

# MAINTAINING STANDARDS, DECENCY AND HUMAN RIGHTS IN OVERCROWDED TIMES

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## I. INTRODUCTION

My first paper identified the general theme of ‘doing more with less’. In other words, the demands that are placed on criminal justice agencies rise faster than the allocated resources. Increasing demands come from many quarters including politicians, the media, victims’ groups and human rights agencies. The paper then discussed the causes and effects of overcrowding before providing a checklist of legal options to try to reduce the extent of overcrowding. However, overcrowding will undoubtedly remain a problem for many – perhaps most – countries.

The first paper argued that overcrowding creates pressures at three levels. First, it creates *individual* pressures (it impacts on individual prisoners and individual staff). Second, it creates *systemic* pressures (it impacts on the system’s capacity to operate and deliver full services). Third, these pressures are *cumulative* (a number of pressures – some relatively small in themselves - will coalesce and build together). The purpose of this second paper is therefore to ask whether and how it is possible, at times of overcrowding, to maintain standards, decency and human rights.

This paper first examines ‘internal’ management options within correctional departments. It then moves on to discuss the setting of standards for correctional services; the options for service delivery at times of financial constraint (including a brief discussion of privatization); how standards can be monitored (including a case study of the Western Australian Office of the Inspector of Custodial Services); and, finally, the implications of countries ratifying the Optional Protocol to the United Nations Convention against Torture (OPCAT). Although the main focus is on corrections, the points under discussion have relevance across the whole criminal justice system.

## II. INTERNAL MANAGEMENT

Internal management strategies within correctional departments should have two components. The first is *good corporate planning by ‘head office’*. Key aspects of this include monitoring trends and pressures, strategic planning and direction setting. The second component is clear, firm and fair local (ie prison-based) management strategies to deal with ‘on site’ issues.

### A. Corporate Planning

(“If you don’t know where you are going, you will never get there”)

Corporate planning faces some significant hurdles in the field of corrections because, as we have seen, trends can be both swift and dramatic. For example, in 2002, Singapore was planning to expand the capacity of its new Changi Prison complex from one ‘cluster’ (for 5,000 prisoners) to four such clusters. On the other side of the coin, countries such as Australia and New Zealand have seen a very rapid increase in prisoner numbers over the past decade, sometimes with ‘spikes’ appearing very suddenly.

Predicting prisoner numbers is very difficult as the factors are diverse and sometimes unpredictable. It is unlikely that anyone would have predicted the extent of the decline in prisoner numbers in Singapore, and the changes in Australia and New Zealand bear no clear relationship to changes in official crime rates. In part, this is because *many parts of the criminal justice system are subject to changes of government and*

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*to quite abrupt changes of policy settings.* It is also because *many parts of the system involve discretionary decision making.* For example, prosecutorial discretion and discretionary practices with respect to the enforcement of parole and community-based sentences can have a major impact. Importantly, decisions made in these parts of the system also tend to be less transparent and less open to public scrutiny than decisions made by courts.

Good corporate planning is also hampered by inbuilt time lags. For example, it is not uncommon for new prisons to take at least three years from planning to commissioning. Good modern correctional practice is also that new prisons should be filled gradually to avoid too many teething problems. Thus, a new prison may not be filled for 6-12 months after opening. Thus, the system is usually playing 'catch up' in trying to meet demand.

However, whilst there are some hurdles to effective forward planning, some things rarely change and most systems face systemic ongoing issues. Despite other distractions, good corporate-level planning should therefore include at least the following elements:

- A clear sense of direction, embodied in a simple and effective mission statement;
- Policies and practical measures to tackle known and predictable pressure points (for example, in many countries, unsentenced prisoners, women and over-represented groups);
- Development of contingency plans in the event of a sharp rise in prisoner numbers;
- Examination of service delivery options;
- Positive engagement with NGOs;
- Ensuring that the whole organization is consulted; informed; in line; and feels supported;
- Putting the case about the risks of overcrowding forcefully to government Ministers even if they are reluctant to listen.

## **B. Local Management**

At the local management level, security and safety are critical. However, there are risks if the system slips into a negative, oppressive survival mode. The key elements to sustaining good practice even in overcrowded times are probably as follows:

- Maintain clear lines of management;
- Maintain a focus on positive staff/prisoner relationships;
- Maintain firm and transparent discipline and grievance procedures for prisoners;
- Maintain the delivery of education, programmes, recreation, visits etc.;
- Develop and maintain staff support processes and mechanisms.

