

## **2020 Future Justice and Corrections Summit**

### **Presentation by the Commonwealth Ombudsman: 'Implementation of OPCAT in Australia – an update'**

**Wednesday 19 February 2020, 1:30-2.00pm (AEDST)**

**Doltone House – Darling Island**

**48 Pirrama Road Pyrmont**

#### **Acknowledgement of Country**

Before I begin, I wish to acknowledge the Traditional Owners of the country on which we meet today, the Gadigal people of the Eora nation<sup>[1]</sup>, and recognise their continuing connection to land, waters and culture. I pay my respects to their Elders past, present and emerging.

#### **Introduction**

I'm pleased to be able to speak with you today about the progress of Australia's implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (or OPCAT for short), and to provide an overview of my Office's work in the OPCAT space.

For those of you who may not be aware, the Office of the Commonwealth Ombudsman takes and investigates complaints, and carries out other forms of oversight, inspection, audit and reporting activities across a wide field, including areas such as Defence, law enforcement, and immigration.

While the investigation of complaints is perhaps our core function, we also have a particular responsibility to the disadvantaged and the vulnerable. This includes historic victims of abuse in the Defence Force, a person experiencing difficulty with accessing the NDIS, or a long term detainee in an immigration detention facility.

In recent years my Office has been given a variety of new functions when governments or the Parliament have identified the need for independent oversight of important topics that carry with them serious public interest considerations. Our involvement in Australia's implementation of OPCAT is one such function.

I'd now like to give a brief summary of Australia's OPCAT journey, and a good place to start is to touch on the 1984 United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (otherwise known as UNCAT). UNCAT is an international human rights treaty which:

- Provides a comprehensive definition of torture
- Sets out obligations on State Parties that have signed up to the treaty to take all necessary legislative, administrative and judicial measures to prevent acts of torture
- Requires acts of torture to be investigated and perpetrators prosecuted
- Allows for redress and rehabilitation for victims of torture

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<sup>[1]</sup> <https://www.commonground.org.au/learn/acknowledgement-of-country>

- Requires State Parties to periodically report to the Committee against Torture on steps taken to implement the treaty.

The Australian Government ratified UNCAT in 1989.

OPCAT came into force in 2006, primarily designed to strengthen the protections provided by UNCAT for people in situations where they are deprived of their liberty and potentially vulnerable to mistreatment or abuse.

The Australian Government ratified OPCAT in December 2017. So what are our obligations now?

OPCAT requires signatory states to establish a system of regular preventive visits of places of detention by independent bodies known as National Preventive Mechanisms (or NPMs). It also requires that signatories accept visits from the UN Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (or the SPT for short).

When Australia ratified OPCAT, it elected to exercise its right to make a formal declaration delaying the commencement of part of these obligations for three years. Specifically, Australia delayed the full implementation of its NPM, but did not postpone its obligation to allow visits from the SPT.

The SPT is the international monitoring body established under OPCAT consisting of 25 international experts with professional experience in a range of specialities including medical and legal expertise and human rights and monitoring experience.

Visits conducted by the SPT occur fairly infrequently. The vast majority of preventive visits will be carried out by the domestic oversight bodies which will form an NPM network. That being said, we do know that the SPT is interested in how a first world country with a federated system of government will implement OPCAT, and has therefore already been closely following the Australian OPCAT journey. Indeed, the SPT will be visiting Australia for the first time in the coming months, and I will be speaking in more detail about this visit later on in my presentation.

It is important to note that OPCAT doesn't create any new rights for people in detention. It does, however place an onus on signatory states that they will seek to uphold basic rights for people in that situation. In essence, what OPCAT requires from ratifying countries is that they take the steps to ensure that their commitments to UNCAT are upheld.

Which brings us to the role of the Office of the Commonwealth Ombudsman in relation to OPCAT. My Office has two functions relevant to meeting our international obligations under OPCAT – one as the Coordinator of Australia's NPM network, and the other as the inspector for places of detention under the control of the Commonwealth.

