Submission on draft general comment of the Subcommittee on Prevention of Torture (SPT) on Article 4 of the Optional Protocol to the Convention Against Torture (OPCAT)

14 April 2023

Submission of the New Zealand Human Rights Commission

NZ Human Rights.
Human Rights Commission
Te Kāhui Tika Tangata

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Introduction

1. The New Zealand Human Rights Commission (Commission) welcomes the opportunity to comment on the Subcommittee on Prevention of Torture's (SPT) draft general comment on article 4 of the Optional Protocol to the Convention Against Torture (OPCAT). The Commission is accredited as an A-status National Human Rights Institution (NHRI) under the UN Paris Principles.

2. This submission first provides a brief overview of the Commission's mandate as New Zealand's designated Central National Preventive Mechanism (CNPM) under OPCAT and its distinct yet correlative role as an NHRI, followed by the Commission's feedback in support of the SPT's draft general comment.

New Zealand National Preventive Mechanism

3. Aotearoa New Zealand has a multi-body National Preventative Mechanism (NPM) which is mandated to carry out the preventive functions established under articles 1 and 3 of OPCAT. This mandate is reflected in New Zealand's domestic legislation through the Crimes of Torture Act 1989 (COTA).

4. The following agencies within New Zealand's NPM are designated to carry out a system of regular visits to places where people are deprived of their liberty:[1]

    a) the Office of the Ombudsman (OOTO)

    b) the Independent Police Conduct Authority (IPCA)

    c) the Office of the Children's Commissioner (OCC), and

    d) the Inspector of Service Penal Establishments (IPSE).

5. The Commission is New Zealand's designated CNPM under OPCAT and, domestically, the COTA. As CNPM, the Commission has an express statutory role to maintain effective liaison with the SPT.

6. The CNPM role primarily entails coordinating New Zealand's NPMs to identify systemic issues arising in places where people are deprived of their liberty. The Commission is not designated to carry out monitoring visits to places where people are deprived of their liberty in New Zealand.

7. Accordingly, we note that NPMs who conduct monitoring visits will be in the best position to provide feedback on whether the definition of places of deprivation of liberty under article 4 of OPCAT has ever inhibited their ability to access these places in order to carry out their preventive functions in practice. The Commission consulted with the other New Zealand NPM agencies prior to preparing this submission, and we understand that some of these agencies will be making separate submissions. Nevertheless, the Commission wishes to express its support for the SPT's draft general comment as a means of clarifying the obligations of States Parties under OPCAT as they pertain to this definition.

[1] See Crimes of Torture Act 1989 (New Zealand), ss27 to 30. See also *New Zealand Gazette* 'Designation of National Preventive Mechanisms' (Notice No. 2020-go2845, 2 July 2020).

8. Furthermore, as referred to above, the Commission's primary role is that of New Zealand's NHRI. The role brings with it an additional mandate regarding monitoring human rights in places of detention. The Global Alliance of National Human Rights Institutions (GANHRI) interprets the UN Paris Principles as mandating NHRIs with functions to monitor, inquire, investigate and report on human rights violations, including authorisation of "unannounced and free access to inspect any public premises" and the undertaking of "rigorous and systematic follow up activities" regarding recommendations and findings made. [2]

9. Notwithstanding the Commission's CNPM status under OPCAT, the GANHRI Subcommittee on Accreditation has recently recommended that the Commission "access all places of deprivation of liberty…in order to effectively monitor, investigate and report on the human rights situations in these places".[3]

10. The Commission notes that there is a distinction between the preventative focus of NPMs designated under OPCAT and the more general human rights mandate of NHRIs. The Association for the Prevention Against Torture (APT) has commented that the two roles "differ in their objectives".[4] Nevertheless, there remains some room for correlation. APT have also addressed the particular role NHRIs have in promoting ratification and implementation of OPCAT.[5]

11. The draft general comment does not presently refer to NHRIs. While this is understandable given the specific application of article 4 to NPMs, we consider that the general comment could helpfully address the role NHRIs have in promoting full implementation of article 4 within their respective jurisdictions, particularly with respect to the access rights and functional scope of NPMs. The general comment could also address the correlative, yet distinctive functions of NPMs and NHRIs. This could be of considerable assistance to NHRIs with NPM mandates.

Feedback on draft general comment

Broad interpretation

12. The Commission supports the SPT's recommendation at paragraphs [3], [4], [8], [11] and [37] of the draft general comment that a "broad" approach should be taken to interpreting the scope of places of deprivation of liberty under article 4 of OPCAT. We consider a broad, inclusive approach to determining which places are covered by this definition reinforces States' obligations to interpret their treaty obligations in good faith.[6] This is also consistent with the preventive purpose of OPCAT and enables NPMs to gain entry to a wider range of places where people may be at risk of torture, cruel, inhuman or degrading treatment or publishment in order to carry out a system of regular monitoring visits.

