

**SUBMISSION BY PROFESSOR RICHARD HARRISON,
INSPECTOR OF CUSTODIAL SERVICES FOR WESTERN AUSTRALIA,
TO THE JOINT STANDING COMMITTEE ON TREATIES
WITH REGARD TO THE POSSIBLE ADOPTION BY AUSTRALIA
OF THE OPTIONAL PROTOCOL
OF THE UNITED NATIONS CONVENTION AGAINST TORTURE
AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR
PUNISHMENT**

1. The UN Convention against Torture and its relation to the European Convention for the Prevention of Torture

The UN Convention against Torture entered into force in 1987. It had been preceded by widespread international discussion as to its principles and as to mechanisms by which it could be made effective. In particular, nations linked to the Council of Europe were eager to lead the way by practical example, adopting identical standards and activating a visits-based enforcement system which could serve as a model for the whole UN membership as and when the Optional Protocol became operative. Accordingly, in 1987 the Council of Europe adopted the European Convention for the Prevention of Torture (ECPT), which established a visits-based mechanism for monitoring standards identical to those found in the UN Convention. A sufficient number of member States ratified the ECPT for it to become operative in 1989. The inspection mechanism is known as the Committee for the Prevention of Torture (CPT).

The first inspections took place in 1990. Since then there have been more than 170 inspections, and about 120 reports have now been made public. There have been inspections of places of detention in each one of the 44 States that has ratified the European Convention for the Prevention of Torture.

The key methodology and organisation of the Committee for the Prevention of Torture includes the following factors:

- Expert members to conduct inspections;
- Right of access to places of detention;
- Periodic or ad hoc (announced or unannounced) inspections;
- Follow-up inspections;
- Development of clear inspection standards;
- End of inspection briefing to Government authorities;
- Compilation of a draft report and submission for comment to Government authorities;
- Publication of a final Report unless vetoed by the applicable Government;
- Effectiveness and recommencement of the above cycle.

Expertise

Each member nation nominates a member. Generally, these members will possess a strong understanding of human rights issues. There is also great emphasis on medical expertise because of the importance of health matters. The Committee can, and does, coopt non-member experts as required.

“Places of detention”, for the purposes of the ECPT, includes prisons, police lock-ups, juvenile detention centres, immigration detention centres and closed psychiatric wards, so that the selection of experts for any given national inspection takes account of this range of needs.

The experts are supported by a fulltime secretariat, as well as numerous officials seconded from the Council of Europe – for example, as interpreters – as required.

Right of access

Obviously, this is crucial. National adherence to the ECPT constitutes acceptance of an obligation to ensure free and unfettered access – not just to the places but also to the persons detained there, the persons working there, the bureaucrats concerned with its administration and relevant documentation.

Periodic or Ad Hoc (Announced or Unannounced) Inspections

It is well understood that there is value both in alerting Governments well in advance to a pending inspection so that they may be given an opportunity to address issues that they consider may cause the Committee concern, and also in conducting inspections with a minimal amount of notice so as to maximise the opportunity to identify problems of which the Government may be unaware or would prefer not to be identified.

As previously mentioned, “places of detention” for the purposes of these visits includes not just prisons but immigration detention centres, juvenile institutions, psychiatric hospitals and police stations. It is the nature of closed institutions that they require external scrutiny. It is also the nature of national arrangements that some such institutions are more “closed” than others, and the inspection process will take account of the extent to which effective autonomous inspection already exists in relation to any given category.

Follow-up Inspections

The European Committee also conducts follow-up inspections as a means of checking progress against its initial recommendations. These may be either announced or unannounced.

Clear Standards

In the last 14 years, the European Committee has worked its way through to a set of clear-cut standards. These may vary according to the type of institution or the type of prisoner. For example, special standards have been developed for immigration detention centres and “super-max” prisons, whilst equally special standards have been developed in relation to women prisoners and juveniles wherever they may be held. These standards have been clearly promulgated and are readily accessible on the ECPT website.

