

National OPCAT Symposium – 9 September 2022

Presentation by the Commonwealth Ombudsman

Iain Anderson

***“The Commonwealth Ombudsman’s work coordinating Australia’s NPM
and monitoring Commonwealth places of detention”***

RMIT Storey Hall Auditorium & Foyer
Building 16, Level 5
342 Swanston Street, Melbourne

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Acknowledgement of Country

I’d like to acknowledge the traditional custodians of the land on which we meet today and pay my respects to Elders past and present. I’d also like to extend my respects to all Aboriginal and Torres Strait Islander people here today.

Introduction

I would like to thank Lorraine Finlay, Australia’s Human Rights Commissioner, along with her staff at the Commission who have made today possible.

The Commission has played a critical role in supporting Australia's ratification and now implementation of OPCAT – and working with my Office since we were nominated as a National Preventive Mechanism (NPM).

I would also like to acknowledge today's other speakers and facilitators, and all the other attendees here today.

I am grateful for everyone's interest and participation, including across civil society and academia, and look forward to hearing your perspectives during this important event as we progress towards OPCAT implementation in Australia.

I am pleased to be here today at this event, 6 weeks after commencing my role as Commonwealth Ombudsman.

Today I want to speak briefly about:

- My roles under OPCAT as both National Preventive Mechanism (NPM) for places of detention under the control of the Commonwealth, and as Coordinator for the emerging network of NPMs across Australia;
- my priorities leading up to and following Australia's OPCAT implementation date of 20 January 2023; and
- the work I and my Office will be doing to engage further with civil society as NPM.

As we have heard many times already today – Australia must fully implement OPCAT. This is a matter of the highest priority for me, and for my Office.

OPCAT implementation is a responsibility that requires a collective effort from all of us – working together to prevent torture and ill-treatment and to support the human rights and dignity of people in detention.

I would now like to outline my Office’s work to date as NPM.

Topic 1: the work of the Commonwealth NPM and NPM Coordinator

On ratifying OPCAT, the Australian Government announced that Australia’s NPM would be made up of multiple inspecting bodies within Australia’s different jurisdictions, to be coordinated at the national level by an NPM Coordinator.

My Office was appointed in July 2018 as both NPM for places of detention under the control of the Commonwealth, and as NPM Coordinator.

Commonwealth NPM

The Australian Government proposed that Australia’s NPMs focus initially on ‘primary places of detention’. For the Commonwealth NPM, this meant immigration detention facilities, Australian Federal Police (AFP) holding cells, and Australian Defence Force (ADF) detention facilities.

My Office has been inspecting immigration detention facilities for over a decade. We observe and examine these facilities, engage with staff from government agencies and service providers, and engage directly with people in detention.

We are evolving our oversight framework to implement the preventive approach required by OPCAT, including to have regard to human rights principles and best practice. Currently on inspection we prioritise matters that pose the greatest risk to the human rights and dignity of people in detention – such as the conditions of accommodation facilities, availability of medical, health and wellbeing services, the availability of educational opportunities and entertainment, the scope for people in detention to remain in contact with family, friends and advocates, and the use of force in detention facilities.

We are also expanding into visiting military detention and AFP holding facilities. The Commonwealth NPM has engaged in preliminary visits to AFP facilities in both the ACT and on Norfolk Island, and participated in a visit to the Defence Force Correctional Establishment at Holsworthy Barracks in Sydney in February this year, and in a visit to ADF detention facilities in Townsville last month.

We continue to publish reports on our immigration detention oversight, including most recently for the period July 2020 to June 2021, all of which can be found on our website.

By being publicly available, I hope our reports can bring transparency and foster a broader public understanding of the need to maintain appropriate conditions in detention facilities, and to support compliance with OPCAT.

My Office's activity as Commonwealth NPM is also informed by other, separate roles which can support it to fulfil its inspection mandate. My Office's complaints management function can inform areas for the Commonwealth NPM to focus on during inspections, where complaints come from or are related to people in Commonwealth places of detention.

I also have obligations under the Migration Act to assess the appropriateness of arrangements for those people held in immigration for longer than 2 years and I am empowered to make recommendations to the relevant Minister about cases where I think some action should be taken, and short reports about those cases and my recommendations are tabled in the Parliament. Typically, where I make a recommendation, its purpose is to provide some relief to a long term detainee, for example, to release them on a bridging visa, to place them closer to their family, to place them in a less restrictive form of detention (if they are currently held in a closed detention facility), or to otherwise seek that the consideration of resolving the underlying issues that give rise to detention is being expedited.

This function can also bring to my Office's attention issues relevant to inspections of immigration detention as Commonwealth NPM.

The powers conferred on me under the Ombudsman Regulations do not limit me to inspecting only primarily places of detention, although I have not exercised my powers beyond this to date.

