



Australian
Human Rights
Commission

National Preventive Mechanisms: a formal safeguard for people with disability

Submission to the Royal Commission into Violence, Abuse, Neglect
and Exploitation of People with Disability

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Contents

1	Introduction	3
2	Summary of recommendations	3
3	OPCAT as a formal safeguard	6
4	Australia’s implementation of OPCAT	6
5	OPCAT and the Convention on the Rights of Persons with Disabilities (CRPD)	7
6	Deprivations of liberty	8
7	A disability inclusive and aware NPM network.....	11

1 Introduction

1. The Australian Human Rights Commission (Commission) welcomes the opportunity to provide this submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Royal Commission).
2. The Commission is Australia's National Human Rights Institution, with recognised independent status and roles in United Nations human rights fora. The Commission's purpose is to provide independent and impartial services to promote and protect human rights and fundamental freedoms.
3. The Commission undertakes a range of policy development and research tasks that aim to promote compliance with Australia's human rights obligations, while also investigating and conciliating complaints of unlawful discrimination and breaches of human rights.
4. The Royal Commission provides an important opportunity to contribute to preventing and redressing violence, abuse, neglect and exploitation of people with disability. The Commission welcomes the endorsement of a human rights-based approach in the Royal Commission's terms of reference.
5. The Commission is well placed to assist the Royal Commission by providing a human rights framework to guide the development of findings and recommendations within the Terms of Reference. The Commission has provided written submissions in response to the Royal Commission's *Education and Learning*, *Criminal Justice System*, and *Employment Issues Papers*.
6. The present submission will complement a future final submission to be made by the Commission on human rights and Australia's compliance with the United Nations *Convention on the Rights of Persons with Disabilities* (the CRPD).
7. This submission highlights the vital role of the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the OPCAT) in creating a proactive and formal safeguard to preventing violence, abuse, neglect, and exploitation of people with disability in situations of deprivation of liberty.

2 Recommendations

8. The Commission makes the following recommendations.

Recommendation 1

'Secondary' places of detention such as disability-specific and related institutions must be included within the ambit of the functions of all

National Preventative Mechanisms: a formal safeguard for people with disability, 23 September 2022

National Preventive Mechanisms. The implementation of such a broad reaching scope must be fast-tracked by the Australian and State and Territory governments.

Recommendation 2

National Preventive Mechanisms should consider prioritising ‘secondary’ places of detention, not only for monitoring and inspections purposes – but also in support of efforts to end disability-based detention.

Recommendation 3

National Preventive Mechanisms should prioritise disability-based concerns which are applied to people with disability in detention, including:

- (a) non-consensual treatments and practices;
- (b) behaviour modification methods;
- (c) the use of restrictive practices, such as physical, chemical and mechanical restraints, and seclusion; and
- (d) indefinite detention.

Recommendation 4

People with disability and their representative organisations must participate in the co-design, or at the least be actively engaged in, decisions around design, development, and implementation of National Preventive Mechanisms across Australia.

Co-design within each National Preventive Mechanism should include:

- (a) inclusion in formal advisory groups;¹
- (b) the use of peer monitors with disability to conduct inspections and make reports;²

- (c) and active engagement with people with disability and their representative organisations to develop the monitoring criteria, the role and make-up of inspection teams and decision making regarding which places of detention should be prioritised.³

Recommendation 5

The network of National Preventive Mechanisms across the Commonwealth and State and Territory governments should engage directly with people with disability and their representative organisations in the National Preventive Mechanisms work.

Recommendation 6

Any formal National Preventive Mechanism advisory panel should include people with disability and representative organisations in its membership.

Recommendation 7

National Preventive Mechanisms must establish a robust and formal feedback mechanism allowing people with disability in all forms of detention to provide information and experiences – with strong protections for anonymity. Such a mechanism must also allow for feedback to be provided in a variety of communication forms.

Recommendation 8

A disability action plan should be developed to ensure that all National Preventive Mechanisms conduct themselves in an inclusive, accessible and non-discriminatory way. Specifically, the organisations designated as NPMs in each jurisdiction should develop and lodge a Disability Action Plan with the Commission – in line with Part 3 of the *Disability Discrimination Act 1992* (Cth).

