



Australian
Human Rights
Commission

everyone, everywhere, everyday

Implementing the Optional Protocol to the Convention Against Torture in Australia

.....

Seminar hosted by the Australian Human Rights
Commission and the Asia Pacific Forum of
National Human Rights Institutions

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1 Welcome and introductions

1.1 Catherine Branson QC, President, Australian Human Rights Commission

Catherine Branson welcomed guests, in particular international guests and acknowledged the traditional owners of the land. She thanked the Asia Pacific Forum of National Human Rights Institutions for co-hosting the seminar. She acknowledged the importance of the right to be free from torture, and congratulated the Australian Government for recognising the rights of those deprived of their liberty by signing the Optional Protocol to the Convention Against Torture (OPCAT). She noted that Australia faces challenges in implementing OPCAT, particularly due to its federal structure.

1.2 Kieren Fitzpatrick, Director, Asia Pacific Forum of National Human Rights Institutions

Kieren Fitzpatrick gave a brief introduction to the fundamental prohibition of torture, and noted that while it is enshrined in the United Nations Convention Against Torture (CAT), it continues to be violated today.

He provided a broad overview of the obligations of state parties under OPCAT, including establishing or designating an independent mechanism to enter, visit and monitor all places of detention. In this way, OPCAT assists states to meet their obligations to prohibit torture under CAT.

He discussed the special role of national human rights institutions, as they provide a link to the international system and monitor state action. Their mandate confers both legal and moral authority and they exercise proactive powers, which include the promotion of human rights awareness and legal reform. He noted that in almost all states with a national human rights institution, upon ratification of OPCAT, that body has been designated as the National Preventative Mechanism (NPM).

2 Session 1: Understanding OPCAT

2.1 OPCAT as a human rights instrument

Barbara Bernath, Chief of Operations, Association for the Prevention of Torture

An operational treaty

Barbara Bernath provided an introduction to OPCAT, which was adopted in 2002 and entered into force in 2006. It is an additional optional protocol to CAT and therefore is one of the core human rights treaties of the United Nations. OPCAT does not establish new norms. Rather, it is an operational treaty, focused on the prevention of torture through the implementation of existing rights, namely the right to be free from torture and other cruel, inhuman or degrading treatment or punishment.

Implementation requires the establishment of a system of regular, independent visits to all places of detention by both international and national bodies. In this way, OPCAT imposes obligations on state parties in addition to their obligations under Articles 2 and 16 of CAT.

Preventing torture

OPCAT is about securing an environment that reduces the risks of torture and ill-treatment as much as possible. It covers all places where persons are deprived of their liberty, including 'traditional' places such as prisons, as well as other places such as international ports, centres for migrants or juveniles, aged care homes, psychiatric facilities and modes of transportation. Under OPCAT, the aim is to identify gaps in protection in the system itself, rather than identifying and investigating individual instances of ill-treatment. It requires a systematic approach to inspecting places of detention, and a consideration of all relevant aspects, including the material conditions of detention; the level of contact with family members, legal representation and the outside world; whether adequate activities are available within detention facilities; and staffing issues, including pay levels and staff conditions.

Cooperation and confidentiality

OPCAT seeks to establish a system which improves conditions for detained people through a cooperative dialogue between the national prevention mechanisms (NPMs) and government authorities. Generally, the system relies on recommendations and proposals based on the findings of inspections, rather than publicly shaming authorities. Cooperation between NPMs and government authorities is to some extent dependent upon confidentiality. Under OPCAT, the international inspecting body, the Sub-committee on the Prevention of Torture (SPT) cannot publish reports and recommendations unless under agreement with the state party. In contrast, OPCAT permits NPMs to publish reports, so publication may be used as a strategy in their dialogue with government authorities.

2.2 What preventive mechanisms are established by OPCAT?

Silvia Casale, former Chair, Sub-committee on the Prevention of Torture

Silvia Casale discussed the international framework with a view to considering possible models for implementation of OPCAT in Australia.

A system of visits

The central idea behind OPCAT is to ensure that there are safeguards to protect detained people against ill-treatment. OPCAT takes a broad approach towards the definition of 'places of detention'. There are many places which may be construed as a place where people are or may be deprived of their liberty by a public authority. Two levels of inspections are required: the SPT is the international inspecting body; and, pursuant to Article 17 of OPCAT, each state party must establish, maintain or designate one or several NPMs at the domestic level. OPCAT does not prescribe a particular model for the NPM but outlines some key requirements for the mechanism.

