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1 March 2013

Our reference: ADM/1704p05
Contact: Tom Millett
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The Hon Catherine Cusack MP
Chair
Committee on the Office of the Ombudsman,
Police Integrity Commission
and the Crime Commission
Parliament of NSW
Macquarie Street
SYDNEY NSW 2000

Dear Madam Chair

Further information about OPCAT

I refer to our discussion of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) at the 18th meeting between the Committee and the Ombudsman on Friday 22 February 2013.

During the meeting, I undertook to provide the Committee with a copy of the joint submission by the Australian Parliamentary Ombudsman to the Commonwealth Joint Standing Committee on Treaties. I have attached a copy of that submission, along with my office's individual submission to the Committee. I have also attached a recent conference paper delivered by the New Zealand Chief Ombudsman Dame Beverley Wakem outlining her office's experience as a National Preventative Mechanism (NPM).

Please feel free to contact me if the Committee would like further information on this issue.

Yours sincerely

[redacted]

Bruce Barbour
Ombudsman

Encl.

Joint Standing Committee on Treaties: Consideration of the National Interest Analysis

Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Submission from the Ombudsman of various Australian States and Territories, and the Commonwealth

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Background

The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the Optional Protocol") was signed by Australia in 2009. Australia has not yet ratified or implemented the Optional Protocol. The United Nations Human Rights Council has urged ratification by Australia.

A National Interest Analysis (NIA) has been completed, including consultation with all states and territories and other interested organisations and individuals. The National Interest Analysis report has been referred to the Australian Parliament's Joint Standing Committee on Treaties (JSCOT) for review.

Implementation of the Optional Protocol requires Australia to develop a National Preventive Mechanism to undertake inspections, make recommendations and prepare reports in relation to all places of detention aimed at detecting and preventing practices contravening the aims of the convention. Places of detention are broadly defined for the purposes of the Optional Protocol and include a wide range of facilities and services where people are detained. In Australia these places of detention are administered by various agencies of commonwealth, state or territory governments.

National Interest Analysis Summary

The "Summary Page" of the National Interest Analysis is provided on the JSCOT website.

The Optional Protocol has come into force generally and several countries comparable to Australia – such as the United Kingdom and New Zealand - have become States Parties and demonstrated the usefulness of the regime it establishes.

The NIA Summary outlines the results of consultation with governments and other parties across Australia about the ratification of the Optional Protocol and the model by which it could best be implemented. It draws on the experiences of the comparable States Parties mentioned above.

Of particular importance the Summary notes that in Australia the Optional Protocol will strengthen measures already in place to prevent torture and other prohibited actions against people:

> "Undertaking monitoring of places of detention in accordance with the Optional Protocol will achieve a more national and comprehensive approach with a greater ability to identify gaps and issues particular to individual Australian jurisdictions, or commonly experienced by all."

It is anticipated in the NIA Summary that upon ratification, implementation of the Optional Protocol would be delayed for three years to allow for a period of preparation. It is further anticipated that "implementation will involve designating a range of existing inspection regimes at the jurisdictional level, utilising a co-operative approach between the Commonwealth, States and Territories" and "that at least some existing monitoring and complaints bodies will be designated to form the national preventive mechanism".

Submission

In recognition of the stated objective of a comprehensive approach to the monitoring of places of detention in Australia via the Optional Protocol, Parliamentary Ombudsman of States, Territories and the Commonwealth jointly submit their support for both ratification and implementation of the Optional Protocol.

The Parliamentary Ombudsman of New South Wales, Victoria, Queensland, South Australia, Tasmania, Northern Territory, and Commonwealth/ACT consider their offices are well placed to fulfil a National Preventive Mechanism role under a "mixed model" as outlined in the NIA Summary.

The Parliamentary Ombudsman Offices of Australia cover a unique jurisdiction independent of government but consistent among them is their role in promoting the human rights of all people, and especially those who are made vulnerable by their detention in various facilities and services operated by the state. Australian Ombudsman offices have a history over several decades of going into such places and investigating complaints, reporting their findings and observations, making useful recommendations and monitoring compliance with the recommendations made.

