

# advocacy for **inclusion**

Response to Australian Human Rights Commission  
OPCAT in Australia Consultation Paper 2

Advocacy for Inclusion  
September 2018

## **About Advocacy for Inclusion**

Advocacy for Inclusion acknowledges the Ngunnawal people as the traditional owners of the land on which we work.

Advocacy for Inclusion provides independent individual, self and systemic advocacy for people with disabilities. We are a Disabled Peoples Organisation which means most of our board, members and staff are people with disabilities. We represent Canberra's most marginalised and isolated people with disabilities, those with cognitive disabilities and/or significant communication barriers.

We act with and on behalf of individuals in a supportive manner, or assist individuals to act on their own behalf, to obtain a fair and just outcome for the individual concerned.

Advocacy for Inclusion works within a human rights framework and acknowledges the *United Nations Convention on the Rights of Persons with Disabilities* and is signed onto the *ACT Human Rights Act 2004*.

### **Contact details:**

2.02 Griffin Centre  
20 Genge Street  
Canberra City ACT 2601

Phone: 6257 4005

Email: [info@advocacyforinclusion.org](mailto:info@advocacyforinclusion.org)

ABN: 90 670 934 099

Prepared and written by Bonnie Millen, Human Rights Policy Advisor

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## Introduction

1. Advocacy for Inclusion is a not-for-profit non-government community organisation in the Australian Capital Territory (ACT). We provide individual, self and systemic advocacy services to people with disabilities to promote their human rights and inclusion in the community. We often work directly with some of the most isolated people with disabilities in disability institutional settings<sup>1</sup> that are deprived of liberty and equal opportunities to be fully included in the community.
2. Advocacy for Inclusion welcomes the opportunity to contribute to the Australian Human Rights Commission's second consultation regarding the Optional Protocol to the Convention against Torture (OPCAT). We have long supported the ratification of OPCAT due to its potential to lift the standard and monitor people with disabilities living in institutional settings.
3. This submission will address the questions 2-4 asked in the *Consultation Paper: Stage 2*, with supplement additions to include training of custodian (prison), police and judicial staff and data collection.
4. Our focus in the first consultation period was centred on the theme of restrictive practices as a method of 'cruel, inhuman or degrading treatment or punishment'. With changes to restrictive practices in the ACT, this submission will be focused on the necessity of the Commonwealth Ombudsman (as Federal NPM<sup>2</sup>) to include disability accommodation settings, including congregate institutional living and residential care and group homes as a focus on 'deprivation of liberty'.
5. Article 14(2) notes that a "deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodian setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority"<sup>3</sup> – in which case, applies strongly to people with disabilities in settings other than police detention, prisons and immigration detention settings. The clear definition of a 'site of detention' remain ambiguous in the context of OPCAT monitoring of a variety of circumstances where people are deprived of liberty.
6. We feel there is an urgent need to pay attention to the numbers of people with disability in isolated settings<sup>4 5</sup> given the high overrepresentation<sup>4</sup> of people with disabilities in Australian prisons, locked psychiatric wards, aged care, police watch houses and compulsory care facilities.<sup>6 7</sup> People with

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<sup>1</sup> Institutions include: Community based homes accommodating usually around 1 - 6 people with disabilities, which are run by services providing disability supports (group homes); Sheltered workshops, where people with disabilities are congregated together in a segregated workplace; Special schools or units – a segregated school environment or program for children with disabilities, both separate from and inside mainstream schools; Respite houses, where people with disabilities stay together for a short period to give their unpaid carers a break from caring responsibilities; Day centres, where people with disabilities are congregated together in a supported service setting to participate in recreational activities.

