

# **New Zealand's specialist Ombudsman function – the OPCAT**

*What is it, what's involved and what were the issues we've encountered when we took on this new role*

## **Introduction**

I did a quick check before I came today to see how many of our APOR members are on the same OPCAT path that we have been on for the past few years. Australian offices and institutions will be fast becoming familiar with this acronym, since your country signed up to and ratified the OPCAT last year. For the Pacific Islands OPCAT may, for the moment, be a complete mystery.

Today, I am going to give you a quick overview of the issues we have had to deal with as a result of taking on this specialist role. Whether you find yourself on the OPCAT path or not, I think my message is the same – and that is, whenever any new function is offered to you:

- detailed research and understanding of the expectations arising from that function are vital;
- ensuring you are adequately resourced for the new function is essential; and
- over and above all else, the independence, powers and jurisdiction of your Office must always be protected.

So, let me quickly run through what OPCAT is actually all about.

## **Background**

In the mid 1980s the United Nations *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT)* was opened for signature. This Convention required all States that signed up to it to take effective measures to prevent torture occurring within their borders. New Zealand became a signatory to the CAT in 1986 – and so far over 140 other nations have also done the same.

New Zealand ratified the CAT 3 years later in 1989 by passing its *Crimes of Torture Act*. This was a short Act – only 14 sections long, and essentially said don't torture people in New Zealand – in fact don't even think about it – don't conspire, counsel, incite or abet a person to commit an act of torture because if you do, you will risk being detained yourself - for a very long time.

All State parties who are signatories to the CAT are required to submit a report every four years to the UN Committee Against Torture. This report must give a comprehensive outline of the State's compliance with the CAT. However, when the UN Committee Against Torture receives these self-reports, all it can do is analyse them and discuss them. It doesn't have any power to visit these countries, or inspect for themselves the places of detention referred to in the reports, unless it has permission from that particular State. So essentially, the UN had to take the State parties' reports at their word.

However, a few years ago the UN realised that if states are to be truly committed to preventing torture occurring within their borders, there should be some form of independent external inspection or monitoring going on. Work was therefore commissioned on developing an **Optional Protocol to the CAT** which would essentially provide for

*“...a system of **regular visits by independent international and national bodies to all places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.**”*

The UN General Assembly approved the Optional Protocol (**the OPCAT**) in late 2002. Only 8 Countries voted against it: (*China, Cuba, Israel, Japan, Nigeria, Vietnam, Syria, United States*) Within the year, the New Zealand Government had signed up to the OPCAT. Upon doing so, they had committed themselves to facilitating and financing the establishment and operation of such a system in New Zealand.

4 years later they ratified the OPCAT by passing the Crimes of Torture Amendment Act. As a result, our Crimes of Torture Act has now doubled in size with the addition of a *Part 2* which essentially provides for three things:

1. *open and unrestricted visits by an international review body* which will do their own examination and monitoring of New Zealand's places of detention as well as evaluate the national review bodies;
2. *the establishment of national review bodies* which will have completely unrestricted powers of entry, inspection and access to information and detainees

AND

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

That's the framework in New Zealand. Here's what it looks like in practice:

### **The New Zealand model**

The **international** review body has been formed and it is the *United Nations Subcommittee on the Prevention of Torture*. It comprises 10 members elected by the 29 States who had signed up to the protocol by the end of 2006. (we weren't one of them). These ten members have already begun entering into States and conducting unannounced visits on places of detention, interviewing detained persons in private and accessing all relevant information (so far Mauritius, Maldives, Sweden, Paraguay, Mexico and Benin). At this stage, we do not know when the UN Subcommittee will be doing their first visit or "audit" of New Zealand. The schedule of countries to be visited is done by ballot and the current expectation is that once every 4 years, they will appear on our doorstep.

When it came to deciding who would be the **national** review bodies in New Zealand, OPCAT was silent on the form or type of organisations they should be. States can therefore choose whether to create an entirely new entity with the specific function of conducting these reviews or they can designate this function to a body that already exists. Some countries, like the UK, Ireland, Germany and Italy for example, have chosen to go with the first option i.e. create specific new bodies to do the monitoring. However, they are already experiencing the constraints of doing it this way i.e. they have had to start from scratch:

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

It's a much slower process – the UK for example, was the third country in the world to ratify OPCAT (in December 2003) - they had a 3 year head start on New Zealand - but already we are a lot further ahead than them. This is because our Government, like most other signatories to the OPCAT, have chosen to designate multiple, already-existing, bodies to be the National Preventive Mechanisms (and almost

always, that's included an Ombudsman) with a central body to co-ordinate their work and liaise with the UN. The **central** co-ordinating body in New Zealand is the *Human Rights Commission*.