Any agency designated as a National Preventive Mechanism will require sufficient resources to ensure the obligations for inspecting and reporting can be met to a level consistent with the requirements of the UN Sub-Committee. Expanding the remit of experienced existing agencies such as the Parliamentary Ombudsman rather than creating additional inspecting bodies across the country would still present the most cost effective option.

Advantages a properly resourced Ombudsman can bring to this role include:

- Independence
- Existing credibility with the bodies to be inspected and with the community
- Avoiding proliferation of oversight bodies, especially in times of financial constraint
- Proven experience in visiting detention facilities - including prisons, juvenile centres, police holding cells, secure forensic services, community disability services, immigration detention – and during the course of such visits, identifying problems and making recommendations for change which are able to be implemented
- Proven experience conducting detailed audits and reviews including multi-disciplinary exploration of systems and procedures
- Proven experience and commonality in reporting on our investigations, audits and reviews
- Proven track record of exercising coercive powers appropriately, efficiently and effectively
- Established relationships with the agencies controlling many facilities/services to be inspected.
- Existing strong communication and liaison networks across all State, Territory and Commonwealth Ombudsman offices, as evidenced by this joint submission.

Any of the signatories to this submission would be pleased to provide further information or assistance to the Committee on these issues upon request.

[redacted]

Bruce Barbour
NSW Ombudsman

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30 March 2012

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Our reference: ADM/6689

Committee Secretary
Joint Standing Committee on Treaties
PO Box 6021
Parliament House
CANBERRA ACT 2600

Dear Secretary

Joint Standing Committee on Treaties – Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Attached is a submission from this office regarding the Joint Standing Committee on Treaties consideration of the National Interest Analysis for the ratification and implementation on the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

I would be pleased to clarify anything in the submission or provide any further information the Committee may require. Any such requests can be facilitated by our Manager of Custodial Services, Jennifer Agius on (02) 9286 1067 or jagius@ombo.nsw.gov.au.

Yours faithfully

[redacted]

Bruce Barbour
Ombudsman

30 March 2012

Ombudsman
New South Wales

Joint Standing Committee on Treaties: Consideration of the National Interest Analysis

Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Submission from NSW Ombudsman March 2012

Background

Australia signed the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the Optional Protocol") in 2009 however it has yet to be ratified or implemented.

An important component of the decision to ratify and implement the Optional Protocol is the method by which Australia will designate the National Preventive Mechanism required to undertake the inspections of all relevant places of detention. Australia's federal system of government requires consultation and consideration of the views and rights of all states and territories. To this end a National Interest Analysis (NIA) has been completed and referred to the Australian Parliament's Joint Standing Committee on Treaties (JSCOT).

JSCOT is now seeking submissions to assist consideration of the NIA report and to progress the ratification and implementation of the Optional Protocol.

The Optional Protocol requires an ongoing regime of inspections to a wide range of facilities and services where people are detained. Such places of detention are administered by various agencies of commonwealth, state or territory governments in Australia. In many jurisdictions inspecting or complaint handling agencies already exist which visit those facilities.

National Interest Analysis

The substance of the NIA Summary (available on the JSCOT website) is that while there has previously been reluctance to ratify and implement the Optional Protocol (JSCOT Report 58, 2004) the experience in those comparable countries where it has been ratified since coming into force generally has been positive:

> "Experience to date indicates that the Optional Protocol is an effective mechanism, including in jurisdictions that already enjoyed preventive monitoring through pre-existing oversight bodies."

The NIA also identifies the decisions which must be made as to the most appropriate way for Australia to establish National Preventive Mechanisms to achieve compliance with the requirements of the Optional Protocol. In particular it canvasses the likelihood that the Australian federal system will require the use of a 'mixed model' in which a range of agencies are designated to achieve a comprehensive and co-ordinated system of inspection and reporting.

Of relevance to the NSW Ombudsman the NIA Summary outlines the availability of current inspection and complaint handling agencies to achieve the wide ranging coverage required under the Optional Protocol.

NSW Ombudsman submission

The NSW Ombudsman submits this office could be designated as an agency to form the National Preventive Mechanism with appropriate legislative underpinning and resourcing.