<sup>2</sup> NPM - National Preventive Mechanism

<sup>3</sup> OPCAT, art. 14(2)

<sup>4</sup> Article 14(2)-(7) of the ICCPR, *Parliamentary Joint Committee on Human Rights: Human Rights Scrutiny Report 1* (2017)

<sup>5</sup> Human Rights Watch (2018), *"I Needed Help, Instead I Was Punished": Abuse and Neglect of Prisoners with Disabilities in Australia*, p.5

<sup>6</sup> Baldry, E., (2014) 'Disability at the Margins: Limits of the Law', vol. 23 *Griffith Law Review*; People with Disability Australia (2014) *Consideration of the 4th and 5th Reports of Australia by the Committee to the Convention Against Torture*, p.59;

<sup>7</sup> Australian Human Rights Commission (2018) *A Future Without Violence: A Report: Quality, safeguarding and oversight to prevent and address violence against people with disability in institutional settings*; Australian Human Rights Commission. (2014). *Equal before the law: Towards disability justice strategies*; Victorian Equal Opportunity and Human Rights Commission (2014) *Beyond doubt: The experiences of people with disabilities reporting crime – Research findings*; Queensland Advocacy Incorporated (2015) *dis-abled Justice: Reforms to the justice for persons with disability in Queensland*; NSW Law Reform Commission (2013) *People with cognitive and mental health impairments in the criminal justice system*.

disabilities are more likely to be victims of crimes than their non-disabled peers and more likely not to report the violence.<sup>8 9</sup> We remain concerned that these settings will not and have not been regarded as primary places of detention under the implementation of OPCAT.

7. We respect and acknowledge that the work of inspection bodies will be supported by the Commonwealth Ombudsman and its responsibility for the coordination among federal, state and territory bodies that fulfil its NPM functions.<sup>10</sup>
8. We also remain concerned whom will be responsible for determining which body or bodies will undertake this function within the ACT as places of detention and if federally and territory-wise, disability accommodation places will be placed as a 'primary place of detention' within or after the NPM's three-year implementation period.<sup>11</sup>
9. During the three-year implementation period, no category of detention facility should be exempt from independent inspections under OPCAT. The implementation period should be a period to determine the areas of priority, to be worked on and to be excluded without prejudice and belief.

## Changes to Restrictive Practices in the ACT

10. From September 2018, progression has been made since *OPCAT Consultation Stage 1* with the introduction of the ACT Senior Practitioner for Restrictive Practices. From September 2018, it has now become legislated that the powers of the Senior Practitioner will allow to "provide a framework for reducing and eliminating the use of restrictive practices by providers".<sup>12</sup>
11. We welcome this legislative reform and will look forward to working with the ACT Senior Practitioner as a key stakeholder. Over several years, Advocacy for Inclusion encountered numerous and regular instances of people with disabilities being chemically restrained as a form of restrictive practices in disability institutional settings. In some cases, chemical restraint has been used as an alternative to address communications barriers or frustrations for years. Long term exposure to some of the drugs used can be damaging and may lead to additional serious health, including mental health, problems.
12. It is welcoming to see that, in an ACT context and in other jurisdictions, restrictive practices are recognised as a fundamental violation of human rights. They can cause physical and psychological discomfort or pain, *deprivation of liberty*, alter thought processes and deprive a person of their property.<sup>13</sup> These practices can have significant adverse impacts on the person's mental and physical health and wellbeing and this is evident in our daily work and expertise of knowledge.<sup>14</sup>

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<sup>8</sup> Community Affairs References Committee (2015) as above, p. 27

<sup>9</sup> Victorian Ombudsman (2015) *Reporting and investigation of allegations of abuse in the disability sector: Phase 2 – incident reporting* (Report, December 2015) p.31.

<sup>10</sup> Australian Human Rights Commission (2017) *OPCAT Consultation Paper Stage 2*, para. 21

<sup>11</sup> *Ibid*, para. 24

<sup>12</sup> Australian Capital Territory, *Senior Practitioner Act 2018*, s.6(a)

<sup>13</sup> CRPD Civil Society. (2012). *Disability rights now: Civil society report to the United Nations Committee on the Rights of Persons with Disabilities*.

