Sub #40 to AHRC OPCAT NGO Consultation from Professor Bronwyn Naylor (RMIT)

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Mr Ed Santow
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Australian Human Rights Commission Consultation on the Implementation of OPCAT in Australia

Thank you for the opportunity to contribute to the AHRC consultation with civil society on the implementation of the OPCAT in Australia. I welcome the Australian government's decision to ratify OPCAT, as an important step in protecting the rights of people in detention in Australia. The AHRC consultation offers an invaluable opportunity to engage civil society with the process of implementing OPCAT.

Significant consultation has been carried out through your regional Roundtable meetings, and many detailed submissions will have been made.[1] This submission will provide brief comments on questions 1 and 3, being some observations on the current framework for monitoring places of detention, and on some important issues that should be taken into account by the National Preventive Mechanism (NPM) when in operation.

1. Comments on the current inspection framework for places of detention

The OPCAT is intended to protect the rights of people 'deprived of their liberty', that is, people held in 'any form of detention …. which that person is not permitted to leave at will … '.[2] This includes traditional places of detention such as prisons, youth detention, immigration detention and closed psychiatric facilities, but also, for example, disability and care facilities, aged care, military facilities, temporary holding facilities and detention-related transport vehicles.[3] In Australia the majority of places of detention are generally clearly located under either federal authority, or under state/territory authority, and it will be an important part of OPCAT implementation to fully identify all places where people are detained to ensure monitoring protections are in place.

As outlined in the Consultation Paper, a mixed model NPM is proposed, with multiple bodies across the Commonwealth, states and territories having monitoring responsibilities, and with the Commonwealth Ombudsman having the national coordinating function. Existing monitoring bodies may be designated as NPM bodies – which, as will be discussed, will require expansion of mandates and resources – but there is also the option of establishing new bodies to ensure comprehensive coverage across the country.

A model identifying existing bodies with expertise in monitoring specific places of detention, to be co-ordinated at the state/territory and federal level, would seem most appropriate in Australia. It is an approach taken in other federal systems,[4] and similar approaches have been taken in the United Kingdom (which has some of the multi-jurisdictional challenges faced in Australia), and in New Zealand.

[1] See for example the extensive submission of the Australia OPCAT Network.

[2] OPCAT Article 4(1) and (2).

[3] See for example Association for the Prevention of Torture (APT) *Implementation of the OPCAT in Federal and other Decentralised States* 2011, 4.

[4] See APT *Implementation of the OPCAT in Federal and other Decentralised States* 2011.

A general oversight and co-ordinating body is also required to ensure there is consistency across different environments on common issues, to guard against gaps and overlaps, and to support development of standards and training. It has been announced that this is to be the Commonwealth Ombudsman at the federal level. A central body will also be needed at the state level to either co-ordinate a set of existing bodies across different sectors of places of detention, or to incorporate previously separate monitoring bodies into a single agency.

Options for co-ordination include the UK model where an existing monitoring body (HM Inspectorate of Prisons) took on the co-ordinating role, or the approach adopted in New Zealand, where the Human Rights Commission has the co-ordinating role as the Central NPM but does not carry out monitoring visits.

In terms of implementing a model which is based on existing monitoring bodies, it will be important to take into account the capacity of the existing body to carry out the *preventive* monitoring required under OPCAT, and to ensure there is the resourcing and support needed to carry out this task. It will also be important to consider the current mandate and focus of the existing body, and how the addition of OPCAT obligations will sit within the organisation. Questions will include whether the OPCAT role will be given appropriate priority; whether there will be adequate resources devoted to the role; whether there is any risk that having an NPM role might introduce role conflict; and how the changed role might affect the relationships the body has/had with relevant authorities.

Assuming that the existing monitoring framework will form the basis of the NPM in most jurisdictions, this requires attention to the requirements for an NPM to be compliant with OPCAT. As set out in the Consultation Paper, OPCAT specifies criteria for the NPM, to maximise the effectiveness of monitoring for preventing torture and cruel, inhuman and degrading treatment in places of detention. In very brief summary, the OPCAT requires that an NPM is functionally independent, has requisite statutory powers, has free access for visits to any place of detention, including free access to all necessary information, and the ability to conduct private interviews with detainees and any other relevant people, is adequately resourced to undertake their role, has power to make recommendations and enter dialogue with detaining authorities, and that the state will publish NPM annual reports.[5] This is the template for evaluating existing monitoring bodies which may be considered as an NPM.