In particular the NSW Ombudsman already carries out visits or inspections to prisons, juvenile detention centres and disability services, as well as providing complaint handling to the NSW Forensic Hospital. We have oversight of the NSW Police Force and can readily visit police facilities.

The Official Community Visitor (OCV) scheme for NSW is co-ordinated within this office. The Official Community Visitors attend 'visitable services', being government and non-government residential services operated, funded or licensed to provide accommodation and care by Ageing, Disability and Home Care or Community Services in NSW. Visitable services provide care for:

- Children and young people in out-of-home care
- Adults, children and young people with disability living in supported accommodation
- Adults with disability living in licensed boarding houses.

An important aspect of the OCV role is to identify issues about the quality of care at the services, to provide feedback to the services and follow up these issues, including providing advice to the Minister or the Ombudsman about issues or concerns. As at 30 June 2011 there were 1,477 visitable services in NSW accommodating 7,949 residents.

The NSW Ombudsman has an established tradition of independence and existing credibility and respect to draw on. In NSW establishing a new entity to take on the role of a NPM would have none of these advantages and would run the risk of resistance from agencies to an additional oversight body. In times of economic restraint in the NSW public sector the risk of resistance from agencies being inspected is strong as having

multiple bodies visiting the agencies for similar purposes is costly to them in terms of their resources. It is also an additional burden on those accommodated by the agencies if such visits/inspections interfere with routines or access to programs etc.

Effective coordination and communication between the state and Commonwealth entities charged with responsibilities under the Optional Protocol will be crucial. Ombudsmans' offices across all states, territories and the commonwealth already have established communication and liaison networks.

From our research in this area, which has included consideration of the Optional Protocol, a number of publications by the Association for the Prevention of Torture and contact with our colleagues in the New Zealand Ombudsman's Office which is already a designated NPM, we are aware of the breadth of places of detention required to be inspected, and in Australia could include:

- correctional centres*
- juvenile justice facilities*
- psychiatric institutions.
- police lock ups and police stations*
- immigration detention centres
- court cells and holding facilities*
- aged care facilities
- secure facilities for people with disabilities*
- holding facilities at airports
- military holding facilities
- vehicles for transporting those in detention
- national intelligence service detention facilities including facilities for counterterrorism holding facilities.

This office already run regular visit programs, or co-ordinates such programs, to those types of facilities marked with an asterisk in the above list.

For the reasons set out in this submission, we consider this office is the only existing agency in NSW which is appropriately equipped to take on the role of an NPM agency. We acknowledge the magnitude of the task posed by Optional Protocol - staff we have spoken to in New Zealand were frank about the challenges posed by the breadth of facilities to be inspected and the extensive nature of the inspection process itself.

By way of illustration, *The Guide – establishment and designation of National Prevention Mechanisms* produced by the Association for the Prevention of Torture provides for the following in relation to in-depth visits to prisons:

- less than 50 detainees: one day
- 50-99 detainees: at least two days
- 100-299 detainees: at least three days
- more than 300: four days

In NSW adult correctional centres alone this would require inspections as follows:

Less than 50 detainees	3 correctional centres
50 – 99 detainees	6 correctional centres
100 – 299 detainees	12 correctional centres
More than 300 detainees	12 correctional centres

The Guide proposes a mix of announced and unannounced visits to all places of detention, some in-depth and some ad hoc, in a schedule that means an in-depth visit is made to every official place of detention at least once every five years. It recommends a visiting team of a minimum of three people for an in-depth visit, some of whom have subject matter expertise in the type of facility being inspected.

Clearly the size of NSW means travel costs would be a significant item in addition to the more obvious staffing, education and training costs associated with such an extensive new regime. It is apparent any agency designated an NPM role will require significant resource enhancement. This, however, would still be considerably more cost effective than establishment of equivalent specialist agencies to only fulfil the NPM role within the same jurisdiction and would therefore still have a positive cost/benefit outcome.

