NOTE

PROTECTING THE "FIRST PEOPLES": AUSTRALIA'S NEEDED RATIFICATION OF THE OPCAT

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INTRODUCTION

In 1999, Corey Brough, a sixteen-year-old Aboriginal Australian juvenile with mild cognitive impairment, was detained in the Kariong Juvenile Detention Centre after being sentenced to eight months' imprisonment for burglary, assault, and causing bodily harm.[1] Only a few weeks after Corey's detainment, he participated in a riot to bring attention to the mistreatment of the juveniles at this detention facility.[2] The next day Australian authorities referred Corey to an adult correctional facility where they segregated him from other inmates and, over the course of the following months, subjected him to solitary confinement, forced antipsychotic medication, forced nakedness, and twenty-four-hour lighting.[3] After Corey attempted to commit suicide in his cell, he was charged with "failing to comply with a reasonable order"[4] and sentenced to further solitary confinement.[5]

Corey brought his case before the United Nations Human Rights Committee, which ruled that he was entitled to a remedy.[6] The Human Rights Committee highlighted Corey's "particularly vulnerable position" as an Aboriginal Australian, and the acutely detri-

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1. *See* Human Rights Comm. Under the Optional Protocol, *Brough v. Austl.*, Commc'n No. 1184/2003 ¶¶ 1–2.2 (Mar. 17, 2006).

2. *See id.* ¶ 2.2.

3. *See id.* ¶¶ 2.3–2.14.

4. To ensure "compliance with a lawful and reasonable order, or maintenance of discipline where a detainee is failing to comply with any remand centre requirement which is lawful, in a manner which cannot otherwise be adequately controlled" or achieving "the control of detainees acting in a defiant manner," an officer may use reasonable force, including solitary confinement. *See* ACT HUMAN RIGHTS COMM'N, HUMAN RIGHTS AUDIT ON THE OPERATION OF ACT CORRECTIONAL FACILITIES UNDER CORRECTIONS LEGISLATION 84 (2007).

5. *See Brough v. Austl.*, *supra* note 1, ¶ 2.10.

6. *See id.* ¶ 11.

mental conditions he experienced due to his Aboriginal status.[7] The Human Rights Committee further stressed that Australia was under an obligation, by virtue of joining the International Covenant on Civil and Political Rights, to guarantee that these violations did not happen again.[8] The Australian Human Rights Commission and Amnesty International, two notable human rights organizations, have stated that this obligation has not been fulfilled.[9]

The conditions of Australian prisons are poor, with reputations for understaffing, riots, and violence among those detained.[10] This is, in no small part, due to the exploding prison population in Australia; as of 2009, on average, Australian prisons were at 117% over the capacity of incarcerated peoples than they were built to house.[11] This trend is worsening. The prison population is continually growing; the year of publication, the Australian Bureau of Statistics announced that approximately 40,577 people were in prison in the first quarter of 2017.[12] The average number of people in prison ten years ago was 25,968.[13] In 2007, the Human Rights and Equal Opportunity Commission alerted that inmates who suffer from mental illness were kept in such poor conditions that it "violate[d] the prohibition on cruel, inhuman, or degrading treatment or punishment," and oftentimes mental health needs were not met at all.[14] The Australian Correctional Services Minister, Peter Malinauskas, articulated that the worsening conditions in Australian prisons, including "increas[ing] prisoner populations, ageing

7. *See id.* ¶ 9.4.

8. *See id.* ¶ 11.

9. *See Universal Periodic Review – Factsheet: Criminal Justice System*, Austl. Human Rights Comm'n, https://www.humanrights.gov.au/sites/default/files/17.%20Criminal%20Justice%20System%20Final.pdf (last visited Dec. 19, 2017) ("The overrepresentation of Aboriginal and Torres Strait Islander Australians as both victims and offenders remains one of the most glaring disparities between Aboriginal and Torres Strait Island[er] Australians and non-Indigenous Australians.") [https://perma.cc/9GZU-X96T]; Amnesty Int'l, Amnesty International Report 2015/16: The State of the World's Human Rights 73 (2016), https://www.amnesty.org/download/Documents/POL1025522016ENGLISH.pdf ("Indigenous children were 24 times more likely to be detained than non-Indigenous children . . . . Indigenous adults were 14 times more likely than non-Indigenous adults to be incarcerated and deaths in custody continued.") [https://perma.cc/CJF3-NP3K].

10. *See* Rita J. Simon & Christiaan A. de Waal, Prisons the World Over 116 (2009).

11. *See id.*

12. *See* Sophie Russell & Eileen Baldry, *Three Charts On: Australia's Booming Prison Population*, Conversation (June 13, 2017), http://theconversation.com/three-charts-on-australias-booming-prison-population-76940 [https://perma.cc/ZH77-DQEZ].