Identification of existing monitoring schemes

There are many existing monitoring bodies in Australia at federal, state and territory level. Australia has had Ombudsman offices since the 1970s, with statutory independence from government, and with powers to investigate complaints about (amongst other things) ill-treatment in various places of detention and to make public reports. The Victorian Ombudsman, for instance, can initiate inquiries as well as act on complaints, and in recent years has reported on conditions in prisons and police cells and in juvenile detention. The Victorian Ombudsman also has an explicit mandate to monitor human rights violations.[6]

A number of jurisdictions have Human Rights Commissions, some of which have powers to inspect places of detention. In Western Australia and New South Wales there are independent statutory Inspectorates to monitor prisons and juvenile detention facilities, and some other jurisdictions are developing similar bodies. All jurisdictions have Children's Commissioners or similar offices. Most jurisdictions also have extensive schemes of volunteer-based Community Visitors, who have powers to talk to detainees in prisons, in juvenile detention, and in some closed disability facilities, and can report back on concerns.

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[5] OPCAT Articles 17-23. See generally, Naylor, Debeljak and Mackay, 'A Strategic Framework for Implementing Human Rights in Closed Environments' (2015) 41(1) *Monash University Law Review* 218, 248ff, 258.
[6] *Ombudsman Act (Vic) 1973* s.13AA(2).

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An informal review of monitoring bodies in Australia, under federal, state and territory jurisdiction, suggests that a small number already operate at or near the standard required for compliance with OPCAT (such as the WA Office of the Inspector of Custodial Services). Many more are effective in terms of their current mandate, which is primarily reactive and complaints-based, rather than proactive and preventive in their focus, and others have limited resourcing and powers that restrict their effectiveness.

It is not possible to offer a comprehensive review in this brief submission, but as identified by the AHRC in its Consultation Paper a full stocktake is needed, both of places of detention and of monitoring bodies. Such a stocktake is currently being undertaken in Victoria by the Ombudsman Victoria.[7] Some earlier work has outlined coverage of places of detention and their oversight mechanisms.[8] Harding and Morgan observed in their 2008 Report that it was difficult to identify all places of detention and to map relevant monitoring agencies, but concluded that at the time of their work, 'There are, in fact, very few OPCAT-compliant mechanisms in existence in any of the nine Australian jurisdictions.' [9]

As part of her recent report on oversight mechanisms in youth justice, the National Children's Commissioner carried out an exhaustive audit of youth detention monitoring, and highlighted the differences between traditional reactive (complaints-based) monitoring and the proactive preventive monitoring required under OPCAT. She observed that Australia does have a relatively comprehensive complaints-based system of oversight of places of detention but that 'mechanisms to *prevent* ill-treatment in places of detention… are not as well developed.'[10]

There is therefore a wide range of models and what has been referred to as a 'patchwork' of monitoring bodies, with some jurisdictions and sectors better served than others, and with some forms of detention monitored by a number of bodies while others have little or no oversight. The range of monitoring bodies is clearly a strength. However if they are to form the basis of the new monitoring regimes under OPCAT they need to be evaluated against the OPCAT criteria. Some limitations should therefore be noted that would need to be addressed.

Limitations of the existing framework

Mandate: There are significant differences across existing bodies in powers to inspect premises and require information and, as already noted, most have a primarily reactive mandate. It is of course essential that there be avenues for complaint about – eg – government activity and the exercise of state power, and Australia has historically been a leader in the establishment of Ombudsman- type offices. It is however important, as a requirement of OPCAT, that an NPM is able to engage in *preventive* monitoring. This requires capacity to proactively oversee the operation of places of detention, with regular announced and unannounced visits. This is important because preventive monitoring has different goals from complaints-based monitoring, but also because many people in places of detention are likely to have difficulty raising a complaint and/or may face recrimination should they complain.

There are significant differences between existing bodies in levels of functional independence. Some are clearly established as independent but others operate within relevant government departments. Funding and resourcing is also a challenge for some existing bodies.

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[7] https://www.ombudsman.vic.gov.au/News/Media-Releases/Media-Alerts/Ombudsman-to-conduct-OPCAT-style-inspection-of-the

[8] See Harding and Morgan, *Implementing the OPCAT: Options for Australia* 2008; Naylor, Harrison, Dussuyer and Kessel, *Monitoring Closed Environments: The Role of Oversight Bodies* Working Paper Number 3, 2014.

[9] Harding and Morgan, 2008, 16.

[10] National Children's Commissioner, *Children's Rights Report* Australian Human Rights Commission, 2016, 94, citing the submission of the Human Rights Law Centre.

Jurisdictional inconsistencies: Given that most detention occurs under state/territory authority there are inevitably currently jurisdictional differences in monitoring practices across Australia. Some states have a range of monitoring bodies providing overlapping monitoring activities (eg several jurisdictions have multiple prison oversight agencies), while others are more limited in the strength and coverage of monitoring agencies.

At the Commonwealth level, the main detention facilities are immigration detention centres. There are several bodies with relevant monitoring roles: the Commonwealth Ombudsman and the Australian Human Rights Commission have powers to monitor and report on Commonwealth immigration detention, as do NGOs and Parliamentary Committees. Monitoring has however been limited by resources, by restrictions imposed by government, and by difficulties in accessing and reporting on remote facilities. Other forms of Commonwealth detention, such as in customs and military facilities, seem to be less clearly subject to oversight.