### **NPM Coordinator**

When the Australian Government ratified OPCAT in 2017, it announced that my Office would be the NPM Coordinator, with responsibility for coordinating the efforts of independent inspection agencies within the Commonwealth, States and Territories that will form a network of NPMs. Our role as the NPM Coordinator took effect from 1 July 2018, and regulations establishing this function came into effect on 10 April 2019.

As the NPM Coordinator we do not have authority over other inspectorates, and do not intend to engage in secondary inspections, although we may do so where that would be appropriate; for example at the request of another jurisdiction.

Last year, in the OPCAT Coordinator space, my Office made an assessment of OPCAT readiness across Australia. The goal was not to criticise any entity or any jurisdiction, but rather to ask: what exists now? In the course of answering that question, we undertook extensive outreach to bodies that do, or may, have a role in inspections and oversight of places of detention in each jurisdiction. Our assessment of Australia's OPCAT readiness drew heavily on self-assessments completed by inspecting and oversight bodies and the extensive communication we have had with them.

We identified over 1000 facilities across the country that could be defined as 'primary places of detention'. These include closed mental health facilities, police lock-ups, juvenile justice facilities, adult correctional facilities, closed disability units, immigration detention facilities and military cells or corrective facilities. Our initial focus is on 'primary places of detention' as the Australian Government considers the challenges posed by the deprivation of peoples' liberty to be at their most acute in these places, and therefore these will be the first focus of Australia's NPM bodies.

Of course, OPCAT adopts a more expansive definition of the places in which a person may be deprived of their liberty. However, noting Australia's iterative approach to OPCAT implementation, and considering other countries' approaches to widening their NPMs' mandates over time, it is clear that there will have to be a broadening of the scope of inspections in the future. Progressively it will be necessary for NPMs to consider all places where people are deprived of their liberty in Australia.

We published our report on the findings of our assessment in September last year, and if you haven't already done so, I encourage you to read it on our website. A few high level observations from the report are as follows.

First, every jurisdiction has some of the legislative and institutional components that are necessary to implement effective, preventive, independent oversight of places of detention, and the existing capacities within each jurisdiction provide a sound basis upon which to build a world class NPM network. Second, the report reflects that different jurisdictions are in different places with respect to readiness. However, there are variances in the degree to which inspectorates are genuinely independent.

There are variances in inspection arrangements being regular and preventive in nature; some bodies either lack the mandate to conduct inspections other than in relation to a complaint, or have insufficient resources to enable regular inspections.

There are also variances in institutional capability dedicated to the task of inspection or oversight. In most jurisdictions there is some form of regular prison inspection regime, but some, or most, are under-resourced. In all jurisdictions there is a gap in relation to inspections of police lock-ups - although I note that, as an NPM, the Western Australian Inspector of Custodial Services will have oversight of police lock-ups in that jurisdiction.

More generally, the defining difference among many of the established agencies around Australia and what best practice might look like is whether they have a preventive visiting mandate. That is, whether these bodies can conduct visits on a regular basis, examine systems within detention, and interview detainees and staff of their choosing without a catalyst, such as a complaint.

My report did not make any specific recommendations. I do not presume to dictate to the States and Territories what their NPMs should be or how they should conduct inspections other than by drawing attention to what OPCAT requires. I hope that the report assists in determining the way forward in each jurisdiction and provide assurance to the public and to the SPT that Australia is taking its ratification of OPCAT seriously.

However, while I didn't make any recommendations, I did arrive at some conclusions that will require the attention of state and territory governments.

First, as I said earlier to be OPCAT compliant, that the scope of inspections will need to broaden over time to encompass more places of detention. As this expansion occurs, each jurisdiction will need to consider how best to do this. Second, a regular preventive inspection regime, especially in places where there has previously been little or no oversight, will require substantial resources to be effective. As NPMs are nominated, they will require new or expanded methods of operation which will need commensurate increases in resourcing over time in most, if not all, jurisdictions. Third, governments will need to consider the extent to which new or updated legislation will be required to be introduced to meet the tests imposed by OPCAT, and to put their NPMs, once nominated, on an appropriate footing.

