Tasmanian national preventive mechanism
Implementation project

Consultation paper 2

Australia's international obligations related to the prevention of torture and ill-treatment

May 2023

About: This consultation paper invites stakeholders to assist the Tasmanian National Preventive Mechanism (NPM) in identifying Australia's international obligations related to the prevention of torture and ill-treatment, relevant best practice, and related issues of importance.

The paper builds upon Consultation Paper 1, which focused on identifying places where people may be deprived of their liberty, by turning to now identify the human rights standards that the NPM should expect to be applied in those places, to prevent torture and ill treatment. In particular, consideration is given to Australia's international obligations with respect to the absolute prohibition of torture with a view to ensuring that places of detention in Tasmania and those responsible for them are in compliance with those obligations.

The Tasmanian NPM forms part of Australia's ratification of the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT). OPCAT is an international human rights agreement that complements and enhances compliance with the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).

Additional background information about OPCAT and the Tasmanian NPM, and a copy of consultation paper 1, are available at www.npm.tas.gov.au.

Key anticipated outcomes from this consultation paper are:

- Developing of a shared understanding among stakeholders and the Tasmanian NPM of Australia's core international obligations relating to torture and ill-treatment;
- Identifying applicable human rights instruments; and
- Understanding how these obligations and instruments may be relevant to different places of detention, and to different vulnerable populations.

Stakeholder feedback is sought on the questions included in this document, as well as in relation to the analysis contained in this consultation paper generally.

Enquiries related to this consultation may be made to Mark Huber, Project Manager, OPCAT Implementation Project, at enquiries@npm.tas.gov.au.

Contents

Acronyms and key words

Bangkok Rules	the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders with their Commentary
CAT	*Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*
Civil society	This includes a wide range of organisations, including non-governmental organisations and associations, professional associations, trade unions, academia, and faith-based groups.
CESCR	UN Committee on Economic, Social and Cultural Rights
CRC	UN Committee on the Rights of the Child
Custodial centre	A prison within the meaning of the *Corrections Act 1997*; and a detention centre
Deprivation of liberty	Any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority. (OPCAT, Article 4(2))
ECtHR	European Court of Human Rights
IACHR	Inter-American Court of Human Rights
ICCPR	*International Covenant on Civil and Political Rights*
ICJ	International Court of Justice
Ill-treatment	All forms of cruel, inhuman or degrading treatment or punishment.
Istanbul Protocol	the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
Nelson Mandela Rules	United Nations Standard Minimum Rules for the Treatment of Prisoners
NPM	National preventive mechanism.
OHCHR	Office of the High Commissioner for Human Rights
OPCAT	*Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*
Paris Principles	Principles relating to the Status of National Institutions

Place of detention	Any place under [a State Party's] jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence. (OPCAT, Article 4(1))
Refugee Convention	*Convention Relating to the Status of Refugees*
SPT	Subcommittee on Prevention of Torture.
'the Act'	*OPCAT Implementation Act 2021* (Tas).
Tokyo Rules	the United Nations Standard Minimum Rules for Non-custodial Measures
UDHR	*Universal Declaration of Human Rights*
UN	United Nations
UNGA Declaration	the UN General Assembly Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
Vienna Convention	*Vienna Convention on the Law of Treaties* (1969)

How to respond to this consultation paper

Stakeholders are invited to respond to this consultation online, at www.npm.tas.gov.au.

Alternatively, submissions can be provided via email as follows:

> **Address**: enquiries@npm.tas.gov.au
>
> **Subject**: 'Submission – Consultation Paper 2'

A summary of this consultation round will be included in the Tasmanian NPM's implementation report. Individual consultation responses will not be published, however stakeholders that provide a submission will be acknowledged. Please indicate in your expression of interest if you would prefer that your participation in this consultation process be treated as confidential. Stakeholders are welcome to publish their submissions to this consultation process on their respective websites.

This consultation round will close on **Friday 23 June 2023**. Please contact us before this date if you require an extension of time to make a submission.

Background information about the Tasmanian NPM and OPCAT is provided at www.npm.tas.gov.au

Enquiries related to this consultation, including a request for extension of time, may be made to Mark Huber, Project Manager, OPCAT Implementation Project, at enquiries@npm.tas.gov.au.

1. Foreword

In releasing this second consultation paper, I first take the opportunity to express my gratitude to the many stakeholders who responded to Consultation Paper 1, which focused on the scope of OPCAT article 4.[1] Insights provided by stakeholders have informed this next step in my office's development.

