# Proposal for Australia to ratify OPCAT:
# Submission to the Joint Standing Committee on Treaties

## by


## Professor Richard Harding


A. Relevant professional qualifications and experience.

Between 2000 and 2008 I served as Inspector of Custodial Services for Western Australia. This Office had been statutorily established by 1999 legislation.[1] The Office is a specialist one, concerned only with inspecting prisons, juvenile detention institutions, prisoner transport arrangements and court custody facilities. It is fully OPCAT-compliant, in terms of autonomy, powers and legal protections.

Whilst there are generalist organisations in most jurisdictions that are also OPCAT-compliant in these terms – for example, Ombudsman offices[2], the Australian Human Rights Commissions and State/Territory equivalents, Offices of the Public Advocate and the like – it is important to understand that there are few if any other specialist organisations in the Australian jurisdictions equivalent to that of the WA Inspector of Custodial Services. The National Interest Analysis (NIA) arguably overstates the present availability of such organisations for establishing a system of National Preventive Mechanisms (NPMs).[3]

As the first Inspector, I was responsible for developing protocols and processes for carrying out inspection responsibilities in ways that were consistent with the responsibilities of the detaining agencies to do their job effectively.[4] I was also responsible for developing the applicable standards. In practice these overlapped with the OPCAT standards of preventing "cruel, inhuman or degrading" treatment, though they also went much further than that.

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[1] *Prisons Amendment Act 1999.* See now *Inspector of Custodial Services Act 2003.*

[2] However, even these generalist and high status agencies do not all necessarily possess OPCAT-compliant powers: see paragraph 43 of the NIA where reference was made to the fact that the NSW Ombudsman does not have free and unfettered access to all the places of detention falling with the Optional Protocol.

[3] See, e.g., paragraph 27 of the NIA.

[4] The NIA correctly refers to the fact that the philosophy of OPCAT is that there should be *"dialogue and review between the detaining authority and the visiting body to encourage States to improve conditions where necessary" (paragraph 5).*

My other relevant professional experience dates back as far as 1971. I have carried out numerous reviews of prison policies and practices, from staff training to the prevention of self-harm and deaths in custody. In the last respect, I have also looked at police practices and safeguards. I have also conducted two reviews of forensic psychiatric detention arrangements. Both police lock-ups and closed psychiatric institutions are, like prisons, prime OPCAT areas of concern.

In 2011 I provided expert evidence in a prisoner litigation case that essentially turned on the imposition of cruel, inhuman or degrading treatment by prison authorities in one State (the case for the plaintiff prisoner was successful). I also consult widely for the private sector with regard to prison construction and prison management. My most recent publication is *Regulating Prison Conditions: Some International Comparisons.*[5]

In addition, I am the co-author (with Professor Neil Morgan) of the 2008 Australia Human Rights Commission publication, *Implementing the Optional Protocol to the Convention against Torture: Options for Australia.* The notion of a "mixed model" for the establishment of National Preventive Mechanisms that is favoured by National Interest Analysis derives from that publication.[6]

Finally, I presented a paper in February 2012 at the conference convened by Monash University on *Implementing Human Rights in Closed Environments.* The paper asked the question, *"Ratifying and Implementing OPCAT: Has Australia missed the boat?"* The point of the paper was to highlight the futility of unnecessary delay, in a context where the nature of setting up new inspection systems is such that their final shape, modus operandi, protocols and governance can only be determined by on-the-ground experience, as has been the case with the New Zealand NPM.

Efforts to anticipate every problem, deal with them as an abstract matter, can only take one so far. In the end, to attain the objective of preventing "cruel, inhuman or degrading treatment" occurring within Australia's various detention systems, one simply has to set up a system and allow it to evolve.

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[5] This appears in Petersilia and Reitz, *The Oxford Handbook of Sentencing and Corrections,* Oxford University Press, New York, 2012.

[6] See generally Chapter 6 and in particular paragraphs 6.12 – 6.24.

The Monash paper is attached both as a hard copy and as a PowerPoint presentation. In the following remarks, some cross-references will be made to it at various points.

B. The National Interest Analysis: Some cogent points

This is a balanced paper. Matters that I would endorse include the following:

a. *"Ratification and implementation of OPCAT will improve outcomes in the detention of people in Australia by providing a more integrated and internationally recognised mechanism for oversight. It will provide an opportunity for organisations involved in detention management and oversight to share information, guidelines, practices and problem solving measures with regard to the conditions and treatment of people in detention."* (*paragraph 7).*

   There are differences across States and within the Commonwealth as to the conditions of various groups within detention systems – for example, Aboriginal people, women, people suffering from mental illness, prisoners who are drug dependent upon admission, and so on. Although forums exist for discussion of differences, the prevailing standards documents (e.g., Standard Guidelines for Corrections in Australia) leave considerable room for disparities. If processes were measured against a robust set of criteria – "cruel, inhuman or degrading" – a greater degree of congruence would be achieved.

   Endorsing this point, the NIA states that: *"Undertaking monitoring of places of detention in accordance with OPCAT will achieve a more national and comprehensive approach, with a greater ability to identify gaps and issues particular to individual Australian jurisdictions, or commonly experienced by all" (paragraph 5).*

   New Zealand has also reported that: "A high level of cooperation by the detaining agencies and willingness to engage with the NPMs has been a consistent feature of the OPCAT experience. There has been an increase in referrals from staff, who recognise the benefits and potential of the OPCAT mechanism to improve conditions, eliminate risk and prevent harm." [7]

b. *"The New Zealand Human Rights Commission noted … that OPCAT had been valuable in 'identifying issues and situations that are otherwise overlooked, and in providing authoritative assessments of whether new developments and specific initiatives will meet the standards for safe and humane detention'" (paragraph10).*

[7] 4th Annual Report of New Zealand to the UN Sub-Committee for Torture, 2011.

