OPCAT - preventative, proactive and non-punitive

Submission to the Joint Standing Committee on Treaties National Interest Analysis

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1. Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights; and
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the Industry and Investment NSW for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC gratefully acknowledges the assistance of Tanaya Roy in the preparation of this submission, and especially the appendix to this submission. Ms Roy is employed by the Australian Human Rights Commission, but contributed to this PIAC submission in her personal capacity. The views expressed in this submission are the views of PIAC only. They do not reflect the views of Ms Roy's employer, the Australian Human Rights Commission.

PIAC's work on human rights and detention

Much of PIAC's current and previous substantive work involves human rights. This includes work on privacy, discrimination, freedom of information, detention, government and democracy, and access to justice. As such, PIAC has extensive experience dealing with the impacts of laws, policies, programs and conduct on human rights. A significant number of PIAC's casework clients have direct experience of having their human rights infringed.

PIAC has provided responses to the various inquiries conducted across Australia in the last five years into human rights protection. For example, PIAC conducted a range of community consultations for the National Human Rights Consultation and worked closely with its diverse networks to encourage those least likely to respond to the Consultation to take part. This included

working with people experiencing homelessness, people with mental illness, Indigenous people, prisoners and former prisoners, older Australians, people with disability, and migrant women. PIAC has also focussed specifically on human rights training and policy development for a number of years.

In February 2011, PIAC also commented on the process for developing the National Human Rights Action Plan[1] and in August 2011 commented on the National Human Rights Baseline Study.[2] In March 2012, PIAC made a submission in response to the National Human Rights Action Plan Exposure Draft[3]

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PIAC has provided submissions to a number of inquiries relating to immigration detention, including a submission to the Senate Legal and Constitutional Committee Inquiry into the provisions of the Migration Legislation Amendment (Identification and Authentication) Bill 2003,[4] a submission to the People's Inquiry into Immigration Detention,[5] and more recently a submission to the Joint Standing Committee on Migration on the inquiry into Immigration Detention in Australia.[6]

PIAC has a long history of involvement with penal reform. In more recent years, PIAC has represented at Coronial Inquests the families of several prisoners who died in custody. PIAC has convened a network of organisations and stakeholders on the issue of mental health care and prisons, is involved with a range of community organisations working with prisoners and former prisoners and is represented on the NSW Department of Corrective Services' Women's Advisory Council and the NSW Justice Health Consumer and Community Group.

2. PIAC's approach to OPCAT

PIAC strongly supports the ratification of OPCAT. We consider that this should be done as soon as practicable. We also give qualified support to the recommendations in the National Interest Analysis. However, we have particular reservations, and these are set out below.

In December 2012, PIAC, with 28 other organisations, wrote to the Attorney-General, the Hon. Nicola Roxon MP, urging the immediate ratification of OPCAT. That letter said:

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1 Brenda Bailey, *Human Rights Action Plan for Australia*, PIAC submission to the Commonwealth Attorney-General's Department, 11 February 2011.

2 Chris Hartley et al *National Human Rights Baseline Study: Submission by the Public Interest Advocacy Centre*, 2011

3 Chris Hartley et al, *National Human Rights Action Plan Exposure Draft: Submission by the Public Interest Advocacy Centre*, March 2012

4 Public Interest Advocacy Centre, *Inquiry into the provisions of the Migration Legislation Amendment (Identification and Authentication) Bill 2003: Submission to the Senate Legal and Constitutional Committee*, 2003.

5 Public Interest Advocacy Centre, *Immigration detention in Australia: the loss of decency and humanity: Submission to the People's Inquiry into Immigration Detention,* 2006.

6 Anne Mainsbridge and Laura Thomas, *Immigration detention in Australia: Towards humanity and decency: Submission to the Joint Standing Committee on Migration*, 2008.

> Our position is based on the serious and well-documented concerns with conditions of detention, including prisons, mental health facilities and immigration detention. We believe that ratifying OPCAT will assist Australian governments to protect the basic rights of people who are detained. There is strong evidence that external scrutiny of places of detention can deter and, where necessary, help to redress torture and other forms of ill treatment.

The letter concluded:

> It is in the interests of the broader community to prevent ill treatment in detention in order to promote rehabilitation and reintegration into the broader community. For this reason, we encourage the Australian Government to ratify OPCAT as soon as possible.

PIAC believes that the ratification of OPCAT is clearly in Australia's national interest. Not only should Australia ratify OPCAT immediately as a sign of Australia's commitment to human rights, it should also do so because of the positive effects that ratification will have on the administration of justice in Australia. That is, because OPCAT is focussed on preventing mistreatment in places of detention, OPCAT National Preventative Mechanisms (NPMs) can be proactive or prophylactic in their strategies to avoid problems from occurring. In this way, ratifying and implementing OPCAT can facilitate institution building in relation to detention, rather than focussing primarily on seeking to remedy human rights abuses.

Finally, PIAC submits that OPCAT is cost effective in that, for the relatively small outlay required to properly fund its implementation OPCAT through the NPMs, in the medium- to long-term there will be costs savings by improving conditions for those held in detention. This, in turn, will lead to less litigation and fewer deaths in custody, thereby reducing all the consequent costs to the community that flow from poor conditions for those in detention.

PIAC is concerned about the timetable for the implementation of Australia's obligations under OPCAT after ratification. While we recognise that some period of time is required to set up the Commonwealth, state and territory NPMs, we consider that JSCOT should recommend a shorter period for implementation. The Commonwealth has been negotiating with the states and territories for some time since the Government commitment to OPCAT in 2007. PIAC submits that there is no need to delay a further three years before the NPMs are set up and operational.

3. A focus on prevention

OPCAT provides for visiting and oversight by the United Nations Subcommittee on the Prevention of Torture and other cruel, inhuman or degrading treatment or punishment (SPT) and the NPMs.

When OPCAT was before JSCOT previously, much of the focus was on torture. That is, whether torture exists in Australia and whether OPCAT was potentially effective in combatting torture (together with concerns generally about the effectiveness of UN human rights bodies).[7] With all

[7] Joint Standing Committee on Treaties, Parliament of the Commonwealth of Australia, *Report 58: Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (2004), 19, 31-33.

respect to the participants in the debate at the time, PIAC submits that this was a misguided focus.

OPCAT is first and foremost a preventative mechanism. The preamble to OPCAT states: 'efforts to eradicate torture should first and foremost be concentrated on prevention'. Drawing, no doubt, on the consistent experience of the twentieth and twenty-first centuries, this implicitly recognises that active vigilance is needed for two reasons. The first is to eradicate any activity *now* that constitutes torture, or other cruel, inhuman or degrading treatment or punishment. The second, which is just as important, is to address any precursors that might result in such activity.