Important progress has been made following Consultation Paper 1. Not least has been the release of the United Nations Subcommittee on the Prevention of Torture's (SPT) "Draft general comment No. 1 on places of deprivation of Liberty (OPCAT article 4)".[2] Under this document the SPT has undertaken essential work to interpret OPCAT's central concepts of 'places of detention' and 'deprivation of liberty'. I welcome the SPT's work to provide substantive clarity on this matter. In the future, my Office will approach OPCAT article 4 in line with the SPT's guidance, which I observe aligns with the approach I outlined in Consultation Paper 1.

In response to stakeholder consultation feedback, I have commenced engaging experts to lead development of draft 'Expectations' in relation to the following types of deprivation of liberty:

1. **Adult criminal detention**. This includes settings such as prisons, the transport of detainees, and other court-ordered deprivations of liberty, such as home detention.

2. **Police and court custody**. This includes settings in which a person may be deprived of their liberty by police or within a court facility. It will include places such as police and court cells, and transport vehicles.

3. **Children and young people**. Applicable to any setting in which a child or young person may be deprived of their liberty, including youth detention.

4. **Mental health**. This will apply to settings in which a person is deprived of their liberty under relevant legislation, such as Tasmania's *Mental Health Act 2013*, and by order of a court or tribunal.

5. **Health and social care**. This includes settings where a person is deprived of their liberty for medical reasons, along with social places where support is provided to older people or people with disability, such as aged and disability care.

[1] A copy of Consultation Paper 1 is available at npm.tas.gov.au.
[2] See: https://www.ohchr.org/en/calls-for-input/2023/call-comments-draft-general-comment-subcommittee-prevention-torture-spt

This approach is similar to that adopted by other established NPMs.[3] These Expectations will set out the criteria used to examine places visited, to assess the treatment of persons deprived of their liberty and ensure that Australia's human rights obligations are met. As part of this process, I will also be updating the Custodial Inspector standards. Each draft Expectations document will be developed with stakeholder input, and released for feedback.

Alongside expert engagement, I have met with relevant government agencies to discuss OPCAT, my functions as Tasmanian NPM, and I have requested (and received) relevant information to assist with the development of my Expectations. I have also commenced familiarising myself with places of detention in Tasmania. This has included a range of places not currently inspected as Custodial Inspector, including police and court facilities, and health and social care places. I observe that there is genuine curiosity across the Tasmanian government to understand how the NPM will operate, and how its preventive focus and functions can assist to improve the treatment of people deprived of their liberty. I am grateful for this assistance and I look forward to ongoing proactive engagement.

This consultation paper provides a background of Australia's international obligations associated with the prevention of torture and ill-treatment. It also provides an overview of related non-binding sources of human rights law that, as a matter of good practice and as a model State in the international community, Australia should be following.

The paper is structured in two parts: it begins with an overview of the sources of Australia's international obligations, binding and non-binding.[4] It then proceeds to identify the key obligations arising for Australia from the Convention against Torture.

The overview provided is not intended to be definitive, and it certainly does not cover the breadth of the human rights field. Rather, stakeholders should regard the obligations and other instruments discussed in this consultation paper as a baseline overview, which I intend to update and add to as my Expectations are developed, and through ongoing stakeholder engagement.

Accompanying the overview are four consultation questions. This consultation paper is an opportunity for civil society organisations to contribute feedback on the human rights obligations applicable to their populations, identify key issues, and identify best practice to prevent torture and ill-treatment in different settings where a person may be deprived of their liberty.

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[3] *See:* United Kingdom, National Preventive Mechanism, *Monitoring places of detention 13th Annual Report of the United Kingdom's National Preventive Mechanism 2021/22*, available at <https://www.nationalpreventivemechanism.org.uk/>.

[4] Additional background information on the CAT and OPCAT is provided in Consultation Paper 1, a copy of which is available at npm.tas.gov.au.

I invite stakeholders to provide feedback on the overview, and a response to the consultation questions. Stakeholders may also provide any other information that they consider relevant to this consultation.

While effort has been made to prepare this consultation paper in plain terms, I am conscious that language used and concepts discussed are complex. If stakeholders would like assistance with the document or have related questions, they are welcome to contact my project manager, Mr Mark Huber, at enquiries@npm.tas.gov.au.

In forming this understanding of Australia's obligations, I wish to acknowledge the valuable assistance I have received from Ms Regina Weiss, and Ms Louise Finer. Finally, I thank stakeholders for their ongoing support of OPCAT, and the implementation of my office and other NPMs in Australia. I look forward to receiving feedback.