Essential elements

The NPM must be independent in practice, and it must also be seen to be independent. Its mandate and powers must be established by law. The legal framework must give NPMs powers to access all places where people are or may be deprived of their liberty, and to talk with detained persons and staff members

privately. The NPM must be provided with adequate resources to allow it to conduct regular and effective visits.

The NPM profile

The role of the NPM is essentially a human rights based role. The NPM is required by OPCAT to adopt a preventive approach. The NPM should not have conflicts of interest, especially in terms of prosecuting individual acts of ill-treatment identified during inspections. The NPM should inform people who are detained that the NPM is there to inspect the facility, and although instances of ill-treatment may be identified, it will not be able to assist with pursuing individual cases. There must be cooperation between the NPMs and the government authorities for the OPCAT system to work effectively.

State party obligations

OPCAT gives state parties certain obligations, including:

- guaranteeing the functional independence of the NPM and its members
- ensuring the legal powers of the NPM, as listed in OPCAT
- providing the resources necessary for the NPM to operate effectively
- safeguarding the NPM's control of its own visiting program and budget
- publishing and disseminating the NPM's annual report
- examining the recommendations of the NPM.

Development of NPMs

The development of NPMs is an ongoing process, which needs to be open, public, transparent and inclusive of all stakeholders. Phase one involves establishing a solid legislative basis for the NPM and consulting stakeholders and the public about draft legislation. The legislation should outline the obligations and powers of the NPM. The NPM must be adequately resourced so that it can visit regularly and effectively.

Phase two involves the implementation of the legislation. OPCAT envisages that it will take time to establish NPMs and allows for this. NPMs are complex systems, especially in the context of federal states. Consultation at the local level is very important in determining the appropriate model for the NPM.

Phase three relates to the membership of the NPM. Members must be independent – they must be at arms length from government and the selection process must be open. The members must be perceived as impartial and independent. There is a need for multi-disciplinary inspection teams, including medical and psychiatric experts as well as legal experts.

Cooperation

There must be cooperation between NPMs, government authorities and the SPT in order for the OPCAT system to work effectively. The NPM is a very important aspect of OPCAT as the international body (the SPT) cannot visit fifty state parties on a regular basis. The SPT is intended to be complementary to the NPM.

2.3 Discussion

A question was asked as to the definition of 'regular' with respect to 'regular visits' by the NPM. Should a risk assessment be used to determine how regular visits should be to particular places of detention?

Silvia Casale stated that at the international level, the limited resources of the SPT would limit its visits to approximately once every ten years, which is inadequate. At the national level, what is regular depends on the context. Certain places (for example police stations) should be visited more frequently than others, and certain units within places of detention (for example, isolation cells) may also require more frequent visits. Inspection bodies may also return to certain places more frequently if they know violations are occurring or have occurred in the past. The question of regularity raises significant resource implications. For example, in the UK, resource constraints are overcome to some extent by the combination of professional inspectors as well as lay visitors - citizens appointed as independent monitors who inspect prisons at least once per week.

Barbara Bernath stated that regular visits might consist of a combination of more frequent, short, thematic visits as well as less frequent but more in-depth visits. Limited resources have to be prioritised towards the places where the biggest risks lie. In addition to conducting visits and highlighting concerns, NPMs should also seek to disseminate examples of good or best practice.

A question was asked about the relationship between the SPT and the UN Special Rapporteur on torture.

Silvia Casale stated that there is consultation between the SPT and the Special Rapporteur, and they are complementary mechanisms. They coordinate their programs to avoid overlapping visits.

A comment was made that simply visiting is inadequate. The NPM needs to look thoroughly at some of the key issues around humane treatment, such as the risks for detainees' mental health and the adequacy of services available. Visits alone will not be enough to prevent ill-treatment; additional steps will also be required.

A question was asked about the practicalities of having a preventive system that is separate to mechanisms identifying instances of torture or ill-treatment. Can the NPM identify systemic issues or risks in places where there are no individual instances of ill-treatment?

Silvia Casale commented that although the purpose of the SPT and NPM is not to pursue individual cases, it doesn't mean that they will not find those cases during inspections. The cooperative dialogue with state parties will involve fact finding and discussion of particular cases. However, the object is not to pursue that individual case, but to consider the underlying systemic issues that may have led to that incident and to consider how to make changes to avoid recurrences in future.

An observation was made that in NSW there is a system for monitoring of juveniles in detention by independent persons who are appointed by the minister. What role might they play under OPCAT?

Silvia Casale suggested that they could feed into the NPM system. Australia needs to map out the existing monitoring mechanisms and work out whether or not they meet OPCAT requirements. If they do not meet the requirements, the next question is whether they can be adjusted to meet the requirements.

A question was asked about how the SPT or the NPM might deal with situations where there is a lack of goodwill or resistance to change within government.

