THE CASE FOR PUBLISHING OPCAT VISIT REPORTS IN NEW ZEALAND

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I Introduction

Deprivation of liberty continues to be an important policy tool in New Zealand used in criminal justice, health, social welfare, immigration and defence. Unfortunately, state detention is the locus of some of the most significant human rights abuses, resulting from the combination of the hidden nature of detention and the high level of state control. New Zealand has recently begun to place more emphasis on improving the conditions of detention through visits to places of detention carried out by independent bodies designated as "national preventive mechanisms" (NPMs). These bodies are given powers to inspect and make recommendations for the improvement of conditions in places of detention under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).[1] During the five years that the system has been operating, the NPMs have reported real improvements in the conditions of detention.[2]

An important issue which arises now that the New Zealand OPCAT system is well established is what can and should be done with the information resulting from these visits to places of detention by the NPMs? In contrast to a number of other states parties to OPCAT,[3] New Zealand does not publish NPMs' reports made up of findings and recommendations. This article explores the benefits of publishing this information and demonstrates how publication would be consistent with the OPCAT treaty.

It begins in Part II by setting out the basic framework of the OPCAT treaty and explaining how OPCAT aims to effect behavioural change in detention agencies through deterrence and constructive dialogue. In Part III, the structure of the New Zealand OPCAT system is explained. Three reasons are suggested for why visit reports have not been published to date: the system is still new; proactive dissemination of official information is still relatively uncommon in New Zealand; and the ability to publish has been made uncertain by the complicated duty of confidentiality in the Crimes of Torture Act 1989, the Act which implements OPCAT in New Zealand. In Part IV, the article turns to explaining why visit reports should be published. It first orients the issue of publishing visit reports within the debate around freedom of information, in which it has long been argued that transparency can increase effectiveness and accountability of government. It is argued that publishing visit reports can increase the effectiveness of the NPMs: the deterrence created by OPCAT is enhanced by creating a societal culture against ill-treatment; and dialogue is extended by increasing the number of actors who monitor the detention agencies in society. Further, by better engaging the public in scrutiny of the NPMs, publishing visit reports increases NPM accountability.

In Part V, this article explains how the publication of visit reports is consistent with the purpose of OPCAT, despite the fact that the Optional Protocol gives states parties the option of keeping reports confidential. This option is only to ensure that states will sign up to OPCAT even where they are not comfortable with publication. Where states are willing to publish, the purpose of OPCAT would be furthered by publication because it contributes to the prevention of torture and other forms of ill-treatment.

The purpose of OPCAT will only be upheld, however, where NPMs respect two constraints in it. First, publication should not reveal confidential or private information. Secondly, NPMs should ensure that publication will not undermine constructive dialogue between the NPMs and the state agencies. In some contexts it may be necessary to give the detention agencies some control over publication to maintain dialogue. This article suggests that in the robust culture of transparency and human rights in New Zealand, the NPMs will both be able to publish comprehensive visit reports and maintain constructive dialogue.

II Key aspects and theoretical basis of OPCAT

OPCAT establishes a framework for an innovative two-tiered system of preventive monitoring carried out by both an international body, the Subcommittee on Prevention of Torture (SPT), and national bodies (the NPMs) of "any place … where persons are or may be deprived of their liberty".[4] Rather than establishing new substantive human rights standards, this framework provides a practical mechanism which helps states parties to fulfil their obligation to prevent torture, and cruel, inhuman or degrading treatment or punishment under the UN Convention against Torture.[5] The bodies set up by OPCAT aim to effect human rights compliance in state detention through deterrence and dialogue.

A OPCAT: the basic framework

On one level, OPCAT establishes the SPT, an international visiting and advisory body. This committee consists of 25 members who reflect the diverse nature of the states parties and have relevant professional expertise.[6] The SPT visits places of detention and makes recommendations to states parties on the protection of persons deprived of their liberty,[7] and it also advises and assists both states parties and the NPMs themselves to establish and strengthen the NPMs.[8] Under OPCAT, states parties are required to: give the SPT access to places of detention and relevant information; examine the SPT's recommendations; and "enter into dialogue with it on possible implementation measures".[9] While this article focuses closely on the domestic OPCAT system, the background and work of the SPT informs the general context of OPCAT.

The real strength of the OPCAT system is found on the national level.[10] Whereas the SPT, at current resource levels, is only able to make a full visit to each state party every 20 years,[11] the NPMs work closely with agencies which hold detainees, making regular visits and recommendations on the conditions of detainees. OPCAT imposes on states parties an obligation to establish one or more functionally independent, adequately resourced NPMs.[12] As with the SPT, states are also required to guarantee the NPMs access to places of detention and relevant information,[13] and enter into dialogue on the recommendations made by the NPMs.[14]

B Mechanisms of behavioural change underlying prevention in OPCAT

The object of OPCAT is for the SPT and the NPMs to carry out regular visits to places of detention to prevent torture and other forms of ill-treatment.[15] The essential assumption underlying OPCAT is that the visits will lead to prevention via the two main pathways of deterrence and constructive dialogue.[16] Like all human rights treaties, key theories of behaviour change connect these practical mechanisms with the desired outcome of compliance, in this case, prevention.[17] In deciding whether publication of visit reports is appropriate, it is important to consider how publication might enhance or undermine the theories which underpin both mechanims of deterrence and dialogue.

Ryan Goodman and Derek Jinks identify three distinct mechanisms of behaviour change which induce human rights compliance: coercion, persuasion and acculturation.[18] Coercion influences actors by increasing the benefits of compliance or the costs of non-compliance.[19] Persuasion effects change by actively convincing actors to internalise new norms.[20] Acculturation is a form of influence whereby actors adopt norms to assimilate into the surrounding culture.[21] As Goodman and Jinks argue, an effective human rights regime may combine all three of these mechanisms, which each work optimally under different conditions.[22]

Deterrence encompasses elements of both coercion and acculturation. Deterrence works on the assumption that torture and other forms of ill-treatment are most likely to occur behind closed doors where perpetrators are away from scrutiny.[23] By opening up places of detention to scrutiny, the potential perpetrators are less likely to feel able to continue such ill-treatment.[24] Actors are deterred either through fear of sanctions (coercion) or because of a desire to avoid shame of social disapproval (acculturation). The driving force of OPCAT is the dialogue between the monitoring bodies and the state. The OPCAT recognises that deterrence is not enough to bring about compliance alone. The philosophy behind OPCAT is that change is possible by cooperation through constructive dialogue.[25] The purpose of OPCAT is "not to condemn States, but, through advice, to seek improvements" in the conditions of detention.[26]

