Prevention is Better than Cure: OPCAT and Preventing Ill-Treatment of Detained People with Disabilities

In December 2017, the Australian Government ratified the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**), a United Nations Treaty that aims to prevent torture and ill-treatment in all places where people are, or may be, deprived of their liberty. While many oversight and accountability mechanisms for places of detention are reactive, what makes OPCAT unique is the objective to prevent the harm before it occurs. This is achieved by establishing a system of regular visits undertaken by independent international and domestic bodies to places of detention. At the international level, Australia is required to permit and facilitate visits by an independent body – the United Nations Subcommittee on Prevention of Torture (**SPT**) – to all places of detention. At the domestic level, these preventive visits are to be carried out by a number of bodies collectively known as the National Preventive Mechanism (**NPM**).

Mitigating the risks of harm to detained people is essential from a human rights perspective, and the prohibition against torture is absolute. But preventing ill-treatment is also closely connected to the objective of reducing recidivism rates. Incarcerated people generally have poorer physical and mental health than others in the community, and many have histories of trauma. Torture and other forms of ill-treatment can have long-lasting, and even lifelong impacts. Minimising the harm to incarcerated people is crucial to avoiding exacerbating those physical and mental health issues, and avoiding undermining simultaneous efforts to strengthen and develop protective factors.

Read more about OPCAT on OICS' OPCAT page here

We acknowledge the traditional custodians of the ACT, the Ngunnawal people. We acknowledge and respect their continuing culture and the contribution they make to the life of this city and this region. We acknowledge also the Noongar people, on whose land the Reintegration Puzzle Conference took place.

Andreea Lachsz e: Andreea.Lachsz@act.gov.au

What is the link between prevention of ill-treatment of detained people and their successful reintegration post-release?

My focus today is going to be on people with disability caught up in the criminal legal system, and specifically, people with disability who have been deprived of their liberty by the criminal legal system. OPCAT, however, is relevant to all places of deprivation of liberty.

Mitigating the risks of harm to detained people is essential from a human rights perspective, and the prohibition against torture is absolute. There can be no exceptions to this rule – not during conflict, not in the so-called war on terror, not to elicit confessions, and certainly not in ostensibly therapeutic closed environments, such as mental health facilities.

As well as torture, cruel, inhuman or degrading treatment or punishment is also prohibited under a number of human rights instruments including the UN *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, which Australia voluntarily ratified in 1989.

The UN Special Rapporteur on Prevention of Torture has stated that:

> ill-treatment denotes any other cruel, inhuman or degrading treatment or punishment, which does not necessarily require the intentionality and purposefulness of the act or the powerlessness of the victim [as torture]… Torture and ill-treatment can take an almost endless variety of forms that cannot be catalogued in an exhaustive manner, ranging from police violence, intimidation and humiliation to coercive interrogation, from denial of family contacts or medical treatment to the instrumentalization of drug withdrawal symptoms, and from inhuman or degrading detention conditions to prolonged arbitrary detention or abusive solitary confinement, to name a few.

Preventing ill-treatment is closely connected to the objective of reducing recidivism rates. Incarcerated people generally have poorer physical and mental health than others in the community, and many have histories of trauma. Torture and other forms of ill-treatment can have long-lasting, and even lifelong impacts. Minimising the harm to incarcerated people is crucial to avoiding exacerbating those physical and mental health issues, and avoiding undermining simultaneous efforts to strengthen and develop protective factors.

For example, the greater impact of solitary confinement on people with disability has been recognised. The UN *Standard Minimum Rules for the Treatment of Prisoners* (also known as the Mandela Rules), define solitary confinement as "confinement for 22 hours or more a day without meaningful human contact." Prolonged solitary confinement is "solitary confinement for a time period in excess of 15 consecutive days." The Rules stipulate that "solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorisation by a competent authority." And it "should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures."

Andreea Lachsz e: Andreea.Lachsz@act.gov.au

While meaningful contact is not defined in UN instruments, Penal Reform International has referred to the Essex paper description:

> the amount and quality of social interaction and psychological stimulation which human beings require for their mental health and wellbeing. Such interaction requires the human contact to be face to face and direct (without physical barriers) and more than fleeting or incidental, enabling empathetic interpersonal communication. Contact must not be limited to those interactions determined by prison routines, the course of (criminal) investigations or medical necessity.

Additionally, over 30 years ago, the Royal Commission into Aboriginal Deaths in Custody recommended that "Corrective Services should recognise that it is undesirable in the highest degree that an Aboriginal prisoner should be placed in segregation or isolated detention."