13. *See id.*

14. *See supra* note 10, at 116–17.

infrastructure, longer sentences and an ageing prisoner demographic are universal."[15]

In addition to facing poor treatment in dilapidated prisons, Indigenous Australians are incarcerated at an alarming rate.[16] In Australia, they are one of the highest incarcerated groups, imprisoned at rates more than fifteen times greater than non-Indigenous Australians.[17] Even more concerning is that this incarceration rate is increasing.[18] From 2005 to 2015, the number of Aboriginal and Torres Strait Islander peoples incarcerated in Australia grew by seventy-four percent, from 5,655 people to 9,885 people.[19] From 2014 to 2015 alone, there was a 6.7% increase in the incarceration rate of Aboriginal and Torres Strait Islander peoples.[20] Further, over three out of every four Aboriginal and Torres Strait Islander prisoners have previously been imprisoned, compared to only one out of every two non-Indigenous prisoners.[21]

In response to concerns of the international community over human rights violations, Australia signed the United Nations Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) on May 19, 2009.[22] The OPCAT establishes an international framework for the prevention of torture and other cruel and inhuman punishment in detention facilities by instituting monitor-

15. *See* Elizabeth Henson, *Inquiry Launched into SA Prison System after Spate of Incidents, Including Death of Inmate*, ADVERTISER (Jan. 2, 2017), http://www.adelaidenow.com.au/news/south-australia/inquiry-launched-into-sa-prison-system-after-spate-of-incidents-including-death-of-inmate/news-story/7ffa36ffc3a7431745573649d08e1381 [https://perma.cc/BLQ7-3644].

16. *See Aboriginal and Torres Strait Islander Prisoner Characteristics*, AUSTL. BUREAU STATISTICS (Nov. 12, 2015), http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2015~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20prisoner%20characteristics~7 [https://perma.cc/22ST-WZZW].

17. *See id.* (Specifically, in Australia, between 2,175–2,253 per 100,000 Aboriginal and Torres Strait Islander population are incarcerated, whereas 138–146 per 100,000 non-Indigenous population are incarcerated).

18. *See id.*

19. *See 4517.0 - Prisoners in Australia, 2015: Table 2, Prisoners, Selected Characteristics, 2005–2015*, AUSTL. BUREAU STATISTICS (Dec. 11, 2015), http://www.abs.gov.au/ausstats/SUBSCRIBER.NSF/log?openagent&45170do001_2015.xls&4517.0&Data%20Cubes&23F02CA55F5E0CF5CA257F1700124814&0&2015&28.04.2016&Latest [https://perma.cc/5JKB-K7FQ]. In contrast, the number of incarcerated non-Indigenous Australians has only grown by thirty-three percent from 2005 to 2015, from 19,699 people to 26,214 people. *Id.*

20. *See id.*

21. *See Aboriginal and Torres Strait Islander Prisoner Characteristics*, *supra* note 16.

22. *See Status of Treaties: 9.b Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&clang=_en (last visited Jan. 4, 2018) [https://perma.cc/RXD3-9HE5].

ing visits by international and national bodies.[23] However, prior to December 21, 2017, Australia had not yet ratified the OPCAT.[24] Subsequent evaluations after Australia's signing demonstrate a lack of commitment to ending the disproportionate incarceration of Indigenous populations.[25] Furthermore, the Australian government has done little to recognize the unique needs of Indigenous Australians, which has led to recommendations by Indigenous leaders and human rights organizations for Australia to sign the Redfern Statement into law.[26] The Redfern Statement is an "18-page manifesto" that proposes changes to Australia's treatment of Aboriginal and Torres Strait Islander peoples, including an increase in resources devoted to Indigenous Australians and the creation of a new department for this purpose in the government.[27]

This Note argues that Australia should prioritize the application of the newly ratified OPCAT, because this will allow Australia to focus on strengthening its weakened standing within the international human rights community, particularly with respect to the disproportionate incarceration of Aboriginal and Torres Strait Islander peoples. This Note proposes that the successful implementation of the OPCAT is dependent upon Australia's adoption of the Redfern Statement in conjunction with Australia's development of an independent and well-resourced National Preventive Mechanism (NPM). A NPM is an internal organization that monitors the conditions of detention facilities in a country and reports its results to a larger international organization.[28]

This Note first considers the OPCAT generally, including the implementation of the OPCAT and the structure that makes the OPCAT successful. Part I.B discusses New Zealand's ratification of the OPCAT and how this led to the improvement of detention con-

23. *See* Natalie Pierce, *Implementing Human Rights in Closed Environments: The OPCAT Framework and the New Zealand Experience*, 31 L. CONTEXT 154, 171 (2014).

24. *See Status of Treaties: 9.b Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 22.

25. *See infra* Part I.C. and Part I.D (discussing lack of constitutional representation, minimal services for Aboriginal and Torres Strait Islander peoples, and continual delay to ratify the OPCAT).

26. *See* Dan Conifer, *Closing the Gap Report: What is the Redfern Statement?*, ABC AUSTRALIA (Feb. 13, 2017), http://www.abc.net.au/news/2017-02-14/what-is-the-redfern-statement/8267146 [https://perma.cc/U33H-GNL9]; *see also infra* Part I.C (further explaining the unique needs of Indigenous Australians).

27. *See id.*

28. *See National Preventive Mechanisms (NPMs)*, ASS'N FOR PREVENTION TORTURE, http://www.apt.ch/en/national-preventive-mechanisms-npms/ (last visited Dec. 19, 2017) [https://perma.cc/AJJ7-RHD7/].

ditions, particularly for Indigenous peoples. Part I.C examines the disproportionate incarceration of Aboriginal and Torres Strait Islander peoples in Australia's criminal justice system. Part I.D discusses Australia's relationship with the OPCAT, from signing to Parliamentary discussions. Finally, Part II suggests that Australia can address the concerns of the international community regarding the disproportionate incarceration of Indigenous peoples in two steps. The first step would be to ratify the Redfern Statement, giving legitimacy and constitutional recognition to people that have none. The second step would be to establish NPMs modeled after the successful NPM structure of New Zealand, but with modifications, as the last missing step before successfully implementing the OPCAT.

