

## Implementing OPCAT in Australia – an update from the Commonwealth Ombudsman

7<sup>th</sup> Annual Prisons Conference, Rendezvous Hotel, 328 Flinders St, Melbourne VIC 3000

**DATE:** 2 August 2018

**TIME:** 11:40 – 12:20

### Acknowledgment of Country

I acknowledge that our conference is being held on the traditional lands of the Boon Wurrung (Bun-er-rong) and Woiwurrung (Woy-wur-rung) peoples of the Kulin (Koolin) Nation<sup>1</sup> and I pay my respects to their Elders, past and present, and acknowledge other Aboriginal or Torres Strait Islander people that are with us.

I'm delighted to be here, and very pleased to be picking up the National OPCAT story straight after Deborah Glass has so eloquently painted a Victorian picture of what OPCAT implementation might look like. I also acknowledge the excellent and expert contribution of Professor Neil Morgan, the WA Inspector of Custodial Services.

Let me also briefly introduce myself, because I suspect that for many of you who serve in correctional systems at the State or Territory level, I and my Office may be something of an unknown quantity. As Commonwealth Ombudsman, I carry out independent, impartial oversight of a wide variety of activities. My office takes and investigates complaints, and carries out other forms of oversight, inspection, audit and reporting activity across a wide field. More particularly, as Commonwealth Ombudsman I am the Ombudsman for almost the entirety of Commonwealth administration (exception is Tax); I am the Defence Force Ombudsman; the Law Enforcement Ombudsman; the Private Health Insurance, Postal, VET Student Loans, Overseas Students, Immigration Ombudsman; and at a more local level in Canberra I am also the ACT Ombudsman. I also provide assurance to the Federal Parliament and the public that law enforcement agencies carry out covert and intrusive powers in accordance with the applicable national laws. My office has a long history of inspecting and reporting about immigration detention issues. And while my office will take complaints and investigate issues that are raised by anyone, we have a particular eye to the most disadvantaged, the vulnerable, be they an historic victim of abuse in the Defence Force, or a person grappling with accessing the NDIS, or a long term detainee in an immigration detention facility. I am fortunate to have a staff of about 220 people who are experts in many of the fields I have just mentioned.

Like Ombudsman's offices here and elsewhere, in recent years I have picked up a variety of new functions when Governments perceive the need for independent oversight of important topics that carry with them serious public interest considerations.

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<sup>1</sup> <https://whatson.melbourne.vic.gov.au/Placetogo/indigenous/Pages/indigenous.aspx>

So in that context, I am very pleased that the Commonwealth Government has asked my office to undertake a role with respect to OPCAT, ie the role of National Preventive Mechanism Coordinator. I am also grateful that the Government, through the May Federal Budget, has afforded me some resourcing to start my work in that space. My role as NPM Coordinator started on 1 July.

And I am here today because I want the role that my office and I are playing to be known to you and to be available to you as we set out on implementing this very important initiative.

I am also here today because I am mindful that notwithstanding the considerable breadth of my office's current activities, our work on OPCAT will take us into a new space altogether – ie dealing with state and territory based entities to bring together a coherent national picture, and public reporting thereof, about our country's compliance with an important United Nations instrument which, at its heart, is about protecting the rights of very vulnerable people.

### **Outlining the objectives of the recently adopted OPCAT initiative**

The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT for short), is an International Treaty which was adopted by the United Nations in 2002 as a means to strengthen in a very practical way, efforts to eradicate the practice of torture and other ill-treatment.

There are two aspects to OPCAT ratification. The first is the implementation of a national system of independent, regular, preventive visits to places where people are deprived of their liberty. The second is periodic visits by the United Nations Subcommittee on Prevention of Torture (the SPT) to review OPCAT compliance. These UN visits are few and far between so the substance of preventive visiting is carried out by the domestic system known formally as the National Preventive Mechanism (NPM). And while UN visits may be fairly infrequent, I am sure that the UN Subcommittee is very interested in how Australia – as a first world, federated state – goes about implementing OPCAT.

