

OPCAT in the Asia-Pacific and Australasia

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Abstract

To date, the Optional Protocol to the Convention against Torture and other cruel, inhuman or degrading treatment or punishment (OPCAT) has made limited inroads in the Asia-Pacific region. This paper canvasses developments in various parts of the Asia-Pacific region, including the reasons for the slow uptake of OPCAT and the prospects for the future. It also examines, in some detail, the developments that have occurred in New Zealand and Australia, and draws out some lessons of general application. However, it is likely that progress in the region as a whole will continue to be piecemeal and rather slow.

Part One: OPCAT Across the Asia-Pacific Region¹

1. Current Status of the OPCAT

The United Nations Convention against Torture and other cruel, inhuman or degrading treatment or punishment (UNCAT) entered into force on 26 June 1987.² The Optional Protocol to the Convention and other cruel, inhuman or degrading treatment or punishment (OPCAT) came into effect on 22 June 2006³ and seeks to ‘give more teeth’ to the Convention through international and national mechanisms. The international dimension requires States Parties to allow the United Nations Sub-Committee for the Prevention of Torture and other cruel, inhuman or degrading treatment or punishment (SPT) unfettered access to places of detention. The national dimension requires Parties to establish a national preventive mechanism (NPM) to give effect to the

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¹ This paper contains three main parts. The first part deals with the Asia-Pacific region in general. The second part deals with New Zealand: the most advanced country in terms of OPCAT implementation. The third part deals with Australia, where important developments are underway. The paper has been written as a comprehensive whole but, to assist readers in cutting to what is most relevant to them, we have also sought to ensure that each section makes sense as a relatively self-contained piece.

² UNCAT, adopted by the UN General Assembly, UN Doc. A/Res/39/46, 10 December 1984, entered into force 26 June 1987, after twentieth instrument of ratification/accession.

³ OPCAT, adopted by the UN General Assembly, UN Doc. A/RES/57/199, 18 December 2002, entered into force 22 June 2006, after twentieth instrument of ratification/accession. Available at <http://www2.ohchr.org/english/law/cat-one.htm>. Last accessed 3 December 2009.

OPCAT. NPMs must have, *inter alia*, functional independence, and free and unfettered access to places of detention and all relevant documentation; there must also be protections against victimisation for people who deal with the NPM (for instance, prisoners who interview with the NPM during detention monitoring visits). To achieve these powers and independence, NPMs should be established on a formal legislative basis, rather than being established by administrative fiat.

The term ‘Asia-Pacific’ has no fixed meaning. We use it here as shorthand for the countries of South Asia, East Asia, South East Asia, Australasia, and Oceania.⁴ The UNCAT has been ratified by most of the more populous countries in the region, but there are some notable exceptions, especially in much of South East Asia and across the Pacific Islands.⁵ However, only three nations have so far ratified the OPCAT: namely, the Maldives (February 2006), New Zealand (March 2007), and Cambodia (March 2007). Two countries have signed but not yet ratified the OPCAT: namely, Timor L’Este (September 2005) and Australia (May 2009).

2. Ratifications

OPCAT implementation is an ongoing process of development amongst the three States Parties in the Asia-Pacific. New Zealand has been moving steadily and carefully towards full implementation and is by far the most advanced. The New Zealand Crimes of Torture Amendment Act 2006 (i) ensures that the SPT has rights of access, (ii) establishes a firm statutory framework for the NPM, and (iii) incorporates both the UNCAT and OPCAT as Schedules. Pursuant to the Act, the New Zealand Human Rights Commission has been designated as the NPM but other specialist agencies (such as the Ombudsman, the Independent Police Conduct Authority, and the Children’s Commissioner) undertake key functions as subsidiary NPMs.⁶ The New Zealand model, as the most advanced in the region, is discussed in detail below; the way it builds on existing structures and recognises cultural imperatives may provide a useful model for other countries.

The Maldives has nominated its Human Rights Commission as its NPM. However, a recent SPT country report, based on a visit, concluded that the Commission is not well-resourced and noted that it lacks a clear legislative mandate.⁷ The SPT’s conclusions broadly accord with the authors’ own observations and research in late 2004.⁸ It must be recognised that there are very particular pressures in the Maldives. In population terms it is small, with a total of just 309,000 people.

⁴ In some definitions, South Asian countries such as India, Pakistan, and Sri Lanka are not seen as part of the Asia-Pacific, but countries whose western borders are bounded by the Pacific (such as Chile) are included. The definition we have used broadly reflects the practice of the Asian and Pacific Conference of Correctional Administrators (APCCA: see www.APCCA.org).

⁵ The countries that have ratified the UNCAT include China, Mongolia, India, Bangladesh, Pakistan, Sri Lanka, Nepal, Japan, the Republic of Korea, Cambodia, Indonesia, Thailand, Philippines, Australia, and New Zealand. Malaysia, Singapore, Brunei, Vietnam, Laos, and Burma are not signatories. Amongst the Pacific Islands, only Nauru is a signatory.

⁶ For further discussion of the New Zealand model, see ‘Part Two’.

⁷ See Report on the Visit of the SPT to the Maldives, UN Doc. CAT/OP/MDV/1, 26 February 2009. Available at <http://www2.ohchr.org/english/bodies/cat/opcat/docs/MaldivesReport26-02-09.doc>. Last accessed 15 January 2010.

⁸ We conducted a review of prison and detention facilities in the Maldives: see Richard Harding and Neil Morgan, *Strengthening Custodial Services in the Maldives*, unpublished report to the Attorney General and the Minister of Home Affairs, 2004.

However, geographically, it is very scattered; there are 1,190 islands in total, 200 of which are inhabited.⁹ These 200 islands total only 300 square kilometres of land, but stretch across some 90,000 square kilometers of ocean. Inevitably, quite apart from the practical and logistical problems this presents, the human resources and legal/ human rights expertise are stretched. The Human Rights Commission is small and rather inexperienced. The Maldives has also experienced considerable political change over recent years and has needed to overhaul the constitution and other basic components of domestic law.

Cambodia still appears to be considering the enactment of draft decrees in relation to the OPCAT, and recent reports indicate that full implementation remains some way down the track. A joint press release by the Ministry of the Interior of the Royal Government of Cambodia and the Office of the United Nations Commissioner for Human Rights, following an OPCAT implementation workshop in January 2009, reported that

The workshop led to a common understanding that, while the effort of the Royal Government to establish such a mechanism was to be commended, more time is needed to establish a mechanism that will be fully compliant with the OPCAT and the Paris Principles. It was also understood that the current draft sub-decree will create a ‘temporary body towards the establishment the NPM’ and that this NPM would be based on a law that would be developed by the Government over a period of time, possibly two years.¹⁰

3. Signatories

Two countries have signed but not yet ratified the OPCAT: namely, Timor L’Este and Australia. Timor L’Este signed the OPCAT in September 2005, but progress towards ratification appears to have stalled. This is hardly surprising as the country is still struggling with its recently won status as a sovereign state (May 2002) and with the aftermath of the struggle for independence. The country is, by some distance, Asia’s lowest ranking country on the United Nations Human Development Index, ahead only of some African nations.¹¹

In Australia, some legal, political, and practical complexities arise from the fact that there is a federal system of government, with the result that responsibility for places of detention is spread across jurisdictions, each with their own traditions and legislative powers (see discussion below). This is likely to make implementation a more lengthy process than in unitary systems of government. However, there are already a number of fully or partly OPCAT-compliant bodies on which to build, so there is reason to be cautiously optimistic that Australia will ratify in 2010 and move towards implementation over the following two years. Australia may be able both to draw on the experience in other federal systems and to provide a model for possible adoption in other federal systems.

⁹ Another 80 islands are devoted to elite international resorts. These resorts are in every way far removed from daily life of Maldivians.

¹⁰ See <http://www.apt.ch/npm/asiapacific/Cambodia1.pdf>.

¹¹ Timor L’Este ranks 158th out of 179 countries on this index; it has, if anything, dropped back on HDI measures recently: see <http://hdr.undp.org/en/statistics>.

4. Prospects for Future Implementation

4.1 *Likely future signatories*¹²

The Association for the Prevention of Torture has identified Indonesia, South Korea, and the Philippines as the next most likely OPCAT signatories in the Asia-Pacific region.¹³ South Korea and Indonesia are reportedly in the process of consultations within government and with civil society.¹⁴ The Philippines has reported that it is ‘on the verge of ratifying OPCAT’¹⁵ but it is not yet clear what its NPM processes will be.

We have not identified any clear indications of intent from other countries with respect to the OPCAT¹⁶ but believe that Thailand may be the most likely new signatory. Thailand has recently described human rights as one of the country’s ‘top national priorities’ and has sought to position itself much more firmly as a key international ‘player’ from the region.¹⁷ As part of this, it is currently coordinating the development of draft rules for the treatment of women prisoners.¹⁸ It remains to be seen whether these moves will lead to OPCAT implementation, but it may be noted that they are fully consistent with the content and tone of Thailand’s recent presentations to the Asian and Pacific Conference of Correctional Administrators (APCCA).¹⁹

5. Factors Affecting OPCAT Adoption

5.1 *Diversity*

The most obvious point is that the region’s historical, geographical, political, religious and ethnic diversity far exceeds that of Europe, Africa or the Americas. For example, it includes five out of the seven most populous countries in the world, each with its own socio-political and religious diversity (China, India, and three predominantly Muslim countries – Indonesia, Pakistan, and

¹² See also Section 5.4 below.