I. Background

The poor treatment of Aboriginal and Torres Strait Islander peoples has been an ongoing concern of the international community.[29] In 2010, the United Nations noted that while the Australian government acknowledges that Aboriginal and Torres Strait Islanders occupy "a special place in its society as the first peoples of Australia,"[30] there has been no progress towards constitutional acknowledgement, and that Indigenous Australians do not "exercise[ ] meaningful control over their affairs."[31] Australia systemically over-incarcerates these persons perhaps as a result of socioeconomic differences, a lack of representation in the government, and multiple laws in place that diminish the rights of Indigenous Australians.[32]

The OPCAT is the appropriate tool to combat Australia's systematic over-incarceration of Aboriginal and Torres Strait Islanders due to the structures the OPCAT establishes and its international success. Part I.A examines the framework of the OPCAT, including

29. *See* Office of the U.N. High Comm'r for Human Rights, Comm. on the Elimination of Racial Discrimination, *Concluding Observations of the Commission on the Elimination of Racial Discrimination: Australia*, U.N. Doc. CERD/C/AUS/CO/15-17 (2010).

30. *Id.* ¶ 15. Significantly, there is minimal representation of Indigenous peoples in the federal government. *See* Hannah Gobbett, *Indigenous Parliamentarians, Federal and State: A Quick Guide*, Parliament Austl., https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1718/Quick_Guides/Indigenous-Parliamentarians (last visited Dec. 19, 2017) (There have only been nine members of the federal Parliament that self-identify as members of the Indigenous community.) [https://perma.cc/UPY8-K5ML].

31. *See Concluding Observations of the Comm. on the Elimination of Racial Discrimination: Australia*, *supra* note 29, ¶ 15.

32. *See infra* Part I.C.1.

the history of the implementation of the protocol. Part I.B considers the successful implementation of the OPCAT in New Zealand. Part I.C continues by discussing the over-incarceration rates of Aboriginal and Torres Strait Islander peoples. Part I.D concludes by addressing Australia's drawn-out process to ratify the OPCAT after signing.

A. *The Framework of the OPCAT*

The General Assembly of the United Nations adopted the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Declaration) on December 9, 1975 to protect persons in detention facilities from torture.[33] The Declaration criminalized the act of torture, but did not offer a framework to prevent its use.[34] This Section addresses how the OPCAT filled this gap and how the structure of the OPCAT facilitates this goal.

The OPCAT was adopted by the General Assembly in Resolution 57/199 on December 18, 2002.[35] It was subsequently entered into force on June 22, 2006.[36] At the time it was entered into force, twenty States Parties had ratified, acceded to, or succeeded to the OPCAT, with an additional thirty-five signatories.[37] At the time of

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33. *See* Pierce, *supra* note 23, at 155–57. "Torture" is defined in the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining . . . a confession, punishing him . . . or intimidating or coercing him . . . ." *See* G.A. Res. 39/46, annex, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1 (Dec. 10, 1984).

34. *See* Pierce, *supra* note 23, at 157–58.

35. *See id.* at 161–62; G.A. Res. A/RES/57/1999, annex, Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 18, 2002) (OPCAT). The significance of the preventive framework was essential and revolutionary, and "[p]lainly, in a sphere such as human rights, where violations are in large measure irremediable, in the sense that nothing can ever efface the victim's memory of suffering – and, in many cases, its scars, physical or psychological – *the key is prevention*." *Id.* at 162 (quoting Judge Antonio Cassese). The Special Rapporteur stated, with respect to the implementation of the OPCAT, the following:

> What we actually need is a shift from a paradigm of opacity, which still surrounds places of detention to a paradigm of transparency – in other words, opening up places of detention to the outside world, so that people from the larger community can come in. That is the best way of preventing torture.

Id. at 162–63 (quoting a statement by Manfred Nowak, U.N. Special Rappoteur on Torture from 2004 to 2010).

36. *See Status of Treaties: 9.b Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 22.

37. *See id.*

publication, eighty-five States Parties have ratified, acceded to, or succeeded to the OPCAT, with an additional fifteen signatories.[38]

The OPCAT features a "twin-pillar" model, which focuses on the consistent monitoring of States Parties by both an international group and national monitoring organizations to ensure torture does not take place.[39] The first pillar of the OPCAT "twin-pillar" model is the United Nations Subcommittee on Prevention of Torture (SPT), an international body that monitors detention facilities, provides advice to State actors, and cooperates with international organizations.[40] The second pillar is the NPM, a national body, which monitors the conditions of detention facilities within its own State.[41] The OPCAT's "twin-pillar" model specifically addresses persons who "are or may be deprived of their liberty," through any "form of detention or imprisonment" or placement in a "public or private custodial setting."[42] The OPCAT establishes an international framework for the prevention of torture and other cruel and inhuman punishment in detention facilities by instituting monitoring visits by the international and national bodies.[43]

1. The First Pillar: The Subcommittee on Prevention of Torture

The first pillar in the "twin-pillar" system of the OPCAT is the United Nations Subcommittee on Prevention of Torture (SPT).[44] The SPT is the biggest human rights treaty body of the United Nations, and consists of twenty-five independent experts from different professional backgrounds who are elected by the States Parties to the OPCAT.[45] Members of the SPT evaluate OPCAT compliance and meet with representatives of States Parties and NPMs.[46] In addition, members meet three times a year in Geneva to prepare for these visits to States Parties.[47]

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38. *See id.*

39. *See* Pierce, *supra* note 23, at 161–62.