[2] GANHRI, *General Observations of the Subcommittee on Accreditation*, Adopted by the GANHRI Bureau on 21 February 2018, at p 7 (G.O 1.2) and p 17 (G.O 1.6).
[3] GANHRI Subcommittee on Accreditation, *2.7 New Zealand: New Zealand Human Rights Commission (NZHRC),* 25 March 2022.
[4] Association for the Prevention of Torture, Asia Pacific Forum, *Preventing Torture: An Operational Guide for National Human Rights Institutions* (Updated Edition), 2010, p 136.
[5] Ibid, p 131.
[6] As the SPT has observed at para [9] of the draft general comment.

Private custodial settings

13. The Commission also supports the SPT's recognition and accompanying explanations at paragraphs [3], [20] to [23] and [29] of the draft general comment that places of deprivation of liberty include both public and private settings, as well as places which are not traditionally dedicated to detention. We consider this recognition accurately reflects the wording and intention of article 4 of OPCAT. During the Covid-19 pandemic, the New Zealand NPMs observed that private institutions, not typically dedicated to detention, were utilised by the State to detain individuals for managed isolation and quarantining.[7]

14. The Commission recommends that the draft general comment include a reference to the *United Nations Guiding Principles of Business and Human Rights*. These principles have particular relevance to places of deprivation of liberty which are privately owned and operated,[8] and which the State may contract to provide custodial services.[9] The *guiding Principles* require private actors to conduct human rights impact assessments by identifying and assessing "any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships", to engage in "meaningful consultation with potentially affected groups and other relevant stakeholders", and "integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action".[10]

Obligations regarding indigenous persons

15. The Commission recommends that the draft general comment also refer to States' distinct but related obligations, in both domestic and international law, to indigenous persons who are deprived of their liberty.

16. In Aotearoa New Zealand, te Tiriti o Waitangi was entered into by Tangata Whenua rangatira (Māori chieftains) and the Crown in 1840. Article 2 of te Tiriti o Waitangi guaranteed Māori tino rangatiratanga; the ability to continue to exercise full authority over lands, homes, and all matters of importance to them. Article 3 of te Tiriti also guarantees Māori all the rights and privileges of British subjects, which obliges the State to ensure equitable outcomes for Māori. Despite the obligations, following its visit to Aotearoa in 2013 the SPT observed that Māori have been consistently disproportionately represented in all stages of New Zealand's criminal

[7] See Office of the Ombudsman (New Zealand) 'Monitoring COVID-19 managed isolation and quarantine facilities' at https://www.ombudsman.parliament.nz/what-ombudsman-can-help/monitoring-covid-19-managed-isolation-and-quarantine-facilities.
[8] As referred to in paragraphs [3], [20] to [23] of the draft general comment.
[9] Relevant to paragraphs [34] and [35] of the draft general comment, and discussed below at paragraph [21(a)] of this submission.
[10] Office of the High Commissioner on Human Rights 'Guiding Principles on Business and Human Rights' (2011) at pp.22 – 27.

justice system including in prisons,[11] as well as child-welfare and health-related detention. In addition, wāhine Māori are the most incarcerated group of indigenous women in the world.[12]

17. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is the most comprehensive and authoritative international human rights instrument dealing with Indigenous Peoples' rights. Adopted in 2007, the UNDRIP elaborates on the universal right to self-determination already affirmed under articles 1 of the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), by confirming that "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[13] Key rights of UNDRIP relevant to the OPCAT context include:

    a) self-determination rights over all areas relating to indigenous people (articles 3, 4, 5);

    b) rights to life, physical and mental integrity, liberty and security of person (article 7);

    c) right not to be subjected to forced assimilation or destruction of indigenous culture (article 8);

    d) cultural rights, including rights to practice and revitalise indigenous cultural traditions and customs (articles 11, 12, 13, 15 and 31);

    e) participation rights in decisions affecting indigenous people (articles 18, 19 and 32(2)); and

    f) rights to the improvement of economic and social conditions of indigenous people without discrimination, and to determine strategies for their own development including in relation to health, housing, and social programmes (articles 21 to 23).[14]

18. When considering their obligations under OPCAT, it is crucial that States are cognisant of their specific legal obligations to indigenous peoples who are detained within their jurisdiction.

Protecting vulnerable detainees

19. The Commission understands that, in practice, there remains some ambiguity or resistance from States Parties about whether particular settings are covered by the definition under

[11] SPT *Visit to New Zealand undertaken from 29 April to 8 May 2013: observations and recommendations addressed to the State party* CAT/OP/NZL/1 (10 February 2017), at [50] to [52]. See also United Nations General Assembly *Report of the Working Group on the Universal Periodic Review of New Zealand* A/HRC/41/4 (1 April 2019), at [122.65]. We note that Aotearoa New Zealand's Waitangi Tribunal is currently inquiring into various claims relating to the criminal justice system in Aotearoa. Chief Judge Isaac notes that issues arising from claims include allegations relating to discrimination against Māori in the statutory and institutional framework for the administration of justice in colonial and modern times; institutional racism and bias in the policy and practice of justice sector organisations; and access to justice. Further information available at: https://www.justice.govt.nz/justice-sector-policy/justice-system-kaupapa-inquiry/.