## **III. SETTING STANDARDS**

Three questions arise with respect to the idea of setting standards for correctional services. First, *why* set standards? Second, *what level of detail* should be set? Third, and tied to the last question, *how* can appropriate national or local standards be developed?

### **A. Why Set Standards?**

I have already identified a number of ways in which internal management mechanisms (both corporate-level and local-level) can help redress some of the problems caused by overcrowding. However, there are limits to this. Ultimately, a prison will generally have to accept those prisoners who are sent there, even if the prison is already 'full'. And it can be very difficult to put the case to government for more resources simply by using 'internal' management arguments: prisons are expensive, the media and the public have little sympathy for the position of prisoners, and more expenditure on prisons means less expenditure on other public services such as schools and hospitals.

Externally-validated standards, which reflect and build upon international human rights obligations, can therefore provide a useful tool for correctional administrators in (i) setting benchmarks and targets; (ii) assessing performance; and (iii) putting a stronger case for funding to ministers and to treasury/finance departments.

## **B. Levels of Standards**

There is a bewildering array of international documents and standards. They can appear intimidating and off-putting in terms of the number, scope and amount of repetition. The basic framework is as follows:

### 1. General United Nations Conventions

Several United Nations conventions contain broad statements to the effect that no-one should be subject to 'torture or to cruel, inhuman or degrading treatment or punishment'. The main examples are Article 5 of the UN Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights (ICCPR).

### 2. Specific United Nations Conventions

Some conventions provide more detail and more specific principles governing the position of people who are deprived of their liberty. These include the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (usually known simply as the 'Convention against Torture' or UNCAT) and the Convention on the Rights of the Child (CROC).

### 3. UN Standard Minimum Rules

The United Nations has adopted 'Standard Minimum Rules' in a number of areas. They include the Standard Minimum Rules for the Treatment of Prisoners (the first such rules and commonly known just as the UNSMR's) – adopted 30 August 1955; the Standard Minimum Rules for Administration of Juvenile Justice (The Beijing Rules) – adopted 29 November 1985; and the Standard Minimum Rules for Non-Custodial Measures (The 'Tokyo Rules') – adopted 14 December 2000. The various Standard Minimum Rules documents provide a very useful starting point. They are non-binding and may require some local modification, but they create a set of expectations that are largely universal and are very commonly used.

### 4. Other UN Principles and Rules

Some later UN documents bolster the Minimum Rules. These include the Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment (1988); Basic Principles for the Treatment of Prisoners (1990); and Rules for the Protection of Juveniles Deprived of their Liberty (1990). For most purposes, however, the Standard Minimum Rules will be the most useful starting point.

### 5. Regional and National Standards

Some parts of the world have adapted and built on the various UNSMR's to develop regional standards (for example, the European Prison Rules) or national standards (for example, the American Correctional Association Standards; the Standard Guidelines for Corrections in Australia (revised in 2004); and, in the United Kingdom, Her Majesty's Prison Inspectorate's lengthy document entitled 'Expectations' (August 2008).

### 6. Local Standards

In Western Australia, the Office of the Inspector of Custodial Services (OICS) has added further layers in its Code of Inspection Standards for Adult Prisoners and its Standards for Aboriginal Prisoners. There are many reasons for this. The standards have more direct operational relevance and more local flavour. They also ensure that the State's Department of Corrective Services and individual prison superintendents have a focus on external expectations without having to examine what they might see as vague and 'remote' principles scattered across various United Nations documents. The standards are also used in assessing performance through independent inspections. Work is in progress on developing OICS Standards for Juvenile Detainees and then Standards for Women Prisoners.

## **C. Developing Relevant Standards**

### 1. Key Principles

I suggest that four main principles should underpin the setting of national standards:

- They should *reflect accepted international standards*.
- They should be *locally relevant*.
- They should be *sufficiently detailed*.
- They should *set best practice targets (these will not just reflect current practices or easily achievable goals)*.

## 2. An Example: Food

One of the most common complaints of prisoners in many countries relates to food. Issues of food provision are complex because some prisoners have dietary *requirements* based on health or religious grounds and others may have dietary *preferences*. In Australia, we also find that most prisoners tend to eat rather unhealthily when they live in the community, and often have a preference for sweet foods such as cakes and soft drinks and for fatty foods such as fried food and fast food. And traditionally, much prison food was itself fatty, sweet, unhealthy and not very palatable.

