

## **8<sup>th</sup> Annual Prisons Conference**

### **Presentation by the Commonwealth Ombudsman - Implementing OPCAT**

**Tuesday 9 July, 2019 at 11:40am**

**Mercure, Brisbane**

#### **Acknowledgement of Country**

Before I begin, I wish to acknowledge the Yuggera (*Jug-er-a*) people, the Traditional Owners of the land on which this event is taking place and Elders both past and present.

#### **Introduction**

I'm pleased to be able to speak with you today about the role of the Commonwealth Ombudsman and Australia's readiness to implement the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (or OPCAT for short).

The Australian government ratified OPCAT in December 2017.

When it ratified OPCAT, Australia opted to exercise its right to make a formal declaration to delay the commencement of its obligations for three years.

So what is OPCAT designed to do and what are our obligations now that it has been ratified?

A good place to start a presentation about OPCAT is to touch on the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (or UNCAT for short). 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
- Requires State Parties to periodically report to the Committee against Torture on steps taken to implement the treaty.

The Australian Government ratified the UNCAT in 1989.

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).

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 has already been closely following the Australian OPCAT journey and just last week they announced that they will be visiting Australia in the coming months. So they are interested in how a first world country with a federated system of government will implement OPCAT.

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 a way, all that OPCAT does is require countries who sign up to take steps to ensure that their commitments to UNCAT – which Australia signed up to 30 years – are upheld.

### **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 Tax and Intelligence matters both of which have specialist oversight agencies). I am the Defence Force Ombudsman; the Law Enforcement Ombudsman; the Private Health Insurance, Postal, VET Student Loans, Overseas Students, and Immigration Ombudsman. At a more local level I am the ACT Ombudsman. I also provide assurance to the Federal Parliament and the public that when law enforcement agencies use certain covert and intrusive Commonwealth powers they do so consistently with the law.

While my Office takes complaints and investigates issues that are raised and are within our jurisdiction, we 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. As a result of my Office's expanding remit, I am fortunate to now have a staff of almost 300 people who are experts in many of the fields I have just mentioned.

Which brings us to the role of the Office of the Commonwealth Ombudsman in relation to OPCAT. My Office has two relatively new functions to do with meeting our international obligations under the OPCAT – one as the Coordinator of Australia’s National Preventive Mechanism, and the other as the Commonwealth inspecting body.

### **NPM Coordinator**

When the Australian Government ratified OPCAT in December 2017, 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 that will form a network of NPMs. We received a small amount of funding to start work in the 2018 Commonwealth budget and our role as the NPM Coordinator took effect from 1 July 2018. Regulations, appended to the Ombudsman Act 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.

It is my intention that the coordination role will be a collaborative and cooperative one, working with the NPMs once they are designated, with a strong focus on:

- Research
- Sharing expertise
- Developing communities of practice focused on areas of vulnerability or concern.

This is consistent with the way the NPM Coordinator works in the UK, where there are 21 different entities that form the NPM. There is a comparable model to our potential network of NPMs – although I make the point that it would be better, in my view, if we ultimately have considerably fewer than 21 entities in the Australian NPM network.

As NPM Coordinator I also envisage publishing reports and reporting to the UN SPT on the work of the NPM network and the implementation of OPCAT more generally in Australia.

### **NPM Inspector 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. To date, we are the only nominated NPM within Australia. As with our coordinating role, the formal establishment of this function came into effect in April this year through Regulation.

The Regulations allow my Office to undertake regular inspections of places of detention under the control of the Commonwealth, as well as provide information to the SPT.

Places of detention under the control of the Commonwealth include immigration detention, military detention and Australian Federal Police holding facilities.

As the NPM Inspector for these facilities, my Office will continue its oversight of domestic immigration detention facilities. My Office has been visiting immigration detention facilities since 2004, and has been regularly inspecting them since 2010.

As the NPM Inspector we will also provide oversight for Australian Federal Police cells in the ACT including in Jervis Bay and the External Territories of Cocos (Keeling) and Christmas Islands. We will provide oversight for military detention facilities, including the Defence Force Corrective Establishment in New South Wales. While my Office does not currently inspect military and federal police facilities, we are in the process of developing inspection methodologies for these places. We have been in touch with the relevant authorities and have started thinking about how often to inspect, what to focus on and so forth. I envisage undertaking full OPCAT inspections of these places from January 2021.