Recommendation 9

National Preventive Mechanisms must avoid reliance on status quo arrangements in their design – additional legislated powers and improved resources are likely to be necessary.

Recommendation 10

National Preventive Mechanisms must have the capabilities, expertise and resourcing necessary to enable people with disability to engage in NPM visits. This will mean making reasonable adjustments, and providing communication supports and supported decision-making.

Recommendation 11

The network of National Preventive Mechanisms should be required to provide data to any relevant Outcomes Framework associated with Australia's Disability Strategy 2021-2031 and the National Disability Data Asset.

3 OPCAT as a formal safeguard

9. OPCAT aims to promote better adherence to the substantive human rights obligations contained in the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the CAT). The inspection processes mandated by OPCAT are directed towards ensuring that conditions of detention, wherever people are deprived of their liberty, meet the requirements in CAT. In other words, CAT and OPCAT combine to create a system of accountability.⁴
10. Under OPCAT, a State Party agrees to establish an independent National Preventive Mechanism (NPM) to conduct inspections of all places of detention and closed environments. The state party also agrees to inspections of places of detention by the United Nations Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the SPT).⁵
11. An NPM is an independent oversight mechanism focused on proactively preventing torture and other cruel, inhuman, or degrading treatment – primarily by monitoring and inspecting places of detention.⁶
12. Such monitoring and inspections ensure that NPMs consider risk factors and systematic issues, and then put forth recommendations to address underlying causes of mistreatment.⁷
13. The NPM's proactive monitoring and inspection functions will help to provide assurances that facilities are run properly and safely for people with disability. In doing so, OPCAT enables a light to be shone on the conditions experienced by people in detention. This is paramount for people confined to disability specific and related institutions.

4 Australia's implementation of OPCAT

14. On 21 December 2017, the Australian Government ratified OPCAT,⁸ a significant step towards establishing enhanced oversight of Australian places of detention, and improvement in conditions.
15. Upon ratification, Australia immediately made a declaration under Article 24 of OPCAT, delaying its obligation to establish an NPM for three years.⁹ This extension was scheduled to formally end on 20 January 2022.

16. On 20 December 2021, the Australian Government formally requested a postponement for an additional year. The main reasons cited for the request were the COVID-19 pandemic and considerations relating to the country's federal system of government. The formal request was granted, and 20 January 2023 was set as the new date for compliance.¹⁰
17. The Australian Government has elected to adopt a multiple-body monitoring system with the Commonwealth, States and Territories asked to designate their own NPM(s) within the relevant jurisdictions. The Office of the Commonwealth Ombudsman has been nominated by the Australian Government as the NPM Coordinator, being tasked with coordinating the Australian NPM Network.¹¹
18. At the time of writing, only four jurisdictions, in addition to the Australian Government, have nominated their NPMS. Others have proposed but not yet established their NPMs. New South Wales, Queensland, and Victoria have yet to designate their NPMs.
19. Despite ratifying OPCAT nearly half a decade ago, the subsequent delays to implementation in Australia – at the federal, state and territory levels – have been disappointing.
20. The Commission considers progress has been too slow and that immediate action is needed to fast-track implementation to ensure that Australia complies with the 20 January 2023 deadline.
21. The SPT will visit Australia between the 16-27 October 2022.¹² The delay in full compliance is likely to be a matter of some concern.

5 OPCAT and the Convention on the Rights of Persons with Disabilities (CRPD)

22. OPCAT replicates and draws on some of the protections contained in the CRPD. For instance, the existence of many 'secondary' places of detention where confinement is on the basis of a person's actual, or perceived, disability conflicts with Article 14(b) of the CRPD which provides that disability shall not justify the deprivation of liberty.
23. Article 15 of the CRPD also reinforces the right of people with disability to freedom from torture or cruel, inhuman, or degrading treatment. This right is critical to realising other CRPD rights, including:

- (a) the rights to equal recognition before the law (Article 12 of the CRPD)
- (b) access to justice (Article 13 of the CRPD)
- (c) freedom from exploitation and abuse (Article 16 of the CRPD)
- (d) bodily and mental integrity (Article 17 of the CRPD) and
- (e) the right to live independently and be included in the community (Article 19 of the CRPD).