The NPM mandate as set out in OPCAT is:

- to conduct regular unannounced visits to all places where people are deprived of their liberty
- to have the option to make submissions about draft or existing legislation relevant to the prevention of torture
- to prepare and publish an annual report of their activities
- to be independent – financially and functionally
- to have a gender balanced and minority representative composition

The OPCAT necessitates that NPM's are empowered to:

- inspect places/ facilities
- interview detainees and staff of their choosing, in private and in locations of their choosing, and
- inspect records.

The Australian Government ratified the Optional Protocol in December 2017 and in doing so made a declaration under Article 24 of the Protocol which affords it the opportunity to delay the

establishment of the NPM for three years. This delay is to allow the States and Territories the time to designate their NPM's as part of what is expected to form a 'mixed model' NPM. What this means is that rather than having one agency perform the function of the NPM for all of Australia, NPMs will be established along jurisdictional lines. There will be a Commonwealth NPM Body providing oversight for Commonwealth primary places of detention and the States and Territories will have NPM Bodies for their respective jurisdictions.

By the way, my presence here today is also a signal that – even though the Commonwealth Government has exercised the option of the three year delay – I am very keen to ensure that this doesn't mean that we all sit around and admire OPCAT but don't do anything about it for the next three years.

The Australian Government has also indicated the NPM will focus on what could be termed 'primary' places of detention such as prisons, juvenile detention, police cells, closed psychiatric institutions and immigration facilities. While the OPCAT takes a broad approach to the term 'deprivation of liberty', at the time of ratification the Australian Government recognised it is within these primary places of detention that 'challenges are perhaps at their most acute.'

Australia currently has oversight inspection mechanisms at the Federal, State and Territory levels in many places where people are deprived of liberty. In the prisons context this oversight is undertaken by a range of agencies including Custodial Inspectors, Official Visitors, Auditors and Ombudsman. This may raise the question, why then do we need the Optional Protocol and the NPM?

The Optional Protocol and the NPM does not replace these existing oversight systems but in many cases the NPM will complement or strengthen them. Many of these existing agencies may form part of the NPM. The Optional Protocol offers an opportunity for the sharing of domestic best practice and the development of inspecting principles in a way that might be new in Australia. It offers oversight agencies across Australia the opportunity to learn not only from one another but from a community of NPMs globally.

With its focus on 'prevention' the NPM is not merely interested in legal compliance with domestic standards. The NPM seeks to understand the experience of detention from the perspective of detainees and of staff in order to make practical suggestions which could contribute to better outcomes.

The Optional Protocol is premised on the notion that torture and ill-treatment can be prevented through a collaborative, constructive and forward looking dialogue between detaining authorities and the national mechanism. In this regard the NPM is not 'just another oversight body' but should be regarded by detaining authorities as a partner in finding pragmatic solutions to mutually recognised issues. It recognises that prevention is as much about staff safety and environmental safety as it is about detainee treatment and conditions.

## **How does the Commonwealth Ombudsman's office intend to carry out its duties as the National Preventive Mechanism Coordinator?**

In ratifying the Optional Protocol the Australian Government designated my Office to be the NPM Coordinator with the responsibility of coordinating the 'mixed model' NPM as well as being responsible for the inspection of Commonwealth primary places of detention.

As the Commonwealth NPM inspection body my Office will continue to oversee domestic immigration detention facilities, and will also oversee Australian Federal Police cells in the External Territories and the Defence Force Correctional Establishment.

In my NPM Coordinator role I want to work in a way that provides useful public insight into Australia's compliance with OPCAT and to conduct my role in as facilitative and collegiate a manner as possible.

Although the State and Territory NPM Bodies are yet to be announced – and therefore I do not yet know who, as NPM Coordinator, I will be coordinating - my Office has already commenced outreach to existing oversight bodies. We have sought to identify all existing bodies that have any form of oversight function in the Commonwealth, States and Territories and contacted those bodies requesting information about how they operate, how they inspect facilities, and which facilities they inspect.

This information will provide a baseline of information for an initial assessment of the extent to which OPCAT compliance is, or is not, currently being achieved in different places of detention, by different inspecting bodies. I aim to provide this baseline information to Attorneys-General during the second half of 2018 and report publicly on our findings in early 2019.