And studies as far back as 1854 identified "solitary confinement as the single central factor in the development of psychotic illness among prisoners."

Giffard, in *The Torture Reporting Handbook*, recognises that "[t]here are… many 'grey areas' which do not clearly amount to torture, or about which there is still disagreement, but which are of great concern to the international community," including solitary confinement in a list of examples. She goes on to say that particular vulnerabilities of a group of people might result in conduct that might not otherwise amount to torture, be defined as torture. Giffard includes in this list of grey areas "[t]reatment inflicted on a child which might not be considered torture if inflicted on an adult".

Shalev outlines symptoms resulting from solitary confinement including:

- Anxiety, ranging from feelings of tension to full blown panic attacks
- Depression
- Anger
- Cognitive disturbances
- Perceptual distortions, ranging from hypersensitivity to hallucinations
- Paranoia and Psychosis, ranging from obsessional thoughts to full blown psychosis

And yet, often detaining authorities rely on this blunt and harmful tool to manage suicidal ideation, and to prevent self-harm because of a range of reasons, including entrenched practices that are not being regularly revisited or challenged, unqualified staff or insufficient resources. As a result, people with pre-existing mental health diagnoses are subjected to it, people with histories of trauma are subjected to it, children with cognitive impairments are subjected to it.

The sad irony being that this tool, in fact, causes further harm to people who need a therapeutic approach. And who are then ultimately released into the community, not only not being rehabilitated while incarcerated, but actively harmed. It is self-evident that this will, in turn, impact on someone's reintegration into the community.

Andreea Lachsz e: Andreea.Lachsz@act.gov.au

What is indisputable it that is preferable to prevent instances of ill-treatment and torture before they have even taken place.

This brings us to OPCAT. So what is OPCAT?

The *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**) is a United Nations Treaty that aims to prevent torture and ill-treatment in all places where people are, or may be, deprived of their liberty. 'Places of detention' is broadly defined, and includes correctional facilities, youth prisons, police custody (cells and vehicles), court cells and closed mental health and disability facilities.

It is important to note that the OPCAT does not create new substantive rights. Prohibitions on torture and ill-treatment in places of deprivation of liberty can be found in other UN instruments, such as the UN Convention against Torture, about which I have already spoken, and the UN *International Covenant on Civil and Political Rights*.

While many oversight and accountability mechanisms for places of detention are reactive, what makes OPCAT unique is the objective to prevent the harm before it occurs. This is achieved by establishing a system of regular visits undertaken by independent international and domestic bodies to places of detention. At the international level, Australia is required to permit and facilitate visits by an independent body of international experts - the United Nations Subcommittee on Prevention of Torture (**SPT**) - to all places of detention. At the domestic level, these preventive visits are to be carried out by a number of bodies designated by the Federal, State and Territory Governments, that are collectively known as the National Preventive Mechanism (**NPM**). The coordinator for the whole Australian NPM is the Commonwealth Ombudsman.

In December 2017, the Australian Government voluntarily signed up to OPCAT, initially postponing meeting its obligations under OPCAT by 3 years, and then securing a further one-year extension from the United Nations Committee Against Torture. The deadline for an operational Australian NPM was 20 January 2023.

In the ACT, the Office of the Inspector of Correctional Services (**OICS**), the Human Rights Commission and the ACT Ombudsman have been nominated to be the multi-body NPM. We will be jointly responsible for visiting places of detention in the ACT, with the aim of strengthening protections against torture and ill-treatment. Under OPCAT, we should have unfettered access to all places of detention and detained people, be able to make recommendations regarding treatment and conditions in detention, and be able to submit proposals on legislation.

Going back to the example of solitary confinement, one of the New Zealand NPM bodies, the Human Rights Commission (the central NPM), has conducted a number of relevant thematic NPM visits, focusing on the use of seclusion. The Commission engaged international expert on solitary confinement, Shalev, for this NPM work.

Andreea Lachsz e: Andreea.Lachsz@act.gov.au

Findings of the first report included:

> A small but persistent number of people in health and disability facilities were subjected to very long-term restrictive measures, and discussion of future plans for these individuals appeared to be focused on variants of seclusion and restraint. For the individuals concerned, prolonged seclusion and /or restraint (and often both) had thus become a chronic state rather than an emergency short term response to an acute situation.