In the short term, and in order to make any meaningful progress, decisive action is needed in the designation of NPMs across Australia. With less than a year remaining in the commencement period, there is a sense of urgency as there are limits to what can be done in the absence of an established NPM network.

At this stage, in addition to my Office, there have been two other bodies nominated as NPMs, both in Western Australia: the Office of the Inspector of Custodial Services, who will have oversight of justice-related facilities including police lock-ups, and the Western Australian Ombudsman, who will have oversight of mental health and other secure facilities. I am heartened by these nominations, and I look forward to other States and Territories nominating soon.

### **NPM for places of detention under the control of the Commonwealth**

In addition to the coordination role, my Office was also nominated as the NPM responsible for inspecting places of detention under the control of the Commonwealth. As with our coordinating role, the formal establishment of this function came into effect in April last year through amendments to the *Ombudsman Regulations*, and allows for regular inspections of immigration detention facilities, military detention facilities and Australian Federal Police holding facilities.

For the last 15 years my Office has had an active inspection role in immigration detention. Using the Office's own motion investigation powers, my staff inspect all immigration detention facilities, at least twice a year, to provide assurance about the administrative and operational effectiveness of the facilities and the detention network. Our inspection program covers the six onshore immigration detention facilities, as well as Christmas Island when operational. My Office has also overseen the services provided by Australian Government contractors in the Regional Processing Countries to asylum seekers and refugees. However, as the management of offshore facilities moves to the local governments of those countries, the elements that remain within my Office's jurisdiction are shrinking.

My Office's current inspection regime for immigration detention facilities is consistent with a number of OPCAT requirements. Inspections are conducted regularly and can be undertaken without notice, although notice is generally given, and inspection staff have full, unescorted access to people, places and records within immigration detention facilities. Additionally, inspection staff closely monitor the use of force, mechanical restraints and placement of detainees in behaviour management regimes. Staff also monitor the outcomes of complaint investigations and our statutory reviews of long-term detainees. But, consistent with international good practice, we are also bringing a more preventive and more multi-disciplinary approach to our inspection regime.

We are beginning to overlay OPCAT methodology into our inspections of immigration detention facilities, and last year began conducting trial OPCAT inspections. A key component of this methodology has been the introduction of detainee surveys into our inspections to improve detainee engagement. Over time, I anticipate that these surveys will act as a valuable source of information about the conditions and treatment of those who are detained in Australia's immigration detention system, and assist the inspection team in highlighting any areas of concern for each individual facility.

Detainee surveys have now been undertaken at all six onshore immigration detention facilities. These surveys have been translated into the nine most common languages (other than English) spoken in Australia's immigration detention centres, in order to ensure the largest possible sample size and increase the ease with which detainees can provide their feedback.

Another core component of our trial OPCAT inspections was the supplementation of core inspecting staff with external experts, in order to provide a more diverse range of perspectives on places of detention. For instance, our trial OPCAT inspection of Brisbane Immigration Transit Accommodation was conducted with the assistance of staff from the New Zealand Office of the Ombudsman, which is one of New Zealand's NPMs. As the Office moves toward full implementation of OPCAT-style inspections of all Commonwealth places of detention, external expertise will be drawn upon in key areas, such as medical care and mental health.

As the NPM Inspector we will also provide oversight for military detention facilities, including the Defence Force Corrective Establishment in New South Wales. Additionally, we will provide oversight for Australian Federal Police cells in the ACT, including in Jervis Bay and the External Territories of Cocos (Keeling) and Christmas Islands. While my Office does not currently inspect military and federal police facilities, we are in the process of developing inspection methodologies for these places, conducting baseline assessments and trialling OPCAT-style inspections in the lead up to a formal OPCAT inspections program for these facilities being implemented in 2020-21.

We are currently considering how best to publish our findings from inspections conducted at facilities under the control of the Commonwealth. At present, for our program of inspections at immigration detention facilities, we provide this information in my annual report. To provide additional transparency, I intend to shortly commence publicly releasing stand-alone reports summarising the outcomes of my Office's oversight of immigration detention.