40. *See UN Subcommittee on Prevention of Torture (SPT)*, Ass'n for Prevention Torture, http://www.apt.ch/en/subcommittee-on-prevention-of-torture/ (last visited Dec. 19, 2017) [https://perma.cc/7UJP-BJBK].

41. *See National Preventive Mechanisms (NPMs)*, *supra* note 28.

42. OPCAT, *supra* note 35, art. 4.

43. *See* Pierce, *supra* note 23, at 171.

44. *See* OPCAT, *supra* note 35, art. 2.

45. *See* Pierce, *supra* note 23, at 170, 174.

46. *See What Does the SPT Do?*, Ass'n for Prevention Torture, http://www.apt.ch/en/what-does-the-spt-do-1/ (last visited Dec. 19, 2017) [https://perma.cc/M52U-PD8J].

47. *Id.*

The SPT has three responsibilities under Article 11 of the OPCAT.[48] The first charge is to monitor detention facilities and the conditions of those being detained in them through visits and to make recommendations based on observations of these conditions.[49] There are four types of visits under the mandate of the OPCAT: SPT country visits (which usually last around ten days), SPT country follow-up visits, NPM advisory visits, and OPCAT advisory visits.[50] During the SPT's visits, the SPT must have unrestricted access to all detention facilities, all information relating to the treatment of those incarcerated in the detention facilities, as well as unrestricted access to confidential interviews with any person the SPT deems to be relevant (including those incarcerated, members of national human rights institutions, and State officials).[51] After these visits, the SPT issues a report with details of its findings to the State and, if necessary, to the NPM; the SPT will make this report public if the State Party requests it.[52]

The second charge of the SPT is to assist NPMs by advising authorities on their independent establishment, maintaining direct (and if required, confidential) communication with them to strengthen the protections of those detained, and making recommendations to States to strengthen the abilities of the NPMs.[53] The third charge is to cooperate with the appropriate U.N., international, regional, and national organizations in furthering the mission of the OPCAT and to protect the rights of those incarcerated.[54] If a state does not comply with the recommendations of the SPT, the SPT may request the Committee against Torture to make a public statement or to publish the SPT report.[55]

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48. *See* OPCAT, *supra* note 35, art. 11. The OPCAT clearly lists the functions and boundaries of the SPT. *See* Pierce, *supra* note 23, at 173 ("Article 13 sets out the process required for the selection of SPT visits; notification to States Parties; the standards relating to visit team composition; and follow-up visits. Article 15 requires protections for persons who cooperate with the SPT during visits. Finally, art 16 establishes a clear process for engagement and reporting of observations and recommendations to a State Party following an SPT visit, as well as the process for the SPT's annual report to the Committee.").

49. *See* OPCAT, *supra* note 35, art. 11(a).

50. *See The SPT in Brief*, U.N. Off. High Comm'r for Hum. Rts., http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/Brief.aspx (last visited Dec. 19, 2017) [https://perma.cc/5Y9Y-QDQY].

51. *See id.*

52. *Id.*

53. *See* OPCAT, *supra* note 35, art. 11(b)(i)–(iv).

54. *See id.* art. 11(c).

55. *See id.* art. 16(4).

2. The Second Pillar: The National Preventive Mechanisms

The second pillar in the "twin-pillar" system of the OPCAT are the National Preventive Mechanisms (NPMs).[56] Article 3 of the OPCAT requires States Parties to establish NPMs to monitor the conditions of detention facilities by taking regular, preventive site visits.[57] The OPCAT empowers the NPMs to regularly examine individuals in detention facilities, to make recommendations to authorities, to propose modifications to draft legislation, and to submit observations on existing legislation.[58] NPMs are also granted access to information concerning people who are detained (the number of people, places of detention, and locations), as well as information about the treatment of those detained and the conditions of detention facilities.[59] Furthermore, NPMs are granted the power to access all detention facilities, to conduct interviews of individuals in detention facilities, and to engage directly with the SPT in a confidential manner.[60]

The work of the NPMs is essential to the success of the OPCAT, because they can monitor detention facilities more directly than the SPT or other international organizations can and have the power to engage with the State to improve detention conditions.[61] NPMs are required to regularly monitor detention facilities,[62] and therefore are in the best position to look for early warning signs of torture to pass along to the State (and to the SPT, if necessary). For this reason, it is essential that a NPM is both perceived as being independent and is actually independent.[63] Article 18 of the OPCAT ensures that State Parties will guarantee this independence to the NPMs and will ensure that the NPM experts have the ability to function effectively.[64] This requires regular assessment by the State to pass legislation to ensure that the NPMs have the resources and capabilities required to undertake the responsibility assigned to them under the OPCAT.[65] A successful NPM will have independence from the State (institutional, personal, and functional), suf-