¹³ See <http://www.apct.ch/content/view/33/58/lang,en/>, including <http://www.apct.ch/images/OPCAT/opcat%20progress%20report.pdf> for the OPCAT Global Campaign Progress Report.

¹⁴ Malaysia and Indonesia are also making increasing reference to human rights issues and both countries have established national Human Rights Commissions, which are already beginning to examine issues relating to imprisonment and the criminal justice system more generally: see www.apcca.org. There may also be some longer term prospects with respect to Japan. In June 2009, Neil Morgan presented papers on prison overcrowding, which included discussion of the OPCAT, at the United Nations and Far East Institute in Japan (UNAFEI) and found a significant level of interest. The Association for the Prevention of Torture is sending a delegation to Japan in early October 2009: see www.apct.ch.

¹⁵ See *Committee against Torture begins Review of the Report of the Philippines*, United Nations Press Release, 28 April 2009. Available at <http://www.unhchr.ch/hurricane/hurricane.nsf/0/BEBEF909063F9A3EC12575A60078F169?opendocument>.

¹⁶ See fn.13.

¹⁷ *Human Rights Council Opens Twelfth Regular Session*, United Nations Press Release, 14 September 2009. Available at

<http://www.unhchr.ch/hurricane/hurricane.nsf/0/9A4F094DC16C3C88C125763100451F99?opendocument>. See also Section 5.4 below.

¹⁸ *Human Rights Council Opens Twelfth Regular Session*. See fn.17.

¹⁹ See the reports of the annual APCCA conferences and also the individual country reports: available at www.APCCA.org.

Bangladesh).²⁰ It also includes many of the world's least populous countries: the Pacific Island nations.²¹ Many countries have emerged from recent conflict and the pace of economic development differs greatly across the region. Some countries are still largely State-run economies and others are exemplars of modern capitalism.

Consequently, as already illustrated by our brief discussions of the Maldives, Cambodia, and Timor L'Este, the reasons for the slow roll out of the OPCAT in the Asia-Pacific are complex, sensitive and jurisdiction-specific. It is therefore important to be realistic, pragmatic, and diplomatic in attempting to promote change and in contributing to regional discussions or commenting on progress. For these reasons, our own professional engagements in the region have concentrated far more on incremental long-term improvement in prison conditions – often behind the scenes – than on short-term symbolism.

5.2 *Investment priorities: national development and natural disasters*

Reflecting what has been argued above, many developing countries' priorities in terms of places of detention, over the past decade, have been very different from European priorities. The annual conferences of the APCCA provide some interesting insights.²² For example, in 1997, in its National Report on Contemporary Issues in Corrections Cambodia informed the APCCA that the top national priority was to provide a safe water supply and enough rice for its whole population: a poignant counterpoint to some other countries' concerns about whether prisoners should have a choice of menu for meals and about the intricacies of prison privatisation.

For small nations in the Pacific Islands, the OPCAT probably seems complex, remote, and only tangentially relevant. Moreover, many parts of the region – most notably Indonesia – regularly suffer from horrific natural disasters.²³ These events sometimes impact directly on prison infrastructure and always impact on investment priorities.

5.3 *Breadth and depth of OPCAT requirements*

Due to its breadth (extending to all places of detention) and the nature and depth of its requirements (which include opening these places up to international scrutiny and the development of NPMs), the OPCAT presents many challenges even to developed countries, such as New Zealand and Australia (see below). These issues are magnified in those countries that have lesser resources, especially as they themselves recognise that conditions in their prison

²⁰ The seven most populous countries are (in order) China, India, USA, Indonesia, Brazil, Pakistan, and Bangladesh.

²¹ The most populous Pacific Island nations are Fiji (around 850,000 people) and the Solomon Islands (around 523,000 people). Many of the islands have 100,000 people or fewer.

²² See the annual conference reports, available at www.apcca.org.

²³ At the time of writing, Indonesia has just suffered another earthquake, this time centred on Padang. The death toll is expected to exceed that of Hurricane Katrina in the United States. At the same time, a tsunami has devastated Samoa and parts of Tonga, and the Philippines, Vietnam, and Laos have suffered huge loss of life and homelessness as a result of typhoons and floods. This had particular consequences in Manila in early October 2009: Pasig City jail was partially submerged by floods and the prisoners (already overcrowded) had to shift to the upper levels of the prison. The authorities then faced the problem of mosquito-borne viruses: available at <http://www.abc.net.au/news/stories/2009/10/05/2705506.htm>.

systems lag behind those of the West and will probably attract criticism if investigated by international bodies.

5.4 *Human rights traditions and the emerging ASEAN culture*

Although it is dangerous to generalise, it is safe to say that most of the Asia-Pacific region has a less developed human rights tradition than Europe and many other parts of the globe, at least in the sense that ‘human rights’ is usually understood. However, as the region has developed over the past decade, the interest in human rights issues has grown and debates have been marked by some interesting tensions. These usually involve four related themes:

- (1) Whether ‘Asian values’ demand a different vision of human rights than the ‘Western’ approaches that are said to dominate United Nations conventions;
- (2) Whether human rights are truly as broad as the UN conventions suggest;
- (3) The notion that rights should be tied much more explicitly and directly to responsibilities/duties; and
- (4) The view that Western philosophies and social structures are more individualistic while Asia’s are more communitarian.²⁴

Developments in the Association of South East Asian Nations (ASEAN) are particularly important, not only because ASEAN covers ten countries, but also because the ASEAN developments and debates may well impact beyond its boundaries. On 20 July 2009, ASEAN Ministers adopted terms of reference for the ASEAN Inter-Governmental Commission on Human Rights, and the Commission was formally established on 23 October 2009.²⁵

It is widely acknowledged that there are three main groupings within the ten ASEAN countries. Thailand is currently the most vocal champion of human rights, followed by Malaysia, the Philippines, and Indonesia. All four countries already have national human rights commissions. The strongest opposition is apparently coming from Burma, Laos, Cambodia,²⁶ and Vietnam. Singapore and Brunei are thought to adopt a middle position.²⁷

The terms of reference of the ASEAN Inter-Governmental Commission on Human Rights clearly reflect the four themes outlined earlier and the differences of opinion between the different ASEAN countries.²⁸ For example, Article 1.4 states that the aim of the Commission is ‘to promote human rights within the regional context, bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds, and taking into account the balance between rights and responsibilities.’

²⁴ For a valuable (but now somewhat outdated) discussion of ‘Asian’ conceptions of human rights, see Eva Brems, *Human Rights: Universality and Diversity* (The Hague: Martinus Nijhoff, 2001).

²⁵ See ASEAN Secretariat Press Release, *Another Step Forward for Regional Human Rights Cooperation*, 20 July 2009, available at <http://www.aseansec.org/PR-Another-Step-Forward-for-Regional-HR-Cooperation.pdf>; see also *ASEAN leaders launch historical human rights body*, available at http://www.channelnewsasia.com/stories/afp_asiapacific/view/1013254/1/.html.

²⁶ Cambodia’s position is not easy to assess given that it has actually ratified the OPCAT.

²⁷ See the material available at www.maruah.org, especially a June 2008 article entitled Professor Tommy Koh highlights ASEAN’s human rights divide.

²⁸ See <http://www.aseansec.org/DOC-TOR-AHRB.pdf>. Last accessed 16 January 2010.

As yet, there is no statement of the scope of human rights under the new arrangements. Moreover, the Terms of Reference also focus on ‘regional cooperation’ rather than enforcement.²⁹ The Commission is an ‘inter-governmental consultative body’ and Member States are to be ‘free from external interference’.³⁰ These Terms of Reference were greeted with predictable cynicism and ridicule in parts of the Western media.³¹ Unfortunately, such attitudes do nothing to help: ultimately, they just reinforce widely held perceptions about Western arrogance and the risks of allowing external scrutiny. We are cautiously optimistic that the existence of such a body, when seen in conjunction with the increased interest in human rights in many countries (for example, as demonstrated by the establishment of domestic human rights commissions), will embed a sharper regional focus than would otherwise be the case;³² in other words, that there will be a ‘drip effect’ as human rights (perhaps in a culturally redefined form) work their way into mainstream debates.

To some people, the drip effect theory will appear naïve and resonant of a stalactite: a ‘living thing’ whose growth is almost imperceptible. However, our combined experience in the region of over fifty years is that it would be unwise to dismiss the drip effect. The fact of the matter is that there is now a vigorous regional discourse taking place that would have been unthinkable twenty years ago, even though significant issues still remain.³³ Malaysia and Singapore, for example, have tended to be very cautious of ‘human rights language’, but Malaysia now has a Human Rights Commission;³⁴ both countries have held public consultations about the ASEAN initiative, and a number of websites provide a relatively open debating zone.³⁵ Japan, South Korea, Thailand, the Philippines, Hong Kong, and Indonesia are also places with a growing human rights culture.