Australia has ratified the United Nations Convention Against Torture (UNCAT). However, OPCAT mandates preventative mechanisms that cannot be achieved under UNCAT.

Wilder Tayler, a Deputy Secretary-General of the International Commission of Jurists (ICJ) and member of the SPT contrasts OPCAT and UNCAT on this point:

> The UNCAT does not allow for practical and regular verification of conditions of detention which may be conducive to torture and other forms of ill-treatment. As such, most of the monitoring provided for in the UNCAT is carried out far from the location in which acts of torture may be taking place. While the CAT may conduct missions to the territory of a State Party in a case of suspected systematic violations of the UNCAT, the UNCAT procedures were not conceived, in principle, to operate during visits in loco. This contrasts with the tasks now entrusted to the SPT and the NPMs set up by the OPCAT; under the OPCAT, regular monitoring of places of detention, and other places where people are deprived of their liberty, is done in situ. Immediacy is thus a distinctive feature of the new mechanism.[8]

Secondly, we accept that torture is antithetical to the values, laws and policies of all Australian governments. Nevertheless, this is not a legitimate basis on which to oppose Australia's ratification of OPCAT.OPCAT is clearly not just about torture. OPCAT's full title does not refer only to torture; rather, it also refers to other cruel, inhuman or degrading treatment or punishment. As the OPCAT preamble makes clear, these other activities are also prohibited under the Convention and 'constitute serious violations of human rights.'

The focus of OPCAT is on prevention, not just chronicling abuses. The role of the SPT and the NPMs in each nation state is not to punish those who breach human rights or domestic law. OPCAT is almost unique in this regard (we note also similarities in the UN Convention on the Rights of People with Disabilities[9]).

Australia can be proud that there are no contemporary reports of the worst forms of torture taking place in places of detention on Australian territory. It is precisely with a view to safeguarding and continuing this record that Australia should ratify and implement OPCAT.

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8 Wilder Tayler, 'What Is the Added Value of Prevention?' (2009) 6(1) *Essex Human Rights Review*,22,25.

9 See University of Bristol OPCAT Research Team, *The Optional Protocol to the UN Torture Convention and the UN Convention on the Rights of People with Disabilities: some common issues* (December 2009) University of Bristol Law School <http://www.bris.ac.uk/law/research/centres-themes/opcat/index.html> as at 19 March 2012.

The philosophy of OPCAT is clear. Torture is abhorrent, and so are other forms of other cruel, inhuman or degrading treatment or punishment. One form of mistreatment can easily lead to another, often even more serious form of mistreatment. For this reason, not only should torture be outlawed (as it already is in Australian law[10]) but conduct or environments that might lead to cruel, inhuman or degrading treatment or punishment should be constantly monitored through preventative mechanisms to ensure that the precursors to more grave mistreatment are eliminated.

OPCAT does not preclude other ways to combat violations of human rights or breaches of domestic law. OPCAT would be complementary to the existing powers of bodies such as the Commonwealth Ombudsman in investigating individual complaints. Overseas experience has been that adopting OPCAT preventative mechanisms has complemented existing individual complaint investigation and resolution powers held by bodies such as the Commonwealth Ombudsman.

4. Promoting innovation, collaboration and best practice

Ratifying OPCAT is in the public interest because of the nature of the Optional Protocol itself. Empowering domestic bodies with a preventative role and mandating their independence, allows OPCAT NPMs to be proactive and innovative in carrying out their role. The NPMs have the potential to initiate effective and collaborative mechanisms to both prevent human rights abuses and positively reinforce best practice in prisons and other places of detention. Overseas experience indicates that NPMs can be proactive in how they conduct inspections and monitor place of detention, but also whom they collaborate with in this process.

For example, in the UK, the Chief Inspector of Prisons has the role of inspecting prisons under OPCAT. Before the inspection takes place (or at the beginning of an unannounced inspection):

> … researchers visit the prison and carry out a confidential survey with a randomly selected number of prisoners: sufficient to provide a statistically significant sample. The survey asks over 100 questions, about all aspects of prison life. There is now an extensive database of those from prisoners in prisons of the same type, and also with the answers that were received from the same prison at its last inspection. The survey results can also be split out, for example, to compare the responses of white prisoners with those of prisoners of black or minority ethnic (BME) origin, or those of prisoners with disabilities with those without.[11]

In the UK, the Chief Inspector of Prisons also carries out thematic reviews:

> There have been reviews into the treatment of women and children, and into suicide, healthcare and resettlement. Most recently, reviews were published into older prisoners, race relations in prisons, national prisoners, those held in extreme custody (segregation and close supervision centres) and into the mental health needs of prisoners.[12]

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10 *Criminal Code*1995 *(*Cth) s.268.25

11 Anne Owers, 'Prison Inspection and the Protection of Prisoner's Rights' (2010) 30 *Pace Law Review* 1535, 1540.

12 Ibid, 1543.

The New Zealand experience also demonstrates that NPMs (either acting alone or in collaboration with other agencies and/or NPMs) can be proactive about the way they go about their preventative role through issues focussed or 'thematic' investigations (see below).

NPMs have also been proactive about a particular requirement of OPCAT that the NPMs use the greatest range of expertise. Article 18.1 of OPCAT states:

> The States parties shall take the necessary measures to ensure that the experts of the national preventative mechanism have the required capabilities and professional knowledge.

This is particularly relevant in inspections of places of detention such as psychiatric hospitals where the use of medical expertise is essential to the proper carrying out of inspections under OPCAT.

The New Zealand Independent Police Conduct Authority, which is responsible for the inspection of police places of detention under OPCAT, has initiated 'multi-agency specialist site visits' with their own staff, staff from other NPMs and staff from other agencies collaborating in the inspections.[13] This not only increases the depth of expertise available, it also assists in cross-agency consistency among the NPMs.

NPMs under OPCAT have also been proactive in involving community organisations and NGOs in the preventative mechanisms under OPCAT. The model where community organisations and NGOs play an active role in inspections and other monitoring under OPCAT in collaboration with the NPM has ben described as the 'Ombudsman plus' model.

Both government, and the NPMs when established, have the potential to draw on a broad range of experience and expertise; for example, by involving civil society in the preventive mechanisms set up under OPCAT.

One of the advantages of having the non-government sector involved in both the discussions to determine Australia's OPCAT structure as well as the inspection and monitoring process itself is the expertise that NGOs can bring. As well as experienced Australian-based community organisations and NGOs being involved, Australian affiliates of organisations such as the International Committee of the Red Cross, Amnesty International and the Association for the Prevention of Torture could call on the experience of their international bodies both with regard to the development of OPCAT NPMs in overseas jurisdictions and with regard to civil society participation in the OPCAT mechanisms. Australian governments can and should harness the existing experience of Australian NGOs, consumer organisations and community legal centres in visiting detainees and monitoring places of detention.

