



Optional Protocol to the Convention Against Torture

Joint Standing Committee on Treaties

30 March 2012

Table of Contents

Acknowledgement	2
Introduction.....	3
The Key Features of the OPCAT	4
National Preventative Mechanism (NPM)	4
UN Sub-Committee on the Prevention of Torture (the Sub-Committee)	5
Previous Consideration of Australia's Ratification of OPCAT	5
National Interest Analysis	7
Benefits of Ratification.....	9
Preventing cruel, inhuman and degrading treatment in all places of detention in Australia	9
Improving conditions of detention in Australia in line with human rights standards.....	11
Enhancing Australia's compliance with the Convention Against Torture and other international human rights treaties	17
Enhancing accountability, transparency and coordination between agencies and organisations responsible for managing and monitoring places of detention.....	18
Effective Risk Management and Potential Cost Savings	20
Options for Implementation	22
Possible Options for a National Preventative Mechanism	23
Ensuring Access to Information and the Safety of Sub-Committee Members when undertaking visits in Australia	24
Conclusion	28
Attachment A: Profile of the Law Council of Australia	29

Acknowledgement

The Law Council of Australia acknowledges the assistance of the Law Society of Western Australia's Human Rights and Equal Opportunity Committee, the Law Society of New South Wales Human Rights Committee, the Queensland Law Society, the Law Society of South Australia and the Law Society of the Northern Territory in the preparation of this submission.

Introduction

1. The Law Council of Australia is pleased to provide the following submission to the Joint Standing Committee on Treaties in relation to its inquiry into Australia's possible ratification of the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the OPCAT).
2. The Law Council opposes all forms of torture, or cruel, inhuman or degrading treatment or punishment and believes that the State's obligation not to impose such treatment or punishment or to expose anyone to the real risk of such treatment or punishment is an obligation which can not be derogated from in any circumstances.¹ In line with this position, the Law Council strongly recommends that Australia ratify and implement the OPCAT.
3. The Law Council is pleased that the National Interest Analysis (NIA) recently prepared by the Commonwealth Government in relation to the OCPAT also makes this recommendation.²
4. The OPCAT is designed to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment by establishing a system of regular visits, to be undertaken by independent international and national bodies, to all places where people are deprived of their liberty.³
5. The Law Council has previously made submissions in support of Australia's ratification and implementation of the OPCAT to the Attorney General's Department⁴ and as part of its reports to United Nations (UN) human rights bodies.⁵ In line with these submissions, the Law Council supports the ratification of OPCAT on the grounds that it would assist in:
 - (a) preventing torture and other cruel, inhuman or degrading treatment from occurring in any place of detention in Australia;
 - (b) encouraging a culture of transparency and accountability amongst responsible Commonwealth, State and Territory agencies; and
 - (c) enhancing Australia's compliance with its obligations under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('the Convention')⁶ and ensure that Australian detention facilities and services adhere to international human rights standards.

¹ Details regarding the Law Council's Policy against the Death Penalty are available at http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/death-penalty/death-penalty_home.cfm

² National Interest Analysis [2012] ATNIA 6 [1], available at http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jscot/28february2012/tor.htm

³ The full text of the OPCAT is available at <http://www2.ohchr.org/english/law/cat-one.htm>.

⁴ See for example, Law Council of Australia, Submission to Attorney General's Department, Optional Protocol to the UN Convention Against Torture (1 July 2008) available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=CB4AD928-C678-E100-3133-862F184CA7F4&siteName=lca

⁵ See for example, Law Council of Australia, Shadow Report to Australia's Common Core Document, Report to the United Nations Human Rights Committee (29 August 2008) available at http://www2.ohchr.org/english/bodies/hrc/docs/ngos/LCA_Australia95.pdf

⁶ Australia signed the Convention in 10 December 1985 (entered into force in Australia 7 September 1989). The full text of the Convention is available at <http://www2.ohchr.org/english/law/cat.htm>

-
6. In addition to these reasons, the Law Council also supports ratification on the basis that:
 - (a) it has the potential to deliver cost savings and reduce the risk of liability for government agencies and departments responsible for detention facilities, by preventing or mitigating against circumstances that have previously given rise to compensation payments, such as those relating to deaths in custody or wrongful detention; and
 - (b) it can be implemented by utilising and building upon existing monitoring models, existing disclosure of information provisions and existing safety policies and procedures.
 7. In this submission, the Law Council will briefly outline the key features of the OPCAT and previous consideration of Australia's ratification, before focusing on the benefits that ratification can deliver for the Australian community.

The Key Features of the OPCAT

8. The Law Council's 2008 submission to the Attorney General's Department provides an outline of the development and key features of the OPCAT.⁷ These features centre on States Parties establishing and adhering to a two-tiered prevention mechanism – the national preventative mechanism and the international preventative mechanism - which can be summarised as follows.

National Preventative Mechanism (NPM)

9. The NPM is an independent body with a mandate to conduct both announced and unannounced visits to all places of detention, to make recommendations to prevent ill treatment and improve conditions, and to report publicly on its findings and views.⁸ The NPM is mandated to visit "any form of detention or imprisonment or the placement of a person in a public or private custodial setting in which that person is not permitted to leave at will by order of any judicial, administrative or other authority".⁹ These forms of detention, imprisonment or placement include police stations, immigration detention centres, juvenile justice centres, mental health institutions and social care institutions.
10. Under the OPCAT States Parties are obliged to establish a NPM or a series of NPMs within one year of ratification.¹⁰ States Parties are also required to:
 - (a) ensure that the NPM has access to all information concerning the number and treatment of persons deprived of their liberty in places of detention under the jurisdiction and control of the State;
 - (b) provide the NPM with the opportunity to have private interviews (without witnesses) with the persons deprived of their liberty, as well as with any other person believed to have relevant information;

⁷ See for example, Law Council of Australia, Submission to Attorney General's Department, Optional Protocol to the UN Convention Against Torture (1 July 2008) available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=CB4AD928-C678-E100-3133-862F184CA7F4&siteName=lca

⁸ OPCAT Article 19

⁹ OPCAT Article 4.

¹⁰ OPCAT Article 17

-
- (c) ensure the NPM has the liberty to choose the places they want to visit and the persons they want to interview; and the right to have contact with the United Nations (UN) Sub-Committee on the Prevention of Torture (the Sub-Committee);
 - (d) protect the free flow of information to the NPM, for example by ensuring that there is no sanction or prejudice exercised against any person or organisation for communicating any information to the Sub-Committee; and
 - (e) provide NPM members with such privileges and immunities as are necessary for the independent exercise of their functions.¹¹

UN Sub-Committee on the Prevention of Torture (the Sub-Committee)

- 11. The Sub-Committee is an independent committee of international experts with a mandate to carry out country missions to monitor all places of detention within that country.¹² Following visits to places of detention, the Sub-Committee makes recommendations and observations to States Parties with a view to strengthening national efforts to prevent torture and other cruel, inhuman degrading treatment or punishment.¹³
- 12. The Sub-Committee also plays a role in advising and assisting the NPMs in the evaluation of the needs and the means necessary to strengthen the protection of persons deprived of their liberty. This advice and assistance can include offering the NPMs training and technical assistance with a view to strengthening their capacities.¹⁴
- 13. Under the OPCAT, States Parties are obliged to:
 - (a) permit the Sub-Committee to access all places of detention;
 - (b) provide the Sub-Committee with all relevant information;
 - (c) permit the Sub-Committee to conduct private interviews with all person deprived of their liberty;
 - (d) protect the free flow of information to the Sub-Committee for example, by ensuring that confidential information collected by a NPM is privileged, and prohibit publication of personal data without express consent; and
 - (e) provide Sub-Committee members with such privileges and immunities as are necessary for the independent exercise of their functions.¹⁵

Previous Consideration of Australia's Ratification of OPCAT

- 14. For a number of years the Commonwealth Government has been considering ratifying and implementing the OPCAT.

¹¹ OPCAT Articles 20-21

¹² OPCAT Article 11

¹³ OPCAT Article 11

¹⁴ OPCAT Article 11(1)(b)(ii).

¹⁵ OPCAT Articles 12, 14-15. For the Subcommittee, the privileges and immunities are those specified in section 22 of the *Convention on the Privileges and Immunities of the United Nations*, done at New York on 13 February 1946 ([1949] ATS 3)

-
15. The Joint Standing Committee on Treaties (JSCOT) previously considered whether Australia should ratify the OPCAT in 2003, however the majority recommendation was against Australia taking binding treaty action at that time.¹⁶ This decision was reached after the majority of JSCOT accepted evidence from the Commonwealth Government regarding its “continued concern with the UN treaty bodies not operating effectively, and the subsequent need for reform”.¹⁷ In particular, the Government raised concerns that facilitating Sub-Committee visits to a jurisdiction such as Australia, in the absence of compelling reasons, was not an appropriate use of the UN’s resources. This view was reached despite 17 of the 20 submissions received by JSCOT expressing strong support for Australia’s ratification of the OPCAT, including those by the then Human Rights and Equal Opportunity Commission, the ACT Government and the Western Australian Government.
16. In 2008, under the newly elected Rudd Government and following Australia’s appearance before the UN Committee Against Torture, the Commonwealth Government publicly indicated its intentions to become a party to the OPCAT.¹⁸ Australia became a signatory on 22 May 2009.
17. During 2008, the then Attorney-General started consulting with State and Territory counterparts and other relevant State and Territory Ministers on what impact ratification may have in their respective jurisdictions. Some of the key issues raised by the States and Territories were that:
- (a) amendments to legislation would be required to comply with the Sub-Committee obligations due to legislative barriers that would prevent the Sub-Committee from obtaining access to information concerning the treatment of persons in detention or obtaining unrestricted access to certain places of detention;
 - (b) that existing laws and programs already substantially implemented the NPM obligations. These included existing bodies or programs within their jurisdictions with statutory powers to visit places of detention, obtain information about persons in detention and to conduct interviews with persons in detention;
 - (c) while one or more of the existing bodies could fulfil the NPM obligations, amendments to laws, regulations and policies would be required to ensure the mandate of existing bodies was consistent with the OPCAT requirements; and
 - (d) there would be costs associated with the operation of their components of a NPM.¹⁹
18. Further consultations with the States and Territories resulted in the formation of a working group comprising representatives from all Australian jurisdictions which met several times in 2010 and 2011.²⁰ This process resulted in a recommendation that the Commonwealth Attorney-General would seek the agreement of counterparts