The theory of behaviour change behind dialogue is persuasion. The "managerial model" of compliance, proposed by Abram and Antonia Chayes, explains how persuasion through dialogue can bring about compliance. Assuming that most states wish to comply with treaties,[27] the model contends that non-compliance arises not from wilful disobedience, but rather from insufficient information, understanding or capability.[28] Where performance is less than adequate it is "a problem to be solved by mutual consultation and analysis, rather than an offense to be punished".[29] In fact, the actors within the detention agencies themselves are often not the problem – many problems can arise because of a lack of resources and attention from the state. The NPMs may thus help to strengthen the agencies' argument for more resources from central government.[30]

These underlying mechanisms of deterrence and dialogue set the scene for the design of an appropriate publication strategy for the NPMs. Publication can buttress, both deterrence and dialogue by increasing the effectiveness of persuasion and acculturation. Further, publication should not undermine these mechanisms. As discussed in Part V, a key element of an appropriate publication strategy is ensuring that publication does not undermine constructive dialogue with the detention agencies.

III Implementation of OPCAT in New Zealand

OPCAT sets up the framework for an important domestic mechanism which works through deterrence and dialogue. The OPCAT gives states parties significant freedom, both in terms of institutional design and for decisions on more peripheral issues such as publication. New Zealand has established multiple NPMs endowed with wide powers going beyond what the treaty requires. In terms of the publication of information, however, the New Zealand system has been less bold to date.

A Structure of the New Zealand OPCAT system

New Zealand ratified OPCAT on 16 March 2007 after implementing its obligations through an amendment to the Crimes of Torture Act 1989.[31] With respect to the SPT, the Act closely follows the requirements of OPCAT, setting out wide powers necessary for its visits. For the

NPMs, the Act sets out the powers required by OPCAT. Each NPM is also endowed with the powers, protections, privileges and immunities that the NPM has under any other Act.[32] Unlike many other jurisdictions, New Zealand opted for multiple NPMs, each monitoring different types of detention facilities.[33] The Human Rights Commission – the central NPM[34] – has no inspection powers but rather coordinates the four other NPMs, communicates with the SPT. The Commission may, in consultation with the other NPMs, make any recommendations on anything related to the prevention of torture and other cruel, inhuman and degrading treatment or punishment.[35]

There are four NPMs designated to monitor places of detention.[36] The Independent Police Conduct Authority monitors police cells or other police custody. The Office of the Children's Commissioner monitors Child, Youth and Family residences. The Inspector of Service Penal Establishments of the Office of the Judge Advocate General covers military detention. The Ombudsmen's jurisdiction covers prisons, health and disability places of detention, immigration detention and, together with the Office of the Children's Commissioner, Child, Youth and Family residences. Under the Crimes of Torture Act, these NPMs must regularly visit the places of detention under their mandate.[37] The NPMs have wide powers of access to sites and information.[38] NPMs make recommendations to the detention agencies for improvements to conditions of detention and the treatment of detainees, and for the prevention of torture or other forms of ill-treatment.[39]

In practice, the NPMs inspect the institutions, checking whether the facility complies with some minimum standards. These standards are drawn from international human rights instruments.[40] The NPM then shares its main findings orally with the agency at the end of its visits.[41] Common practice is that the NPM will then present a visit report to the agency within three months.[42] These reports, contain the NPM's main findings and recommendations, which may then lead to ongoing dialogue on identified issues.[43]

B Why are visit reports not currently published?

New Zealand NPMs currently publish little more than what OPCAT requires. The only explicit obligation in OPCAT to publish information provides that the atate is required to publish and disseminate an annual report on the activities of the NPMs.[44] The Crimes of Torture Act enshrines this obligation in a provision requiring NPMs to publish "at least 1" report on the exercise of their functions annually.[45] The NPMs duly publish a combined brief annual report on their activities,[46] as well as occasional thematic research-based reports.[47] Although this practice meets international obligations, New Zealand generally falls behind the international trend towards increasing OPCAT's effectiveness by publishing visit reports. A number of NPMs in other jurisdictions publicise NPM visit reports, whether in full or truncated form.[48]

A number of factors have likely contributed to why New Zealand falls behind this international trend. First, the New Zealand OPCAT system, established in 2007, is still relatively new and under-resourced. During the first five years, the NPMs have likely focused primarily on increasing the effectiveness of the visits themselves. This task would have required much attention and, in the face of limited resources, would have overshadowed any peripheral issues such as increasing the amount of information published. Like any new policy, the exact design of publication would also require some thought and consultation. In New Zealand, this is complicated further because there are multiple NPMs to be involved in designing the publication strategy. This may require time and resources that a growing system simply does not have.

The fledgling system would likely also be concerned about establishing strong relationships between the NPMs and the monitored agencies. As discussed, a key concept of OPCAT is "constructive dialogue" between parties. How publication affects this dialogue process is a relevant issue to designing any publication strategy and will be discussed further in Part V. During the early stages, more than any other time, publication may undermine the process of building trust between actors – something which NPMs are no doubt aware of. This is even more so where independent monitoring is something new for many of the agencies, as is the case in New Zealand.[49] The absence of a history of independent monitoring of places of detention in New Zealand may also explain why publication has been less important to date.[50] In contrast, in the United Kingdom the HM Inspectorate of Prisons – the central NPM – was established following the Committee of Inquiry into the United Kingdom Prison Services in 1979.[51] Since its inception, the publication of reports has been taken for granted as a necessary element of this independent institution's work.

More generally, New Zealand is yet to establish a strong culture of proactive release of government information. If one views the NPMs simply as bodies with some connection to the state, NPMs are not anomalous in their lack of proactive publication. In the past 20 to 30 years, the government has become slowly more transparent, particularly due to the advent of the Official Information Act 1982.[52] Nevertheless, much of this transparency has been reactive – information is often only released where requested. Only recently has the government recognised the need to move from a reactive information policy to a more proactive dissemination strategy.[53] The rate of proactive disclosure by government and other official agencies is still relatively low.[54]

The release of government information is, however, shifting towards a proactive approach. Proactive dissemination has most recently received more attention, primarily because of the recognition that the government holds a lot of valuable information which could be useful to the economy.[55] Proactive disclosure is also becoming more viable in light of improvements in technology for efficient dissemination.[56] Governments are also beginning to recognise that proactive dissemination can remove some of the barriers which prevent access to information,[57] such as lack of awareness of the right to information.[58] The Law Commission has accordingly recommended that the Official Information Act include a duty "to take reasonably practicable steps to proactively make information available".[59] Against this background, although this Act does not apply to the NPMs, their limited publication to date may simply be a symptom of the reluctance to move towards proactive release of government information.