Silvia Casale noted that it may well be a long term process to work with government to overcome such resistance. However, there are always willing individuals to work with. The majority of people involved are just trying to do their job. Our challenge is to show them ways to do their job that are respectful of people's rights.

3 Session 2: International examples of the implementation of OPCAT

3.1 Overview of National Preventive Mechanism options

Audrey Olivier, Association for the Prevention of Torture

OPCAT signatures and ratifications

There are 50 state parties to OPCAT and 23 state signatories. There are currently 29 NPMs within state parties. In the Asia-Pacific region there are three state parties (Cambodia, the Maldives and New Zealand) and two state signatories. As the number of state parties has reached 50, membership of the SPT is due to increase from 10 to 25. Therefore, Australia has an incentive to ratify, as ratification would provide it with an opportunity to present a candidate for membership at the 2010 SPT election.

Designating an NPM

There are SPT guidelines for designating an effective NPM. An existing institution may be designated. The matter should be open for debate as consultation is important for the legitimacy of the NPM. Civil society and stakeholders at the local level should be included in the process. All of the states and territories should be consulted.

OPCAT in federal and decentralised states – options and challenges

There are nine state parties which are federal or decentralised states. Germany, Mexico, Spain, UK and Switzerland have NPMs. There are two state signatories: Australia and Austria. States may establish or designate a single NPM comprised of a new or existing body, or several NPMs, which may be based on thematic or jurisdictional divisions.

- Single Body:

Examples are Spain, Switzerland, Mexico. In Mexico, a specific unit was created. In Spain, the existing human rights institution was designated (26 staff). Switzerland created a new body because no monitoring body existed. Designating a single body can be particularly challenging for federal states, which may need to alter existing institutions (by allocating more human and financial resources and changing the mandate). Designating a single body creates access issues because there is only one body to reach all places of detention. There are also jurisdictional issues in a federal state.

- NPMs based on jurisdiction:

A NPM could also be based on jurisdiction. This presents challenges in terms of coordination. There are also issues in terms of coherence of standards of monitoring. If Australia established several state bodies and a coordinating body, it would need to look at the methodology in each state or territory.

- NPMs based on themes:

The United Kingdom is one example. Challenges faced include how existing institutions could change their approach to focus on prevention, sustainability issues, coordination, coverage of all places of detention, and coherence. Not all bodies could constitute the NPM and in the UK, some had to step down. However, these bodies often fulfil an important role in terms of working with the NPM.

3.2 OPCAT: the New Zealand experience

Susan Biggs, New Zealand Human Rights Commission

The New Zealand Human Rights Commission is an independent crown entity, established under a Crown Act. Its mandate includes the promotion of human rights and receiving and investigating complaints.

Implementing OPCAT - preparatory steps

New Zealand undertook a consultative process with existing bodies that could potentially play a role in the NPM. The committee received numerous submissions and the consultation process led to changes to the initial plans.

New Zealand NPMs

The national coordinating NPM is the New Zealand Human Rights Commission. The NPMs which carry out inspections are the Ombudsman, the Independent Police Conduct Authority, the Children's Commissioner and the Inspector of Service Penal Establishments. Each body is responsible for different places of detention.

Role of the New Zealand Human Rights Commission

The role of the New Zealand Human Rights Commission is to coordinate the activities of the NPMs, identify systemic issues in places of detention, coordinate the dissemination of information, make recommendations to the government and publish

the annual NPM report. It meets with the other NPMs quarterly and the NPMs meet with civil society twice per year.

In its first year as the coordinating NPM, the Commission undertook a lot of planning. It developed standards for what NPMs should look at, by reference to international indicators and drawing on APT tools and guidance. The first annual report recommended the provision of additional resources for NPMs (some of which was allocated in the following year).

In the second year of operation, there were slight changes to the designations to eliminate overlap of responsibility. The visiting program is currently underway. The program has resulted in a change in awareness on the part of staff and management in institutions. A number of issues have been identified such as bullying detainees to prevent them speaking out, medicating detainees prior to visits, and insufficient paperwork to authorise detention. Ill-treatment in the form of restraint and seclusion of detained persons was also identified through inspections.

Challenges

There are many challenges related to adequate documentation for detaining people and the validity of detention. Often staff members do not have an adequate understanding of what constitutes torture and ill-treatment. There are issues surrounding conditions, transportation, access to rehabilitation programs and mental health care. There are ongoing challenges in relation to inadequate resources and heavy workloads. It is also difficult to coordinate multiple NPMs and ensure cohesion. The NPMs need to be wary of blurring the complaints/ investigation function and the preventive monitoring function.