¹⁶ Joint Standing Committee on Treaties, Report 58, tabled on 24 March 2004 available at <http://202.14.81.34/house/committee/jsct/OPCAT/report.htm>

¹⁷ Ibid at [3.61]

¹⁸ See for example Media Release, The Hon Robert McClelland, Attorney General, ‘Re-engagement with United Nations on Torture’ 17 May 2008, available at <http://www.robertmcclelland.com.au/2008/05/17/re-engagement-with-united-nations-on-torture>, see also ABC AM Program interview with the then Attorney General, the Hon Robert McClelland MP (8 August 2008) available at <http://www.abc.net.au/am/content/2008/s2328247.htm>

¹⁹ National Interest Analysis [2012] ATNIA 6 Attachment on Consultation [41]-[43]

²⁰ National Interest Analysis [2012] ATNIA 6 Attachment on Consultation [44]

from States and Territories to a timetable for ratification of the OPCAT.²¹ When writing to his counterparts, the then Attorney General proposed that Australia be in a position to ratify by the end of 2012 and sought in-principle agreement to a 'mixed model' approach to the NPM, whereby responsibility for inspections is shared between a number of bodies.²²

19. All States and Territories, apart from Western Australia, responded positively to the Attorney's letter. Western Australia expressed the view that ratification of the OPCAT was unnecessary given the existence of a satisfactory monitoring and inspection regime in its jurisdiction, however it agreed to cooperate on the passage of jurisdictional legislation to implement obligations in regard to the Subcommittee. In principle support for the 'mixed model' approach to the NPM was also provided.²³ However, the States and Territories maintained their earlier concerns regarding bearing the costs associated with the operation of their components of a NPM.²⁴
20. During 2008, the Commonwealth Attorney-General's Department also wrote to non-government organisations explaining the consultation process and inviting them to participate. The Law Council participated in this process by preparing a submission, with the assistance of a number of its constituent bodies, in favour of ratification.²⁵ The NIA states that a total of 19 submissions were received, all of which supported Australia becoming a party to the OPCAT.
21. On 6 June 2011 the Commonwealth Government re-iterated its commitment to ratify and implement the OPCAT, in response to recommendations to the Australian Government on how to improve its human rights performance as part of Australia's first Universal Periodic Review (UPR), which were made by UN Member States and endorsed by the UN Human Rights Council.²⁶

National Interest Analysis

22. On 28 February 2012, the Commonwealth Government tabled a National Interest Analysis (NIA) which proposes that Australia ratify the OPCAT.²⁷ The reasons in favour of ratification cited in the NIA include:
 - (a) Improving outcomes in detention by providing a more integrated and internationally recognised mechanism for oversight;

²¹ National Interest Analysis [2012] ATNIA 6 Attachment on Consultation [45]

²² Ibid at [45]

²³ Ibid at [46]

²⁴ Ibid at [46]

²⁵ See for example, Law Council of Australia, Submission to Attorney General's Department, Optional Protocol to the UN Convention Against Torture (1 July 2008) available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=CB4AD928-C678-E100-3133-862F184CA7F4&siteName=lca

²⁶ Australia appeared before the UN Human Rights Council in January 2011 for its first Universal Periodic Review (UPR). The UPR process is facilitated by the UN Human Rights Council and is separate from the UN treaty monitoring process. The UPR examines the human rights records of all 192 Member States once every four years. Member States are invited to pose questions and make recommendations to the country being examined. These recommendations are then collated and endorsed by the UN Human Rights Council and the country being examined is given up to six months to consider the recommendations and make its response. On 6 June 2011 the UN Human Rights Council released the Australian Government's response to the recommendations made during the UPR. A copy of this response is available at <http://www.ohchr.org/EN/HRBodies/UPR/PAGES/AUSession10.aspx>.

²⁷ Joint Media Release, the Hon Nicola Roxon MP, Attorney General, and the Hon Craig Emerson MP, Minister for Trade Acting Minister for Foreign Affairs, 'Gillard Government moves to ratify OPCAT', (28 February 2012) Available at <http://www.attorneygeneral.gov.au/Media-releases/Pages/2012/First%20Quarter/28-February-2012---Gillard-Government-Moves-To-Ratify-Opcat.aspx>

-
- (b) Providing an opportunity for organisations 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;
 - (c) Coordinating and standardising the current varying levels of oversight both between different types of detention, and between jurisdictions, and addressing any gaps in monitoring, particularly in relation to police detention facilities; and
 - (d) Minimising instances giving rise to concerns about the treatment and welfare of people detained in prisons and other places of detention in Australia, which have the potential to minimise the costs of addressing such instances, including avoiding some costs of litigation and compensation payments.²⁸
23. The NIA also notes that the OPCAT has now been in force for over five years and has more than 60 States Parties, with a further 22 countries listed as signatories.²⁹ The positive experiences of comparable overseas jurisdictions are also noted.³⁰
24. It is clear from the NIA that arrangements regarding the establishment of the NPM have not yet been finalised and that consultation and negotiations between the Commonwealth and the States and Territories remain ongoing.³¹
25. The NIA acknowledges that some gaps exist in the coverage provided by existing monitoring bodies, particularly relating to police cells and detainee transfer vehicles. It suggests that these gaps might be addressed by expanding the mandate of an existing independent body or establishing a new independent body to specifically carry out the NPM functions with respect to these places of detention. The UK's Inspectorate of Constabulary and Her Majesty's Inspectorate of Prisoners is cited as an example of a monitoring body that had its mandate extended following ratification of OPCAT to cover police stations across the UK.³²
26. In terms of time frames for implementation, the NIA sets out the Government's intention to make a declaration at the time of ratification that Australia's obligations under the OPCAT in respect to the NPM be delayed by three years. Although Article 17 of the OPCAT obliges States Parties to establish a NPM within one year of ratification, Article 24 allows States Parties to make a declaration delaying the implementation of one (but not both) of the monitoring mechanisms by a maximum of three years. The NIA explains that this approach has been adopted by the United Kingdom (UK) and Germany. The NIA states that the three year delay is necessary to manage any "administrative and legislative changes" to effectively implement the OPCAT, which is likely to involve "designating a range of existing inspection regimes at the jurisdictional level, utilising a cooperative approach between the Commonwealth and the States and Territories".³³
27. The NIA further provides that a working group of officials from all jurisdictions, reporting to the Standing Committee on Law and Justice, has been formed to carry forward implementation arrangements.

²⁸ National Interest Analysis [2012] ATNIA 6 [7]-[11]

²⁹ Ibid at [10]

³⁰ Ibid at [10]

³¹ Ibid at [31]

³² Ibid at [31]

³³ National Interest Analysis [2012] ATNIA 6 [26]-[27]

-
28. In terms of costs, the NIA explains that the only cost in relation to the Sub-Committee component of the OPCAT will relate to Australia facilitating visits by the Sub-Committee to places of detention, which is likely to be minimal due to the low frequency (once every four to five years) and short lengths (one or two weeks) of such visits.
29. The NIA describes the costs in relation to the NPM as “ongoing and stable”,³⁴ with the lowest cost option being the utilisation of existing bodies to undertake this role. However, the NIA also notes that it will be up to each jurisdiction to bear their own costs as a result of their responsibility for the welfare of their relevant detainee populations, and that jurisdictions “benefit from improved risk management and flow on effects from regular monitoring of their places of detention”.³⁵

Benefits of Ratification

30. Australia has historically supported international action to prevent torture and cruel, inhuman and degrading treatment and has publicly condemned such conduct at home and abroad.
31. Australia has been a signatory to the Convention since 1985 and the OPCAT since 2009, regularly appears before the UN’s Committee Against Torture, and is due to do so again within the next 12 months. The current Commonwealth Government has continued in this tradition, and in 2009 introduced a specific Commonwealth offence of torture and provisions to ensure that Australian States and Territories cannot re-introduce the death penalty into their criminal laws.³⁶ Ratifying the OCPAT would build upon these measures and demonstrate a practical commitment to guarding against torture and cruel, inhuman and degrading treatment within Australian detention facilities.
32. Ratification and implementation will deliver a range of benefits for the Australian community, both in terms of preventing torture or cruel or inhuman treatment in line with our international human rights commitments and in terms of enhancing accountability and transparency within those agencies responsibly for managing and monitoring place of detention. This process in turn has the potential to result in improved service delivery, risk management and cost savings for the community.