Specifically, the early New Zealand experience identified that the detention situation most in need of oversight was that of closed psychiatric institutions. This came as a surprise, in a context where there is a common expectation that police and prison detention are typically the areas most in need of monitoring (see, e.g., for Australia the Royal Commission into Aboriginal Deaths in Custody).

It is possible that the establishment of a comprehensive NPM structure in Australia would similarly identify detentions areas that do not possess the highest profile. For example, early evidence suggests that disability institutions generally (not merely closed psychiatric wards) may fall into this category – but whether this supposition is accurate can only be truly determined when the NPM structure is established and operational.

c. *"The first Annual Report of the United Kingdom NPM … described increased cooperation and coordination among the existing oversight bodies that form their mechanism, including identifying areas of duplication and setting out the possibilities of cooperative reviews" (paragraph 10).*

This has also been the case in New Zealand. Some early overlap between two NPMs – the Ombudsman and the Children's Commissioner – has been sorted out on the ground, and an important joint research role has now been developed. This takes the form of a Joint Thematic review on Children and Young Persons in Police Custody.

d. *"Implementation of OPCAT should minimise instances giving rise to concerns about the treatment and welfare of people detained in prisons and other places of detention in Australia. In addition to the human rights benefits, monitoring pursuant to OPCAT has the potential to minimise the costs of addressing such instances, including some costs of litigation and compensation payments" (paragraph 11).*

In Australia at the present time the most publicised example of human rights concerns about conditions in places of detention relates to immigration facilities. Throughout the history of immigration detention, there has never been an OPCAT-compliant specialist agency with oversight of the conditions in these places measured against international human rights standards. The Commonwealth Ombudsman, the Australian Human Rights Commission and various Parliamentary Committees from time to time have inspected. However, this has been a patchwork approach with varying inspection models and standards – complaints driven (the Ombudsman), party political (Parliamentary scrutiny) and intermittent (Human Rights Commission). Consequently, Australia's international reputation has certainly been compromised.

The costs issue is extremely important. It is one that has concerned the States. I have addressed this in detail on slides 19-24 of the attached presentation. In summary, the points are as follows.

First, it is correct that Australian jurisdictions are starting to incur litigation costs because of breaches of duty of care standards that often are directly related to "cruel, inhuman or degrading" treatment. The extent of these costs is not fully on the public record because of the propensity of all jurisdictions – including the Commonwealth – to settle cases out of court subject to a "gag" or confidentiality clause.[8] The NIA (paragraph 34) confirms the New Zealand experience that *"preventing ill-treatment of detainees contributes a costs saving in the use of legal and health care systems arising from incidents of ill treatment."*

Second, a rigorous cost-benefit analysis would reveal other savings for governments. Poor detention practices carry with them a tangible political risk: see slide 20. The NIA also obliquely refers to this in its reference to risk management (paragraph 35).

Third, inspection systems are surprisingly inexpensive. The WA Inspector of Custodial Services office costs about 0.4% of the cost of running the services it overviews. A comparable figure is applicable to the British Chief Inspector of Prisons – though the jurisdiction is so wide that the costs are likely to be even lower when spread across all of these activities. A more narrowly focussed OPCAT-compliant agency is the Office of the Correctional Investigator (Canada). Its role is strictly limited to federal prisons. The budget of Correctional Service Canada is C$3 billion dollars; the budget of the Office is C$4.5 million. That is 0.15% of the monitored agency's costs. For this outlay the Office is remarkably effective.

Governments should readily be able to absorb such costs as add-ons. An alternative possibility is simply to levy the budget of the operational agency. Large agencies always carry fat; small agencies seldom do so. Of course, the budget would have to be directly allocated by central government to the NPM, not handed over within the operational agency's budget, if the arrangement is to be OPCAT-compliant. But the point is put this way to bring home how inexpensive this kind of function can be. It also serves to emphasise that, ultimately, a beneficiary of autonomous inspection is the inspected agency itself.

Fourth, improved systems are better not just for detainees but also for agency staff. Typically there are higher than average churn rates amongst employees in places of detention, as well as high levels of sick leave and of workers' compensation claims. Whilst it is not suggested that these things are solely attributable to human rights failures in relation to detainees, it is nevertheless widely accepted that a less stressed environment for detainees is a less stressed workplace for staff. Long experience in the UK with the MQPL (Measuring the Quality of Prisoner Life) and the SQL (Staff

[8] Informed speculation suggests that the Commonwealth has paid out between $17million and $23 million in the last decade or so.

