CONNECT

the Newsletter of the Mornington Peninsula Human Rights Group

'committed to promoting in our municipality and beyond understanding of and respect for human rights through programs of community education'

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Kristen Walker is a barrister at the Victorian Bar, specialising in constitutional law, administrative law and human rights law. She has appeared in many constitutional cases in the High Court, as well as in several cases involving the Victorian *Charter of Human Rights and Responsibilities.* She appeared recently as one of the team of counsel in *Plaintiff M70 v Minister for Immigration and Citizenship,* the 'Malaysian Solution' Litigation.

Kristen is also a Principal Fellow at Melbourne Law School, where she has researched and taught extensively in the fields of constitutional law and international law.

She will speak at our next meeting about the High Court's decision and the human rights implications of the 'Malaysian Solution'.

2pm on the 2nd April, 2012

St Peter's Church, Mornington (enter from Octavia Street)

ALL WELCOME

A Review of *The Trial*

by Jenni Colwill

At the February meeting (6 February 2012) the Mornington Peninsula Human Rights Group was given the opportunity to see *The Trial,* a film about the twelve Muslim men who were tried for terrorism offences in February 2008. Their trial ran for nine months, heard 482 secretly taped conversations and presented 66,000 pages of evidence. The film-makers had unique access to Greg Barns, one of the key defence barristers, and Omar Merhi, the brother of the youngest accused. As a result, *The Trial* takes us inside one of the biggest court cases in Australia's history. A trial where there is more at stake than just the fate of the accused.

Written and directed by MPHRG supporter, Joan Robinson, the film was very good viewing. Brilliant camera work and skilled editing turned a story that could have been difficult to follow into fascinating viewing.

Named after Kafka's *The Trial,* this film presents a black vision of the terrorist legislation in Australia. Unlike Kafka, however, Robinson has found little for us to laugh at. There is nothing funny about the powerlessness of people accused of terrorism in our country.

The Trial focuses on two of the accused. They were charged with being members of a terrorist organisation and with providing it with resources. The youngest of them was also accused of planning to be Australia's first suicide bomber. The press release for the film tells us that the "film tells the two men's sides of the story through their lawyers and relatives. Omar, the older brother of the youngest accused, believes his brother is a man of peace who was influenced by the group's spiritual leader initially, but rejected any ideas of violence well prior to his arrest."

"The prosecution argue that the secretly recorded conversations prove the men were committed to violent jihad and that they planned to bomb a railway station or the Melbourne Cricket Ground. They played to the court recordings where some of the accused men discuss the terrorist bombings in London and Madrid and show the court terrorist handbooks and beheading videos owned by some of the men."

"The defence team argues the men were members of a religious group more concerned with knowledge of the Koran and not intending to mount terrorist attacks. Greg Barns argues his client only talked about the idea of terrorism. Greg calls it 'thought crime' and rails against the new laws that have criminalised what individuals 'say' rather than what the 'do'. The defence team argue that the threat of terrorism has been used by governments to extend the reach of the law into areas traditionally protected by the principles of freedom of speech and association. They believe the ambiguity of the laws could pose a bigger threat to our democratic values than the threat of terrorism."

If you get the chance to see this film, I recommend you go. It is an important film for everyone concerned about human rights and how Australia deals with the very real threat posed by Islamic terrorists.

OPCAT, SPT, NPMs, & OTHER ACRONYMS: WHY AUSTRALIA SHOULD CARE

by Deidre Greig

I was in the middle of writing a piece for *Connect* about the necessity for Australia to ratify the OPCAT, the convenient acronym for the unwieldy title of *UN Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, when suddenly there was an announcement by Nicola Roxon and Craig Emerson that we shall indeed be doing so.

In Roxon's words of 28 February 2012:

> *Torture is wholly inconsistent with the Australian Government's fundamental responsibility to protect the rights and dignity of all individuals. Ratifying OPCAT will send a strong message both within Australia and internationally that Australia takes its human rights obligations seriously*.

