



# Joint Submission

## Article 4 of the Optional Protocol to the Convention Against Torture

Submission to the call for comments on the draft General Comment of the Subcommittee on Prevention of Torture (SPT) on Article 4 of the Optional Protocol to the Convention Against Torture (OPCAT)

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### Acknowledgment of Country

The authors would like to acknowledge the traditional custodians of the lands on which this report has been written, reviewed and produced, whose cultures and customs have nurtured and continue to nurture this land since the Dreamtime. We pay our respects to their Elders past, present and future. This is, was and always will be Aboriginal land.

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## About the authors

The following Organisations of Persons with Disabilities (OPDs) worked together to produce this joint submission:

[Women with Disability Australia](#) (WWDA) is the National Disabled People's Organisation (DPO) and National Women's Alliance (NWA) for women, girls, feminine identifying, and non-binary people with disability in Australia. As a DPO and an NWA, WWDA is governed, run, led, staffed by, and constituted of, women, girls, feminine identifying, and non-binary people with disability.

[People with Disability Australia](#) (PWDA) is a leading disability rights advocacy and representative organisation made up of, and led by, people with disability. PWDA is the only Australian national cross-disability organisation representing the interests of people with all kinds of disability. We are a not-for-profit and non-government organisation, and our membership is comprised of people with disability and organisations primarily constituted by people with disability.

The drafting of this joint submission was also supported by:

- Associate Professor Dinesh Wadiwel, Faculty of Arts and Social Sciences, University of Sydney.
- Associate Professor Linda Steele, Faculty of Law, University of Technology Sydney.

Both PWDA and WWDA have consultative status with the United Nations Economic and Social Council (ECOSOC).

## Introduction

Thank you for the opportunity to comment on *Draft General Comment No. 1 on Places of Deprivation of Liberty* (article 4) (from here on “Draft General Comment”). This submission specifically draws attention to the issues relevant to people with disability in interpreting the obligations on States parties in Article 4 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

## Background & Context

Historically, people with disability have been subject to systemic forms of deprivation of liberty through institutionalisation and segregation. Many jurisdictions today continue regimes of institutionalisation and segregation of people with disability, often, but not exclusively, in health, social care, forensic and educational contexts.<sup>1</sup>

In most cases, these practices of deprivation of liberty are at odds with general human rights obligations to prevent arbitrary detention. This is recognised in Article 19 of the Convention on the Rights of Persons with Disabilities (CRPD), which states that people with disability have the right to live independently and be included in the community. It is also recognised in Article 14 of the CRPD which states that people with disability have the right to freedom from arbitrary deprivation of liberty, including that which is based on their disability.

In many jurisdictions, third parties are authorised by law to consent to these practices of deprivation and override the wishes of people with disability (‘substitute decision-making’). People with disability are denied the right to legal capacity in “a discriminatory manner under substitute decision-making regimes such as guardianship, conservatorship and mental health laws that permit forced treatment.”<sup>2</sup> This context is recognised in Article 12(3) of the CRPD which obliges States parties to “take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.”

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<sup>1</sup> CYDA, WWDA, NEDA, AFDO, Inclusion Australia, DANA, FPDN, and PWDA. *Segregation of People with Disability is Discrimination and Must End: Position paper*. September 2020. At: [https://dpoa.org.au/wp-content/uploads/2020/11/Segregation-of-People-with-Disability\\_Position-Paper.pdf](https://dpoa.org.au/wp-content/uploads/2020/11/Segregation-of-People-with-Disability_Position-Paper.pdf)

<sup>2</sup> CRPD/C/GC/1

As shall be discussed, substitute decision-making regimes often provide the context for the torture and ill-treatment experienced by people with disability. In this context, *General Comment No.1 of the Committee on the Rights of Persons with Disabilities* notes that substitute decision making regimes “must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others.”<sup>3</sup>

While many people with disability experience deprivation of liberty in health, social care, forensic and educational contexts, it is also important to note that people with disability are also represented, and in some cases over-represented, in other custodial contexts, including within prison systems.

In Australia, First Nations children and adults are also overrepresented in prisons, and there are a range of intersectional issues that relate to First Nations people with disability.<sup>4</sup> It is also important to note that forms of restraint, seclusion and forced treatment (discussed below) occur in a diverse variety of settings including, for example, in education contexts, where children with disability may “not be permitted to leave at will”.

Many people with disability are subject to forms of restraint, seclusion and forced treatment that restrict the movement of people with disability. These practices are at odds with obligations to prevent torture and ill-treatment. These practices can include, but are not limited to, chemical, mechanical, physical and environmental restraint and seclusion, forced sterilisation, forced contraception, forced abortion, menstrual suppression and anti-libidinal medication, unnecessary surgery or treatment on intersex people, and involuntary mental health treatment.

