

Future Justice and Corrections Summit: 29–30 March 2022

Presentation by the Office of the Commonwealth Ombudsman

Rebecca Vonthethoff – Senior Assistant Ombudsman, Assurance Branch

***“Developments in OPCAT implementation in Australia, and the
importance of the preventive mandate”***

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Acknowledgement of Country

I would like to begin by acknowledging the Gadigal (gha-da-gal) people from the Eora (*e-or-a*) nation, the traditional custodians of the land on which we meet today and pay my respects to Elders past and present.

Introduction

I am pleased to represent the Office of the Commonwealth Ombudsman at this Future Justice and Corrections Summit. In 2020, at the last in-person Summit, former Commonwealth Ombudsman Mr Michael Manthorpe PSM spoke about

implementation of the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, or OPCAT. Since Mr Manthorpe's retirement last year – and while we await the appointment of the next Commonwealth Ombudsman – I am delighted to be here to speak to you about developments in Australia's implementation of OPCAT, and the importance of OPCAT's preventive monitoring mandate.

Background and overview to OPCAT

While some of you may be very familiar with OPCAT, others may be less so. I will start with a brief refresher on OPCAT including its history and purpose.

OPCAT stands on the shoulders of two earlier international instruments.

At international law, torture and other ill treatment are prohibited by the *International Covenant on Civil and Political Rights* – or the ICCPR – adopted by the United Nations General Assembly in 1966.

The General Assembly built on this by adopting the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* – or the CAT – in 1984. The CAT goes beyond the ICCPR by, among other things:

- providing a comprehensive definition of torture
- requiring States Parties such as Australia to take effective legislative, administrative, judicial or other measures to prevent acts of torture and other ill treatment
- requiring all acts of torture to be offences under domestic criminal law, and to be promptly and impartially investigated and
- requiring redress and rehabilitation for victims of torture.

Australia ratified the ICCPR in 1980, and the CAT in 1989.

OPCAT builds on the foundation of the ICCPR and CAT, not by creating new rights but by honing in on the importance of prevention to combat torture and ill treatment.

OPCAT focuses on *prevention* rather than *response*. In particular, OPCAT focuses on preventing the risk of torture or ill treatment in places where people are deprived of their liberty. OPCAT entered into force in 2006, was signed by the Australian Government in 2009, and ultimately ratified by Australia in December 2017.

So, what obligations arise from OPCAT?

OPCAT requires States Parties to establish a system of regular preventive visits to places of detention by independent, domestic bodies known as National Preventive Mechanisms – or NPMs.

As I imagine you are keenly aware, under Australia’s federated system some places of detention are the responsibility of the Commonwealth – such as immigration detention facilities – and the majority fall within the jurisdiction of the states and territories – for example correctional facilities. It makes sense for Australia to have a network of NPMs, made up of bodies nominated by the Commonwealth and each state and territory, to monitor places of detention across the country.

I am pleased to report that more Australian jurisdictions have nominated NPMs since Mr Manthorpe last spoke at this Conference in 2020. We do not have a full network yet, but we are on the way! The Commonwealth, Western Australia (WA), Tasmania and the Australian Capital Territory (ACT) have nominated their NPMs (sometimes multiple NPMs in each jurisdiction), and the Northern Territory (NT) has nominated an interim NPM to crack on while final arrangements are considered. An OPCAT implementation Bill was introduced in South Australia in August 2021, foreshadowing

the appointment of South Australian NPMs.¹ I sincerely hope this trajectory continues and that we will soon have a full network of NPMs operating across all Australian jurisdictions.

Spoiler alert, the Commonwealth Ombudsman is the Commonwealth NPM – more on this shortly!

In addition to setting up a system of NPMs, OPCAT requires State Parties to accept visits to their places of detention from the UN Subcommittee on Prevention of Torture – or the SPT. The SPT is an international monitoring body of 25 experts elected by OPCAT State Parties. These experts are from different regions and bring professional competence across an array of specialties such as medicine, law, police and justice administration, human rights, and social work.

Under OPCAT the two visiting bodies – domestic NPMs and the international SPT – must be able to:

- enter all places of detention of their choosing
- access all information relevant to those places of detention
- engage in dialogue with anyone they see fit – including staff and people who are detained and
- make recommendations to improve the treatment of people who are detained and prevent torture and ill treatment.

The concept of prevention is critical to OPCAT and is something I will return to later.

