

10th Annual Prisons Conference

Presentation by Michael Manthorpe PSM, Commonwealth Ombudsman

‘The Implementation of OPCAT in Australia and challenges for detention inspections in a COVID-19 world’

Tuesday 15 June, 2021

Aerial UTS Function Centre, Sydney

Acknowledgement of Country

I would like to acknowledge the Gadigal people from the Eora (yo-ra) nation upon whose ancestral lands I stand today and pay my respects to Elders past, present and emerging.

Introduction

Today represents the third time that I have attended your conferences to speak about Australia’s journey to implement OPCAT. It is also my final presentation on this subject as the Commonwealth Ombudsman. As I move to retirement this July after 4 years in my current role, this is the ideal opportunity to reflect on:

- 1) Australia’s progress in implementing OPCAT, and
- 2) the challenges in inspecting places of detention, specifically immigration detention facilities during the COVID-19 pandemic.

Introduction to OPCAT:

The Australian government ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (or OPCAT) in December 2017. When it ratified OPCAT, Australia exercised an option to postpone its obligation to establish a National Preventive Mechanism under the Protocol for three years beyond when that obligation would have otherwise commenced, ie until January 2022. However, the clock is still ticking.

OPCAT is an international treaty designed to strengthen protections for people in situations where they are deprived of their liberty and potentially vulnerable to mistreatment or abuse. 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).

The SPT is the international monitoring body established under OPCAT consisting of 25 international experts with professional experience in a range of disciplines 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 Australian NPM network. The SPT's first visit to Australia in March 2020 was postponed as a result of the COVID pandemic and has not yet been rescheduled. Nevertheless, the SPT has been closely following the Australian journey and is interested in how we, as a first world country with a federal system of government, will implement OPCAT.

OPCAT itself does not create new rights for people in detention. It does, however, place the onus on signatory states to uphold basic rights for people in that situation. In this respect, it is important to remember that the OPCAT builds on the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (or the CAT, for short). The Australian Government ratified the CAT in 1989. To put it simply, if you are a state that is serious about your obligations to not commit torture and other cruel, inhuman or degrading treatment, OPCAT is a way in which to hold yourself to account.

The role of the Commonwealth Ombudsman's Office:

For those of you who are not aware of the role of the Office of the Commonwealth Ombudsman, let me tell you a little bit about our work. Broadly, my Office takes and investigates complaints, and carries out other forms of oversight, inspection, audit and reporting activities across a wide field. As Commonwealth Ombudsman I am the Ombudsman for almost the entirety of Commonwealth administration (with the exception of taxation matters and intelligence agencies, which have specialist oversight agencies).

The cornerstone of my Office's oversight function is to ensure the actions of agencies are fair and reasonable.

While the investigation of complaints is perhaps the starting point for our office, we also have a particular responsibility to the disadvantaged and the vulnerable. Over the years we have taken on a variety of new roles which include things like oversight of law enforcement agencies' use of covert powers; or assisting historic victims of abuse in the Defence Force; or overseeing the participant experience of people accessing the NDIS; or considering the circumstances of long-term detainees in immigration detention facilities.

Which brings us to the role of my Office in relation to OPCAT. Some of you will be familiar with the two roles my Office has as part of the implementation of OPCAT in Australia, but I would like to provide a brief summary of our work for those who are newer to this area.

The role of the Commonwealth Ombudsman's Office in relation to OPCAT:

NPM Coordinator:

When the Australian Government ratified OPCAT, it announced my Office would be the NPM Coordinator with responsibility for coordinating the efforts of independent inspection agencies within the Commonwealth, states and territories.

Given Australia's federated system of government, the Commonwealth and the eight state and territory governments are all required to nominate NPMs to monitor places of detention within their jurisdictions. While the majority of NPMs are yet to be nominated, it

seems likely that most state and territory governments will nominate multi-body NPMs from existing oversight bodies to monitor different types of places of detention.

A multiple body NPM along jurisdictional lines is the logical approach as the Commonwealth is responsible for federal places of detention such as immigration detention, federal police and military detention facilities, whereas the states and territories are responsible for prisons, juvenile detention and secure mental health facilities.

As the NPM Coordinator, my Office is, or will be, responsible for facilitating and coordinating the Commonwealth, state and territory NPMs once they are designated (the NPM Network). This may include collecting information, facilitating information sharing and collaboration, and preparing consolidated reports. We also have a role to promote improvements and share experiences between bodies in strengthening oversight in places of detention.

