Contact: Tom Lord

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Ombudsman
Fairness for all

Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
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Tēnā koe

Draft general comment No. 1 on places of deprivation of liberty (article 4)

1. Thank you for the opportunity to comment on the '*Draft general comment No. 1 on places of deprivation of liberty (article 4)*' (the draft general comment).

2. As Chief Ombudsman, I am one of New Zealand's designated National Preventive Mechanisms (NPMs) under the New Zealand Crimes of Torture Act 1989 (COTA), which gives effect to the United Nations Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the Optional Protocol). I have designation for examining the conditions and treatment experienced by people in prison,[1] immigration detention facilities, health and disability places of detention (including within privately run aged care facilities), residences established under section 114 of the New Zealand Public Safety (Public Protection Orders) Act 2014, and court facilities.

Support for a general comment on article 4

3. I welcome this draft general comment and consider it to align with my own interpretation of article 4 of the Optional Protocol. I consider that a broad interpretation of the meaning of 'places of deprivation of liberty' is essential to ensure that settings where people may experience torture or other cruel, inhuman or degrading treatment or punishment are subject to external scrutiny with the view to preventing these acts. In my view, comment from the Subcommittee on Prevention of Torture (SPT) on the meaning of 'places of deprivation of liberty' will assist states parties in understanding their obligations under the Optional Protocol, including the role of the SPT and NPMs.

4. A number of issues raised in the draft general comment closely relate to my recent dialogue with the New Zealand government regarding the use of COVID-19 'Alternative Isolation Accommodation' (AIA) facilities.[2] During this engagement, I clarified with the Ministry of

[1] Or otherwise in the custody of the New Zealand Department of Corrections – Ara Poutama Aotearoa.

[2] AIA facilities provide emergency accommodation for individuals required to self-isolate under the under the New Zealand COVID-19 Public Health Response (Self-isolation Requirements and Permitted Work) Order 2022.

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Business, Innovation and Employment - Hikina Whakatutuki, as the responsible government agency, my view that AIA facilities fall within my jurisdiction as an NPM based on an expansive, risk-based approach to what constitutes a 'place of detention'.

5. As such, I consider that this draft general comment is timely, as novel and complex questions on the scope of the Optional Protocol and the meaning of 'deprivation of liberty' have arisen for states parties and NPMs over the years, particularly, though not solely, in the context of the COVID-19 pandemic.

6. In light of these questions, I would like to provide feedback on several key areas of the draft general comment, outlined below, where the SPT may wish to consider providing further guidance.

Interpretation of the terms 'permitted' and 'free' to leave at will

7. The terms '*not permitted to leave at will*' and '*not free to leave at will*' are used frequently in the draft general comment to describe circumstances where someone is, or may be, deprived of liberty. While the draft general comment addresses this aspect of article 4 at Section D (paragraph 30), I have found that the meaning of being 'free' or 'permitted' to leave a setting at will can, in practice, be complex to interpret. For example, I have observed a distinction between situations where individuals may be *permitted* to leave a setting at will, and where they are, in fact, *free* to leave at will. I discuss this distinction further, below.

8. Given these complexities, the SPT may wish to consider providing further guidance on whether or not 'permission' and 'freedom' are synonymous in the context of interpreting article 4.

'Free' but not 'permitted' to leave

9. The SPT will be aware that there are situations where an individual may be *free* to leave a setting at will – that is, there are no physical restrictions on their leaving – but may not be *permitted* to do so. This may include, for example, where people are required to remain in 'open' environments by order of any judicial, administrative or other authority. This could include a variety of hospital and other healthcare settings, places used for the purpose of quarantine or isolation, or places where some types of non-custodial sentences are carried out.

10. The nature of being 'not permitted' to leave at will can also vary, from being explicit in law to being a consequence of another authority (for example, being legally required to remain at a facility to receive compulsory treatment).

11. The exercise of the permission may also be relevant. For instance, the general comment may usefully comment on whether the permission or prohibition *itself* is sufficient to amount to a deprivation of liberty, or whether this authority needs, or should reasonably be expected, to be exercised, and whether there needs to be a certain level of severity in consequence for 'leaving at will'. Such matters may be relevant for distinctions to be drawn, if appropriate, between home detention and national 'COVID-19 lockdowns', for example.

'Permitted' but not 'free' to leave

12. Conversely, there are circumstances where people have the permission or ability to withdraw consent and disavow or discharge themselves from a setting, but may not, in law or in practice, have the 'freedom' to physically exit the place (and potentially return) at any time.

13. The draft general comment and other sources refer to the ability to leave at will as needing to be more than a '*theoretical option to be exercised at some point in the future*'[3] and '*without exposing themselves to serious human rights violations*'.[4] However, the SPT may wish to address whether the ability to withdraw consent and discharge from a service reflects an ability to leave at will (as long as this can be reasonably exercised without serious consequence), or whether this ability should be read more broadly. If the broader interpretation is adopted, it may be useful for the draft general comment to provide guidance on the point at which an impediment to leaving a facility[5] amounts to a deprivation of liberty.

14. By way of example, during my monitoring of health and disability places of detention, I have observed many instances where people who receive medical treatment or supported living services voluntarily are accommodated in the same secure facilities as those who are legally detained and subject to compulsory treatment. While these individuals are, in theory and by law, permitted to leave at will due to their 'voluntary' status, in practice they may not be able to exit a facility *independently* or *immediately* due to the secure environment and the need for staff to provide or approve egress.