The last and not least significant factor which might explain why visit reports have not yet been published is that NPMs are unsure of the scope of their strict duty of confidentiality under the Crimes of Torture Act.[60] This Act holds that all information given to the NPMs must be kept confidential unless one of three exceptions applies.[61] It is beyond the scope of this article to discuss the contusions of this section. However, the section is far from explicit.[62] NPMs may have interpreted this provision to preclude publication of their visit reports. Further, the unclear nature of this provision would in any event have increased the reluctance of NPMs to engage with this issue, particularly because they must already prioritise their focus due to resource constraints. As time moves on, the role of this article is to refocus attention on publication, recognising the real benefits that can come from increased transparency around OPCAT.

IV Increasing effectiveness and accountability of NPMs

Publishing visit reports will increase the transparency of the NPMs. Although independent, NPMs hold information useful to society and perform a public function similar to other state

institutions. The publication of visit reports is beneficial for society in the same way that proponents of freedom of access to information argue that transparency of public institutions is important: publication increases both the effectiveness and accountability of the NPMs.

The importance of freedom of information is increasingly being recognised around the world. International law states that the right to freedom of speech includes the right to receive information, although the extent of state obligations arising out of this right is yet unclear.[63] The UN Human Rights Committee has stated that freedom of expression includes a positive obligation to guarantee access to information held by public bodies.[64] Among regional human rights bodies, the Inter-American Court on Human has recognised such a right,[65] and recent case law from the European Court of Human Rights suggests that this right is included within freedom of expression.[66] States around the world are simultaneously ensuring access to official information through legislation.[67] New Zealand has done so in the form of the Official Information Act 1982.

This movement towards access to public information is for good reason – this is generally recognised as a vital element of a well-functioning democracy.[68] The purpose of the Official Information Act encapsulates the key rationales for open government, namely effectiveness and accountability. Official information should be made available:[69]

- to enable … more effective participation in the making and administration of laws and policies; and
- to promote the accountability of Ministers of the Crown and officials.

Official but independent institutions which monitor the state (such as the NPMs and Ombudsmen) are often not subject to freedom of information legislation, primarily because of the need to manage transparency in a way that is consistent with fostering relationships with informants and the state, which are essential to their monitoring function.[70] These good reasons for withholding certain information do not, however, render the benefits of transparency any less potent. In fact, there is a compelling argument that the benefits are much greater in this context. These institutions exist for the very same reasons that underpin open government – to increase effectiveness and accountability of government – so as far as possible they should promote rather than be exempt from freedom of information. Occupying the space between the state and civil society, these institutions should "act as role models and … cooperate with and promote information and dialogue between the two parties".[71]

On one level, these monitoring institutions play a particular role in promoting public awareness and participation because of their privileged situation in respect of information about the government's activities.[72] In the case of such institutions, the publication of information is not simply increasing the effectiveness of participation in any standard government task, as would often be the goal of releasing official information. Much more significantly, it promotes public participation in holding the government to account, one of the very goals of freedom of information.On another level, these institutions should themselves be held accountable, particularly to send a proper message to other state institutions. The Law Commission, in its recent review of the Official Information Act states: "It does not send a satisfactory message if the Ombudsmen, the authority charged with holding other agencies to account under the Official Information Act, are themselves completely exempt from it".[73]

Aside from these general reasons for why NPMs, as official institutions, should increase transparency, current limitations make transparency a much more pressing issue for NPMs. In the face of current resource constraints, publishing visit reports is a cost-effective way to

increase effectiveness by enhancing the deterrence and dialogue underlying OPCAT. Further, publishing visit reports introduces another layer of NPM accountability.

1 Increasing effectiveness

The current importance of increasing effectiveness of the OPCAT system cannot be understated. The NPMs do not inspect detention facilities every year and, for some of the NPMs, the percentage visited is very low.[74] For example, in the 2011 year the Independent Police Conduct Authority visited around 15% and the Ombudsmen visited around 20% of their respective designated sites.[75] Resources also limit the monitoring of the full array of detention facilities. For example, although aged care facilities would fall within the Ombudsmen's mandate of "health and disability places of detention", the Ombudsman is unable to cover these at current resource levels.[76] Limited resources also mean that NPMs have little ability to focus on anything other than visits or, if they do focus on other preventive activities, this reduces the number of visits made.[77] The Human Rights Commission notes that "NPMs have undertaken careful prioritization and planning of monitoring activities, focussing on 'formal' places of detention and adopting a 'risk management' approach where necessary".[78]

It seems unlikely that OPCAT will receive more resources in the near future.[79] Despite calls for more funding, the government has confirmed that there is no additional funding available.[80] The NPMs face an uphill battle for extra resources not only because of limited government funds, but because it is difficult to provide the necessary evidence that torture prevention is working.[81] Gains for human rights are themselves particularly difficult to measure, in large part because it is both difficult to define and measure the standards for comparison, and to determine a causal relationship between the measures taken and the improvement in human rights.[82] *Prevention* of human rights abuses brings with it the added difficulty of establishing a *hypothetical* causal relationship between the standard of human rights and measures taken via the measurement of risk.[83] The prevention of *torture and other forms of ill-treatment* involves yet another difficulty, namely, the hidden nature of this activity makes it difficult to make an accurate assessment of the situation at any given point in time.[84]

Publishing visit reports can thus be an extremely important tool in increasing effectiveness within current resources. Effectiveness of the NPMs may be bolstered by raising public awareness through the publication of visit reports. To recall, the two key pathways through which the NPMs achieve prevention are deterrence and dialogue. By engaging civil society through increased information, publication also adds layers to the existing dialogue between the NPMs and the monitored agencies. Publication plays a key role in enhancing acculturation, the theory of behaviour change underlying deterrence.