International experience, and my Office's own experience since being conferred its OPCAT responsibilities, indicate a progressive implementation of an NPM's mandate is needed.

NPM Coordinator

Of course, there are many detention settings that are controlled by state and territory authorities – such as prisons, juvenile justice facilities, closed psychiatric facilities, and forensic disability facilities.

The Commonwealth Government appointed my Office as the NPM Coordinator, giving me responsibility for coordinating the efforts of the network of independent NPM bodies across the Commonwealth, states, and territories. I am looking forward to working with my colleagues from state and territory NPM bodies as they carry out their preventive monitoring of places of detention.

To date, my Office has spent time meeting with, and learning from, international NPM counterparts and experts. We continue to engage with the SPT, along with the Association for the Prevention of Torture – a key international NGO specialising in torture prevention and the operation of OPCAT.

Harnessing this expertise will help shape our future work as Coordinator of the NPM Network, taking advantage of best practice and lessons learnt by those who started before us in implementing OPCAT.

This year, we have also convened two meetings of the NPM Network, the most recent in August, to bring together the nominated NPMs to discuss information-sharing, shared challenges and opportunities for collaboration, and the practicalities of implementing the NPM function and operating as a network.

We have also continued to provide advice and suggestions to jurisdictions across the country on draft legislation relating to OPCAT, noting good practice and sharing what we have learned from research and from our international counterparts.

While the path of Australian jurisdictions towards OPCAT implementation has been long – and there is still a way to go – our NPM Coordinator activity has emphasised the importance of being supportive and collaborative.

ACT NPM

Under an arrangement between the ACT Government and the Commonwealth Government, the Commonwealth Ombudsman also performs the role of the ACT Ombudsman.

In January 2022, the ACT Government announced the ACT Ombudsman as one part of a multi-body NPM for the ACT, along with the ACT Human Rights Commission, and the ACT Inspector of Correctional Services.

My Office continues to work with the ACT Government, the ACT Human Rights Commission, and the ACT Inspector of Correctional Services, to ensure there is clarity about the functions, powers and jurisdiction of each constituent part of the ACT NPM and to support the effective implementation of our NPM responsibilities.

Topic 2: upcoming priorities of the Commonwealth NPM and NPM Coordinator

I now want to turn briefly to my Office's forward priorities on OPCAT in the lead up to, and following, the 20 January 2023 implementation deadline.

Commonwealth NPM

As Commonwealth NPM, my first priority is to continue our inspection of immigration detention facilities, and expand further into formal inspections of both AFP and ADF places of detention.

We will also continue updating our Commonwealth NPM inspection methodologies and assessment tools, to guide our future inspections of immigration detention facilities, to expand to support our work visiting ADF and AFP places of detention, and, where relevant, to assist state and territory NPMs by providing model tools they may be able to adapt for their own use.

On reporting, the Commonwealth NPM's key priority is to prepare and ultimately publish its report covering inspection activities during the 1 July 2021 to 30 June 2022 period.

NPM Coordinator

As NPM Coordinator, my principal priority is to prepare for and support the visit to Australia by the SPT from 16 to 27 October.

My Office is working with the SPT as closely as possible to ensure they can make the most of their visit and use their time most effectively.

We will be the central point of contact for Australia's NPM bodies in liaison with the SPT, especially important given the number of bodies we have. I look forward to working with the SPT to ensure they can meet with all Australia's nominated NPM bodies and that each, including my Office, can learn from their expertise and take lessons back to our ongoing NPM roles.

The NPM Coordinator is also focused on engaging with the Committee against Torture as it considers Australia's sixth periodic report under the Convention against Torture.

In my role I have an opportunity to both make a submission to, and meet with, the Committee, particularly to discuss OPCAT implementation and remaining challenges.

Committee reporting procedures are an important opportunity for scrutiny of progress on human rights, in this case under the Convention against Torture, but also for dialogue and constructive recommendations towards improved rights protection.

Once made, my submission will be published on the Committee's website per their usual processes (with appropriate redactions to protect identities if specific cases are raised), and I encourage you all to read it once made.

While much of the NPM Coordinator's immediate forthcoming work is internationally focused, we are continuing to support Australia's nominated NPM bodies.

At this stage Australia has 11 NPMs appointed.¹

Our NPM Network meetings are now in 'full swing', and we are working to formalise our arrangements as a Network.

¹ Appointments are currently as follows: Commonwealth – 1, WA – 2, NT – 1, ACT – 3, Tasmania – 1, SA – 3.

We are working with the Network to develop an online information-sharing platform, as a simple and practical means of keeping each body aware of each other's work, acknowledging the importance of such visibility for consistency of approach and for learning opportunities.

We will also continue to explore opportunities for collaboration and training within the Network. I am particularly pleased to see instances already of more established NPM bodies working with newer or smaller bodies to support knowledge transfer – including through accompanying bodies on official visits to detention facilities.