The impact of OPCAT

Goodwill on the part of the relevant parties and good relationships have led to cooperation between government authorities and NPMs. Police staff and managers generally value the OPCAT visits and most institutions are moving quickly to remedy problems identified. The approach has been one of a constructive dialogue.

3.3 Discussion

A question was asked about the New Zealand approach towards the development of standards for NPM visits.

Susan Biggs stated that New Zealand considered international standards and came up with a chart of standards. This was given to the NPMs, which then tailored it to the institutions they visit.

A question was asked as to whether the New Zealand Commission had involved detainees themselves in the OPCAT process. Did the Commission inform people in places of detention about the OPCAT NPM system?

Susan Biggs said that the Commission hasn't systematically provided information to detainees about OPCAT. However, the Commission does receive complaints from detainees. The Commission's response to these

complaints does include mention of the OPCAT mechanisms. It would be a good idea to more systemically inform detainees.

Audrey Olivier said that in the Maldives, leaflets had been given to detainees, as well as holding meetings with them to explain the OPCAT mandate.

Barbara Bernath noted that entering places of detention is a proactive way to inform detainees about the NPM through direct interaction.

A question was asked about the preferable approach towards the NPM having both complaints and prevention functions. Is strict separation of these roles better?

Susan Biggs said that in New Zealand the Police Conduct Authority doesn't separate the roles because there are so many cells to visit. However, the Ombudsman does keep them separate. Best practice would be to separate the functions. Visits to investigate complaints usually involve an aspect of 'blame', whereas a preventive visit is more about working collaboratively to achieve systemic improvements.

Audrey Olivier said that many human rights institutions that are designated as NPMs also have a complaints function. They often create a separate unit to handle the OPCAT prevention functions. It is better to separate the roles but the two units need to communicate with one another.

There are obligations under Article 20 of OPCAT to provide access to information and documents regarding places of detention. A question was asked as to the New Zealand experience in terms of institutions providing access to information. Did this require legislative changes, for example, to the Privacy Act?

Susan Biggs didn't believe there had been changes to the Privacy Acts. The legislation in New Zealand sets out the role of NPMs, including access to records.

A question was asked as to whether the New Zealand Human Rights Commission would consider publishing reports regarding individual visits or urgent situations? What action could the Commission take as NPM if a government refused to act on NPM recommendations?

Susan Biggs stated that the New Zealand Commission has not faced that issue so far as there has been positive cooperation and institutions have been receptive. If they were resistant in the future, the Commission would most likely approach the Minister of Justice to seek to address the matter in a constructive way.

Audrey Olivier noted that it depends on the strategy of the NPM. If a NPM publishes a report directly from a visit, it may place strain on the NPM's relationship with the authorities. While public reporting does increase transparency, the NPMs have to balance competing goals.

When the New Zealand system was being set up, the Human Rights Commission argued that it should have some form of direct inspection role. That did not occur. In hindsight, is that positive or negative?

Susan Biggs noted that it was positive in the sense that the Commission does not form any set views about how to best conduct NPM visits, so it can be open to the different ways the NPMs conduct their inspections. However, the Commission recognises the need for its OPCAT staff to have some hands-on experience and is considering sending some staff on NPM visits to get that experience.

A question was asked as to how likely it was that OPCAT could lead to real changes. There are some instances in Australia where government authorities are willing to violate human rights, even where the UN has commented on the violations. There is a need to maintain realistic expectations. In response,

Susan Biggs noted that the preventative visits have led to positive changes in New Zealand to date.

4 Session 3: The benefits of preventive monitoring of places of detention

4.1 *The benefits of monitoring places of detention – from a prisoner’s perspective*

Brett Collins, Coordinator, Justice Action

Brett Collins is also the spokesperson for Justice Action. He led a significant campaign regarding the right of prisoners to vote and has represented prisoners in New Zealand regarding the impact of the privatisation of prisons. He also has personal experience of imprisonment.

The presentation commenced with the presentation of a paper that:

- called for consultation with people in detention as part of the process of implementing OPCAT
- observed that people in detention are particularly vulnerable
- criticised aspects of the new prison in the Australian Capital Territory, particularly the facilities available for difficult prisoners
- observed that current inspection mechanisms have not led to effective change
- expresses concern about relying on current inspection mechanisms in a NPM under OPCAT.

There are approximately 27,000 prisoners in Australia. Prisoners are citizens who will return to the community. If they are mistreated in prison they are likely to be resentful and less productive community members. They are also more likely to reoffend.