The SPT intended to visit Australia in 2020 but postponed this due to COVID-19. We don't yet know when the SPT will reschedule its visit to Australia. While in practice

¹ See [OPCAT Implementation Bill 2021](#). Part 2 of the Bill sets out official visitors, the Training Centre Visitor, and the Principal Community Visitor as the NPMs for specific places of detention.

SPT visits to parties' places of detention are infrequent, domestic NPM visits are designed to be regular.

The roles of our Office under OPCAT

I now want to give a short overview of the Office of the Commonwealth Ombudsman, for those who may not be familiar with us. In brief, the Office takes and investigates complaints, and carries out other forms of oversight, inspection, audit and reporting activities across a wide field of mainly (but not only) Commonwealth Government activity. The cornerstone to the Office's oversight functions is to ensure the actions of agencies are fair and reasonable.

While the investigation of complaints has been the traditional role of the Office, over the years Government has given our Office additional responsibilities towards the vulnerable and the disadvantaged. This includes oversight of law enforcement agencies' use of covert powers; assisting historic victims of abuse in the Defence Force; and considering the circumstances of people detained long-term in immigration facilities.

And this brings me to the three roles of our Office under OPCAT.

NPM Coordinator

In 2018, the Commonwealth Government appointed the Commonwealth Ombudsman as the NPM Coordinator, giving us responsibility for coordinating the efforts of the network of independent NPMs across the Commonwealth, states, and territories.

Our principal work is to facilitate information sharing and collaboration within the NPM Network, and prepare consolidated annual reports on the Network's activity.

We also aim to support further engagement with civil society, along with other bodies which have existing roles in the detention monitoring space.

While not all states and territories have yet nominated their NPMs, it is apparent Australia will have various NPMs arranged not only by jurisdiction, but also based on the types of places of detention.

Commonwealth NPM

In 2018, the Commonwealth Government also nominated the Commonwealth Ombudsman as the NPM responsible for inspecting places of detention under the control of the Commonwealth.

Our focus to date has been inspecting immigration detention facilities. We have been inspecting those facilities in some form for over a decade. Our current focus is evolving our oversight framework to implement the preventive approach required by OPCAT, including by having regard to human rights principles and best practice. We will also expand into visiting other places of Commonwealth detention, namely military detention and Australian Federal Police holding facilities.

ACT NPM

Under an arrangement between the ACT Government and the Commonwealth Government, the Commonwealth Ombudsman also performs the role of the ACT Ombudsman, which brings me to the Office's third role under OPCAT.

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.

Our Office's OPCAT work since the last Summit in February 2020

I will now touch briefly on what our Office has been doing to implement OPCAT since the last Summit in 2020.

As I'm sure I don't need to explain to you all today, COVID has presented varied and evolving complexities in the management of detention environments. COVID has also impacted our Office's ability to perform our NPM functions and has required from us a new degree of flexibility and responsiveness to risk.

Commonwealth NPM

Once COVID-related risks escalated in early 2020, as Commonwealth NPM we adjusted our approach to monitoring immigration detention facilities.

We suspended in-person visits between March and October 2020 and again from June 2021 since our attendance unacceptably increased the risk of COVID-19 entering facilities. We visited immigration detention facilities (without engaging with people held in detention) in May/June 2020 to monitor how the authorities were implementing COVID-19 risk management measures. We promptly published a statement on our findings and recommendations in July 2020. That statement is available on our website.

As you would appreciate, suspending in-person inspections of immigration detention facilities was not a decision we took lightly. We considered the safety of people in detention and staff, as well as the lockdowns, travel restrictions, and public health orders in place in jurisdictions.

Our Office's inspections provide an important safeguard for people detained. In considering the risks posed by our visits, we were informed by the clear advice of the *Communicable Diseases Network Australia* Guidelines for COVID-19 outbreaks in

correctional and detention facilities. These Guidelines noted that, in facilities where large numbers of people reside in close proximity, residents are at higher risk of transmission. These same guidelines would be familiar to many of you through your work with detention facilities over the pandemic.

On balance, we concluded it was not reasonable for us to place people in detention at heightened risk by entering facilities if we could effectively monitor immigration detention remotely.

The Commonwealth NPM maintained oversight of immigration detention by implementing a ‘whole of network’ remote monitoring model including regular review of:

- weekly reports from, and information from meetings with, the Department of Home Affairs
- complaints received by the Office
- media reports and
- feedback from peak bodies, civil society stakeholders and advocates.