Preventing cruel, inhuman and degrading treatment in all places of detention in Australia

33. While incidences of “torture”, understood as treatment designed to obtain a confession or undertaken with some other purposive intent, are very rare in Australia, there remains a pressing need to ensure that any treatment that could be classified as cruel, inhuman or degrading is prohibited and *prevented* in all Australian detention facilities. The OPCAT assists in this process by providing a two-tiered monitoring mechanism that aims to identify areas, practices or procedures that give rise to a risk of cruel, inhuman and degrading treatment occurring, and helps implement strategies, such as training and education, to eliminate these risks in the future.
34. Subjecting all Australian places of detention to meaningful, regular and consistent external scrutiny would provide the incentives for all Australian Governments to develop proactive policies and procedures to prevent cruel, inhuman or degrading treatment. For example, it would encourage governments to put qualitative

³⁴ National Interest Analysis [2012] ATNIA 6 [34]

³⁵ National Interest Analysis [2012] ATNIA 6 [35]

³⁶ *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2009*.

inspection systems in place; collect accurate and detailed data; appropriately train staff; review resource allocations and develop their own practical guidance and standards specific to the conditions of each detention facility.

35. Importantly for Australia, ratification of the OPCAT and the establishment of a NPM or NPMs would also remove any gaps in the current approach to monitoring detention facilities and promote a consistent approach to prevention strategies.
36. A 2008 review of existing internal accountability mechanisms operating in respect of places of detention in Australia found that most are not OPCAT compliant.³⁷ For example, the review found that often existing accountability mechanisms only report internally to the responsible Government Department and that many do not have full access to places of detention.³⁸ The review also noted that there is often no system for measuring the extent to which their findings are reflected in changing practice.³⁹ It was further found that while some existing bodies have many features in common with NPMs under the OPCAT, such as the Ombudsman offices and the Human Rights Commissions, these bodies have broad, resource intensive mandates that do not necessarily allow for a consistent focus on inspecting places of detention against international human rights standards.⁴⁰
37. In addition, while some Australian detention facilities have external monitoring systems in place, other places of detention in Australia have not been subject to long term, consistent or regular external scrutiny to ensure compliance with human rights standards: such as police cells and vehicles; psychiatric facilities; secure care facilities for minors and other health facilities or services that include practices involving forms of detention or restraint. For example, the Queensland Law Society, one of the Law Council's constituent bodies, has noted that the OPCAT may apply to the use of restrictive practices (such as physical restraints or mechanical restraints)⁴¹ in services which form part of Queensland's disability services model.
38. Even where external monitoring or scrutiny of a place of detention currently exists, it may not be sufficient to ensure Australia adheres to its obligations under the Convention. The fact that there continue to be incidences occurring within Australian detention facilities that fall within the category of cruel, inhuman or degrading treatment – such as the tragic case of an Indigenous man who died while being transported in a police vehicle in extreme heat,⁴² and the high incidence of serious mental illness in immigration detention facilities⁴³ - suggests that more needs to be done to monitor all places of detention and to develop effective prevention strategies.
39. It is also important to note that ratification of OPCAT would not subject the objectives of detention to external scrutiny, but rather the conditions of detention, or

³⁷ A report to the Australian Human Rights Commission by Professors Richard Harding and Neil Morgan (Centre for Law and Public Policy, The University of Western Australia), *Implementing the Optional Protocol to the Convention against Torture : Options for Australia* (2008) available at http://www.hreoc.gov.au/human_rights/publications/opcat/index.html#1

³⁸ Ibid at [1.3]-[16]

³⁹ Ibid at Part 6.

⁴⁰ Ibid at [6.19]

⁴¹ For further information see <http://www.communities.qld.gov.au/disability/key-projects/positive-futures/changing-lives-through-positive-behaviour-support/restrictive-practices/>

⁴² See for example Chalpat Sonti 'Multimillion-dollar payout to Mr Ward's family after prison van death' *WA Today* (29 July 2010) available <http://www.watoday.com.au/wa-news/multimilliondollar-payout-to-mr-wards-family-after-prison-van-death-20100729-10x1l.html#ixzz1q1kjFnd9> ; see also Deaths in Custody Watch Committee WA at deathsincustody.org.au

⁴³ See for example Media Release by Australian Medical Association 'Prolonged Immigration Detention puts Detainees At Higher Risk of Mental Illness' (17 January 2010) available at <http://ama.com.au/node/5277>

the way that is carried out. This focus ensures that ratification of OPCAT does not result in the Commonwealth or any other body unlawfully intruding into State and Territory criminal justice policy.⁴⁴

Improving conditions of detention in Australia in line with human rights standards

40. In addition to *preventing* torture or other cruel, inhuman or degrading treatment from occurring in the future, ratification of the OPCAT can assist Australia to address existing national and international concerns with certain places of detention, and to ensure that these detention facilities adhere to international human rights standards, including those under the Convention.
41. The urgent need to monitor, review and reform certain places and practices in detention can be illustrated by the following examples drawn from a range of Australian jurisdictions and various detention facilities.

Improving conditions of detention in New South Wales

42. In the Law Council's 2008 submission, the Law Society of New South Wales (LSNSW) raised particular concerns regarding the harsh regime, including prolonged isolation of remand detainees and other prisoners, in 'super maximum' prison facilities, such as that at Goulburn, which have not been subject to regular monitoring for compliance with human rights standards, including Australia's obligations under the Convention.
43. Concerns about the conditions of detention at this facility were highlighted by the Australian Human Rights Commission (AHRC) during a coronial inquest into the death of Scott Ashley Simpson, a prisoner who suffered from paranoid schizophrenia who was held on remand in the facility for almost 12 months.⁴⁵ Ratification of OPCAT could assist in the development and enforcement of national standards or guidelines regarding the appropriate conditions of detention for persons with serious mental health problems
44. More recently, in a letter to the NSW Attorney General, the LSNSW raised concerns about other detention facilities in NSW that may fail to adhere to Convention obligations and that would greatly benefit from regular, consistent monitoring from national and international bodies under OPCAT. For example the LSNSW raised concerns about insufficient mental health care within prisons for mentally ill inmates; poor conditions, including overcrowding, within juvenile detention centres; and poor conditions within aged care facilities. The LSNSW also noted the use of inappropriate prisoner transport, which led to the recent death of Mark Stephen Holcroft, in conditions that constituted a clear breach of Article 11 of the Convention.

Preventing Aboriginal Deaths in Custody

45. Statistics from 2011 show that Aboriginal and Torres Strait Islander people comprised 26% of the total prison population despite making up only 2.5% of the total population.⁴⁶ The overrepresentation of Aboriginal people in prisons is

⁴⁴ Professor Richard Harding 'Ratifying and Implementing OPCAT: Has Australia missed the boat?' Presentation at Human Rights in Closed Environments Conference, Melbourne, 21 February 2012

⁴⁵ Human Rights and Equal Opportunity Commission, *Written Submissions to the NSW Coroner's Inquest into the Death of Scott Simpson* (27 June 2006)

<http://www.humanrights.gov.au/legal/submissions_court/intervention/simpson.html>, [4.16].

⁴⁶ Gerry Georgatos 'The real facts on deaths in custody and the racism of incarcerating Aboriginal peoples' Independent Media Centre Australia (26 October 2011), available at '<http://indymedia.org.au/2011/10/26/the-real-facts-on-deaths-in-custody-and-the-racism-of-incarcerating-aboriginal-peoples-mo>'.

particularly stark in Western Australia, where Aboriginal people make up 42% of the total prisoner population, despite comprising less than 3% of the total population in that State.⁴⁷ In 2011, a federal parliamentary committee described the over-representation of Indigenous youth in Australia's criminal justice system as a "national crisis", finding that Aboriginal youth are 28 times more likely to be detained than non-Indigenous youth.⁴⁸

46. Indigenous deaths in custody remain a very serious concern, with the numbers of deaths per year continuing to rise despite the passage of 20 years since the Royal Commission into Aboriginal Deaths in Custody.⁴⁹ The Royal Commission made over 300 recommendations for reform, including in relation to conditions of detention such as cell design, and many of these recommendations have not yet been fully implemented.⁵⁰
47. The need for Australia to ensure independent oversight of all places of detention including places where police hold people in custody, and for independent investigation of all deaths in custody, was also one of the recommendations endorsed by the UN Human Rights Council during the 2011 UPR of Australia. The need for independent oversight and investigation of places of detention has also been subject to recommendations by the Committee against Torture in its 2008 Concluding Observations; the Committee on the Elimination of Racial Discrimination in its 2010 Concluding Observations; and the Special Rapporteur on the rights of Indigenous people following his country visit in 2010.⁵¹
48. Ratification of OPCAT and the involvement of national and international monitoring bodies could provide the impetus needed for policy makers to fully implement the recommendations made by the Royal Commission into Aboriginal Deaths in Custody and subsequent recommendations by UN bodies in this area.

Improving Conditions of Detention in Immigration Detention Facilities

49. Despite a range of political developments impacting on the approach taken to processing asylum seekers in Australia, a policy of mandatory detention for all non-citizens who arrive in Australia without a visa remains in place. In recent years, this has led to the detention of large numbers of asylum seekers and other non-citizens in immigration detention facilities, some of which are in remote locations.
50. The recent political impasse on the issue of processing asylum seekers who arrive by boat,⁵² combined with a series of High Court decisions,⁵³ has led the

⁴⁷ Ibid

⁴⁸ Sabra Lane, 'Indigenous youth crime rates a 'national crisis' ABC Online (21 June 2011) available at <http://www.abc.net.au/news/2011-06-21/indigenous-youth-crime-rates-a-national-crisis/2765676>

⁴⁹ The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) reported in 1991. Its report is available at http://www.hreoc.gov.au/social_justice/publications/deaths_custody/introduction.html. For information about Aboriginal deaths in custody since the Royal Commission see Australian Institute of Criminology 'Deaths in Custody' webpage http://www.aic.gov.au/criminal_justice_system/deaths%20in%20custody.aspx

⁵⁰ See for example, Ben Schokman, 'Reflection on 20 years since Royal Commission into Deaths in Custody', (2011) 36(2) *Alternative Law Journal* 127; Larissa Berhendt, 'Deaths in custody still haunt indigenous communities' *Sydney Morning Herald*, (15 April 2011)

Available at : <http://www.smh.com.au/opinion/society-and-culture/deaths-in-custody-still-haunt-indigenous-communities-20110414-1dfoz.html#ixzz1q1scppKJ>

⁵¹ For further discussion see Ben Schokman, 'Reflection on 20 years since Royal Commission into Deaths in Custody', (2011) 36(2) *Alternative Law Journal* 127

⁵² In 2011 the Government signed a Memorandum of Understanding (MOU) under the Bali Regional Protection Framework with Malaysia, that would involve Australia transferring 800 asylum seekers to Malaysia, and Australia receiving 4000 persons determined to be by the UNHCR to be refugees from Malaysia. However, the Government's attempt to implement the MOU by declaring Malaysia as a country to which

Commonwealth Government to restore a single system for processing visa applications which enables boat arrivals to have their applications for protection visas reviewed through the Refugee Review Tribunal instead of the previous Independent Merits Review System. It has also led to the release of some detainees from particularly crowded facilities and the continued use of community detention for vulnerable asylum seekers including children and families.