Debrief to Governments

The practice of the European Committee is to issue a confidential communiqué at the end of each inspection before leaving the country in question. This will indicate matters that are clear and which also require urgent attention, as well as referring to good practice and acceptable regimes.

Reporting

The Report is compiled after the inspection and mediated through the secretariat. Governments are given an opportunity to comment upon the Report, and ultimately, if there is profound disagreement, can refuse to consent to publication. However, the majority of Reports are published, and thus the lever for compliance is created.

Effectiveness and recommencement of the Inspection Cycle

As with all accountability systems, there is difficulty in measuring the precise extent of compliance. This difficulty is exacerbated when the causal linkages are so extended – i.e. from a non-mandatory, supranational inspections body through national governments to administering departments. The leading book (Morgan and Evans, *Combating torture in Europe* (2001) is modest in its claims:

“...[T]he links between the recommendations of CPT and the final outcomes are generally shrouded in some mystery.... In the final analysis, the truth is that there are too many imponderables to be able to make a definitive assessment of the impact of the CPT. What is certain is that many CPT recommendations concerning conditions of detention have been implemented and that these have undoubtedly had beneficial effects.... Equally clearly, many recommendations have not been implemented.”

The very fact that unacceptable practices are publicly recorded, however, alters the internal political dynamics in relation to those practices. A fundamental tenet of accountability systems of this kind is that improvement is more commonly achieved by way of gradual accretions rather than radical change.

The recommencement of the inspection cycle will occur in differing phases for different countries, according to their performance. The strength of the visits' mechanism is that it can be tailored to the standards, needs and performance of the particular jurisdiction.

2. The Western Australian Prison Inspection System

Pursuant to *The Inspector of Custodial Services Act 2003* (re-enacting and amending Part XA of the *Prisons Act 1981* as amended by the *Prisons Amendment Act 1999*) Western Australia possesses an inspection system in relation to “custodial services” that exceeds in rigour the mechanisms established by the ECPT. “Custodial services” for these purposes includes: adult prisons, juvenile detention centres, prisoner transportation arrangements and court custody centres. Not included are: immigration detention centres (a matter for Commonwealth law and regulation), police lock-ups or closed psychiatric institutions.

From the point of view of the possible adoption of the Optional Protocol to the UN Convention, the relevance of the Western Australian system is as follows: if similar systems were in place nationally, extending to the whole range of places of detention relevant to the Convention, it is likely that the United Nations inspections body would be more inclined to adopt an “arm’s length” approach. Of course, this would depend upon the extent to which the national inspections systems were perceived as being effective, which in turn would come back to the degree of governmental acceptance of recommendations.

The Western Australian model is the most robust in the English-speaking world. The following section compares it to that of the CPT.

Expertise

The permanent staff possess a broad range of expertise, covering most of the gamut of activities relevant to the particular custodial service. The staff are supplemented by a range of specialists seconded in from other government departments such as Health (for medical services), Agriculture (for prison farms), Drugs and Alcohol (for rehabilitation and treatment programs), Auditor-General (for private prison inspections) and Ombudsman (for complaint systems). Consultants have also been used where required – for example, with regard to security, occupational health and safety, and fire risk.

Right of access

Any person authorised by the Inspector has a right of “free and untrammelled access” to any custodial place at any time. Equipment, such as cameras or recording apparatus, may also be taken into that place. This right overrides any rules or regulations of the Department of Justice (the operating Department).

Authorised persons also have right of access to prisoners, Departmental personnel, vehicles and all relevant documentation. There are criminal sanctions for hindering the exercise of these powers or victimising or intimidating any person with whom the Inspectorate is dealing.

Periodic or Ad Hoc (Announced or Unannounced) Inspections

Every custodial service or place must be inspected at least once every three years. A program of announced inspections is set out in each Annual Report, as is the case with the CPT. Unannounced inspections occur as the Inspector thinks fit. In-house criteria have been developed to guide that process.