56. *See* Pierce, *supra* note 23, at 177.
57. *Id.*
58. *See* OPCAT, *supra* note 35, art. 19.
59. *See id.* art. 20.
60. *See id.*
61. *See* Pierce, *supra* note 23, at 177–78.
62. *See UN Subcommittee on Prevention of Torture (SPT), supra* note 40.
63. *See* Pierce, *supra* note 23, at 178–79 ("[A] monitoring body's independence 'is seen as the central pillar of the institution around which its work revolves, its credibility is anchored to [sic], and upon which it may successfully achieve its mandate.'").
64. *See* OPCAT, *supra* note 35, art. 18.
65. *See* Pierce, *supra* note 23, at 179.

ficient resources from the State (both financial and human), employees of multidisciplinary backgrounds, and powers and guarantees to access all places, information, and people relevant to the NPMs monitoring of detention facilities.[66]

New Zealand's OPCAT structure, discussed in more detail in Part I.B, demonstrates the successful implementation of NPMs.[67] New Zealand created one Central NPM with four independent subsidiary NPMs that each have jurisdiction over a certain type of detention facility.[68] In the first five years of using NPMs, 383 site visits were made to detention facilities.[69] Numerous meetings were held with government agencies and international bodies.[70] Some of the NPMs have made separate submissions to New Zealand's Parliament on draft legislation, including to the Corrections Amendment Bill in 2012, and they have agreed to consider making joint submissions in the future.[71] As a result of the effective NPM system in New Zealand, the State often institutes the recommendations made by NPMs.[72]

B. *New Zealand: An OPCAT Success Story in the South Pacific*

Historically, like Australia, New Zealand has incarcerated their Indigenous people at disproportionately high rates. Unlike Australia, New Zealand was the first State in the South Pacific to ratify the OPCAT.[73] New Zealand is regularly an early adopter of U.N. instruments.[74] New Zealand's successful use of the OPCAT serves as a model to other countries, such as Australia, considering ratification and implementation of the OPCAT.

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66. *See Effective NPMs*, Ass'n for Prevention Torture, http://www.apt.ch/en/effective-npms/ (last visited Dec. 19, 2017) [https://perma.cc/D22K-N2AC].

67. *See* New Zealand Human Rights Commission et al., OPCAT in New Zealand 2007–2012: A Review of OPCAT Implementation by New Zealand's National Preventive Mechanisms 3 (July 2013); *infra* Part I.B.

68. *See* Richard Harding & Neil Morgan, *OPCAT in the Asia-Pacific and Australasia*, 6 Essex Hum. Rts. Rev. 99, 108 (2010).

69. *See* OPCAT in New Zealand 2007–2012: A Review of OPCAT Implementation by New Zealand's National Preventive Mechanisms, *supra* note 67, at 3.

70. *See id.* at 15.

71. *See id.* at 16.

72. *See id.* at 17. The willingness of detaining agencies to "take OPCAT on board has been a significant factor in the success of implementation so far," demonstrated by a collaboration between the NPMs, government agencies, and Ministry of Justice, which has led to improvements in conditions in detention facilities and the treatment of those being detained. *See id.*

73. *See* Harding & Morgan, *supra* note 68, at 107.

74. *See id.* New Zealand has adopted almost all U.N. human rights conventions. *Id.*

1. New Zealand's OPCAT Structure

New Zealand is a unitary state, which has the authority to bind all citizens with new policies.[75] After signing the OPCAT in 2003, New Zealand's Ministry of Justice consulted with a variety of agencies that could potentially serve as NPMs and passed an essential piece of legislation enabling ratification of the OPCAT—the Crimes of Torture Amendment Act.[76]

In establishing its national parameters, New Zealand established multiple NPMs, which is allowed under Article 17 of the OPCAT.[77] The OPCAT framework requires the designation of a Central NPM and allows the establishment of other NPMs as required.[78] New Zealand designated the New Zealand Human Rights Commission as the Central NPM, with the primary objective of coordinating with other NPMs and serving as the liaison with the SPT.[79] Four institutions were designated as the subsidiary NPMs and each monitored a different category of detention facilities: the Office of the Children's Commissioner, the Police Complaints Authority, Visiting Officers under the Armed Forces Act 1971, and the Ombudsman.[80]

New Zealand prioritized the independence of these four NPMs, even passing the Independent Police Conduct Authority Act to ensure that the Police Complaints Authority was an "independent statutory office holder" in line with the other designated NPMs to preserve objectivity.[81] Each NPM in New Zealand has the power to independently investigate places of detention, the treatment of detainees, and the conditions they face within their designated jurisdiction.[82] Each NPM prepares at least one written report every year to update either the House of Representatives or the Minister

75. *Id.*

76. *See id.* The Crimes of Torture Amendment Act's purpose was "to enable New Zealand to meet its international obligations under the Convention [against Torture]" and "to meet its international obligations under the Optional Protocol." *Id.* (quoting The Crimes of Torture Amendment Act 2006 ss 6, 7 (N.Z.)).

77. *See id.* at 108.

78. *Id.*

79. *Id.* The primary aim of the New Zealand Human Rights Commission is to advocate for human rights. *See* Pierce, *supra* note 23, at 185.

80. Harding and Morgan, *supra* note 68, at 108. The Office of the Children's Commissioner monitors juvenile justice facilities; the Police Complaints Authority monitors persons in the custody of police (i.e., during transportation or in police cells); the Visiting Officers monitor Defense Force detainees; the Ombudsman monitors prisons, immigration facilities, medical detention facilities, and some juvenile justice facilities. *Id.*

81. *See id.* at 108–09.