51. Despite these developments, the Australian Human Rights Commission (AHRC) and many other non-government organisations continue to hold serious concerns regarding the conditions experienced by those detained in immigration detention facilities, particularly as the number of people in detention have grown over recent years and people have been detained for longer periods. Many of these concerns relate to the dramatic impact that immigration detention has on the mental health of detainees.
52. In recent years, the growth in the number of people in detention has led to increased incidents of self-harm and suicide. Statistics provided by the Department of Immigration and Citizenship (DIAC) indicate alarming rates of self-harm: for example, from 1 July 2010 to 30 June 2011 there were 700 instances of threatened self-harm, 46 serious self-harm attempts and 386 incidents of actual self-harm in immigration detention facilities.⁵⁴
53. The Mental Health Council of Australia also reports high rates of self harm in immigration detention with 1110 self harm incidents reported in 2010/2011 or up to three or four a day being reported.⁵⁵ These rates place suicidal behavior by people in detention at more than 26% higher than in the general community.⁵⁶
54. In its most recent visit to Curtin Immigration Detention Centre in December 2011,⁵⁷ which held around 1400 detainees at that time, the AHRC expressed significant concern about “the impacts of detaining people in a remote location with a harsh physical environment; inappropriate infrastructure including intrusive security measures and crowded dormitories; limited access to communication facilities; limited opportunities for external excursions; limited recreational and educational activities; and claims of inappropriate treatment by some detention staff.”⁵⁸

asylum seekers could be taken under the *Migration Act 1958* (Cth) was found to be invalid by the High Court. The Government subsequently introduced amendments to the Migration Act in response to the High Court decision but the Opposition, the Greens and key Independents indicated that they would vote against the amendments and they have not progressed in Parliament, despite the Government recently agreeing to consider processing in Nauru, which the Opposition has long called for, in addition to processing in Malaysia.

⁵³ For example see *Plaintiff M61/2010E v Commonwealth of Australia*; *Plaintiff M69 of 2010 v Commonwealth of Australia* [2010] HCA 41; *Plaintiff M70/2011 and Plaintiff M106/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011).

⁵⁴ Joint Select Committee on Australia's Immigration Detention Network, *Question 22 - The Department of Immigration and Citizenship's answers to questions on notice, received 16th August 2011*. At http://www.aph.gov.au/Senate/committee/immigration_detention_cte/immigration_detention/submissions.htm

⁵⁵ Northern Territory Council of Social Services (NTCOSS) in partnership with the Darwin Asylum Seeker Support and Advocacy Network (DASSAN), *The Community Services Sector and Asylum Seekers in the Northern Territory*, 31 January 2012 p. 14.

⁵⁶ Mental Health Council of Australia (2012) Fact Sheet: Mental Health Centre for Refugees and Asylum Seekers in Immigration Detention Centres available at http://dassan.weebly.com/uploads/8/2/7/1/8271022/refugees_and_asylum_seekers_in_detention.pdf.

⁵⁷ Australian Human Rights Commission, 2011 Immigration detention at Curtin Observations from visit to Curtin Immigration Detention Centre and key concerns across the detention network (December 2011) available at http://humanrights.gov.au/human_rights/immigration/idc2011_curtin.html

⁵⁸ Ibid, Part A 2

-
55. The AHRC also explained that the remote location of the Curtin Detention facility was having serious negative impacts on the ability of detainees to access timely and appropriate health care, and mental health care. For example, it was observed that:

*In order to receive specialist medical care, people detained at Curtin IDC have to be transported to Broome (a two hour drive away) or to Perth (more than 2500 kilometres away). At the time of the visit, there were a limited number of vehicles and Serco officers available to transport people to medical appointments. It was also concerning that, should an ambulance be required at Curtin IDC, it would have to travel from Derby, approximately 40 kilometres away. This was especially troubling given the lack of an onsite trauma bed, cardiac monitor and intravenous infusion pump at the time of the visit.*⁵⁹

56. The AHRC also observed that the impact of prolonged periods of detention, coupled with the sense of uncertainty surrounding the finalisation of their asylum claims, was leading to high rates of self-harm and an apparent suicide at the facility earlier in 2011.⁶⁰
57. While ratification of the OPCAT alone is unlikely to resolve the many complex policy problems associated with Australia's asylum seeker policies, it does have the potential to introduce clarity and consistency into what has previously been a limited system of review of immigration detention facilities for compliance with human rights standards.⁶¹ While the AHRC and the Commonwealth Ombudsman have undertaken many critical visits to immigration detention facilities to investigate complaints and to report on whether these facilities comply with human rights standards, these visits must compete with other urgent priorities faced by the AHRC and the Ombudsman.
58. Ratification of the OPCAT would ensure that all immigration facilities are regularly visited and monitored by the NPM, and are subject to inspection by the international Sub-Committee. It would also encourage the development of standards and guidelines, based on human rights principles that could be implemented in all immigration detention facilities to address and prevent the type of conditions described above.

Particular Concerns with Immigration Detention in the Northern Territory

59. The Law Society of the Northern Territory (LSNT), one of the Law Council's constituent bodies, has raised particular concerns that many features of immigration detention facilities in the Northern Territory (NT)⁶² fail to adhere to the standards under the Convention, and could be greatly improved by the external scrutiny mechanisms that form part of the OPCAT.⁶³

⁵⁹ Ibid Part B 8.1

⁶⁰ Ibid Part A 2

⁶¹ The Law Council notes that the Commonwealth Ombudsman has a system of visiting each immigration detention centre at least twice per annum, and undertook four visits to the detention centre Christmas Island and six visits to the detention centre at Villawood, see Annual Report at http://www.ombudsman.gov.au/pages/publications-and-media/reports/annual/ar2010-11/download/pdf/ombudsman_anrep_2010_2011.pdf

⁶² The immigration detention facilities in the Northern Territory are: Darwin Airport Lodge, which holds families and unaccompanied minors, with a capacity of 435 people; the Northern Immigration Detention Centre, which holds unaccompanied men with a capacity of 536 people, and may also hold unaccompanied minors who are alleged to be illegal foreign fishermen; Wickham Point, which is a new facility designed to hold up to 1,500 unaccompanied men, and currently holds around 800 men; Berrimah House, which is currently empty.

⁶³ In addition to consulting with the legal profession in the NT, the LSNT also consulted with the Northern Territory Council of Social Services, the Darwin Asylum Seeker Support and Advocacy Network, the Migration

-
60. The LSNT is particularly alarmed by the dramatic, negative impact immigration detention has on detainees' mental health. For example, the Northern Territory Council of Social Services (NTCOSS) has reported that the Royal Darwin Hospital has seen a child as young as nine years old admitted for self-harming while in immigration detention.⁶⁴ In a March 2012 press release, Darwin Asylum Seeker Support and Advocacy Network (DASSAN) has reported that the levels of self harm inside the Northern Immigration Detention Centre (NIDC) are "out of control", with "four people attempting suicide by hanging themselves, a large number of self harm incidents and a number of hunger strikes" occurring in recent weeks.⁶⁵ The Australian Medical Association in Darwin has also recently reported that up to five people a day are attending the Royal Darwin Hospital from Darwin detention centres and "virtually all of them have mental health issues".⁶⁶
61. Given the fact that the majority of persons in immigration detention ultimately receive permanent visas, the LSNT is also concerned about the long term impact mental health problems associated with immigration detention can create for the community. Issues of particular concern include: levels of mental illness, levels of self-harm, the impact on relationships and parenting capacity, the reported levels of use of self medication and reduced capacity to contribute to Australian society in terms of employment after release. The LSNT submits that having members of the Sub-Committee inspecting detention facilities in the NT as a mechanism under OPCAT would contribute to improving conditions that are currently giving rise to such alarming mental health concerns.

Particular Concerns with Immigration Detention Facilities in South Australia

62. The Law Society of South Australia (LSSA), one of the Law Council's constituent bodies, has raised particular concerns regarding the conditions of detention in immigration detention facilities in South Australia, including facilities at Woomera and the Baxter Detention Centre at Port Augusta. South Australian lawyers have for many years visited these detention centres on a pro-bono basis for the purpose of representing asylum seekers and have encountered difficulties obtaining access to clients. Visiting lawyers have also been continually appalled at the standard of conditions in these centres, noting for example the lack of adequate medical facilities, and inhumane treatment by certain guards.
63. The LSSA draws particular attention to *Secretary, Department of Immigration and Multicultural and Indigenous Affairs v Mastipour*⁶⁷ where the Full Federal Court noted that there was no detailed regulatory regime in place in detention centres against which one would consider the duty of care owed to detainees by the

Support Program at the Australian Red Cross in the Northern Territory and the Australian Medical Association in the Northern Territory when raising these concerns with the Law Council. In raising these concerns, the LSNT notes the many private service providers currently engaged to deliver health and other services to asylum seekers and other people who are or have been immigration detention, such as Serco Australia Ltd whose services include management of the three major immigration detention facilities in the NT, the International Health and Medical Service whose services include mental, physical and dental health, Red Cross Australia whose services include resettlement assistance and Melaleuca Refugee Centre Torture and Trauma Survivors Service of the NT Incorporated, which provides torture and trauma counseling.