24. In its concluding observations in 2019, the UN Committee on the Rights of Persons with Disabilities made recommendations in relation to Australia's compliance with the above CRPD articles. In relation to compliance with Article 14 of the CRPD, the Committee raised serious concerns in relation to the following practices: the arbitrary and indefinite detention of people with disability, ongoing practices of compulsory treatment, the absence of data on the number of people found unfit to plead, and the use of restraints on children with disabilities.¹³

25. Through regular monitoring, OPCAT represents an opportunity to drive compliance with the CRPD.

6 Deprivations of liberty

26. Fundamental to the implementation of OPCAT in any jurisdiction is the definition or scope of places of detention because this determines where NPM inspectors will carry out their visits.

27. The Australian Government has opted for a 'progressive realisation' of OPCAT, whereby NPMs will prioritise activities in 'primary' places of detention, as opposed to all places where people may be deprived of their liberties. 'Primary places of detention' is defined by the Australian Government as including:

- (a) adult prisons
- (b) juvenile detention facilities (excluding residential secure facilities)
- (c) police lock-up or police station cells (where people are held for equal to, or greater than, 24hrs)
- (d) closed facilities or units where people may be involuntarily detained by law for mental health assessment or treatment (where people are held for equal to, or greater than, 24hrs)
- (e) closed forensic disability facilities or units where people may be involuntarily detained by law for care (where people are held for equal to, or greater than, 24hrs)
- (f) immigration detention centres, and
- (g) military detention facilities.¹⁴

28. The term 'place of detention' is not defined by OPCAT; however, Article 4 states that it applies to places where 'people are deprived of their liberty', in a place that falls within the jurisdiction and control of the state, and where the deprivation occurs by virtue of an order of a public authority, or with its consent or acquiescence.

29. The Royal Commission has by now received compelling evidence to show that people with disability are significantly over-represented in 'primary' sites of detention, such as in the criminal justice system and immigration detention centres.¹⁵

30. There are also numerous other 'secondary' places of detention where individuals with disability may be deprived of their liberties.

31. These settings include, but may not be limited to:

- (a) compulsory care facilities
- (b) disability group homes
- (c) closed community-based accommodation and residences for people with disability
- (d) 'time out' and seclusion rooms and segregated areas in educational settings
- (e) rehabilitation facilities
- (f) aged care facilities, dementia units and nursing homes¹⁶
- (g) emergency departments and hospitals
- (h) child welfare institutions and out of home care arrangements
- (i) special schools and/or
- (j) boarding schools.

32. There is evidence that rates of violence in 'secondary' detention settings are unacceptably high, indicating that the current levels of monitoring and oversight are insufficient.¹⁷ There is also evidence that people with disability experience higher rates of all forms of violence, torture and ill-treatment.¹⁸

33. There may be circumstances where the detention of an individual may, as a result of internal detention practices, lead to impairment and disability.¹⁹

34. Additionally, it may also be the case that in these 'secondary' settings people are less likely to complain or have access to, or awareness of, any complaint mechanism.

35. Article 4 of the OPCAT imposes obligations on Australia to allow NPMs to visit any place under its jurisdiction and control where persons are, or may be, deprived of their liberty.

36. The UN SPT considers that the preventative nature of OPCAT requires a broad interpretation of Article 4 to maximise the preventive impact of the work of NPMs in places of detention.²⁰

37. 'Deprivation of liberty' should therefore include any form of confinement in which a person is not permitted to leave at will by order of any judicial, administrative, or other authority.
38. The Commission considers that the best approach for Australia is simply to adopt an inclusive approach, consistent with Articles 1 and 4 of OPCAT. This will uphold OPCAT's aim to strengthen protections for people deprived of their liberty.
39. This is also consistent with the approach of the SPT – as it has visited a wide range of 'secondary' places of detention.²¹
- 40. Recommendation 1: 'Secondary' places of detention such as disability-specific and related institutions must be included within the ambit of the functions of all National Preventive Mechanisms. The implementation of such a broad reaching scope must be fast-tracked by the Australian and State and Territory governments.**
- 41. Recommendation 2: National Preventive Mechanisms should consider prioritising 'secondary' places of detention, not only for monitoring and inspections purposes – but also in support of efforts to end disability-based detention.**