The Asian and Pacific Conference of Correctional Administrators (APCCA) also provides considerable evidence of the long term drip effect. When the APCCA first started work in 1980, there was virtually no discussion of issues beyond a rather narrow prison management focus. As the years have gone by, there has been a much stronger and more explicit focus on standards in the treatment of prisoners. For example, documents such as the United Nations Standard Minimum Rules for the Treatment of Prisoners are treated as a key benchmark, even by some countries that do not expressly sign off on them. Moreover, our visits to prisons (many at short notice) in many Asian countries bear testimony to the fact that the principles in these documents are bearing at least some fruit.³⁶ It is perhaps indicative of the evolving context that the 2009

²⁹ For example, Articles 1.3, 1.5, 2.1 and 2.4. See fn.25.

³⁰ Article 3 and Article 2.1(c). See also Articles 2.1(a), 2.1(b) and 2.3. See fn.29.

³¹ On 22 July 2009, the *Wall Street Journal* published an opinion piece entitled ASEAN’s Toothless Council. It begins, ‘The United Nations once boasted the world’s most toothless human rights body – until ASEAN formed one’.

³² A point grudgingly and sarcastically acknowledged by the *Wall Street Journal*.

³³ For example, some countries, including Malaysia and Singapore invoke ‘Internal Security Acts’ to justify detention without trial in situations involving alleged subversive activities.

³⁴ Human Rights Commission Act 1999, Malaysia, Act 597. Available at http://www.hurights.or.jp/database/E/nhri_law/malaysia.html. Last accessed 16 January 2010.

³⁵ For example, see the Singapore Working Group for an ASEAN Human Rights mechanism (www.maruah.org) and the Singapore Institute of International Affairs (www.siaaonline.org). The Hong Kong-based Asian Human Rights Commission (www.ahrchk.net) also provides a useful resource.

³⁶ For example, we have both been independently, and quite frequently, asked questions in different countries to the effect of ‘Do you think we meet the UN Minimum Standards?’ We have also observed first hand some significant improvements in some places with respect to general conditions, and in the rules that apply in areas such as prisoner discipline and complaints handling.

APCCA conference included, for the first time, an agenda item about the OPCAT, presented by representatives of the SPT and the Association for the Prevention of Torture.

6. Summary

The OPCAT has a very low profile in the Asia-Pacific region, with only three ratifications and two signatures to date. The reasons for this include political, historical and socio-economic factors. However, there is some basis to be cautiously optimistic. There will always be resistant states in a region as diverse as the Asia-Pacific, but there are signs in a significant number of places of a much stronger human rights focus than a decade ago.

One of the challenges that OPCAT supporters face will be working out how ‘pure’ to be in their expectations. Without departing from core OPCAT principles, we believe it will be necessary, over the coming years, to address three key issues. First, how do OPCAT’s expectations fit with the emerging Asian human rights cultures? Second, what strategies can best be employed to make OPCAT implementation practical and feasible, especially in places with limited economic resources? Third, how can the SPT best go about its work in the region? There is no doubt, too, that other Asia-Pacific countries will be mindful of the experience in places such as New Zealand, the Maldives, Cambodia, and Australia, with respect to both domestic and international monitoring.

Part Two: The New Zealand Experience

New Zealand was the first State in the Oceania/Southern Pacific area to ratify the OPCAT. The subsequent implementation processes demonstrate the value of a ‘slow build’ in seeking to bring about cultural change in the expectations and sensitivities of departments whose activities involve detaining citizens involuntarily.

1. The Human Rights Background

New Zealand has a long history of human rights activity, going back to the Treaty of Waitangi between the colonisers and the indigenous Maori people in 1840. Women obtained the vote in 1893, thus New Zealand became the first country to enact full female suffrage. Working hours and conditions have been regulated so as to avoid exploitation since the mid-nineteenth century. Furthermore, New Zealand was a leading contributor to the formulation of the Universal Declaration of Human Rights in 1948. With only one or two exceptions, the nation promptly and unreservedly adopted all the UN human rights conventions of the next 60 years. The national Human Rights Commission was established in 1978, and its role consolidated and extended as new UN instruments came on line. Remarkably and most importantly, this line of politico/legal development has been largely bi-partisan, surviving changes in government. Australia has, by contrast, suffered from the political contestability of human rights.³⁷

Another key factor has been that New Zealand is a unitary state. The national government possesses the legal power and authority to bind all elements of the polity. By contrast, Australia’s federal system presents a number of legal and political complexities.³⁸ In many ways, New Zealand can, therefore, be seen as almost an ideal location for OPCAT ratification and implementation: a unitary state with an empathetic history and culture. Nevertheless, the process has been carefully modulated with a view to ensuring that it becomes embedded strongly at ground level in the operational agencies and their frontline staff, rather than simply being imposed from above.

2. Ratifying and Implementing the OPCAT

New Zealand signed the OPCAT on 24 September 2003 and ratified it on 16 March 2007. Before ratification, a great deal of preparatory work was done. This emanated largely from the Ministry of Justice, the department that had the carriage of the matter, and involved widespread consultation with the agencies that were likely to be involved as NPMs as well as with organs of civil society. These processes enabled the implementing legislative framework – the Crimes of Torture Amendment Act – to be passed and brought into operation in December 2006, thus paving the way for the ratification process. The Act states that the overarching ‘purpose ... is to enable New Zealand to meet its international obligations under the Convention against Torture’ and, specifically, under Section 15, ‘to meet its international obligations under the Optional Protocol.’ Both the UNCAT and the OPCAT are set out as Schedules to the Act. The detailed provisions of the Act pick up all the key aspects of the OPCAT itself, both in relation to the

³⁷ See, for example, fn.48 and the accompanying text.

³⁸ See ‘Part Three: Constitutional Issues’ below.

powers of NPMs and also those of the SPT. As will be seen, the Act exceeds OPCAT requirements in terms of the inspection criteria and reporting requirements.

2.1 *National preventive mechanisms*

The Act draws upon Article 17 of the OPCAT, which permits the establishment of multiple NPMs where a State decides this arrangement is appropriate. Provision is made for the Minister to designate a Central NPM, and as many other NPMs as are required, by notice in the *Official Gazette*. In designating NPMs, the Minister should also specify the ‘places of detention’ in relation to which their remit shall extend. There is an ongoing power for the Minister to vary and amend these arrangements.

In June 2007 the New Zealand Human Rights Commission (HRC) was designated as the Central NPM. Its role is to coordinate the activities of the other NPMs and to maintain effective liaison with the SPT. However, the HRC has no direct inspection role under the Act. It is arguable – and this is our position in relation to Australian circumstances – that the coordinating NPM may be better placed to carry out its OPCAT role effectively if it also has the direct responsibility of carrying out some substantive OPCAT inspection role and, thus, develops hands-on experience and skills in an area of activity that is by no means straightforward. The general powers of the HRC, under its own legislation, are such that non-OPCAT investigations could be undertaken in areas that fall within the OPCAT remit of another NPM: this would seem to pose a slight awkwardness.³⁹

At the same time as designating the HRC as the Central NPM, the Minister also designated four other bodies as NPMs. These were the Ombudsman, the Office of the Children’s Commissioner (OCC), the Police Complaints Authority (PCA), and Visiting Officers under the Armed Forces (Discipline) Act 1971. The last three of these NPMs were each allocated role-specific jurisdiction: Visiting Officers in relation to Defence Force detainees; the PCA in relation to the treatment of persons detained in police cells or otherwise in the custody of the police, as during transportation; and the OCC in relation to children and young persons detained in youth justice residences established under the Children, Young Persons and their Families Act 1989. The Ombudsman’s jurisdiction extends to the remainder of OPCAT places of detention: prisons; Immigration Act premises; health and disability places of detention; and, overlapping with the OCC, youth justice residences.

The Act (Section 26[2]) provides that ‘in designating a National Preventive Mechanism the Minister must have regard to the matters set out in Article 18’ of the OPCAT. Foremost amongst these is functional independence. Consequently, a knock-on effect of these designations was that legislative amendments were needed in relation to the PCA and Visiting Officers, as neither really met the functional independence test. Accordingly, in 2007 the Independent Police Conduct Authority Act was passed, changing the composition of the Authority from a single person to a board of up to five members comprising both legal experts and lay people. The Court

³⁹ The HRC had argued that the Act should contain a fallback provision enabling it to inspect directly as a last resort, or when matters of special importance were drawn to its attention. In addition, it was concerned that ‘places of detention’ under the OPCAT constitute a wider category than the places covered by the other NPM agencies, so that the HRC might be required to act as a stopgap inspection body until the question of the primary NPM was settled in such cases. The Commission’s position was not adopted in the legislation, and it is understood that, to date, this omission has not proved to be problematic.