As for the **National** bodies, they are agencies which the New Zealand Government considered had a tradition and reputation for institutional independence and credibility which they could fall back on or rely on when carrying out this UN role. These agencies were formally designated as New Zealand's *National Preventive Mechanisms* in June last year and they are:

1. *the Independent Police Conduct Authority* - they are 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 Commissioner For Children* - who is designated to look at the conditions and treatment of children and young persons in care and protection and youth justice residences;
3. *Visiting Officers appointed under the Armed Forces Discipline Act*, - They monitor the conditions and treatment of persons detained within the military justice system; and
4. *The Ombudsmen* –we are designated to oversee the bulk of the places of detention in New Zealand:
  - prisons; (where we already work under the Ombudsman Act)
  - health and disability places of detention;
  - premises approved and agreed under the Immigration Act 1987; and
  - youth justice residences; and
  - child care & protection residences.

The last 2 are shared with the Commissioner for Children.

This may look and sound fairly straight forward (and that's certainly what the New Zealand Government thought when they signed up to the OPCAT and then designated us the various places of detention). But, as with most things, the devil is in the detail!

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

## Issues arising from this specialist role

A major issue for us was trying to accurately work out just **how big this new role** was – how many facilities were we expected to visit regularly, monitor and report on?. The answer to this is so important for determining what additional resources or funding would be needed for the Ombudsmen to meet New Zealand’s international (and national) obligations. We began by looking at the proposed designation alongside the expectations of the UN. We have found that the way the designation is worded has hindered our ability to quickly and accurately define which facilities we should be monitoring. We knew there were:

- 20 prisons;
- 7 youth justice residences;
- 9 child care and protection residences;

But there were also an indeterminate number of detention facilities assigned under the Immigration Act – “*indeterminate*” because our Act provided for detention in “*any premises approved by the Secretary of Labour*”; which can include formal immigration detention facilities, airports, border terminals etc.

We were also designated to visit all “*health and disability places of detention*” in New Zealand. Originally we thought they numbered 35 - but the figure is closer to 130 and still growing. The number is so high because of the way the health sector is set up in New Zealand. While some facilities might be on the same campus or under the same district health board, they often operate autonomously, with different reporting structures and pursuant to quite different legislation. We’ve had to spend some time undertaking scoping visits to find this out, rather than simply rely on numbers on a piece of paper that the Ministry of Health initially provided to us. It’s only been as a result of those visits that we now know that each unit needs to be visited and reported on separately given the needs of the patients detained therein, whether they are there:

- for assessment and care when they are thought to lack the ability to form criminal intent because of intellectual disability or insanity (the Criminal Procedure (Mentally Impaired Persons Act) 2003);
- for mental health assessment and treatment (the Mental Health (Compulsory Assessment and Treatment) Act 1992);

- because they are intellectually disabled and offending has occurred the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003);
- because they are considered a danger to themselves, others or property – and intellectually disabled, and the elderly are included here (Protection of Personal and Property Rights Act 1998 ); or, detained
- for treatment for alcoholism or drug addiction;

We are also aware that our current designation of *“health and disability places of detention”* could encompass rest homes – if so, the numbers of places to visit would rise exponentially and we simply don’t have the resources to meet this.

So the size of the role is the first issue And the Independent Police Conduct Authority is a kindred spirit in this regard – their designation is to monitor and review not only every police cell in New Zealand but also *any other place where a person is detained in police custody.*- they’ve realised that this can include every police car, the side of the road, or even in a person’s living room.

Associated with this size issue has been the matter of working out ***how frequent do the visits need to be.*** The OPCAT and the Crimes of Torture Act require our visits to these places of detention be *“regular”* - but so far there’s no clear definition of how frequent the UN expect these to actually be. For those in prison, their stay can be for a while so we are able to interview the same people over time for their views on whether there has been any improvement of the conditions and treatment they are subjected to. However, the average detention of a young person in a child care and protection residence is between 28 days and 3 months, so visits may have to be more regular to determine whether the treatment is appropriate. This naturally has resource implications.

Thirdly, there’s been the issue of ***the make-up of the teams*** and ***whether we were indeed qualified to take on this role*** in the first place. As Ombudsmen, we have never really looked at the needs of patients with particular mental health issues, the specific needs of young children or of traumatised asylum seekers. So how could we form quality opinions on the facilities and treatment these people were subject to and make recommendations that were appropriate for their circumstances? Certainly that was a question asked of us by many officials already operating in these areas - and I suspect at the root of any suspicion they had of us entering into their domain and forming opinions on whether what was happening in their sectors was reasonable or needed improvement.

At first we found it difficult to disagree. We too, were initially unsure what level of specialist knowledge we ought to have to properly carry out our role, for example, how far should we go on commenting on actual medical treatment e.g. the use of ECT (electro-convulsive therapy) when it's a recognised form of treatment, diagnosed by medical professionals.