⁶⁴ Northern Territory Council of Social Services (NTCOSS) in partnership with the Darwin Asylum Seeker Support and Advocacy Network (DASSAN), *The Community Services Sector and Asylum Seekers in the Northern Territory*, 31 January 2012 p. 14.

⁶⁵ Darwin Asylum Seeker Support and Advocacy Network (DASSAN) Press Release (20 March 2012) <http://dassan.weebly.com/dassan-press-releases.html>

⁶⁶ ABC News Online 'Darwin hospital struggling with asylum trauma' (20 March 2012) available at <http://www.abc.net.au/news/2012-03-20/darwin-hospital-struggling-with-self-harm-asylum-cases/3900116>

⁶⁷ [2004] FCAFC 93

Secretary of the Department of Immigration.⁶⁸ The Full Court stated that the lack of a detailed regulatory regime resulted in uncertainty as to what powers and obligations might apply. The Court expressed concern that such uncertainty involves risks not only to those detained in detention centres but also to those employed there.⁶⁹

64. The Full Court also noted that a submission by Counsel for the Department of Immigration and Citizenship (the Department) had been made to the primary Judge that:

*once a person is in unlawful immigration detention, the form of that detention is entirely within the Minister's discretion so that a form of detention which is imposed for punitive purposes (even if unwarranted or capricious) is not subject to judicial review although it may give rise to a claim for damages.*⁷⁰

65. That submission was disowned by Counsel for the Secretary who appeared before the Full Court, however, the Full Court noted that :

*of course, as a proposition of law that submission is entirely onerous. The problem is that the Counsel who put it may not be the only one who has that view. In particular, it would be very troubling if any of those exercising the power to detain were of the view that their powers were so unqualified".*⁷¹

66. The LSSA agrees with the views of the Federal Court in this case. The LSSA considers that the ratification of OPCAT would assist in establishing a detailed uniform regulatory regime for both Federal and State places of detention. This would protect both the detainees and those persons employed in such centres and promote transparency of conditions and accountability of relevant authorities.

Detention of Children and Young People in Adult Jails

67. The Queensland Law Society has particular concerns regarding the conditions of detention for 17 year olds, who are treated as adults for the purposes of the criminal justice system in Queensland. This treatment is contrary to Article 1 of the *Convention on the Rights of the Child*, which specifically states that a child is a person under the age of 18.
68. An additional concern relates to section 18(2) of the *Corrective Services Act 2006* (Qld) which provides that a prisoner who is under 18 must be kept apart from other prisoners unless it is in his or her best interest not to be kept apart. The Queensland Anti-Discrimination Commission has previously noted that the way this provision has applied in practice has led to some potentially discriminatory results.⁷² For example, the Commission heard that 17 year old female prisoners are often put in the protection unit by prison authorities concerned for their safety, leading to stigmatisation. This stigmatisation can in turn result in the young prisoner spending longer periods in the protection unit, where they are extremely restricted in their space, movement and activities compared with other prisoners. The Queensland Law Society considers that the establishment of a NPM under the OPCAT would assist in ensuring that this separation is carried out appropriately and is not in breach of the Convention Against Torture.

⁶⁸ *Secretary, Department of Immigration and Multicultural and Indigenous Affairs v Mastipour* [2004] FCAFC 93 at [14] per Selway J

⁶⁹ *Ibid* at [17] per Selway J

⁷⁰ *Ibid* at [16] per Selway J

⁷¹ *Ibid* at [16]] per Selway J

⁷² Anti-Discrimination Commission of Queensland 'Women in Prisons' (2004) p. 115-117.

Enhancing Australia's compliance with the Convention Against Torture and other international human rights treaties

69. In December 2010, the UN Committee Against Torture identified a range of issues on which it seeks further information prior to Australia's appearance before the Committee in the next 12 months.⁷³ For example, the Committee has asked for further information about:⁷⁴
- mechanisms for monitoring and oversight of places of detention, including prisons;
 - the right to health and access to adequate health care for detainees, including prisoners and persons detained in immigration facilities;
 - the operation and impact of Australia's refugee and asylum seeker policies, including in relation to mandatory detention, offshore processing, and the detention of families and children; and
 - the over-representation of Indigenous people and people with mental illness in the criminal justice and prison systems.
70. Many of these issues could be addressed by implementing the monitoring mechanisms prescribed by OPCAT, which would for example, allow the development of nationally consistent standards to ensure all detainees have access to timely and appropriate mental health care. Ratification of the OPCAT would also provide the opportunity to monitor Australia's conditions of detention from national and international perspectives, and may also assist in developing effective policy responses to some of the most concerning issues pertaining to detention in Australia, such as the conditions for Indigenous Australians in custody and the treatment of persons detained in immigration detention facilities.
71. In addition to enhancing Australia's compliance with the Convention, ratifying OPCAT would assist Australia in meeting a number of its other international human rights obligations, including those contained in the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention on the Rights of the Child* (CROC). These instruments impose positive duties on Australia to implement procedures and policies to prevent torture and other cruel, inhuman or degrading treatment or punishment and to investigate allegations of torture or ill-treatment.
72. Ratification of the OPCAT may also encourage Australia to remove its formal reservations to those ICCPR provisions which affect the rights of persons deprived of their liberty. For example, a reservation has been entered in respect of Article 10 concerning both the provision requiring the segregation of accused people on remand from convicted prisoners, and the provision requiring the segregation of minors from adult prisoners.
73. Australia's reservation to Article 10 provides:

Australia accepts the principle stated in paragraph 1 of Article 10 and the general principles of the other paragraphs of that Article, but makes the reservation that these and other provisions of the Covenant are without prejudice to laws and lawful arrangements, of the type now in force in

⁷³ In December 2010, the UN Committee Against Torture issued a 'List of Issues Prior to Reporting' for Australia'. The purpose of this List is to outline those issues which the Committee would like Australia to address and respond to in its next periodic report to the Committee (due in 2012).

⁷⁴ Ibid.

*Australia, for the preservation of custodial discipline in penal establishments. In relation to paragraph 2(a) the principal of segregation is accepted as an objective to be achieved progressively. In relation to paragraphs 2(b) and 3 (second sentence) the obligation to segregate is accepted only to the extent that such segregation is considered by the responsible authorities to be beneficial to the juveniles or adults concerned.*⁷⁵

74. This reservation essentially allows juvenile offenders to be held with adult offenders when incarcerated⁷⁶, limits the protections granted to children who are deprived of their liberty and exposes these children to older offenders who may have a negative influence on them.
75. The Law Council has welcomed the Commonwealth Government's commitment to review this and other reservations to the ICCPR in its Exposure Draft of Australia's National Human Rights Action Plan,⁷⁷ but has recommended that the Government go further than committing to a review and actually commit to removing its reservations to Articles 10(2)(b) and 10(3), as a matter of urgency.⁷⁸

Enhancing accountability, transparency and coordination between agencies and organisations responsible for managing and monitoring places of detention

76. As noted above, while oversight and monitoring of certain places of detention currently exists in Australia, the types of detention facilities monitored and the standards applied varies depending on jurisdiction, and there remain some places of detention which are not regularly monitored or held to account in relation to human rights standards. The absence of consistent, regular and comprehensive monitoring and oversight of all places of detention in Australia to ensure compliance with human rights standards has led to concerning incidences of mistreatment and harm (such as those described below).
77. There are also no national standards for monitoring conditions of detention, or industry-specific guidelines for managing detention facilities. The need for such standards and guidelines is evident in recent media reports that suggest that certain immigration detention facilities are not readily accessible by members of the public or the media⁷⁹ and have been utilising training manuals that appear to authorise various methods to incite pain as a way to control detainees.⁸⁰
78. Experience in other jurisdictions suggests that ratification of OPCAT, and the establishment of a single or multiple NPM has delivered tangible benefits in terms of enhancing accountability, transparency and coordination between agencies and organisations responsible for managing and monitoring places of detention. This

⁷⁵ ATS 1980 No 23, *Reservations and Declarations*, art 10. The ICCPR and Australia's reservations to the Convention are reproduced at <http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html>

⁷⁶ See for example *Brough v Australia* (2006) UN Doc CCPR/C/86/D/1184/2003 (27 April 2006) where the UN Human Rights Committee found that Australia was in violation of: article 10(1) of the ICCPR, which requires that prisoners be treated humanely; article 10(3), which provides that juveniles be separated from adults in prison; and article 24(1) which requires that children be protected by society and the State without discrimination.

⁷⁷ Attorney-General's Department, *Exposure Draft - Australia's National Human Rights Action Plan 2012*, Item 3, p.4. Available from <http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiahumanrightsframework/Pages/NationalHumanRightsActionPlan.aspx>

⁷⁸ Law Council of Australia, Submission to the Attorney General's Department on Australia's National Human Rights Action Plan, (29 February 2012) p. 6, available at <http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/human-rights/bill-of-rights.cfm>

⁷⁹ 'Detention and denial', *Sydney Morning Herald*, (15 March 2012) p. 10.