Justice Action believes that prisoners and other detainees should be engaged as part of the OPCAT process. OPCAT will not lead to positive change without direct involvement of those it seeks to protect. Consultations about OPCAT should include a voice for detainees and staff who work in places of detention.

Current inspection mechanisms are not very effective in preventing mistreatment of people in detention. An inspection mechanism under OPCAT must be different to be effective.

An independent monitoring mechanism must have sufficient resources to be truly independent.

It is also necessary to utilise existing prisoner-focused mechanisms for consultation and communication. The presenter proposes using the prisoner representative structure of Inmate Development Committees, which enable a form of cost-free continual monitoring. He also proposes using existing technology within prisons, for example video camera monitoring, to allow prisoners to raise concerns with NPMs as well as their families and communities. Finally, non-government organisations and the ex-prisoner community should be strengthened to enable them to coordinate information to the NPM.

4.2 Why should we monitor places of detention and how can we do a good job of it?

Neil Morgan, Inspector of Custodial Services, Western Australia

The presenter acknowledged the traditional owners of the land and noted the need to ensure participation by relevant Indigenous groups at future OPCAT seminars and consultations.

Monitoring places of detention is important because history shows that abuses can and do occur, although often not deliberately. OPCAT is focused on torture and other cruel, inhuman or degrading treatment. In practice, the NPM is the most important mechanism, rather than the SPT.

Requirements for NPMs

Under OPCAT, NPMs are required to conduct regular visits. They must have functional independence and be provided with unfettered access to places of detention and relevant documents. Detainees who speak with the NPM during visits need to be protected from victimisation. The NPM reports will not necessarily always be public documents.

OPCAT in Australia

In 2008 Neil Morgan and Richard Harding provided a report to the Australian Human Rights Commission (AHRC), *Implementing the Optional Protocol to the Convention Against Torture: Options for Australia*. In Australia, it is difficult to identify all of the places of detention, especially the places controlled by intelligence services. An up-to-date inventory is needed. It is necessary to identify all of the existing monitoring agencies, which is also a difficult task. OPCAT ought to increase visibility and transparency.

Office of the Inspector of Custodial Services (OICS)

The Office of the Inspector of Custodial Services (OICS) in Western Australia is currently the most OPCAT complaint mechanism in Australia. It was established in

2000, has a legislative basis, and is accountable to Parliament. It is a functionally independent body with a good relationship with the minister and the state government. OICS provides a model for the development of NPMs across Australia. Its focus is broader than torture or cruel, inhuman or degrading treatment.

Jurisdiction

OICS has jurisdiction over prisons, work camps, juvenile detention centres, court custody centres and suspected terrorist detainees. It has no jurisdiction regarding psychiatric facilities, immigration detention centres, and police lock ups (except for transport). It must inspect every prison, detention centre and court custody centre every three years. It has broad jurisdiction to inspect at any time ‘custodial services’ or ‘administrative arrangements’ regarding such services. OICS may also conduct thematic reviews, for example, deaths in custody.

Powers

OICS has unfettered access to places of detention and relevant documents, and can publish its findings. They do make their reports public, but they also pursue a constructive dialogue with the state government (although that dialogue can be ‘robust’ at times).

Methodology

The methodology for inspections requires careful preparation. They spend 1-2 weeks onsite and involve relevant experts in visits, such as health experts. It is a process of ongoing monitoring. They keep track of prison incident reports and maintain regular contact with prison managers. OICS conducts 4-6 visits per year, usually with two staff members, which are announced and informal. They speak with detainees during those visits. Regular risk reports to the minister are also important. They monitor and follow-up on implementation of their previous recommendations.

Human rights and OICS standards

The OICS legislation doesn’t refer specifically to cruel, inhuman and degrading treatment, but some aspects of OICS inspections of prison conditions do relate to human rights standards. The standards they use in inspections are based on relevant international standards, but are tailored to the Western Australian context (including, for example, Indigenous issues). NPMs need to develop their own locally relevant standards.

Examples

- *Example: Mr Ward and prisoner transport*

Mr Ward died in the back of a transport van during a long journey in the heat. A report was made which highlighted numerous transport issues, including nothing for passengers to hold onto, forcing passengers to face sideways, a roof which sloped in, bare metal seats, and travelling long distances (in this case five hours in summer).

The state owned the fleet. There were questions about whether the drivers did what they were supposed to have done. The Department of Public

Prosecutions is yet to decide on charges. The question is, did the OICS fail? In a sense, yes, because Mr Ward died. But in another sense, it did not. The failures of the system would not have been revealed in this way if not for the inspection system. Systems try to hide things. It would have been easy to point the blame at the drivers but there is a more complicated story.