The question of food for prisoners is far too specific to be part of international human rights covenants or for general domestic human rights legislation. However, it is covered by the Standard Minimum Rules for the Treatment of Prisoners. Rule 20 reads as follows:

“(1) Every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well-prepared and served.  
(2) Drinking water shall be available to every prisoner whenever he needs it.”

The Standard Guidelines for Corrections in Australia go further (especially in Guideline 2.13 which refers to special dietary needs). They read as follows:

### “**Food and Water**

2.12 Every prisoner should be provided with continuous access to clean drinking water and with nutritional food adequate for health and well being, at the usual hours prepared in accordance with the relevant health standards.

2.13 Special dietary food should be provided where it is established such food is necessary for medical reasons, on account of a prisoner's religious beliefs, because the prisoner is a vegetarian, or where the prisoner has other reasonable, special needs.”

In Western Australia, the OICS standards are considerably more detailed. First, standards 96 to 99 of the Code of Inspection Standards for Adult Prisoners state:

### “**96. Food should be hygienically prepared and of sufficient quality, quantity and variety to meet prisoners' nutritional needs.**

96.1 Menus should be planned to ensure that high quality, nutritional and varied meals are provided. Prisoners should be consulted about food choices and kitchen staff should schedule regular sessions with different prisoner cohort groups to receive comments about prison food.

96.2 Prisoners should be able to choose between food options.

96.3 All prisoners should have continuous access to clean drinking water.

96.4 Particular care and consideration must be given to ensure that prisoners that are required work outside the prison or prisoners in transit have access to adequate supplies of drinking water, using the guideline quantities noted above.

96.5 Menus should consider the availability of fresh produce, climate, prisoner work requirements, and the need for special meals.

96.6 Menus should be developed in consultation with a qualified dietician.

96.7 Food should be procured, stored, prepared, produced and served in accordance with generally accepted professional health and safety standards and in compliance with legislation.

96.8 All persons engaged in food preparation and or handling should be trained in food hygiene matters commensurate with their work activities.

96.9 All persons involved in preparing and serving food wear appropriate protective clothing.

96.10 Custodial staff must supervise the serving of food to prevent tampering with food and other forms of bullying. Particular care must be taken to ensure that food for protection prisoners is not subject to tampering.

96.11 There should be regular formal and informal kitchen inspections.

**97. Special dietary food should be provided where it is established such food is necessary for medical reasons, on account of a prisoner's religious beliefs, because the prisoner is a vegetarian, or where the prisoner has other reasonable, special needs.**

97.1 Halal and other religious requirements for food procurement, storage, preparation, distribution and serving should be fully observed. This may involve the separate preparation and cooking of certain foods.

97.2 Prisoners requiring special diets such as vegetarian, vegan, religious, cultural and medical diets, should be able to select from a menu which includes sufficient choice.

97.3 Prisoners should be educated about healthy eating and its benefits.

97.4 Prisoners are consulted and can make comment about the quality, quantity and variety of food and have their views taken into account.

97.5 There should be arrangements for food to be available at non-meal times for late arrivals, court returns etc.

**98. Prisoner accommodation that involves self-catering must be monitored to ensure appropriate standards of hygiene and nutrition.**

98.1 Prisoner self-catering arrangements require the prison to ensure that proper standards are observed for the storage of food, the hygiene of the kitchen, and that prisoners are receiving a balanced diet.

**99. The provision of tea, coffee and snacks in any work, study, recreation or accommodation areas must be subject to regular inspection with regard to hygiene and safety.**

99.1 Food that has been purchased from the canteen for later consumption must be stored safely and hygienically.

99.2 Healthy snacks should be available as an alternative to confectionery.

99.3 Nutritional information concerning healthy food and lifestyles should be made available to prisoners.”

Standard 18 of the OICS Standards for Aboriginal Prisoners also makes reference to food:

**“18. Food and dietary arrangements should take account of the particular health needs and preferences of the prisoner population and appropriate provision should be made for the availability of traditional food and bush tucker.**

18.1 A range of menu options for traditional foods should be provided that recognises the diversity within the Aboriginal prisoner population and that meets the requisite health and dietary requirements.