⁸⁰ 'Detention workers taught to incite pain', *The Daily Telegraph* (15 March 2012) p. 3

process in turn assists in the development, implementation and evaluation of prevention and risk management strategies,

79. The ratification of OPCAT in New Zealand (NZ) in 2007 has already had a positive impact on detention conditions and improved coordination and communication between agencies and organisations responsible for managing and monitoring places of detention.
80. In NZ, the NPM function is shared among four agencies (the Children's Commissioner, the Inspector of Service Penal Establishments, the Independent Police Conduct Authority and the Ombudsmen) and one Central Preventative Mechanism (the Human Rights Commission). In the 2010 Annual Report of activities under OPCAT each of the four NPM agencies record examples of practical improvements that have been achieved this year as a result of their visits.⁸¹ For example, the detaining agencies have agreed to: cease use of a substandard facility; alter an exercise area to allow improved access to the outdoors; and provide children and young people with a say in how residences could be improved.⁸²
81. When reporting on the OPCAT activities in 2010, the NZ Human Rights Commission observed that:

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.

*There has also been greater engagement with civil society and community organisations, extending beyond the national to the local and regional levels.*⁸³

82. The benefits of involving multiple agencies in the development and evaluation of prevention strategies have also been evident in NZ. For example:
- (a) the Independent Police Conduct Authority contributed to the evaluation of the NZ Police/Ministry of Health Watch House Nurse Pilot Initiative, which involved the use of on-site nurses in watch houses to help police better manage risks associated with those who suffer from mental health, alcohol, or other drug problems and, where appropriate, make referrals to treatment providers for affected detainees;⁸⁴
 - (b) the NZ Ombudsmen considered a plan proposed by the Department of Corrections to permanently increase total capacity at its four newest facilities through use of double bunking and the use of modified shipping containers. In light of the potential human rights implications of increased double bunking, and housing prisoners in converted shipping containers, inspectors from the Ombudsmen's office visited each of the sites to ensure the necessary processes and procedures were in place to minimise any issues around the management of prisoners, and their safety, security, dignity and privacy.⁸⁵

⁸¹ New Zealand Human Rights Commission, Monitoring Places of Detention, Annual report of activities under the Optional Protocol to the Convention against Torture (OPCAT), 1 July 2009 to 30 June 2010, available at <http://www.hrc.co.nz/2010/commission-releases-annual-report-on-opcat>.

⁸² Ibid, p. 2

⁸³ Ibid, p. 2

⁸⁴ Ibid, p. 12

⁸⁵ Ibid pp.19-20

-
83. Visits by the Sub-Committee to NZ detention facilities have also helped to identify 'cross cutting' issues in need of attention, such as concerns regarding the legislative basis, policies and practices that cover use of restraints and searches of people in detention.⁸⁶
84. Ratification of the OPCAT has also assisted NZ authorities and agencies to prioritise research into and evaluation of detention facilities. For example, during the current reporting period, the NZ Children's Commissioner and the Independent Police Conduct Authority have agreed to undertake a joint thematic review of the treatment of and issues affecting children and young people detained in police custody.⁸⁷
85. A further benefit of ratification of OPCAT illustrated by the NZ experience is the development of a single monitoring standards framework, drawn from international human rights standards and monitoring guidelines, that can be used as a starting point for the development of detailed standards and measures tailored to suit each type of detention facility. This monitoring standards framework is included as an appendix to the 2010 report on OPCAT activities and provides general guidance on issues such as torture and ill treatment, the use of force and restraints, and the use of segregation, isolation or seclusion. The framework, along with many other features of the NZ experience, could serve as a useful model for Australia when it sets about implementing the OPCAT following ratification.
86. Ratification of the OPCAT would also provide Australian NPMs with access to the international Sub-Committee, which can advise and assist the NPMs in the evaluation of the needs of detainees and the means necessary to strengthen the protection of persons deprived of their liberty.⁸⁸

Effective Risk Management and Potential Cost Savings

87. Preventing incidences of torture or cruel, inhuman or degrading treatment in detention is not just a moral imperative for a country such as Australia, it is also an important risk management strategy as it has the potential to reduce the number of incidences giving rise to legal liability for ill-treatment in detention as well as reducing other related costs, such as health care. The cost savings associated with preventing such incidences from occurring are significant when the awards for compensation are considered. For example:
- (a) The family of an Aboriginal elder, Mr Ward, who perished in extreme heat while being detained in a prison van, received \$3.2 million compensation from the Western Australian Government;⁸⁹
 - (b) The family of Mr Cameron Doomadgee, who died in a Palm Island police cell from serious injuries that were not treated while in detention, received \$370,000 from the Queensland Government;⁹⁰
 - (c) Cornelia Rau, who was detained in immigration detention for over 10 months after authorities incorrectly assumed she was an illegal immigrant, received

⁸⁶ Ibid, p. 34

⁸⁷ Ibid, p. 3

⁸⁸ OPCAT Article 11(1)(b)(ii).

⁸⁹ See for example Chalpat Sonti 'Multimillion-dollar payout to Mr Ward's family after prison van death' *WA Today* (29 July 2010) available <http://www.watoday.com.au/wa-news/multimilliondollar-payout-to-mr-wards-family-after-prison-van-death-20100729-10x1l.html#ixzz1q1kjFnd9> ; see also Deaths in Custody Watch Committee WA at deathsincustody.org.au.

⁹⁰ Matt Wordsworth, 'Compensation over death in custody' *ABC News Radio Brisbane AM* (21 May 2011) transcript available at <http://www.abc.net.au/am/content/2011/s3223102.htm?site=brisbane>

\$2.6 million in compensation from the Commonwealth Government.⁹¹ This payment followed a detailed inquiry into the circumstances of her detention commissioned by the then Minister for Immigration and Multicultural Affairs in 2005.⁹²

88. Litigation has also occurred in Australia regarding standards of treatment in detention, such as the case of *Collins v State of SA*,⁹³ where an inmate at the Adelaide Remand Centre challenged the policy of 'doubling up' single person cells to house two prisoners on the grounds that it breached the *United Nations Standard Minimum Rules for the Treatment of Prisoners* and the *International Covenant on Civil and Political Rights*.
89. There are also numerous reports of incidences of detainees engaging in lethal self harm or suicide while supposedly being held under close observation in cells specifically designed to prevent self harm. For example, an inquest into the death of Wendy Hancock, an Aboriginal woman detained at the Mulawa Reception and Remand Centre for Women (now Silverwater Women's Correctional Centre), found that correctional staff failed to appropriately monitor her cell despite Ms Hancock being identified as being at high risk of self harm. According to the investigating coroner, Ms Hancock's behaviour during that time "would have raised immediate concern" had officers been paying attention. State Coroner Carl Milovanovich observed that: "the failings of the staff on duty were compounded by the lack of clear delegation of duties, no apparent management structure and no clear and concise statement of responsibilities".⁹⁴
90. The LSNT has also highlighted the potential costs savings associated with improving conditions of immigration detention as one positive consequence of Australia's ratification of OPCAT. These costs relate to medical assistance and political and legal assistance, which the LSNT suggests could be significantly reduced if an alternative approach to immigration detention was to be employed, such as a higher reliance on the use of community detention in the NT.
91. As noted above, it has recently been reported that up to five asylum seekers are presenting to the Royal Darwin Hospital's emergency department per day following incidents involving self harm. The LSNT suggests that this could incur costs of around \$500 per day, with possible additional costs if interpreters are required. These high rates of presentation at Royal Darwin Hospital were confirmed by the Northern Territory President of the Australian Medical Association, who told the LSNT that the Royal Darwin Hospital's resources are overstretched as a result. The LSNT submits that a harm prevention strategy, such as that developed as a result of Sub-Committee or NPM visits of immigration detention facilities under the OPCAT, could help alleviate this pressure on the Royal Darwin Hospital and potentially result in net costs savings for the community.
92. The LSNT also notes that there are currently considerable costs associated with the provision of policing services related to immigration detention facilities in the NT. For example the LSNT notes that the Commonwealth Minister for Immigration and Citizenship and the NT Chief Minister have recently signed a Memorandum of

⁹¹ Chris Merritt, Canberra to pay Cornelia Rau \$2.6m compensation for unlawful detention, (8 March 2008).

⁹² Mick Palmer AO, APM, *Inquiry into the Detention of Cornelia Rau*, (July 2005) available at www.immi.gov.au/media/publications/pdf/palmer-report.pdf

⁹³ (1999) 74 SASR 200

⁹⁴ Report By The NSW State Coroner into deaths in custody/ police operations 2006

[http://www.lawlink.nsw.gov.au/lawlink/Coroners_Court/ll_coroners.nsf/vwFiles/dic2006.pdf/\\$file/dic2006.pdf](http://www.lawlink.nsw.gov.au/lawlink/Coroners_Court/ll_coroners.nsf/vwFiles/dic2006.pdf/$file/dic2006.pdf)

Understanding for the provision of policing services and cooperation with the Immigration Department worth around \$53 million.⁹⁵

93. The LSNT is of the view that significant increases in funding for other justice services is also urgently required to meet the needs of the growing immigration detention industry in the NT. For example, the LSNT submits that the NT Legal Aid Commission must also be funded to respond to growth in this sector. The LSNT suggests that such funding would help address the high costs associated with unrepresented litigants, and ensure that existing legal aid services are not compromised to meet the urgent needs of those in immigration detention. The LSNT has called upon both the NT and Commonwealth Governments to establish a legal assistance service for people in detention. Ensuring adequate legal representation for persons in immigration detention in NT could also be an important risk management strategy to emerge from Australia's compliance with its OPCAT obligations.
94. The LSNT also supports the use of community detention in the NT while asylum seekers claims are being processed as a cost effective alternative to immigration detention, and one that might address the concerns described above relating to the significant impact immigration detention currently has on the mental health of detainees. Community detention may also help address the long term impact of immigration detention and the potential burden this places on the broader community once detainees are released. The LSNT refers to a recent report by NTCOSS which estimates that it costs \$113,000 per year to keep a person in detention in Australia, compared to costs of around \$31,480 per year if asylum seekers are allowed to live in the community while their applications are being processed.⁹⁶ This figure may be even less if applicants are allowed to work and are not reliant on government benefits.
95. While the Law Council stresses that the primary motivator for Australia's ratification of OPCAT should be the prevention of torture or cruel, inhuman or degrading treatment in detention, the potential gains ratification can deliver from a risk management perspective should also be considered a benefit.