Involving NGOs as part of this process potentially will not only strengthen NGO support for OPCAT's preventative approach, but also provide a buffer against accusations of inappropriate deal making or 'quick fixes' to complex issues.

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13 Independent Police Conduct Authority, *2010-11 Annual Report*, 9.

There are overseas examples where the involvement of NGOs and other elements of civil society in the NPMs have facilitated innovative preventative strategies by OPCAT NPMs and other investigative bodies.

In the UK, for example, every prison has an Independent Monitoring Board. Members are 'lay people from the local community.'[14] They are described as 'strong watchdogs with access to all parts of the prison, a right to talk to prisoners in private and a line of communication with the part of government responsible for the system.'[15]

In Slovenia, NGOs participate directly with the NPM (the Human Rights Ombudsperson's Office). In 2007, interested organisations were invited through a public tender to submit applications to the Ombudsperson's Office to be considered as part of the NPM. Two NGOs were subsequently selected for this role. It was envisaged that initially visits to places of detention would be undertaken jointly by both the Ombudsperson's Office and the NGO. However future visits can also be undertaken by either of those NGOs selected as, according to the enacting legislation, all parties have equal powers and authority.[16]

There is a multiplicity of ways that Australian NPMs could be proactive, and involve civil society in preventing cruel, inhuman or degrading treatment or punishment. OPCAT thus provides an opportunity to create collaborative models to prevent ill treatment in detention.

5. A non-punitive, institution-building approach

If Australia ratifies OPCAT, the outcome will not be to create mechanisms that are designed to merely chronicle human rights abuses or to identify those responsible for abuses and to enforce sanctions as a consequence. OPCAT is designed to create, in the NPMs and the visits of the SPT, institutions and institutional practice that complement already existing mechanisms such as Ombudsmen and Human Rights Commissions.

Dr Sylvia Casale, the first president of the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, puts it this way:

> As the SPT and the NPMs begin to operate as part of the system of regular preventive visits undertaken by independent international and national bodies, the establishment of which is the stated objective of the OPCAT, it is important that all elements, new and old, in the system adjust so as to ensure that they co-operate to optimal effect. In my opinion, they should form a protective network of mechanisms active in the field, interlocking in such a way as to fill the gaps in the safeguards for people deprived of liberty and so reduce to an absolute minimum the risks of ill-treatment.[17]

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14 Vivien Stern, 'The Role of Citizens and Non-Profit advocacy Organizations in Providing Oversight' (2009-10) 30 *Pace Law Review* 1529, 1530.

15 Ibid, 1532.

16 Association for the Prevention of Torture, *Civil Society and National Preventative Mechanisms under the Optional Protocol to the Convention against Torture* (2008), ISN ETH Zurich <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=cab359a3-9328-19cc-a1d2-8023e646b22c&lng=en&id=57291> as at 21 March 2012.

17 Silvia Casale, 'A System of Preventive Oversight' *Essex Human Rights Law Review* 2009(1),1, 6.

Article 22 of OPCAT specifically mandates constructive dialogue complementary with the inspection and monitoring process:

> 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.

Murray et al suggest that this constructive dialogue should go beyond interaction with government and the administrators of places of detention. They suggest that NPMs act as

> an important and trusted bridge between a variety of national actors, in particular between civil society and the State authorities.[18]

The New Zealand (NZ) example has shown how OPCAT is non-punitive yet institution building. In the latest NZ Human Rights Commission Annual Report of Activities under OPCAT, the Commission commented:

> A high level of cooperation by the detaining agencies and willingness to engage with the Preventive Mechanisms has been a consistent feature of the OPCAT experience. This year there has been an increase in referrals from staff, who recognise the benefits and potential of the OPCAT mechanism to improve conditions, eliminate risks and prevent harm. [19]

This report identified several recent initiatives under OPCAT where the designated NPM has been proactive in initiating non-punitive and institution-building initiatives under OPCAT.

For example, the Independent Police Conduct Authority, which has responsibility for police places of detention under OPCAT, has facilitated regular meeting with NZ police national headquarters. These meetings have, and continue to address, a range of issues, including:

- suicide prevention and risk assessment procedures;
- control and restraint policies, particularly in relation to vulnerable individuals;
- portable defibrillators and other health provision issues;
- information available to detainees about their rights and how to make a complaint.[20]

Another example in the report related to the NZ Ombudsman's concerns about an older prison:

> The prison was the subject of a focused visit during the reporting year. The inspectors found that requiring prisoners to eat their meals in such close proximity to the toilets was unhygienic

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18 Rachel Murray, Elina Steinerte, Malcolm Evans and Antenor Hallo de Wolf, *The Optional Protocol to the UN Convention Against Torture*, (Oxford University Press, 2011) ,126.

19 New Zealand Human Rights Commission, *Annual Report of Activities under the Optional Protocol to the Convention against Torture 1 July 2009 to 30 June 2010*, 2.

20 Ibid,10.

> and possibly amounted to inhuman or degrading treatment. They also found that the unlock hours in unit one, which averaged around two hours per day, were unreasonable, given the extremely small cell dimensions and the limited access to outdoor exercise facilities.[21]

The Department of Corrections has acted on these findings and prisoners can now take their meals in the dining room. The 'unlock hours' for affected prisoners was increased to a minimum of three and up to seven hours per day. The Department of Corrections has also agreed to investigate the division of the main exercise area into smaller yards to allow better use of the space available.[22]

Also, as part of research and evaluation under OPCAT, the Independent Police Conduct Authority, the Children's Commissioner and the Human Rights Commission have agreed to undertake a joint thematic review of the treatment of and issues affecting children and young people detained in New Zealand Police custody.[23]

The above examples show that OPCAT's non-punitive approach can enhance the preservation of human rights and assist in the prevention of cruel, inhuman or degrading treatment or punishment. There is a clear public interest in achieving this goal alone. However, the overseas examples clearly show that OPCAT can also enhance the efficiency of places and institutions where people are detained by promoting and rewarding best practice models of detention.

6. Cost effectiveness

There is a significant cost to government arising from negligent or otherwise unlawful conduct by government departments, agents and employees relating to detention in Australia. Costs also arise from coronial inquests involving deaths in custody. Some of these costs arise from conduct that could be said to be cruel, inhuman or degrading, or from conduct that while not meeting this definition may nevertheless be addressed by an OPCAT system that seeks to identify best practice standards and improve conditions of detention in Australia. As the research at Appendix 1 makes clear, it is difficult to quantify the precise cost to government of such litigation; however, it is useful to consider some of the costs involved.