We will also aim to work cooperatively with the Commonwealth Attorney-General's Department, the Australian Human Rights Commission and other bodies with a role in this area.

NPM Inspector for Places of Detention under the control of the Commonwealth:

In addition to the coordination role, my Office was nominated as the NPM responsible for inspecting places of detention under the control of the Commonwealth. Commonwealth places of detention at this stage include immigration detention, military detention and Australian Federal Police holding facilities in the ACT and Australia's external territories.

1) OPCAT implementation in Australia and why OPCAT matters.

I would like to talk now about how OPCAT implementation in Australia is tracking, why it is still so important and what still needs to be done.

The function of **NPM Coordinator** conferred upon me and as set out in our Regulations in respect of people deprived of their liberty include:

- consulting on the development of standards and principles regarding their treatment and conditions
- collecting information and related research on oversight arrangements
- proposing options and developing resources to facilitate improvements in oversight arrangements
- facilitating the sharing of expertise, knowledge and practice
- proposing options for reducing duplications, overlaps and gaps in coverage
- convening meetings and facilitating collaboration
- sharing information and, very importantly, reporting publicly about issues that are being identified by NPMs, and
- making recommendations to government.

My approach to all of these functions – and noting that most of them require a network of Australian NPMs to be actively engaged in this process – is to be collaborative and

transparent, with the inspecting bodies I am to coordinate, with the entities I or they oversee, with international bodies such as the SPT, or with varying levels of governments, but also with representatives from civil society organisations.

There are few, if any, federated states that provide a model for how an NPM Coordinator should do their work. One important point to note is that I do not envisage that the Coordinator in the Australian context can, or should, be able to direct the activities of the various state and territory NPMs – indeed, it is fundamental to the effective operation of OPCAT that all of the NPMs are genuinely independent.

As the NPM Coordinator, my Office's focus has also been on continued engagement with domestic stakeholders to encourage the nomination of NPMs across all jurisdictions.

Our first major work as NPM Coordinator was the engagement and dialogue with existing oversight bodies to map and provide a baseline assessment report of Australia's readiness to meet OPCAT requirements. As of 2019, this provided a comprehensive overview of how far along each jurisdiction was, in order to establish its independent NPMs with a regular preventive inspection monitoring regime.

That was, and remains, an important piece of work. On the one hand it identified with clarity that every jurisdiction has bodies that have some or many of the characteristics you would expect to see in an NPM. Subject to appropriate legislative, organisational or capability adjustments, the bones of an NPM network are already there. On the other hand, the report identified that each jurisdiction needed to do more work to ensure that their NPM bodies met the specific expectations set by OPCAT – in relation to things like independence, reporting, a preventive focus, and resourcing.

The report highlighted too that there is a matter of scope that ultimately will need to be addressed. That is, whilst the Australian Government's starting point in relation to OPCAT is to focus on so-called primary places of detention, OPCAT itself is not limited in this way. Over time, consideration will need to be given to ensuring that implementation of OPCAT applies to all places of detention.

And the report called out the very important role for civil society organisations in providing advice and input to NPMs. In that context, in early 2020 I formed an advisory group, comprised of individuals from various oversight bodies and civil society organisations who have experience in areas important to preventive monitoring of places of detention.

Since establishment, the OPCAT Advisory Group has met three times, most recently in April 2021 and will meet again in July just before my retirement. The group's current membership is:

- Mr Edward Santow, the Australian Human Rights Commissioner;
- Mr Paris Aristotle, the CEO of Foundation House;
- Mr Noel Clement, of the Australian Red Cross;
- Professor Bronwyn Naylor, co-founder of the Australian OPCAT Network;

- Professor Neil Morgan, the former Inspector of Custodial Services for Western Australia and
- Mr Brendan Thomas, CEO of NSW Legal Aid and a Wiradjuri man with expertise in social justice, policy reform and detention issues affecting Aboriginal and Torres Strait Islander people.

Over and above the advice I take from the Advisory Group, my staff are working to build regular, productive engagement with a wide array of civil society groups. We are genuinely interested in hearing their views.

My Office has also continued to engage with the SPT.