This news has not received much press space, possibly for the reason that it would seem to lack relevance for the general reader since torture is not a sanctioned method by which Australian agencies may gather information or intimidate suspects. However, the use of the word "torture" in the UN Optional Protocol is only part of the story. In order to recognise the reach of this Protocol it is necessary to consider the second part of its title, and that is *OR other Cruel, Inhuman or Degrading Treatment or Punishment.* There are few accepted definitions to cover this second limb. Torture is

generally assumed to be purposive, but other forms of ill treatment may be obscured and diffuse, seemingly without purpose. What they do share in common, however, is their power to demean the inherent dignity and sense of worth of the individual, and they are generally unrelated to the primary goal of the detention. Some of these practices are both intrusive and endemic custodial practice, such as poor lighting, open toilets and showers, cage-like airing yards, mechanical restraints, strip searching and inadequate clothing.

The OPCAT's mandate governs those situations whereby a person is deprived of liberty in an authoritative way, whether it be official or unofficial, the latter allowing for non-traditional forms of deprivation. With the identification of more relevant areas over time, it is likely that its sphere of influence will increase. In the same vein as being dismissive of the possibility of torture in Australian places of custody, we prefer to consider that we have developed a civilised society with adequate rules and regulations to prohibit any intentional mistreatment. If this is the case, why then have so many other nations signed and ratified this UN Protocol and established monitoring procedures, yet Australia has lagged behind? Why is ratification so important?

In order to answer this question it is necessary to have some understanding of how the Protocol works for both the international community and individual nation states. OPCAT was adopted on 18 December 2002 at the UN General Assembly and came into effect on 26 June 2006. Its aim is to establish a worldwide system whereby regular visits are made by *independent* bodies to places where people are held in detention, whether for treatment or punishment. It applies to both public and private custodial settings that have the authority to prevent a person from leaving. Those nations ratifying the Protocol must establish monitoring mechanisms and allow unfettered access to institutions so that visits may be made in a confidential manner for both staff and residents, as well as other interviewees.

The OPCAT is very different from other optional protocols to human rights' treaties in that it does not just set standards, but is 'hands on' in its scope and intent. It takes a proactive, rather than a reactive approach to violations. Once a member has ratified the Protocol it is considered to have assented to unannounced visits by international and national experts to places of detention, and there are no precise triggers for the timing of these. The visiting experts have the right to view records, and may interview staff, current and former detainees, and even their relatives. They may also publish reports in order to enhance the transparency of the process. The underlying aim is that they should have the opportunity to consider risk factors and systemic faults that could allow maltreatment to occur, and thus assist in the creation of an environment to mitigate the possibility of torture and other cruel, inhuman or degrading treatment or punishment occurring.

The acronym SPT (*Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*) designates the special Subcommittee created within the UN to assist states to carry out their monitoring role and each is then required to establish NPMs or National Preventive Mechanisms based on a set of criteria established by the OPCAT. These provide the international and national framework, respectively, for visits to places of custody and the emphasis is thus on a cooperative international and national effort to achieve recognised standards of care. Recommendations for change may be made and states are obligated to consider these. Thus there is a three-way relationship and ongoing communication between an individual state and its NPMs and the SPT. A further consequence of ratification of the OPCAT is that it may turn the spotlight on public policies that may impact indirectly on practices associated with the deprivation of liberty, such as any increase in the rigour of sentencing practice, or particular procedures associated with the involuntary detention of the mentally ill or drug offenders. Internal custodial rules, as well as staff training, may come within the preventive ambit of the OPCAT, as do accessible and effective complaints' mechanisms and the openness of institutions to the media. Since at times there may be conflicting goals at stake, e.g. security versus openness and transparency, the SPT is able to act in an advisory capacity to strengthen safeguards and assist individual states in carrying out their custodial role in many very different settings.

As of August 2011, 60 states had ratified the Protocol, including New Zealand, Denmark, France, Germany, the United Kingdom, Spain, Sweden, Switzerland and most Latin American states. Australia was among the 22 countries to have signed, but not yet ratified the Protocol. Others in this position include Austria, Belgium, Finland, Ireland, Italy, the Netherlands, Norway, Portugal and South Africa.