- *Example: Prison conditions*

Both the negatives and positives should be acknowledged in inspections reports. The presenter showed pictures of buildings and cells demonstrating both good conditions as well as prison crowding and poor conditions.

- *Example: Health care*

Health is a constant issue in prisons. OICS is active in promoting better health care for detainees. Their mandate is not limited to cruel, inhuman and degrading treatment. They consider whether standards of service delivery are adequate.

Concluding remarks

The presenter believes the preventive inspection mechanism can lead to positive changes. It requires preparation and proper planning. NPMs must set priorities. There are often resourcing challenges.

4.3 Discussion

Support was expressed for the need to involve detainees themselves in the OPCAT process. Is there current support from prison superintendents or managers for the Inmate Development Committees?

Brett Collins said there are requirements in most states for monthly meetings. In practice, the level of support differs in each prison. There can be victimisation of prisoners heavily involved in the committees.

A question was asked as to the considerations surrounding OICS's publication of inspections reports.

Neil Morgan said that providing feedback to the people who have spoken to OICS during inspections is very important. They operate based on a general presumption that they will publish their reports unless there is a good reason not to publish. For example, a significant security issue.

A comment was made that OICS conducts group discussions with various prisoner groups when they do inspections (e.g. Aboriginal, youth, Indonesian, etc). OICS also follows a process of debriefing prison staff and subsequently prisoners after conducting an inspection. The inspectors then write a report and provide a draft to the Department of Corrective Services and the manager of the prison in order for them to comment.

A question was asked as to the scope for OICS to cooperate with relevant community groups in Western Australia.

Neil Morgan stated that OICS does make use of community resources in a number of ways. For example, under the independent visitors' scheme, visitors are appointed by the Minister and coordinated by OICS. OICS conducts briefings during inspections with relevant NGOs that offer services in the prison. They also have a community consultation group, including the Aboriginal Legal Service and other relevant community groups.

A question was asked as to what redress is available if OICS recommendations are not adopted by the government.

Neil Morgan indicated that OICS does everything it can to encourage the implementation of its recommendations. However, ultimately it is up to the government. The government has recently announced that it is considering granting OICS additional powers including power to issue a 'show cause' notice. In Mr Ward's case, for example, this would have required the government to show cause for why there were no padded seats, no hand rails or windows in the transport vans. He is of the view that OICS should not become an enforcement agency – that would be adversarial and not cooperative as envisaged by OPCAT.

Brett Collins suggested that a report by the Inspector General could lay the foundation for a claim of a breach of duty of care.

A further comment was made that in relation to the Ward Case, the fact that there was a history of OICS reporting, documentation and correspondence relating to the case will assist in a damages suit for negligence. Inspection reports, even if unfortunately not acted upon at the time, can still be useful in later litigation.

5 Session 4: Implementing OPCAT in Australia

5.1 What are the key considerations?

Ben Schokman, Human Rights Law Resource Centre

The presenter made the following observations, which he noted were from the perspective of a non-government organisation:

- The key to the effective operation of OPCAT is ensuring that institutional commitments are made to its implementation. OPCAT offers an additional mechanism to help prevent torture. It is not just a compliance tool but an opportunity to develop effective mechanisms which can also lead to a reduction in complaints, lower costs, and more efficient systems. Prisoners and people with disabilities are two groups which often give up on lodging complaints because they feel their concerns are never met. OPCAT must be different.
- Expertise is crucial. It is vital that NPMs contain human rights expertise and expertise in terms of monitoring detention. The Victorian Charter experience demonstrates that it takes a long time for government agencies to develop the expertise required to comply with their human rights obligations.

- Organisations must be adequately resourced in order to be effective NPMs. Staff in monitoring bodies require ongoing training and a holistic approach to prevention is required.
- Independence must be actual and perceived, especially from the perspective of the rights-holder. It is important for the NPM to feed information back to detainees after visits, including regarding their rights and the NPM functions.
- The NPM's reporting function and the requirement for Parliament to respond to such reports must be incorporated into law. The absence of overarching human rights protections in Australia makes OPCAT incorporation all the more important. The legal framework must clearly define the responsibilities of the NPMs, especially if there is a mixed model.
- NGOs should play a key role in designing the NPM and implementing OPCAT. NGOS can be a useful resource as they have high levels of expertise in both human rights and in situations of detention. Community visitors and volunteers should be seen as additional to the role of NPMs, rather than fulfilling the inspection role.
- It is important to manage relationships with government, as the implementation of NPM recommendations will largely depend on goodwill. However, there is a need to ensure the relationships are institutionalised rather than dependent on selected individuals. There is a need to develop a real, institutional commitment to implementation of OPCAT.