Coronial inquests regarding deaths in various forms of state-sanctioned detention (ie, prisons, police detention, juvenile detention, immigration detention and psychiatric hospitals) involve significant costs. For example, in 2011, PIAC represented in two Inquests family members of deceased persons who died in custody in NSW. In both, PIAC was legally aided to instruct counsel to appear for the family at the Inquest. NSW Corrective Services was also represented by counsel, as was Justice Health. The Coroner was assisted in both Inquests by a police advocate. Correctional officers and Justice Health nurses were separately represented, funded by their unions. One Inquest went for seven days, the other for three. As well as the cost of legal representation for all parties, there was the cost of the Coroner, court administrative costs and costs to witnesses.

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21 Ibid, 16.

22 Ibid, 16.

23 Independent Police Conduct Authority, *Review of treatment and conditions for young people in Police custody,* Independent Police Conduct Authority (December 2010) <http://www.ipca.govt.nz/Site/media/2010/2010-Dec-10-Joint-Thematic-Review.aspx> at 19 March 2012.

All of these costs were justified. It is important that all parties, including the family of the deceased, are represented and their interests protected at inquests. It is also important that the Coroner comes to a finding after a thorough review of all the evidence, in relation to the manner and cause of the death of the deceased. However, the point here is that, if the implementation of OPCAT could prevent just a few deaths in custody a year, the saving in human terms would of course be central, but there would also be financial savings.

No one could legitimately claim that OPCAT will eliminate all deaths in custody. However, PIAC considers that, with increased scrutiny of places of detention, OPCAT will improve prison environments and practices so that deaths and injuries in detention will be reduced. Consequently, the cost of litigation and inquests should also decline.

It is also important to consider and compare the relative costs of implementing OPCAT and the costs of funding and maintaining the detention of individuals and the infrastructure in which they are detained. Richard Harding has recently discussed this comparison in support of the cost effectiveness of OPCAT:

> Autonomous inspection is surprisingly inexpensive. The UK Chief Inspector's office runs at something around 0.4% of the cost of running the various activities that it inspects. The WA Inspector's office is funded in this range also. Even more strikingly, the Office of the Corrections Investigator (Canada) – a specialist agency that is fully OPCAT-compliant – costs 0.15% of the cost of running the federal prison system in that country.[24]

There will be some cost to the Commonwealth, state and territory governments to introduce the inspection and scrutiny of places of detention as required by OPCAT. However, these costs are minimal when compared to the institutions they will be set up to monitor and improve.

If OPCAT implementation is sufficiently funded, based on overseas experience, it will improve conditions in places of detention. Given the relatively small cost of OPCAT implementation and the significant cost of detention related litigation and inquests, just to name one financial cost associated with mistreatment in detention, it may be reasonable to assume that there will be some cost saving overall – albeit that the precise amount would be difficult to quantify.

In any event, PIAC considers that the major benefits of ratifying OPCAT are not measurable in monetary terms. The benefits in preventing torture and other cruel, inhuman or degrading treatment or punishment are the prevention of human suffering, the saving of lives and the maintenance of basic human rights. These benefits are immeasurable. However, it is clear that implementation will not be expensive, and may actually make overall savings for government.

7. Timeframe for implementation

PIAC is concerned about the prospect of a further three year delay in the setting up of the NPMs. Whilst acknowledging that the proposed three years is a maximum (although there is provision for

[24] Richard Harding, *Ratifying and Implementing OPCAT: Has Australia missed the boat?* (Presentation at Human Rights and Closed Environments Conference, Melbourne, 21 February 2012),6

a further two-year extension by the SPT), PIAC considers seeking the maximum postponement possible will give a negative signal about Australia's commitment to human rights and, in particular, to Australia's commitment to prevent torture and other forms of other cruel, inhuman or degrading treatment or punishment.

If Australia ratifies OPCAT, it will be by no means one of the first countries to do so. According to the Association for the Prevention of Torture,[25] there are currently 62 States Parties that have ratified OPCAT and 22 additional states signatories (including Australia). Although there are no doubt extra complexities created by Australia's federal system, there are now many countries with federal or devolved systems that have ratified OPCAT.[26] Australia will benefit from their experience and should be able to identify the best international models to fit our co-operative federal system within a reasonable time.

The Commonwealth Government has the responsibility for Australia's international relations, and this brings with it a primary responsibility in respect of Australia's international human rights law obligations. The Commonwealth should take a leadership role in establishing the structure responsible for the national co-ordination of the NPMs and the NPM(s) to inspect and monitor places of detention under Commonwealth control.

PIAC has stated its preference for the OPCAT mechanisms to operate with maximum co-operation with civil society in Australia. We would urge that this engagement should commence immediately after ratification through a dialogue with NGOs, consumers and other stakeholders about the model(s) Australia should adopt to comply with OPCAT, particularly about the structure, independence and functioning of the NPMs.

This process, however, should not take three years. State, territory and Commonwealth budgets are produced annually in Australia, and once there is general consensus about the structure of the NPMs, PIAC believes there is no reason, with funding in place, that OPCAT could not be in operation in Australia by early 2014.

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25 Association for the Prevention of Torture, *OPCAT Database*, Association for the Prevention of Torture <http://www.apt.ch/index.php?option=com_content&view=category&id=143&Itemid=244&lang=en> as at 19 March 2012.

26 See Association for the Prevention of Torture, *Implementation of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Federal and other Decentralised States,* Association for the Prevention of Torture (June 2005) <http://www.apt.ch/index.php?option=com_k2&view=item&layout=item&id=678&Itemid=253&lang=en> as at 19 March 2012.

Appendix

Estimating some of the financial impacts of implementing OPCAT

Aim of this appendix

This is an appendix to the Public Interest Advocacy Centre's submission regarding OPCAT. It aims to estimate some of the financial costs and benefits associated with implementing OPCAT. We reiterate our acknowledgement that any such estimation is a difficult, involving at least some degree of informed speculation. Nevertheless, our clear conclusion is that there are clear financial benefits likely to flow to Australian governments from the implementation of OPCAT in Australia.

The Association for the Prevention of Torture (APT) observes that the affordability of implementing OPCAT is a key political challenge as regular monitoring of all places where deprivation of liberty occurs is resource-intensive. The APT argues, however, that value for money in the context of OPCAT comes from a national implementation that reduces the risk of ill-treatment.[1]

The report identifies some of the costs of allegations of ill-treatment in detention:

- Administrative and legal costs to government authorities associated with investigation and litigation of allegations of ill-treatment in detention;
- High costs in terms of detainee health, public safety and security, and stress on the criminal justice system created by poorly functioning places of detention and ineffective systems of deprivation of liberty;
- Damage to the reputation of a government from allegations of ill-treatment in detention.