Martial Act 2007 (Section 80) provided that the Registrar of Court Martials should be Inspector of Service Penal Establishments and should perform ‘the functions of the National Preventive Mechanism under the Crimes of Torture Amendment Act 2006 in relation to service penal establishments.’ The Registrar is an independent statutory office holder answerable only to the Chief Judge of that court. As the other three NPM bodies – the HRC, the OCC, and the Ombudsman – were already clearly autonomous, it is evident that New Zealand has moved decisively to meet OPCAT standards relating to functional independence.

Article 18 of the OPCAT requires that NPMs have the ‘necessary resources’ to perform their role. The Ombudsman received additional resources at the outset, and the Independent Police Complaints Authority (IPCA) has subsequently received additional resources. This occurred under the aegis of the new government that was elected after ratification, illustrating the point made earlier about the bi-partisan approach to human rights issues in New Zealand. The two principal frontline NPMs have, thus, had their new role acknowledged as an additional and distinct one, not merely something to be absorbed within existing resources.

2.2 *Getting started: NPM activity on the ground*

There have been eight main elements to getting started: administration, coordination, defining ‘cruel, inhuman and degrading treatment or punishment’, prioritisation, methodology, education, reporting, and international liaison.

2.2.1 *Administration*

This involves the whole gamut of how the system as a whole and the individual agencies deal with the logistics of carrying out a new task. From a systematic point of view, the role of the Ministry of Justice has been important. Its crucial role in urging ratification of the OPCAT, and preparing the enabling legislation, did not come to an end at that point. Within the Ministry, a small number of officers retain responsibility for seeing that the OPCAT is supported by the operational agencies and that problems encountered by NPMs are understood.

The NPMs themselves have nominated specific officers or sections to carry out OPCAT-related functions. Notably, the Chief Ombudsman has appointed from within her Office an Inspector – Crimes of Torture Act and delegated to him the day-to-day carriage of the NPM responsibilities. The IPCA has, likewise, nominated a senior Board member to oversee the OPCAT functions. A similar arrangement, though perhaps not quite as clear-cut, has been made within the OCC. The role of the Inspector of Service Penal Establishments (ISPE) seems, of all the NPM arrangements, to be the most straightforward at this early stage. There is only one primary detention facility, which holds a maximum of 12 people. The existing experience and ongoing engagement of the ISPE with the New Zealand Defence Force meant that the inspection activity was able to commence almost at once after the conferral of jurisdiction, without the preparation and administrative complexities involved with the other NPMs.

A common concern has been to maintain some degree of separation between the standard statutory powers and functions of the NPM agencies and those that are derived from OPCAT. We believe that this concern seems over-stated; however, it is indicative of the great care that is being taken not to ‘frighten the horses’, as the jurisdiction has been initially exercised in relation

to departments for which such external scrutiny is novel. However, an important balancing factor has been the emphasis on the ‘constructive dialogue’ approach, rather than public criticism. Nevertheless, it is likely that, as a result of their OPCAT functions, a stronger human rights culture will start to flow over into the accountability culture adopted by the NPMs in relation to their non-NPM functions.

2.2.2 *Coordination*

The coordinating role of the HRC as the Central NPM has developed in several ways. Most notably, NPM meetings are held quarterly at which each NPM reports its activities and broad discussions occur as to methodology, priorities, scope of inspections, style of reports and related matters. The Chief Commissioner of the HRC believes that the fact that the Central NPM does not have any direct inspection role has, despite her earlier concerns,⁴⁰ turned out to be an advantage in that there is no danger of any given approach becoming, by default, the dominant model. In her view, the bureaucratic hazards of territoriality have also been successfully avoided. For example, there is an issue of overlap between the role of the OCC in relation to juvenile residences and that of the Ombudsman in the identical area. The quarterly meeting mechanism enables structured discussion about this, rather than allowing the matter to deteriorate into assertions of territoriality.

The Ministry of Justice personnel have so far attended these coordination meetings as observers. Article 18(4) of the OPCAT requires that the Paris Principles⁴¹ should be complied with. One of these Principles states that Government representatives should participate in deliberations only in an advisory capacity. The HRC, as Central NPM, is well aware of this requirement and appreciates the importance of the fact that it is being met. Nevertheless, it is evident that the support of the Ministry of Justice is, at this stage, a crucial aspect of the OPCAT scheme. For example, in a context where the NPMs have no enforcement powers in relation to recommendations, the Ministry sees its role as involving, to some extent, informal or possibly formal follow-up with Departments to ascertain what progress is being made.

2.3 *Defining ‘cruel, inhuman and degrading treatment or punishment’*

An important issue is what constitutes cruel, inhuman or degrading treatment or punishment (CIDTP). This has already been well-defined by case examples around the world. The Crimes of Torture Act also enables recommendations to be made to prevent torture, or other forms of cruel, inhuman or degrading treatment or punishment.

However, the Act is drafted in a way that would entitle NPMs to go beyond this. Section 27 speaks more broadly of ‘the conditions of detention applying to detainees ... and the treatment of detainees’ and empowers NPMs to ‘make any recommendations it considers appropriate for improving the conditions of detention applying to detainees and for improving the treatment of detainees.’ The question arises, therefore, whether deficits such as no access to offender

⁴⁰ See fn.39.

⁴¹ Paris Principles relating to the Status and Functioning of National Institutions for the Promotion and Protection of Human Rights (the Paris Principles), adopted by the UN General Assembly, Resolution 134, UN Doc. A/RES/48/134 (1993), 20 December 1993.

rehabilitation programs or inadequate work opportunities, or deficient pre-release reintegration opportunities, would fall within NPM jurisdiction. This is the case, for example, with an autonomous inspectorate, such as that of the Inspector of Custodial Services in Western Australia, whose jurisdiction does not derive from the OPCAT. A view currently being debated at NPM level is whether such deficits are indicative of a failure to provide a non-degrading correctional environment and are, thus, within NPM jurisdiction under the Crimes of Torture Act. The Ministry of Justice expectation is that OPCAT jurisdiction under the Act will inevitably broaden out to cover regime quality generally, but that this should happen in a carefully modulated way, not precipitately. The Monitoring Standards Framework (adopted by the HRC) for the NPMs to apply, in fact adopts the wide view of CIDTP.⁴²

Returning to the themes in ‘Part One’, this is a very interesting stance, for it involves adopting a standard for CIDTP that is relative to the means, development status and human rights culture of the particular nation. It may be doubted whether States Parties to the OPCAT that are coming to this jurisdiction from a position where human rights values are not so embedded will take the same line. For the reasons already canvassed, many Asia-Pacific nations will probably adopt a relatively narrow interpretation of CIDTP if and when they ratify the OPCAT.

2.4 *Prioritisation*

The NPMs, and particularly the Ombudsman, with her multiple NPM jurisdiction, initially focused their activities on scoping their role and identifying where their efforts could, in the short run, most productively be made. This involved identifying which places of detention fell within each NPM body’s jurisdiction, making an inventory of where they were, assessing actual and potential risks of CIDTP or torture, evaluating team skills and the capacity of the NPM to assemble a visiting group appropriate to the particular location, and measuring these matters against the overall objectives of the OPCAT. A decision was made that closed psychiatric institutions were the least accountable, as well as the most problematic places of detention. In the short run, therefore, it was decided that these places would be given particular attention.

This is a good example of a coordinated approach. The HRC, as Central NPM had also reached the view that the District Inspector arrangements within the Department of Health in relation to its closed psychiatric institutions were not fully effectual. They were not autonomous, their observations were often unduly legalistic and the judgement of some of them seemed to have been compromised due to their position within the hierarchy of the health system (i.e. some of them seem to have over-identified with the perspectives of the health system that employed them). This was a standout case of why autonomous, external inspection – the very essence of OPCAT – is preferable to line-management internal inspection.

At this stage, prison inspection has not been accorded quite the same priority, though there have been many prison visits of a scoping nature. The view was expressed that the role of the quasi-independent Inspector of Corrections⁴³ constituted something of a safeguard that could be taken into account when allocating priorities. In other words, when constructing a total OPCAT system, existing accountability structures should be taken into account.

⁴² Information provided by the Chief Commissioner of the Human Rights Commission, September 2009.

⁴³ See Sections 28-29 and Sections 151-159, *Corrections Act*, 2004, Public Act 2004 No 50, New Zealand, entered into force 1 June 2005.

This view reflects the ‘don’t frighten the horses’ approach of the NPM jurisdiction in New Zealand. However, it is doubtful if it quite meets the spirit of the OPCAT. It certainly does not meet the letter of the OPCAT, for the Corrections Inspectorate does not possess functional independence. At best, it is quasi-independent. Moreover, it does not inspect against CIDTP and the human rights standards of the OPCAT so much as against statutory compliance with the provisions of the Corrections Act and other domestic legal criteria. The Corrections Act has not been drafted from the point of view of prisoners’ rights; it is a document setting out the powers and obligations of the authorities. It is quite conceivable that aspects of some New Zealand prisons will raise issues relating to cruel, inhuman and degrading treatment, even though they do not breach the Corrections Act. In other words, a regime may pass the Corrections Inspectorate test yet be in breach of OPCAT standards. Of course, the Ombudsman also has her own window on to the prison system via the prisoner complaints system. However, experience elsewhere would suggest that this is not necessarily effectual in identifying trends and patterns of the kind that NPM jurisdiction is intended to cover.