18.2 Simply providing a traditional meat such as kangaroo once a week is not sufficient without considering traditional vegetables, nuts and fruits. It is acknowledged that these are not as readily available as European style foods but this should not prevent the identification of sources of supply. In this regard, community groups should be approached for assistance in securing regular supplies of traditional foods.

18.3 Traditional ways of preparing and cooking traditional foods may not meet strict institutional health regulations, and in prisons with a predominantly Aboriginal population it will be necessary to ensure that health standards are met while at the same time producing food that is acceptable and appetising to Aboriginal prisoners.

18.4 Healthy diet promotions need to be implemented on an ongoing basis for all prisoners. These should engage Aboriginal prisoners through tastings and cook-ins rather than relying upon standard classroom approaches to learning.”

Some may feel that the OICS standards are too detailed. However, they do illustrate the way in which locally relevant issues (such as education on nutrition; support for prisons in providing healthy food even in the face of prisoner complaints; and the special needs of particular groups) can be enveloped in local or national standards and how specific examples can be given to support the general principle. The existence of these detailed standards also provides OICS with a checklist when we conduct our inspections and can provide the Department of Corrective Services with support in seeking appropriate funding to maintain or improve standards in overcrowded times.

#### IV. SERVICE DELIVERY OPTIONS

##### A. Privatization: Issues, Criticisms and Evidence

Discussion of standards and resource constraints leads inevitably to the vexed question of privatization. This is not the place for a detailed discussion of the various forms of privatization that can occur or for the intricacies of such processes. However, it is necessary to make some general observations.

First, let me state my personal position. Intuitively, the idea of 'privatizing' parts of the criminal justice system seems wrong because prisoners and suspects are detained by the state. On the other hand, I am above all an advocate for better standards (if possible at a reduced cost). Furthermore, it needs to be recognized that NGO's have always played a role in the justice system and there have often been elements of 'outsourcing' of services.

There are many critics of prison privatization. Their criticisms tend to involve two main types of argument. The first is that the criminal justice system is a state responsibility and that privatization involves an abdication of that responsibility. However, critics tend to over-state their case. The critical point is that the *state retains the ultimate duty of care*. In privatizing services, it is 'contracting *in*' a service; it is *not* contracting *out* of its ultimate responsibility. Bad privatization models have failed to recognize this properly. Good privatization models have clearly embedded the principle: for example, they ensure that the highest level security and control duties remain with the public sector and do not allow the private sector to decide whether a person is released or to extend a prisoner's stay for disciplinary reasons.

The second main criticism relates to service delivery: it is said to be wrong for the private sector to profit from punishment and that service delivery will suffer when profit is the motive. However, the worldwide evidence is that the private sector, like the government sector, is capable of running very good prisons, alarmingly bad prisons and everything in between. What seems to matter most is the way in which privatization is done, not the fact of privatization itself.

##### B. Keys to Success

In summary, the evidence is that privatization can work but can also fail. So what are the keys to success? Although there can be no guarantees, the four key factors are as follows:

- Manage the initial process properly (evaluate the bids carefully and decide on the basis of value for money and capacity to deliver the service, not the cheapest bid);
- Set clear contractual requirements for performance and include penalties for failures (such as outbreaks of disorder) or under-performance (such as failing to provide adequate access to education or treatment programmes);
- Monitor the contractor's performance and enforce the contract;
- Re-tender if not satisfied.

In terms of standards, it should also be noted that in most places, privatization has driven a sharper focus on standards because it has been necessary to include these as part of the contract for services. The system-wide side-effect is that the public sector should then be expected to meet the same standards as the private sector.

In terms of *costs*, care must be taken when comparing the public and private sectors. The full costs of the private sector include not only the fee that is paid under the contract but also the additional costs that are covered by the public sector (such as contract monitoring and high level security operations). However, in both Australia and the United Kingdom, there is evidence that (i) many privately operated prisons are performing better than public sector prisons; and (ii) the total costs of the private sector are lower.

##### C. Example

An example of good practice from Western Australia is Acacia Prison which was commissioned in 2001. Great care was taken in developing the specifications for the new prison and in the selection of the contractor, who was responsible for designing and constructing the prison and then had a contract for its management for five years up until 2006 (a DCM – design, construct and manage arrangement). The State always had the option to take the prison over if things went badly wrong (as was the case with one prison in Victoria).