This appendix considers this first point and attempts to quantify the costs to Australian jurisdictions of investigating and litigating incidents and practices in detention leading to allegations of ill-treatment.

Sources of information

Precise figures and data are not readily available in relation to these issues. For this reason, this appendix is limited to identifying only in broad terms approximate costs of investigation and litigation relying on the following sources of data:

1. Costs of civil claims made against police and correctional authorities arising out of imprisonment and detention;
2. Costs to the state of inquests concerning deaths in custody or care (including Coroners' Court costs and Legal Aid costs);
3. Costs of awards/settlements/claims in relation to immigration detention

This appendix aims to consider the broad amounts spent over the period of a year. However, Annual Reports and other sources of information for agencies were not always available for comparable reporting periods. In some cases, data are available in relation to financial years (ie, 30 June 2009-1 July 2010 or 30 June 2010-1 July 2011), whereas in

[1] Association for the Prevention of Torture, Series of OPCAT Briefings, 'Implementation of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Federal and other Decentralised States' (March 2011).

other cases it is reported on a calendar basis (2010 or 2011). This will be noted in each case.

Other significant qualifications to and limitations of the data will be identified as they arise.

1. Costs of civil claims against police and correctional authorities

The costs of litigation, awards and settlements deriving from claims against police and correctional authorities for specific actions (such as false imprisonment, assaults and other negligent conduct related to custody, detention or imprisonment) are extremely difficult to ascertain from publicly available material, without detailed costings from agencies or governments.

This appendix considers several sources of data to attempt to get a broad picture of the costs of civil actions involving police/corrections, however, each of these carry their own limitations. The costs of investigations by external bodies such as an Ombudsman's Office, or police integrity agencies are not included.

1.1 Annual reporting on contingent liability for claims against police

Most annual reporting contains an estimate of contingent liabilities relating to potential litigation or claims made against an organisation. For example, one 2002 study of civil litigation against police observed that contingent or potential liability for civil litigation against police was $10 million for Victoria Police and $90 million for NSW police alone.[2]

However, these data present a limited picture for present purposes, as figures for contingent liabilities may include many forms of civil litigation against police (eg, under tort, contract, administrative or industrial law). Even in relation to tort claims, not all would relate to treatment in custody or detention, and could include a range matters such as forced entry raids, shootings, assaults outside of custody or other misconduct.[3]

Assessing the costs of such litigation against correctional authorities through contingent liabilities reporting is even more problematic. In most cases, corrections costs are reported through the relevant State Attorney-General/Justice portfolio annual reporting. In these cases, contingent liabilities include such a broad range of matters that they are of no utility for the purposes of this appendix. The following discussion is limited to police agencies only.

In its 2010-11 Annual Reports, contingent liabilities for civil matters claims against the NSW Police Force are reported as $75 million in 2010 and $69.7 million in 2011.[4] Victoria Police reported $55.8 million in 2010 and $47.7 million in 2011.[5]

Looking at Annual Reports of police agencies in other jurisdictions, contingent liabilities are estimated as follows:

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2 J McCulloch and D Palmer, 'Civil litigation by citizens against Australian police between 1994-2002', *Report to the Criminology Research Council* (2002) p 3.

3 One of the recommendations of the McCulloch and Palmer report was that police annual reports include information each year on the number of civil suits lodged against police, the total monies paid in settlements and court-ordered awards of damages, the number of outstanding cases, and the issues involved in each case: ibid, p vi.

4 Total police expenditure is reported as $2,707 million in 2010 and $2,683 million in 2011: NSW Police Force, *Annual Report 2010-11*, pp 32, 67.

5 Victoria Police, Annual Report *2010-11,* p 139. Total expenses are reported as $1,859 million in 2010 and $1,965 million in 2011.

- Queensland Police Service reported 36 litigation cases against Queensland Police as at 30 June 2011 and 35 in 2010. The Annual Report notes that 'QPS has implemented a contingent liability management system to manage litigation cases and minimise the costs associated', noting that 'it is not possible to make a reliable estimate of the final amount payable, if any in respect of litigation before the courts'.[6] As part of its current expenses, however, the report also provides 'Plaintiff damages and costs' as just over $1 million each year in 2010 and 2011, with ex-gratia payments of $383,000 made in 2010.
- Western Australia Police reported (for unsettled legal claims and Act of Grace payments[7]) $877,000 (in 2010) and $447,000 (in 2011) (based on the 'maximum obligation potentially payable for the claims on hand as at 30 June 2011).[8]
- South Australia Police reports provisions made for civil actions against police as $613,000 in 2010 and $772,000 in 2011.[9]
- Northern Territory Police, Fire and Emergency Services reported that contingent liabilities existed which were not quantifiable and no claim had yet been made. Litigation matters were not disclosed in case of adverse effect on the outcome of any future litigation.[10] However, it reports 'Legal Expenses' including legal fees, claim and settlement costs as just over $2 million each year in 2010 and 2011.[11]
- The Tasmania Department of Police and Emergency Services Annual Report noted that as at 30 June 2011, the Department had a number of claims against it for legal disputes, reporting its quantifiable contingent liabilities as $753,000 in 2010 and $358,000 in 2011.[12]
- Australian Capital Territory policing is provided by AFP. No value was provided for continent liabilities in 2010-11, however 'legal expenses' were reported as $669,000 in 2010-11.[13]

1.2 Budget estimates of costs of claims against police

NSW Police

A much more accurate picture of claims relating to mistreatment in the context of arrests involving NSW Police is provided by the 2011-12 Budget Estimates hearings. The NSW Police Minister clarified the costs to NSW Police in 2009-10 and 2010-11 of claims relating to false imprisonment, assaults and malicious prosecution.[14]

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6 Queensland Police, *Annual Report 2010-11*, p 80. The total expenses for delivering policing services was reported as $1,672 million in 2009-10 and $1,785 million in 2010-11 (p 5). The Report notes that under its insurance fund, the department would be able to 'claim back, less a $10K deductible, the amount paid to successful litigants' (at p 112).

7 Special discretionary compensatory payments (under s 33 of the *Financial Management and Accountability Act 1997*.

8 Western Australia Police, *Annual Report 2010-11*, p 87. The total expenditure for Services was reported as $1,079 million in 2011 and $979 million in 2010.

9 South Australia Police, *Annual Report 2010-11*. The total operating expenses were reported as $660 million in 2009-10 and $699.5 million in 2010-11 (p 86).

10 Northern Territory Police, Fire and Emergency Services, *Annual Report 2010-11*, p 107. Comprehensive operating expenses were reported as $302.8 million for 2010 and $320 million for 2011, however, this included expenses for fire and emergency services as well as police.