Although not attending facilities in person, we were able to maintain oversight of key areas of risk that, if not addressed, may lead to torture or other cruel, inhuman, or degrading treatment or punishment. We appreciated the assistance of the Department of Affairs, including Australian Border Force, and its detention service providers in supporting the implementation of this remote monitoring model.

Our Office continued to publish reports on our immigration detention oversight, with a further two reports and one statement on COVID management published since the 2020 Summit.²

These documents are available on the Office's website.³ By being publicly available, our reports foster a broader public understanding of the need to maintain appropriate conditions in detention facilities, and support compliance with OPCAT.

NPM Coordinator

The path of Australian jurisdictions towards OPCAT implementation has been long – and there is still a way to go. We have worked hard as NPM Coordinator to support other jurisdictions in moving towards implementation of OPCAT.

We continued to build relationships and liaise with contacts in states and territories. Through advice and suggestions on draft legislation, best practice and sharing what we have learned from research and international counterparts, I hope we have helped jurisdictions take achievable steps towards OPCAT implementation.

We also focused on engagement with people and organisations with particular expertise and perspectives on the detention environment. At the last Summit, the Ombudsman explained he had formed an OPCAT Advisory Group – or OAG – to provide advice on OPCAT and our NPM roles. Pleasingly I can say we have since had six meetings with the OAG, with the next to be scheduled next quarter.⁴ The OAG enables the Ombudsman and our Office to both update and receive advice from civil

² See:

- [1 July to 31 December 2019 Immigration Detention Oversight Report](#), published August 2020
- [1 January to 30 June 2020 Immigration Detention Oversight Report](#), published June 2021
- [Statement by the Commonwealth Ombudsman on the management of COVID-19 risks in immigration detention facilities](#), published July 2020.

³ See the Office's [Monitoring places of detention – OPCAT](#) page.

⁴ Further information on OAG is available on the Office's [Monitoring places of detention – OPCAT](#) page.

society and detention experts, and expand our knowledge and expertise on matters relating to OPCAT implementation.

Further afield, we have liaised with international experts and counterparts to support our NPM Coordinator role and help us with forward planning. Australia is in the fortunate position of being able to mine the wealth of NPM expertise of countries who worked through implementation before us.

To this end we have been engaging with NPM counterparts in New Zealand, the United Kingdom and South Africa, and we plan to reach out to more. These countries have multi-body NPMs with a central coordinating function, similar to the NPM Network here in Australia. We have also continued to engage with the SPT, along with the Association for the Prevention of Torture (APT) which is a key international NGO specialising in torture prevention and the operation of OPCAT.

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

Forward priorities on OPCAT for the Office's next year

I will now turn briefly to our Office's forward priorities on OPCAT over the coming year.

I want to again emphasise that our Office does not stand alone in performing NPM functions in Australia. Each state and territory requires its own NPM, and most jurisdictions are appointing multiple NPMs. Australia already has 8 NPMs appointed.⁵

⁵ Appointments are currently as follows: Commonwealth – 1, WA – 2, NT – 1, ACT – 3, Tasmania – 1.

As remaining jurisdictions nominate their NPMs and inspection roles develop,
Australia may give the UK 21 member NPM a run for its money!

NPM Coordinator

The way Australia's NPM Network operates, both as a whole and as each individual NPM, is a matter of considerable importance.

Not only is this important to us as NPM Coordinator but, I would suggest, it is also important to you. Our Office is a small part of a large and diverse NPM structure, each with its own OPCAT implementation responsibilities. For those of you coming principally from the corrections space, your future interactions with the NPM Network are less likely to be with us, and more likely with the relevant state and territory NPMs whose scope includes adult correctional facilities and/or youth justice facilities.

It is important each NPM within the Network understands the broader OPCAT picture in Australia.

To support this, as NPM Coordinator we have started working with representatives of Australian NPMs appointed to date. We are discussing matters like:

- the status of NPM implementation by body and jurisdiction
- the role of the NPM Coordinator in working with nominated NPMs and
- how each jurisdiction is planning to manage OPCAT reporting requirements – to inform our reporting as NPM Coordinator for the network as a whole.

We are focused on how we can build and maintain connections between diverse NPMs.

In considering what an effective NPM Network looks like, I see a collective of individual NPMs that works together to:

- build connections to make the most of the resources and opportunities at our collective disposal
- help each other, where we can offer skills or expertise
- identify when we need further, external expertise or support – and work together to get this.

As NPM Coordinator we will continue our international engagement with the SPT, the APT and the international NPM community.