Having said all that, you can't be a fully effective NPM Coordinator until all jurisdictions have nominated the NPMs whose efforts you might coordinate. That remains the central next step, but more on that in a few moments.

First, I'd like to give you an update on our inspection work following our nomination in 2018 to be the **Commonwealth NPM**, with a modest amount of additional funding. This supports our existing immigration detention oversight function that we commenced over 15 years ago.

As the Commonwealth NPM we have developed a framework for inspecting immigration detention consistent with OPCAT principles that considers the safety, security, dignity and respect for detainees, but getting to OPCAT best practice is still a work in progress. We have made progress at more regularly putting material into the public domain about what we see in immigration detention facilities, albeit that I would like to be able to speed up our reporting program. We have made progress at building relationships with civil society representatives and at more actively engaging with detainees – although the latter has been impacted by Covid 19. We need to do more to build a multi-disciplinary approach to our inspections.

As the Commonwealth NPM, we are also developing frameworks for inspecting military detention facilities and the Australian Federal Police holding cells with a view to commencing inspections in the upcoming financial year. So at a national NPM level we are making progress, but there is more to do.

I now return to the role of state and territory jurisdictions. In 2019 I gave a presentation at the 8th Annual Prisons Conference where I discussed the implementation of OPCAT. As part of my presentation, I addressed the need for state and territory NPMs to be nominated as an essential step towards OPCAT implementation in Australia.

We have seen some, but only partial, progress since then.

Western Australia's NPM, nominated in July 2019, consists of the Western Australian Ombudsman which will oversee mental health and other secure facilities, and the Western Australian Inspector for Custodial Services responsible for justice-related facilities including police lock ups.

In April 2021 the **Northern Territory** government has nominated the Northern Territory Ombudsman as its interim NPM. As interim coordinating NPM, their focus will be on considering amendments to existing legislation and engaging with existing oversight bodies and relevant stakeholders to progress NPM implementation.

I look forward to further engagement with the existing NPMs before my departure and I'm sure my office will carry on that engagement into the future.

Similarly, the **Australian Capital Territory** has committed to OPCAT implementation and NPM designation. I have participated in consultations with potential oversight agencies and civil society organisations, together with the ACT Department of Justice. And I look forward to the ACT's nomination in due course.

In the ACT and Northern Territory, legislative amendments have been passed to define places of detention and allow SPT visits.

In November 2020 the **Tasmanian** government called for comment on its draft legislation that stepped towards the Custodial Inspector becoming the NPM covering all places of detention in Tasmania. We look forward to the passage of that legislation, and the development of a resourced Tasmanian NPM by January 2022. I note that the Custodial Inspector is also the Tasmanian Ombudsman.

Very recently too, the **South Australian** government has prepared draft legislation for comment to support its proposed NPMs, and we are engaging in that consultation.

It has been harder, however, to discern progress in some other major jurisdictions, including here in NSW. Some jurisdictions have stated publicly that they cannot nominate NPMs or progress implementation without funding from the Commonwealth and to date funding has not been provided. This is a problem that needs to be resolved if Australia is to have a fully functioning NPMs by January 2022.

In my 2019 baseline report, I highlighted that adequate resourcing will be needed to fully implement OPCAT. That said, the amount of resourcing needed to fund effective oversight is relatively small compared to the cost of running places of detention. Good quality oversight, that helps drive fair treatment for detainees, might in fact save money in the long run. More importantly, oversight that is directed towards prevention of harm can be one contributor – not the only one, but an important contributor nonetheless – to preventing the tragedy of deaths or serious harm occurring in places of detention.

So resourcing is important. I am personally agnostic as to which level of government funds the improved oversight needed to achieve OPCAT implementation, but it is important that the issue be considered with some urgency.

I turn now to the challenges for inspecting bodies, including my own, posed by Covid 19.

The world has changed in the face of the COVID pandemic, with greater restrictions imposed on people in places of detention. Limits on mobility and visitors may be warranted for short periods to minimise and contain the risks of outbreaks of COVID in places where people are confined. However, without regular independent oversight, such as can be provided by NPMs, there is a real lack of assurance that all vulnerable people in detention have adequate safeguards against the risks of ill-treatment.

Before the pandemic, my Office conducted regular physical inspections of Australia's six mainland immigration detention facilities, as well as other facilities known as Alternative Places of Detention (or APODs).