### **Baseline Assessment of OPCAT Readiness**

Although there are places of detention that fall under the control of the Commonwealth, most places of detention – such as prisons, juvenile justice facilities, and various psychiatric facilities are administered by the States and Territories.

For OPCAT to be implemented in Australia, therefore, the next essential step is the nomination of NPMs within each jurisdiction and is a matter for the states and territories.

In the absence of any other NPM bodies being designated, my Office has been doing three complementary pieces of work.

First, we have been examining international and national practice with respect to the inspection of places of detention to seek to understand what effective OPCAT implementation might look like here in Australia. We have taken a particularly close interest in New Zealand and the UK, both of which ratified OPCAT well over a decade ago, and both of which have broadly similar systems of government to us.

Second, we have been examining our own practices as an inspector of places of detention to see how we need to change what we do (in the case of immigration detention facilities) or start to do (in Defence and AFP establishments), in order to be OPCAT ready.

I should add here that the OPCAT itself is a relatively simple instrument. As well as describing the roles of the SPT and the NPMs in general terms, it sets out a set of tests that ought be applied to determine whether or not an NPM, or a country, is OPCAT compliant. I will not list them all here, but I think they are sensible, indeed when you read them they strike me as fairly obvious things that you would want to see in an effective inspection system. They include that the inspection body should be genuinely independent of the entity they inspect; that the body has full access to people and places and records in detention facilities; that they can visit facilities announced or unannounced; that they are free to report publicly and to make recommendations; that they are free to allocate their resources as they see fit; and that they visit regularly, so that their focus becomes one of prevention and systemic improvement rather than kneejerk crisis response.

So having regard to these and the other tests that OPCAT lists, in looking at my own office, we have been asking what do we need to do differently? The Office's inspections team already conducts regular visits of immigration detention facilities. Although these can be undertaken without notice, we generally provide notice. In the course of these inspections, my staff have full access to the people, places and records within immigration detention facilities, and have the ability to move around the facilities unescorted. We currently publish a summary of our findings in our annual reports, but we are considering doing more.

We are at the beginning of trialling elements of OPCAT methodology into our inspections of immigration detention facilities. One consideration for my Office is the extent to which we will need to supplement core inspecting staff with external experts. The use of external expertise is already a feature of many OPCAT inspection regimes. For instance, the New Zealand Ombudsman - which is a New Zealand NPM - utilises multi-disciplinary teams with external professional experts, such as mental health experts in mental health facilities. These experts have been authorised to exercise the New Zealand Ombudsman's powers when visiting places of detention.

Through the development of methodology for the inspection of Commonwealth places of detention, my Office will consider how best to build on best practice in the OPCAT context. We are paying particular attention to how we ensure that our inspections are undertaken with an appropriate human rights emphasis, and indeed we are working closely with the Australian Human Rights Commission on those aspects.

And the third thing we have been doing is to make an assessment of State and Territory OPCAT readiness. The goal is not to criticise any entity or any jurisdiction, but rather to ask: what exists now? We hope the answer to that question will provide a solid foundation for the work that lies ahead. We have undertaken extensive outreach to bodies that do, or may, have a role in inspections and oversight of places of detention in each jurisdiction.

The task of mapping existing oversight and inspection bodies nationally was both larger and more complex than initially anticipated and highlighted the broad range of current oversight practices. The existing bodies we canvassed across the Commonwealth and the eight States and Territories have developed different approaches to monitoring places of detention. These have been shaped by their respective legislation, tradition and convention.

So for example, here in Queensland we identified and engaged with the:

- Office of the Chief Inspector of Correctional Services
- Director of Forensic Disability
- Youth Detention Inspectorate
- Queensland Ombudsman
- Office of the Public Guardian (Community Visitors program)
- Office of the Health Ombudsman
- Office of the Family and child Commission
- Office of the Chief Psychiatrist.

Individually and collectively, these bodies perform an array of inspection, oversight, complaint handling and visiting roles, and every jurisdiction has some similar, but different, array of bodies.

We have collected a large amount of information from these existing oversight and inspection bodies, establishing which entities are able to visit and inspect prisons and juvenile detention, police cells and various psychiatric facilities within their jurisdiction.

We have also built up a picture of what they inspect in aggregate.