Ultimately, whether a prison, immigration detention centre or youth facility is effectively monitored should not depend on where it is located or on the government currently in power.

Gaps in coverage: There are significant gaps in coverage across the range of places in which people may be detained. Most jurisdictions provide some monitoring of, for example, prisons, youth detention and closed psychiatric and disability facilities, but there is more limited monitoring across Australia of police cells, court custody facilities, and police and other detention-related transport, and the monitoring of aged care also seems to be problematic.

Rights-based monitoring: Given Australia's limited formal recognition of international human rights principles it is not surprising that many existing monitoring bodies do not have an explicit human rights mandate or focus. Exceptions include the AHRC, the Victorian Ombudsman, and ACT Human Rights Commission. On the other hand a number of monitoring bodies have independently developed monitoring standards which embody international human rights standards.

Standards: It is important, both for accountability and for the dissemination of good practice, that monitoring bodies make their monitoring standards, and their inspection findings, publicly available wherever possible. For example, the Western Australian Office of the Inspector of Custodial Services and the New South Wales Inspector of Custodial Services publish their inspection and thematic reports, and their inspection standards, online. However other monitoring bodies do not publish either the standards they employ, or reports on the inspections carried out.

A central co-ordinating NPM will have a valuable role in supporting the development of standards, for example drawing on those already developed in the corrections area in Western Australia and New South Wales. There are also valuable models available from the Association for the Prevention of Torture[11] and the Subcommittee on the Prevention of Torture.[12] The continued importance of the UN Standard Minimum Rules for the Treatment of Prisoners, revised in 2015 and known as the Mandela Rules, has been recently highlighted by the UK NPM. [13]

Reporting: public reporting is a vital part of maintaining accountability of places of detention. Many monitoring bodies in Australia – but not all - already present public reports, either general overviews or reports of inquiries. The OPCAT requires only annual reporting from NPMs but this is an area where it would be highly desirable for Australian NPMs to go beyond OPCAT minimum requirements and continue

[11] Eg APT *Monitoring Places of Detention: a practical guide* (2004); *Monitoring Police Custody: a practical guide* (2013).

[12] See http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/NationalPreventiveMechanisms.aspx

[13] http://www.apt.ch/en/blog/nelson-mandela-rules-uk-npm/#.WXlX54SGOpo

the practice of providing public reports on all inquiries, and on government responses to recommendations, wherever possible.

Legislative basis: Many Australian monitoring bodies have a statutory basis but at this stage this will be limited by the currently agreed mandate of the agency. The Subcommittee on the Prevention of Torture emphasises the importance of spelling out the new obligations and powers of an NPM in legislation, to ensure the bodies carrying out NPM functions have the powers and protections required.[14] More broadly, implementation of the NPM regime requires comprehensive Commonwealth, state and territory legislation to articulate and coordinate the powers and obligations of the various bodies, and their authority in relation to places of detention.[15]

Finally, it is often observed that a limitation of monitoring as a means of protecting rights is the unenforceability of recommendations, compared for example with the findings of courts in litigation. It is vital that monitoring bodies are independent of government and of the agencies – public and private - being monitored; it is also vital to their credibility and effectiveness that their reports and recommendations are considered by the monitored agency and by government. It is therefore argued here that the legislation setting up the Australian NPM bodies, at federal, state and territory levels, should include a requirement for the NPM to table reports, and for the government to respond to recommendations in these reports within a specified time frame, and to report on those responses.

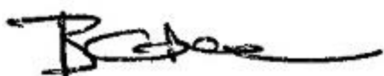
Question 3: what are the most important or urgent issues for the NPM?

There are a number of issues which are of potential concern across all places of detention, both nationally and at state/territory level. The co-ordinating NPM will have an important role in identifying and supporting systemic reviews of such issues. The capacity to do so is one of the strengths of the OPCAT monitoring model. The issues should also be on the agenda of all monitoring bodies across different jurisdictions and across different sectors. These include:

- Uses of seclusion and restrictive practices, an issue recently addressed by the New Zealand NPM in in collaboration with Dr Sharon Shalev,[16] and by the UK NPM.[17]
- Conditions of detention for people with disabilities and people with mental ill health, both in relation to the conditions in which they receive services, but also as a group which is over-represented in most places of detention, including prisons.
- Conditions and experience of detention of Aboriginal and Torres Strait Islander people, who are, again, over-represented in many places of detention.

Should you have any questions about any matters raised in this Submission please feel free to contact me.

Yours faithfully,



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[14] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment *Guidelines on National Preventive Mechanisms* 2010.

[15] See Harding and Morgan 2008, 45.

[16] See Sharon Shalev, *Thinking Outside the Box? A Review of Seclusion and Restraint Practices in New Zealand* New Zealand Human Rights Commission 2017.

[17] https://s3-eu-west-2.amazonaws.com/npm-prod-storage-19n0nag2nk8xk/uploads/2017/02/NPM-Isolation-Guidance-FINAL.pdf