(a) Dialogue

Publication of visit reports can increase the direct effect envisioned by OPCAT by involving a wider number of actors in the dialogue with the agencies. The SPT has stated that publication is not an end in itself, but rather a means of enhancing the dialogue with states by improving the knowledge of those who can share in the task of prevention.[85] While publication can generally engage individuals in society, it is the engagement of *civil society* or *non-governmental organisations* (NGOs) which is most likely to increase effectiveness of NPMs. NGOs play an important role in the effectiveness of human rights protection in a society.[86] International human rights treaty bodies generally recognise the essential role that civil society plays in all stages of the process of state reporting, including ongoing monitoring of implementation of treaty bodies' recommendations.[87] The SPT – OPCAT's international body – recognises the importance of

civil society, encouraging NPMs to maintain dialogue with such groups.[88] The Committee against Torture has emphasised that prevention of torture requires multiple measures, including raising public awareness about torture and other forms of ill-treatment.[89] As the SPT appropriately states: "There should be no exclusivity in the prevention of torture".[90]

To date NPMs have consulted civil society on relevant issues in the pre-inspection process, and in reviewing policy and proposed legislation.[91] Publication is thus an opportunity to extend this role of civil society in the OPCAT system, which is currently limited by resource constraints. Indeed, by engaging civil society on a larger scale through increased information the NPMs may "become the centre of a national torture prevention network".[92] Civil society might add general weight to the dialogue existing between NPMs and the monitored agencies: visit reports can provide food for civil society action, which increases the pressure on agencies or elected officials to change practices and policies.[93] Although civil society groups may be concerned about treatment in places of detention, generally they do not have access to places of detention. NPMs can provide a vital stream of information to accurately inform their action.[94] Further, the specific detail which NPMs can provide is likely to result in more effective and focused civil society action. As Michael O'Flaherty notes in respect of international human rights monitoring: "… all those who wish to see change in society or governmental practice must have as a starting point for their campaigns and activities an understanding of the government position on the matters in question".[95] NGOs might also play a greater role in directing the media to the most newsworthy issues that come out of reports.[96]

More specifically, civil society can engage itself more specifically in the dialogue process by monitoring the implementation of the NPMs' recommendations. The underlying basis for compliance in OPCAT is persuasion; the state has an obligation to enter into a dialogue with the NPMs around possible implementation measures, but if this fails there are no coercive powers to ensure that recommendations are implemented. In fact, under the Crimes of Torture Act there is no provision ensuring that any dialogue does occur.[97] Generally it seems that the NPMs do monitor the implementation of recommendations on an ongoing basis, carrying out follow-up visits. Nevertheless, the eyes of civil society would add an extra safeguard and an extra level of pressure to ensure that recommendations are not disregarded over time. NGOs that have contact with the agencies being monitored may also be able to have a tangible effect on the implementation of the measures. During their other activities, armed with information from visit reports, these organisations can informally monitor the ongoing situation and where appropriate help the agencies to implement recommended measures.[98]

Increasing dialogue through publication has extra significance because it is a cost-effective way to improve a system that currently operates under huge resource constraints. The simple action of publishing visit reports can have many flow-on effects: extended monitoring beyond the limited number of visits; increased focus on implementation of recommendations; more education in society on the prevention of torture.

(b) Deterrence

To recap – NPM visits under OPCAT create a deterrent effect by shining light on potential perpetrators of torture and other forms of ill-treatment. Under watch, these individuals change their behaviour either because they fear sanctions (a form of coercion) or because they wish to avoid social disapproval (acculturation). Publication does not change the coercive aspects of deterrence, but can increase the social pressure to comply with the prevailing anti-ill-treatment norms in society. Publication of visit reports can induce more social pressure in two ways. First, greater pressure arises because the agencies must reveal their actions through visit reports, not

only to the NPMs but also to the wider public. There is thus a higher level of potential shame if unjustified actions are exposed via publication. Secondly, publication increases awareness of anti-ill-treatment norms in society which form the basis for the social pressure.

Social disapproval is contingent on the public being aware of the standards of appropriate behaviour in the area of detention. Such standards must, in other words, form part of society's "legal consciousness" which encompasses "people's routine experiences and perceptions of law in everyday life".[99] Publishing visit reports can increase the prevalence of anti-torture and anti-ill-treatment rights-based norms within society's legal consciousness, which can create the necessary psychological pressure on detention agencies.[100] Education and communication play a vital role in developing such norms. Just as the media plays a significant role in "setting acceptable standards of human rights within which a society operates", through publication, both the legal standards and areas which fall short of those standards are exposed to the public.[101] Visit reports are a hugely important and efficient tool for creating this culture: the HM Inspectorate of Prisons of the United Kingdom considers the publication of its visit reports to be the main tool through which the NPM can raise awareness around prevention generally.[102]

The public thus gains an understanding of the necessary requirements, adding them to their legal consciousness.[103] These norms may form the basis for the public's criticism of institutions, in the form of a human rights discourse, a powerful force, giving ordinary citizens added authority to hold institutions to account.[104] Such criticism can lead to expectations and norms.[105] Ideally, the pressure from these norms will ultimately lead to internalisation of these norms within the agencies themselves. Often the individual agencies may wish to comply with the requirements. However, despite calls to government for changes to the resources or policy these agencies are unable to change their practice. The public pressure created by publication of visit reports might change the game slightly. In this case, it is not the agencies themselves that fear the public's social disapproval but the state itself.

Thus publication can provide a cost-effective way of increasing effectiveness by engaging civil society in the dialogue with detention agencies, and increasing the deterrent effect by increasing social pressure on agencies to comply. These effects not only ameliorate an under-resourced system, but could also add tangible evidence of effectiveness which adds weight to the argument for extra resources. Rachel Murray suggests a number of factors which can be used to measure the effectiveness of human rights institutions.[106] These include the publicity of the organisation,[107] and the connections made with other societal actors involved in human rights activism such as civil society,[108] both of which would be bolstered by publication of visit reports. A higher prevalence of anti-ill-treatment norms and expectations in society is another factor which provides tangible evidence of progress towards prevention. The greater the measurable effect of NPMs, the more likely the state will invest resources in their continuing operation.