7 A disability inclusive and aware NPM network

42. In support of OPCAT's wide mandate to protect people with disability in 'primary' or 'secondary' places of detention, the Commission notes that there has been little engagement by the federal and state and territory governments with disability rights groups and individuals with disability.
43. Articles 4 and 33 of the CRPD contain obligations to ensure that people with disability, and their representative organisations, are consulted and actively involved in the development of policy and legislation that affects them.
44. Accordingly, decisions concerning the design, development, and implementation of NPMs must be co-designed by, or at a minimum actively involve, people with disability and relevant stakeholder bodies.
45. It is disappointing that there has been minimal consultation with stakeholders from disability representative groups, particularly considering both the requirement for NPMs to monitor and inspect 'secondary' places of detention and the slow progress towards implementation in Australia.²²
46. That the disability sector has not been sufficiently consulted in the implementation of OPCAT was noted as a serious concern in relation to compliance with Article 15 of the CRPD in the UN Committee on the Rights of

National Preventative Mechanisms: a formal safeguard for people with disability, 23 September 2022

Persons with Disabilities concluding observations. A recommendation was made by the Committee to ensure that organisations of persons with disabilities are engaged in the establishment and work of the NPMs.

47. A disability inclusive and aware NPM network will enable Australia to fulfil its obligations under the CRPD and OPCAT, while moving towards ending disability-based detention. This is of the utmost importance in the context of growing evidence that the rights of people with disability to be free from involuntary treatment, violence, torture, and ill-treatment are frequently breached.²³

48. The NPM network must be disability-inclusive to safeguard against risks which are unique to people with disability in all forms of detention.

49. Recommendation 3: National Preventive Mechanisms should prioritise disability-based concerns which are applied to people with disability in detention, including:

- (a) **non-consensual treatments and practices;**
- (b) **behaviour modification methods;**
- (c) **the use of restrictive practices, such as physical, chemical and mechanical restraints, and seclusion; and**
- (d) **indefinite detention.**

50. It is vital that the voices, expertise, and experiences of people with disability are incorporated into NPMs – including in their standards, mechanisms, inspection teams and monitoring efforts. This requires significant consultation with the relevant bodies and people with disability, which to date has not meaningfully occurred.

51. Input from the necessary stakeholders and providing NPMs with a broad mandate to cover ‘secondary’ settings will ensure NPMs enable Australia to meet its obligations under the CRPD.

52. Recommendation 4: People with disability and their representative organisations must participate in the co-design, or at the least be actively engaged in, decisions around design, development, and implementation of National Preventive Mechanisms across Australia.

Co-design within each National Preventive Mechanism should include:

- (a) **inclusion in formal advisory groups;**²⁴
- (b) **the use of peer monitors with disability to conduct inspections and make reports;**²⁵
- (c) **and active engagement with people with disability and their representative organisations to develop the monitoring criteria, the role and make-up of inspection teams and decision making regarding which places of detention should be prioritised.**²⁶

53. Recommendation 5: The network of National Preventive Mechanisms across the Australian and State and Territory governments should engage directly with people with disability and their representative organisations in the National Preventive Mechanisms work.

54. Recommendation 6: Any formal National Preventive Mechanism advisory panel should include people with disability and representative organisations in its membership.

55. Recommendation 7: National Preventive Mechanisms must establish a robust and formal feedback mechanism allowing people with disability in all forms of detention to provide information and experiences – with strong protections for anonymity. Such a mechanism must also allow for feedback to be provided in a variety of communication forms.

56. Recommendation 8: A disability action plan should be developed to ensure that all National Preventive Mechanisms conduct themselves in an inclusive, accessible and non-discriminatory way. Specifically, the organisations designated as NPMs in each jurisdiction should develop and lodge a Disability Action Plan with the Commission – in line with Part 3 of the *Disability Discrimination Act 1992 (Cth)*.