The role of an NPM is to find the root causes of ill-treatment, and then make expert recommendations to detaining authorities and governments on how to mitigate risk of ill-treatment. One of the recommendations of the Commission/Shalev NPM report, for example, was:

> The Ministry of Health should be applauded for its commitment to policies aimed at the reduction, and eventual elimination, of seclusion. This commitment must be supported by a reassertion of why seclusion needs to be minimised in the first place: i.e. because it is damaging, inappropriate, not conducive to the therapeutic relationship between the patient and their care givers, and because it has no therapeutic value. This can be done through further training which may also help to address staff concerns about policies to eliminate the use of seclusion.

So this recommendation really goes to the heart of the culture within that workforce.

What does prevention mean in the context of OPCAT?

It is important to note that this concept of prevention is broad, and while visits to places of detention are the core of the NPM's work, what constitutes prevention has been deliberately left open-ended.

The UN Subcommittee on Prevention of Torture (**SPT**) has stated that "there is more to the prevention of torture and ill-treatment than compliance with legal commitments. In this sense, the prevention of torture and ill-treatment embraces — or should embrace — as many as possible of those things which in a given situation can contribute towards the lessening of the likelihood or risk of torture or ill-treatment occurring."

In fact, the UN Special Rapporteur on Torture has concluded that "avoiding depriving a person of [their] liberty is one of the most effective safeguards against torture and ill-treatment". And so, means by which to reduce the number of people incarcerated falls within the mandates of the SPT and Australian NPM. For example, in its visit to New Zealand almost 10 years ago now, the SPT raised concerns in relation to proposed amendments to legislation on bail, that would disproportionately affect Māori people.

So you might be wondering how prevention compare to cures

There are a range of oversight mechanisms which respond to alleged incidents and systemic issues in places of detention. However, these mechanisms focus on action after issues have arisen, after the

Andreea Lachsz e: Andreea.Lachsz@act.gov.au

harm has been done (and potentially irreparable harm, at that), rather than prevention. These corrective mechanisms include:

- independent statutory bodies, such as a state ombudsman, which conduct investigations, audits and respond to complaints
- civil litigation, including pursuing compensation
- coronial inquests following a death in custody
- systemic inquiries and royal commissions
- criminal prosecutions for alleged wrongdoing by staff who work in places of detention or who have powers to detain, like police
- regulatory bodies, such as those focusing on workplace health and safety for staff, that have coercive and enforcement powers, such as issuing fines.

You might also be wondering where are we up to on OPCAT implementation in Australia

The UN Subcommittee delegation suspended its first ever visit to Australia before it could be completed in October last year. In giving its reasons for the decision, the delegation claimed it had, "been prevented from visiting several places where people are detained, experienced difficulties in carrying out a full visit at other locations, and was not given all the relevant information and documentation it had requested." Justice Aisha Shujune Muhammad, the head of the four-member delegation, concluded there had been "a clear breach by Australia of its obligations under OPCAT".

A few short weeks later, Australia appeared before another UN body, the Committee Against Torture, which commented on both the suspended SPT visit and Australia's progress in establishing an operational NPM across the country.

The Committee concluded that Australia should "take all necessary measures to promptly establish its NPM across all states and territories and ensure that each of its bodies has the necessary resources and functional and operational independence to fulfil its preventive mandate in accordance with the Optional Protocol, including access to all places of deprivation of liberty as prioritised by the NPMs themselves."

One expert member of the Committee commented that, "noticing the huge amount of financial resources that Australia puts into their prison system… we don't think that the financing of NPMs is really a financial problem. It could be more a problem of the will of particular responsible entities to deal with this problem."

For the January deadline this year, for Australia to have this operational NPM, members of the Australian NPM released a statement that "there is still much work that needs to be done. Progress towards designating and operationalising NPM bodies varies across different states and territories," and that "where they have not yet done so, we call on all Australian governments to appoint NPMs, to legislate their role and powers, and to resource them to fully discharge their mandate to carry out preventive visits to places of detention."

Andreea Lachsz e: Andreea.Lachsz@act.gov.au

The most recent development in this space followed the SPT's plenary from 6 to 10 February this year, during which the SPT decided to terminate its visit to Australia. Members of the Australian NPM stated that this was "a disappointing outcome", noting that "Australia now joins Rwanda as the only other country where the SPT has decided to terminate a visit," and that "Australian governments, detaining authorities, civil society organisations and other oversight bodies have lost a valuable opportunity to work cooperatively with the SPT to progress our shared goal of protecting the human rights of people in detention."

In an interview following the termination, the Commonwealth Ombudsman stated that he hoped the SPT report to the Commonwealth Government would be made public (it is a confidential report, and it is at the discretion of the Commonwealth Government whether it is published). Different countries have taken different approaches to this.

