

## Executive summary

1. New Zealand's National Preventive Mechanisms under the Optional Protocol to the Convention against Torture are particularly concerned about resourcing for their work, the mental health needs of those detained, the responsiveness to the needs of Māori in detention, the use of seclusion and restraint, age-mixing, and youth in police cells, and want to see the recommendations of the Subcommittee on the Prevention of Torture implemented.
2. We encourage the following recommendations to be made:
  - The Government increase funding levels to cover the actual costs of NPMs' OPCAT work.
  - Take urgent steps to ensure the availability and appropriate provision of mental health for people in detention.
  - Adequately resource the implementation of actions arising from the mental health inquiry.
  - Detaining agencies (including the Department of Corrections, Ministry of Health, Oranga Tamariki, and New Zealand Police) to develop overarching frameworks and strategies to address the needs of Māori in detention, in consultation with Māori, and provide adequate resourcing to implement them.
  - Implement all the recommendations from the report, *Thinking Outside the Box? – A review of Seclusion and Restraint Practices in New Zealand*.
  - Withdraw the reservations to article 37(c) of the Convention on the Rights of the Child, and articles 10(2)(b) and 10(c) of the International Covenant on Civil and Political Rights.
  - Repeal section 238(1)(e) of the Oranga Tamariki Act and create alternative accommodation options.
  - Take urgent, adequately resourced measures to sustainably reduce the prison population, particularly for remand and women prisoners.
  - Remove from legislation the ability for police cells to be designated as prisons.
  - Implement the recommendations of the Subcommittee on the Prevention of Torture in their report following their visit to New Zealand in 2013.

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## Introduction

3. In 2007, New Zealand ratified the Optional Protocol to the Convention against Torture (OPCAT) and established National Preventive Mechanisms (NPMs).

4. New Zealand established a multiple body NPM comprising four independent monitoring bodies each responsible for specific places of detention, and a central coordinating NPM. The NPMs are the Ombudsman, the Independent Police Conduct Authority, the Children's Commissioner, and the Inspector of Service Penal Establishments. The New Zealand Human Rights Commission has a coordination role as the central NPM.
5. This submission concerns the rights of persons deprived of their liberty and implementation of OPCAT in New Zealand. It focusses on areas across detention environments and of concern to the NPM as a collective, specifically;
  - resourcing for NPMs
  - mental health
  - over-representation of Māori
  - seclusion and restraint
  - age-mixing
  - youth in police cells, and
  - recommendations of the Subcommittee on the Prevention of Torture.

### **Resourcing for NPMs**

6. The NPMs continue to struggle with resourcing. Since ratification of OPCAT NPMs have not consistently received adequate resourcing to carry out their OPCAT functions. The NPM's potential remains underutilised as inadequate resourcing continues to constrain some NPMs. As a result, some NPMs are yet to make consolidated progress on a range of key issues and have not been able to implement a more comprehensive monitoring approach that is in line with international best practice.
7. The Children's Commissioner received no additional funding when it was first designated as an NPM in 2007. For many years work for OPCAT was funded from other streams of work. However, in 2017/18 the Office of the Children's Commissioner received an additional \$250,000 for all of their monitoring, of which approximately \$95,000 was used for OPCAT monitoring.
8. The Independent Police Conduct Authority has been allocated a minimal amount for its OPCAT work, approximately NZ\$55,000 per annum. In 2018 they applied for more funding. They obtained funding for other work but were not given more funding for their OPCAT function.
9. In the 2017/18 year the Ombudsman was successful in obtaining new funding for an increased focus on prison conditions. On 6 June 2018 the Ombudsman was designated as the NPM responsible for privately run aged care facilities, a place of detention not currently covered by the NPMs in New Zealand. There are approximately 180 of these facilities in New Zealand. The Ombudsman was also designated as an NPM responsible for court cells, of which there are approximately 60. This designation is shared with the Independent Police Conduct Authority. To effectively monitor these places of detention will require a significant increase in resourcing for the Ombudsman.

10. Better resourcing would enable increased frequency of visits and better inspection coverage by all NPMs, as required under OPCAT. More funding would also mean the services of experts could be contracted to assist with visits when and where required.