We also hope to explore what opportunities international NPM counterparts and other international specialists like the APT, may be able to offer the NPM Network on training and skills sharing.

Commonwealth NPM

As Commonwealth NPM, I am pleased to say that we resumed in-person visits to detention facilities in February. Recognising the importance of regular visits under the OPCAT mandate, as well as the impact of COVID-19 on meeting this mandate, the Commonwealth NPM intends to visit the remainder of immigration detention facilities around the country this year.

Our next report on our Office's immigration oversight activities, for the period 1 July 2020 to 30 June 2021, is also being finalised. We anticipate publishing this in the coming months.

Further, we participated in a technical visit to the Defence Force Correctional Establishment at Holsworthy Barracks here in Sydney in February. We hope to visit unit and area cells at Defence bases around the country in 2022. We also hope to

inspect Australian Federal Police holding cells in the ACT and external territories this year.

ACT NPM

Finally, the Office as the ACT Ombudsman will work with our colleagues from the ACT Inspector of Custodial Services and ACT Human Rights Commission to stand up the ACT's NPM.

Challenges to OPCAT implementation in Australia

As Australia's road so far – and international experience – have shown, implementing OPCAT is no quick and easy task. There are challenges ahead to ensure OPCAT is implemented comprehensively in Australia.

OPCAT implementation is a progressive and iterative process. The NPM Network cannot move instantaneously to comprehensive, mature, OPCAT-compliant visits to all places of detention overnight. This can be a matter of frustration to some, given the gravity and impact of torture and ill treatment in detention, should this occur.

However – the progressive implementation of OPCAT should not be understood as meaning Australian jurisdictions have all the time in the world. It is critical for us to crack on.

Progressive implementation means acknowledging that NPMs may not be flawless in their functions from day one – but nonetheless should start anyway. Progressive implementation recognises that NPMs cannot fully develop their oversight framework and approach through theory alone. NPMs must build, test and refine our frameworks and approach, learning from our practical experience monitoring facilities as we go.

Jurisdictional status

Some jurisdictions are yet to appoint NPMs, and some are still contemplating or progressing legislation to give effect to OPCAT and establish NPM roles, powers and protections – that is, to reflect or better reflect the NPM mandate.

I am aware that resourcing for NPMs remains a difficult issue.

But I reiterate what the former Ombudsman said at this conference in 2020, which is that across Australia we need to ‘get on with it’. We acknowledge and appreciate that colleagues from NPMs, other policy bodies and policy departments, across all levels of government and jurisdictions, have been working on this. We encourage you to press on with your efforts towards the implementation of OPCAT, and we will continue working hard on this ourselves.

Moving beyond primary places of detention

The Australian Government’s starting point for OPCAT has been ‘primary’ places of detention, as a means of prioritising those places where risks are most acute. In the initial phases of OPCAT implementation, Australia has chosen to focus on places such as prisons, secure psychiatric facilities and immigration detention.

However, under OPCAT ‘places of detention’ are defined expansively and non-exhaustively. Under OPCAT, a place of detention is any place where someone is or may be deprived of their liberty, by order of a public authority.

As Australia’s OPCAT implementation journey continues and our system of NPMs matures, I expect our NPMs will expand the places they monitor into those areas where people are, effectively, detained, but which go beyond the traditional detention context. For example, some of our international NPM colleagues such as

New Zealand conduct preventive visits of aged care facilities and places of quarantine.⁶

Spotlight on the preventive mandate

I want now to bring my speech back closer to everyone here today, by turning to what makes OPCAT different from other oversight activity in the detention space, and why this difference matters.

There are two facets I wish to note here: OPCAT's preventive focus, and its emphasis on dialogue.

Preventive focus

There are various responsive approaches to managing torture and other ill treatment in detention. These include, as just three examples, robust complaints management processes, internal incident reviews, and of course the criminal justice system.

Mechanisms such as these have critical roles to play in responding to situations of torture or other ill treatment in detention.

OPCAT's preventive focus complements these.

Responsive mechanisms provide critical information sources to inform our preventive mandate. Taking our Office as an example, our Commonwealth NPM team considers complaints made by those in immigration detention or their representatives to help plan for and inform our visits, and to help consider which issues may be in need of particular focus.

⁶ See [OPCAT inspections of aged care facilities – Ombudsman New Zealand](#); [Chief Ombudsman to begin inspections of COVID-19 Isolation Facilities – Ombudsman New Zealand](#).