2.5 *Methodology*

The NPM agencies have each recognised the desirability of not allowing their processes and procedures to become too complicated. Check sheets have been produced that facilitate a simplified, almost ‘tick-a-box’ approach to identifying factors that may be indicative of CIDTP. The more broad-ranging and qualitative evaluations made by such a body as the Western Australian Inspector of Custodial Services⁴⁴ have not explicitly been built into these check sheets, even though, as previously mentioned, the expectation is that, eventually, a broader set of criteria may be applied. This seems prudent and sensible. The objective is to build confidence while, at the same time, unambiguously asserting power and jurisdiction. Internationally, the first aim of the OPCAT is to prevent CIDTP and torture, not to produce an ideal correctional system. Countries, such as New Zealand, that are prepared to leverage OPCAT ratification so as to go further and try to improve corrections systems holistically should not lose sight of this.

In the case of the IPCA, the Board member in charge of OPCAT activities has developed the methodology of getting investigators to do a quick OPCAT-focused assessment while they are visiting a police station for the main statutory purpose of investigating a complaint. This is something that the Ombudsman has tried to avoid, as has the Children’s Commissioner, on the basis that the OPCAT role may become little more than an afterthought. However, the practice simply reflects the reality of trying to cover several hundred different police posts spread across the South and North Islands. Numerically, IPCA possesses the most demanding and difficult of the NPM functions.

2.6 *Education*

Although all departments had previously been subject to the jurisdiction of both the Ombudsman and the Human Rights Commission, it was not in an OPCAT way. The Ombudsman’s jurisdiction was complaints-driven and the line of investigation focused on procedural fairness. The same point was true of both the IPCA (or rather the PCA, as it then was) and the OCC. With the advent of OPCAT jurisdiction, the Ombudsman’s role became, to that extent, human rights

⁴⁴ See below ‘Potential NPM Structures’ (‘Part 3, Section 4).

focused. Accordingly, the NPMs, including the HRC and the Ministry of Justice, have each recognised the need to explain to senior Departmental personnel and to line staff what the new system is all about. Efforts are being made to produce simple guidelines in electronic and booklet form. They include such matters as routine examples of CIDTP, a definition of torture, the fact that on-the-ground staff carry responsibility for the safety of NPM staff while they are on-site, the importance of the role of one-on-one meetings and the confidentiality to which interviewees are entitled, and the duty to facilitate free movement within places of detention. Comparable work is being done within IPCA to ensure that policing-specific OPCAT guidelines are developed.

Once more, the New Zealand agencies have demonstrated their understanding that, if the OPCAT is to be effective in the long run, the personnel affected must be enabled to understand what it is and why it is important. Ultimately, as with all inspection regimes, the beneficiaries are actually as much the staff as the detainees; that is the message that training on the OPCAT aims to get across.

2.7 Reporting

With regard to publication of reports, the Crimes of Torture Act goes a little further than the OPCAT itself. The latter simply requires, under Article 23, that ‘States Parties ... undertake to publish and disseminate the annual reports of the NPMs.’ The policy preference (Article 22) is clearly that this should normally occur only after ‘dialogue ... on possible implementation measures.’ The Act provides that each NPM shall present *at least one* report to Parliament or to the Minister annually, at which point they become public documents (Sections 27 and 36). In other words, if an NPM chooses to write several reports, it seems that each of these will become public documents. In addition, each NPM is empowered (under Section 33) to make public statements in relation to anything contained in a report or, in the case of the Central NPM, anything that it considers to be ‘in the public interest’.

It is too early to state with confidence how these powers will develop, but the Central NPM understandably has a strong preference for constructive dialogue to precede reporting and for the NPMs to take a coordinated approach. It is likely that the Annual Report of the HRC, as Central NPM, will develop into the principal vehicle for OPCAT coverage.

An interesting local practice is that each operational agency whose role includes holding people involuntarily in places of detention will, henceforth, include in their own Annual Reports their assessment of their own level of OPCAT compliance and the impact of the NPM system on their processes and policies. This is the sort of commitment that could only occur in a context where there is a strong human rights culture and an emerging understanding of the status and authority of the NPMs as the agencies responsible for the implementation of OPCAT. Potentially, this would seem to be a significant factor in ensuring that departments are OPCAT-aware.

3. International Liaison

Up to this point, New Zealand has sent only one national report to the United Nations SPT. It was presented in Geneva by the Chief Human Rights Commissioner in May 2009. The Report

was, at that early stage, necessarily rather general in tone, but highlighted several of the matters referred to above, including the need to embed a human rights culture in operational agencies, the varying levels of OPCAT awareness in agencies, the need for additional resources that the scoping work identified, some problems of overlap, and some issues around functional independence. As it happened, this Report was discussed at the UN at the same time as New Zealand's 5th National Report on compliance with the UNCAT.⁴⁵ This is a much more wide-ranging Report; in fact, somewhat surprisingly, it made no reference to the OPCAT or to the implications of New Zealand's ratification. In the informal discussion, however, the UN Committee on Torture spent some time pursuing, in more detail, the OPCAT implementation arrangements. This may be indicative of the fact that, henceforth, these matters cannot be treated discretely, which certainly makes sense.

4. Summary

There can be no doubt that New Zealand is taking its OPCAT obligations seriously. International obligations are being cemented into future developments. An example of this relates to the foreshadowed moves to permit private sector management of prisons again, as was the case between 2000 and 2005. The Corrections (Contract Management of Prisons) Bill is, as of October 2009, before Parliament. Section 199(2)(c) requires that 'every prison management contract must impose on the contractor, in relation to the management of the prison, a duty to comply with ... all relevant international obligations and standards.' The importance of this clause was emphasised in the Explanatory Memorandum accompanying the Bill. It would, thus, appear that OPCAT obligations are regarded as constituting a key factor in privatisation arrangements.

To this point, New Zealand has taken its OPCAT arrangements forward in ways that emphasise that each nation's model should ideally grow out of its existing structures, culture and political arrangements. Certainly, this will need to be the case with Australia and other Asia-Pacific nations if the OPCAT is to get off the ground. Some nations will decide that the extent of the socio-political change that the OPCAT requires can only be met by the imposition of an entirely new mechanism; this has been the case, for example, in France, Liechtenstein, and Senegal. Others have decided that the central Human Rights Commissions, or the offices of the Ombudsman, are sufficiently robust and well-respected to pick up the NPM role as a whole. Others, such as the UK, have shied away from trying to unite or rationalise the activities of existing accountability agencies, arguably leaving the NPM structure fragmented, but perhaps bowing to current bureaucratic and political realities.

That is the real lesson to be learned from New Zealand; it has gone about implementation of the OPCAT in ways that should work for New Zealand, rather than conceptualising a new model that may look wonderful on the drawing board but may not work on the ground. Australia can learn from this, as will be explained in the next part.

⁴⁵ The Fifth National Report had actually been lodged in January 2007. The decision to ratify the OPCAT had already been made at that time and the enabling legislation had been enacted.

Part Three: OPCAT and Australia

1. Human Rights Culture and Political Structure

Australia generally prides itself on its human rights record and has given full domestic effect to a number of international obligations, especially in areas such as equal opportunity laws. However, it has been far more reticent than New Zealand in embracing a full human rights culture. The Australian Human Rights Commission (formerly the Human Rights and Equal Opportunity Commission) was established in 1986 (some eight years after its New Zealand counterpart). There is no equivalent of New Zealand's Treaty of Waitangi and no national Human Rights Act, and New Zealand is some years ahead in terms of OPCAT implementation.

Furthermore, Australia has a federal system of government involving no fewer than nine political entities – the federal or Commonwealth Government, six State Governments, and two Territory Governments.⁴⁶ This poses delicate political and legal problems. Politically, the notion of 'States' rights' is by no means dead and buried and the prevailing pattern is that Governments of different political persuasions hold power in different jurisdictions.⁴⁷ These factors exacerbate the problem of political contestability as to the substance of proposed human rights laws.⁴⁸ There are also a number of legal and constitutional complexities around the extent to which the Commonwealth can enact overriding national legislation.⁴⁹ Although it is open to individual States and Territories to enact their own human rights legislation, only two – the Australian Capital Territory and Victoria *v* have done so.⁵⁰

On 8 October 2009, just as this article was being finalised, the Report of the National Human Rights Consultation was published. The Committee was tasked with 'finding out which human rights and responsibilities should be protected and promoted in Australia, whether human rights are sufficiently protected and promoted, and how Australia could better protect and promote human rights.'⁵¹ Its Report comes down in favour of a Human Rights Act which would 'protect and promote' rights under seven international human rights conventions, the most relevant of which, for present purposes, are the International Covenant on Civil and Political Rights and the UNCAT.⁵² However, there is very little specific discussion of the rights of people in places of detention and there appears to be no discussion of the OPCAT and its preventive mechanisms.