In the period from 2001 to 2005 there were no serious incidents but in other ways (such as education, programme delivery and staffing issues), the prison was not meeting full expectations. In simple terms it was generally 'doing OK' but no more, and there were some points of weakness. It was comparable to many of the other prisons in the State.

In 2005, the contract for prison services was re-tendered. The original contractor put in a competitive bid but, in the end, a different contractor was selected, and took over in May 2006. Acacia is now the best-performing male prison in the state, based on a number of indices. In total its costs are around 60%-65% of the costs of public sector prisons. In making these comparisons, some allowance must be made for the fact that Acacia prison is the state's largest prison (so there are economies of scale) as well as its newest prison (so it has the advantage of modern buildings). Nevertheless, the savings are significant.

It is also worth noting that the contractors (Serco) have proved to be cautious in accepting more prisoners into Acacia. Even though more prisoners would mean a higher fee, Serco has requested more infrastructure funding from the government and does not want to jeopardize its commercial reputation.

The keys to success were those identified earlier – a rigorous process for selection of the contractor; a clear set of contractual obligations; a robust monitoring system; and exercising the option of re-tendering. The monitoring system has two components – 'internal' monitoring by the Department of Corrective Services and independent, external monitoring by the Inspector of Custodial Services. Both play a critical role and there is no doubt that a robust external system helps to ensure standards, accountability and transparency.

## **V. MONITORING STANDARDS: WESTERN AUSTRALIA'S INSPECTOR OF CUSTODIAL SERVICES**

### **A. Background**

The Office of the Inspector of Custodial Services (OICS) was established in 2000 in light of decision to privatize a new prison (Acacia). The view was taken that if prison services were to be privatized, it was essential to ensure public accountability and transparency.<sup>2</sup> The governing legislation is now the Inspector of Custodial Services Act 2003 (WA).

The Inspector is an Officer of the State Parliament appointed by the Governor. This *functional independence* means that the Inspector is not located within the Department of Corrective Services (DCS) and does not work under the direction of a Minister. However, there are protocols to govern these relationships.

Since the Inspector is an officer of the Parliament, his reports are tabled in Parliament and published on his website ([www.custodialinspector.wa.gov.au](http://www.custodialinspector.wa.gov.au)). There is not yet an equivalent office elsewhere in Australia; other jurisdictions have mechanisms that are internal to the Department or Ministry and little is ever made public by way of reports or criticisms.

### **B. Jurisdiction and Powers**

Although the trigger for establishing OICS was the new privately operated prison, it has jurisdiction over all prisons and a range of other custodial services. In total, it covers prisons (13); work camps (7); juvenile detention centres (2); court custody centres (17); custodial transport (for example, prison to court and inter-prison transfers); and any cases involving suspected terrorist detainees (wherever they are held). Currently, OICS therefore has no jurisdiction with respect to psychiatric facilities, immigration detention centres, police detention facilities (except as an adjunct to transport) or community corrections.

In line with what has already been said, the OICS mission is to "provide an independent, expert and fair inspection service so as to give Parliament and the community up-to-date reports and advice about custodial facilities and services". The focus is on systemic issues, not individual complaints (which are for

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<sup>2</sup> It should also be noted that, in the interests of transparency, the contract itself is publicly available (see [http://www.correctiveservices.wa.gov.au/A/acacia\\_security\\_management\\_contract.aspx](http://www.correctiveservices.wa.gov.au/A/acacia_security_management_contract.aspx)). In most places, this is not done for 'commercial confidence' reasons. However, it is, in my view, an important part of a good privatisation process.

the Department of Corrective Service and the Ombudsman to resolve). However, individual complaints may well point to systemic issues, so mechanisms are in place to track this.

The Inspector *must* inspect every prison, detention centre and court custody centre at least once every three years. He *may* inspect at any time a 'custodial service' and any 'administrative arrangements' in relation to such services (includes prisoner transport).

The statutory powers of the Inspector and his staff are very extensive. Importantly, they include:

- (i) The power to conduct unannounced inspections (this power is not commonly used but is critical);
- (ii) The right of unfettered access to all places at all times;
- (iii) It is an offence to hinder the Inspector or staff in any way (e.g. by not providing information when requested);
- (iv) Criminal penalties also apply to anyone who victimizes another engaging with OICS;
- (v) The right to publish findings and recommendations.