Quality of Life) surveys demonstrate this point: see also *Alison Liebling, Prisons and their Moral Performance.*[9]

Finally, there is the hard-to-measure but tangible benefit of doing things properly. Gradually, autonomous inspection systems bring about improvements in such areas as deaths and self-harm in custody, segregation practices, prisoner health care, re-offending rates, rehabilitation and resettlement achievements, and so on. Precise cause and effect are not always easy to prove. But experienced autonomous inspection agencies observe clearly that it is so. These things are worth achieving for their own sake

e. The NIA recommends that Australia should *"lodge a declaration postponing the obligations relating to implementation of a national preventive mechanism for three years, as provided for under Article 24" (paragraph 2; see also paragraph 25).*

Whilst I agree with this recommendation, it is important to understand that this should not be taken as a permit for ratifying and then doing little else for three years. What should happen is that the ratification instrument should be lodged with the United Nations by, say, August 2012. The Commonwealth legislation setting up the framework, including crucially the obligations upon the States to create NPM structures, should be passed as soon as possible and preferably by the end of 2012. The States should then be encouraged to pass matching legislation as soon as possible.[10]

It is well understood that each jurisdiction will then have to make an inventory of places of detention that fall within OPCAT, then map their existing agencies, then make decisions as to what agency or agencies to designate as their NPM or NPMs, and that these matters will take some time.

Nevertheless, the aim should be to get the NPM structures up and running as soon as reasonably possible, perhaps by mid-2014; then to develop the relationship with the Central or Coordinating (Commonwealth) NPM; and then to indicate to the UN before the end of the three-year grace period that Australia is ready to commit unequivocally.

The three-year grace period provided by Article 24 should be regarded as a target to beat, not a period to be occupied by further delay.

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[9] Oxford University Press, Oxford, 2004.

[10] It is appreciated that Parliamentary time is always at a premium in all jurisdictions. In that respect early commitment is necessary. The process will be facilitated by the fact that a model statute has now been developed and approved in principle by each jurisdiction.

f. *"It is anticipated that implementation will involve designating a range of existing of existing inspection regimes at the jurisdictional level, utilising a cooperative approach between the Commonwealth and the States and Territories" (paragraph 27).*

The NIA favours the "mixed model" for the NPM structure. In reality this is the only way in which OPCAT can be implemented in a complex federal state such as Australia. Any attempt to impose a centralised model would fail. A crucial aspect of this sort of task is that the inspecting body should have good contact with and knowledge of the local detention system as well as with community organisations ("civil society").

A diagrammatic model of the mixed model is set out on Slide 28 of the attached presentation: see also paragraph 7.8 of Harding and Morgan (2008).[11]

## C. The National Interest Analysis: Some points that require clarification

The consultation phase was clearly beneficial. However, States may too readily assume that their existing mechanisms for inspection are either OPCAT-compliant or can readily be tweaked into compliance. The NIA tends to reflect that underlying assumption: for example, in its belief that there are numerous *existing agencies* that can be readily adapted into NPMs.

Later in the NIA, this position is modified: *"It was noted that the laws did not provide for access to all places of detention, and did not in all circumstances provide for regular inspection of places of detention…." (paragraph 43).*

There are more profound concerns than these, however. Apart from the high-level generalist agencies mentioned above and the WA Inspector of Custodial Services, it is true to say that very few inspection agencies possess the *functional independence* that is required by OPCAT (Article 18). For example, the Victoria Office of Correctional Service Review reports in-house to the Director-General, and the staff are employees of the inspected agency. It is evident from past history that its reports are regarded more as one of many inputs into Departmental policy development rather than as high-level documentation epitomising external scrutiny and requiring objective response.

[11] *Implementing the Optional Protocol to the Convention against Torture: Options for Australia,* Australian Human Rights Commission publication, 2008.

Similarly, the Queensland "Inspector-General of Prisons" reports in-house, and his reports are subject to review and negotiation with the Director-General before they are formally received.

In Western Australia – the State that is reported in the NIA as being somewhat opposed to the ratification of OPCAT because it is already compliant (at least in terms of the jurisdiction of the Inspector of Custodial Services) – it is proposed that closed psychiatric institutions should henceforth be inspected by "an independent evaluation and monitoring service *commissioned by the Health Department" and applying standards developed by the Department.* This would directly contradict the notion of "functional independence" that is central to OPCAT.

It could be thought, therefore, that some of the States have cultural difficulties in understanding the notion of "functional independence", as envisaged and required by OPCAT. The move to an NPM system will not simply be a case of anointing existing agencies, for many of them will lack the tradition of autonomous scrutiny of government bureaucracies.

In the Australian context, it may well be that each jurisdiction will have to re-think its inspection protocols and structures. This could be extremely beneficial. When inventories are done, it is likely that many "mini-inspectorates" will be identified, lacking the status or critical mass to make worthwhile inputs into standards in the particular detention area. If this is the case, consequential rationalisation offers the opportunity for savings – a matter relevant to the costs issue raised in the NIA.

These matters take time, of course. The Article 24 option mentioned above is appropriate for this reason – as long as it is not seen as an excuse for delay.

One other point requires comment. The NIA proceeds on the basis that the SPT is likely to visit Australia every five or six years. This seems unlikely. At present there are 63 States Parties. The SPT is not well resourced, and its current capacity seems to be to make about six country visits per annum. Many of the States Parties would seem to be in greater need of guidance and oversight than Australia. Possibly, there would be an initial visit quite soon after the Article 24

period has elapsed. After that, however, it would seem probable that nations with more pressing compliance issues would receive ongoing priority. It might well be that a further ten years could pass before the second visit.

That has been the experience with the European CPT, which has given more frequent attention to nations that are struggling to meet the human rights standards and less frequent attention to those that demonstrably have good internal mechanisms in place. Thus, the better Australia's internal NPM system is structured, the less often the SPT is likely to visit.

