

Submission on the implementation of the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)

Department of Justice and Equality

1. Introduction

Sage is a support and advocacy service whose mission is to promote, protect and defend the rights, freedom and dignity of vulnerable adults and older people¹. It was established in 2014 with funding from the HSE and The Atlantic Philanthropies with support and governance provided by Third Age. Sage Advocacy clg assumed responsibility for governance of the service on 1st March 2018.

The development of Sage has been influenced by the scandals of Leas Cross and Aras Attracta. Through its dedicated support and advocacy service, Sage works to ensure the will and preferences of the person can be heard and implemented, independently of family, service providers or systems' interest. The model to which Sage works is of core paid staff supported by, and in turn supporting, trained volunteers. Some of these volunteers act in support roles, some are advocates and some have specialist legal, financial or other professional skills.

It is conservatively estimated that the work of Sage in 2016 impacted on the lives and practice of some 20,000 people. Sage works to uphold the right to self-determination and autonomy by supporting a functional approach to capacity and ensuring the person is enabled to make decisions that affect them. Sage works with vulnerable adults and older people at transition points in the person's life when they are adapting to a cognitive impairment, moving from home to residential care, in acute hospital, transitioning from hospital to residential care and when they are experiencing significant loss associated with these changes.

Sage welcomes the opportunity to make a submission to the Department of Justice and Equality on Ireland's implementation of the Optional Protocol to the UN Convention on Torture (OPCAT). In making this brief submission Sage is incorporating experience and evidence gathered by the service since it commenced supporting vulnerable adults in residential care/congregated settings, acute hospital settings and in the community in 2014.

2. Related Submissions

Sage made a submission to the United Nations Committee Against Torture (UNCAT)² as part of Ireland's examination at the 61st session of the Committee in July 2017.

In Sage's submission to UNCAT we highlighted violations, which amount to inhuman or degrading treatment, of older people and other vulnerable adults' rights to integrity and dignity, autonomy and self-determination. The submission highlighted experiences of *de facto* detention and deprivation of liberty encountered through interactions within the State, and bodies operating on behalf of the State, including those in receipt of State funding for the provision of services. The report made 21 recommendations to ensure the State meets its obligations under the Convention, these recommendations cover the following areas.

¹ The main Objective of Sage Advocacy clg is "To promote, protect and defend the rights and dignity of vulnerable adults and older people, the prevention of cruel, inhuman and degrading treatment and deprivation of liberty and the enhancement of personal autonomy and decision making in all care settings and in the transition between them within the Republic of Ireland".

² Sage Support and Advocacy Service, 2017. *Human Rights: Vulnerable Adults and Older People in Ireland*. Available at <http://sageadvocacy.ie/wp-content/uploads/2017/07/Sage-Submission-to-CAT-Review-of-Ireland-June-2017.pdf>

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1. Recognition of a Person's Capacity
2. Deprivation of Liberty
3. Chemical Restraint
4. Lack of Access to Suitable Care
5. Protection from Abuse
6. Incontinence Wear & Artificial Feeding
7. Quality of Life, Physical Environment, Privacy and Dignity
8. Education and Information
9. Investigation, Complaint and Redress
10. Ratification of the Optional Protocol to CAT (OPCAT)

Sage made a submission on Adult Safeguarding³ and appeared before the Joint Oireachtas Committee on Health in October 2017. Sage's submission highlighted the need for adequate legislative safeguards to protect a person from experiencing abuse and ill-treatment, and called for the enactment of the Adult Safeguarding Bill 2017 and establishment of an independent National Safeguarding Service/Authority as envisaged in the Adult Safeguarding Bill 2017. The National Safeguarding Authority would promote safeguarding, protect vulnerable adults from abuses and establish a framework for consistent approaches to investigate allegations of abuse and ill-treatment. The National Safeguarding Authority's functions under the draft legislation are to promote standards, carry out investigations, receive reports, make recommendations on practice to the Minister and relevant bodies, and have a public information and education function. Sage also called for the right of access to independent advocacy and the establishment of a National Council for Support and Advocacy in our submission to the Joint Committee.

In March 2018 Sage made a submission to the consultation on Deprivation of Liberty Safeguard Proposals and Draft Heads of Bill⁴. Sage demonstrated how a person may experience, or be at risk of, deprivation of liberty in care settings due to a lack of recognition of a person's autonomy and decision-making capacity, and due to a lack of a statutory right to homecare or other flexible models of care. A process to protect a person's liberty and safeguard against arbitrary detention should be for the benefit of all people, regardless of a determination of the person's decision-making capacity. Any measure taken by the State to safeguard a person's right to liberty and protect against ill-treatment should be focussed on human rights principles and norms.