82. *See* Pierce, *supra* note 23, at 183.

of Justice.[83] NPMs may also have "extensive legislative authority to perform their functions."[84] For example, the Office of the Ombudsman has extensive investigation powers enabling them to summon officers, employees of government departments, and complainants, and to require the production of documents that would otherwise be kept secret.[85]

New Zealand's approach to both the Central NPM and the other NPMs has been successful thus far.[86] The New Zealand Human Rights Commission has established a standardized methodology for the monitoring of detention facilities, and the NPMs have worked with detention facilities to improve the treatment of incarcerated people through tailored versions of this standardized methodology.[87] Using existing "structures, culture and political arrangements," New Zealand created a model implementation plan.[88]

2. The Over-Incarceration of Maori People in New Zealand

In spite of recognizing the rights of the Maori people in 1840 with the Treaty of Waitangi,[89] New Zealand has long over-incarcerated its native minority population.[90] The prisons in New Zealand contain a disproportionately high number of Maori individuals at "every stage of the criminal justice system."[91] The New Zealand 2003 Census showed Maori comprised 48.7% of the prison population, but only 14.5% of the general population.[92]

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83. *Id.* at 182–83.

84. *See id.* at 184.

85. *See id.* Furthermore, these proceedings are also privileged. *Id.* at 185.

86. *See id.* at 187. The New Zealand Human Rights Commission reported that while "[i]mplementation of OPCAT will be an ongoing and evolving process, that will continue to be refined as practical experience of OPCAT monitoring is developed within New Zealand and internationally . . . The preparatory work undertaken in [the] first year provide[d] a solid basis for sound and effective monitoring." *Id.*

87. *See id.* at 187–90.

88. *See* Harding & Morgan, *supra* note 68, at 114.

89. *See id.* at 107.

90. Aaron Smale, *Why are There So Many Maori in New Zealand's Prisons?*, Aljazeera, June 2, 2016, http://www.aljazeera.com/indepth/features/2016/05/maori-zealand-prisons-160525094450239.html [https://perma.cc/S3CB-T3NK].

91. *See* Subcomm. on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Rept. of the Subcomm. on the Visit to New Zealand Undertaken from 29 April to 8 May 2013: Observations and Recommendations Addressed to the State Party, U.N. Doc. CAT/OP/NZL/1, at 12 (2014).

92. N.Z. Office of the Ombudsman, Ombudsmen's Investigation of the Department of Corrections in Relation to the Detention and Treatment of Prisoners 11 (2005).

Since the ratification of the OPCAT in New Zealand, the State has increased its targeted actions to address the disproportionate incarceration of Maori. New Zealand's Department of Corrections has stated an official commitment to reducing the disproportionate incarceration of Maori and reducing their reoffending rate, writing: "As Maori offenders make up over half of the offender population, we need to succeed with Maori in order to reduce reoffending overall."[93] The Department of Corrections has set a target for reduction in the reoffending rate that is five percent higher than that set for the general prison population.[94] The Department has implemented "Maori Focus Units," which are cultural support groups to facilitate rehabilitation for Maori persons.[95] The Department set an aggressive goal to reduce the reoffending rate by thirty percent for offenders in Maori Focus Units by the end of 2017.[96]

The transparency required for NPMs to gather information and to write reports gives opportunities for government agencies such as the Department of Corrections to institute the recommended policies. For example, in 2015, New Zealand's Ombudsman's Office stated that while some detention facilities have "given considerable attention to building Maori cultural capability in recent years, and some residences do an exceptional job of this . . . cultural capability is still not given sufficient priority."[97] After this report, the Maori Focus Units were repurposed—they were no longer used as rehabilitative programs, but rather were used to "improv[e] [Maori offenders'] sense of cultural identity and values . . . to encourage further participation in proven rehabilitation programmes."[98] One of these proven rehabilitation programs is the Mauri Tu Pae, which is a "medium-intensity" rehabilitation program that includes "a specific Maori cultural perspective that builds on the foundation provided by the . . . Maori [F]ocus [U]nits."[99] The ability of the NPMs, including the Ombudsman's Office, to visit detention facilities with full access has led to New

93. *See* N.Z. Controller and Auditor-Gen., Department of Corrections: Managing Offenders to Reduce Reoffending 73 (Dec. 2013).

94. *Id.*

95. *See id.*

96. *See id.*

97. N.Z. Human Rights Comm., Monitoring Places of Detention: Annual Report of Activities under the Optional Protocol to the Convention Against Torture (OPCAT) 23 (Dec. 2015).

98. *See* Department of Corrections: Managing Offenders to Reduce Reoffending, *supra* note 93.

99. *See id.* at 74.