Fears that SPT jurisdiction could be intrusive or cut across Australia's sovereignty will not be borne out by our future experience as an OPCAT-compliant nation.

## D. Conclusion

JSCOT is urged to endorse the recommendation that Australia should ratify OPCAT. The process of on-the-ground implementation should commence simultaneously with the decision to ratify and preferably be brought to fruition before the three-year implementation period has elapsed.

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# Ratifying and implementing OPCAT: Has Australia missed the boat?

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# A brief conspectus of the story so far (1)

- 2003: The question of signing and ratifying OPCAT was referred to the Joint Standing Committee on Treaties (JSCOT).
- 2004: The Committee split along party lines, and the Coalition majority resolved that "there is no immediate need for Australia to sign and ratify OPCAT."
- The minority, consisting of A.L.P. and Greens members, argued that Australia's signing and ratifying OPCAT would be "an important act of leadership and a significant step in maintaining Australia's good human rights standards."

# A brief conspectus of the story so far (2)

- The reasons of the majority included –
  - Australia's then concern that "UN committees are not focussing on the most pressing of human rights violations";
  - "There is no suggestion that the independent national preventive mechanisms are inadequate in Australia;
  - "Australia is already regarded as a leader in human rights standards" so that there was no need to "send a message or set an example on human rights".
- The minority noted that Australia had recently taken up the position of Chair as the UN Human Rights Commission, and to reject OPCAT was inconsistent with that role.

# A brief conspectus of the story so far (3)

- November 2007:  A.L.P. Government elected.
- January 2008: Lobbying commenced at various levels to have Australia re-visit the question of OPCAT.
- September 2008: publication of AHRC consultation paper, *Implementing the Optional Protocol to the Convention against Torture: Options for Australia.*
- May 2009: Australia lodged signature to OPCAT with UN.
- 2009: National Interest Assessment (NIA) commenced, with a view to taking a recommendation back to JSCOT.

# Four years later

- Internationally there have been substantial strides forward:
  - Since January 2008, 27 additional States have ratified OPCAT, bringing the total to 62. (The 63rd, Philippines, will ratify in March.)
  - 37 States Parties have so far designated their National Preventive Mechanisms (NPMs).
  - Membership of the Sub-Committee for the Prevention of Torture (SPT) has increased from 10 to 25. This occurred from January 2011, after the number of States Parties had reached 50.
  - New Zealand was elected a member of the SPT from February 2011.
  - The SPT has conducted 11 country visits, has scheduled 6 more for 2012, and has developed robust and realistic *Guidelines on NPMs* which it is assisting States Parties to adopt and implement.

# Recent Australian activity

- National Interest Assessment nearing completion:
  - Drafting of model statute commenced under leadership of NSW – matching legislation required in all jurisdictions
  - Discussions at SCAG (now Standing Council on Law and Justice)
  - Roundtable involving all jurisdictions, with guidance and facilitation from the New Zealand member of the SPT (Justice Goddard) and also the Association for the Prevention of Torture (APT), July 2011
  - Correspondence with States seeking agreement in principle on ratification
  - Change in the position of Commonwealth Attorney-General – inevitable delay until full Departmental briefing.
- Is the NIA almost ready for JSCOT? Apparently, this is so.

# Some issues raised during the National Interest Assessment

- 1. The OPCAT jurisdiction goes too far in that the definition of "places of detention" is too wide.
- 2. "Torture" does not occur in Australia, and the definition of "cruel, inhuman and degrading" is too uncertain and potentially far-reaching.
- 3. Australia already has effective internal accountability systems in relation to "places of detention."
- 4.The new system would be too costly.
- 5. SPT visits to Australia would be intrusive and in any case redundant.
- 6. These matters are essentially for the States, and Commonwealth intervention via the external affairs power undermines the balance of Australian federalism.

# 1. “Places of detention”

- Make inventories, jurisdiction by jurisdiction.
- Prioritise the “Big Five.” These are:
  - Prisons
  - Juvenile institutions
  - Police cells
  - Closed psychiatric institutions (and other disability institutions)
  - Immigration detention facilities.
- Having identified the remainder, bring them within OPCAT at a manageable pace:
  - Military detention facilities; court custody centres; custodial transportation; hospital sits; transit zones/health quarantine areas at airports; terrorist detention facilities; secure welfare hostels for juveniles and wards of State; aged care homes.

# 2A. "Torture"

- "Torture" is defined by Article 1 of the UN Convention against Torture (UNCAT) in terms that require not just severity of the infliction of pain and suffering but also some purposive intent – e.g., to obtain a confession.
- "Torture" is primarily an agent-focused rather concept.
- Even such an extreme case as the death of Mr Ward, fried to death in the back of a prison van during a long journey in extreme heat without air conditioning, is probably not torture for the purposes of the Convention.
- **In practical terms "torture" can be disregarded**. Ratification is not an "admission" that Australia perpetrates torture.

# 2B. "Cruel, inhuman or degrading treatment or punishment" (1)

- Article 16 defines CID by way of exception to torture:
  - "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1."

- Summary points to address NIA concerns
  - F**or the purposes of possible OPCAT application, there is sufficient clarity that its meaning will not cause State authorities to feel they have been ambushed.**
  - Most decisions relate to prison conditions, but are in principle equally applicable to all "places of detention".
  - Regime objectives and outcomes are not *per se* factors relevant to whether conditions are cruel, inhuman or degrading.