As noted in the NIA Summary "Attachment on Consultation", legislative change would be necessary in NSW to provide the Ombudsman as an NPM with the right of entry to all places of detention at any time. While the *Ombudsman Act 1974* provides for a right of entry, this is limited to circumstances in which this office is conducting a formal investigation or as an agreement/understanding with the organisation concerned. The Optional Protocol contemplates entry to any place of detention at any time. Statutory provision would also need to be made for information sharing with any Commonwealth coordinating body, and between this office and all agencies within the scope of the Optional Protocol in NSW. Legislation would also need to make clear the obligations and responsibilities of agencies whose facilities are identified as being within the scope of Optional Protocol.

The NSW Ombudsman supports the overall considerations set out in the National Interest Analysis of the Optional Protocol for the Australian government to proceed to ratification and implementation. Furthermore, the NSW Ombudsman submits that with proper legislation and resource considerations this office provides government with a viable existing structure to be designated as a National Preventive Mechanism.

"Experiences of an Ombudsman that adapted the OPCAT model to meet the needs of their own state"

10th World Conference of the International Ombudsman Institute

Dame Beverley Wakem DNZM CBE, Chief Ombudsman of New Zealand and President of the International Ombudsman Institute

The New Zealand Government signed up to the OPCAT in 2003. Upon doing so, they committed themselves to facilitating and financing the establishment and operation of such a system in New Zealand.

In 2006 the Government gave effect to their obligations under the OPCAT by passing the Crimes of Torture Amendment Act. The amended Act included a new Part 2 which essentially provided for three things:

1. **open and unrestricted visits by an international review body** which will do its own examination and monitoring of New Zealand's places of detention as well as evaluate the national review bodies;

2. **the establishment of national preventive mechanisms** (NPMs) which will have completely unrestricted powers of entry, inspection and access to information and detainees 24 / 7; and

3. **the establishment of a central co-ordinating NPM** whose function is to co-ordinate the activities of the NPMs and liaise with the international review body.

A brief comment on the Ombudsmen's involvement in the 'setting up' process

The OPCAT was silent on the form or type of organisations that NPMs should be. Some countries, like the UK, Ireland, Germany and Italy for example, chose to create specific new bodies to do the monitoring. But starting from scratch meant they had to:

- build a relationship with all the relevant organisations;
- get a constructive dialogue going with the relevant authorities; and
- establish their own credibility.

In contrast New Zealand chose to designate five already existing bodies to be the National Preventive Mechanisms including the Ombudsman, with a central body to co-ordinate their work and liaise with the United Nations. The **central** co-ordinating body in New Zealand is the Human

Rights Commission (HRC).

Harding and Morgan commented on this approach in their 2009 study:[1]

> *"...The coordinating role of the HRC as the Central NPM has developed in several ways. Most notably, NPM meetings are held quarterly at which each NPM reports its activities and broad discussions occur as to methodology, priorities, scope of inspections, style of reports and related matters. The Chief Commissioner of the HRC believes that the fact that the Central NPM does not have any direct inspection role has, despite her earlier concerns, turned out to be an advantage in that there is no danger of any given approach becoming, by default, the dominant model. In her view, the bureaucratic hazards of territoriality have also been successfully avoided...."*

The other **NPMs** are agencies which the New Zealand Government considered to have a tradition and reputation for institutional independence and credibility. The following agencies are formally designated as New Zealand's National Preventive Mechanisms under the Crimes of Torture Act 2006:

1. **the Independent Police Conduct Authority** - which is designated to examine the conditions and treatment of persons who are in police cells or otherwise detained in the custody of the police;

2. **the Children's Commissioner** - who is designated to look at the conditions and treatment of children and young persons in care and protection and youth justice residences;

3. **The Inspector of Service Penal Establishments**, appointed under the Court Martial Act - This office monitors the conditions and treatment of persons detained within the military justice system; and

4. **The Ombudsmen** - who are designated to oversee the following places of detention in New Zealand:

    - prisons (where we already have jurisdiction under the Ombudsmen Act);
    - health and disability places of detention;
    - premises approved and agreed under the Immigration Act 1987;
    - youth justice residences; and
    - child care and protection residences.

A complicating factor for us is that **part of our function is shared** with the Office of the Children's Commissioner. We are both designated to visit and monitor child care and protection residences and youth justice facilities. This could have been problematic, particularly in terms of determining how this should work in practice, and avoiding unnecessary duplication.

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[1] OPCAT in the Asia-Pacific and Australasia – Richard Harding and Neil Morgan (2009).