5.2 What are the key considerations?

Richard Harding, former Inspector of Custodial Services, Western Australia

A human rights compliant organisation is easier to manage, more pleasant to work in and offers a better quality of life for everyone involved in it. An effective prevention system minimises political risk.

The big issues

Important issues include choosing the NPM model for Australia; selecting a coordinating NPM; identifying agencies that could be potential subsidiary NPMs; prioritising the coverage of the NPM/s; and developing international and national relationships.

Unitary model

Under the external affairs power, Australia could establish a unitary model with one federal NPM. However, possible drawbacks include the creation of a large, centralised bureaucracy with limited local knowledge. The reality is that one central NPM would not work in remote locations. The governmental entity that bears responsibility for laws and systems relevant to detention and detention facilities should also bear the accountability for them. The Commonwealth does not bear responsibility for criminal laws, mental health etc, the states do. The drawbacks far exceed the benefits of a unified model. A diversified model is preferable. It could be jurisdictionally or thematically based.

Diversified model - jurisdictional

It is necessary to consider whether there is already an OPCAT compliant monitoring body. Article 17 of OPCAT allows for multiple NPMs in each jurisdiction, as is the case for example in New Zealand and the UK.

Within each state there could be a coordinating NPM that would coordinate with the Commonwealth NPM. The notion of a state or territory NPM doesn't necessarily undermine other agencies, which could also be strengthened. It would be chaotic if the national coordinating NPM had to deal with every subsidiary NPM.

Diversified model - thematic

All places of detention of a common type could be monitored by a unified NPM. There would still have to be a relationship with a central or coordinating NPM. Australia already has some theme-based inspection agencies, for example in relation to aged care.

Diversified model – a mixed model

There could be some function based NPMs and 8 or 9 jurisdiction based NPMs. The central coordinating NPM should also have some inspection role itself.

Selecting a central or coordinating NPM

Possible bodies include the AHRC or the Commonwealth Ombudsman. They are OPCAT compliant, and functionally independent. Neither is currently a task oriented inspection agency. Issues to consider include how to build the necessary expertise in a central NPM; whether its resources are adequate; and whether it needs new organisational structures. In the case of the AHRC, an additional OPCAT Commissioner would be required to prevent the blurring of responsibilities.

In terms of which body should be the NPM, that is a matter for the federal government to determine.

The AHRC is Australia's central link to Australia's international human rights obligations. The AHRC has a strong track record with immigration detention visits and reporting.

The Ombudsman also has a good record. The Ombudsman's roles are complaints-driven and tend to be reactive rather than proactive. The Ombudsman is concerned mainly with administrative due process issues. It is possible to have administrative due process and still have an outcome that is non-compliant with human rights.

Identifying or establishing agencies as subsidiary NPMs

Very few Australian jurisdictions have existing agencies that meet NPM requirements. All have agencies that could be empowered and adapted, which might require statutory amendment. The national coordinating NPM should not have to deal with too many subsidiary agencies, so there should be one coordinating NPM in each state and territory to coordinate with the central NPM.

The scope of the task

It is necessary to determine how many places of detention there are and coverage must be prioritised. The central NPM should undertake at least some inspections of its own in order to be in a position to undertake quality control of other NPMs.

Biggest issue: ratification

Ratification of OPCAT would be beneficial for civil life in Australia. Agencies interested in playing a role as NPM should work together in order to achieve early ratification and establishment of NPMs.

5.3 Discussion

A question was asked as to which functions the coordinating NPM should undertake on an inspection basis.

Richard Harding replied that if it was a Commonwealth NPM it could do things the Commonwealth has responsibility for, such as aged care and immigration detention. Neil Morgan and Richard Harding in their 2008 report suggested a national police inspectorate.

It was noted that it is important in developing the NPM model that we don't see the state and territory NPMs as subsidiary. Many of the areas of responsibility fall under the states and territories – they are key players.

A question was asked as to how to engage with the community and NGOs in order to develop effective public policy around OPCAT.

Ben Schokman noted that the consultation process for OPCAT to date has involved very few opportunities for civil society participation. Moving forward, consultations should allow for involvement by all key stakeholders, including NGOs and civil society.

A comment was made that National Human Rights Institutions (such as the AHRC) have a unique role to play in terms of representation and communication at the international level. NHRIs are afforded the right to participate in proceedings of the UN Human Rights Council. Such participation is not available to other bodies of a similar nature. This might be one advantage to having the AHRC as the central NPM.