**Recommendation one: The Government increase funding levels to cover the actual costs of NPMs' OPCAT work.**

## **Mental health**

11. Those who are detained are more likely to experience mental health issues and being detained can exacerbate these conditions. Those people who are detained and experience mental health issues are not receiving optimal care and treatment while detained or may be detained in an inappropriate environment.
12. In prisons, mental health services are provided by regional forensic psychiatry services. Prisoners may be transferred to a secure forensic mental health facility for treatment in a therapeutic environment. Prisoners may be kept in prison many months waiting for a transfer to a mental health facility.<sup>1</sup> This may occur due to a lack of beds or someone from the community taking precedence over a prisoner, who is viewed as already in a secure environment.
13. Studies have shown that between 40 and 60 per cent of youth who have offended have mental health and/or alcohol or other drug disorders.<sup>2</sup> Access to specialist mental health treatment is variable across youth justice and care and protection residences.<sup>3</sup> A National Secure Youth Forensic Inpatient Service, with 10 beds, opened in 2016. This is a positive step but more needs to be done.
14. Police are often the first point of call when someone is experiencing mental distress. As at July 2017, every 24 hours Police responded to 90 calls involving a person having a mental health crisis.<sup>4</sup> Over the past 20 years the number of incidents of acute mental distress responded to by Police increased by 350 per cent. At the same time, incidents involving threatened or attempted suicide increased by 800 per cent.<sup>5</sup> Police are not the appropriate agency to deal with those in mental distress. Often these people end up detained in a police cell due to a lack of other suitable facilities and mental health professionals not being available.

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<sup>1</sup> Shalev, S. (2017) *Thinking Outside the Box? A review of seclusion and restraint practices in New Zealand*, Available: [www.seclusionandrestRAINT.co.nz](http://www.seclusionandrestRAINT.co.nz)

<sup>2</sup> Ministry of Health (2011) *Youth Forensic Services Development: Guidance for the health and disability sector on the development of specialist forensic mental health, alcohol and other drug, and intellectual disability services for young people involved in New Zealand's justice system*, Available: <https://www.health.govt.nz/system/files/documents/publications/youth-forensicdevelopment-services-dec2011.pdf>

<sup>3</sup> New Zealand National Preventive Mechanisms (2016) 2015/16 Monitoring Places of Detention, Available: [https://www.hrc.co.nz/files/6414/9082/5210/Monitoring\\_Places\\_of\\_Detention\\_2016\\_3.pdf](https://www.hrc.co.nz/files/6414/9082/5210/Monitoring_Places_of_Detention_2016_3.pdf)

<sup>4</sup> NZ Police (2017) Mental health – driver of demand, Available: <http://www.police.govt.nz/news/ten-one-magazine/mental-health-%E2%80%93-driver-demand>

<sup>5</sup> New Zealand National Preventive Mechanisms (2015) 2014/15 Monitoring Places of Detention, Available: [https://www.hrc.co.nz/files/6814/4971/3990/Monitoring\\_Places\\_of\\_Detention\\_final\\_2015.pdf](https://www.hrc.co.nz/files/6814/4971/3990/Monitoring_Places_of_Detention_final_2015.pdf)

15. People with mental health needs and experiencing mental illness should receive the treatment they require in an appropriate facility that will not exacerbate their illness.
16. On 23 January 2018 the Government announced a wide ranging independent inquiry into Mental Health and Addiction Services. The panel that has been appointed to consider the matter is tasked with recommending specific changes to improve New Zealand's approach to mental health, with a focus on equity of access, community confidence in the mental health system, and better outcomes, particularly for Māori and other groups with disproportionately poorer outcomes. The Inquiry Panel is due to report back by 31 October 2018.

#### **Recommendation two:**

- a) **Take urgent steps to ensure the availability and appropriate provision of mental health for people in detention.**
- b) **Adequately resource the implementation of actions arising from the mental health inquiry.**

#### **Over-representation of Māori**

17. Māori make up 15.4 per cent of New Zealand's population,<sup>6</sup> but make up a greater percentage of those detained in New Zealand;
  - As at 30 June 2017, Māori were 50.4 per cent of the prison population.<sup>7</sup>
  - Māori accounted for 26 per cent of mental health service users in New Zealand in 2015.<sup>8</sup>
  - 60 per cent of those detained in a care and protection residence, and 70 per cent of those detained in youth justice residences are Māori.<sup>9</sup>
  - Māori are involved in 46 per cent of police apprehensions.<sup>10</sup>
18. We are concerned that our criminal justice system is not responding to the needs of Māori. The Waitangi Tribunal stated that the Crown has a Treaty responsibility to reduce inequities between Māori and non-Māori reoffending rates to protect Māori interests.<sup>11</sup> This responsibility requires the Crown to work in partnership