15. The draft general comment, and other sources, provide useful clarity that article 4 should be broadly interpreted to cover 'de facto' as well as 'de jure' deprivation of liberty. The draft general comment may present an opportunity for the SPT to provide guidance on circumstances that amount to, or are likely to amount to, de facto detention.[6]

Interpretation of the phrase 'at will'

16. Further to the discussion above, the SPT may wish to consider, in the general comment, situations where restrictions on liberty may be consented to by the guardian or attorney of an individual who has been assessed as lacking capacity to make independent decisions about this, and therefore may be prevented from leaving a setting independently. In such circumstances, it could be said that the person's ability to leave at will is simply being

[3] A/HRC/37/50, para. 17.

[4] Draft general comment, para. 39.

[5] For example, the requirement to 'sign out', the need to wait for staff to open a door, or having only designated times when one can leave.

[6] I note the discussion in the draft general comment on the 'broad definition in international law', includes reference to the European Court of Human Rights, but does not directly discuss jurisdiction from the Court which suggests deprivation of liberty is determined by the nature and scope of individual circumstances, and the relevance of this, if any, to article 4 of the Optional Protocol.

exercised by a third party, who themselves are not under any '*order given by a public authority or at its instigation or with its consent or acquiescence*'.[7]

17. It may be helpful for the SPT to outline its expectations in this regard in the general comment, with reference to how article 4 should be read in light of article 14 of the Convention on the Rights of Persons with Disabilities.

Interpretation of the phrase 'where persons *may be* deprived of liberty'

18. A key aspect of the scope of the Optional Protocol is that it includes places where persons 'may be' deprived of liberty. This definition is also reflected in the New Zealand COTA. It may be helpful for the SPT to provide further guidance on the scope of this term, particularly in regard to the following circumstances:

    a. Situations that are suspected of being, or may amount to, deprivation of liberty, but this is unconfirmed or there are diverging views on the matter; for example, where an NPM, or the SPT, considers somewhere a place of detention, but the state party does not.

    b. Places that are, or may be, used as places of deprivation of liberty, but are which not currently 'in use'. For example, I am designated to examine places approved or agreed under the Immigration Act 2009 for immigration detention. These facilities are not always in use, but I may examine them by virtue of the fact they *may* be used to detain people. Similarly, certain prisons or health and disability facilities may not be in use at certain times, but may still fall within the scope of the Optional Protocol.

    c. Places that are being considered for use as places of deprivation of liberty. This would allow the SPT and NPMs to visit such places with a view to advising on their suitability, making recommendations to prevent torture or ill-treatment, and improving potential conditions and treatment before anyone is detained in those places.

    d. Places where people who are deprived of liberty may be located, but which are not places of detention. For example, where people deprived of liberty such as prisoners may be in hospital settings for medical appointments, or during the deportation/removal of immigration detainees. There can be uncertainty as to whether the obligations under the Optional Protocol primarily relate to the *place* of detention, or the *person* deprived of liberty.

Resourcing of NPMs

19. A broad interpretation of '*place of deprivation of liberty*' may affect the ability of NPMs to fulfil their mandates successfully due to the possible expansion of potential places of detention and the finite resources available to NPMs. As such, it may be helpful for the SPT to provide further guidance on how NPMs can navigate the practicalities of a broad

[7] Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, article 4.

definition and take a pragmatic approach to prioritising monitoring and examination activity to reflect the principle of proportionality.[8]

Role on NPMs in identifying and commenting on arbitrary detention and alternatives to deprivation of liberty

20. The draft general comment highlights the wide variety of settings that an NPM *may* examine based on a comprehensive understanding of 'deprivation of liberty'. In my view, there is the potential for some of these circumstances to amount to unlawful or arbitrary detention; for example, where the circumstances of voluntary users of health or disability services amounts to deprivation of liberty. Given this, the SPT may wish to consider providing advice within the draft general comment on the role of NPMs in addressing or commenting on situations that may potentially amount to unlawful or arbitrary detention.

21. There is also the wider question of who is detained, and when; this is particularly relevant to the New Zealand context, where a disproportionately high number of Māori are deprived of liberty in both prison and health and disability facilities.[9] As such, it may be helpful for the SPT to provide guidance on the role of both NPMs and the SPT in commenting on the appropriateness of, or highlighting alternatives to, the use of interventions that may amount to deprivation of liberty.

Concluding comment

22. I appreciate the opportunity to comment on this draft general comment. Please do not hesitate to get in contact should any further details on the content of this submission be helpful. Tom Lord, Senior Advisor Strategic Advice (OPCAT), will be the main point of contact (Tom.Lord@ombudsman.parliament.nz).

Nāku noa, nā

Peter Boshier
Chief Ombudsman

[8] As highlighted in CAT/OP/C/57/4, annex I, para. 3.

[9] For example, in December 2022 Māori made up 53 percent of people in prison, despite being approximately 17 percent of the general New Zealand population (Department of Corrections, Prison facts and statistics – December 2022, available: https://www.corrections.govt.nz/resources/statistics/quarterly_prison_statistics/prison_stats_december_2022).