The Committee Against Torture, for example, has urged Australia to cease these practices,<sup>5</sup> as have other human rights treaty monitoring bodies to the international treaties to which Australia is a party.<sup>6</sup>

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<sup>3</sup> CRPD/C/GC/1

<sup>4</sup> Australian Bureau of Statistics (2022), [Prisoners in Australia](#), ABS Website, accessed 11 April 2023. Bower C et al, ‘Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia’, *BMJ Open*, accessed 11 April 2023. See also: Sarah Collard. ‘Banksia Hill: autistic teenage girl ‘treated like a dog’ at detention centre, class action alleges.’ *The Guardian*. 13 Jan 2023. At: <https://www.theguardian.com/australia-news/2023/jan/13/banksia-hill-teenage-girl-with-autism-treated-like-a-dog-at-detention-centre-class-action-alleges>

<sup>5</sup> CAT/C/AUS/CO/6 [p.40]

<sup>6</sup> See: CRPD/C/AUS/CO/2-3 [p.24, 29, 30, 34]; CCPR/C/AUS/CO/6 [p.24,26]; CEDAW/C/AUS/CO/8 [p.26(b)(c)(d)]; E/C.12/AUS/CO/5 [p.36, 46]; CRC/C/AUS/CO/5-6 [p.30,31,43]; CERD/C/AUS/CO/18-20 [p.28]. See also: Juan E. Mendez, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 22<sup>nd</sup> sess,

In most cases, these practices have legal authorisation. In its guidelines on Article 14 of the CRPD, the Committee on the Rights of Persons with Disabilities has called upon States parties to eliminate “the use of forced treatment, seclusion and various methods of restraint in medical facilities, including physical, chemical and mechanical restraints.” Relevant to the Draft General Comment, the CRPD Committee notes that these “practices are not consistent with the prohibition of torture and other cruel, inhuman or degrading treatment or punishment of persons with disabilities.”<sup>7</sup>

## Guidance in the General Comment on Disability

At present the Draft General Comment, while referring to a range of circumstances relevant to people with disability, does not explicitly discuss the unique factors which underpin and shape the deprivation of liberty and treatment of people with disability.

Of relevance, and as noted in the Draft General Comment, in many jurisdictions States parties have interpreted Article 4 of the OPCAT in a narrow way which has excluded several settings (including health and social care institutions), from the monitoring of National Preventative Mechanisms (NPMs). Given this context, we strongly urge the SPT to consider dedicated guidance within the General Comment on the obligations contained in Article 4 of the OPCAT that are relevant to people with disability.

The SPT itself, has said that “the duty to prevent is “wide-ranging” and has indicated that the content of that duty is not static since “the Committee’s understanding of and recommendations in respect of effective measures are in a process of continual evolution” and so are “not limited to those measures contained in the subsequent articles 3 to 16.”<sup>8</sup>

We also strongly recommend a wider interpretation of settings that move beyond health and social care, noting that some people with disability, as a result of substitute decision-making regimes, use of restrictive practices and forced treatment, may be effectively “not permitted to leave at will” within other settings such as education or segregated employment services.

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Agenda Item 3, UN Doc A/HRC/22/53 (1 February 2013) para 64. See also: Joint statement by the Committee on the Rights of Persons with Disabilities (CRPD) and the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW): [Guaranteeing sexual and reproductive health and rights for all women, in particular women with disabilities](#), 29 August 2018.

<sup>7</sup> A/72/55 (2017). See also: CRPD/C/AUS/CO/2-3 [p.24, 29, 30, 34].

<sup>8</sup> CAT/OP/12/6 [p.2]. See also: CAT/OP/27/1 [p.14].

We note that the Draft General Comment at present does not contain a “gender lens” and thus does not draw attention to the particular implications of Article 4 of the OPCAT for women, girls, feminine identifying and non-binary people. For example, and relevant to women and girls with disability, the Committee on the Rights of Persons with Disabilities has observed that “women with disabilities are subjected to high rates of forced sterilization” and that some jurisdictions “have higher rates of imposing substitute decision-makers on women than on men.”<sup>9</sup>

The SPT has acknowledged the lack of a gender-approach in addressing the prevention of torture and ill treatment,<sup>10</sup> recognising that torture and ill treatment of women occurs in a variety of situations... and that it is “the responsibility of States parties to prevent acts of torture and ill-treatment in all contexts of deprivation or restriction of liberty...”<sup>11</sup>.

We recommend that the General Comment include specific focus on the implications of Article 4 of the OPCAT for women, girls, feminine identifying and non-binary people.

Finally, we note that the Draft General Comment makes an explicit reference to “privately owned or rented housing for persons with intellectual disabilities” (p9). We recommend this be amended to “persons with disabilities,” as the example is applicable to all people with disability, and thus risks a narrower interpretation in its current form.