### **What might an OPCAT inspection look like?**

I would now like to go over what exactly the 'ideal' inspection framework looks like, as required under OPCAT.

In performing inspections of facilities, Australian NPM bodies will be examining many different elements of detention during their visits. International guidance gives us several suggestions about what should be examined. These include the treatment of detainees, such as the use of restraint and force against them, as well as their material conditions, such as the quality of food, lighting, ventilation and sanitary facilities.

Other important points to assess include:

- a facility's operating regime and activities
- detainees' ability to contact family and friends and exercise their religion
- detainees' access to work, education and meaningful activities
- the quality of and access to medical services
- the provision of specific health services such as mental health services.

I seek to highlight these aspects of detention to demonstrate the breadth of what could be examined in considering the risks of torture and ill-treatment in our nation's places of detention.

### *Preventive visits*

One of the key aspects of the OPCAT framework is the extent to which an NPM is specifically mandated to conduct preventive visits, on a regular basis, and without prior notice. The preventive visiting mandate is the defining difference between what many inspection and oversight bodies do now in Australia and what will need to take place under OPCAT over time if we are to achieve best practice. The focus under OPCAT is the prevention of harm rather than solely the need to respond when harm occurs. In other words, to achieve best practice any entity that is to become an NPM requires the institutional capability to conduct visits on a regular basis, examine systems within detention, and interview detainees and staff of their choosing without a catalyst such as a complaint or incident of mistreatment.

Good practice also suggests achieving a longitudinal perspective on what is happening in places of detention. For that reason, the United Kingdom's NPM adopts a practice of surveying detainees in advance of each visit so that they can track various indicators of the relative health of a facility over time. This provides a powerful way to identify questions like: do detainees feel less safe in this facility than they did three years ago? If so why? I note that the WA Inspector of Custodial Services also undertakes surveys of this kind.

### *Independence*

Independence is another core aspect of an NPM. Functional and financial independence ensure that NPMs are able to undertake their roles without interference or fear of reprisal. International guidance suggests that desirable characteristics of functional independence for an NPM include a statutory basis, defined terms for office holders and clear grounds of dismissal. Persons should not be appointed to an NPM who hold positions which could lead to perceptions of conflicts of interest.

NPMs should also have financial independence and the ability to make budgetary allocations according to priorities that they determine. If the NPM performs other functions apart from an OPCAT mandate, guidance suggests that the NPM functions should be located within a separate unit or department with its own staff and budget – a point that I am adopting in my Office.

### *Access to people, information and places*

OPCAT requires an NPM to have unfettered access to all places where people are deprived of their liberty as well as access to all facilities and installations within the places it can visit. Authorities should allow NPM bodies to visit all places, parts of places, and suspected places where deprivation of liberty occurs. Full and free access is necessary in order for inspectors to accurately construct an impression of the conditions and treatment of detainees.

When visiting places of detention an NPM inspection team requires access to all information regarding the number of detainees, the places of detention, the treatment of detainees and the conditions of their detention. This includes medical records, registers, schedules, files and other data relevant to the administration of places of detention and the treatment of detainees.

NPM inspecting teams will need to be able to conduct private interviews with detainees at the time and in the location of their choice. In particular, the ability to speak privately ensures that people are able to speak openly about their conditions of detention or concerns without fear of reprisal. OPCAT also envisages that NPMs may want to speak privately with members of staff, not just detainees at inspected facilities to gain their views and insights as to conditions of detention.

### *Ability to make recommendations and publish reports*

In order to be able to contribute to the improvement of the conditions in which people are detained, oversight and inspections bodies should be able to make recommendations to detention facilities and their relevant authorities.

Similarly, it is important that NPM bodies have the ability to review and comment on proposed policy changes and legislative reforms that impact upon torture and ill-treatment prevention. This should allow the network of inspection bodies to have substantive input into the policies and legislation that will shape the treatment and conditions of detainees, contributing to the development of facilities that will more actively prevent the risk of ill-treatment and torture. OPCAT also requires authorities to examine the recommendations of the NPM and enter into dialogue with the NPM on possible implementation measures.