Our assessment of Australia's preparedness to undertake OPCAT compliant inspections has identified that there are over 1000 facilities across the country that fall within the following categories:

- 497 closed mental health facilities
- 396 police lock-ups,
- 16 juvenile justice facilities
- 110 adult correctional facilities
- 11 closed disability units
- six immigration detention facilities and
- 12 military cells or corrective facilities.

We asked bodies that were identified as having a level of involvement in monitoring or inspecting places of detention to complete a baseline study tool in order to determine OPCAT readiness. The parameters against which these bodies provided a self-assessment stem from those outlined in the Articles of the Optional Protocol.

We are close to finalising a report on our findings and I will share a few high level observations in advance of its publication.

Firstly, Australia's task of implementing OPCAT begins in a 'brown field site' rather than a 'green field site'. That is, we are not starting from scratch in any jurisdiction. Every jurisdiction already has entities with some of the legislative and institutional components that are necessary to implement effective, preventive, independent oversight of places of detention.

Second, I anticipate that the report will also reflect that different jurisdictions are in different places with respect to readiness. There are variances in the degree to which inspectorates are genuinely independent.

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

There are also differences in institutional capability and resources dedicated to the task. In most jurisdictions there is some form of regular prison inspection regime. In all jurisdictions there are gaps in relation to inspection of police lock-ups.

Third, we anticipate that some oversight bodies' legislation, mandates or processes may need to be amended so as to allow them to access facilities that they would otherwise not have the ability to visit, and to conduct inspections that meet the requirements of OPCAT.

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

In performing inspections of facilities, 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 merely 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 UK 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 3 years ago? If so why? I note that the WA Inspector of Custodial Services also undertakes surveys of this kind.

#### *Independence*

Independence is a core aspect of an OPCAT 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 at the Ombudsman’s office.

*Access to people, information and places*

The 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.

## Conclusion

In Australia there are few entities that meet all of the requirements under OPCAT, though many have some of the required features.

Having said that, while there are clearly further steps required to be taken, the task of implementing OPCAT is not insurmountable nor unachievable.

90 countries have ratified OPCAT and some, including some that are rather like us, are well advanced.

Closer to home, there is already a substantial amount of expertise within the inspection and oversight bodies currently operating across the country, and through the implementation of OPCAT we will draw on this experience to focus on improvements that can be made to the facilities in which people are detained (mention Victorian Ombudsman and WA Inspector). As the Coordinator for the NPM network, it is my intention to facilitate the sharing of expertise between bodies within the network, and I hope that such openness of communication will enable NPM bodies to learn best practice from one another.

Before concluding, I would just like to touch on three further points.

First, I think it is very important for civil society to have a voice in how OPCAT is implemented and NPMs operate. To this end, my office has been very interested in the work the AHRC has been doing to engage civil society on OPCAT implementation, and we are in touch with the OPCAT network and other interested parties. As the Commonwealth NPM, I am considering the establishment of some sort of civil society reference group to help inform how my office goes about its inspection activities. I respect the fact that a variety of advocacy groups have long campaigned for OPCAT to be ratified and their voice should continue to be heard.

Second, some people have queried what the “scope” of OPCAT implementation might look like. The Commonwealth government has indicated that, as a starting point, it thinks that implementation should focus on what it has termed “primary” places of detention, such as prisons, juvenile justice facilities, psychiatric facilities, immigration detention centres and the other places I have mentioned during this presentation. However, it is important to note that OPCAT does not contain a limited definition of what a place of detention is; this means that, over time, Australia will need to think about what OPCAT compliance looks like in other places where people are held involuntarily. I note that the NZ Ombudsman now has an expanded OPCAT jurisdiction with respect to privately run aged care facilities where there are dementia units. I note too that there is a Royal Commission going on about aged care right now. We should watch this space.

Finally, I have talked about a report that my office is drafting. I should therefore tell you where it is up to. It is close to finalisation. I am about to send a draft of it to relevant Ministers and Departments for comment, principally to ensure that my assessment of each jurisdiction is accurate. And shortly after that I plan to publish the report. I have recently

had the opportunity to brief Attorneys-General on the work I've outlined today, and hope to meet Corrections Ministers to do the same thing in the coming weeks. The key message for Ministers is that it is a fact that Australia has ratified OPCAT and the next step is for jurisdictions to nominate NPMs.

I look forward to continuing to progress OPCAT implementation in Australia, not just because Australia has made a commitment to do so, but in the wider public interest.

Thank you.