2 Increasing accountability

The second benefit of publishing visit reports is that publication can increase accountability of the NPMs themselves. The classic argument in favour of open government is that in order for individuals to hold institutions to account, they must be informed.[109] Thus citizens should have full information to hold the NPMs to account. Publication of visit reports provides another important layer to NPM accountability. As an independent institution, the NPM lacks the otherwise direct line of accountability that government institutions hold. Currently, the main method of NPM accountability is through an annual report tabled in Parliament. As Rachel

Murray has argued, however, where the NPMs perform less than adequately the powers of the state or the SPT to step in to improve the situation can be weak.[110]

Because OPCAT is an international treaty, its obligations fall on the state, and not the NPMs, but these obligations only extend so far as the establishment and maintenance of NPMs.[111] Where the NPMs are operating less than effectively, the SPT can make recommendations to the state, at which point the state has an opportunity to respond.[112] In the case of an ineffective NPM, the SPT could increase its engagement with the state party.[113] The state retains an element of control through its ability to legislate and its power to appoint and remove members of the NPMs.[114] Acculturation and persuasion add a necessary more nuanced layer of accountability, as already discussed providing the public with information can increase pressure towards and dialogue with the NPMs in maintaining effective practice.

In discussions on transparency, an argument which commonly accompanies increased accountability through the public is that this simultaneously increases trust.[115] Agencies and detainees need to trust the NPMs if they are going to cooperate. As an independent institution, if the NPM does not promote its own transparency, it is true that it "risks to discredit and alienate itself from the citizens".[116] Nevertheless, although secrecy promotes suspicion it does not necessarily follow that more transparency increases trust. While transparency might reveal that everything is working effectively and lead to greater trust, there is also reason to suggest that transparency can undermine trust. First, if transparency reveals a corrupt organisation, this will undermine trust. Secondly, too much information can move the focus away from the important objectives to unnecessary detail.[117] Too much unsorted information can also make it difficult to discern what is and is not relevant and reliable.[118] Onora O'Neil argues that the connection between transparency and trust is not transparency per se, but the ability to verify that the information is reliable.[119] O'Neil argues that the best way to establish trust through transparency is to provide clear information with the ability to check and question its reliability.[120] Thus visit reports can increase trust where the NPMs also give civil society an opportunity to test the information's reliability.

In summary, publishing visit reports creates a more transparent OPCAT system which can increase its effectiveness and accountability. Importantly, engaging civil society and the public through visit reports extends the impact of the under-resourced NPMs. Publishing visit reports can also increase the accountability of the NPMs, which because of their independent nature is currently quite weak.

V OPCAT: publish visit reports where appropriate

There are therefore a number of good reasons why NPMs should publish their visit reports. The NPMs can only do so, however, where this is consistent with the OPCAT framework. As already discussed, a key aspect of the OPCAT is the ability to engage in dialogue with states, something which requires cooperation. While cooperation is the primary concern of OPCAT, transparency through publication is a secondary aspirational concern, appropriate where cooperation can be maintained. OPCAT uses confidentiality as a tool to ensure that states parties begin to cooperate by signing up to the OPCAT. Where the state *is* willing to cooperate and publish visit reports, publication promotes the purpose of OPCAT because it contributes to the overall prevention of torture and ill-treatment. Publication must, however, always continue to encourage constructive dialogue between the NPMs and the detention agencies, and respect private and confidential information.

A Publication is consistent with the purpose of OPCAT

OPCAT, in order to gain a state's cooperation, leaves confidentiality as an option open to the state, both in interaction with the SPT and in establishing the NPMs. The SPT is bound by the principle of confidentiality,[121] and communicates its recommendations to the state party in confidence.[122] It may publish its visit reports only where the state requests it do so.[123] The SPT sees confidentiality of its activity as a means of fostering the "spirit of constructive engagement".[124] In terms of publication by NPMs, the appropriate level of confidentiality is left largely up to the state. To recall, the state is required to publish and disseminate an annual report on the activities of the NPMs.[125] There is, however, no corresponding provision requiring publication of visit reports – the OPCAT remains largely silent on this. It does, however, lay down minimum obligations to respect privacy and requests for confidence.[126]

This necessary compromise is evident from the drafting process of OPCAT. Early on, some parties were concerned that the SPT, which has wide-ranging powers to inspect places of detention within state territory, could freely publish damning information about the state.[127] Thus, in respect of sovereignty and in aid of cooperation, it was agreed that the SPT would be guided by the principle of confidentiality and the visit reports of the SPT would only be published at the request of the state party concerned.[128] There is, however, an exception to this rule which makes it clearer that cooperation, not confidentiality, is the goal. Where the state refuses to improve the situation in light of recommendations made, the SPT may request the UN Committee against Torture to issue a public statement which may include the SPT's findings and recommendations.[129]

The explicit obligation on NPMs to publish annual reports appears to have arisen out of a compromise between a push towards publication and the desire to leave publication up to the state. In the ninth session of the Working Group on OPCAT – the last session to discuss publication of NPMs – most delegates felt that NPMs should be bound by a principle of publicity, publishing at least their annual reports.[130] Because the establishment of the NPMs would be a matter for the state party, other delegates considered that national laws could determine the extent of publication.[131] While there is no explicit statement supporting the final publication policy, it seems natural that this resulted from a compromise between the underlying support for publication and the need to ensure state cooperation. Thus the clearest indication that OPCAT favours publication is that where cooperation can be established, there is no remaining need for confidentiality.

Where cooperation can be established, publication is consistent with OPCAT not *only* because confidentiality is no longer needed, but more importantly because this upholds its overall purpose to prevent torture and other forms of ill-treatment. The SPT recognises this in its advice to states. The SPT has stated that "publication of reports significantly enhances their preventive impact".[132] The SPT strongly encourages states to give consent to publish SPT reports,[133] and to allow NPMs to publish their visit reports.[134]

B Two reasons to constrain publication

Where states parties do choose to publish visit reports, there are two important constraints laid down by OPCAT which will encourage cooperation of both informants and the monitored detention agencies. The first is explicitly enshrined in Article 21 of OPCAT:

> Confidential information collected by the national preventive mechanisms shall be privileged. No personal data shall be published without the express consent of the person concerned.