# 2B. "Cruel, inhuman or degrading treatment or punishment" (2)

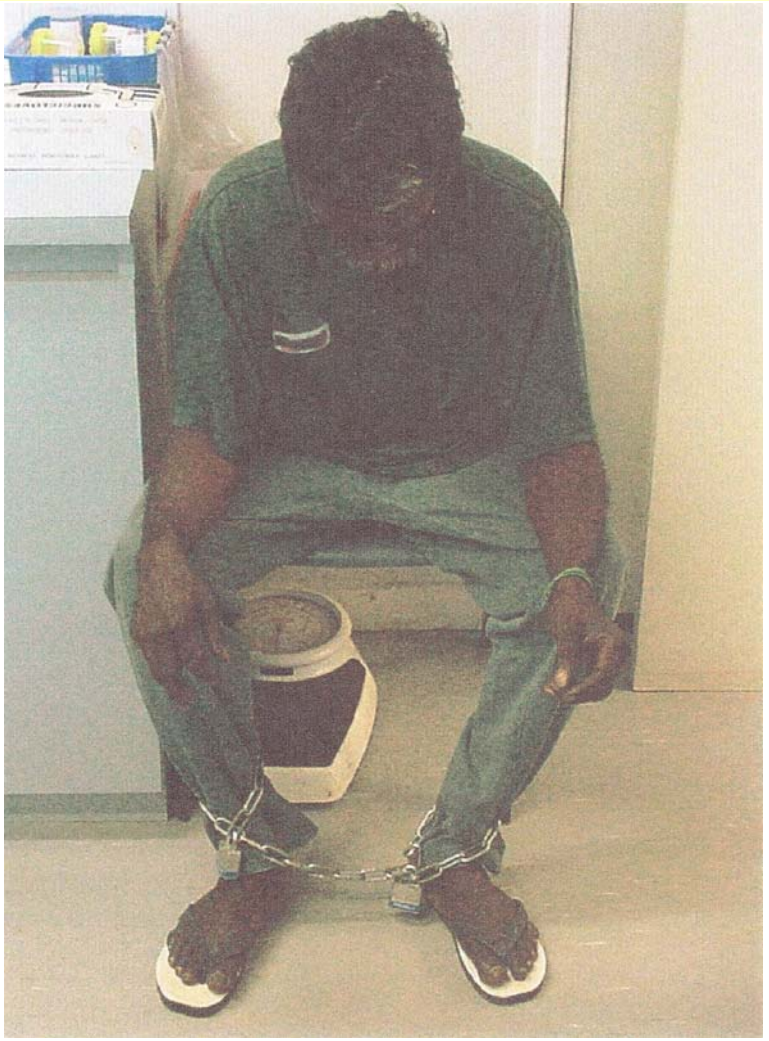
- OPCAT does not purport to intrude into regime objectives chosen by any particular State Party. It is concerned only with aspects of the means used to pursue the chosen objective.
- The general principle has been that conditions that bear upon a [detainee's] daily life can in principle be examined and weighed in the balance to determine at what point they become cruel, inhuman or degrading.
- Interpretative tools, including case law, inspection observations, coronial inquest findings, official inquiries etc, give substance to the notion.
- The international (viz. not common law) human rights standards and terminology have become part of the vernacular of regulatory and oversight bodies in Australia.

- Moreover, we can recognise it when we see it – there is a common sense aspect to it.

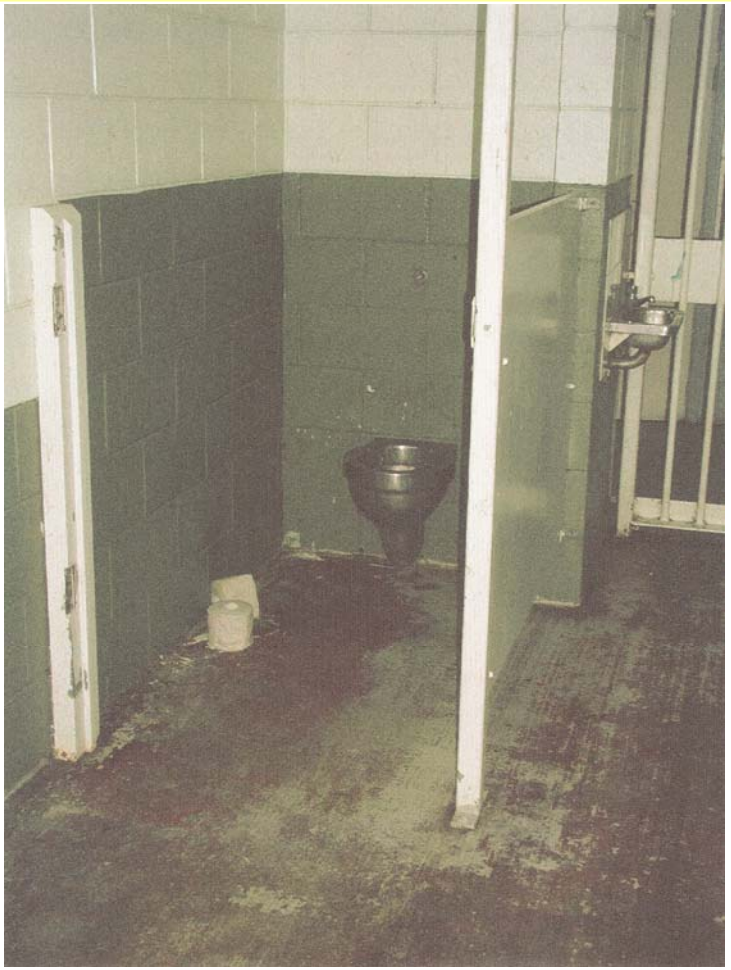
# Roebourne Regional Prison 2001: Degrading eating arrangements