## **UN SPT Visit**

I now turn to the SPT and their upcoming visit to Australia. As I mentioned previously, the SPT is the international monitoring body established under OPCAT. It has a dual mandate to monitor conditions and treatment of persons in detention through visiting countries that have ratified OPCAT; and also to advise on OPCAT implementation, especially supporting the establishment and functions of the NPMs.

The SPT has signalled that the establishment of our NPM will be of particular interest to them during their visit next month. We look forward to the visit, and the opportunity for the SPT to get to know Australia as a recently ratified country.

The SPT comprises 25 experts elected by OPCAT State Parties from different regions with professional competence in a range of areas, including medicine, law, police and justice administration, human rights, and social work. Each of these members is part of a regional team, responsible for a certain number of countries, and Australia will therefore be visited by the Regional Team for the Asia-Pacific. The SPT's

mandate covers all places where people may be deprived of their liberty including prisons, police stations, psychiatric hospitals, social care institutions and immigration detention facilities. During visits, the SPT engages with NPMs by providing feedback on annual reports, addressing any queries made by NPMs, and providing NPMs with substantive and practical information in country-specific contexts. It is expected that, prior to Australia's visit, the SPT will provide advance written notification to the government of the SPT members and external experts who will attend as part of the visiting delegation. The SPT has published its visit dates which are 29 March to 9 April 2020, but the places it will visit will be confidential.

As an indication of the work in which they are likely to engage during their visit, when the SPT visited New Zealand for the first time in 2013 they visited 35 places of detention, including police stations, prisons, Defence Force facilities, Youth Justice Residences, and immigration facilities. During this visit, the SPT also met with 58 representatives from New Zealand's multi-body NPM, other relevant authorities, and members of civil society. At the conclusion of their visit to New Zealand, the SPT made 63 recommendations pertaining to the resourcing and independence of the NPM, amendments to legislation, complaints mechanisms, and a host of other areas.

If New Zealand's visit is anything to go by, there will be a certain amount of geographical and jurisdictional variety in the places of detention that the SPT chooses to visit. However, Australia's federated system will add an extra level of complexity in comparison to other countries. It is not yet known which jurisdiction or facilities the SPT will visit.

Before wrapping up, I would like to briefly mention the important role that civil society plays in Australia's implementation of OPCAT. Those who have lived experience and knowledge of the facilities being inspected can provide invaluable expertise to the work of all members of the NPM network. In each of Australia's jurisdictions, it will be important for NPMs, once established, to consider how relevant civil society representatives will best inform their inspection regimes. This may be done through informal, ad hoc advice, submissions on relevant themes, or through the participation of civil society representatives in inspections.

Another possibility is for NPMs to establish formal advisory committees, and on this point I am pleased to advise that my Office has formed its own advisory group to help inform our priorities in the years ahead as both the NPM Coordinator and the NPM for places of detention under the control of the Commonwealth. This advisory group will provide a forum for key stakeholders to engage in open and collegiate discussions about issues relevant to OPCAT implementation in Australia.

You might be listening to this and thinking that – as a democratic country – the risk and incidence of torture here is fairly insignificant, and that Australia's 1989 ratification of the Convention against Torture was sufficient. You might think there's no need to go further, by formally implementing a network of NPMs and allowing an international body to inspect any place of detention of its choosing.

The documented reality is that people have been mistreated in Australia's places of detention. This has been chronicled in detail in any number of reports by Ombudsmen, Human Rights bodies, coroners and royal commissions. OPCAT – through its requirement to have regular preventive visits to places of detention by independent bodies who report on their findings - is an influential tool in helping reduce the risks of ill-treatment to those who are vulnerable by virtue of being deprived of their liberty.



Australia has the opportunity to lead as a first world federation in this space, but we are not there yet. We are now more than two thirds of the way through the implementation period, and NPMs have been designated in only two of Australia's nine jurisdictions. Civil society, advocacy and other groups, together with the SPT are watching our progress with interest. Indeed, with the SPT visiting Australia next month to assess our progress, all relevant parties need to focus on this issue, and get on with it.

Thank you.