### **C. Reports and Other Publications**

OICS has now published 60 detailed Inspection Reports (for good examples of topics discussed in this paper, see Reports 19 and 53 on Acacia Prison at [www.custodialinspector.wa.gov.au](http://www.custodialinspector.wa.gov.au) under "reports and reviews"). In addition, the Office has published 'thematic reviews' on a number of matters, including a series of suicides at one of the State's prisons (2004); a review of vulnerable and predatory prisoners (2003); a review of prisoner transport (2007) and a review of health services (2008). These reports all have potential value well beyond the borders of the State

### **D. Ongoing Monitoring**

In addition to conducting its inspections, OICS keeps a close eye on places under its jurisdiction through:

- Tracking incident reports and other intelligence from prisons;
- Regular contact with prison superintendents and others;
- Regular liaison visits by allocated OICS liaison officers (usually at least four visits per annum to every prison and detention centre);
- Managing the Independent Visitors Scheme (IVS). Around 34 community volunteers are appointed to observe and report on the treatment and conditions of detainees and staff. More than 100 reports are received each year from this source;
- The OICS Community Reference Group, which includes all key NGOs.

### **E. Inspection Methodology**

The methodology for announced inspections (the usual practice) aims to embrace a number of different sources of information so that our findings, criticisms and recommendations are validated and well-founded. The basic methodology is as follows:

- Surveys of staff and prisoners three months before the inspection period;
- Desk-top analysis of these results;
- Briefings from the Department on any matters we request;
- Discussions with service providers and others;
- Panel discussions;
- On-site inspections (including inspections of physical infrastructure, security and group discussions with staff and prisoners). Usually this takes one week with four to eight staff but, at times, we have taken two weeks;
- The Inspector provides an 'Exit Debrief' at the end of the inspection period in which the main issues and suggestions are provided;
- The report is then written and sent to the Department of Corrective Services for comment. The Department is asked specifically to respond to any recommendations in the Report, by stating whether it accepts those recommendations or not;
- After comments are received from the Department, the Report is then finalized. Due to the various procedural requirements, there is usually a period of 6 to 9 months from the time of the on-site inspection and the publication of the final report.



When *unannounced* inspections are conducted, the first few elements of this methodology are obviously not followed. Throughout its work, as noted earlier, OICS makes extensive use of its various Standards.

## VI. IMPLICATIONS OF THE OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE (OPCAT)<sup>2</sup>

I have provided some detail about the operations of the Office of the Inspector of Custodial Services not only because it provides an interesting example of external scrutiny but also because its structure, powers and processes are a model for what should be developed in all those countries who decide to implement the Optional Protocol to the United Nations Convention against Torture (OPCAT).

### A. Parties to OPCAT

As with all such instruments, the first stage is for a country that is already a signatory to the UN Convention against Torture to *sign* the Optional Protocol. However, signing OPCAT does not create binding obligations: it is, in essence, a statement of principle and a sign of good faith and an intention to ratify at a later date. *Ratification* imposes a number of obligations.

The number of countries signing and ratifying OPCAT is increasing significantly. The current situation is as follows:

#### 1. Ratifications (47 'States Parties')

Albania, Argentina, Armenia, Azerbaijan, Benin, Bolivia, Bosnia and Herzegovina, Brazil, Cambodia, Chile, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Former Yugoslav Republic of Macedonia, France, Georgia, Germany, Guatemala, Honduras, Kazakhstan, Kyrgyzstan, Lebanon, Liberia, Liechtenstein, Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Moldova, Montenegro, New Zealand, Nicaragua, Paraguay, Peru, Poland, Senegal, Serbia, Slovenia, Spain, Sweden, Ukraine, United Kingdom, Uruguay.

#### 2. Signatories (25)

Australia, Austria, Belgium, Burkina Faso, Republic of the Congo, Ecuador, Finland, Gabon, Ghana, Guinea, Iceland, Ireland, Italy, Luxembourg, Madagascar, Netherlands, Norway, Portugal, Romania, Sierra Leone, South Africa, Switzerland, Timor-Leste, Togo, Turkey.