Secondly, publication must be consistent with "constructive dialogue", the direct means through which the NPM brings about compliance.[135]

1 Protection of sensitive information

Private and confidential information should be protected when NPMs publish any information. OPCAT relies on candid interactions with detainees and other persons.[136] Should sources be revealed in any way, there may be a "chilling effect" which could render the system wholly ineffective.[137] This requirement is part of the general principle of "do no harm" of human rights monitoring.[138] This principle has its roots in the principle of beneficence of medical ethics,[139] and is now a fundamental principle of humanitarian practice and human rights monitoring.[140]

2 Maintaining constructive dialogue

Just as importantly, publication should not undermine cooperation between the NPMs and the detention agencies. The primary means of cooperation is through "constructive dialogue". As discussed in Part II, constructive dialogue is the means by which OPCAT effects change through persuasion. Dialogue is more than a discussion; it is about exploring entrenched positions, breaking down assumptions and building common ground.[141] Constructive dialogue provides states with a means of support towards human rights compliance.[142] The process can help the state in "identifying weaknesses in its implementation activities and offer possible ways forward".[143] The "constructive dialogue" model is recognised in the text of OPCAT in Articles 12 and 22, which require states parties to examine recommendations and "enter into a dialogue … on possible implementation measures" with the NPMs and SPT, respectively. The support for this model is further seen in the context surrounding OPCAT.

Constructive dialogue permeates the human rights monitoring world and, in particular, the field of torture prevention. "Constructive dialogue" was first used as the name of the process whereby treaty bodies review periodic reports which states voluntarily submit to provide evidence of their compliance with rights obligations.[144] Constructive dialogue is also central to the monitoring bodies for torture prevention which inspired OPCAT, namely, the International Committee of the Red Cross (ICRC)[145] and the Committee on the Prevention of Torture under the European Convention on the Prevention of Torture.[146] The SPT has continually emphasised the importance of constructive dialogue with states,[147] and advises that any publication strategy which the NPMs adopt should continue to foster dialogue.[148]

Publishing visit reports should not undermine trust and cooperation, which is necessary to establish and maintain constructive dialogue. Over the five years that OPCAT has operated in New Zealand, a strong constructive dialogue appears to have been established. All NPMs have reported good relations between their office and the detention agencies.[149] Feedback suggests that agencies consider the visits worthwhile.[150] It is important that this relationship is therefore not undermined by publishing visit reports. Examples from other jurisdictions offer a range of various options to maintain trust in spite of publication, all of which involve varying levels of the monitored agency's input into and control of the NPM publication. In light of the strong culture of transparency in New Zealand, it is suggested that it is likely that constructive dialogue can be maintained even where the visit reports are published, with only minimal state input to check the report for factual accuracy.

The foundations of constructive dialogue are mutual trust and cooperation,[151] and two key factors build and maintain these foundations; actors in the dialogue have the ability to speak openly,[152] and be frank with one another without fear that everything they say will be published;[153] and the process should be fair and impartial.[154] Publishing visit reports does not directly undermine the ability to speak openly. Visit reports, in New Zealand and elsewhere, typically only include the final findings and recommendations of the NPMs rather than the raw opinions of the actors given in confidence in the dialogue.[155] Where informants do not wish raw discussion to be disclosed, it would be considered confidential and therefore comes under privilege, as already discussed. The OPCAT system relies heavily on information gathered from the agencies, thus it is extremely important that the actors do not censor themselves. Publishing only finalised information is consistent with the approach taken under the Official Information Act. Under this Act, information may be withheld on the basis that it is necessary to "maintain the effective conduct of public affairs through free and frank expression of opinions".[156] Similarly, space must be made in the OPCAT process for free and frank discussion.

Publishing visit reports may yet undermine constructive dialogue, even though the reports only contain final findings and recommendations. Publishing visit reports may interfere with dialogue where the information that is published undermines the trust between parties. This might occur because the agencies do not want certain information to be made public or because the agency feels that the information published is incomplete, inaccurate or unfair. In some cases, the state may wish to retain control over the publication process. As discussed in Part V, publication is consistent with the purpose of OPCAT, so long as it does not undermine the ability to have a constructive dialogue with the state. If necessary, it is more consistent with OPCAT to compromise on publication in order to achieve more gains for torture prevention through constructive dialogue. The appropriate compromise will vary according to the context, ranging from no publication at all to merely giving the state an opportunity to check the report for factual accuracy.

The constructive dialogue process before international treaty bodies reveals how more gains for human rights might be achieved if states have some control over publicity. The procedure, which is entirely public, is:

- the state party presents its report to the treaty body
- the members of the body then ask questions, make comments and request further information
- the state then responds orally or may make a written response within a certain timeframe
- finally, the body issues "concluding observations".[157]

While this process promotes public scrutiny and requires states to publicly acknowledge human rights concerns,[158] some commentators are of the view that this highly public process is ineffective for bringing about human rights compliance.[159] Many states are not honest in their accounts,[160] and do not take the process seriously.[161] A private or partially private dialogue may achieve more gains in the long run. Thus states, should be given control over publication if that is the only way to achieve such gains.

In some circumstances, publication would altogether undermine constructive dialogue. The International Committee of the Red Cross (ICRC) inspection system provides an example. This body conducts inspections of places detention, primarily in states where there are humanitarian concerns, and often in the context of armed conflict and other situations of violence.[162] The Committee carries out dialogue with states under strict confidentiality; transparency plays no role. It intentionally adopted this policy knowing that it tackles often very sensitive political

situations,[163] claiming that this policy is "undoubtedly the key that opens the doors for the ICRC".[164] Not all contexts will, however, demand the same level of confidentiality. In most jurisdictions, at least some publication would be consistent with constructive dialogue.