# Broome Regional Prison 2001: Inhuman and degrading cell conditions

# Broome Regional Prison 2001: Degrading treatment of prisoner/patients



# Eastern Goldfields Regional Prison 2001: Degrading shared toilet conditions



# Constitutional authority under the external affairs power (s. 51(xxix))

- Implementing legislation:
  - must not depart too far from the terms of the Convention;
  - must be reasonably capable of being considered appropriate and adapted to the implementing treaty;
  - must prescribe a regime that the Convention itself has defined with sufficient specificity.
- The Commonwealth could not enact implementing legislation that required States and Territories to establish NPMs whose jurisdiction goes beyond the limitations of identifying and seeking to prevent what is cruel, inhuman or degrading.

# 3. Effective internal accountability systems are already in place

- Harding and Morgan (2008) attempted to make an inventory of OPCAT-compliant prevention mechanisms.
- Almost impossible – literally hundreds of inspection/reporting/quasi-regulatory agencies were found in the various jurisdictions in relation to the principal OPCAT "places of detention".
- Virtually none of the specialist agencies were OPCAT-compliant:
  - No autonomy
  - No public reporting
  - No untrammeled access to places or detainees

# OPCAT-compliant agencies

- Generalist bodies such as Commonwealth and State Human Rights Commissions/ Equal Opportunity Commissions and Ombudsman Offices are OPCAT-compliant.
- But their main expertise does not necessarily lie in inspecting places of detention against international human rights standards, nor are they primarily resourced to do so in the context of their broad general jurisdictions.
- AHRC and the Ombudsman Victoria and some other agencies have striven to fill the gaps, but the tap inevitably gets turned on and off.

# 4. OPCAT-compliant NPM system would be too costly (1)

- Autonomous inspection is extraordinarily cheap. The WA system costs less than 0.4% of the cost of running the prison system and related custodial services.
- This is so with most established inspection systems – e.g., HMCIP for England and Wales, Chief Inspector of Prisons for Scotland, and the Committee for the Prevention of Torture (Council of Europe).
- The Correctional Services Investigator (Canada) has a budget of C$4.5 million to monitor an agency that has a budget of C$3 billion – i.e., 0.15%.
- Consideration could be given to a levy on inspected agencies or even a fee-for-service system. This would be easily absorbed by large agencies.

# OPCAT-compliant NPM system would be too costly (2)

- There is a huge amount of overlap and waste amongst dozens of existing monitoring agencies most of whom are not OPCAT-compliant and do not inspect against clear standards and with proper powers.
- There has never been a comprehensive State-by-State mapping of these agencies and their roles.
- Some rationalisation, and thus cost savings, could occur as a by-product of OPCAT implementation.

# OPCAT-compliant NPM system would be too costly (3)

- There could possibly be a cost/benefit analysis as part of the OPCAT implementation process.
- The benefits would include reduced political risk:
  - In WA the Ward case was a classic example. The risk of a prisoner being harmed on a very long, land-based transport because of poor ventilation and climate control was repeatedly drawn to the attention of the Government of the day, but ignored. It is not too far-fetched to state that this incident contributed to the unexpected defeat of the ALP Government in the 2008 election.

# OPCAT-compliant NPM system would be too costly (4)

- Financial risk is also present when a detention situation is in breach of international human rights standards
  - The incoming WA Government will have to pay very large damages in the Ward case (c. $4 million), as well as endure the humiliation of a Departmental conviction for breach of applicable Worksafe (OHS) regulations.
  - At a Commonwealth level, the federal Government has had to pay about $20 million to date in compensation to immigration detainees detained in cruel, inhuman or degrading conditions, with the avoidable consequence of mental health trauma to those detainees
  - It is known that all State governments have had to settle prisoner litigation cases at considerable cost – usually with a gag clause.

# OPCAT-compliant NPM system would be too costly (5)

- Positive aspects of a cost/benefit analysis involve doing things better, to the benefit of everyone in the system, including the people who work in it –
  - The potentially inhuman practice of imprisoning Indigenous people out-of-country is gradually being addressed in WA – Derby and Eastern Goldfields prison developments – because of the problem being insistently highlighted by the inspection process
  - Deaths in custody have been reduced
  - Women are being treated in a more appropriate way
  - Segregation conditions have been improved.
- It is not easy to quantify such matters in $$ – but they are real.

# OPCAT-compliant NPM system would be too costly (6)

- The “hidden” cost benefits include staffing costs.
- It is well established that workers in areas where people have to be managed and controlled in a closed environment tend to have *lower-than-average job satisfaction*, *higher employment “churn” rates*, to take *more sick leave* and to make *more Worksafe (OHS) citatations* and *more compensation claims*.
- Each of these factors tends to diminish when the workplace conditions are more pro-social: see a range of literature including *Liebling, Prisons and their Moral Performance*.