## **Substitute decision-making regimes and context of deprivation of liberty**

As detailed above, in many jurisdictions people with disability are subject to substitute decision-making regimes such as guardianship, conservatorship and health laws that permit forced treatment which are at odds with obligations to prevent torture and ill-treatment.

As noted in the Draft General Comment, Article 4 of the OPCAT contains a number of elements which pertain to the definition of “deprivation of liberty”; namely, as described in Article 4(2) of the OPCAT as “any form of detention or imprisonment or the placement of a

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<sup>9</sup> CRPD/C/GC/1

<sup>10</sup> CAT/OP/27/1 [p.5]

<sup>11</sup> CAT/OP/27/1 [p.13]

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.”

As noted in the Draft General Comment, these elements must be read with Article 4(1) of the OPCAT. It is also worth emphasising that Article 4 of the OPCAT must be read in context of Article 1 of the OPCAT which sets out the purpose of the instrument, namely, to establish a monitoring process of those deprived of their liberty to prevent torture and other cruel, inhuman or degrading treatment or punishment.

In this context, while “places of detention” provide a focus point for the visit of mechanisms, it must be emphasised that the purpose of the OPCAT is to establish monitoring processes to prevent torture and ill-treatment. For this reason, a wide, rather than narrower, interpretation of “places of detention” is called for. The SPT has stated that “the obligation to prevent torture and ill- treatment 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...” ”<sup>12</sup>

Substitute decision-making regimes interact with the definition of “deprivation of liberty” described in Article 4. Substitute decision-making arises as a result of “an order given by a public authority or at its instigation or with its consent or acquiescence.” Substitute decision-making regimes are recognised as a pathway to the “deprivation of liberty” described in Article 4 (2).

In some jurisdictions, substitute decision-making regimes effectively prevent people with disability the opportunity to “leave at will.” For example, they might enable doors to be locked or for facility staff to contact police to forcibly return people who leave. In the context of institutionalisation and segregation, substitute decision-making regimes can result in circumstances where people with disability are obliged to reside in living arrangements against their preferences.

Finally, many people with disability are subject to forms of restraint, seclusion and forced treatment through the consent of a substitute decision maker. In these circumstances

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<sup>12</sup> CAT/OP/27/1 [p.14]



substitute decision-making regimes point to a context or set of arrangements that place a person at risk of torture and ill-treatment in a range of public and private settings.

As a result, we recommend a wide interpretation of the concept of “places of detention” to take into account the role of disability-specific legislative frameworks and substitute decision-making in establishing a context or set of arrangements that can give rise to torture and other cruel, inhuman or degrading treatment or punishment.

In a concrete sense, we recommend that all settings where persons are subject to substitute decision-making regimes such as guardianship and conservatorship laws, and mental health and forensic mental health laws that permit involuntary detention and/or forced treatment should be considered relevant to monitoring arrangements described in the OPCAT.

We believe that this is consistent with the stated understanding expressed in the Draft General Comment that “the concept of places of deprivation of liberty is not fixed or limited and should allow for novel circumstances of deprivation of liberty that may arise in new contexts.”

## **Legal authorisation that gives rise to torture and ill-treatment**

As indicated above, in many jurisdictions there is legal authorisation for restraint, seclusion and forced treatment. In so far as this treatment is applied on a differential basis against people with disability, it can give rise to discrimination, at odds with both the non-discrimination principle contained in Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and Article 5(2) of the CRPD, which mandates that States parties “shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.”

Arguably this legal authorisation creates a perverse challenge for attempts to eliminate torture and ill-treatment against people with disability. In many cases Article 4 of the OPCAT responds to settings where domestic legal arrangements formally prohibit torture and ill-treatment, in line with the obligations expressed in the CAT.

However, in the case of restraint, seclusion and forced treatment of people with disability, OPCAT monitoring must contend with places of detention where these practices have been granted legal and social authorisation.

The challenge is that this torture and ill-treatment is not perpetrated by individuals engaging in illegal conduct but is instead legal under domestic law and is routine and widespread practice designed into service systems, funded by governments and supported by legislative frameworks. If torture prevention focuses too narrowly on illegal conduct, the legal, systemic and normalised practices experienced by people with disability will be overlooked by OPCAT monitoring and ultimately condoned.

Article 4(1) states that the visits by mechanisms outlined in Articles 2 and 3 “shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.”

We recommend that the General Comment includes guidance on how mechanisms should respond where domestic legal arrangements authorise forms of torture and ill-treatment that are at odds with the obligations imposed by the CAT.

We hope the above assists the SPT, and that the SPT will favourably consider this submission in redrafting the General Comment.