<sup>14</sup> Spivakovsky, C. (2012). *Restrictive Interventions in Victoria's Disability Sector Issues for Discussion and Reform*. <http://www.publicadvocate.vic.gov.au/file/Restrictive%20interventions%20discussion%20paper>.

13. Despite the introduction of the ACT Senior Practitioner in both legislation and in presence, the climate of abuse, neglect and denial of liberty is still and will still be evident in disability accommodation settings. A change where restrictive practices in the ACT does not eliminate the fact that disability institutional and residential care setting should be placed as a primary area for OPCAT inspections.
14. Restrictive practices and seclusion remain a concern<sup>15</sup> within the international human rights system and within our domestic law. Individuals subjected to them do not consent to these practices, yet these interventions do not constitute unlawful violence as they are considered lawful<sup>16</sup> when conducted as a doctrine of necessity or specific legislative schemes in which disability, mental health and aged care service providers work under.
15. The use of seclusion, physical and mechanical restraint in mental health settings occurs at the highest rates in forensic services.<sup>17</sup> In our experience, until disability settings can and will be inspected, and data collected, it can be expected that number of people being restrained would be similar.

## Response to Question 2: Categories of Places of Detention to be visited

16. We maintain that 'primary places' of detention to be visited under OPCAT needs to include institutional and residential care settings where people with disabilities are held as a 'deprivation of liberty'. In our case, advocates nor Official Visitors often cannot enter these places despite complaints and concerns of abuse and neglect that are predominant and frequent.<sup>18</sup>
17. It is often wrongly perceived that people with disabilities are safer in institutional settings where they are "cared for" and "with their own kind". In our experience, lateral violence<sup>19</sup> is very common in institutional settings, including prisons and police watch houses, but is very poorly recognised as a serious issue with major impacts on people with disabilities.
18. In our individual and systemic advocacy role in the ACT, we recognise and advocate on behalf of people with disabilities in the ACT that represent the most marginalised of our Territory population. Aboriginal and Torres Strait Islander people, women with disabilities, people with cognitive impairment and people with psychosocial disabilities (mental health) are particularly affected. People with disabilities are

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<sup>15</sup> Australian Law Reform Commission (ALRC) (2014) *Equality, capacity and disability in Commonwealth Laws: Final Report*. Sydney; Senate Community Affairs References Committee (2015) *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age-related dimensions, and the particular situation of Aboriginal and Torres Strait Islander People with disability, and culturally and linguistically diverse people with disability*. Canberra: Commonwealth of Australia

<sup>16</sup> Lea, M. et al (2018) A disability aware approach to torture prevention? Australian OPCAT ratification and improved protections for people with disability, *Australian Journal of Human Rights*, p.76

<sup>17</sup> Australian Institute of Health and Welfare (2017) *Admitted patient mental health-related care*. Canberra: AIHW

<sup>18</sup> Advocacy for Inclusion (2015) *Submission to the Senate Inquiry into violence, abuse and neglect against people with disability in institutional and residential settings*, 8.

<sup>19</sup> In spaces where people with disabilities have little control and choice, and where power is exercised over them to extreme degrees including through physical force, people with disabilities can become violent toward each other or toward support workers as a form of protest.

overrepresented in our prisons<sup>20 21</sup>, institutionalised in our communities<sup>22</sup>, and placed into psychiatric wards<sup>23</sup> where the difference between a cognitive disability and mental illness is unacknowledged and blurred. Systemic failures that remain unaddressed are endemic in restrictive practices used in disability services, with constant evidence that the denial of legal capacity that is compounded by guardianship and mental health-specific laws causes further breaches of human rights for people with disabilities.

19. Advocacy for Inclusion strongly recommends that the Federal NPM (Commonwealth Ombudsman) ensures oversight and accountability for disability institutional settings. As the NPM, the Commonwealth Ombudsman should adopt a social justice lens to recognise deprivation of liberty and of human rights in group homes, congregate living arrangements and other institutional settings where people with disabilities are confined without choice and control.