I am also engaging with the Australian Human Rights Commission and representatives from civil society. The Human Rights Commissioner Ed Santow will conduct a second round of consultations with civil society on OPCAT implementation and has released an interim report which can be found on their website<sup>2</sup>. We are also in regular contact with the Commonwealth Attorney-General's Department which is negotiating with its State and Territory counterparts on an Intergovernmental Agreement (IGA) in relation to OPCAT.

## **Reflections of trip to the UK**

OPCAT already has 88 State signatories. We have the good fortune therefore of being able to learn from other countries' experiences about the way in which they inspect and have developed their principles and inspection methodologies.

I have recently returned from a visit to the UK where I met with my NPM Coordinator counterparts at Her Majesty's Inspectorate of Prisons for England and Wales. I also had the opportunity to meet other partners in the UK's 'mixed model' NPM as well as the Chair of the Subcommittee on Prevention of Torture.

The UK NPM is comprised of 21 different inspection agencies that inspect along functional or jurisdictional lines. The visit gave me insight into the Optional Protocol and its implementation from the strategic to the operational level. I not only spoke with the Chief Inspector and a former Chief Inspector but accompanied a team of inspectors on a visit to HMP Send, a low security prison in Surrey, England.

One of the most important lessons that came out of the visit was a strong emphasis on not allowing the NPM to be a continuation of 'business as usual' for oversight agencies. As I mentioned before, the Optional Protocol is about approaching inspections in a preventive and collaborative manner and

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<sup>2</sup> <https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/opcat-australia-consultation-paper-stage-2>

this is something that not only detaining agencies have to come to understand but equally the oversight bodies that will make up the NPM.

In addition to being preventive, the Optional Protocol approach to inspections is also a multidisciplinary approach. Oversight agencies will need more than legal or auditing or human rights expertise but will need a range of expertise from medical to criminology and so on.

In the UK, joint prison inspections are often facilitated between Her Majesty's Inspectorate for Prisons and representatives from the Care Quality Commission, responsible for monitoring and regulating health and social care providers. An entity called Ofsted which in the UK has responsibility for inspecting and regulating education services, is also part of the NPM.

Let me share some other learnings I picked up in the UK, particularly matters that might bear on how we approach OPCAT implementation here.

First, it's a long journey. It took quite a number of years for the UK to get from OPCAT ratification to the establishment of its NPM model; and those I met also talked about implementation as an ongoing, rather than finished, task.

Second, there already exist lots of inspecting guidelines and other materials – particularly those produced by HMIP – that we ought to have close regard to in Australia, ie we don't necessarily have to reinvent the wheel when it comes to principles, standards or procedures against which inspections occur. The "Guiding Principles for Corrections in Australia" recently revised by state and territory governments also provides useful context. So my sense is that we are entering a brown field rather than a green field.

Third, a HMIP OPCAT compliant inspection is a seriously intensive exercise. On the day at which I accompanied a team of inspectors into a prison, there were 13 people on the team, with expertise across diverse disciplines. The prison we visited had just 250 or so inmates in quite a small geographical footprint, so the staff of the prison really felt the presence of the inspection team and the inmates had ready access to members of the team.

Fourth, HMIP has a really interesting and I think impressive way of gaining insights into the views of detainees about their experience of a correctional facility, and then tracking that over time. So just as implementing OPCAT is an ongoing task in some ways, so too is prison inspection. In HMIP's case there is a survey tool that is provided to prisoners before a visit and then used to inform HMIP's findings as to the strengths and weaknesses of the prison. They achieve quite a high survey completion rate and then track the data over successive visits. In the case of the prison I visited the previous visit had been 4 years before, so the data being collected in 2018 could be readily compared with the data from 2014 and provide insights into what had got better, or worse, from the prisoners' perspectives, in terms of health care, or security, or safety, or education programs and so on.

Fifth, notwithstanding the relative sophistication of HMIP's work, not every setting is suited to exactly the same standards or approach – and the Scots in particular were at pains to tell me that they approached inspections in a manner that was at least a little different to what happened in London. We will need to think about that in our federation too. Having worked in Commonwealth/State relations during my career as an official, I can well imagine that we will need to work in the NPM on sharing good practice and seeking to achieve consistency of approach, but in a manner that respects jurisdictional, geographic and locational variables. Listening to the Scots talk

about London was eerily similar to hearing Queenslanders talk about Canberra (note: I am a Queenslander!)