Sincerely

Richard Connock
Tasmanian National Preventive Mechanism

2. Summary and consultation questions

The analysis in this consultation paper provides an overview of Australia's international obligations related to torture and ill-treatment, and identifies supplementary human rights materials that provide guidance on the obligations' scope and application. At a high level, Australia's overarching international obligations relating to the prohibition of torture and ill-treatment include:

a) prevention;
b) education on prevention and prohibition; and
c) ongoing review of the steps it has taken in relation to these obligations.

To fulfil the prevention obligation, Australia is required to actively uphold full respect for human rights. In addition to its obligations under the CAT and OPCAT, Australia is a party to 12 significant international human rights agreements, each of which identifies specific conduct that can amount to torture and ill-treatment in particular circumstances. These agreements are complimented by 18 further sources of detailed 'soft-law' developed by the international community that, although not binding, are reflective of the minimum standards of conduct expected by the UN.

Against this background, the Tasmanian NPM seeks stakeholder input on the application of its mandate to prevent torture and ill-treatment. This will assist in the identification of initial priority areas for examination when exercising its visiting function. Feedback is requested in response to the following questions:

1. What does your organisation see as the core issues affecting populations that you represent in places of detention, that the Tasmanian NPM should consider as a matter of priority?

2. What does your organisation see as the main barrier(s) to preventing torture and ill-treatment in places of detention, and to people in these places engaging with the Tasmanian NPM?

3. Are there any international obligations or other materials missing from this consultation paper that your organisation considers the Tasmanian NPM should have regard to when exercising its functions?

4. Are there any examples of best practice in preventing torture and ill-treatment that you consider the Tasmanian NPM should have regard to during the development of its operating policies and procedures?

3. Introduction

The purpose of an NPM is, first and foremost, to prevent torture and ill-treatment in places where people are or may be deprived of their liberty. It achieves this through the exercise of four functions: the (primary) **visiting** function, **cooperation** with State and other relevant authorities, and by providing **education** and **advice**.

The question that naturally flows from this mandate is: when exercising these functions through its preventive lens, what criteria is the NPM supposed to consider to improve treatment and strengthen people's protections?

In answering this question, OPCAT takes an expansive approach. In its Preamble, OPCAT refers broadly to the common responsibility shared by all, being 'full respect for human rights'. And in its body, Articles 2 and 19 (which establish the SPT and NPM respectively) make reference to United Nations norms. However, in contrast, while Article 2 refers specifically to norms "concerning the treatment of people deprived of their liberty", Article 19 refers in general terms to any "relevant norms". This implies that the NPM is to have regard to a broader range of criteria when exercising its functions than one can expect of the SPT.

For the NPM, therefore, implementing OPCAT in practice requires it to consider two key questions:

1. What are the human rights that apply to a particular setting that the State must fully respect? And,
2. What relevant UN norms apply to inform how these human rights should be respected?

This consultation paper is the first step in scoping answers to these important questions. It aims to identify the main sources of Australia's obligations in the context of torture and ill-treatment, and the corresponding normative requirements that arise under these sources. It proceeds on the basis that, as a model State in the international community and as a matter of good practice, Australia will follow these sources of human rights, and relevant best practice adopted by NPMs in other States.

4. The sources of Australia's obligations

A broad range of obligations apply to Australia under international law in the context of torture and ill-treatment. Many of these obligations are rooted in customary international law (meaning they arise from established international practice), and some are now regarded as *jus cogens*.[5] Importantly, the prohibition of torture is a peremptory norm of general international law, being absolute and non-derogable.

Through the process of arranging these customary obligations into treaty, the scope of their application has become more clearly defined. And, through the international human rights movement in particular, States have continued to raise the bar by further elaborating in subsequent treaties the human rights and freedoms that are inherent to all; and establishing mechanisms to monitor the way that a treaty is implemented and enforced at the domestic level.

A. Binding obligations

Australia's legally binding obligations with respect to torture and ill-treatment are found predominantly in key international legal instruments that it has ratified, primarily the:

- *Convention against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment* (CAT)
- OPCAT
- *Convention Relating to the Status of Refugees* (Refugee Convention)
- *International Covenant on Civil and Political Rights* (ICCPR)
- *Universal Declaration of Human Rights* (UDHR)

That is, Australia is legally bound under international law to comply with the obligations contained in these treaties.[6]

Central to the role of an NPM is the CAT. This treaty codifies customary international law in relation to torture and ill-treatment, and expands on core principles found in the *Charter of the United Nations*, *Universal Declaration of Human Rights*, the *Covenant on Civil and Political Rights*, and the *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*[7]

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[5] As outlined in Consultation Paper 1, this means that that the obligation applies absolutely, and universally to all States. A copy of Consultation Paper 1 is available at npm.tas.gov.au.