In some circumstances, where constructive dialogue is best encouraged by keeping reports confidential, the threat of publishing them may instead be used as a deterrent to effect compliance. Under OPCAT, constructive dialogue is the ideal form of cooperation. However, where constructive dialogue fails altogether, publication may be used as a tool to re-engage the state. The SPT, which uses confidentiality to encourage constructive dialogue, has the power to publish reports where the state refuses to cooperate.[165] The General Inspector of Places of Detention in France, which publishes an annual report rather than individual visit reports, has the power to publish visit reports as examples, either to air a lack of cooperation or to highlight good examples of practice.[166] The Public Defender of Rights in the Czech Republic, as well publishing general reports, has the power to use individual visit reports as a sanction. Under this power, the authorities have 30 days to advise the NPM of measures taken in response to any recommendations made, after which the NPM "may inform the public of his findings, including the disclosure of any names and surnames of persons authorized to act on behalf of the Authority".[167]

Some NPMs have found that publication of visit reports is possible, but only once the report is shared with the state before publication. For example, the Maldives NPM, the Human Rights Commission, originally published all of its visit reports under its legislative power to "disseminate general information on human rights to the public, and make relevant publications".[168] However, since 2010 the Commission has adapted its engagement strategy, now sharing its reports prior to publication to instigate dialogue on the implementation of its recommendations. This has apparently resulted in stronger relations between the NPM and the state, and an increase in implementation of recommendations.[169]

Some states also publish a government response to the NPM's recommendations. For example, the Swiss NPM publishes visit reports on its website together with a concise letter of response from the government.[170] A government response can help maintain trust between parties and can also provide helpful information on how the government aims to address the issues identified. However, including government responses could yet undermine effective disclosure. First, including a government response may affect the quality of the information. If, for example, the government downplays the issues in the report, this could reduce the level of response from civil society because the issue seems less urgent. Secondly, it takes time to obtain a response from the government, which can reduce the timeliness of the report, one of the key principles identified for effective disclosure. For example, initially the HM Inspectorate of Prisons in the United Kingdom allowed for state comment but this led to long delays in publication.[171] The NPM now only sends the reports to the concerned agency with a strict deadline to check for any factual inaccuracies.[172]

This level of state input may not however be necessary; constructive dialogue can be maintained even where the visit reports are published in their raw form, as originally drafted. At minimum, in order to be fair and impartial, the reports should be accurate and balanced. The agency should also be given an opportunity to check the report at least for factual accuracy, as for example is the practice of the HM Inspectorate of Prisons in the United Kingdom.[173] Where there are multiple NPMs, a coherent message across reports is also important for constructive dialogue – the agencies should not feel as though they are being treated differently across NPMs. Good relations may also be maintained by praising good aspects of state action as well as identifying flaws, as is the practice in the concluding observations of international treaty bodies.[174]

In the New Zealand context, the NPMs will need to consult with the agencies to gauge what will be necessary to maintain constructive dialogue throughout publication. In this sense, the strategy for publication must simply be the subject of a constructive dialogue. Because there is currently a strong constructive dialogue between the agencies, the NPMs may have significant power to convince the agencies that publishing visit reports with minimal state interference is beneficial. In light of New Zealand's relatively strong culture of transparency and human rights, it is suggested that minimal state interference with the publication of visit reports would be appropriate. The Official Information Act has fostered a general expectation of openness of government.[175] This openness, as discussed earlier in this article, is developing even further from reactive release to proactive dissemination of information. As has been recommended in the design of the Australian OPCAT model, where transparency is relatively common (as in New Zealand) it would seem only sensible to publish visit reports in their full form.[176]

Moreover, in New Zealand, the agencies themselves recognise the importance of human rights compliance,[177] unlike in some other jurisdictions where the NPMs are resistant to the OPCAT system.[178] Richard Harding and Neil Morgan suggest that New Zealand's robust human rights culture has led to a relatively strong OPCAT system internationally.[179] Further, these authors also suggest that it is the strong human rights culture which has led the New Zealand NPMs to individually include information on their OPCAT activities in their individual annual reports.[180] It is therefore suggested that this culture would also support a relatively robust strategy for the publication of visit reports. While the agencies should be consulted, it suggested that the NPMs would maintain constructive dialogue where they do the minimum necessary to ensure that reports are fair. Reports should be consistent across NPMs, and highlight both good and bad practice. Similar to the HM Inspectorate of Prisons in the United Kingdom, the agencies should be given an opportunity to check the report for factual accuracy.[181] It may also be appropriate to include a response from the agency, but this should not undermine timeliness or the quality of the report. Currently, the Ombudsmen includes in its visit reports a brief, clearly marked response from the agency.[182]This could continue so long as the response is provided within a short timeframe. To reiterate, the most important element of maintaining constructive dialogue is ensuring that the proposed publication strategy is itself the subject of dialogue between the NPMs and the agencies.

VI Conclusion

In conclusion, this article argues that NPMs should publish their visit reports. The key impetus behind this decision is that publication will increase the effectiveness and accountability of NPMs. Publishing reports will give the public tools to engage in torture prevention and will create a culture which is critical of ill-treatment. Publication of visit reports is consistent with OPCAT. Publication will be consistent so long as NPMs protect both confidential and private information, and continue to maintain constructive dialogue with the detention agencies. To maintain constructive dialogue, the NPMs should consult the agencies on the proposed publication strategy. Constructive dialogue is likely to be maintained in New Zealand so long as the agencies are given an opportunity to check the report first for factual accuracy.

While this article has concluded that NPMs should publish their visit reports, they can only do so if this is possible under the current legislative framework. As highlighted in Part III, the confidentiality provision in the Crimes of Torture Act may currently prohibit publication. The author will, in a longer paper (see below), analyse this provision and conclude whether it is necessary to suggest reform of the Act.

This article forms part of a longer paper submitted for an LLM course on Human Rights at Victoria University

Endnotes

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2 See, for example, Human Rights Commission, *Monitoring Places of Detention: Annual Report of Activities Under the Optional Protocol to the Convention Against Torture (OPCAT) 1 July 2010 to 30 June 2011* (Auckland, February 2012) [*OPCAT Annual Report 2011*] at 2.

3 See Association for the Prevention of Torture *OPCAT Status Ratification and Implementation* (Geneva, 2010).

4 OPCAT, art 4(1). See also Association for the Prevention of Torture *Optional Protocol to the Convention Against Torture: Implementation Manual* (Geneva, 2010) [*Implementation Manual*] at 12-13.

5 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987) [UNCAT]; OPCAT, art 1. See also Rachel Murray and others, *The Optional Protocol to the Convention Against Torture* (Oxford University Press, Oxford, 2011) at 1.

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7 Article 11(1)(a).

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19 At 633.

20 At 635.

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26 Commission on Human Rights, *Letter Dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations Office at Geneva Addressed to the Under-Secretary-General for Human Rights* E/CN.4/1991/66 (1991) at [5].

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28 At 9-17. See also for recognition of this assumption in the OPCAT context: Nowak, *Report of the Special Rapporteur*, above n 10, at [72].