Sixth, building on that previous point I noted with interest in the UK that the NPM Coordinator is working hard to bring together and draw on the insights and expertise of the constituent NPM bodies to develop and drive good practice. Rather than dictating what must be done, the Coordinator has brought together working groups and sub-committees from the wider group of NPM bodies to develop good practice, to draw on each others' expertise and the like, according to thematic (eg children in custody) or geographic (there is a Scottish sub-group of the NPM) interests. I can imagine replicating some similar approaches here.

Seventh, the main thing is to get started.

There will be a lot of issues to think about as we go forward – to legislate or not? If so, at what level of government? Are there adequate resources to do the job? And where might we focus our efforts, on what themes, or topics? And how do you get the balance right between ticking lots of checklists that assess the policies and procedures that exist in a place of detention, versus measuring and focusing on outcomes and making recommendations at a more holistic level?

## **How will complying with OPCAT change the treatment of prisoners and the conditions they are housed?**

As you will have gathered from my presentation so far, the Optional Protocol is focused on strengthening the way in which oversight agencies work and interact with detainees and detaining agencies.

What in practice will this mean for the treatment of prisoners and their conditions? Given the 'preventive' nature of the OPCAT there is no limit to the recommendations the NPM can make to improving treatment and conditions. The NPM can make context specific recommendations of a practical nature which might not necessarily have been picked up in other compliance type inspections. The NPM has the capacity to combine domestic and international best practice and ensure its recommendations align with what we know works in mistreatment prevention.

The NPM is empowered to make comment on existing legislation and policy or draft legislation, providing a valuable opportunity to highlight systemic issues at a Government and public discussion level and further its influence beyond the individual prison and detaining agency.

International experience highlights the value of the OPCAT. For example, in reviewing their first five years of OPCAT, the New Zealand NPM found that:

'Implementation of the OPCAT system has made the human rights standards relating to detention more visible, and with greater awareness has come improved understanding and application of those standards.'

NPMs have identified issues that may not otherwise have come to light. Because detaining agencies have been so receptive and responsive to OPCAT, there have been many improvements in both the conditions of detention and the way detainees are treated.<sup>3</sup>

In a recent development for the UK NPM, an isolation guidance document was produced in 2017 from the collective effort of several NPM agencies. In its most recent annual report the UK NPM

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<sup>3</sup> New Zealand Human Rights Commission (2013) OPCAT in New Zealand 2007-2012, p15.

reports ‘this guidance is already being used by UK NPM members and NPMs internationally to strengthen their practice and make recommendations to detaining authorities for improving practice.’<sup>4</sup>

## **Conclusion**

Compliance with the Optional Protocol is not only in the interest of detainees, it is in the interest of oversight and detaining agencies. We need to work as partners in the efforts to make prisons and other forms of detention safer and more humane.

As the old saying goes ‘prevention is better than cure.’ In the prisons context, prevention is better than dealing with the human impact of ill-treatment on detainees and the morale and safety of staff. Prevention is better than costly litigation, reputational damage and in the most extreme of cases Royal Commissions and Coronial Inquests.

In reading this conference’s overview I noted that the issues pertinent to the criminal justice system included ‘improving conditions, providing functioning facilities, and stemming the incessant growth in prisoner numbers.’ NPM’s are directly involved in improving conditions and ensuring functioning facilities. In a more indirect way they deal also with the growth factor by ensuring that the rehabilitative aspect of prisons are not undermined by ill-treatment. The Vice-Chair of the Subcommittee on the Prevention of Torture has noted that: “The National Preventive Mechanisms represent the most significant single measure which States can take to prevent torture and ill-treatment occurring over time.”

I look forward to the role my Office will play in the implementation of the OPCAT, to working with State and Territory NPM counterparts when they are designated and to working with detaining agencies as partners in this very worthwhile endeavour.

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<sup>4</sup> UK NPM (2018). Monitoring places of detention Eighth Annual Report of the United Kingdom’s National Preventive Mechanism, p5.