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<sup>6</sup>Statistics New Zealand (2016) *Māori Population Estimates: Mean year ended 31 December 2016*, Available at [http://www.stats.govt.nz/browse\\_for\\_stats/population/estimates\\_and\\_projections/Maori/PopulationEstimates\\_HOTPMYe31Dec16.aspx](http://www.stats.govt.nz/browse_for_stats/population/estimates_and_projections/Maori/PopulationEstimates_HOTPMYe31Dec16.aspx)

<sup>7</sup>Department of Corrections (2017) *Prison facts and statistics - June 2017*, Available: [http://www.corrections.govt.nz/resources/research\\_and\\_statistics/quarterly\\_prison\\_statistics/prison\\_stats\\_june\\_2017.html](http://www.corrections.govt.nz/resources/research_and_statistics/quarterly_prison_statistics/prison_stats_june_2017.html)

<sup>8</sup>The Office of the Director of Mental Health (2016) *The Office of the Director of Mental Health Annual Report 2015* Available: <https://www.health.govt.nz/publication/office-director-mental-health-annual-report-2015>

<sup>9</sup>Children's Commissioner (2017) *State of Care 2017: A Focus on Oranga Tamariki's Secure Residences*, Available: <http://www.occ.org.nz/assets/State-of-Care.pdf>

<sup>10</sup>NewsHub (2015) *Commissioner: Police addressing bias in Maori relations*, Available: <https://www.newshub.co.nz/home/new-zealand/2015/11/commissioner-police-addressing-bias-in-maori-relations.html>

<sup>11</sup>Waitangi Tribunal (2017) *Tū Mai te Rangi: Waitangi Report on Disproportionate Re-offending* Available: [https://forms.justice.govt.nz/search/Documents/WT/wt\\_DOC\\_135986487/Tu%20Mai%20te%20Rangi%20W.pdf](https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_135986487/Tu%20Mai%20te%20Rangi%20W.pdf)

with Māori, not just simply inform itself of Māori interests. Some detaining agencies are making great strides towards reducing inequities while others have some way to go.

19. Oranga Tamariki (The Ministry for Children) has new obligations towards mokopuna (child) Māori under the Oranga Tamariki Act 1989, which come into force on 1 July 2019. Oranga Tamariki must aim to reduce disparities by setting measurable outcomes for Māori children and young people. The Act also makes it clear that regard must be had to mana tamaiti (improving the wellbeing of and upholding the dignity of Māori children and young people), the whakapapa (genealogy) of Māori children and young people, and the whanaungatanga (relationship/connections) responsibilities of their whānau (extended family), hapū (subtribe), and iwi (tribe). Many youth justice and care and protection residences are beginning to put significant effort into this for example, by having concrete plans to improve their services for mokopuna Māori. The plans however are reliant on skilled staff. Māori staff often end up with extra responsibilities on top of their daily work, without accompanying resources, on-going support, or acknowledgement of this additional work. Resources are needed to ensure that residences can build the cultural capability of staff and implement the new plans. Iwi and Māori social service agencies need to be recognised and better supported and utilised, as the Oranga Tamariki Act 1989 requires, to significantly improve the lives of mokopuna Māori.
20. Some prisons do have specialised units with a focus on Māori culture. There are two Whare Oranga Ake Units, which aim to provide a kaupapa (foundational principles) Māori environment, and five Te Tirohanga units, the national kaupapa Māori rehabilitation programme. During inspection the Ombudsman noted these units were not full and had spare capacity. While the existence of these units is positive, these programmes are not available in all prisons. This was raised as a concern by the UN Subcommittee on the Prevention of Torture. Reports of the Ombudsman following inspections have noted some prisons lack an overarching kaupapa and do not provide sufficient cultural support and engagement.
21. Mental health services are more effective when they understand and respect individuals' support circles and identities. This is particularly important for Māori and their whānau (extended family). The Ministry of Health requires District health Boards (DHBs) to report on whānau consultation. However, the Ombudsman has found some DHBs have not been contacting whānau.
22. There needs to be an overarching kaupapa, bicultural frameworks, and strategies that make a real difference for Māori.