11 Northern Territory Police, Fire and Emergency Services, *Annual Report 2010-11*, p 97.

12 Department of Police and Emergency Services (Tasmania), Annual Report 2010-11, p 99. Total expenses were reported as $209 million in 2010 and $222 million in 2011.

13 Under the Policing Arrangement between the Commonwealth and ACT Government, funds to deliver community policing services to the ACT are provided by the ACT Government to the AFP. The total operating expenditure budget was reported as $146.2 million.

14 Minister for Police and Emergency Services, Answer to Questions Submitted Following Hearing, General Purpose Standing Committee No 4 - Budget Estimates 2011-2012, (Questions 50-54).

In response, the Police Minister advised that such claims often involve multiple causes of action from a single incident, and that the majority of claims are resolved prior to hearing. In these cases, the settlement figure is not usually divided into amounts for a specific cause, and costs and damages components may not easily be separated out.

However, figures were given in relation to matters for compensation in 2009-10, in the context of unlawful arrests or detention, as follows:

2009-10	
Matters	**Total spend inclusive of both parties' costs**
6 matters solely involving compensation for false imprisonment	$410,171.92.
6 matters involving compensation for assault and false imprisonment	$1,279,624.78
2 matters involving compensation for malicious prosecution and false imprisonment	$364,783.40
8 matters involving compensation for assault, false imprisonment and malicious prosecution	$2,032,185.69.[15]

The total amount for 2009-10 comes to just under $4.1 million (around 5.5% of the contingent liabilities estimate for that financial year).

Figures were given in relation to matters for compensation in 2010-11, in the context of unlawful arrests or detention, as follows:

2010-11	
Matters	**Total spend inclusive of both parties' costs**
10 matters solely involving compensation for false imprisonment	$879,102.43
13 matters involving compensation for assault and false imprisonment	$1,499,063.69
7 matters involving compensation for malicious prosecution and false imprisonment	$1,376,009.39
4 matters involving compensation for assault, false imprisonment and malicious prosecution	$1,597,490.93

The total amount for 2010-11 is approximately $5.3 million (around 7.6% of the contingent liabilities estimate reported for that financial year).

Victoria Police

In Victoria, the relevant Minister was also questioned on the costs of 'defending civil actions' against Victoria Police for 2010 and 2011.

[15] In response to a separate question, the Minister also referred to expenditure in 2009-10, in the context of police officers using unreasonable force and causing injury, relating to:
solely a claim of assault (total spend inclusive of both parties costs of $250,624.11)
6 additional matters involving compensation for assault and false imprisonment (total spend inclusive of both parties costs of $1,279,624.78)
4 matters involving compensation for assault, false imprisonment and malicious prosecution (total spend inclusive of both parties costs of $1,597,490.94).
It would appear that these matters include those unlawful arrest/detention matters already noted, and it is unclear whether the assault arose at all in the context of detention/custody. these figures will be excluded from the broad total estimate of costs.

Although the causes of action in these cases were not disclosed, the response was that in 2009-10, the Victoria Police Civil Litigation Division expenditure for legal costs related to civil actions against police was approximately $3 million and a similar amount would be budgeted for 2010-11.[16] It is unclear whether this includes amounts for settlements/awards or whether this is only in relation to legal services.

1.3 Case searches of claims against police/corrections in relation to detention/custody

To present a snapshot of the types of cases in which claims are pursued against police/correctional authorities in the courts, and judgment amounts being made against them, a search was done of AustLII caselaw databases (including reported and some unreported cases for state and federal superior and intermediate courts and tribunals) for 2010 and 2011.

A keyword search was done using combinations of terms (eg, police, false imprisonment, detention, trespass, assault, damages, compensation, negligence, duty of care, malicious prosecution, custody, imprisonment, detention).

Again this data is necessarily limited for several reasons:

- many cases are settled prior to judgment and the outcome may not be published,
- the search does not include cases from lower, or even some intermediate courts, which are not available on AustLii,
- the relevance of cases which have been highlighted in the search has been determined looking at headnotes, catchwords, summaries and orders, rather than analysis of the case,
- though an attempt has been made to do as broad a sweep as possible over this period, cases may not have been identified using this search, due to the keywords used, where police or correctional authorities involved are not identified as such, or where cases are complicated by numerous causes of action, or claims and counterclaims.

The results of this search brought up 15 cases where a person was awarded damages against the police or other similar authority (in one case a claim related to immigration detention). In at least 3 of these cases, however, the circumstances do not appear to involve custody/detention relevant for the purposes of this paper (for example, they took place on private property).[17] Further, information about the amount of damages is not available in 2 cases.[18]

Some of the costs to the State in terms of damages awards for such matters are as follows:

1. *Quirk v The State of New South Wales* [2011] NSWSC 341(for assault, false imprisonment, malicious prosecution) including compensatory, aggravated and exemplary damages - total $175,000.

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16 Parliament of Victoria, Legislative Council, Victorian Parliamentary Hansard, Questions on Notice, Tuesday 1 March 2011, Q88.

17 *Slaveski v State of Victoria & Ors* [2010] VSC 441 (numerous claims against police involving trespass, assault and battery and negligence - on private property – approximately $28,300); *Lassanah v State of New South Wales* (No. 3) [2010] NSWDC 241 (wrongful arrest and false imprisonment but not relating to custody - $35,000 awarded in respect of false imprisonment – another 35,000 for defamation); *White v South Australia* [2010] SASC 95 (not involving custody – on private property – successful claims by 10 plaintiffs totalling around $725,000).

18 *Crowley v Commonwealth of Australia*, ACT & Pitkethly [2011] ACTSC 89 (damages awarded, amount unknown); (Costs appeal in relation to settlement – amount unknown) *State of New South Wales v Williamson* [2011] NSWCA 183.

2. *Fernando v Commonwealth of Australia (No 4)* [2010] FCA 1475 (immigration detention, false imprisonment and other causes of action) ($28,000 including aggravated and exemplary damages).
3. *Carter & Anor v Walker & Anor* [2010] VSCA 340 (decision involved amount of exemplary and aggravated damages reduced from previous decision to total $300,000. $600,000 had previously been awarded as general damages).
4. *Moses v State of New South Wales (No. 3)* [2010] NSWDC 243 ($18,000 damages for assault, false imprisonment and malicious prosecution).
5. *Eaves v Donelly & Anor* [2011] QDC 207 (false imprisonment - $93,000).
6. *Zreika v State of New South Wales* [2011] NSWDC 67 (wrongful arrest and battery totalling $304,556 including aggravated and exemplary damages).
7. *Watkins v The State of Victoria & Ors* [2010] VSCA 138 (assaults $98,000).
8. *TD, by her Tutor, the Protective Commissioner of NSW v State of NSW* [2011] NSWSC 763 (false imprisonment – settlement of $80,000).
9. *Kanters v State of Queensland* [2010] QSC 107 (this decision was regarding access to damages as a prisoner in custody for settlement in 2008 for $1.4 million and $100,000 costs for injuries suffered in prison but).
10. *New South Wales v Landini* [2010] NSWCA 157 (malicious prosecution) (reducing damages to $60,000).