[6] There are additional binding obligations related to torture and ill-treatment that apply to Australia, but are specific to situations outside the jurisdiction of the Tasmanian NPM. This includes, for instance, international obligations relating to armed conflict, under the *Geneva Conventions of 1949* and *Rome Statute of the International Criminal Court.*

[7] See the Preamble to the CAT.

In particular, the CAT sets out the prohibition of torture and ill-treatment in detail, establishing clear obligations for States. This includes the obligation to take effective legislative, administrative, judicial or other measures to prevent acts of torture and ill-treatment.[8] (Ratification of OPCAT being one measure that many States have agreed to implement, in order to meet this obligation.) It also defines key terms, such as the definition of torture.[9]

In addition to these treaties, Australia is party to international agreements that expand on the prohibitions of torture and ill-treatment against certain categories or groups.[10] These treaties, which are also legally binding, set out in particular that breaching specific obligations or protections can amount to ill-treatment under international law. This includes:

- *Convention on the Rights of the Child*.[11]
- *International Covenant on Economic, Social and Cultural Rights*.[12]
- *Convention on the Rights of Persons with Disabilities*.[13]
- *International Convention on the Elimination of All Forms of Racial Discrimination*.[14]

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[8] Article 2.

[9] Article 1 defines torture as: "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
The definition requires a level of severity, a specific purpose, and for the act to be committed or instigated by, or with the consent of, a person acting in an official capacity. Such acts committed or instigated by, or with the consent of, a person acting in an official capacity which do not amount to torture may nevertheless be covered under other acts of cruel, inhuman or degrading treatment or punishment, to which many operative provisions of the CAT apply.

[10] Australia is also party to a large number of international economic agreements, such as free trade and bilateral investment agreements, under which it has agreed to afford certain foreign individuals and groups a minimum level of protection that may be breached if torture or ill-treatment occurs. While an NPM will not examine places of detention with these economic agreements in mind, it is relevant to note that breaches of these agreements can give rise to international disputes, under which monetary damages may be awarded and payable by Australia.

[11] Ratified by Australia on 17 December 1990 (with reservation relating to Article 37). For instance, Article 37 provides an express provision relating to deprivation of liberty and torture.

[12] Ratified by Australia on 10 December 1975. For instance, Article 12 relates to the right of all people to the enjoyment of the highest attainable standard of physical and mental health.

[13] Ratified by Australia on 17 July 2008. For instance, Article 15 expressly precludes medical or scientific experimentation without consent, and requires States Parties to take all measures to prevent torture or ill-treatment of persons with disabilities on an equal basis with other persons.

[14] Ratified by Australia on 30 September 1975. This agreement is relevant in general with respect to equal treatment of persons by way of their race, in particular Article 5 which lists rights without distinction as to race, colour, or national or ethnic origin, to equality before the law.

- *Convention on the Elimination of All Forms of Discrimination against Women.*[15]
- The International Labour Organization *Abolition of Forced Labour Convention.*[16]
- *International Convention for the Protection of all Persons from Enforced Disappearance.*[17]
- The OHCHR *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.*[18]
- *Declaration on the Rights of Indigenous People.*[19]

As outlined in Consultation Paper 1, when interpreting an international agreement, guidance can be sought from the negotiating history of the treaty itself, as well as any principles set out by international courts and other judicial bodies. And, although these principles may not be binding on Australia, they can be regarded as reflective of best practice and should certainly be taken into consideration when considering Australia's obligations.

B. Soft law (or non-binding) obligations

Looking beyond obligations arising under treaty and customary international law, there are also supplementary sources of so-called 'soft' law, related to torture and ill-treatment, which are generally not binding on States, but are representative of good practice and reflect the minimum standards expected by the UN. These are regarded as normative, and as such fall within the scope of OPCAT Article 19.

It is expected that these sources be given considerable weight in interpreting and implementing related binding obligations, outlined above. In some cases, these sources have been developed to directly assist States in understanding and applying their legal obligations.

Despite their non-binding nature, Australia as a model State ought to apply these sources as if they had binding effect.

The main supplementary sources of Australia's obligations are

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[15] Ratified by Australia on 28 July 1983. 1. This agreement applies broadly to obligations relating to equality of women, particularly at Article 2.
[16] Ratified by Australia on 7 June 1960. For instance, Article 2 imposes obligations on State Parties to abolish forced or compulsory labour as a means of discipline, which in turn could amount to ill-treatment.
[17] Adopted by the UN General Assembly on 23 December 2010. For instance, Article 1 declares that no person shall be subjected to enforced disappearance (which is defined in Article 2).
[18] Adopted by the UN General Assembly on 25 November 1981. For instance, Article 4 imposes a legal obligation for States to "*take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life.*"
[19] Adopted by the UN General Assembly on 13 September 2007. For instance, this agreement affirms the human rights and fundamental freedoms of indigenous people as recognised in the UN Universal Declaration of Human Rights and international human rights law (at Article 1) and confirms equality of indigenous persons in particular to be free from any form of discrimination.

- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;[20]
- Basic Principles on the Role of Lawyers;[21]
- Code of Conduct for Law Enforcement Officials;[22]
- Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief;[23]
- Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they live;[24]
- Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities;[25]
- Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[26]
- Principles for the protection of persons with mental illness and the improvement of mental healthcare;[27]
- United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules);[28]
- The United Nations Rules for the Protection of Juveniles Deprived of Their Liberty;[29]
- the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders with their Commentary (the Bangkok Rules);[30]
- the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules);[31]

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[20] G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988).
[21] Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990).
[22] Adopted by General Assembly resolution 34/169 of 17 December 1979.
[23] Proclaimed by General Assembly resolution 36/55 of 25 November 1981.
[24] Adopted by General Assembly resolution 40/144 of 13 December 1985.
[25] Adopted by General Assembly resolution 47/135 of 18 December 1992.
[26] G.A. res. 37/194, annex, 37 U.N. GAOR Supp. (No. 51) at 211, U.N. Doc. A/37/51 (1982).
[27] Adopted by General Assembly resolution 46/119 of 17 December 1991.
[28] A/RES/70/175, 8 January 2016 (Resolution adopted by the General Assembly on 17 December 2015, 67th Session, Agenda item 106).
[29] Adopted by General Assembly resolution 45/113 of 14 December 1990.
[30] A/RES/65/229, 16 March 2011 (Resolution adopted by the UN General Assembly, 65th Session, Agenda item 105).
[31] A/RES/45/110, 14 December 1990 (Resolution adopted by the UN General Assembly, 68th plenary meeting).

- the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol);[32]
- the UN General Assembly Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNGA Declaration);[33]
- UN Committee on the Rights of the Child (CRC), General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration;[34]
- UN Committee on the Rights of Persons with Disabilities, Guidelines on Article 14: The right to liberty and security of persons with disabilities;[35]
- UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 23 on the right to just and favourable conditions of work;[36]
- CESCR, General Comment No. 14: The right to the highest attainable standard of health;[37] and
- various reports by the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment.[38]

Similar to treaty interpretation, decisions of international courts and tribunals also offer persuasive guidance in applying Australia's obligations. In particular, the International Court of Justice (ICJ), the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACHR) and the African Court in Human and People's Rights offer relevant insights into the nature and scope of States' obligations pertaining to torture and ill-treatment as interpreted by courts.

For instance, the prohibition of torture and ill-treatment has been considered extensively by the ECtHR. It has ruled that deplorable living conditions in detention, particularly when dealing with minors can amount to ill-treatment,[39] while a lack of appropriate medical supervision for inmates with suicidal tendencies or other psychosocial disabilities can also

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[32] Published by OHCHR in 2001; updated 2004; comprehensive review by practitioners and academics, updated 2022. Accessible at: https://www.ohchr.org/sites/default/files/documents/publications/2022-06-29/Istanbul-Protocol_Rev2_EN.pdf. While the Istanbul Protocol is not binding on States, the UN Special Rapporteur on Torture has recommended adopting the Protocol. *See*: Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 23 September 2012, A/69/387 at [67].
[33] A/RES/3452(XXX), 9 September 1975 (Resolution adopted by the UN General Assembly, Resolution 3452).
[34] May 2013.
[35] September 2015.
[36] April 2016.
[37] August 2000.
[38] *See* OHCHR, Special Rapporteur on torture, available online: <https://www.ohchr.org/en/special-procedures/sr-torture> accessed 20 April 2023.
[39] *Popov v. France*, ECHR, application Nos. 39472/07 and 39474/07, Judgment, 19 January 2012, paras. 91–103; *Mahmundi and Others v Greece*, ECHR, application No. 14902/10, Judgment, 31 July 2012, paras. 61–76.

constitute torture or ill-treatment.[40] Rape in certain conditions can amount to torture, and interference with reproductive rights can amount to ill-treatment.[41]

Although the decisions of the various courts are not binding on Australia as such, principles established by the ECtHR have, for example, been referred to in Australian High Court jurisprudence, which demonstrates their standing domestically.[42]

In practice, it is observed these sources of soft law are considered by NPMs and the SPT in the exercise of their respective mandates.[43] And, because OPCAT obliges States to examine recommendations of the SPT,[44] and the NPM,[45] with a view to implementation, there is a positive obligation to take active steps to follow them.