# 5. SPT visits would be intrusive and redundant

- SPT protocols are extremely sensitive to national concerns.
  - A prime example relates to the willingness not to publish reports, with the emphasis being on dialogue rather than sanction.
- SPT is unlikely to visit Australia more than once every ten years, on account of its immense workload with inadequate resources and assuming that priority will be given to nations most in need of guidance.
- However, at the present time such visits would not be redundant, particularly in relation to immigration detention and many State-based places of detention.

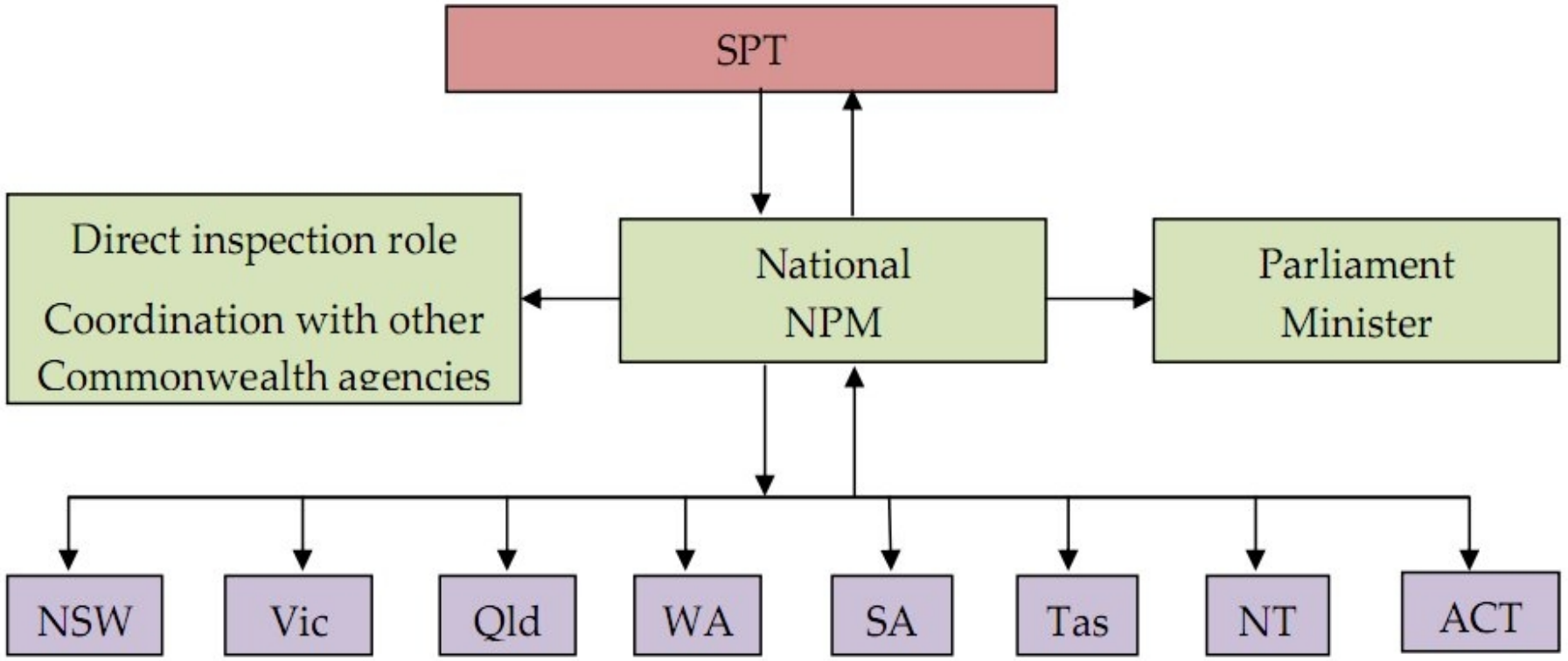
# Key example: Immigration detention and the AHRC

- Christmas Island inspection report, AHRC 2009:
  - "Legislation should be enacted to set out minimum standards for conditions and treatment of detainees in all of Australia's immigration detention facilities… The minimum standards should be based on relevant international human rights standards, should be enforceable and should make provision for effective remedies."
- Government response:
  - "DIAC does not consider it necessary to enact standards in legislation in order to meet Australia's human rights obligations…. New contractual arrangements for detention have a strong focus on the rights and wellbeing of people in immigration detention." Demonstrably, this response was wrong and politically costly.

# 6. States' rights and the balance of federalism

- The proposed models for OPCAT all assume that the individual States will create their own OPCAT structure in ways that suit their own needs and resources.
- OPCAT specifically provides for this eventuality:
  - Article 17 requires States Parties to establish "one or several independent national preventive mechanisms." This provision was explicitly intended to cater for the complexities of federal and devolved States. The UK has 19 NPMs; New Zealand has 5.
- The State NPMs would have a working but not subservient relationship with the national NPM, which in turn would have responsibility for the Ministerial and SPT linkages.

