10. Accessed on 9 February 2019 from http://www2.ohchr.org/english/bodies/cat/opcat/docs/SPT_Guidelines_NPM_en.doc

who provide information to the NPM in the course of its work and outline penalties for non-compliance.

As expressed by Commissioners White and Gooda, '…for an oversight mechanism to be effective, matters need to be drawn to their attention or uncovered by them. This requires having sufficient mechanism in place to encourage the flow of information…'[72]

In the area of aged care there is evidence to suggest that that the free flow of information is insufficient. The Carnell-Patterson Review identified significant issues pertaining to fear of reprisal when dealing with the Complaints Commissioner:

'By far the most frequent issue raised as a barrier to making a complaint was the fear of reprisals. This was raised not just by residents and families, but also by residential aged care staff and professionals who have observed practices that they find inconsistent with the provision of quality care.'[73]

If those fears were persistent despite the ability to make anonymous complaints over the phone, undoubtedly the same problem would arise and be more significant in the course of an onsite audit or assessment where anonymity is more difficult to ensure.

Recommendation Two:

(a) That a thorough analysis of the Australian Aged Care Quality and Safety Commission's compliance with the principles of the OPCAT and Principles of Oversight as expounded in the Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, be undertaken as a priority.

(b) That following this analysis, the required legislative, policy and procedural changes be made to ensure the Australian Aged Care Quality and Safety Commission is compliant.

Recommendation Three: Subsequent to Recommendation Two; The Australian Aged Care Quality and Safety Commission be a made a part of the National Preventive Mechanism for the purposes of the Optional Protocol to the Convention against Torture.

[72] White, M & Gooda, M (2017). *The Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, Vol 2B, Chapter 22 – Detention System Oversight, p109. Accessed on 9 February 2019 from http://pandora.nla.gov.au/pan/160243/20180522-0124/childdetentionnt.royalcommission.gov.au/Documents/Royal-Commission-NT-Final-Report-Volume-2B.pdf

[73] Carnell, K & Paterson, R (2017). *Review of National Aged Care Quality Regulatory Processes*, p150. Accessed on 8 February 2019 from https://agedcare.health.gov.au/sites/default/files/documents/10_2017/review_report_final_23_october_2017.pdf

Recommendation Four: That the Australian Aged Care Quality and Safety Commission be assisted in the development of a Human Rights Framework for its visiting methodology and a training and educational package for its assessors.

Concluding Comments

The author consulted with Professor Sir Malcolm Evans, Professor of Public International Law at the University of Bristol and Chair of the SPT regarding this submission, and asked if he could provide insight into why an NPM would visit an aged care facility. Whilst his response echoes much of what is already addressed in this submission, it is intended to remove any doubt that such facilities fall within the remit of the OPCAT and subsequently the remit of Australia's responsibility as an OPCAT signatory:

> "There are ultimately two reasons why it's important for NPMs to visit aged care facilities in my view. The first is obvious and clear: the OPCAT requires that the NPM be able to visit all places where persons may be detained. As with refugee centres, whilst aged care facilities may not be formal places of detention some older persons are often de facto detained within them. Since such premises are invariably subject to state regulation, this puts them within the scope of the preventive obligation. The SPT has made this clear on several occasions.
>
> But beyond the formal obligation there lies the more general point that there is, unfortunately, plenty of evidence in many jurisdictions of older people being subject to direct forms of abuse as well as of neglect. General regulatory structures for social care are often poorly equipped to address such issues from a human rights perspective. Similarly, the avenues of challenge open to them often fall short of what may be required. The approach of an NPM, focused on prevention, rather than on regulatory compliance or on disciplinary procedures, adds a more victim-oriented approach to the problems and so is an important addition to the more constrained forms of oversight which otherwise exist."[74]

[74] Evans, M (2019). OPCAT and Aged Care, email to Steven Caruana on 9 February 2019.