In most of these cases, costs will be an additional significant expense to the State.

There was also one case involving a successful *habeas corpus* application and one case in which a new trial was ordered. In another 11 matters, the issues were procedural. In another 10, the plaintiff/appellant was not successful in their action.

2. Costs of inquests on deaths in custody or care

It is difficult to source data on the specific costs of inquests in relation to deaths in custody/care in the Coroner's Court. Coroners Court costs are provided in the Productivity Commission's *Report on Government Services 2012*, however this does not separate out inquest costs from other court costs.

The data provided in the Report relates to coroners' court inquiries into the cause of sudden and/or unexpected reported deaths in each jurisdiction (and suspicious fires in NSW, Victoria, Tasmania and ACT). Reported deaths in custody/care are not separated out from other deaths.

Nationally, across all coroners' courts, there were 20,011 reported deaths (not including fires). However, reporting rates for deaths vary across jurisdictions because of different reporting requirements (for example, deaths in institutions such as nursing homes of people with intellectual impairments must be reported in South Australia but not in other jurisdictions).[19]

2.1 Estimating the cost per death

The Report provides a rough estimate of expenditure, nationally, per reported death and fire in coroners' courts as approximately $1829 in 2010-11.[20] This costing is estimated on the basis of the net recurrent expenditure of coroners' courts in each jurisdiction, and the number of matters finalised for that period. Unfortunately, the numbers of matters finalised

[19] Productivity Commission, *Report on Government Services 2012*, Court Administration, 7.17.

[20] Productivity Commission, *Report on Government Services 2012*, Court Administration, 7.51, Figure 7.10.

does not disaggregate reported deaths and fires. The number of finalised matters across all Australian jurisdictions is reported as 21,683 in 2010-11.[21]

It is clear that this figure of $1829 does not correlate with the actual cost of an inquest. It is provided as an indicator of comparative efficiency across different jurisdictions. The Report cautions that this indicator is not a measure of the actual cost per case – whereas some matters may only take a short time and require few resources, others may be resource intensive and involve lengthy inquest hearings. This may well be the case where issues about treatment in custody are involved.

This estimated cost per death also excludes costs associated with autopsy, forensic science, pathology tests and body conveyancing fees, because of differences in each jurisdiction as to the way these costs are managed. Costs for autopsies separated out was just under $32,809 across all jurisdictions.

Data for the Queensland and Victorian Coroners' Courts include the full costs of government assisted burials/cremations, legal fees incurred in briefing counsel assisting for inquests and costs of preparing matters for inquest, including obtaining expert reports.[22]

These additional costs can be significant. For example, in Victoria, for coronial investigations involving scrutiny of police conduct, independent legal services are required to assist the coroner (rather than the Police Coronial Support Unit). This also happens in some highly technical or complex investigations. The costs of independent legal assistance for coronial investigations and inquests was $1.22 million in 2010-11.[23] The cost of transporting deceased persons (for reportable deaths) in Victoria has also significantly increased in recent years to to $2.08 million in 2010–11.

There may also be costs to the State incurred where a party seeks legal aid representation for an inquest. Again, in Victoria, for example, VLA provides that the lump sum fee for preparation for an inquest is $511, with $731 for a first day appearance, and $660 for additional days. Fees for appearance at a mention/directions hearing are $154.[24]

2.2 Estimating the number of deaths in custody

The Report provides data on 'Deaths in police custody' as indicators of governments' objective to provide safe custody for alleged offenders, and ensure fair and equitable treatment for both victims and alleged offenders.[25]

Nationally, there were 17 deaths in police custody and custody-related operations in 2010-11 and 56 deaths in custody under correctional authorities (however, data for Victoria was reported as incomplete). There was one death in juvenile justice custody in 2010-11.[26] The Report does not provide the numbers of deaths in care. It must be noted that the number of deaths in custody reported to the Productivity Commission does not

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21 Productivity Commission, *Report on Government Services 2012*, Court Administration, 7.21, Table 7.6.

22 Productivity Commission, *Report on Government Services 2012*, Court Administration, 7.51.

23 Coroners Court of Victoria, *Annual Report 2010-11*.

24 VLA Handbook available at: http://www.legalaid.vic.gov.au/handbook/655.htm.

25 Deaths in police custody include deaths in institutional settings (for example, police stations/lockups and police vehicles) or during transfer to or from such an institution; or deaths in hospitals following transfer from an institution; and other deaths in police operations where officers are in close contact with the deceased (for example, most raids and shootings by police). Deaths in custody-related operations include situations where officers did not have such close contact with the person as to be able to significantly influence or control the person's behaviour (for example, most sieges and most cases where officers were attempting to detain a person, such as pursuits).

26 Productivity Commission, *Report on Government Services 2012*, Court Administration, 15.75.

equate to the number of deaths in custody with which the coroner's court may deal with in a given year, as there are sometimes lengthy delays before an inquest is held.

By applying the number of deaths in custody to the average cost per coronial case, this generates a cost of $0.13 million. A similar method of calculation has been relied on elsewhere in lieu of more readily available data (eg, in estimating the costs of DV specific investigations by coroners in relation to DV-related deaths).[27] However, this is clearly a gross underestimation of the costs involved in an inquest.

For convenience, the following table summarises the data available through the Productivity Commission for 2010-11:

2010-11	NSW	VIC	QLD	WA	SA	TAS	ACT	NT	ALL
Reported deaths (not incl. fires)	5 434	4 857	4 416	1 996	2 148	558	317	285	20,011
Finalised cases (deaths and fires)	6 314	5 586	4 408	1 372	2 058	519	1 140	286	21,683
Real net recurrent expenditure (autopsies, etc not incl.)	5.5m	13.5m	10.5m	4.1m	2.9m	527,000	1.5m	1.1m	39.7m
Expenditure per finalised case	922	2 492	2 441	2 993	1 465	1 029	1 317	3 896	1,880
Times case before court (finalised cases only)	-	1.0	3.9	1.0	1.5	1.0	3.1	1.0	1.6
Deaths in custody (incl. natural, unnatural & unknown causes)	20	10	11	5	4	0	0	6	56
Deaths in police custody/custody related operations	7	-	1	5	2	1	-	1	17
Cost of finalising all deaths in custody	24,894	24,920	29,292	29,930	8,790	1029	0	27,272	137,240

The costs of inquests would take up a far greater amount of total coroners court expenditure than other coronial work. For example:

- The Victorian Coroner reported that, in 2010-11, an extensive inquest into the deaths of four aged care residents continued from the 2009-10 financial year to 2011 and involved 13 days of inquest, with 5 days the previous year, as well as mention and directions hearings.
- An inquest into deaths of two men following restraint by staff in psychiatric facilities took 11 and 10 days for each.[28]
- The Victorian Coroner's court expenditure is reported by the Productivity Commission as $13.5m and 5586 matters were finalised, however the Annual

[27] See, Access Economics, *The Cost of Domestic Violence to the Australian Economy: Part* I (2004) p 53.
[28] Coroners Court of Victoria, *Annual Report 2010-11.*

Report notes that only 142 of these were findings with inquest. It is not possible to assess what proportion of these were deaths in custody or care without closer analysis.