Consultation Process on OPCAT

The Subcommittee on Prevention of Torture (SPT) states in its Guidelines on National Preventive Mechanisms that the identification of the NPM should be an open, transparent and inclusive process involving all relevant stakeholders, including civil society.⁵ The first stated next step from IHREC's research *Ireland and the Optional Protocol to the UN Convention against Torture* is the need for further national consultation and debate on OPCAT involving a full range of stakeholders including civil society. As OPCAT, and a NPM established under this treaty, would be for the benefit of all people who are, or may be, deprived of liberty to ensure they are treated with dignity and are free

³ Sage Support and Advocacy Service, 2017. *Submission by Sage – Support & Advocacy Service to the Joint Committee on Health on Adult Safeguarding*. Available at <http://sageadvocacy.ie/wp-content/uploads/2017/10/Sage-Submission-to-the-Oireachtas-Committee-on-Health-re-Safeguarding-Adults-FINAL-021017.pdf>

⁴ Sage Support and Advocacy Service, 2018. *Submission as part of the Consultation on Deprivation of Liberty: Safeguard Proposals*. Available at http://sageadvocacy.ie/wp-content/uploads/2018/03/Sage_Submission-DOL-Safeguards-Proposals_09032018.pdf

⁵ Subcommittee on Prevention of Torture, Guidelines on National Preventive Mechanisms, UN Doc CAT/OP/12/5 (2010), para 16.

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from ill-treatment it is crucial that a consultation process is inclusive of organisations and people connected to the broad health and social care sector where deprivation of liberty can occur. The need for this process to be conducted in conjunction with the Department of Justice and Equality but separate from the process for considering a criminal justice inspectorate is highlighted by the IHREC research which clearly states that previous and current debate around the proposed criminal justice inspectorate are not sufficient to meet the requirements of OPCAT⁶.

Broad consultation should not impede the ratification of OPCAT, it is not a requirement that the NPM be established before ratifying the instrument, and the SPT in its functions can offer advice and assistance post ratification on establishing a NPM.

Recent Parliamentary Questions on ratification of OPCAT would indicate that consultation by the Department of Justice and Equality on the IHREC research is with specific Government Departments and 'relevant agencies' due to be concluded by June 2018, with an aim to develop the Heads of the Inspection of Places of Detention Bill which will be the 'legislative vehicle' to establish the NPM network.⁷ The measures to develop legislation to establish the NPM is welcomed, however a limited consultation process that is not proactively inclusive prior to developing the draft legislation is not in keeping with the requirements of OPCAT. It is a missed opportunity to have meaningful contribution from all stakeholders, civil society, and all involved or affected by deprivation of liberty in places that are not in the criminal justice area, such as care settings.

National Preventive Mechanism

It has been clearly established, and outlined in the IHREC Report, that OPCAT refers to any place within the State's jurisdiction where persons are or may be deprived of their liberty, and that in addition to traditional places of detention in the criminal justice area, the treaty and the mandate of the NPM established under OPCAT extends to nursing homes, social care homes, psychiatric hospitals, and other places where a person may be deprived of their liberty.

The Subcommittee on Prevention of Torture (SPT), as referenced in the IHREC research, has provided the following guidance:

'The Subcommittee therefore takes the view that any place in which persons are deprived of their liberty, in the sense of not being free to leave, or in which the Subcommittee considers that persons might be being deprived of their liberty, should fall within the scope of the Optional Protocol, if the deprivation of liberty relates to a situation in which the State either exercises, or might be expected to exercise a regulatory function⁸

The UN Committee Against Torture in its Concluding Observations following Ireland's review in 2017 noted that '...existing bodies do not systematically carry out visits to all places of deprivation of liberty such as Garda stations, residential care centres for people with disabilities, nursing homes for the elderly and other care settings' and made recommendations that Ireland should immediately

⁶ Murray, R. & Steinerte, E., 2017. *Ireland and the Optional Protocol to the UN Convention Against Torture*. Dublin: Irish Human Rights and Equality Commission, page 53

⁷ Parliamentary Question, Question 291 of 30th January 2018, 4122/18, available from <http://www.justice.ie/en/JELR/Pages/PQ-30-01-2018-291> Parliamentary Question, Question 161 of 8th February 2018, 6598/18, available from <https://beta.oireachtas.ie/en/debates/question/2018-02-08/161/?highlight%5B0%5D=291&highlight%5B1%5D=30&highlight%5B2%5D=2018>