**Recommendation 1: The Commonwealth Ombudsman to adopt a social lens to recognise deprivation of liberty where people with disabilities are housed in institutional and socially isolated settings.**

### Response to Question 3: Engaging with Stakeholders

20. We argue that active engagement and collaboration with civil society organisations, including advocacy organisations, is essential in ensuring that measures to implement OPCAT. To create reliability and efficiency of OPCAT practices, civil society organisations can provide proficiency of their consumer groups and clientele from a grassroots level as an advisory to the NPM.
21. It is necessary that engagement with civil society (from grassroots organisations upwards) is inclusive to a variety of organisations that are involved in the OPCAT implementation and work specifically with people who are detained. These include community advocacy organisations, peak NGOs, professional health, medical and social work association groups and organisations, researchers and universities and people with lived experience that wish to participate. The NPM must remain visible and accessible to all civil society and not consult with one in-between agency as a form of collaboration and must be open and transparent in its communications, intentions and working focus.
22. We welcome the idea from the Australian Human Rights Commission (AHRC)<sup>24</sup> of awareness raising and public consultation and education as part of the remit of the NPM'S under OPCAT to engage the public with understanding the difference and the purpose of OPCAT for effectiveness.

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<sup>20</sup> Advocacy for Inclusion (2017) *Submission to: Senate Community Affairs Reference Committee Inquiry to address outcomes of National Disability Strategy 2010-2020*,

[http://www.advocacyforinclusion.org/Senate\\_CARC\\_Submission\\_to\\_address\\_outcomes\\_of\\_NDS\\_FINAL.pdf](http://www.advocacyforinclusion.org/Senate_CARC_Submission_to_address_outcomes_of_NDS_FINAL.pdf)

<sup>21</sup> Advocacy for Inclusion (2013) *Submission to the Australian Human Rights Commission: Access to justice in the criminal justice system for people with disabilities*,

[http://www.advocacyforinclusion.org/images/Publications/Justice/Access\\_to\\_justice\\_in\\_the\\_criminal\\_justice\\_system\\_for\\_people\\_with\\_disabilities\\_August2013\\_FINAL.pdf](http://www.advocacyforinclusion.org/images/Publications/Justice/Access_to_justice_in_the_criminal_justice_system_for_people_with_disabilities_August2013_FINAL.pdf)

<sup>22</sup> Advocacy for Inclusion (2017) *Submission to: Senate Community Affairs Reference Committee Inquiry to address outcomes of National Disability Strategy 2010-2020*

<sup>23</sup> *Ibid*

<sup>24</sup> AHRC (2017) *Joint Submission to the Australian Human Rights Commission Consultation: OPCAT and Civil Society*, Para 4.4: Submission 44 NGO Consultation from Australia OPCAT Network, p. 26

**Recommendation 2: Support AHRC recommendation that the Federal NPM and additional NPMs (State and Territories) undertake awareness-raising and public education among civil society and the wider community to increase understanding of OPCAT and the role of the NPM.**

23. The NPMs, both federally, state and territory, must adopt a working practice that is accessible and not a 'trickle-down' effect, including the sharing of information in an accessible manner. At present, civil society groups have already formed a collaboration outside of the submission process in which shares information and discussions which has proven to be well-received by those involved. Such transparency can be further engaging where the NPM is not behind closed doors or reliant on a go-between (i.e. State or Territory Government bodies) for their engagement with civil society.
24. The implementation of OPCAT cannot be successful without the engagement of civil society: they must be a central component from the beginning, including the designation and continuous involvement with the NPM. The 'process for the selection and appointment of members of the NPM should be open, transparent and inclusive and involve a wide range of stakeholders including civil society'.<sup>25</sup> The transparency should not be the an example of the NPM and advisory consultancies being decided from an executive government level (Federal, State and Territory) and then a 'trickle-down' effect to civil society organisation – engagement must be inclusive, open and transparency from all levels of society as a functionality to OPCAT.