This shared jurisdiction is also complicated by the fact that any act, omission, decision or recommendation of the Children's Commissioner can be the subject of a complaint to the Ombudsmen and investigated under the Ombudsmen Act. For these reasons, and others we have developed a memorandum of understanding as to how we work together in relation to monitoring these particular facilities. In practice this has worked well.

The multiple approach adopted in New Zealand looked and sounded fairly straightforward (and that is certainly what the Government thought when it signed up to the OPCAT and then designated the Ombudsman to oversight the various places of detention for which we would be responsible). But, as with most things, the devil is in the detail. Particularly when you consider that, in New Zealand, there are 11 different Acts under which people can be detained, and there was no definitive list of the total number of places of detention. For example, the Ministry of Health was initially not able to tell us exactly how many 'locked' facilities its District Health Boards operated.

The Ombudsman as an effective NPM

When a country is contemplating the mechanism for implementing the OPCAT a common debate is whether the National Human Rights Institution (NHRI) or an Ombudsman is the more appropriate agency to lead this work.

Many countries have opted for the latter on the basis that the Ombudsman's breadth of jurisdiction and powers enables a broader approach to be taken. The Ombudsman is independent and generally reports only to the Parliament or its equivalent and has its funding authorised by Parliament.

The Ombudsman's Office in New Zealand is celebrating its 50th Year this year, and so the Ombudsman has the credibility built up over those 50 years as being an independent, robust and trusted agency. A high level of integrity, and trust in the work of the office, had been established with government agencies, and with the public.

So in this country it was only necessary for us to do our part in promoting the value of the OPCAT process and also to demonstrate that we could be a valuable resource for agencies in highlighting specific or systemic issues which needed action; then to draw attention of the appropriate Minister to the need for resources to deal with these issues.

Commenting on the New Zealand development of the OPCAT in Australasia and the Pacific, Harding and Morgan note:

> *"...the NPMs, including the HRC and the Ministry of Justice, have each recognised the need to explain to senior Departmental personnel and to line staff what the new system is all about. Efforts are being made to produce simple guidelines in electronic and booklet form. They include such matters as routine examples of Cruel, Inhuman or Degrading Treatment or Punishment, a definition of torture, the fact that on-the-ground staff carry responsibility for the safety of NPM staff while they are on-site, the importance of the role of one-on-one meetings and the confidentiality to which interviewees are entitled, and the duty to facilitate free movement within places of detention.*

> *... the New Zealand agencies have demonstrated their understanding that, if the OPCAT is to be effective in the long run, the personnel affected must be enabled to understand what it is and why it is important. Ultimately, as with all inspection regimes, the beneficiaries are actually as much the staff as the detainees; that is the message that training on the OPCAT aims to get across."*[2]

Delegating the powers and responsibilities to Inspectors, to ensure the separation of the Ombudsman's normal function from its NPM responsibilities

The UN requires that when an existing agency is designated as an NPM there must be a **strong internal separation of this role** from its other functions. To facilitate this we appointed two Crimes of Torture Act (COTA) Inspectors to assist with the exercise of our functions under delegation, and we have made a concerted effort to keep separate our investigation role from our OPCAT role as much as possible. The OPCAT work and visiting schedules are kept secure and locked off from investigators. If a complaint arises from an OPCAT visit, then we deal with that under our Ombudsmen Act powers. Similarly, if any of our designated Prison investigators comes across anything which falls into the OPCAT framework they will refer that to the OPCAT inspectors.

However, while a strict internal separation of roles may be desirable, in the New Zealand context, given the limited resources we have, a total separation just is not practical for any of the other New Zealand NPMs, especially where little if any extra funding is provided. We are all in agreement that the practical has to trump the theory in this case and the Human Rights Commission (as the designated liaison between the NPMs and the UN) agreed to support our approach. To date, there seem to have been no issues arising from the lack of a complete separation of the roles.