Options for Implementation

96. The Law Council recognises that implementing the two tiered monitoring mechanism prescribed by the OPCAT will demand consideration of Australia's federal structure and, as noted in the NIA, will need to occur with the assistance and cooperation of the States and Territories.
97. Legislation will need to be enacted in each jurisdiction to recognise the existence and role of the Sub-Committee and to establish the NPMs. Provision will also need to be made to ensure that these bodies have the relevant powers and privileges to undertake their functions under the OPCAT.
98. As discussed further below, the Law Council recommends that this Committee carefully consider the recommendations made in a 2008 paper prepared for the AHRC, outlining options for implementing the OPCAT in Australia ('the OPCAT

⁹⁵ Joint media release with Chris Bowen MP – Minister for Immigration and Citizenship and Paul Henderson – Northern Territory Chief Minister 'Immigration MoU signed with Northern Territory Government' (Monday, 12 March 2012) available at <http://www.minister.immi.gov.au/media/cb/2012/cb183684.htm>

⁹⁶ Northern Territory Council of Social Services (NTCOSS) in partnership with the Darwin Asylum Seeker Support and Advocacy Network (DASSAN), *The Community Services Sector and Asylum Seekers in the Northern Territory*, 31 January 2012 p. 9.

paper').⁹⁷ Recommendation 4 provides that a comprehensive Commonwealth statute should be enacted to enshrine OPCAT and to set out the processes through which it will be implemented across Australia. It also recommends that complementary State and Territory legislation should follow. The constitutionality of this approach - which is based on the exercise of the Commonwealth's external affairs power in section 51(xxix) of the Constitution – is also discussed in this paper.⁹⁸ This approach also appears to be that contemplated in ongoing discussions between the Commonwealth Government and the States and Territories, which is referred to in the NIA.⁹⁹

99. There are also range of existing monitoring bodies in Australia and examples from comparable jurisdictions such as NZ, that offer useful models to guide the development of the Australian NPM or NPMs.

Possible Options for a National Preventative Mechanism

100. As the Law Council noted in its 2008 Submission, the Sub-Committee has outlined a set of preliminary guidelines for the development of NPMs.¹⁰⁰ The guidelines stress the importance of ensuring that the NPMs are independent of government and adequately resourced and mandated to cover all potential and actual places of deprivation of liberty. Different approaches to establishing NPMs have been adopted around the world, with a number of countries opting to refine or extend the mandate and powers of existing monitoring bodies to fulfil this function.
101. As noted above, NZ ratified OPCAT in March 2007, following the enactment of amendments to the *Crimes of Torture Act 1989* (NZ), to provide for visits by the Subcommittee and the establishment of multiple NPMs. NZ's designated NPMs are:
- the Office of the Ombudsmen – in relation to prisons, immigration detention facilities, health and disability places of detention, and Child, Youth and Family residences
 - the Independent Police Conduct Authority – in relation to people held in police cells and otherwise in the custody of the police
 - the Office of the Children's Commissioner – in relation to children and young persons in Child, Youth and Family residences
 - the Inspector of Service Penal Establishments of the Office of the Judge Advocate General – in relation to Defence Force Service Custody and Service Corrective Establishments
102. The NZ Human Rights Commission has a coordination role as the designated Central NPM.
103. A multifaceted approach to a NPM could also be adopted in Australia, for example by utilising existing State based monitoring bodies,¹⁰¹ such as the Western

⁹⁷ A report to the Australian Human Rights Commission by Professors Richard Harding and Neil Morgan (Centre for Law and Public Policy, The University of Western Australia), *Implementing the Optional Protocol to the Convention against Torture : Options for Australia* (2008) available at http://www.hreoc.gov.au/human_rights/publications/opcat/index.html#1

⁹⁸ *Ibid* at [6.3]-[6.7]

⁹⁹ National Interest Analysis [2012] ATNIA 6 Attachment on Consultation [46]

¹⁰⁰ The First Annual Report of the Subcommittee on Prevention can be found at <http://www2.ohchr.org/english/bodies/cat/opcat/docs/annualreportunitedversion9May08.doc>

¹⁰¹ Other State and Territory bodies which already perform some of the functions the Optional Protocol sets out for the national preventative mechanism include: the Office of the Ombudsman in every State and

Australian Office of Inspector of Custodial Services established under the *Prisons Act 1981* (WA), and considering broadening the mandate and increasing the resources of the AHRC so that it might play a coordinating role.

104. This approach was endorsed in a paper prepared by Professors Richard Harding and Neil Morgan for the AHRC outlining possible options for Australia when implementing the OPCAT (the OPCAT paper).¹⁰² Included in the terms of reference for the OPCAT paper were to analyse whether existing monitoring bodies meet the requirements of the NPM and to consider what model of NPM may be the most appropriate to Australia. The OPCAT paper included the following recommendations in relation to a NPM:

- there should be a national coordinating NPM, and this should be a suitably adapted existing agency rather than a new agency;
- the AHRC appears to be the most appropriate body to undertake the national coordinating NPM role (provided it is suitably resourced);
- a new Commissioner position within the AHRC should be created to take specific responsibility for all OPCAT functions;
- the States and Territories should work out their own NPM arrangements, however there would be some advantage in establishing or designating a single body in each jurisdiction as the relevant NPM; and
- in developing the NPM model for itself and offering guidance to the States and Territories, the Commonwealth should note that the *Inspector of Custodial Services Act 2003* (WA) provides a strong template.

105. The Law Council encourages JSCOT to carefully consider the options outlined in the OPCAT paper when considering whether and how to ratify and implement the OPCAT.

Ensuring Access to Information and the Safety of Sub-Committee Members when undertaking visits in Australia

106. As noted above, States Parties to the OPCAT are required to ensure that both the Subcommittee and the NPM have unrestricted access to relevant information and places of detention and the power to interview in private any person who is detained.¹⁰³ States Parties are also prohibited from applying any sanctions to any person or organisation because they communicated with the Sub-Committee or the NPM.¹⁰⁴ Members of the Subcommittee and the NPM are also entitled to the privileges and immunities prescribed under the *Convention on the Privileges and Immunities of the United Nations*.

Territory; Health Service Commissioners in every State and Territory; Mental Health Review Tribunals in New South Wales, Northern Territory, South Australia, Tasmania, Victoria and Western Australia; Official Prison Visitors in ACT, Northern Territory and South Australia; Human Rights and Discrimination Commissioners in ACT and Victoria; Commissions Against Police Corruption in New South Wales and Queensland; the ACT Office of the Community Advocate; the South Australian Public Advocate; the Tasmanian Public Guardian; the Queensland Health Rights Commission and the Queensland Commissioner for Children and Young People.

¹⁰² A report to the Australian Human Rights Commission by Professors Richard Harding and Neil Morgan (Centre for Law and Public Policy, The University of Western Australia), *Implementing the Optional Protocol to the Convention against Torture : Options for Australia* (2008) available at http://www.hreoc.gov.au/human_rights/publications/opcat/index.html#1

¹⁰³ For example see OPCAT Articles 12-14

¹⁰⁴ For example see OPCAT Articles 15

107. The NIA states that:

*... existing legislation is sufficient to provide for the required privileges and immunities of Subcommittee members performing their duties in Australia. However, some changes to Commonwealth, State and Territory laws and policies will be required to clearly enable the Subcommittee to carry out its functions in the context of other statutory, and common law duties and responsibilities and contractual arrangements, for example, in regard to privacy and security.*¹⁰⁵

108. The Law Council recognises that these changes may involve amendments to existing Commonwealth, State and Territory laws to ensure, for example, that disclosure of information to the Sub-Committee by an employee of an agency responsible for managing a place of detention is not in breach of privacy legislation obligations, or that full access is provided to NPM members to interview persons detained in immigration facilities. Care will also need to be taken when seeking to fulfil OPCAT obligations in respect of detainees for whom specific individuals or Ministers may have a duty of care or legal responsibility, such as unaccompanied minors in immigration detention or those persons detained in psychiatric facilities.
109. This process is likely to involve a careful audit of existing laws to ensure that competing interests relating to personal privacy and the public interest remain protected, while still ensuring NPM members and Sub-Committee members are able to access relevant information and conduct visits and interviews with detainees.
110. As the OPCAT envisages regular visits by Sub-Committee and NPM members to places of detention in Australia, consideration will also need to be given to the development of appropriate protocols or procedures to ensure that such visits accord with the principles outlined in the OPCAT (such as allowing private access to all detainees if required) and to ensure the safety of any inspectors.
111. Many of Australia's detention facilities already have appropriate safety standards and procedures in place to protect visitors, such as legal representatives or departmental officials, that could be adapted to meet the requirements under the OPCAT.
112. Provisions currently in place in NZ under the *Crimes of Torture Act 1989* (NZ) to facilitate access by their NPMs and in Western Australia under the *Prisons Act 1981* (WA) to facilitate the work of the Office of Inspector of Custodial Services may also offer some models for Australia to consider when seeking to implement these obligations under OPCAT. The United Kingdom's Her Majesty's Inspectorate of Prisons also has developed detailed manuals that address issues of security and safety of inspectors that could be adapted to an Australian context.