In March 2020, noting the imposition of state quarantine requirements and border restrictions it quickly became clear that:

- it was not practical or advisable for our staff to travel interstate to inspect immigration detention facilities, and
- our attendance could pose serious health risks for detainees, service provider staff and inspection officers.

For a short period my Office suspended its onsite inspections. We did not take this decision lightly and were mindful that, in many ways, the restrictions imposed in response to COVID-19 could make detainees more vulnerable. We were particularly conscious that, at the same time we paused our inspections, the department responsible for managing immigration detention suspended in-person visits to detainees by friends, advocates and legal representatives. These visits, in conjunction with oversight by my Office and other independent bodies, provide an important safeguard for people who live in closed environments.

Around this time we were in regular contact with existing monitoring bodies both here and overseas, and noted for the most part that they too had been unable to physically visit places of detention as a result of the pandemic.

Instead, for a period my Office remotely monitored the immigration detention network via weekly reports from, and regular meetings with, the Department of Home Affairs about individual detention facilities and the broader detention network. We also received feedback from complaints, monitoring the media, engaging with peer bodies and civil society stakeholders. Reviewing contemporaneous information from a range of sources meant that, although we were not attending facilities in person, we could maintain oversight of key areas of risk that if not addressed, might lead to the increased risk of torture or other cruel, inhuman or degrading treatment or punishment.

In late May and early June 2020 my Office was able to conduct limited onsite visits to all mainland Immigration Detention Centres and Immigration Transit Accommodation facilities specifically to assess the department's practical arrangements for preventing and managing COVID-19 in facilities.

My Office's monitoring focused on how the Department adhered to the CDNA's guidelines across the immigration detention network, and overall we were satisfied with the way in

which the risks of a Covid outbreak were being managed. It remains the case that there has not been a Covid outbreak in any of the facilities. That said, my report on this matter, published last June, called out that having fewer people in crowded immigration detention would further reduce the risk. Today, the rollout of the Covid 19 vaccine is an obvious further priority.

Our inspections team now operates under a hybrid model of detention monitoring. This includes both in-person inspections as well as remote and virtual monitoring. This model gives us the flexibility to adapt to COVID-19 challenges and the changing environment whilst ensuring we can maintain oversight of immigration detention centres.

For example, earlier this month our inspections team was scheduled to visit immigration detention facilities in Melbourne. Following the announcement of restrictions in Victoria, the team was not able to travel in person and instead proceeded with the inspection through remote monitoring. The inspection consisted of participating in scheduled virtual stakeholder meetings, requesting and reviewing specific information, conducting meetings with all relevant stakeholders via video conference and reviewing relevant CCTV footage. In other locations, physical inspections are continuing.

The SPT has also released useful advice relating to COVID-19.¹ It's most recent statement outlined that numerous NPMs across the globe had sought further advice about how to respond to the pandemic. It emphasised the heightened exposure of people in places of detention to ill-treatment as a consequence of necessary public health measures taken, and the need for NPMs to continue to undertake visits, albeit with respect to the necessary limitations.

Similarly, in February 2021, the Association for Prevention of Torture (the international non-government organisation that provides advice to NPMs) released the results of a survey on how detention monitoring bodies have adapted during COVID-19.² The survey identified similar challenges across the 32 countries that responded, including heightened risk of COVID-19 transmission, prohibitions on visiting detention premises, lack of cooperation from authorities and budget constraints. The survey reveals that most countries participating in the survey reported adapting their visiting programs in different ways, including prioritising visits and using technology to collect information where possible.

Conclusion:

The ratification of OPCAT by Australia represented an important step towards ensuring people deprived of their liberty are protected from mistreatment or abuse.

However ratification was just the first step, and implementation is becoming an ever more pressing priority. I hope that, by the time of your 2022 conference, my successor will be able to report to you about how all jurisdictions have come together to create a fully functioning NPM network, that NPMs are learning from each other and building a

¹ [United Nations \(ohchr.org\)](https://www.ohchr.org/)

² [How have detention monitoring bodies adapted during COVID-19? | Association for the Prevention of Torture](#)

collaborative, best practice approach to implementation, and that my successor is playing a constructive role at steering that work.

All of this will be in the interests of those in detention, but also in the broader public interest, because how we treat those who are most vulnerable reflects on us all. Thank you.