Scoping of the role was essential

Scoping for this new role raised some very important issues for us:

- geographically the sites for which we are responsible cover the length and breadth of New Zealand and would necessitate much travel. To extract the best value for money out of the travel costs the Inspectors do multiple visits to different sites in a particular area;
- it was to be nearly three years before we established a reasonably accurate list of mental health sites;
- we had to determine exactly who were the most appropriate personnel/ managers on site that the Inspectors ought to be dealing with;
- complicating matters considerably was the recent realisation that our visit responsibilities may also cover secure aged care facilities (particularly dementia units - of which there are

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[2] Ibid.

160) and for which we have yet to receive any additional funding. We are presently scoping this potential additional role.

The composition of visiting teams

During the scoping exercise the Chief Inspector was assisted by a former Mental Health Commissioner, who literally 'opened doors' for him at the mental health facilities as she was already well-known in that environment. This also gave some immediate credibility to the Inspector. Once the second Inspector was appointed, the Visiting Team became a two-person operation, complemented from time to time by other NPM operatives, a former Ombudsman Investigator, and a contracted social worker.

Whist this process certainly underlined the need for specialist advice to supplement the Inspectors' review, the reality for us is that there is unlikely to be any additional money available in the foreseeable future to expand the role to its fullest extent and always have a team of experts to accompany us on our inspections. The Inspectors therefore have to work within the limitations of existing funding and are currently in the process of setting up contractual arrangements with experts (for example a psycho-geriatrician) to accompany them, on some visits. A proposal that an 'expert panel' be convened to assist all the NPMs is under consideration, but in the meantime, if we are to fulfil our obligations under the OPCAT as to the composition of teams, we need to continue to prioritise our visits carefully and redeploy resources to enable expert advice to be utilised as necessary.

What's working for us

In general terms, the OPCAT Inspectors look at any or all of the following:

- **Treatment:** any allegations of ill-treatment; the use of isolation, force and restraint.
- **Protection measures:** registers, provision of information, complaint and inspection procedures, discipline procedures.
- **Material conditions:** accommodation, lighting and ventilation, personal hygiene, sanitary facilities, food, clothing and bedding.
- **Activities:** contact with family and the outside world, outdoor exercise, education, leisure activities, religion.
- **Medical services:** access to medical care.
- **Staff:** staffing levels, conduct and training.

Depending on what presents to the Inspectors at the time, the Visit/Inspection might focus on one particular area in some depth, such as the use of restraint, or the adequacy of a particularly old building that may no longer be fit for purpose.

In conducting our inspections we have adapted the UN "checklist" for recording aspects of abuse of human rights to something which better suits the New Zealand reality and the resources we have available. This enables us to validate the level of compliance with the various Acts

governing these institutions and the provisions of the Convention Against Torture.

Getting results

The issues we have dealt with in our NPM role have all been manageable, and not in my view, any reason to decline taking on such a role. In fact, the reality of what we have found has convinced me, more than anything else, that this is an important role for an Ombudsman. In the 3 years since we started formal announced and unannounced visits we have found, among other things:

- A mental health patient who had been in virtual seclusion and waist restraints for nearly six years because of her propensity to assault other patients and staff. While we could understand the need for limited restraint and seclusion for a short period of time while other options were considered, this subsequent evaluation of the patient's predicament never occurred – until, that is, we intervened. The hospital authorities agreed that the patient was entitled to a better quality of life and two years on (subsequent to a follow-up visit) the patient is now doing much better, had only required restraint for a few hours in the previous twelve months, and was now enjoying escorted trips into the city without incident.
- People detained in mental health facilities and being subjected to seclusion and restraint with no valid documentation authorising their detention.
- An asylum seeker held in a mental health facility for more than a year simply because they could not release them into the community for immigration reasons.
- Offenders who had been denied their appearance before the parole board because they were detained in a hospital and the paperwork had not been passed across with them.
- Sub standard detention facilities.
- Ill considered placement of prisoners undergoing gender re-assignment

Despite all the other agencies already working in, and reporting on, these sectors, if it wasn't for the Ombudsmen taking on the OPCAT role, these people would still be subject to the wrong, illegal and inappropriate conditions and treatment that we discovered. We have been able to remedy their circumstances and hopefully prevent anything similar from occurring again.

Are there ways to measure success?

An issue which also confronts the NPMs is to demonstrate the worth of their work to Government and the public.