We have managed and resolved these issues by researching, consulting experts and receiving guidance from the UN as to the expectations of our OPCAT role. As a result, it is clear that the OPCAT role is not a medical role nor is it a legal one. Rather:

*“The OPCAT requires that the NPM approach its work with the aim of improving conditions of detention and protecting persons **in a practical sense** rather than an assessment of “legality” per se ...However the NPM’s own expertise can be supplemented from time-to-time by engaging outside experts to accompany NPMs on their visits to assist their understanding” .*

That is an approach which we are comfortable with and so it seems, are the people we deal with in our OPCAT role.

The UN also requires that when a state designates an agency that already exists to be its National Preventive Mechanism, there must be a **strong internal separation of this role** from its other functions. In this regard, we have received guidance from the UN which states:

*“If, having considered the possible problems and benefits of having a combined mandate, the State determines that a single institution is to serve both as a National Preventive Mechanism and as a forum for individual complaints, it will be necessary to create strong internal separation of functions (formally divided administrative structure, physically separate offices, separate personnel and record-keeping systems etc) in order to ensure that the visiting-dialogue functions under OPCAT are not compromised by other mandates.”*

The rationale behind this is sensible. If one of our prison investigators knows of the OPCAT visiting schedule and casually refers to a forthcoming visit of the OPCAT inspector, theoretically there's time for the prison to shift a troublesome prisoner

elsewhere or sedate him so he is not able to raise concerns. Alternatively, staff in the facility may be less inclined to speak to an investigator about an issue for fear they could use that information against them in an investigation, whereas the OPCAT inspectors can use that information confidentially to focus their enquiries and monitoring.

However, while a strict internal separation of roles may be desirable, in the New Zealand context, given the limited resources we have, such a separation just is not practical for the Office of the Ombudsmen. Nor was it so for any of the other New Zealand NPMs. We expect that this may be the subject of criticism by the UN Subcommittee when it comes to visit us. But 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) has advised them accordingly and agreed to support our approach.

Having said that, 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. And if a complaint arises from an OPCAT visit, it is investigated by a separate team rather than by the Inspectors.

Another issue we initially had to work through came out of the OPCAT requirement that NPMs not only conduct visits, but also ***make recommendations for improvements*** of these places of detention. You might think this may not sound problematic as we do that already as Ombudsmen. But Article 22 of the OPCAT requires more. It says:

*“The competent authorities of the State Party concerned shall examine the recommendations of the National Preventive Mechanism and **enter into a dialogue with it** on possible implementation measures”*

In other words, it expressly creates a duty under international law for the government to consider our recommendations **and** enter into an active and constructive dialogue with us about their implementation. However, the New Zealand Crimes of Torture Act does **not** expressly require any ongoing government dialogue nor any other reaction to our recommendations at all.

We received a paper from the Association for the Prevention of Torture in Geneva (the NGO who drafted the OPCAT) heavily criticising legislation such as ours. Members of this NGO came to New Zealand early on and met with all the NPM's and warned us that the UN Subcommittee will not only be expecting our reports to set out a timeframe and procedure for the Government to respond to our recommendations but will also be expecting us to take responsibility for ensuring they are followed through and implemented. In other words, there could be some tension between New Zealand's National Preventive Mechanisms and the UN Subcommittee in terms of how far they expect us to push for implementation of our recommendations. In theory at least. So far, in practice we have found the reputation of the Ombudsmen precedes us and any recommendations we have made thus far have been accepted and implemented. It's when there is no funding for implementing a particular recommendation that things may become tricky.

Finally, as I indicated earlier, ***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 has been problematic, particularly in terms of determining how this should work in practice. For one thing we have quite a different focus and powers:

- the Children's Commissioner is a Crown entity and a statutory advocate for children; whereas
- the Ombudsmen are independent Officers of Parliament with all the powers of a Commission of Inquiry.

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 are in the process of developing a memorandum of understanding as to how we expect to work together in relation to monitoring these particular facilities. If that doesn't work, we may have to seek a change in the designation.

### **The good news**

Those are the main issues we have had to deal with under OPCAT - but they 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 as a result of taking on this role has convinced me, more than anything else, that this is an important role for the New Zealand Ombudsmen to embrace. In the 18 months since we started formal announced and unannounced visits we have found, among other things:

- a person in virtually constant restraint and seclusion for nearly 6 years in a mental health facility;
- 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.

Despite all the other agencies already working in, and reporting on, these sectors, if it wasn't for the Ombudsmen taking on this particular specialist role, I fear 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.

## **Closing**

In closing, my advice to any colleague considering taking on a new and specialist role is 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.