Zealand's decrease in the disproportionate prosecution rate of Maori individuals.[100]

In addition, based on recommendations of NPMs, New Zealand has restructured the Police Department to lower recidivism rates.[101] The Police Department is making efforts to include Maori issue-focused individuals in the higher ranks of the Police Department.[102] The Commissioner of Police has given Maori Responsiveness Managers direct access to District Commanders and created a new role, Deputy Chief Executive: Maori.[103] A new initiative was also put into place called the "Turning of the Tide," which focuses on using "alternatives to prosecutions for eligible offences and offenders."[104]

The U.N. SPT has commended New Zealand's efforts.[105] The SPT has praised the establishment of the Maori Focus Units in prisons and efforts to reduce recidivism rates for both the general population and the Maori people specifically.[106] The SPT also noted room for improvement, including addressing the "absence of such programmes in other prisons, particularly women's prisons," and that New Zealand should "further develop existing programmes, including Maori literacy programmes, aimed at reducing Maori recidivism."[107]

Though there is much work to be done in New Zealand, the SPT did recognize that "there are significant declines in the overall number of recorded offences and prosecutions" in New Zealand.[108] However, there has not been a reduction in the size of the overall prison population, which could be due to the use of "custo-

100. *See* Rept. of the Subcomm. on the Visit to New Zealand Undertaken from 29 April to 8 May 2013: Observations and Recommendations Addressed to the State Party, *supra* note 91, at 9. However, the Subcommittee acknowledged that policies need to change regarding custodial sentencing in order to effectively reduce the prison population. *See id.*

101. *See generally* Justine O'Reilly, N.Z. Police: Maori, Pacific & Ethnic Services, A Review of Police and iwi/Maori Relationships: Working Together to Reduce Offending and Victimisation among Maori (Oct. 2014), https://www.hrc.co.nz/files/4214/2550/8326/NZ_Police_2014_-_A_review_of_Police_and_Iwi_relationships.pdf [https://perma.cc/CPW3-WMV5].

102. *See id.* at iv.

103. *See id.* at iv.

104. *See id.* at 17–19.

105. *See* Rept. of the Subcomm. on the Visit to New Zealand Undertaken from 29 April to 8 May 2013: Observations and Recommendations Addressed to the State Party, *supra* note 91, at 12.

106. *See id.*

107. *See id.*

108. *See id.* at 9.

dial sentences" such as rehabilitation programs.[109] While the SPT offered recommendations on how New Zealand could further reduce the incarceration rate of the Maori community, the SPT suggested that New Zealand's initial efforts were moving in the right direction.[110]

C. *Australia and the OPCAT: The Over-Incarceration of Aboriginal and Torres Strait Islander Peoples in Australia and the Laws that Enable It*

Australia has generally "pride[d] itself" on an inclusive human rights record, particularly in equal opportunity laws,[111] but it has not "embrac[ed] a full human rights culture."[112] For example, Australia's policies of the detention of immigrants on Nauru Island has received extensive criticism from human rights organizations worldwide.[113] Moreover, Aboriginal and Torres Strait Islander peoples are not mentioned in the Constitution of Australia.[114] The main constitutional protection for Indigenous Australians—the Racial Discrimination Act of 1975—has been suspended by the Australian government multiple times and each occasion has been connected to domestic policies related to Aboriginal and Torres Strait Islander peoples.[115]

Australia has been pressured to ratify the OPCAT both throughout the international community,[116] and within Australia inter-

109. *See id.*

110. *See id.*

111. *See* Harding & Morgan, *supra* note 68, at 115.

112. *See id.*

113. The island of Nauru is used by Australia as a "Refugee Processing Centre," where Australia settled all refugees who arrived to Australia by boat. Refugees are not allowed to leave the island, do not have adequate access to mental health care, and there have been reports of physical and sexual abuse by locals, including some in positions of authority. *See, e.g.*, *Press Briefing Notes on Nauru, Yemen, and the Democratic Republic of the Congo*, U.N. OFF. HIGH COMM'R FOR HUM. RTS. (Aug. 12, 2016), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20368&LangID=E (describing reports of migrants who have suffered from severe mental health problems as a result of their detention on Nauru) [https://perma.cc/YT94-FGWJ]; *Australia's Regime of Cruelty Has Turned Nauru into an Open-Air Prison*, AMNESTY INT'L (Oct. 14, 2016), https://www.amnestyusa.org/reports/australias-regime-of-cruelty-has-turned-nauru-into-an-open-air-prison/ (discussing issues faced by migrants on Nauru, including mental health issues, lack of access to mental health care, and reports of physical and sexual abuse) [https://perma.cc/LG88-445K].

114. *See Constitutional Reform: FAQs – Why Reform of the Constitution is Needed*, AUSTL. HUM. RTS. COMMITTEE, https://www.humanrights.gov.au/publications/constitutional-reform-faqs-why-reform-constitution-needed#reform1 (last visited Dec. 19, 2017) [https://perma.cc/N7JW-8HGS].

115. *See id.*

116. *See* Nick Miller, *UN Human Rights Review: Countries Line up to Criticise Australia for its Treatment of Asylum Seekers*, SYDNEY MORNING HERALD (Nov. 10, 2015), http://www.smh

nally.[117] However, the ratification of the OPCAT has not been of primary focus specifically to decrease the over-incarceration of Aboriginal and Torres Strait Islander peoples.[118] As stated previously, the disproportionately high rates of detention of Aboriginal and Torres Strait Islander peoples in Australia are not only due to "underlying social, cultural and legal factors, like the legacy of colonisation and socio-economic disadvantage, but also the processes of the criminal justice system."[119]

1. Australia's History of Failing to Protect Indigenous Peoples

Following initial contact with British colonizers, Aboriginal and Torres Strait Islander peoples continued to maintain their own system of law relating to the philosophy of the Dreaming, which focuses on "laws . . . evoked more directly and on a more personal basis to maintain or regain community harmony."[120] In colonial times, they were subjected not only to general Australian laws, but also to special laws prohibiting their movements and freedom of association, and were denied equal legal status.[121] The increase in Aboriginal criminal detention began in the 1950s, when larger groups of Aboriginal and Torres Strait Islander peoples began to move into non-Indigenous towns.[122]

In response to the migration of Indigenous peoples, "Special Acts" were instituted to continue discriminatory prohibitions.[123] For instance, Aboriginal society uses "public space" in a much more visible way (drinking in public, loitering in front of stores, and sitting in the street), which many non-Indigenous Australians

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.com.au/federal-politics/political-news/un-human-rights-review-countries-line-up-to-criticise-australia-for-its-treatment-of-asylum-seekers-20151109-gkusj4.html [https://perma.cc/9G7Y-9BXW].