New Zealand

113. Amendments to the *Crimes of Torture Act 1989* (NZ) introduced in 2006¹⁰⁶ provide the Sub-Committee with unrestricted access to information about the number of places of detention; the location of places of detention; the number of detainees; the treatment of detainees; and the conditions of detention applying to detainees (section 18). Section 20 also permits the Sub-Committee to interview in private any person in detention or any person who might be able to provide relevant information,

¹⁰⁵ The NIA notes that the *Convention on the Privileges and Immunities of the United Nations* is given effect in Australia by the *International Organisation (Privileges and Immunities) Act 1963* and the *United Nations (Privileges and Immunities) Regulations 1986*, National Interest Analysis [2012] ATNIA 6 [29].

¹⁰⁶ *Crimes of Torture Amendment Act 2006* (NZ)

and protects any person or agency who has provided information to the Subcommittee in good faith from any criminal or civil liability or other disadvantage or prejudice of any kind. Similar provisions provide the NPMs with unrestricted access to information and to any place of detention and to any person detained.

114. In addition to these provisions, the *Crimes of Torture Act 1989* (NZ) protects confidentiality of information, by requiring every person to keep confidential any information given to him or her in the exercise of that person's functions or duties under the Act (subsection 33(1)). However, provision is also made for disclosure of information if it is required to fulfil an obligation under the OPCAT or if it is in the public interest to do so, provided that such disclosure does not identify an individual without his or her consent (subsections 33(2)-(4)). The protections, privileges and immunities of the NPMs are preserved in section 36 and the Minister is required to table reports from the NPMs in Parliament in section 36.
115. Other NZ legislation can also provide a model for how visits to places of detention by NPM members or subcommittee members can be managed at a practical level. For example, under section 160 of the *Corrections Act 2004*, the chief executive of the Department of Corrections and the Chief Ombudsman must enter into an agreement about access to persons under control and supervision; access to records relevant to the resolution of complaints; and general assistance to be provided by the chief executive to the Ombudsmen. Relevant complainants include prisoners held by the Department.¹⁰⁷ The most recent Protocol requires the Ombudsmen to give five days notice of a visit, and requires the Department of Corrections to help facilitate the visit by providing briefing; ensuring departmental officers are available to accompany investigators; and facilitating communication with inmates.

Western Australia

116. The Office of the Inspector of Custodial Services (OICS) is an 'an independent statutory body that provides external scrutiny to the standards and operational practices of custodial services in Western Australia'.¹⁰⁸ It reports directly to Parliament and operates under the *Inspector of Custodial Services Act 2003* (WA). It is required to inspect and report on every correctional facility at least every three years, and can carry out both announced and unannounced inspections.
117. The OICS also allocates each custodial facility or service that falls within its jurisdiction to an Inspection Research Officer, who acts as a liaison officer between the OICS and the facility or provider. The OICS's website explains that:

*This designated liaison officer is responsible for developing an ongoing relationship with the facility and a knowledge of its operations and progress against previous inspection reports. A key aspect of undertaking this task is to conduct a minimum number of on-site liaison visits to their designated facilities each financial year. The number of visits required is determined by the assessed level of risk that the facility poses and encompasses such factors as size, security level, and previous inspection findings and assessments. At a minimum each facility is subject to at least four liaison visits per year.*¹⁰⁹

¹⁰⁷ The most recent agreement dated 15 March 2012, is available at

<http://www.ombudsmen.parliament.nz/imagelibrary/100474.pdf>

¹⁰⁸ See Office of the Inspector of Custodial Services Website

<http://www.custodialinspector.wa.gov.au/go/about-us>

¹⁰⁹ Office of the Inspector of Custodial Services Website <http://www.custodialinspector.wa.gov.au/go/inspections>

-
118. The OICS has also developed a *Code of Inspection Standards* (2007) which draws upon a number of international human rights treaties to which Australia is a party; the *Standard Guidelines for Corrections* in Australia (which themselves draw on the UN's *Standard Minimum Rules for the Treatment of Prisoners*),¹¹⁰ and *Inspection Standards for Aboriginal Prisoners* (2008). These documents are all available from the OICS website (www.custodialinspector.wa.gov.au) and may provide a useful model for use by any future Australian NPMs.

United Kingdom Her Majesty's Inspectorate of Prisons

119. The United Kingdom's Her Majesty's Inspectorate of Prisons (HMI Prisons) also has developed detailed manuals that address issues of security and safety of inspectors which could be adapted to an Australian context.
120. HMI Prisons is an independent inspectorate which reports on conditions for and treatment of detainees in prison, young offender institutions and immigration detention facilities. Its role is to provide independent scrutiny of the conditions for and treatment of prisoners and other detainees, and also to promote "the concept of 'healthy prisons' in which staff work effectively to support prisoners and detainees to reduce reoffending or achieve other agreed outcomes."¹¹¹ It also has statutory responsibility to inspect all immigration removal centres and holding facilities and forms part of the UK's NPM under the OPCAT.
121. The HMI Prisons conduct different categories of inspections. Some are announced and the prison is informed in advance of the visit. Others are unannounced and the inspection team visits without notifying the establishment in advance. Inspectors have the right to carry out inspections and cannot be refused entry by the establishment.
122. The HMI Prison inspectors use an Inspection Manual¹¹² designed to assist and support inspectors, but also to provide a "transparent source document for those wishing to understand how and why inspections are carried out as they are."¹¹³ This manual includes detail regarding personal safety and security for inspectors when undertaking inspections – including advice ranging from suitable clothing, to how to deal with a range of prisoner complaints and potential acts of self harm. This manual could provide a useful document for any Australian NPMs to consider when developing detailed guidance for inspectors of detention facilities.

International Commission of the Red Cross

123. The Human Rights and Equal Opportunity Committee of the Law Society of Western Australia, one of the Law Council's constituent bodies, has also noted that the International Committee of the Red Cross (ICRC) has certain procedures that apply to its legal representatives and other staff who visit detention centres to inspect for compliance with the Geneva Conventions, or in cases of internment, imprisonment and labour where prisoners of war or civilian internees are held.
124. The ICRC is generally guided by seven fundamental principles - humanity, impartiality, neutrality, independence, voluntary service, unity and universality - in all

¹¹⁰ Ibid.

¹¹¹ See Her Majesty's Inspectorate of Prisons website at <http://www.justice.gov.uk/about/hmi-prisons>.

¹¹² This manual was published in 2008 and is available at <http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/inspection-manual-2008.pdf>

¹¹³ See Her Majesty's Inspectorate of Prisons website at <http://www.justice.gov.uk/about/hmi-prisons>.

of its work, and these in turn inform its procedures relating to inspections of places of detention.¹¹⁴

125. Some of these procedures are outlined on the ICRC website, for example, ICRC visits to places of detention are usually carried out by a team of specialised delegates, accompanied by interpreters and medical personnel when appropriate.¹¹⁵ The organisation follows the same standard working procedures wherever it visits detainees. These include ensuring that ICRC are able to speak in total privacy with each and every detainee of their choice, and have access to all cells where detainees are held and also to other facilities such as kitchens, showers, infirmaries and punishment cells.¹¹⁶ In confidential discussions with the authorities before and after each visit, ICRC delegates raise concerns and make recommendations where appropriate. Further details regarding these procedures and protocols could be obtained directly from the ICRC.

Conclusion

126. The Law Council strongly urges this Committee to recommend that Australia ratify and implement the OPCAT.
127. Ratification of this important preventative mechanism will build upon Australia's history as a nation determined to eradicate and prevent torture, cruel, inhuman and degrading treatment at home and abroad. Ratification would also enhance the protection of the fundamental rights of people in detention in Australia and improve conditions in detention facilities, for example by facilitating independent and regular external scrutiny of all places of detention and by providing incentives for those agencies responsible for managing detention facilities to develop prevention strategies.
128. The monitoring mechanisms in OPCAT would build upon and coordinate the existing monitoring mechanisms that operate in respect of certain detention facilities around the country, and would also fill the gaps by ensuring that *all* places of detention – for example police cells and mental health facilities – are subject to regular scrutiny against human rights standards. Ratification of the OPCAT would also provide an opportunity for all Australian Governments to work together to address long standing human rights concerns relating to Aboriginal deaths in custody and conditions of detention in immigration detention facilities. Jurisdictions that have already ratified and implemented the OPCAT, such as New Zealand, have noted improvements in terms of rights protections as well as enhancement of coordination, accountability and transparency within and between detention related agencies.
129. In addition to delivering improved conditions for those experiencing detention in Australia, ratification can also deliver cost savings for Australian governments and the community, for example by preventing the devastating and expensive consequences of wrongful treatment in custody and by minimizing the high incidence of mental health and other problems requiring treatment both during and after detention. The Law Council also notes that there exist many useful models to be drawn upon when Australia implements the OPCAT that could ensure that Australian and international inspectors have full access to facilities and detainees and that can help keep implementation costs to a minimum.

¹¹⁴ *The Fundamental Principles of the Red Cross and Red Crescent* ICRC publication 1996 ref. 0513, available at http://www.icrc.org/eng/assets/files/other/icrc_002_0513.pdf.

¹¹⁵ See ICRC website at <http://www.icrc.org/eng/resources/documents/misc/detention-visits-010407.htm#a3>

¹¹⁶ See ICRC website at <http://www.icrc.org/eng/resources/documents/misc/detention-visits-010407.htm#a3>

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's constituent bodies. The Law Council's constituent bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 56,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Ms Catherine Gale, President
- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- Mr Duncan McConnel, Executive Member
- Ms Leanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.