57. In establishing its NPMs, Australia can also learn from good practice of existing statutory bodies such as complaints bodies and Community Visitors Programs that have a role in safeguarding the rights of people with disability.

58. However, present arrangements will not be sufficient in fulfilling the mandate of the NPM, and additional legislated powers and improved resources will be necessary.

59. Recommendation 9: National Preventive Mechanisms must avoid reliance on status quo arrangements in their design – additional legislated powers and improved resources are likely to be necessary.

60. NPMs must not view disability as a separate, specialist issue to be dealt with by other regulatory bodies or stakeholders. Rather, NPMs should ensure that

National Preventative Mechanisms: a formal safeguard for people with disability, 23 September 2022

the necessary capabilities and expertise are embedded across the entirety of their work to ensure it is truly inclusive of people with disability and able to effectively safeguard against risks which are unique to people with disability in all forms of detention.

61. NPMs will be required to support people with disability to engage in visits. This will be fundamental for visits made to people with cognitive impairments, who may require specialist communication supports or supported decision-making.

62. Recommendation 10: National Preventive Mechanisms must have the capabilities, expertise and resourcing necessary to enable people with disability to engage in National Preventive Mechanisms visits. This will mean making reasonable adjustments, and providing communication supports and supported decision-making.

63. By nature of their preventive role, the NPMs will be well placed to build on existing efforts for law reform to better protect and promote the rights of persons with disability. For example, NPMs could contribute to an increased release of data concerning people with disability in detention or those who will possibly be deprived of their liberty, including people found unfit to plead. This could be related to an Outcomes Framework developed under Australia's Disability Strategy 2021–2031 or the National Disability Data Asset.²⁷

64. NPMs could also make substantial contributions to the realisation of commitments to reduce and eliminate the use of restrictive practices in disability and mental health settings.

65. The NPM network should involve people with disability in all aspects of its work.

66. The inclusion of such stakeholders would enhance the credibility and visibility of NPMs among people with disability, ensure that NPMs are equipped to respond to disability-specific issues, while also providing a useful mechanism for social and political reform.²⁸

67. Recommendation 11: The network of National Preventive Mechanisms should be required to provide data to any relevant Outcomes Framework associated with Australia's Disability Strategy 2021-2031 and the National Disability Data Asset.

Endnotes

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- ¹ An example of this is found in the Norwegian NPM which has a formal advisory group with representatives including the Norwegian Association for Persons with Development Disabilities, The Norwegian Association of Youth Mental Health and The Norwegian Research Network on Coercion in Mental Health Care <<https://sivilombudsmannen.no/en/torturforebygging/the-advisory-committee/>>.
- ² A recent example of this is the inclusion of a disability expert by experience in the ACT Inspector of Correctional Services 2020 Healthy Centre Review of Bimberi Youth Justice Centre <https://www.ics.act.gov.au/_data/assets/pdf_file/0008/1779866/FINAL-ACT-ICS-Bimberi-Healthy-Centre-Review-June-2021_FA_tagged.pdf>.
- ³ The Committee on the Rights of Persons with Disabilities drew attention to this issue in its concluding observations in 2019, urging Australia to: 'Ensure that organizations of persons with disabilities can effectively engage in the establishment and work of the national preventive mechanism'. (CRPD/C/AUS/CO/2-3) [29 (c)]
- ⁴ Australian Human Rights Commission, 'Implementing OPCAT in Australia', (Report: June 2020) 47.
- ⁵ OPCAT art 4(1).
- ⁶ Association for the Prevention of Torture and the Inter-American Institute of Human Rights, 'Optional Protocol to the UN Convention against Torture: Implementation Manual' (Manual, 2010) 12.
- ⁷ Ibid 12-13.
- ⁸ Australia signed the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT) on 19 May 2009.
- ⁹ United Nations, United Nations Treaty Collection: 'Declarations and Reservations: 9. b Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations' (18 December 2002), <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&clang=en#EndDec>.
- ¹⁰ United Nations Committee Against Torture. 'Decision adopted by the Committee on the request submitted by Australia under Article 24(2) of the Optional Protocol to the Convention' (CAT/C/73/3).
- ¹¹ See <[Monitoring places of detention - OPCAT - Commonwealth Ombudsman](#)>.
- ¹² See <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/CountryVisits.aspx?SortOrder=Chronological>
- ¹³ CRPD/C/AUS/CO/2-3
- ¹⁴ Commonwealth Ombudsman, 'Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)' (Report, September 2019) 8.
- ¹⁵ Eileen Baldry, 'Disability at the Margins: Limits of the Law' (2014) 23(3) Griffith Law Review 370, 370; Ngila Bevan, 'Consideration of the 4th and 5th Reports of Australia by the Committee to the Convention Against Torture' (Submission, People with Disability Australia, October 2014) 22; Ngila Bevan and Therese Sands, 'Submission to the Senate Inquiry into Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia' (Submission, Australian Cross Disability Alliance, April 2016) 26.
- ¹⁶ The Commonwealth government has stated it considers aged care facilities as outside the scope of OPCAT. See Attorney General's Department Senate Standing Committee on Legal and Constitutional Affairs, Supplementary Budget Estimates 2019-20 (LCC-SBE19-141-OPCAT-National Preventive Mechanism) (4 November 2019). This is despite almost 88% of people living