Finally, one of our next key steps will be determining, as a Network, our approach to annual reporting arrangements in accordance with Article 23 of OPCAT. We want to make sure that annual reporting is efficient and effective, especially in a resource-constrained environment across all NPMs, while being an opportunity to explain the work we do and familiarise as many people as possible with the nature and objectives of OPCAT.

Topic 3: the Office's commitment to engaging with civil society in progressing its OPCAT priorities

I now come to the third and final part of my speech today, which is on civil society engagement.

As I've already foreshadowed, NPMs' OPCAT functions are frequently collaborative. NPMs cannot on their own effectively prevent torture and ill treatment in places of detention.

To this end, I recognise the unique expertise that civil society can bring to OPCAT implementation, including as the gateway to lived experience perspectives so important to a holistic understanding not only of detention environments, but of the particular circumstances, needs or vulnerabilities of all those who interact with them.

OPCAT Advisory Group

In early 2020 the then Ombudsman formed an OPCAT Advisory Group – or OAG – to provide advice to him on OPCAT and on the roles the Office plays as Commonwealth NPM and NPM Coordinator.

To date, seven meetings of the OAG have been held, and I hope to have the first under my stewardship within 2 months.

Now that I am in the role of Ombudsman, I am considering the future role and operation of this body, what it means and how it can best operate and contribute to my Office's OPCAT work.

One of my immediate priorities is considering expanding OAG's membership. This is so that the OAG can be a means for my Office to understand and, critically, reflect in

its work the lived experience of cohorts in detention, such as those with disability, children and young people, and First Nations Australians.

Disability engagement

Separately, in the coming months my Office will be engaging in forward work planning linked to the commencement of NPM obligations in January next year, to develop means to formalise our engagement with civil society stakeholders on matters relating to people with disability.

We recognise that expert input to our work by or on behalf of people with disability is key. People with disability are disproportionately represented in detention environments in Australia, and a disability aware NPM is critical as a result.

At this stage, I expect our work on disability engagement will be in two parts.

First, my Office's current focus is to ensure the immediate forward work priorities of both the Commonwealth NPM and the NPM Coordinator reflect the lived experiences of people with disability.

My Office is developing a plan of our upcoming pieces of OPCAT-related work which would greatly benefit from input from or on behalf of people with lived experience of disability. This work planning is still under development, but we will seek to engage with disability specialists as part of actioning that work.

This may include:

- inviting a person with lived experience of disability onto the OAG;
- seeking input from disability representative organisations on the development of disability-related standards for the Commonwealth NPM's inspection tools;
- arranging initial meetings with disability representative organisations to discuss specific concerns in places of detention currently within our operating scope, or emerging issues arising across Commonwealth places of detention;
- ensuring there are appropriate lines of communication, both as Commonwealth NPM and as NPM Coordinator, with disability representative organisations.

On the latter, I also want to note the webform on our public website, which can be used to provide information to my Office on matters relevant to either its Commonwealth NPM or NPM Coordinator functions. This might include suggested matters for consideration in Commonwealth NPM inspection planning, or requests for OAG to consider particular issues of interest.

We will also move to a longer-term project of developing a broader and enduring disability engagement strategy, to guide all of my Office's OPCAT work on an ongoing basis.

This strategy would be a living document governing who we engage with, when and how on disability matters. I would like the development of this strategy to include co-design with input from people with disability and their representatives. I and my Office will have more to say on this work in due course.

I would also greatly welcome suggestions from participants at the Symposium today, whether in person or through our webform, on how the Office can most effectively and meaningfully undertake our collaboration on matters relating to people with disability – both in terms of immediate work priorities, and broader planning for enduring engagement with people with disability, and those acting on their behalf.

Other engagement

Lastly, I am also aware of the need for my Office to engage with civil society stakeholders who can provide insights into the experiences of other groups of people in detention settings, such as First Nations people and children. My hope is that our work relating to people with disability will help inform comparable work in relation to other cohorts of people whose needs in detention require particular care and consideration.

Conclusion

There is a lot of important work ahead for us all. But OPCAT implementation is a progressive and iterative process.

For NPMs – progressive implementation recognises that we must build, test, and continually refine our work, learning as we go from our practical experience, from other NPMs and from expert sources such as those here today as we go.

For those jurisdictions that have not yet nominated NPMs – OPCAT implementation is within our reach. It is a large and ongoing responsibility, but working together our governments and our NPMs can meet this. My Office and I are here to support your NPMs when you nominate them.

My fellow NPMs and I value – and need – your support. Contributions from civil society to Australia’s NPM will make it a stronger and more effective entity, able to drive meaningful change to improve the treatment of and conditions for all people held in detention.

Thank you.