5. Summary of key legal obligations

A significant body of international obligations, principles and norms spring from the sources of law listed above. Listed below are the legal obligations that have been identified as being central to the overall purpose of the CAT—which states in its Preamble, that is "*to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world*."

These are obligations that the Tasmanian NPM will have regard to when exercising its functions. It is stressed though that they are not the only obligations that the Tasmanian NPM will have regard to. As the office of the Tasmanian NPM is implemented, it will develop comprehensive criteria for different types of deprivation of liberty, expanding on these core obligations considerably, having particular regard to the soft sources of law noted above. These will be known as the Tasmanian NPM's 'Expectations'.

Stakeholders are encouraged to provide feedback on the consultation questions in this paper, which will inform the initial Expectations development process. Draft Expectations will be released for public consultation.

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[40] *Rivière v. France*, ECHR, application No. 33834/03, Judgment, 11 July 2006, paras. 59–77 (official version available in French); *Renolde v. France*, ECHR, application No. 5608/05, Judgment, 16 October 2008, paras. 119–130

[41] *Aydin v Turkey*, European Court of Human Rights, application No. 23178/94, Judgment, 25 September 1997, para 86; *R.R. v Poland*, ECHR, application No. 27617/04, Judgment, 26 May 2011, paras 148–162.

[42] See for example *Macoun v Commissioner of Taxation* [2015] HCA 44 at [81].

[43] *See*: United Kingdom, HM Inspectorate of Prisons, 'Our Expectations', available online: <https://www.justiceinspectorates.gov.uk/hmiprisons/our-expectations/> (accessed 20 April 2023).

[44] Article 12(d). This extends to any guidance provided by the SPT in the form of interpretive materials, which NPMs are also expected to apply in the exercise of their functions. These materials are published by the SPT through its website: https://www.ohchr.org/en/treaty-bodies/spt (accessed 20 April 2023).

[45] Article 22.

A. The obligation to take measures to prevent torture and ill-treatment

There exists an overarching general obligation under international law for Australia to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.[46] Conversely, no circumstances or rationalisation whatsoever can be used to justify the use of torture or ill-treatment,[47] which stems from the prohibition against torture being non-derogable. That is, an absolute and unrestricted human right, initially established under treaty in the ICCPR in 1966.[48]

There are two key obligations which flow from the obligation to prevent torture and ill-treatment, being to educate and to review. Each is discussed briefly below.

i. The obligation to educate

The obligation to take measures to prevent torture includes a specific obligation to educate relevant personnel. Under Article 10 of the CAT, each State Party must

> "ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil and military, medical personnel, public officials and other persons involved in the custody, interrogation or treatment of any individual subject to any form of arrest, detention or imprisonment."

This obligation applies equally to education and information regarding other acts of cruel, inhuman or degrading treatment or punishment.[49] In addition, rules 75 and 76 of the Nelson Mandela Rules specifically apply this obligation to prison staff.

ii. The obligation to review

Australia is obliged to systematically review the rules, instructions, methods and practices used in interrogation, as well as arrangements for custody and treatment of persons in detention (including arrest).[50] While this is expressly aimed at preventing cases of torture, it also forms part of the broader obligation to monitor and review. This obligation applies equally to preventing cases of other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture.

B. The obligation to criminalise torture and ill-treatment

As a State Party to the CAT, Australia must make all acts of torture a specific offence under domestic law, punishable by 'appropriate penalties' taking into account the grave nature of the offence.[51] Australia has enacted Div 274 of the *Criminal Code Act 1995* (Cth), which

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[46] Article 2.1 of the CAT.
[47] Article 2.2; UNGA Declaration Article 3; ICCPR Article 7; Nelson Mandela Rules, Rule 1.
[48] Ratified by Australia in 1980.
[49] Article 16 of the CAT; UNGA Declaration, Article 5.
[50] Article 11 of the CAT.
[51] CAT art 4; *See also* CAT/C/GC/2, Committee against Torture, General Comment No. 2, 24 January 2008, at [8]-[11].

adopts the definition of torture from the CAT and makes torture an offence punishable by 20 years imprisonment. The CAT further requires that Australia extend this offence to acts that attempt to commit torture, or being complicit or participating in torture. However, there are no express offences present in Australian law that address this obligation.