Australia has been slow to move towards ratification on the grounds that the OPCAT jurisdiction is too broad; that torture plays no part in our custodial system; and that variations in states' rights and procedures have to be considered. However, it did sign the Protocol on 19 May 2009 and ratification will now allow monitoring procedures to be put in place.

In effect, Australia now needs to establish a National Preventive Mechanism, or national system of inspections to all places of detention. There are many models to suggest ways in which this can be done without duplicating the work of existing agencies. For example, the United Kingdom draws on 18 existing bodies to fulfil this requirement, whilst New Zealand has designated the Office of the Ombudsman, the Independent Police Conduct Authority, the Office of the Children's Commissioner, and the Inspector of Service Penal Establishments Reports from these bodies are coordinated by the NZ Human Rights Commission.

The OPCAT is powerful because it focuses on those in society who are most vulnerable to abuses that may be hidden and systemic, and therefore continue unchallenged. Total control may be exercised over all aspects of their daily living and there is not always a satisfactory outlet for redress of grievances. But what are these places of custody? Their scope is broad and includes any setting in which a person may be deprived of liberty by an authority, whether formally or informally. This encompasses secure psychiatric units, places of pre-trial detention, prisons, nursing homes, police cells, facilities for the intellectually disabled, places of military detention both here and overseas, social care units, institutions for juvenile offenders, children's homes, closed drug treatment centres, secure transit or deportation zones at airports, security or intelligence service agencies, mandatory immigration detention centres, places of transfer between authoritative control settings, border crossing units, and even those restrictions imposed by treatment orders or home detention. All these detention practices involve a state or national authority, and in some instances there is a double bind as, for example, when asylum seekers are fleeing human rights breaches in their own country only to face further indefinite custody without charge and associated constraints that increase fear and uncertainty and decrease their sense of autonomy, all of which lead to significant demoralisation.

Human rights violations are not always acts perpetrated against individuals in custody, but they may be the unintended consequences of management practices or inappropriate government policy. For example, it is not difficult to envisage the significant depression, despair, and mental illness likely to result from indefinite confinement when there is no certainty of a review process or proper communication with the authoritative holding agency. The monitoring role with its national and international experts is invaluable in such circumstances. Attention may well focus on such aspects as poor transport conditions, excessive force used by arresting officers, strip searching, the necessity for shackles, overcrowding, lack of privacy, denigrating comments, inadequate access to lawyers, solitary confinement, chemical restraint, disciplinary regimes, restrictions on visits, double or multiple bunking, privacy breaches, locked doors with key codes that are inaccessible to some residents. One particularly serious recent example, where human rights were breached, occurred when twelve prisoners charged with terrorism offences were transported daily to the Melbourne Custody Centre, which is a holding facility, prior to their trial, which was intended to be a lengthy one. Justice Bongiorno inquired into the custodial conditions and was scathing in his findings

> *On court days, they were woken before 6 am and offered breakfast, which some did not eat. They were thoroughly strip-searched, handcuffed and shackled, and then placed in a van. The trip to court usually took 65 to 80 minutes. The vans were divided into small box-like steel compartments with padded steel seats, lit only artificial light. They were under video surveillance at all times. When court proceedings finished for the day, the applicants were transported back to Acacia by the same method, returning between 6 pm and 7pm, and thoroughly strip-searched again.*
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> *(See http://www.hrlrc.org.au/files/HUN5KEVYTV/Benbrika%20[2008].pdf; VSC 80.)*

There are two factors that will impact on the operation of the SPT and NPMs in Australia. First, institutions are dispersed over a broad geographic distance and many are situated in quite isolated areas,

e.g. Leonora, Christmas Island and remoter parts of the Northern Territory and Western Australia. Second, we have moved towards privatisation in the traditional area of prisons and there are dual authorities operating that may lead to the development of a parallel, yet separate, custodial culture despite the State maintaining overall responsibility. This is where the educative arm of the NPMs will be invaluable in opening up dialogue and assessing variations in the outcomes of possibly diverse and entrenched custodial practices. Thus, ratification of the OPCAT paves the way to establish a powerful mechanism for the protection of those in the custodial care of the state and its associated agencies and it can promote a more coherent and justifiable development in the methods of control.