



Written Submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory

Submission on a System of Torture Prevention

Geneva, 28 October 2016

Introduction

1. The Association for the Prevention of Torture (APT) is an independent non-governmental organisation based in Geneva, working globally since 1977 to prevent torture and other forms of ill-treatment.¹ Among our priorities, we advocate for the ratification of the UN Optional Protocol to the Convention against Torture (OPCAT)² and for the adoption of legal and policy frameworks to ensure the effective prevention of abuse.
2. The APT wishes to extend our thanks to the Royal Commission for inviting evidence from NGOs and other parties.³
3. It is understood the Royal Commission has been instructed to inquire into multiple identified areas, including the effectiveness of any oversight mechanisms and safeguards to ensure the treatment of detainees was appropriate; and whether more should have been done by the Government of the Northern Territory to take appropriate measures to prevent the reoccurrence of inappropriate treatment. As these are both areas of our established experience, the APT submission will address these matters exclusively.

¹ See www.apt.ch.

² The Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) was adopted by the UN General Assembly in 2002 and came into force in 2006. It aims to minimise the risks of abuse by opening up prisons, police stations, mental health institutions and all other places of detention to examination by independent watchdogs. The basic premise behind the OPCAT is that the more open and transparent places of detention are, the lesser the risk for abuse. See <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx>.

³ <https://childdetentionnt.royalcommission.gov.au/Submissions/Pages/default.aspx>.

Executive Summary:

- The creation of a monitoring system for places of detention with a view to preventing abuse of persons deprived of liberty in the Northern Territory can begin, even before OPCAT ratification.
- Such a preventive approach is ideally suited to dealing with the multiple vulnerabilities experienced by persons in detention.
- How legal and procedural safeguards against abuse can be operationalised in an effective way should be among the areas of priority for the Royal Commission.

Independent Detention Oversight

4. The *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) (National Uniform Legislation) Bill 2013* (Northern Territory) sought to provide – following OPCAT ratification by the Commonwealth Government – for independent monitoring of places and facilities in the Northern Territory where people are detained. Although the Bill was tabled, Parliament was not given an opportunity to vote on the proposal due to the lack of progress on ratification at the federal level.
5. While APT remains confident that Australia will ratify OPCAT in the near future, the lack of ratification should not be a barrier to the creation of a preventive monitoring system in the Northern Territory. The benefit of an effective system of independent oversight for places of juvenile detention, where expert monitors conduct visits and engage in open constructive dialogue with authorities, with a view to making recommendations aimed at reducing cases of torture and other ill-treatment, will be of clear relevance to the Royal Commission.
6. Our experience in other federal States has shown that local preventive mechanisms can provide effective oversight of detention, even in the absence of a fully-functioning national system. In Brazil, for example,⁴ Local Preventive Mechanisms have been established in six states,⁵ plus Rio de Janeiro, where their recommendations have positively impacted on detention laws and practices. For example, the 2014 annual report of the local preventive mechanism (LPM) in Rio highlights their work in juvenile detention, where their recommendations have sought to address systemic inequalities, which lead to an overrepresentation of young, black men in the criminal justice system.⁶ The LPM has also helped to put an end to the abusive practice of conducting humiliating body searches of detainees and their visitors, including children, adolescents and women. In its recommendations to the authorities, the LPM highlighted that strip searches and

⁴ See the example of Brazil: http://www.apr.ch/en/opcat_pages/opcat-situation-81/ and Argentina: http://www.apr.ch/en/opcat_pages/opcat-situation-84/.

⁵ From a total of 26.

⁶ http://www.apr.ch/content/files/npm/americas/Rio_LPM_Annual_Report_2014.pdf

body-cavity searches can be a form of inhuman and degrading treatment and reiterated the need to prohibit the practice. As a result of these recommendations the State of Rio de Janeiro, in May 2015, approved a law which prohibits intimate searches of visitors to detainees in the prison system. Since then, the Mechanism has been monitoring the law's implementation, noting significant progress.

7. The APT encourages the Royal Commission to recommend the setting up of a well-resourced, independent detention monitoring system in the Northern Territory (including through the designation of existing bodies), with a view to ensuring that the treatment of juvenile detainees in the Northern Territory meets recognised international standards.
8. While the Children's Commissioner and Ombudsman do provide some level of existing oversight of NT detention facilities, these bodies do not have powers of unfettered access to institutions or their records, which both reduces transparency and limits oversight, particularly in regards to critical incidents and the use of force. In addition, an oversight system that is primarily driven by complaints, without a preventive approach is likely to miss a number of important issues, such as the length of time individuals spend in seclusion, which may not necessarily lead to a formal complaint.
9. Key powers of effective national preventive mechanisms under the OPCAT include the ability to make unannounced visits to all places of detention, to access all records, and to interview, in private, any individual (both staff and detainees) of their choosing. Because OPCAT emphasises a collaborative approach, this type of monitoring seeks to work with authorities to understand the context and make recommendations on law, policy and practice that lead to real improvements in treatment and conditions.
10. Preventive mechanisms, whether at the national or local level, are able to draw on a global network of international experience and standards to inform their policy and practice. In Australia, this includes, for example, the work of the WA Inspectorate of Custodial Service, which has adopted a preventive approach in its own monitoring standards. The APT works to share these experiences, standards and good practices with those engaged in prevention and would be ready to do so in relation to any bodies that wish to undertake such work in the Northern Territory.⁷
11. The issues under examination by this Royal Commission are at the intersection of a number of different groups in situations of vulnerability, in particular, indigenous people, youth, and those with a range of mental health conditions. By working proactively to identify issues and risks, even in the absence of formal complaints, a preventive approach is uniquely suited to addressing such vulnerabilities and to ensuring that problems in both law and practice are addressed..