**Recommendation 3: NPM to involve civil society groups that are highly involved in OPCAT consultancy and engaged from the beginning in the process of designating the NPM (Federal) and State and Territory NPMs.**

25. We support the initiative that people with lived experience must be engaged equally as civil society as former detainees. In the disability advocacy space, we have several clienteles in which would be able to contribute their expertise and insights into the criminal justice system (as detainees in police stations, watch houses, remand centres and prison settings) as well as those who have lived in institutional and residential care settings for people with disabilities. These people in both OPCAT definitions of 'deprivation of liberty' will be able to attest to seclusion, isolation, restrictive practices, confusion of their plight and violence and abuse.<sup>26 27</sup>
26. Involving civil society organisations and standalone individuals will allow relationship building and insight into the plight of detainees and perspective will increase the capacity and understanding of the NPM to engage with vulnerable groups, advocacy organisations and professions to gain better understanding and perspective of factors in which otherwise would remain hidden and misunderstood.
27. The additional benefit of civil society involvement is the assistance to NPMs to develop appropriate methods to monitoring that are sensitive to people who are detained who require additional support to approached or questioned. In our experience, people with disabilities face significant and complex barriers when it comes to reporting abuse or neglect or participating in a justice process. In some cases,

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<sup>25</sup> UN Subcommittee for Prevention of Torture, (2008), *First Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, May 2008, CAT/C/40/2 para. 28.

<sup>26</sup> Australian Cross Disability Alliance (ACDA) (2015) *Submission to Inquiry into Violence, Abuse and Neglect against People with Disability in Institutional and Residential Settings*, see [http://wwda.org.au/wp-content/uploads/2013/12/ACDA\\_Sub\\_Sen\\_Inquiry\\_Violence\\_Institutions.pdf](http://wwda.org.au/wp-content/uploads/2013/12/ACDA_Sub_Sen_Inquiry_Violence_Institutions.pdf)

<sup>27</sup> Advocacy for Inclusion (2015), *Submission to the Senate Inquiry into Violence against PwD in Institutions*

a lack of access to information means that people do not know how and where they can engage in a complaint's mechanism process.<sup>28</sup>

## Engaging with Lived Experience

28. Civil society, including key advocacy organisations, play in identifying the appropriate the places of detention that require monitoring and assisting the scope of the role of NPMs from a Federal and State and Territory levels. The identification of key places of detentions cannot be determined solely by high government bodies to pre-determine the role of NPM functionality and roles without the consultation of stakeholders.
29. Civil society, including advocacy organisations, can play a key functionality of alerting NPMs to systemic issues of concerns in relation to their clientele whom have been released or have experienced closed environments to be ensure that issues are fresh, recent and can be addressed as opposed to continuous public consultations that require submissions. It is imperative that civil and advocacy organisations be provided opportunity to hold both governments and NPMs to accounts while also supporting NPM recommendations to be implemented.
30. We advocate strongly that people with lived experience must be included as the civil society voice outside of organisations to ensure active engagement. In the UK, NZ and Denmark, active involvement of individuals with lived experience<sup>29 30</sup> is considered valuable as part of advisory panels and expertise of understanding the impact of deprivation of liberty and the standard human rights and care in settings.

**Recommendation 4: A similar body to the models of New Zealand, the UK and Denmark to be considered in best practice to involve lived experience of people in detentions. In our experience, we strongly recommend people with disabilities and mental health be involved to review methods and practices to prevent torture and developing awareness.**

## Response to Question 4: Core Principles the NPM Functionality

31. The role of the NPMs under OPCAT is to monitor mistreatment with the aim to prevent, rather than to react. The operational independence of the NPMs to be clear and concise in its role to enter and be present at any place of detention with or without warning with vested power to override decision-making and oversight when determining the scope of places to be visited.
32. The legislation should state and be concise that an NPM be provided full financial and operational autonomy in its functions. It is imperative that if the Commonwealth Ombudsman is to be the Federal NPM, that it remain wholly independent of the government and on separate premises.