# NPM structure: Devolved and diversified



# OPCAT in action: The New Zealand position

- The Human Rights Commission has been appointed as the Central NPM.
- Four other specialist bodies have been appointed as NPMs in relation to their areas of expertise:
  - Ombudsman – prisons, closed psychiatric and health disability institutions, and child and youth residences;
  - Independent Police Conduct Authority – all forms of police detention;
  - Children's Commissioner – joint responsibility with Ombudsman in relation to child and youth residences;
  - Inspector of Service Penal Establishments – military detention;

# The scope of NPM jurisdiction and powers in New Zealand

- Free from Constitutional inhibitions, New Zealand has empowered its NPM agencies as follows:
  - (a) to consider the conditions of detention applying to detainees, and the treatment of detainees;
  - (b) to make any recommendations it considers appropriate (i) for improving the conditions of detention, (ii) for improving the treatment of detainees, and (iii) for preventing torture and other cruel, inhuman and degrading treatment or punishment in places of detention.
- Rehabilitation, vocational training and education opportunities, reparation and preparation for release could fall within the NPM remit within this formula.

# NPM achievements in New Zealand

- However, in practice the NPMs in NZ have restricted themselves to the strict terms of OPCAT.
- The 2009/2010 Annual Report to the SPT records many "practical achievements" relating to classic "cruel, inhuman or degrading" items:
  - Closure of a sub-standard facility
  - Adequate provision of health and mental health services
  - Changes in rules relating to use of restraints
  - Segregation practices
- First-round visits identified priorities, with closed psychiatric institutions emerging as the greatest single challenge.

# New Zealand and the notion of intrusiveness: 4th Annual Report to the SPT

- "A high level of cooperation by the detaining agencies and willingness to engage with the NPMs has been a consistent feature of the OPCAT experience. There has been an increase in referrals from staff, who recognise the benefits and potential of the OPCAT mechanism to improve conditions, eliminate risk and prevent harm… There has also been a greater engagement with civil society and community organisations, extending beyond the national to the local and regional levels."

# Relevance of the New Zealand experience to Australia

- New Zealand is a unitary State.
- The model is thus applicable to an Australian State jurisdiction.
- For example, New South Wales could decide upon its "subsidiary" NPM model in ways akin to New Zealand.
- Within that " subsidiary" but autonomous NPM structure, an appropriate linkage would be established to the "Central NPM", which would necessarily and appropriately be a Commonwealth agency: see slide 28, above.

# Cultural resistance in Australia to OPCAT-compliant approaches to inspection and prevention

- New South Wales: abolished its OPCAT-compliant prisons inspection agency in 2003.
- Victoria: litigated to prevent the reports of the "Office of Correctional Services Review" from being made public.
- Queensland: the "Chief Inspector of Prisons" reports directly to the CEO of the operational Department and the drafts of his reports must be sent up the hierarchical line for vetting before they are finalised and formally presented.
- Federal Coalition parties: totally opposed in 2003 and no basis for thinking this has changed.

# Recent WA developments: Self-referential bureaucratic standards and monitoring

- WA: The Inspector of Custodial Services is a model of OPCAT-compliance. However, the OPCAT-compliant culture has not taken hold.
- May 2011: Secure welfare detention of children commenced. The internal Standards Monitoring Unit of the Department of Child Protection monitors it, against internally set Departmental standards.
- October 2011: The amended Mental Health Act will abolish an OPCAT-compliant agency, the Council of Official Visitors, and replace it with an "independent evaluation and monitoring service" to be commissioned by the Health Department and apply the Department's own standards.

# Other Australian developments: Tiny beacons of light

- NSW: An election promise by the incoming government to establish an autonomous and OPCAT-compliant agency to inspect prisons is apparently in the action pipeline – and last week, a year after the election, the enabling legislation was introduced into Parliament.
- Tasmania: After a series of scandals, reports and successful prisoner litigation based on the argument that the conditions at the Tamar Unit at Risdon Prison were in breach of international human rights laws, the Government has said that it will confer specialist prison inspection powers upon the Ombudsman. That would be OPCAT-compliant in relation to that particular "place of detention". However, this undertaking has not yet been implemented.

# Implications for Australia (1)

- In terms of Commonwealth Government initiative, we may have missed the boat. Nominal acceptance in principle (i.e., 2009 signature of OPCAT) is not thoroughly matched by politico-legal cultural values and commitments: see Immigration Detention.
- A change of Commonwealth government would in any case mean the end of OPCAT commitment by Australia: see 2004 rejection of OPCAT.

# Implications for Australia (2)

- If the present Government is still serious about OPCAT – and the informal advice is that it is still committed - it should ratify the Protocol now. This formal commitment would be a practical symbol that would confront an incoming (non ALP) Government in the event of its election.
- The Government should then pass framework legislation.
- To the extent that the States are genuinely committed, they are running out of Parliamentary time themselves for 2012, unless there are very clear-cut commitments by the Commonwealth to bring the matter on.

# Implications for Australia (3)

- However, the concern is that Australia will go forward, if at all, in a patchy, uncoordinated way, with one State or another f(e.g. NSW) rom time to time creating an OPCAT-style agency in relation to some “place of detention” without any particular regard for OPCAT principles, and that OPCAT-style agencies from time to time will be closed down (WA).
- There will not be a principled, coherent and integrated development of NPMs in relation to Australian “places of detention.”
- Commonwealth action is thus urgently required.

# Implications for Australia (4): Department of External Affairs protocols

- The long-held standard that the implications for treaty ratification should be spelled out in precise detail prior to formal ratification is not fully applicable to OPCAT.
- New Zealand experience has shown that only on-the-ground experience enables the working protocols and agency relationships to evolve in realistic ways.
- As long as the framework legislation is not unduly rigid – e.g. by designating NPMs by name in ways that require statutory amendment if that arrangement is not working well – then the texture of the NPM arrangements will evolve pragmatically.