29 At 26.

30 Rodley, above n 23, at [36].

31 Crimes of Torture Amendment Act 2006.

32 Crimes of Torture Act 1989, ss 34 and 35. The main Acts include the Ombudsmen Act 1975, Independent Police Conduct Authority Act 1988, Children's Commissioner Act 2003, and Court Martial Act 2007. For example, the Ombudsman has powers under the Ombudsmen Act to compel persons to provide evidence: see Ombudsmen Act, s 19.

33 National Preventative Mechanisms [NPMs] are designated by notice in the *New Zealand Gazette* as per the Crimes of Torture Act, ss 26 and 31.

34 "Designation of Central National Preventive Mechanism" (21 June 2007) 69 *New Zealand Gazette* 1816.
35 Crimes of Torture Act, s 32.
36 "Designation of National Preventive Mechanisms" (30 April 2009) 57 *New Zealand Gazette* 1344; and "Amendment-Designation of National Preventive Mechanisms" (28 May 2009) 76 *New Zealand Gazette* 1786.
37 Crimes of Torture Act, s 27(a).
38 Sections 28-30.
39 Section 27(b).
40 For a comprehensive list of the international instruments from which the NPMs standards are drawn see Human Rights Commission *OPCAT Annual Report 2011*, above n 2, at 22. Beyond the main human rights treaties, relevant instruments include, for example, the *Standard Minimum Rules for the Treatment of Prisoners* ESC Res XXIV (1957) and ESC Res LXII (1977); and *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* A/RES/40/33 [*The Beijing Rules*] (1985).
41 Human Rights Commission *OPCAT Annual Report 2011*, above n 2, at 21.
42 Ministry of Justice, *The Achievement of the National Preventive Mechanisms Designated to Monitor Places of Detention in New Zealand* (23 November 2011) at [12].
43 Human Rights Commission *OPCAT Annual Report 2011*, above n 2, at 21.
44 OPCAT, art 23.
45 Crimes of Torture Act, ss 27(c) and 36.
46 The most recent report released in the 2011 year is around 20 pages long and contains a brief summary of the key operations and findings of each NPM. See, for example, Human Rights Commission, *OPCAT Annual Report 2011*, above n 2. Each NPM also includes the same information in its individual annual report: see, for example, *Report of the Ombudsmen* (30 June 2011).
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51 Report of the Committee of Inquiry into the United Kingdom Prison Services (1979).
52 See Law Commission, *The Public's Right to Know* (NZLC R125, 2012).
53 See, for example, Ministry of Economic Development *The Digital Strategy 2.0* (2008). See also Law Commission, *The Public's Right to Know* (NZLC R125, 2012) at 256.
54 Law Commission, *The Public's Right to Know* (NZLC R125, 2012) at 256.
55 See State Services, Commission *Enabling Transformation: A Strategy for E-government 2006* (2006); and Law Commission, *The Public's Right to Know* (NZLC R125, 2012).
56 Mendel, Toby, *Freedom of Information: A Comparative Legal Study* (UNESCO, Paris, 2008) at 33.
57 Darbishire, Helen, *Proactive Transparency: The Future of the Right to Information* (Working Paper, World Bank Institute, 2010) at 3.
58 Danish Institute for Human Rights, "An Introduction to Openness and Access to Information" (2005) at 8.
59 See Law Commission, *The Public's Right to Know* (NZLC R125, 2012).
60 The interpretation of this provision will affect any final decision on publication of visit reports in New Zealand. This is, however, beyond the scope of this article.
61 Crimes of Torture Act, s 33.
62 The author's original LLM paper also addresses the interpretation of this section. The author intends to publish this interpretation in the near future.
63 *Universal Declaration of Human Rights*, GA Res 217, III (1948), art 19; International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 19.
64 UN Human Rights Committee, *Gautier v Canada* CCPR/C/ 65/D/633/1995 (1999) at [13.4]; and UN Human Rights Committee, *General Comment 24* CCPR/C/GC/34 (2011).
65 *Reyes v Chile* Series C No 151, ICHR 19 September 2006.
66 *Társaság a Szabadságjogokért v Hungary* (37374/05) Section II, ECHR 14 April 2009; and *Kenedi v Hungary* (31475/05) Section II, ECHR 26 May 2009.
67 See Law Commission, *The Public's Right to Know* (NZLC IP18, 2010) at 25.

68 Hussein, Abid, *Report of the Special Rapporteur on Freedom of Opinion and Expression* E/CN4/1995/32 (1995) at [35]; Committee on Official Information, *Towards Open Government: General Report* (Wellington, 1981) at [20]; and Hood, Christopher, "A Historical Perspective on Transparency" in Christopher Hood and David Heald (eds) *Transparency: The Key to Better Governance?* (Oxford University Press, Oxford, 2006).
69 Official Information Act 1982, s 4.
70 See Law Commission, *The Public's Right to Know* (NZLC R125, 2012) at [14.31]-[14.32].
71 Danish Institute for Human Rights, above n 58, at 76.
72 At 63.
73 See Law Commission, *The Public's Right to Know* (NZLC R125, 2012) at [14.26].
74 Ministry of Justice, above n 42, at 6.
75 Ministry of Justice, above n 42, at 3.
76 At 2.
77 This was the case for the IPCA in the 2011 year – fewer than the target of 30 visits were completed because the IPCA broadened its focus to other activities including "research, evaluation and engagement with outside groups": Human Rights Commission, *OPCAT Annual Report 2011* at 7.
78 Human Rights Commission, *OPCAT Annual Report 2011* at 18.
79 Ministry of Justice, above n 42, at [3]-[7].
80 At 1.
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82 Association for the Prevention of Torture "Does Torture Prevention Work?", www.apt.org, at 5.
83 At 6.
84 At 6.
85 Subcommittee on the Prevention of Torture, *Fourth Annual Report*, above n 25, at [47] and [58].
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107 At 217.
108 At 214-215.
109 Committee on Official Information, above n 68, at [23]; Law Commission, *The Public's Right to Know* (NZLC IP18, 2010) at [1.23]; Jonathan Fox, "The Uncertain Relationship Between Transparency and Accountability" 17 Development in Practice 663 at 663.
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111 At 511.
112 At 512.
113 At 513.
114 See, for example, the Independent Police Conduct Authority Act 1988, ss 5-6.
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142 Nowak, Manfred, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, Kehl, Germany, 2005) at 731.
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144 See Nowak, *UN Covenant on Civil and Political Rights*, above n 142 at 730-733.
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