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<sup>28</sup> There is no available data on how many of those people are currently in institutional care or how many have experienced violence in such settings thus is unknown if and how these people are receiving information on reporting crime and victim support.

<sup>29</sup> Steinarte, E., Murray, R. and Liang, J. (2012), 'Monitoring those Deprived of their Liberty in Psychiatric and Social Care Institutions and National Practice in the UK', *The Journal of Human Rights*, p.825

<sup>30</sup> Caruana, S. (2018) "Enhancing best practice inspection methodologies for oversight bodies with an Optional Protocol to the Convention Against Torture focus", *Report the Winston Churchill Memorial Trust of Australia*.

33. The NPMs needs to be included of people with specific and appropriate levels of expertise before being provided with places in which they will be conducting. In the case of disability institutional and residential care settings, and even mental health and psychiatric, strong knowledge and experience of disability and mental health advocacy and understanding of the sector/s is required.
34. We strong advocate to a 'no warning' system to be implemented for detention settings that have been 'flagged' as a concern. A time of 24 hours provides adequate time for a facility to 'fix' or 'hide' an issue in which they are prepared for with notice. Many people whom we have advocated for in the past have indicated they have been intimidated, afraid or coerced not to say further of incidents that have occurred to themselves or others – and this will continue regardless of OPCAT in place. Without the protection of 24 hours' notice of a visit to facilities, this will allow NPMs more capacity and power to make and ensure a thorough observation. Multiple objection to a visit(s) without an exceptional circumstance and/or reason, involving the same one or more people in a setting, rings alarm bells in our experience.
35. In addition, NPMs should absorb or work collaboratively with State and Territory Official Visitor Schemes (or Community Visitors) programs to clarify any cross-over or confusion of roles. At present, there are two Official Visitors responsible for visiting disability institutional and residential care settings in the ACT with other Official Visitors targeting prisons, mental health, aged care and juvenile care settings.
36. Although Official Visitors are recruited as volunteers, their role entails them to observe the environment and staff interaction with residents and patients, make enquiries to inspect documentation and communicate to residents to ensure information being provided to them and they are being given the opportunity to make complaints, question their care or raise concerns. They are well placed to identify and monitor systemic issues occurring in such settings through regular intervals.
37. With the addition of the ACT Senior Practitioner and its possible interaction with OPCAT in the future, the new *Senior Practitioner Act 2018* contains mechanisms that require the approval, recording and/or reporting of particular 'restrictive practices' and the ability to question any interventions used on people with disabilities, eventually flowing into aged care, mental health facilities and education settings. The role of the Senior Practitioner is solely independent from the ACT Government, allowing autonomy and transparency in the role. The functions of the Senior Practitioner under the new Act allows the rights of the person subject to restrictive interventions and compulsory treatment are protected and standards referred.
38. Providing the instances where deprivation of liberty is apparent in disability institutions and residential care are imposed under informal authority rather than a judicial or administrative order<sup>31</sup> and as such, are not recorded or reported. In addition to the Senior Practitioner role in ACT and other States and Territories, OPCAT NPMs need to work in conjunction with these roles to gather data and information involving restraint or seclusion.
39. It is also recognised that the current State and Territory mandates and practical capacities of the Official Visitors/Community Visitors programs would need to be extended to meet OPCAT requirements to work in unification.

**Recommendation 5: The functions of the NPMs to include a 'limited/no warning' clause to allow unexpected visits to be placed on detention settings of primary concern. It is envisaged that**

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<sup>31</sup> Advocacy for Inclusion, *Response to Australian Human Rights Commission OPCAT in Australia Consultation Paper 1*

programs like the Official Visitors Scheme/Community Visitors, can be designated as an NPM body.