[12] Sophie Cornish "Māori even more overrepresented in prisons, despite $98m strategy" (1 May 2022) Stuff NZ https://www.stuff.co.nz/national/128306867/mori-even-more-overrepresented-in-prisons-despite-98m-strategy.

[13] United Nations Declaration on the Rights of Indigenous Persons (UNDRIP) (adopted by UNGA 13 September 2007, signed by New Zealand 20 April 2010), preamble and art 3.

[14] The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) has also provided substantial guidance in this area. See EMRIP thematic study on *Access to justice in the promotion and protection of the rights of indigenous peoples* A/HRC/EMRIP/2013/2 (29 April 2013) at [7], [11], [12], [19], [44] and [47].

article 4 of OPCAT. This is most likely to occur where people are not detained subject to formal orders, or may have entered detention voluntarily, but are still not able to leave of their own free will, for example in some healthcare settings,[15] residential disability facilities or community homes, and residential school settings.

20. Inherently vulnerable people who are deprived of their liberty, such as children, disabled people and women, face a heightened risk of torture or cruel inhuman or degrading treatment or punishment.[16] Between 2016 and 2021, the Commission engaged Dr Sharon Shalev to investigate and report on the use of force and punitive practices against persons detained in Aotearoa New Zealand. [17] Dr Shalev's found there is a disproportionately high use of punitive measures against female prisoners, and in particular a high rate of segregation of wāhine Māori and Pacific women in prison. It follows that there is a heightened obligation on States to ensure that NPMs can access settings where children, disabled people, women and other vulnerable groups are detained, in order to conduct monitoring visits and fulfil their preventive function under OPCAT.

21. The Commission considers the guidance contained in the SPT's draft general comment will provide States Parties with further clarity as to the extent of their obligations to enable regular monitoring by NPMs in all setting contemplated by article 4 of OPCAT. In particular:

    a) The Commission supports the SPT's recognition at paragraphs [34] and [35] of the draft general comment that the definition in article 4 encompasses settings where people are deprived of their liberty at the State's "instigation" but also with the State's "consent" or "acquiescence". The SPT's explanation of State "consent" and "acquiescence" in these paragraphs clarifies that States' obligations under OPCAT should extend to all places where the State might be expected to exercise a regulatory function. This includes situations where the State should exercise a regulatory function, or should be aware of violations, but does not take action. The Commission supports the SPT's advice that a lack of action by the State should not exclude such settings from NPM's monitoring mandate.

    b) At paragraphs [36] and [37] of the draft general comment, the Commission also supports the SPT's clarification that article 4 extends to sites of apprehension, transfer and removal of detainees, and that there is no minimum time period for detention before OPCAT obligations apply. In light of the particular vulnerabilities experienced by detainees at transitional times including the point of arrest, the Commission considers it imperative that NPMs are enabled to monitor these settings.

    c) The Commission also endorses the non-exhaustive list of examples provided by the SPT at paragraph [36] of the draft general comment of settings which may not traditionally be considered to constitute places of deprivation of liberty but which

[15] See *Report of the UNSRT, Juan E. Méndez* UN Doc A/HRC/22/53 (1 February 2013) at [26], citing CAT Committee, *general comment No. 2*, at [21]; *Ximenes Lopes v. Brazil*, para. 103.
[16] *Report of the UNSRT, Juan E. Méndez* UN Doc A/HRC/28/68 (5 March 2015) at [16] and [53]; Committee on the Rights of Persons with Disabilities (CRPD Committee), *General Comment No.1 on Article 12, Equal Recognition before the Law* UN Doc. CRPD/C/GC/1 (19 May 2014) at [31] and [40].
[17] See Dr Sharon Shalev reports: *Thinking Outside the Box?* (2017); *Time for a Paradigm Shift* (2020); *First, Do Not Harm* (2021) available at https://www.solitaryconfinement.org/solitary-confinement-in-new-zealand.

nevertheless fall within the scope of article 4, including locations of house arrest, closed centres for migrants and asylum-seekers, closed residential centres for children, social care homes, hospital and psychiatric institutions, facilities for military personnel, and clinics that provide conversion practices aimed at suppressing or changing a person's sexual orientation, gender identity or gender expression.[18]

Conclusion

22. For the reasons outlined in this submission, the Commission wishes to express its strong support for the guidance provided by the SPT in its draft general comment.

[18] As defined in the Conversion Practices Prohibition Legislation Act 2022 (New Zealand), s 5 which passed into law on 18 February 2022.