⁷ For examples of this kind of work see, for example the reports of our annual "Jean-Jacques Gautier" symposia, which bring together NPMs and experts from around the world to discuss issues of mutual concern: <http://www.apr.ch/en/jean-jacques-gautier-npm-symposium/>

12. For example, while the use of some restraints is often justified on public health grounds (i.e., that spit hoods prevent the spread of infectious diseases), or on the grounds of effective administration of detention, their use may be problematic when considered from the point of view of humane treatment. Preventive monitoring bodies can assess whether adequate regulations and procedures are in place, setting out the limits for the use of restraints and the preventive effect of specific safeguards against abuse. They can establish whether instruments prohibited under international law are explicitly forbidden, and whether the use of restraints is applied consistently with the principles of necessity and proportionality, rather than on a routine basis. Monitoring bodies can also examine whether training of staff, before entering duty and in-service training, covers the use of force and restraints, but also control techniques that enable staff to avoid their use.⁸,
13. Preventive monitoring bodies can have such positive impact in detention environments because, in part, they are able to engage with both staff and detainees on these issues and understand the particular culture in each place of detention. This is then reflected in recommendations that balance both dignity and security.⁹ The New Zealand Ombudsman, which forms part of the NPM provides us with an example of this approach. In 2013, following visits to several forensic psychiatric facilities, the NPM found patients being locked in their bedrooms overnight, due to outdated night safety procedures. It also observed that seclusion rooms continued to be used as bedrooms for service users who were disruptive and difficult to manage. The Ombudsman brought these issues to the attention of the relevant authorities and also carried out follow-up visits to the facilities. As a result, the Ministry of Health is now in the process of publishing guidance on restrictive practices, such as night safety procedures in forensic units. The night safety “blanket policy” was replaced with individualised safety plans. While the number of patients on night safety plans remained high in one of the facilities, the other facilities had abandoned the practice of night seclusion and patients were free to leave their bedrooms any time, night and day. Likewise, in the United Kingdom, NPM regularly submits joint proposals on areas of shared concern or interest. This has included responding to the UK government’s proposals to transform the youth custodial estate and to Home Office proposals relating to detention of 17-year-olds, engagement which resulted in the decision to require an appropriate adult to assist them, and that a person responsible for their welfare is informed.¹⁰

⁸ Including preventive and defusing techniques, such as negotiation and mediation

⁹ See APT Factsheet on the use of restraints http://www.appt.ch/content/files_res/factsheet-5_use-of-restraints-en.pdf and our thematic paper on balancing security and dignity in detention http://www.appt.ch/content/files_res/thematic-paper-4_balancing-security-and-dignity-in-prisons-en-1.pdf

¹⁰ Further details on these case studies is available on request.

Safeguards against Abuse

14. Safeguards in detention are increasingly recognised as among the most important mechanisms for the prevention of torture.¹¹
15. Safeguards that apply in juvenile detention serve to protect young persons from risks of torture and ill-treatment, guarantee assistance designed to facilitate the rehabilitative process and preparedness for release, and communicate clear rules for the treatment of detainees by authorities.
16. Fundamental safeguards prevent torture and other ill-treatment and promote the well-being of the institutionalised juvenile. These include: ensuring access to family or a third party; having access to a lawyer that includes their presence in all proceedings; and offering an independent medical examination on admission to the detention facility and as reasonably required thereafter. Wherever an allegation of abuse is heard, a full forensic examination should be made available.
17. To promote access to rights in detention, on admission, juveniles should be given age-sensitive information in a language that he or she can understand. Such information should include, *inter alia*, practical information on accessing a lawyer and challenging his or her ongoing detention; how to make a complaint; how to access healthcare, recreation and education services; and the process post-release.
18. Clear rules should explicitly prohibit all forms of corporal punishment and any use of force which is not made absolutely necessary in the particular circumstances. Solitary confinement of juveniles should be absolutely prohibited in line with international standards.¹²
19. While the APT recognises that the implementation of these and other fundamental safeguards can present significant challenges, particularly in remote areas, our experience in other jurisdictions has demonstrated that these barriers can be overcome, particularly where monitoring bodies have worked cooperatively with detention authorities to close the gap between what is written in law and what is done in practice. We thus encourage the Commission to focus its attention on the implementation of fundamental safeguards.

¹¹ For instance, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) have repeatedly affirmed that legal and procedural safeguards in detention are among the most effective means of preventing torture. See, <http://www.cpt.coe.int/en/documents/eng-standards-scr.pdf>

¹² See, for instance, Thematic Report of the UN Special Rapporteur on torture, Juan Mendez, A/66/268, 5 August 2011. See also, UN Standard Minimum Rules for the Administration of Juvenile Justice ("Beijing Rules"), GA Res 40/33; and UN Rules for the Protection of Juveniles Deprived of their Liberty, GA Res 45/113.