⁴⁶ The six States are Western Australia, South Australia, Tasmania, Queensland, Victoria, and New South Wales. The two Territories are the Northern Territory and the Australian Capital Territory.

⁴⁷ For example, it is often the case that one political party will dominate federally and the other will dominate at the State and Territory levels.

⁴⁸ This contestability is well illustrated in the particular context of the OPCAT by the manner in which OPCAT ratification was treated on the first occasion that it came before the Federal Parliament. Report 58 of the Standing Joint Committee on Treaties of the Australian Parliament recommended, in 2004, that Australia should not sign or ratify the OPCAT. The Committee split along party lines, with all of the members of the then Liberal Government recommending against and all of the then Labor Opposition members voting for adoption.

⁴⁹ See 'Constitutional Issues' below.

⁵⁰ The Human Rights Act 2004 (Australian Capital Territory) and the Charter of Human Rights and Responsibilities Act 2006 (Victoria).

⁵¹ The Report is available at <http://www.humanrightsconsultation.gov.au>.

⁵² Recommendation 17. The others are the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention on the Rights of the Child; and the Convention on the Rights of Persons with Disabilities.

Even if the Committee's recommendation for a 'national' Act is adopted, the practical impact will be very limited in terms of places of custody. The vast majority of prisoners and juvenile detainees are held for breaching State or Territory laws. Mental hospitals, the vast majority of police facilities, court custody centres, and prisoner transport arrangements are also State and Territory-based. The main places of Commonwealth detention are immigration detention centres, facilities related to Customs, and aged care homes. Although it was open to the Committee to recommend truly national laws, it decided against this:

It would be counter-productive and unwise to have the Federal Parliament impose on the states and territories a catalogue of human rights and a process for determining the regular limitation of those rights. Given the history of attempts to legislate for human rights at the national level in Australia, the Committee thinks the Commonwealth should look to its own affairs and lead by example.⁵³

Thus, a national Human Rights Act is by no means assured. If it does come about, it is some way off and, if it is limited to Commonwealth jurisdiction, it will have no relevance to most places of detention.⁵⁴ However, we are not unduly concerned by this *provided that OPCAT implementation proceeds independently* because a well-implemented OPCAT regime, based on systematic and regular independent inspections, offers more long term benefits than sporadic legalistic interventions by the courts. Indeed, we have been told that OPCAT implementation is proceeding separately from the Human Rights Act process.

Australia also still shows an embarrassing resentment of international scrutiny. In August 2009, at the invitation of the Australian government, the UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, Professor James Anaya, considered the controversial 'Northern Territory Intervention' in Aboriginal communities. The official justification for the Intervention was that it was necessary to protect Aboriginal women and children against violence and sexual abuse, often fuelled by alcohol abuse. It had many supporters but also attracted many critics, not least because it involved an explicit suspension of the Racial Discrimination Act. Anaya concluded that the Intervention was

As currently configured ... incompatible with Australia's obligations under the Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights, treaties to which Australia is a party, as well as incompatible with the Declaration on the Rights of Indigenous Peoples, to which Australia has affirmed its support.⁵⁵

⁵³ p.364. See also the discussion in Chapter 14. This is not the place to debate the Committee's position but we would prefer a truly national model.

⁵⁴ Interestingly, those who are imprisoned for breach of Commonwealth laws are also held in facilities operated by the States and Territories. We assume, though the Report does not address such details, that those who offend against Commonwealth law would probably be protected by a Commonwealth Human Rights Act, even if they are held in State or Territory prisons.

⁵⁵ Un High Commissioner for Human Rights, 'Statement of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, as he concludes his visit to Australia', 27 August 2009. Available at <http://www.unhcr.ch/hurricane/hurricane.nsf/0/313713727C084992C125761F00443D60?opendocument>. Last accessed 16 January 2010.

Anaya's comments attracted vitriolic reactions from leading figures in both major political parties: 'sanctimonious claptrap'; 'the kind of nonsense we are used to from armchair critics'; 'should be chucked in the bin along with every other rapporteur's report'; and 'pontificating about human rights'.⁵⁶ Most segments of the media followed suit.⁵⁷ The Minister for Indigenous Affairs showed better manners but was still dismissive.⁵⁸

An ambivalent human rights culture,⁵⁹ over-sensitivity to external comment and the likely limited scope of Commonwealth human rights legislation would not seem to augur well for the OPCAT, especially as it is premised on basic human rights principles being applied across the country, and on international as well as national scrutiny. Nevertheless, we are reasonably optimistic. First, the Labor Party moved to sign the OPCAT relatively quickly after assuming office and the fact of signing, rather than the prospect of signing, sets the parameters for further consultations with the States and Territories. Second, as previously noted, the OPCAT process is not tied to the introduction of a Human Rights Act. Third, a number of tragic events, including the heat-related death of an Aboriginal man in the back of a prisoner transport vehicle in Western Australia – 'a terrible death which was wholly unnecessary and avoidable'⁶⁰ – have given added national impetus to an inspections model. Fourth, an increasing number of inspection bodies are being established; although most are internal to the administering agencies, and are therefore not fully OPCAT-compliant, they do provide a basis upon which to build. Fifth, one State, Western Australia, not only already has a strong independent Inspector of Custodial Services, but is also proposing to significantly expand the Inspector's powers.⁶¹

2. Constitutional Issues

International conventions do not automatically become part of domestic law unless there is legislation to give them effect. Until such time as there is legislation, the provisions of such conventions simply become part of the background context in which the law operates, and not a source of law as such. For example, in the event of ambiguity, the courts should interpret a statute in conformity with Australia's international obligations. However, if legislation is clear

⁵⁶ The first two comments were made by Tony Abbott, the Opposition Liberal Party's shadow minister for indigenous affairs, the third by senior Labor Party official Warren Mundine, and the last by Mal Brough, the architect of the Intervention under the previous Liberal/National government.

⁵⁷ There were a few exceptions, such as Nick Cheesman, 'Leading the world in hypocrisy and intolerance', *Canberra Times*, 4 September 2009. Cheesman's views reflect our own: 'Whether James Anaya is right or wrong about Australia, the sharp rebukes of his assessment were an insult to him and a disservice to us all. They were out of line. They have diminished Australia's stature abroad and can but embolden politicians and autocrats in other countries who seek to ridicule universal human rights and the people who monitor them.'

⁵⁸ The Minister, Jenny Macklin said 'When it comes to human rights, the most important human right is the need to protect the lives of the most vulnerable, particularly children, and for them to have a safe and happy life, and a safe and happy family to grow up in. These are the rights that I think need to be balanced against other human rights.'

⁵⁹ The 2009 National Human Rights Consultation Report also commented on the need for Australia to develop a stronger human rights culture, especially in Chapter 6. See fn.51.

⁶⁰ Alistair Hope, Coroner for Western Australia, *Record of Investigation into the Death of Mr Ian Ward*, June 2009. The Coroner's report and other useful information can be found at <http://www.abc.net.au/4corners/content/2009/s2595622.htm>.

⁶¹ See fn.79 and accompanying text.

cut, it must be applied.⁶² This is so even when Australia has ratified, and not merely signed, a convention.

Australian constitutional law is renowned for its intricacies and subtleties, and there will, undoubtedly, be claims in some quarters that any proposed Commonwealth law to give domestic effect to the OPCAT would be unconstitutional. However, it is difficult to see any significant constitutional impediment to such legislation, provided it is properly structured and tied directly to the OPCAT. The Commonwealth Parliament can only enact legislation in conformity with the powers enumerated in the Australian Constitution. This does not give the Commonwealth direct constitutional power in relation to human rights and so it must depend on other heads of legislative authority. The most significant of these is the power under Section 51(xxix) to ‘make laws for the peace, order and good government of the Commonwealth with respect to ... external affairs.’ This provision has been interpreted so as to empower the Commonwealth Parliament to enact national legislation to achieve full implementation (within the States and Territories, as well as within the Commonwealth itself) of international obligations under *bona fide* international treaties or conventions to which Australia is a State Party.⁶³ The Commonwealth Parliament can choose the form that the implementing law takes, but must ensure (i) that it does not depart too widely from the terms of the treaty or convention, and (ii) that it is ‘reasonably capable of being considered appropriate and adapted to implementing the treaty’.⁶⁴

There are also a number of other principles, some of which are rather under-developed and none of which would seem to hinder legislation to implement the OPCAT. First, the High Court has indicated that, if the Commonwealth seeks to rely on a treaty to support a law made under the external affairs power, it is not sufficient that the law prescribes one of a variety of means that might be thought appropriate and adapted to the achievement of an ideal. The law must prescribe a regime that the treaty has itself defined with sufficient specificity to direct the general course to be taken by the signatory States.⁶⁵ There may be occasions when this ‘sufficient specificity’ test is difficult to apply. However, the intention and terms of the OPCAT lend themselves to sufficient specificity, as the New Zealand legislation exemplifies. Second, there appear to be limits on the extent to which the Commonwealth can impose legislative requirements if these

⁶² This principle is well-established. In *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1994-95), 183 Commonwealth Law Reports 273, the High Court went further and held that ‘if a decision-maker proposes to make a decision inconsistent with a legitimate expectation [based on the Convention on the Rights of the Child], procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course’ (Mason CJ and Deane J, 291-292). In terms of our previous comments regarding Australia’s human rights culture, it is interesting that there was considerable political debate about overturning the *Teoh* decision. A Bill was debated in the Federal Parliament that provided that the executive act of ratifying a treaty would not give rise to a legitimate expectation that the content and tenor of the treaty will be applicable in a domestic administrative law context. The Federal Bill was not enacted, but South Australia did enact such legislation. Perhaps it is a positive sign that a Bill is currently before the State Parliament to repeal that legislation: see Administrative Decisions (Effect of International Instruments) Act Repeal Bill 2009, South Australia, introduced 17 June 2009. Available via <http://www.legislation.sa.gov.au/listBills.aspx?key=A>. Last accessed 16 January 2010.