**Recommendation 6: NPMs work absorb or work in collaboration with State and Territory Official Visitor Schemes to ensure clarity of roles and responsibilities as both groups can and will be able to enter and assess places that are considered deprivation of liberty.**

## Training for Correction, Police and Judicial Staff

40. Part of the social justice lens is the need for disability awareness training for prison staff in the ACT and nationally. As part the UN CRPD principles of Article 13(2), it is required that *“in order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff”*.<sup>32</sup> It is concerning that disability is not considered as a priority of the implementation of OPCAT and its core focus. To address an ‘overrepresentation’ in the prisons, remand centres or police watch houses, OPCAT also needs to address and understand disability and mental health<sup>33</sup> are a key factors of detainee health and wellbeing.
41. The negative experiences of people with disabilities, including Aboriginal and Torres Strait Islander people in prison settings, locked psychiatric wards and police watch houses have all demonstrated lack of care, training<sup>34</sup> and resources due to overcrowding.<sup>35</sup> There is a difference between ‘mental impairment/disabilities’ and ‘mental health conditions’ and too often disability is mixed with mental health, creating difficulties in ensuring an individual receives the right support or assessment.<sup>36</sup>
42. The current climate of prisoner care has shown light on how prison, police and judicial staff treat people with disabilities held in custody. Staff acknowledge<sup>37</sup> that they are not adequately training on disability or mental health to distinguish between behaviour from lack of support and accommodation, particularly during crisis intervention.<sup>38</sup> As a result and due to lack of resourcing or knowledge, staff responses are punitive than supportive.

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<sup>32</sup> UN Human Rights, UN Convention on the Rights of Persons with Disability (CRPD), *Article 13: Access to Justice*, para.2

<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-13-access-to-justice.html>

<sup>33</sup> Baldry, E. (2012) *People with Intellectual and Other Cognitive Disability in the Criminal Justice System*, Department of Families and Community Services NSW. [https://www.adhc.nsw.gov.au/\\_data/assets/file/0003/264054/Intellectual\\_and\\_cognitive\\_disability\\_in\\_criminal\\_justice\\_system.pdf](https://www.adhc.nsw.gov.au/_data/assets/file/0003/264054/Intellectual_and_cognitive_disability_in_criminal_justice_system.pdf); NSW Law Reform Commission (2012) *People with cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*, Report No. 135, NSW LRC; Rowley, M. (2014) ‘Invisible Clients: People with Cognitive Impairments in the Northern Territory Court of Summary Jurisdiction’, *NT Law Journal*, Vol. 2, p. 383

<sup>34</sup> Includes cultural awareness training of Aboriginal and Torres Strait Islander prisoners and generalised training of cognitive and intellectual disabilities, and mental health training.

<sup>35</sup> Human Rights Watch (2018), *“I Needed Help, Instead I Was Punished”: Abuse and Neglect of Prisoners with Disabilities in Australia*, p.6

<sup>36</sup> Baldry, E. (2012) *People with Intellectual and Other Cognitive Disability in the Criminal Justice System*, Department of Families and Community Services NSW; NSW Law Reform Commission (2012) *People with cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*, Report No. 135, NSW LRC

<sup>37</sup> Bartels, L. (2011). “Police Interviews with Vulnerable Adult Suspects”. *Research in Practice Report No. 21*. Australian Institute of Criminology, Canberra, ACT, p.13; Parliament of Victoria Law Reform Committee (2013) *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers- Final Report*. quoting the Submissions of the Legal Services Commissioner, Villamanta Disability Rights Legal Service, Victorian Advocacy League for Individuals with Disability Inc.

<sup>38</sup> Human Rights Watch (2018), *“I Needed Help, Instead I Was Punished”: Abuse and Neglect of Prisoners with Disabilities in Australia*, *ibid*.