But the preventive approach is different to a purely responsive mechanism because, put simply, it seeks to avoid the occurrence of ill treatment before it happens. Unlike responsive mechanisms, prevention does not require a ‘catalyst’. This brings with it a particular complexity. A preventive approach requires NPMs to be especially attuned to the breadth of matters which can contribute to the risk of ill treatment in detention before ill treatment has happened.

The preventive focus of OPCAT also relies on education and awareness: education and awareness of what amounts to torture and other ill treatment, and how and why its prevention is both necessary and achievable. Part of our Office’s responsibility, along with that of all current and future NPMs in Australia, is to enable this education and awareness raising.

Within the detention environment this awareness should be at all levels of authority, along with supporting awareness among detained people themselves. Outside of the detention environment, this needs to focus on two-way educative dialogue with civil society and the general public.

Dialogue

Dialogue provides an opportunity for agencies (and oversight bodies!) to learn, but also address risks before their realisation.

Dialogue between NPMs and the agencies and structures responsible for places of detention is critical. This helps to prevent misunderstanding and disagreement.

NPMs are empowered to direct and to use their monitoring mandate to address concerns they find, including by making recommendations.

OPCAT requires dialogue after recommendations have been made, but more broadly the APT has noted the OPCAT system is “based on a process of long-term, sustained

cooperation and dialogue” to assist governments to achieve long-term prevention of torture and ill-treatment.⁷

Crucially, dialogue also helps us to recognise that taking steps to prevent the risk of torture and ill-treatment in detention is a responsibility that rests with all of us – not only with detention authorities, not only with oversight bodies. All of us must work on this together.

This is particularly so when the number and variety of places of detention is significant, and detention authorities and NPMs have finite resources.

What your organisations can do to support OPCAT implementation

I now turn to my final point this morning. OPCAT’s preventive focus and its scope for dialogue is an opportunity for us to broaden our thinking on how to prevent torture and ill treatment in detention facilities.

A critical element is understanding that torture prevention does not rest solely with corrections officers, it does not rest solely with corrections management, it does not rest solely with government, and it does not rest solely with NPMs. Rather, everyone in attendance today has some link, and as such a responsibility and opportunity to support the prevention of torture and ill-treatment.

We all must consider prevention of ill-treatment in the way places of detention are designed – for example are they well ventilated, do people in detention have access to educational and recreational facilities?

⁷ Association for the Prevention of Torture and the Inter-American Institute for Human Rights (2010), [*Optional Protocol to the UN Convention against Torture: Implementation Manual*](#), p 14.

We all must see it in the equipment used in detention environments – are they still fit for purpose? Does the use of this equipment respect the dignity of the person?

And we all must see it in the training given to detention staff – are they aware of standards for the appropriate treatment of people in detention? Are they aware of NPMs' role and right of access to all places, records and people?

These are just some issues we need to consider to ensure the appropriate treatment of those who are detained. These are also the sorts of matters which, among many others, may form the basis of dialogue between NPMs and detaining authorities. And they may also form part of the conversation with people held in detention.

I hope my talk today helps you to consider how you and your organisation can support the prevention of torture and ill-treatment in Australian detention facilities.

From the breadth of presenters, attendees and exhibitors I see here, it is clear that OPCAT's preventive focus is relevant to you. I invite you to consider the ways in which facets of your own work – including those you may not first expect – can support the implementation of Australia's obligations under OPCAT.

OPCAT's scope ensures matters as broad as government correctional policy, and matters going directly to the treatment and conditions of people in detention, need to be considered through a preventive lens.

I also ask you to consider how you could contribute your expertise directly to the work of NPMs, or the NPM Network as a whole.

You may be aware of complex issues which could benefit from engagement with the applicable NPM.

You may have contacts with more information on particular issues which could assist conversations between NPMs and detaining authorities.

You may have expertise which you think could assist on an inspection visit.

Or you may have knowledge which you think merits sharing with NPMs to adjust their approach, or indeed correct a misunderstanding.

I ask you – if you feel you can make a contribution in this space – to reach out. Australia’s NPMs cannot work on their own, and I hope that you and your networks consider supporting the NPMs relevant to your detention involvement, in whatever manner is feasible and appropriate.

In the spirit of dialogue and the spirit of prevention, I look to this as a way we can all ensure Australia has an informed, responsive, and fit for purpose approach to implementing OPCAT – for the benefit of all those who are or may be detained, and through this for our broader community.

Thank you all.