⁶³ The language of the treaty or convention is also important: see *Commonwealth v Tasmania* (1983), 158 Commonwealth Law Reports 1; *Richardson v Forestry Commission* (1988), 164 Commonwealth Law Reports 261; *Queensland v Commonwealth* (1989), 167 Commonwealth Law Reports 232; and *Victoria v Commonwealth (Industrial Relations Act case)* (1996), 187 Commonwealth Law Reports 416.

⁶⁴ *Victoria v Commonwealth* (1996), 187 Commonwealth Law Reports 416, 487 (per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

⁶⁵ (1996), 187 Commonwealth Law Reports 416, 486.

requirements interfere with the ability of the States to function as a government.⁶⁶ This area of law is evolving, but does not seem to hinder appropriate legislation in this area. Indeed, under our preferred model (see below), the NPM will build on, complement and enhance existing good governance processes.

In summary, there seems to be no impediment to the Commonwealth enacting legislation, pursuant to the external affairs power, to give effect to the OPCAT. However, such legislation is also constrained by the limits of the OPCAT and would not be able to go further, unlike New Zealand and Western Australia's Office of the Inspector of Custodial Services.⁶⁷

3. Priority One: A national inventory

As part of a project on the OPCAT undertaken for the Australian Human Rights Commission in the second half of 2008, we began an inventory of places of detention and existing monitoring agencies. The aim was to better understand the scope of the OPCAT in Australia, and to consider how far it would be possible to build on existing accountability structures to meet its requirements. Although we were able to take this inventory a considerable way, it was difficult to be confident about the accuracy of some of our findings, given that there is such diversity between jurisdictions. For example, there is no readily accessible national register of all places of detention used by the police or the intelligence services. Even in the case of prisons, which should be easy to count, we came across different official statements about the number of prisons within the same jurisdiction.⁶⁸ When it came to monitoring agencies, we again encountered significant problems. Above all, with only a few exceptions, the existing agencies are very low visibility. This derives from the fact that they are usually 'in house' (in other words, they are part of the administering agency and do not have an independent profile) or are just one part of a much larger, generic accountability agency (such as the Ombudsman). This is unfortunate, as transparency and accountability ultimately depend on visibility.

For these reasons, we recommended to the Government that it was essential that the work we had commenced on compiling an inventory of places of detention and monitoring agencies be completed in moving towards OPCAT implementation.

4. Potential NPM Structures

Given the constitutional parameters, there are several ways in which the Commonwealth, in establishing its NPM(s), could choose to exercise its legislative power consistently with the Constitution and with the requirements of the OPCAT.

One option would be for the Commonwealth to create a single, unified NPM in relation to all categories and places of detention in Australia. This has some attractions in that it would promote consistency, allow the development of a highly specialised national body, and ensure a simple reporting relationship to the United Nations. However, we have argued that these benefits

⁶⁶ *Austin v Commonwealth* (2003), 215 Commonwealth Law Reports 185.

⁶⁷ On New Zealand, see 'Part Two' and the Section 4 below.

⁶⁸ This may have been due to a prison being taken off line for refurbishment or to the question of whether 'work camps' are counted as separate places.

are outweighed by (i) the political disadvantages of this approach (in terms of obtaining positive cooperation from the States and Territories), and (ii) the practical benefits and cost efficiencies of building up existing State and Territory agencies to make them OPCAT-compliant, rather than creating an expensive new bureaucracy that would probably conflict with existing agencies, rather than complement them.⁶⁹

Our preferred model is, therefore, a mixed model in which responsibility would be shared between the Commonwealth and the States and Territories. There are a number of ways in which such a model might work, but the key underpinning principles, as in New Zealand, should be to build on existing structures and to ensure strong coordination between the various national agencies, and also between Australia and the United Nations. In broad terms, our suggested model is as follows:⁷⁰

- (1) The Commonwealth establishes the Central or National NPM. This body would be formally responsible for
 - (i) Matters within Commonwealth jurisdiction (such as immigration detention centres);
 - (ii) Matters that stretch across jurisdictions where there are no existing State-based mechanisms, or it is considered appropriate to have a national approach;
 - (iii) Coordination across all States and Territories; and
 - (iv) Reporting to the United Nations.
- (2) The Central or National NPM should probably be the Australian Human Rights Commission (AHRC), but it will need to be properly funded and restructured for this purpose.⁷¹
- (3) Each State and Territory should establish a single body that is responsible for coordinating OPCAT activities within that jurisdiction and for reporting, in turn, to the Central or National NPM. As with New Zealand, these bodies would be NPMs.
- (4) The Central or National NPM and the eight NPMs would be able to devolve some of their functions to other agencies, but should, ideally, undertake some inspections activities themselves.⁷²

These arrangements look complex in the abstract, and there are obvious risks of fragmentation in our suggested model. However, some examples may help to explain how it might work, as well as giving an insight into current arrangements in Australia.

At the Commonwealth level, there is already an active, fairly well-resourced and almost OPCAT-compliant agency with responsibility for overseeing aged care facilities: the Aged Care Standards and Accreditation Agency (ACSAA).⁷³ It would make no sense to disband the ACSAA and to bring such powers directly under the NPM, not least because some of ACSAA's

⁶⁹ See Richard Harding and Neil Morgan, *Implementing the Optional Protocol to the Convention against Torture: Options for Australia* (2008); a report to the Australian Human Rights Commission, available at http://www.hreoc.gov.au/HUMAN_RIGHTS/publications/opcat/index.html.

⁷⁰ For more details, see Harding and Morgan *Implementing the Optional Protocol* ..

⁷¹ The alternatives are a new agency or the Commonwealth Ombudsman. However, on balance, we believe (i) that it is better to build on an existing agency, and (ii) that the culture of the AHRC (as the national human rights body, with existing responsibility for reporting to the UN) is more attuned to the OPCAT than the Ombudsman (which is primarily an individual complaints mechanism).

⁷² Harding and Morgan, *Implementing the Optional Protocol*, p.9. See fn.69.

⁷³ Harding and Morgan, *Implementing the Optional Protocol*, para.6.21. See fn.69.

powers, as an accreditation agency, extend well beyond the OPCAT. Instead, the NPM should be able to draw on ACSSA expertise through a process of reporting. On the other hand, the inspection of immigration centres has been rather dispersed.⁷⁴ This is an area where the AHRC already undertakes some work and where its role could appropriately be firmed up and rationalised.

The various States and Territories are at very different stages in terms of the development of independent inspection agencies. Western Australia's Office of the Inspector of Custodial Services (OICS), which is discussed below, is, without doubt, the most advanced model. In Western Australia, it would probably, therefore, make sense for the OICS to become the NPM. If this happened, functions that currently lie outside OICS jurisdiction (such as inspections of locked mental hospitals) could either (i) be transferred to the OICS, or (ii) continue to be undertaken by the existing Official Visitors scheme, provided it was made fully OPCAT-compliant and reported to the OICS as the NPM. In other States, which have not developed specialist independent inspection agencies, a body such as the State's main human rights body, or the ombudsman, might be the most suitable NPM.

The system should also build in capacity for the NPM to sub-contract some functions to specialist agencies in other States or Territories. For example, some small jurisdictions may be best served, in terms of independence and costs, by buying in expertise from other larger jurisdictions.

A final example concerns the police. There has been no history of independent inspections of places of police detention anywhere in Australia so, unlike prisons and mental hospitals, there is no base upon which to build. We have suggested that consideration should, therefore, be given to placing responsibility for inspections of police facilities, across the whole country, in the Central or National NPM rather than in each State or Territory's NPM.⁷⁵

4.1 *Western Australia's Inspector of Custodial Services*

Throughout this paper, we have argued that it is desirable to build on existing mechanisms where possible. However, we have also noted that very few of the existing agencies across the country meet OPCAT requirements, especially in the area of functional independence. Western Australia's Office of the Inspector of Custodial Services is the exception to this. In developing a national template for the Central or National NPM and the NPMs, the legislation establishing the OICS should, therefore, be considered alongside the New Zealand legislation. It would also make sense to draw on OICS practices and procedures in making the statutory model operational.