### B. Relevance of OPCAT

In essence, OPCAT gives 'teeth' to the United Nations Convention against Torture. The relevance of this may not be immediately obvious because many countries would say "*We don't torture people*". However, the critical point is that OPCAT goes much further than 'torture' in the sense of doing unspeakable things to people to extract confessions or evidence. OPCAT outlaws *any form of cruel, inhuman or degrading treatment* and extends to *all places where people are deprived of their liberty*:

In most countries, the 'Big 5' places where people are deprived of their liberty are probably prisons, juvenile detention facilities, immigration detention centres, police detention facilities and locked psychiatric wards. Other places covered by OPCAT include court security, prisoner transport, locked aged care facilities, airport holding areas, places run by national security services and locked facilities for wards of the state.

### C. Requirements of States Parties

OPCAT imposes two main requirements on parties who have ratified. First, there is an *international dimension*: with effect from the date of ratification, all States Parties must allow inspections of all places of detention by the United Nations Subcommittee on Prevention of Torture (the SPT) which has been established under OPCAT.

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<sup>2</sup> See website of the Association for the Prevention of Torture (APT) – [www.apr.ch](http://www.apr.ch) and R Harding and N Morgan, *Implementing the Optional Protocol to the Convention Against Torture: Options for Australia* (2008) – [www.hreoc.gov.au/human\\_rights/publications](http://www.hreoc.gov.au/human_rights/publications)

Secondly, there is a *national dimension*. Within 12 months of ratification (or later if the country makes a 'reservation' to that effect), States parties must develop 'national preventive mechanisms' (NPM's) to prevent torture and cruel, inhuman or degrading treatment.

It should be noted that for political and resourcing reasons, the direct involvement of the SPT in any given country is likely to be sporadic and ad hoc. In practical terms, therefore, it is the NPM's within the country that will have the greater importance.

The precise NPM structures that are adopted in each country will differ and the position in federal systems such as Australia is particularly complex.<sup>2</sup> However, it is important to emphasize that the NPMs must have functional independence and professional expertise (Article 18); broad powers of inspection including the rights to enter and inspect places of detention and the right to access information without hindrance (Article 20); and that people who communicate with the NPM must be protected (Art 21).

It can be seen that the Office of the Inspector of Custodial Services meets all of the requirements of NPMs under OPCAT. Indeed, it is one of very few (perhaps the only) fully OPCAT-compliant mechanisms currently operating in Australia. For this reason, the Inspector of Custodial Services Act (WA) and OICS practices should, in my view, provide a national template for the development of legislation to establish Australia's NPMs. OICS legislation, practice and experience may be useful to other countries too, as they move towards full OPCAT implementation.

## VII. CONCLUSION

Unfortunately, abuses can, and do, occur in some places of detention. Recent history has revealed that some appalling examples of abuse and lower level abuse will also occur. Sometimes the abuse is deliberate (and may satisfy traditional definitions of 'torture'). But more often, it is the result of neglect, indifference or a lack of focus on proper standards. At times of overcrowding and limited resources, it can be especially difficult to meet existing standards, and even more difficult to move towards higher standards. 'Internal' mechanisms to address such issues may have limited impact unless bolstered by external expectations.

For these reasons, I believe that there are many benefits in using existing United Nations standards as a starting point in the development of more detailed national standards. It is also a good idea to keep an open mind about service delivery options. Although privatization must be approached cautiously, and will certainly not work for everyone, there is evidence that in some places, it has offered real benefits in terms of costs, standards of service and 'competition' for the public sector.

Whatever processes are adopted, it is absolutely critical to ensure that there are effective monitoring mechanisms. Some of these will be internal, but external processes are also fundamentally important. The benefits of external scrutiny, as recognized by delegates to the 2008 Asia and Pacific Conference of Correctional Administrators in Malaysia, include improved standards; greater accountability and transparency (and therefore greater public confidence); improved processes; and better capacity to put the case for funding to governments.<sup>3</sup>

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<sup>2</sup> See R Harding and N Morgan, *Implementing the Optional Protocol to the Convention Against Torture: Options for Australia* (2008) – [www.hreoc.gov.au/human\\_rights/publications](http://www.hreoc.gov.au/human_rights/publications)

<sup>3</sup> N. Morgan and I. Morgan, *Report of the 28<sup>th</sup> Asian and Pacific Conference of Correctional Administrators*, available soon at [www.apcca.org](http://www.apcca.org). See the reports on Agenda Item Two and Specialist Workshop 1.