Given all of these limitations, this data must be treated with a great deal of caution, as these costings do not represent an accurate picture of the costs of inquests. Obtaining a clearer estimate would require analysis of inquests in each jurisdiction individually to ascertain whether they related to a death in custody or care and estimating the costs based on the length of time spent in each case. Alternatively, an overall cost estimate may be able to obtained directly through the courts. Given the tight timeframes, this has not been possible for this paper but could be considered in the future.

3. Costs of awards/settlements/claims in relation to immigration detention

The Department of Immigration and Citizenship reported that in the period 2009-10, it spent $30.4 million in legal services.[29] As at September 2010, DIAC's active litigation caseload in relation to migration was 836 matters (this has increased from 639 on 30 June that same year).

Although just under 80% of these were administrative law matters,[30] the remaining matters making up just over 20% were 'civil and other litigation matters', such as proceedings in State Supreme Courts for damages arising from detention.[31] If the costs of this caseload were evenly distributed, this would be at least $6 million of the legal services expenditure, however, it is likely that the overall cost of Supreme Court litigation in a single matter may be significantly more than the smaller administrative law cases, making this a modest estimate.

These costs are comparable in the period 2010-11, when DIAC reported its legal services expenditure as approximately $31.2 million. In 2010–11, there was a 34% increase in the total numbers of people in immigration detention from 9802 people in 2009–10 to 13,134 people in 2010–11.[32]

In its Annual Report for this period, it was noted that DIAC receives a 'small number of claims for monetary compensation for alleged instances of false imprisonment or negligence'. The majority of negligence claims relate to harm suffered in immigration detention, and may include claims of ongoing mental illness.

The Report notes that, of these, 'legitimate claims are usually settled by mediation or negotiated settlement. However, complex claims may take some years to finalise'.

At 30 June 2011, DIAC reported 40 civil compensation claims before the courts, including two matters involving members of 247 cases that were referred to the Ombudsman in 2005 for events occurring between December 1998 and March 2006.

At 30 June 2011, 237 of the 247 Ombudsman referred cases had been resolved by the department. During 2010–11, the department reached out of court settlements involving

29 J McMillan, 'Regulating Migration Litigation after Plaintiff M61', Report to the Minister for Immigration and Citizenship (2011) citing DIAC, Annual Report 2009-10 at Part 6, Appendix 2.

30 These 656 administrative law matters included: applications to the FMC for judicial review of MTR/RRT visa refusal decisions; appeals from the FMC to the Federal Court; special leave and other applications to the High Court; and AAT applications for merit review of visa cancellation and passport decisions. Roughly half (341) of the matters were refugee cases.

31 The report cites 180 civil and other litigation matters: J McMillan, 'Regulating Migration Litigation after Plaintiff M61', Report to the Minister for Immigration and Citizenship (2011) p 44.

32 DIAC, Annual Report 2010-11.

the payment of compensation in 13 of the 247 Ombudsman referred cases. A further eight non-247 formal claims were finalised with compensation paid and five non-247 formal claims were finalised without the payment of compensation.

3.1 Other costs associated with allegations of ill-treatment in immigration detention

Currently, costs of external scrutiny of immigration detention also includes the Commonwealth and Immigration Ombudsman. The 2010-11 Annual Report of the Ombudsman gave its expenses as $21.400 million, comparable to the previous year. For this period of 2010-11, the Ombudsman reported that there were 2,137 complaints involving DIAC (including complaints about detention) comprising 11% of all complaints/approaches.

More than 90% of detention-related complaints were made during the Ombudsman's immigration detention centre visits program. Of these complaints, 341 were investigated 341 (16% of all complaints received) and remedial action by DIAC was facilitated in 242 (71% of cases investigated). The report also referred to an own motion investigation into the use of force by AFP and Serco staff during the Christmas Island disturbances in April 2011.

As well as complaints from the Commonwealth and Immigration Ombudsman and the Australian Human Rights Commission, the Report notes that 'other forms of external scrutiny by the courts have been activated by some of the tragic events of recent times involving the deaths of individuals'.[33] In December 2010, a number of coronial inquiries were in progress relating to deaths in immigration detention and also the Christmas Island boat tragedy.

In relation to criminal conduct, the Minister for Immigration and Citizenship was questioned about allegations of any kind of abuse against any detainee in any of the detention facilities on the mainland or on Christmas Island by another detainee, employee of the Government or employee of the contractor.[34]

The Minister's response was that, for the period 1 July 2010 to 30 June 2011 there were 372 allegations of physical assault. The Police were notified in relation to 136 incidents. The allegations included:

- 271 allegations of assault between detainees (referred to as 'clients');
- 90 allegations of detainees assaulting detention centre staff ('Detention Service Provider Staff');
- one allegation of a detainee assaulting another and staff;
- No allegations of assault on DIAC staff;
- one allegation of assault on a staff member from the Commonwealth Ombudsman's Office; and
- 9 allegations of a 'DSP officer' (i.e. Detention Service Provider staff) assaulting a client (not resulting in an assault charge).

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33 The department received 317 complaints from the Commonwealth and Immigration Ombudsman in 2010–11, a decrease of 35.8 per cent on the previous year. The department received 104 new complaints from the Australian Human Rights Commission (AHRC) in 2010–11 compared to 65 in the previous year. The most common issues raised in the complaints related to visa outcomes and detention.

34 Senator Cash, Question Taken on Notice, Budget Estimates Hearings: 23-24 May 2011, Immigration and Citizenship Portfolio, (Be11/0373) Program 4.2: Onshore Detention Network.

Also for this period, the Minister noted 38 allegations of sexual assault or sexual harassment, including detainees harassing or assaulting both staff or other detainees. The Police were notified 17 times in relation to allegations of sexual assault or harassment.