This is not the place for a detailed discussion of the OICS, but a number of key points should be noted.

⁷⁴ A number of bodies have examined the operations of Immigration Detention Centres, both through special inquiries and through or yearly inspections. They include The Foreign Affairs Committee of the Commonwealth Parliament, the Commonwealth Ombudsman, an Immigration Detention Advisory Group, and the Australian Human Rights Commission. However, the boundaries and powers of these bodies have been unclear, and they have tended to operate quite independently. This, of course, reinforces the need for a coordinated and fully OPCAT-compliant approach.

⁷⁵ See Harding and Morgan, *Implementing the Optional Protocol*, para, 6.25-6.27. See fn.69.

- (1) The OICS' jurisdiction extends to prisons and work camps, juvenile detention centres, prisoner transport, court security, any 'administrative arrangements' in relation to these places, and any places where a suspected terrorist is detained.⁷⁶
- (2) The functional independence of the OICS is deeply embedded: it has its own statute,⁷⁷ the Inspector is accountable to Parliament, its reports are readily available public documents,⁷⁸ and the Office has its own budget and staff.
- (3) The legislation contains strong powers, including the right to conduct unannounced inspections, unfettered access to sites, the right to access documents, and protection of people from victimisation (especially following involvement with the OICS). It is also an offence to hinder the OICS.
- (4) OICS focuses on systemic issues, not individual complaints. The methodology is one of continuous inspection through formal inspections at least once every three years, regular liaison visits and constructive dialogue with the administering agencies. Interestingly, OICS is also to be given an 'individual audit' role that will allow studies of the treatment of individuals and selected cohorts.⁷⁹
- (5) In addition to inspection reports about particular sites, the OICS has issued a number of discussion papers and thematic reviews. It has also developed codes of inspection standards for adult custodial services and for Aboriginal prisoners, and is currently developing its standards for the treatment of juveniles.
- (6) Through the constructive dialogue approach, a good deal is achieved 'beneath the radar' of formal inspections via communication with the Minister and the administering department.

OICS work has always included a human rights component. The fact that the OPCAT has been signed means that its principles will form, more explicitly, part of the general context in which the OICS operates. In that sense, the OPCAT can be seen to be already having a practical impact. Indeed, it is quite likely that legislation governing the treatment of people detained under the criminal justice system in Western Australia will be amended, in line with the protections already extended to suspected terrorists, to include specific reference to cruel, inhuman, or degrading treatment.⁸⁰

⁷⁶ *Terrorism (Preventative Detention) Act 2006* (Western Australia), Sections 34, 39 and 50. Available at http://www.austlii.edu.au/au/legis/wa/consol_act/tda2006389/. Last accessed 16 January 2009.

⁷⁷ *Inspector of Custodial Services Act 2003* (Western Australia). Available at http://www.austlii.edu.au/au/legis/wa/consol_act/iocsa2003337/. Last accessed 16 January 2010.

⁷⁸ Available at www.custodialinspector.wa.gov.au.

⁷⁹ This comes in the aftermath of the inquest into the death of Aboriginal elder Mr Ward: see fn.60 and accompanying text. See also the State Government's full response to that case at [http://www.mediastatements.wa.gov.au/Lists/Statements/Attachments/132542/Government%20Response%20\(Final\).pdf](http://www.mediastatements.wa.gov.au/Lists/Statements/Attachments/132542/Government%20Response%20(Final).pdf).

⁸⁰ See fn.79,

5. Summary

There are many complex reasons – political, cultural and legal – why Australia is well behind New Zealand in terms of human rights legislation and the OPCAT. Debates about a national Human Rights Act have only commenced and if, as seems likely, such an Act is limited to Commonwealth Laws, it will have little impact on most places of detention across the country. For these reasons, it is critical that OPCAT implementation is vigorously pursued and is not sidetracked or neutered by Human Rights Act debates. In order to progress matters, Australia urgently needs a comprehensive up-to-date inventory of all places of detention and of existing monitoring mechanisms. In terms of preventive mechanisms, we believe that Australia should adopt a mixed model in which responsibility is shared between the States and Territories, and the Commonwealth.

In giving effect to the OPCAT, Australia can draw on the New Zealand legislation and on the legislation governing the OICS to develop national templates. Although the Commonwealth cannot impose obligations on States and Territories beyond the OPCAT, individual jurisdictions could choose to go further. In our view, there is much to be said for including a power to examine ‘administrative arrangements’ and a power of public reporting, even though the OPCAT concept of constructive dialogue with the agencies responsible for detention should be the normal practice.

Drawing on the New Zealand experience, it is also important to set implementation priorities and timeframes. The priority areas in Australia are prisons, juvenile detention facilities, immigration detention centres, detention facilities operated by the police, closed psychiatric institutions, and prisoner transport. Inspections of other places can be rolled out progressively. Our preferred timeframe would be for ratification in the second half of 2010 to be followed by staged implementation. In this regard, it may be noted that Article 17 of the OPCAT suggests a twelve-month timeframe for the establishment of NPMs. If the preparatory work is done effectively, Australia should be able to meet that requirement. However, as a fallback position, consideration may be given to the provisions of Article 24. This allows countries to make a declaration postponing implementation for up to three years. Germany, which also has complex constitutional hurdles to overcome, has taken this course and it is one that should not necessarily be ruled out in Australia.

6. Conclusion

Regional factors have had a strong influence on the ratification progress of the OPCAT. For example, the take-up among South American nations has been notable, possibly because of the recent history of dictatorship and torture that has ultimately provoked a strong human rights response among civil society and the elected governments. The pace has also picked up in Africa, possibly for similar reasons. European States, including the independent States formerly part of the Soviet Union, have also started to sign and ratify in significant numbers. In the case of the Western European States that have been members of the Council of Europe for longer than the other European States,⁸¹ this is partly explicable by the fact that for two decades they have been subject to a parallel regime within the jurisdiction of the European Committee for the

⁸¹ Forty-seven European States are members of the Council of Europe. This includes all the former Soviet Union States, including the Russian Federation, apart from Belarus.

Prevention of Torture and inhuman or degrading treatment or punishment and, thus, have become accustomed to external scrutiny of their closed institutions. In the case of the former Soviet Union States, the impetus to sign and ratify the OPCAT is possibly due to the previous history of oppression, a decade or so of experience of preventive visiting by the Committee for the Prevention of Torture, and a desire to meet the standards for admission to the European Union.

Comparable factors have not been present in the Asia-Pacific region.⁸² Reference has been made to the geographic, demographic, political and cultural history, and the characteristics of the region. The diversity is so great that, although there are some common factors of the kind that have influenced other regions, they do not amount to commonality. There is no unifying Asia-Pacific characteristic that has driven the region towards ratifying the OPCAT. That being so, to date quite individualistic factors have driven the ratification process. For New Zealand, the key factor was the country's long history and culture of human rights acknowledgement. For Australia, that history and culture has not been so distinctive and the human rights debate has always had a conflictual element. Nevertheless, the Australian human rights tradition is robust enough to be propelling the nation down the OPCAT path, albeit at a slower pace than New Zealand. The Asia-Pacific nations that have ratified would all seem to have had a particularly close relationship with the United Nations and its various agencies, such as UNICEF (UN Children's Fund), the UN Development Programme, the Food and Agriculture Organization, and the World Health Organisation. Possibly, this has had a bearing on the willingness to ratify; international aid and the acceptance of UN standards is part and parcel of political life.

However, the bulk of the Asia-Pacific nations, particularly the very populous ones, have their own cultures, histories and values that do not necessarily lead to the OPCAT being seen as high priority or even, at this stage of their development, as particularly relevant. We have identified, in 'Part One', a slow shift and named the nations that may lead a change of approach. As one and then the next ratifies, the pace is likely to pick up a little. The barrier remains what we identified previously: that OPCAT is essentially a document written by and for Western democracies. If it is to spread and to drive human rights considerations in the Asia-Pacific region, its application on the ground will have to reflect prevailing cultural and political norms in the particular ratifying nation. To state this is to accept, though not necessarily to positively promote, the notion that the application, on the ground, of human rights instruments, including the OPCAT, will inevitably be (to some degree) relative, not absolute. New Zealand, as an essentially Western democracy, has had no difficulty with the concepts of the OPCAT. However, its manner of implementation is an example of politico-cultural realism driving local solutions and, thus, is a regional exemplar of what must be done if the OPCAT is to thrive.

We would expect that, if we re-visit this issue after a decade, the OPCAT will have gained considerable maturity across the Asia-Pacific region. However, it would be misleading to expect a mass ratification, as has started to occur in other regions.

⁸² Nor have they been present in the United States. The OPCAT will only come of age when the nation with the greatest number of prisoners in the world, and the most assertive rhetorical stance about human rights, sets an example by signing, ratifying and implementing the OPCAT.