Flowing from this obligation to criminalise torture and ill-treatment are the specific obligations to establish jurisdiction, including geographical, extra-territorial and universal jurisdiction;[52] and to not provide for amnesties and/or pardons for crimes involving torture and ill-treatment.[53]

C. The obligation to investigate and prosecute

Australia has an obligation to conduct prompt and impartial investigations when reasonable grounds to believe that an act of torture has been committed exist.[54] This applies equally to other acts of cruel, inhuman or degrading treatment or punishment.[55] The ICJ in its Judgment in *Belgium v Senegal*, the Court determined that

> It is not sufficient […] for a State party to the Convention to have adopted all the legislative measures required for its implementation; it must also exercise its jurisdiction over any act of torture which is at issue, starting by establishing the facts'.[56]

Importantly in the context of understanding Australia's obligations at a national level, and consistently with Article 7.2 of CAT, the Court determined that it is irrelevant whether the jurisdiction being exercised is national or universal – the same standards apply.[57] The IACHR in *Velasquez-Rodriguez v. Honduras* applying the American Convention on Human Rights found that

> The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.[58]

Guidance on the manner in which investigations of alleged torture ought be conducted is stipulated in the Istanbul Protocol:

> The fundamental principles of any viable investigation into incidents of torture are competence, impartiality, independence, adequate resources, promptness, effectiveness,

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[52] Article 5.1 and 5.2 of the CAT.
[53] Including amnesties and immunities, and procedural restrictions such as statutes of limitations. See CAT/C/GC/3, Committee Against Torture, General Comment No 3 (13 December 2012) at [38]; Istanbul Protocol p 44, para 186.
[54] Article 12 of the CAT; Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 23 September 2012, A/69/387 at [25]; Nelson Mandela Rules, rule 57.3.
[55] Article 16 CAT.
[56] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), Judgment* (International Court of Justice, 20 July 2012), at [85].
[57] *Ibid.,* at [84].
[58] *Velasquez-Rodriguez v. Honduras*, Judgment, (Inter-American Court of Human Rights, 29 July 1988) para. 176.

> thoroughness, sensitivity to gender, age, disability and similarly recognized characteristics, victim involvement and public scrutiny. These elements can be adapted to any legal system and should guide all investigations of alleged torture.

This extends to providing bespoke training and education specifically relating to, and in compliance with, international standards on investigating allegations of torture or ill-treatment.[59]

Of particular interest is the 'soft' obligation relating to monitoring bodies, including national preventive mechanisms, which "while not tasked with investigating complaints, should also be provided with training on the [Istanbul Protocol]. Such bodies should be able to receive confidential allegations of torture or ill-treatment and be mandated to identify issues of concern, which must be raised with the authorities concerned, as part of their regular visits."[60]

Australia's best practice when conducting investigations into allegations of torture and ill-treatment at minimum should comply with the benchmark outlined in the Istanbul Protocol and should apply equally to monitoring bodies. Investigations must be prompt and impartial in order to fully comply with international obligations, with Article 6.2 of the CAT stipulating that at minimum, a preliminary inquiry shall be made "immediately."[61]

With respect to impartiality, Australia must ensure that investigations relating to torture are carried out by an independent and impartial body, which has no institutional links to the alleged perpetrator(s) and is free from bias,[62] such as a properly resourced commission of inquiry or similar procedure.[63]

Under Article 7.1 of the CAT, if a person is alleged to have committed an act of torture, the State in which the person is found must either submit the case for prosecution, or extradite the person within a reasonable timeframe.[64] This is fairly uncontroversial as Australia would apply the Commonwealth prosecution policy to allegations of torture or ill-treatment in the same manner it does to all Commonwealth prosecutions.[65]

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[59] Istanbul Protocol p 50 para 203, referencing Committee against Torture, General Comment No. 3 (2012), para 35; and Inter-American Court of Human Rights, *Espinoza Gonzáles v Peru*, paras 323–327.

[60] Istanbul Protocol p 64 para 262.

[61] See also *Belgium v Senegal* where at [86] the Court interpreted 'immediately' for the purposes of Article 6.2 as requiring "*that steps must be taken as soon as the suspect is identified in the territory of the State, in order to conduct an investigation of that case*." Senegal was found to be in breach of its obligation under Article 6.2 by not immediately initiating a preliminary inquiry as soon as they had reason to suspect Mr. Habré, who was in their territory, of being responsible for acts of torture. Similarly, in *Servellón-García et al. v. Honduras*, Judgment, (Inter-American Court of Human Rights, 21 September 2006) at [119], the court found that the duty to investigate arises "as soon as authorities become aware or have grounds to believe that torture has occurred."

[62] Nelson Mandela Rules, Rule 71.

[63] The Istanbul Protocol referencing the Special Rapporteur, A/HRC/19/61 at [187].

[64] *Belgium v Senegal* at 94–95 and 114–115.