⁸ Subcommittee on 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/OP/C/57/4 (2016) Annex, at para 3 as in Murray, R. & Steinerte, E. Ibid 6, page 21

ratify OPCAT and establish a NPM that ‘...has access to all places of deprivation of liberty in all settings;’⁹. The Committee also recommended that the State should

‘Ensure that existing bodies which currently monitor places of detention as well as civil society organizations are allowed to make repeated and unannounced visits to all places of deprivation of liberty, publish reports and have the State party act on their recommendations.’¹⁰

The Committee further recommended that the State ‘should also ensure that the Inspection of Places of Detention Bill provides for independent monitoring of residential and congregated care centres for older people and people with disabilities within the National Preventive Mechanism, and that people residing in such facilities can submit complaints, including regarding clinical judgments, to these independent monitors.’¹¹

- Considering OPCAT encompasses all places where a person is, or may be, deprived of liberty, and the requirement that a NPM is inclusive and its function is made known to the public, the language used in this context should ensure it is relevant to and understood by people it aims to protect. Language commonly associated with the criminal justice system should be avoided where not necessary. The function of a NPM is based on a human rights mandate to prevent and protect individuals from ill-treatment, legislative instruments and related documents should clearly reflect this and not overly focus on the role of inspections.
- The IHREC research puts forward four models of a NPM for Ireland. Sage would favour options that includes bodies with relevant expertise required to carry out the function of the NPM and bodies with expertise in human rights in Ireland described in options three *Designation of existing inspectorates and others* and option four *Coordinating Body* with IHREC in a coordinating role.
- The options to expand the role of the Inspector of Prisons or to appoint the Inspector of Prisons as the Coordinating Body risks a criminal justice focus of the NPM. To ensure there is a more comprehensive approach the option of two bodies, criminal justice sector and health and social care sector, with expanded remits working jointly as the designated NPM or in joint coordinating role could be explored. Regarding the health and social care sector the Health Information and Quality Authority could be considered for this role. Establishing a joint role or a joint coordinating role would ensure all NMP functions are consistent in all places of deprivation of liberty and the NPM is adhering to international human rights treaty obligations.
- To ensure the NPM is not a continuation of existing bodies’ roles and to avoid a ‘tick box’ approach, there is a clear need for additional expertise and training for personnel within the existing inspectorate bodies to meaningfully engage in the functions of a NPM that an expanded remit would require, and ensure it is focussed on human rights and prevention of ill-treatment.
- In developing a comprehensive approach provision should be made for the future inclusion of new bodies in a NPM, or a mechanism for new bodies to contribute to the functions of the NPM, for example the Decision Support Service under the Mental Health Commission.

⁹ Committee Against Torture, Concluding Observations on the second periodic report of Ireland (31 August 2017) UN Doc CAT/C/IRL/CO/2, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fIRL%2fCO%2f2&Lang=en, para 7

¹⁰ Ibid, para 8

¹¹ Concluding Observations para 36

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- The IHREC research identified the potential role of Civil Society Organisations in a NPM. There is a unique perspective that Civil Society Organisations active in places where a person is deprived of liberty can contribute to monitoring by way of making observations and submitting recommendations regarding ill-treatment of persons in places where deprivation of liberty occurs. Organisations such as Sage operate independently of systems' interests and from the perspective of the individual. A mechanism should be considered to enable civil society organisations with a track record and experience in the area, such as Sage, National Advocacy Service (NAS), Irish Advocacy Network (IAN), Empowering People in Care (EPIC) to contribute to the functions of the NPM in a credible manner through a recognised system of submissions and consultations which does not compromise the organisations' integrity and independence.
- In carrying out the functions of the NPM under Article 14 of OPCAT, to interview people deprived of liberty or get relevant information from other persons, the role of an independent advocate and a process of consultation with civil society organisations would be crucial to capture the experiences of people with diminishing capacity experiencing restrictions on their liberty.
- The process of identifying and designating a NPM to give full effect to OPCAT should be in line with developing Adult Safeguarding legislation, Deprivation of Liberty Safeguards and any developing measures on restrictive practices and the prohibition of chemical restraints. The State's actions should be based on human rights principles and norms, adhere to international and domestic human rights obligations, and seek to protect individuals who are at risk of ill-treatment in any setting.