You can point to success in having recommendations acted upon, improvements made to process and practices in detention facilities and people's human rights and safety being observed and enhanced. But developing a framework for measuring success in terms of the reduction of potential financial liability to the Government is not so easy. In discussions on annual budgets being able to demonstrate that for every dollar spent in the OPCAT jurisdiction there is an overall

gain for the taxpayer could be potent.

We are giving this matter some thought in light of our experience with unlawful detention.

In New Zealand, unlawful detention of an individual in any place of detention risks a financial liability for the relevant agency, and in turn, the Crown (and of course, the taxpayer). Given that New Zealand supposedly had the necessary systems in place to minimise instances of unlawful detention, it was of significant concern to find that substantial potential financial liability had been accruing over previous years due to numerous instances of unlawful detention occurring that existing audit and inspection processes had failed to identify. Bearing in mind that we are only identifying instances that occurred in prisons, mental health sites and immigration detention facilities, for which we are the relevant NPM, the following examples of unlawful detention were alarming:

- The discovery of a patient in a mental health facility who had been detained for six years without any lawful documentation. His treatment included frequent use of seclusion and restraint.
- The identification a prisoner who was unlawfully recalled to prison for 31 days because none of the agencies involved (NZ Parole Board, Department of Corrections, Courts, Ministry of Health and Ministry of Justice) properly understood the parole limitations/restrictions on people detained under the Criminal Procedure (Mentally Impaired Persons Act 2003). Further discussions with the Ministry of Justice resulted in their developing a process with Corrections and Courts to record these individuals' details in a shared database. It was very concerning to note that although the relevant legislation had been in place for nearly five years, there was no collective understanding of its implications until the matter was uncovered by the OPCAT Inspectors.

The potential financial liability arising from such cases could be substantial, particularly if an award of punitive damages was considered warranted.

Had these instances not been identified the Crown's potential liability would have grown further.

Issues that have arisen that others contemplating the role need to be aware of

Countries considering signing up to the OPCAT or which have signed the OPCAT need to consider this question:

> *"Can your country be absolutely sure that the various agencies responsible for the detention of individuals have existing audit and inspection processes that have, and will continue to properly identify each and every case of unlawful detention of the types we have described above?"*

Given our experience, the answer is likely to be a resounding 'NO'.

Enhancing our work under the OPCAT

We have found a number of ways of working that enhance our role under the OPCAT:

- Arranging with the other NPMs for their staff to accompany the Inspectors on some of their visits, and vice versa. This ensures that we are all acting in accordance with the Protocol and can share experience and learnings.
- Regular meetings with HRC and other NPMs to undertake, among other things, joint promotional activities.
- Commenting on legislative proposals which raise implications for the human treatment of detainees. While this is not one of the New Zealand NPM's functions under legislation, Article 19(c) of OPCAT states that NPMs should have the power to make proposals and observations about existing or draft legislation. We recently made submissions on proposals to amend the Corrections Act, which raised a number of issues relating to the restraint and search of prisoners, their minimum entitlements to exercise, and testing for alcohol and drugs. We criticised some of the proposals which, in our view, removed existing protections that were put there for good reason.
- Developing a prisoner questionnaire, based on the United Kingdom's Prison Inspectorate Prison Questionnaire, but adapted to the New Zealand situation. This enables us to identify emerging issues and locations where human rights abuses may be occurring.
- Using an expert in psycho-geriatrics to assist with assessing mental health issues in health and disability places of detention.
- Constantly looking at ways to improve what we do and better promote the work to the stakeholders.

Conclusion

We may not be doing the work under OPCAT exactly as the UN would prefer in regard to the composition of teams, or the scale and complexity of visits, but with the very good skill base of our current Inspectors, and the additional skilled team members we co-opt from time to time, we believe we are doing the best we can with the resources that have been made available.

Finally, for those of you still considering taking on this specialist role, don't be afraid to consider it. The value you can add could be immense. However, before accepting any new specialist function offered to you, I encourage you to make sure that you:

- understand clearly what the expectations are arising from that function;
- ensure you are adequately resourced to properly carry out that new function and meet those expectations; and over and above all else
- protect your independence, powers and jurisdiction as an Ombudsman.