5.4 Small group discussion: The appropriate NPM model for Australia

Groups were asked to discuss which model of the following was the most appropriate in the Australian context: a single Commonwealth model; a Commonwealth-State jurisdictional model; or a mixed model (jurisdictional and functional). Groups were invited to consider administrative effectiveness, local diversity, NPM independence, the role of civil society organisations and the comprehensiveness and depth of inspection visits.

- Group 1 preferred a mixed model, with one coordinating NPM in each state and territory to be the point of contact with a national NPM. The bodies that do the inspections should make the specific recommendations for action (rather

than the national NPM making recommendations about areas that fall under state or territory responsibility). The role for the national NPM would be to facilitate standardised models for inspections, developed in consultation with states and territories.

- Group 2 preferred also preferred a mixed model. In some states there could be functional inspectorates feeding up to the central NPM. Smaller states may just have the one state NPM. The group emphasised the need for the NPMs to be independent, and noted that funding is likely to be an issue, especially in terms of enabling flexibility for a NPM to manage its own budget. It is important to involve NGOs in the process.
- Group 3 agreed that a mixed model was the most likely to be adopted in Australia. There are existing bodies which are or could be made OPCAT compliant, so there might be different NPM models in the various states and territories. A coordinating Commonwealth NPM is the most appropriate should inspect facilities for which the Commonwealth has responsibility, such as immigration, detention. Ideally, the Commonwealth NPM would need an arm for coordinating and an arm for visiting. The judiciary may have the power to oversee some places of detention, which is often overlooked.
- Group 4 preferred a mixed model with functional and jurisdictional NPMs. They wanted a central Commonwealth NPM 'with bite'. They noted that places of detention may include places such as Australian vessels out at sea or Australian military facilities outside Australia. They noted that the military would most likely want its own NPM. They thought that the central NPM ought to undertake the role of monitoring the NPMs, rather than conducting its own inspections.
- Group 5 agreed that a mixed model was likely in Australia. They thought that a central NPM should coordinate NPMs in the states and territories as well as a federal NPM to oversee federal areas of responsibility. They noted that the Commonwealth already had some thematic inspection bodies, and considered that the states could also set up thematic NPMs. They noted that some jurisdictions (such as NSW and the ACT) already have in place independent official visitors for some places of detention, but noted some gaps including police cells. They thought that generally the bodies were already in place and just required tweaking.

- Group 6 also preferred a mixed model, and thought that existing bodies at the state level could become OPCAT compliant. They thought that inspection reports should be based at the state level (rather than by the coordinating NPM). The coordinating NPM would be responsible for the annual report and maintenance of a relationship with the SPT.
- Group 7 endorsed a mixed model. The central NPM would have responsibility for setting standards and providing training programs. The state and territory NPMs would provide input on the standards to ensure they reflect the particularities of different jurisdictions. There would be challenges in terms of coherence. In diverse states such as Queensland, the system would need to rely on community organisations to ensure regular inspection of all places of detention.

Further comments

It was noted that even if there were state-based NPMs that were coordinating functional inspectorates, it may be useful to have networks between states to set benchmarks and share information.

A comment was made that OPCAT is a top-down approach. There is a need to inform detainees and include them in the process.

The impact of the absence of a bill or charter of rights in Australia was raised. It was noted that the UK Human Rights Act provides a body of jurisprudence which is a point of reference for all courts and agencies in England. Australia lacks this.

6 Summary and closing remarks

Barbara Bernath thanked all seminar participants for their contributions, and for inviting the APT to participate. She noted the need for ongoing consultations, including at the state and territory level.

In closing, Catherine Branson QC gave a brief overview of the day's proceedings. She noted that the seminar had been privileged to hear from individuals with a wide range of expertise.

She noted that OPCAT does not create new normative standards, but focuses on implementing existing human rights. It covers all places where people are deprived of their liberty. It seeks to identify systemic risks and to negotiate improvements within places of detention. She also noted that:

- There is no 'right' model for implementing OPCAT in Australia. The model may be single or mixed, and could be based on jurisdictional or thematic issues or both.
- The Commonwealth is obliged to establish a preventive mechanism which is independent and has power to visit all places of detention. The mechanism must be provided with adequate resources.
- In order for OPCAT mechanisms to have legitimacy, broad consultation is needed with all relevant stakeholders including NGOs, civil society and detainees themselves. It should be recognised that many different agencies

and bodies could play important roles in the implementation of OPCAT in Australia.

- The seminar participants were assisted by hearing about the New Zealand experience and the role of OICS in Western Australia. Adequate planning and preparation will be critical in implementing OPCAT in Australia. It will be a long term process.
- There was a fairly consistent view among seminar participants as to the appropriate NPM model for Australia, with general support for a mixed model. Broader consultations will be required to investigate whether other stakeholders share this view.