**Recommendation three: Detaining agencies (including the Department of Corrections, Ministry of Health, Oranga Tamariki, and New Zealand Police) to develop overarching frameworks and strategies to address to the needs of Māori in detention, in consultation with Māori, and provide adequate resourcing to implement them.**

### **Seclusion and restraint**

23. The United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules) state that solitary confinement shall only be used in

exceptional cases and as a last resort and should never be used on persons with mental or physical disabilities. For restraints, the least intrusive method shall be used and only for the time required. In New Zealand there are concerns that these standards are not being met;

- Less restrictive measures are not always explored. A prisoner was restrained in a waist restraint with his hands behind his back over a three-month period due to self-harming. His self-harm could have been managed in other ways and did not need this extreme measure.<sup>12</sup>
- A prisoner died whilst being restrained by Department of Corrections staff at Hawkes Bay Regional Prison on 17 March 2017. The Department is conducting an internal investigation.
- Staff shortages and/or risk aversion leading to a greater focus on control and use of seclusion or restraint. For example, a prisoner was tied to a bed for 16 hours a day for 37 nights due to a shortage in staff during this 16-hour period. Some staff at health and disability facilities place a greater focus on controlling patient's behaviour for staff safety reasons.<sup>13</sup>
- Seclusion and restraint are not always used for the shortest time possible. There have been and continue to be individual cases of long-term seclusion. For example, a mental health patient had been in virtually constant restraint and seclusion for nearly six years to prevent the patient from assaulting other patients and staff.<sup>14</sup>
- People in seclusion across detention settings including prison, health and disability facilities, and police cells are not always receiving their minimum entitlements. These include being able to bathe or shower, the ability to make calls or have visitors, a minimum of one hour out of their room or cell each day, and access to water. Some places of detention require people in seclusion to wear anti-suicide gowns.<sup>15</sup>
- Research and literature has shown indigenous people and ethnic minority populations worldwide are more likely to be secluded. This is no different in New Zealand, where Māori are more likely to be secluded than other ethnicities.<sup>16</sup>
- Seclusion areas are not always used for their intended purpose. For example, some mental health patients use seclusion rooms as their bedrooms and some disabled prisoners are in at-risk units due to other cells

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<sup>12</sup> Office of the Ombudsman (2017) *A question of restraint - Care and management for prisoners considered to be at risk of suicide and self-harm*, Available: <http://www.ombudsman.parliament.nz/resources-and-publications/documents/a-question-of-restraint>

<sup>13</sup> ibid

<sup>14</sup> Shalev, S. (2017) *Thinking Outside the Box? A review of seclusion and restraint practices in New Zealand*, Available: [www.seclusionandrestraint.co.nz](http://www.seclusionandrestraint.co.nz)

<sup>15</sup> ibid

<sup>16</sup> Shalev, S. (2017) *Thinking Outside the Box? A review of seclusion and restraint practices in New Zealand*, Available: [www.seclusionandrestraint.co.nz](http://www.seclusionandrestraint.co.nz)

not being accessible for their needs. Being in these areas of seclusion often means the person is subject to a stricter regime.<sup>17</sup>

- Paperwork regarding seclusion and restraint is often inadequate and incomplete. It may not properly record the reason for the seclusion or restraint, may not detail whether less restrictive options were attempted first, or may not state the start and end time of the measure being applied. At worst, some paperwork has been legally invalid. Legislation requires seclusion and restraint to be reviewed within certain time periods. The paperwork shows this does not always occur.<sup>18</sup>
  - Blanket policies leading to seclusion are applied. For example, night safety orders in some health and disability residences require all patients' doors to be locked, and lock-up has been used in one whole area of a prison or youth facility due to one or a few people's infractions.<sup>19</sup>
24. A successful application was made for funding from the Office of the United Nations High Commissioner for Human Rights, through the Special Fund of the OPCAT, for a project reviewing seclusion and restraint practices in New Zealand. This project involved an international expert visiting New Zealand and releasing a public report with recommendations for improving these practices. The NPMs were heartened to see detaining agencies changing and reviewing practices in line with the recommendations. However, there is still a long way to go to alleviate the severe problems with seclusion and restraint, and not all recommendations have been implemented.

**Recommendation four: Implement all the recommendations from the report, *Thinking Outside the Box? – A review of Seclusion and Restraint Practices in New Zealand*.**

### Age-mixing

25. Young people (those aged under 18 years) are held with adults in detention facilities in New Zealand. New Zealand maintains reservations to articles 37(c) of the Convention on the Rights of the Child, and articles 10(2)(b) and 10(c) of the International Covenant on Civil and Political Rights, which concern age-mixing. Treaty bodies and previous UPR recommendations have recommended withdrawing these reservations.
26. Prison youth units are not restricted to offenders under 18 and some units contain young adult male prisoners aged 18 and 19. Some young men aged 16 to 17 have been held in adult prison units. Because there are no youth units in women's prisons, all young women under 18 in the adult prison system mix with adult prisoners. The Department of Corrections explains that age-mixing takes place in some cases because there is a shortage of facilities and/or because it is in the best interests of the young person who has offended. Changes to include 17-year-olds in the youth justice system from 1 July 2019, will mean that few 17-year-olds will remain in the adult corrections system.