Australia is now also at risk of being added to the UN's list of non-compliant States, whose obligation to set up an operational NPM is substantially overdue. Countries currently on that list include Belize, Bosnia and Herzegovina, Nauru, the Philippines and the Democratic Republic of the Congo.

So what are some concrete examples of the preventive work an NPM can do in relation to detained people with disabilities?

Following the suspension of the SPT visit last year, the Queensland Government responded by introducing a Bill that would ostensibly address its non-compliance with obligations under OPCAT to give the SPT access to detained people in mental health in-patient units (the government cited patient privacy provisions last year for denying the UN access to those places).

Members of the Australian NPM made a joint submission on the Bill, lending its collective expertise and experience. For example, it commented on Clause 16 of the *Monitoring of Places of Detention Bill*, which addressed obtaining consent to interview. The Bill provided that the SPT must not interview a person unless they or their legal guardian, where relevant, consents. The NPM submitted that establishing consent should be a matter for the SPT and the person concerned. If an individual does not wish to speak to the SPT they should not be required to, even if their legal guardian consents. Similarly, if an individual does wish to speak to the SPT, they should be able to even if their legal guardian does not consent. Of course, SPT reports do not identify individuals with whom it has spoken, being guided by the principle of 'do no harm' in its work. In fact, OPCAT stipulates that "no personal data shall be published without the express consent of the person concerned".

In terms of visits, NPM bodies can choose to include staff or consultants with lived experience. People with lived experience be involved in a number of ways, "including the design of the NPM, in drafting expectations/standards and the visits framework, in preparing for visits, partaking in the visit itself, providing feedback during the visit regarding what evidence might need to be properly triangulated (should they not be entering the place of detention themselves), in drafting recommendations, in

Andreea Lachsz e: Andreea.Lachsz@act.gov.au

analysing the detaining authority's response to those recommendations and findings, and providing training to NPM staff."

Murray et al have canvassed how expertise in the form of lived experience or service use can be incorporated in the functioning of the NPM. They refer to 'a study of the examination of mental health and social care inspectorates [that] recommended… [i]n order to ensure credibility of the inspectorate's work, people who have experienced mental health services and services for people with intellectual disabilities should be actively recruited as inspectors.' They note this particular issue has received more attention in the context of the UN *Convention on the Rights of Persons with Disabilities* than OPCAT, however.

In 2017, Sisters Inside, in its submission to the Australian Human Rights Commission OPCAT in Australia consultation, provided the following useful guidance:

> NPMs could also ensure direct input from 'experts with experience' by: employing people with lived prison experience; hosting safe, accessible and open consultations specifically for people with lived prison experience; resourcing the emotional support required to facilitate participation by people with lived prison experience (e.g. advance preparation, debriefing, follow-up counselling); providing the practical support required to facilitate women's participation (e.g. transport and childcare); and recognising the unique contribution of these organisational and individual experts (e.g. remuneration at similar levels to academic experts).

An example in practice can be found in the ACT Inspector of Custodial Services engaging contractors with disabilities. This enabled OICS to identify issues with the correctional facility's induction building and processes, particularly bringing attention to the lack of captions on video and harsh surfaces meaning that sound bounced off them, making hearing difficult. It has also enabled OICS to identify the lack of Easy English induction materials. These issues, left unaddressed, could lead to detained people not knowing the rules, placing them at risk of breaking those rules, and subsequently being subject to disciplinary action. They could also compromise the screening process, ultimately increasing the risk of discrimination and other forms of ill-treatment of people with disability.

Conclusion

Hopefully I have persuaded you today that prevention is better than cure, when it comes to torture and cruel, inhuman or degrading treatment or punishment of detained people with disabilities. It is obviously in the best interests of detained people to never be harmed in the first place, particularly given that the outcomes of certain practices, such as solitary confinement, can have persistent, and even life-long effects. It is also in the self-interest of the community for detained people to not be harmed, as this can increase the rates of recidivism. Of course, it is also fundamentally a question of what sort of society we want to be, and I think I can confidently say that we all share a vision of a world free from torture and cruelty.

A properly funded Australian NPM, with legislated powers, privileges, immunities and protections, is key to preventing torture and ill-treatment of people with disability in places of detention. And while

Andreea Lachsz e: Andreea.Lachsz@act.gov.au

there have certainly been set-backs of late, that should not make us despondent, but only more committed and energised to achieve this shared vision. And that means ensuring that the Australian NPM and UN SPT are able to effectively exercise their mandates to mitigate risks of torture and ill-treatment of detained people with disabilities in detention.

Andreea Lachsz e: Andreea.Lachsz@act.gov.au