[65] Commonwealth Director of Public Prosecutions Prosecution Policy available at https://www.cdpp.gov.au/prosecution-policy

D. The obligation to protect victims and witnesses and provide redress and compensation

Article 13 of the CAT requires States to take steps to ensure that complainants and witnesses are protected from all ill-treatment or intimidation as a result of making the complaint or giving evidence. States must guarantee rights of victims and witnesses at all stages of the investigation, including the right to lodge complaints, to participate in proceedings, to be protected from threats and harassment.[66] This includes the obligation to implement an effective and impartial complaint-handling mechanism, free from retribution or threat.[67] Article 21 of the OPCAT prohibits any sanction or prejudice against any person or organisation as a result of having communicated information to the NPM.

Article 14 of the CAT requires States to provide legal avenues for redress for any victim of an act of torture, as well as an enforceable right to fair and adequate compensation:

> "Reparation must be victim-oriented, gender-sensitive, adequate, effective, prompt and comprehensive, tailored to the particular needs of the victim(s) and proportionate to the gravity of the harm suffered."[68]

E. Obligation to monitor and review

Australia is obliged to systematically review rules, instructions, methods and practices regarding interrogation, as well as arrangements for custody and treatment of persons under detention and including arrest.[69]

In addition to implementing the Istanbul Protocol principles as best practice, Australia as a matter of course should monitor and ensure the quality of all official evaluations in which torture or ill-treatment is alleged or suspected and take remedial action for non-compliance.[70]

The obligation to monitor extends to an obligation to report, which is emphasised by the Nelson Mandela Rules at Rule 34.[71]

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[66] CAT/C/GC/3, Committee Against Torture, General Comment No 3 (13 December 2012) at [29]-[36]. *See also* Rule 71.3 of the Nelson Mandela Rules, which states that "*steps shall be taken immediately to ensure that all potentially implicated persons have no involvement in the investigation and no contact with the witnesses, the victim or the victim's family.*"

[67] Istanbul Protocol p 5, at [10(k)]; CAT/C/GC/3, Committee Against Torture, General Comment No 3 (13 December 2012) at [2].

[68] Istanbul Protocol p 45, para 186, referencing (Committee against Torture, General Comment No 3 (2012), paras 6–18; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; and African Commission on Human and Peoples' Rights, general comment No. 4.).

[69] Article 11 of the CAT.

[70] At [641].

[71] 'if…professionals become aware of any signs of torture or other cruel, inhuman or degrading treatment or punishment, they shall document and report such cases to the competent medical, administrative or judicial

F. Non-refoulement

The principle of non-refoulement is stated primarily in the 1951 Refugee Convention at Article 33(1).

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Australia is a State Party to the Refugee Convention, though the principle of non-refoulement is also accepted as customary international law.[72] It has since been codified in the CAT as applying explicitly to cases "*where there are substantial grounds for believing that [the person] would be in danger of being subjected to torture.*"[73]

The principle applies equally to cases of extradition. It follows, then, that Australia is under an international obligation to not locate or relocate any person to any State where there is reason to believe they would be subjected to torture. Article 3.2 of the CAT implies that the danger of torture may not need to be proven on an individual basis. Instead, authorities shall take into account (where applicable) *"the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."*

G. The obligation to establish an NPM, and to allow visits by the SPT

Finally, OPCAT requires each State Party to establish *at least* one NPM, and allow visits from the SPT.[74] The creation of the Tasmanian NPM under the *OPCAT Implementation Act 2021* (Tas) forms part of Australia's compliance with this obligation. It is noted that the SPT visited Tasmania in accordance with OPCAT requirements in 2022.

Associated with this obligation is a requirement that Australia prevent reprisals against any person or organisation for having communicated with the SPT or NPM. In Tasmania, section 36 of the *OPCAT Implementation Act 2021* makes this a specific offence:

> **36. Protection from reprisal**
>
> A person must not –
>
> (a) prejudice, or threaten to prejudice, the safety or career of; or
> (b) intimidate or harass, or threaten to intimidate or harass; or
> (c) do any act that is, or is likely to be, to the detriment of; or

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authority. Proper procedural safeguards shall be followed in order not to expose the prisoner or associated persons to foreseeable risk of harm.'

[72] See UNHCR Advisory opinion on the extraterritorial application of non-refoulement obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (Geneva, 2007), at [14]-[16].

[73] At Art 3.1.

[74] The requirements of these obligations are set out in detail across OPCAT. General background information is provided on the Tasmanian NPM's webpage: www.npm.tas.gov.au

(d) incite or permit another person to take any of the actions specified in paragraph (a) , (b) or (c) in relation to –

another person because the other person has provided, is providing or may in the future provide information, whether true or false, to a Tasmanian national preventive mechanism or the Subcommittee for the purposes of this Act.