43. Within the same walls of the detention facility (prisons, remand centres or police watch-houses), seclusion units become a default response, causing the problem to escalate where restrictive practices are concerned and at risk.<sup>39</sup>
44. There needs to be a strong focus on engagement with staff but done in a cooperative, rather than authoritative manner. Advocacy organisations like Advocacy for Inclusion, often work with people with disabilities that are risk of entering the criminal justice system, as well as those who have been released. There needs to be a cooperative and transparent connection made between NPM's and civil society groups to improve training, knowledge awareness and improvement of standards where people with disabilities are concerned. Advocacy organisations are well placed to offer training to correction, police or judicial staff when required.

**Recommendation 7: Disability awareness training to be provided, when necessary, but civil society groups working closely with a specific cohort of people in the justice system (i.e. disability, mental health, Aboriginal and Torres Strait Islanders, CALD, etc.)**

## Data Collection

45. Under OPCAT, States are required to “access all information concerning the number of persons deprived of their liberty in places of detention... as well as the number of places and their location”.<sup>40</sup>
46. Article 31 of the CRPD features Statistics and Data Collection; yet, it is evident that the lack of data to support the implementation of the Convention is universal.<sup>41</sup> It is difficult for Australia to report on OPCAT implementation without benchmarking critical data, despite the UN making it clear that Australia must develop nationally consistent measures for data collection and public reporting of disaggregated data across the full range of obligations contained in the our human rights obligations, including OPCAT.
47. Article 31 of the CRPD – statistics and data collection – requires that “*States Parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention*”.<sup>42</sup> Statistics and data collection should be used to identify and address the barriers experienced by people with disabilities in exercising their human rights, and data should be disseminated to people with disabilities detained.
48. There is a need for data collection to be increased in the ACT justice system, including police and corrective services. There is a need for data information on how many people with disabilities are in places of OPCAT inspection to ensure that policy implementation and consultation between both NPM, ACT Police, ACT Corrective Services and community advocacy organisations remains transparent.

**Recommendation 8: The Commonwealth Ombudsman reconsider disability institutional settings to better analyse measures and outcomes to reduce marginalisation and inequality under Article 31 of the Convention on the Rights of Persons with Disabilities (CRPD).**

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<sup>39</sup> *Ibid*

<sup>40</sup> OPCAT, art.20(a)

<sup>41</sup> Committee on the Rights of Persons with Disabilities (2013) *Concluding observations on the initial report of Australia*, adopted by the Committee at its tenth session (2-13 September 2013); see UNDoc: CRPD/C/AUS/CO/1

<sup>42</sup> UN Human Rights, UN Convention on the Rights of Persons with Disability (CRPD), *Article 31: Statistics and Data Collection*

<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-31-statistics-and-data-collection.html>

49. Advocacy for Inclusion continues to suggest that the principles of accountability and transparency should be included in the NPMs, whilst measures for documentation, benchmarking, evaluation, reporting and monitoring should be included explicitly within the UN Sub-committee on the Prevention of Torture (SPT).

**Recommendation 9: NPM and SPT models must commit to a comprehensive audit of existing monitoring bodies and released publicly in compliance with UN treaties data collection on people with disabilities can be measured.**

**Recommendation 10: Measures for documentation, benchmarking, evaluation, reporting and monitoring of restrictive practices and efforts to eliminate restrictive practices by the Federal and State and Territory NPMs must be included explicitly when presented to the UN Sub-committee on the Prevention of Torture (SPT).**

## Conclusion

50. We maintain that the NPMs should outline robust strategies, including the development of legislative frameworks, to improve accountability and transparency whilst working with and alongside civil society organisations and stakeholders. It is imperative that people with disabilities and those with mental health should not be treated as an additional feature, yet for the NPMs to recognise that this cohort of our population have an explicit representation within many sites of detention and there represent a primary feature where deprivation of liberty can be concerned.

51. We thank the Australian Human Rights Commission the opportunity in continuing to consult, have input and be valued as part of the consultation process for the implementation of OPCAT in Australia.