in aged care facilities having a physical disability and 73% have a psychosocial disability. See Australian Bureau of Statistics, 'A Profile of People Living in Residential Aged Care in Australia' (Information Sheet, 2018) 1.

- ¹⁷ Community Affairs References Committee, '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' (Report, the Senate, November 2015) 45.
- ¹⁸ See, e.g., Disabled People's Organisation's Australia, 'Submission to the Committee on the Rights of Persons with Disabilities List of issues [Australia] to be adopted during the 18th Session of the Committee on the Rights of Persons with Disabilities' (Submission, June 2017).
- ¹⁹ See generally Janette Green and Kathy Eagar, 'The health of people in Australian immigration detention centres' (2010) 192(2) *Medical Journal of Australia* 65.
- ²⁰ The United Nations Subcommittee on the Prevention of Torture, Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment UN Doc CAT/C/57/4 (22 March 2016) 19 [1]-[3].
- ²¹ Meredith Lea et al, 'A Disability Aware Approach to Torture Prevention? Australian OPCAT ratification and Improved Protections for People with Disability' (2018) 24(1) *Australian Journal of Human Rights* 70, 74.
- ²² The Committee on the Rights of Persons with Disabilities. Concluding observations on the combined second and third periodic reports of Australia. (CRPD/C/AUS/CO/2-3) [29 (c)]
- ²³ Ngila Bevan and Therese Sands, 'Submission to the Senate Inquiry into Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia' (Submission, Australian Cross Disability Alliance, April 2016) 13.
- ²⁴ An example of this is found in the Norwegian NPM which has a formal advisory group with representatives including the Norwegian Association for Persons with Development Disabilities, The Norwegian Association of Youth Mental Health and The Norwegian Research Network on Coercion in Mental Health Care <<https://sivilombudsmannen.no/en/torturforebygging/the-advisory-committee/>>.
- ²⁵ A recent example of this is the inclusion of a disability expert by experience in the ACT Inspector of Correctional Services 2020 Healthy Centre Review of Bimberi Youth Justice Centre <https://www.ics.act.gov.au/_data/assets/pdf_file/0008/1779866/FINAL-ACT-ICS-Bimberi-Healthy-Centre-Review-June_2021_FA_tagged.pdf>.
- ²⁶ The Committee on the Rights of Persons with Disabilities drew attention to this issue in its concluding observations in 2019, urging Australia to: 'Ensure that organizations of persons with disabilities can effectively engage in the establishment and work of the national preventive mechanism'. (CRPD/C/AUS/CO/2-3) [29 (c)]
- ²⁷ See <<https://www.dss.gov.au/disability-and-carers/disability-strategy>> and <<https://www.dss.gov.au/disability-and-carers-research-and-data/the-national-disability-data-asset>>
- ²⁸ Ibid 86.