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<sup>17</sup> ibid

<sup>18</sup> ibid

<sup>19</sup> ibid

27. Within health and disability places of detention, 16 and 17-year olds have been managed in acute adult mental health units or adult secure homes due to the lack of secure youth beds.
28. Withdrawing the reservation on age-mixing would mean that the right of detained children to be separated from adults would ensure children's best interests are paramount, and not limited by financial or resource constraints.

**Recommendation five: Withdraw the reservations to article 37(c) of the Convention on the Rights of the Child, and articles 10(2)(b) and 10(c) of the International Covenant on Civil and Political Rights**

**Youth in police cells**

29. Young people continue to be held in police cells. For example, in June 2017 it was reported a 16-year-old boy spent his third night in an Auckland police cell.<sup>20</sup> In the same month a 14-year-old spent four days in police cells in Christchurch.<sup>21</sup> In October it was reported a 13-year-old was held overnight in police cells.<sup>22</sup>
30. Section 238(1)(e) of the Oranga Tamariki Act allows children and young people to be held in a police cell pending hearing after a court appearance. Police cells are not an appropriate place to hold children and young people. This section should be repealed, and alternative accommodation options should be constructed.

**Recommendation six: Repeal section 238(1)(e) of the Oranga Tamariki Act and create alternative accommodation options.**

**The increase in the prison population**

31. In 2006 New Zealand's prison population was 7,595.<sup>23</sup> Towards the end of 2016 the prison population in New Zealand hit 10,000 for the first time, an increase of approximately a third. Since then it has continued to rise, peaking at 10,308 at the end of June 2017. The remand population has experienced a significant increase of 14.7 per cent from June 2016 to June 2017.<sup>24</sup> The women's prison population has increased from 660 in June 2016 to 756 in June 2017,<sup>25</sup> an increase of 14 per cent.
32. The increased prison population is impacting on prison conditions. There is an increasing trend in the incidence of serious violence perpetrated by prisoners against both staff and other prisoners, which included the murder of a prisoner in March 2015. Remand prisoners are being held in unacceptable conditions; run-down accommodation, a lack of staff supervision, a lack of purposeful activity, a lack of time outside of their cell, limited communal space, a lack of

<sup>20</sup> <http://www.radionz.co.nz/news/national/332993/lives-at-risk-by-keeping-youths-in-cells-overnight>

<sup>21</sup> <https://www.stuff.co.nz/national/crime/93951804/still-no-bed-for-christchurch-14yearold-held-in-desolate-police-cell>

<sup>22</sup> <https://www.stuff.co.nz/national/crime/97644378/thirteenyearold-held-in-police-cells-overnight-after-allegedly-driving-stolen-car>

<sup>23</sup> World Prison Brief, <http://www.prisonstudies.org/country/new-zealand>

<sup>24</sup> Figures provided by the Ministry of Justice

<sup>25</sup> Figures available at from the Department of Corrections at

[http://www.corrections.govt.nz/resources/research\\_and\\_statistics/quarterly\\_prison\\_statistics.html](http://www.corrections.govt.nz/resources/research_and_statistics/quarterly_prison_statistics.html)



privacy, and having to eat meals in cells next to uncovered toilets. Single cells are being double-bunked, although the original cell was only designed with enough space for one person. These issues are affecting the wellbeing of prisoners.

33. Corrections have an ongoing agreement with Police for prisoners to spend nights in police cells. As the prison population continues to increase there is concern prisoners will be held in police cells. Police cells are not built to detain people for long periods of time. Those in police cells cannot easily access showers, rehabilitation programmes, have visitors, get fresh air or natural light, or spend time out of their cell. Prisoners should not be held in police cells.

**Recommendation seven:**

- a) **take urgent, adequately resourced measures to sustainably reduce the prison population, particularly for remand and women prisoners.**
- b) **remove from legislation the ability for police cells to be designated as prisons.**

**Recommendations of the Subcommittee on the Prevention of Torture**

34. The Subcommittee on the Prevention of Torture (SPT) visited New Zealand in 2013. The SPT made recommendations across a range of topics including resourcing of the NPMs, youth in prison, prolonged detention in police stations, high rates of incarceration and reoffending, Māori recidivism, the separation of remand and sentenced youth, mental health in places of detention, the state of police cells, and the transportation of prisoners. While some of these recommendations have been addressed many have not been appropriately addressed. Implementing the recommendations of the SPT would address many of the NPM's concerns.

**Recommendation eight: Implement the recommendations of the Subcommittee on the Prevention of Torture in their report following their visit to New Zealand in 2013.**