In addition, the Inspector has created a system of “continuous inspection” whereby members of his staff visit all prisons regularly between inspections. This is a stronger model than that which the CPT has been able to adopt.

Follow-up Inspections

These may be made at any time, with or without notice.

Clear Standards

The Inspector’s standards are qualitative as well as quantitative. They very much derive from the UK “healthy prison” test, though are articulated in terms of the Department of Justice’s “new operational philosophy”. This involves the achievement of an appropriate balance between safe and secure custody, care and wellbeing, rehabilitation and reparation. Such a balance can only be achieved if the human resources and the operational and management systems are properly designed, and thus this aspect of Departmental activities also falls within inspection standards.

What constitutes an “appropriate balance” between these various standards depends upon the intended purpose of the particular prison or custodial service – for of course not all such matters have identical objectives.

Debrief

After each inspection, the Inspector gives a debrief on-site. This is recorded, edited and distributed to Departmental and other relevant personnel within a few days. It parallels the confidential communiqué of the CPT.

Reporting

The draft report is, as with the CPT, sent to the Government department for comment. The draft will contain a List of Recommendations in relation to which an Action Plan is required from the Department. This Action Plan then forms part of the Final Report.

All Reports are made public. This is by way of tabling in Parliament. Tabling cannot be vetoed or even delayed by the Department or even the Minister; the tabling schedule is within the ultimate control of the Inspector. Several Parliamentary Committees have jurisdiction to examine the Inspector upon his performance and recommendations and his views as to the performance of the Department of Justice.

With regard to effectiveness, the Inspector has developed a matrix of recommendation by type by acceptance. This shows a high (90%+) acceptance rate by the Department. As the second full round of inspections commences, it is possible to check the implementation rate against the acceptance rate. Inevitably, there has been some slippage. However, it is possible to trace cause and effect and change with much more precision than in the extended causation chain of the CPT processes.

It can already be said that inspection has enhanced custodial services – to the benefit of prisoners, of staff, and of the taxpayer (money saved and/or better spent). For the Government, inspection has diminished the political risk that flawed incarceration systems create.

3. Should Australia adopt the Optional Protocol?

Yes: there would be considerable benefits in doing so.

The knowledge that this was imminent would encourage Governments to put qualitative inspection systems in place. The COAG data give performance indicators that are purely quantitative and in some ways misleading. The only other qualitative Inspectorate that previously existed - in New South Wales – was abolished because of the discomfort that the operating Department felt about external scrutiny. In so doing and replacing it with an inferior model, the New South Wales Government not only became less accountable to taxpayers but also increased its own political risk.

Inspection systems are extremely cheap. In Western Australia the cost of the Inspectorate is about 0.6% of the total cost of running the offender services division of the Department of Justice. Yet expenditure that has been deferred or redirected as a consequence of the activities of the Inspectorate arguably has saved Government up to \$50 million already.

Political risk has been reduced also. The Inspectorate has highlighted fire risks (leading to a major internal review), escape risks and death risks previously unrecognised by the Department. That is not to say that the prison system and other custodial services will ever be risk-free; but risks have tangibly diminished.

The places of detention that would be most likely to come under international scrutiny if Australia adopted the Optional Protocol would be the immigration detention centres. A great deal of political heat would be removed, however, if a home-grown inspection system were in place. Such a system would not necessarily have to be built from scratch. Existing inspectorates (at present only in Western Australia but others would be encouraged if it were realised that the Optional Protocol were about to be adopted) could be contracted, on a Government-to-Government basis, to carry out the inspections according to standards that would need to be developed and refined.

A further benefit would be the likely development of national standards in relation to each of the types of detention within the scope of the UN Convention. In the long run, this would be cost-effective, enabling better comparators to be developed across States and funding models to be calibrated more accurately.

The benefits of adopting an international convention would be intra-national.

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