117. *See* Public Health Association Austl. et al., A Joint Statement: Call for Australia's Ratification of the OPCAT (Oct. 2015), https://www.phaa.net.au/documents/item/1145 [https://perma.cc/T737-EWRQ].

118. *See* Aboriginal and Torres Strait Islander Soc. Justice Comm'r, Austl. Human Rights Comm., Social Justice and Native Title Report 2016 10 (2016).

119. *See* Aboriginal and Torres Strait Islander Soc. Justice Comm'r, Austl. Human Rights Comm., Social Justice and Native Title Report 2015 29 (2015).

120. *See* Elliott Johnston, Royal Comm'n into Aboriginal Deaths in Custody, Final Report of the Royal Commission into Aboriginal Deaths in Custody, Volume 2 ¶ 10.6.1 (1991), http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol2/VOLUME2.RTF [https://perma.cc/T7VP-U3D9].

121. *See id.* ¶¶ 10.6.2–10.6.3. Aboriginal people could not testify in court, could not press charges in certain colonies, and were not permitted to give evidence. *See id.*

122. *See id.* ¶ 10.7.1.

123. *See id.* ¶ 10.7.3.

consider to be "non-legitimate and deviant behaviour."[124] This cultural misunderstanding surrounding land rights has led to high arrest rates for Indigenous Australians.[125]

The culture and heritage of the Aboriginal and Torres Strait Islander peoples were not legally recognized until 2013.[126] The Aboriginal and Torres Strait Islander Peoples Recognition Act 2013 was passed to encourage constitutional recognition of Indigenous peoples.[127] The Act is currently extended to March 28, 2018,[128] but as of January 2018, there is still no constitutional recognition of Indigenous peoples.

Further, Australia has multiple laws that disproportionally affect Aboriginal and Torres Strait Islander peoples.[129] One of these laws remains in effect in Australia's Northern Territory,[130] which has the largest proportion of Aboriginal and Torres Strait Islander people (thirty percent) in its general population; in other states, the population share is four percent or less.[131] In the Northern Territory, the Police Administration Act, which entered into effect in December 2014, allows police to arrest and hold a person for up to four hours merely for suspicion of an "infringement notice offence," which is a minor offense that is unpunishable by imprisonment.[132] Police do not even require a warrant for a paperless arrest.[133] Accordingly, a highly disproportionate number of paperless arrests in 2015 were of Aboriginal and Torres Strait Islander peoples.[134] Approximately seventy percent of the people released from custody with one infringement notice were Aboriginal or Torres Strait Islander peoples; most, if not all, of the people released with more than one infringement notice were Aboriginal or Torres Strait Islander peoples.[135]

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124. *See id.* ¶ 13.2.23.

125. *See id.* ¶¶ 10.7.4–10.7.5.

126. *See* Social Justice and Native Title Report 2015, *supra* note 119, at 31; *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth) (Austl.).

127. *See id.*

128. *See id.*

129. *See* Social Justice and Native Title Report 2016, *supra* note 118, at 39.

130. *See id.*

131. *See Aboriginal and Torres Strait Islander Peoples: Population*, *in* Austl. Bureau of Statistics: 1301.0 – Year Book Austl., 2012 (May 24, 2012), http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0~2012~Main%20Features~Population~245 [https://perma.cc/JD26-9W3D].

132. *See* Social Justice and Native Title Report 2016, *supra* note 118, at 40.

133. *See id.*

134. *See* Social Justice and Native Title Report 2015, *supra* note 119, at 29.

135. *See id.* at 29. The Aboriginal or Torres Strait Islander people released with one notice totaled 901 (compared to 1,295 total), and a further 512 people were released with

In addition, the crime of fine defaulting, when one is unable to or refuses to pay fines issued by a court, also disproportionately affects Aboriginal and Torres Strait Islander peoples, with Aboriginal women comprising sixty-four percent of female fine defaulters in custody in Western Australia alone.[136] Aboriginal women face severe financial hardships,[137] including high unemployment rates, which are exacerbated by closures of Aboriginal communities in Australia, particularly in Western Australia.[138]

In an effort to bring the mistreatment of Aboriginal and Torres Strait Islander peoples to the forefront of the Australian government, a coalition of organizations signed an election platform during the 2016 Australian federal election cycle called the Redfern Statement.[139] The Redfern Statement "called upon the 45th Parliament to meaningfully engage with Aboriginal and Torres Strait Islander peoples and commit to a plan of action" to address a multitude of issues, including criminal justice, "as a matter of national priority."[140] The Redfern Statement urged in its "Call for Action" the creation of national strategies for prevention and early intervention addressing "incarceration and access to justice."[141]

The Redfern Statement shows a clear demonstrated interest in reforming Australia's criminal justice system. The Australian government has also instituted the Indigenous Advancement Strategy (IAS), which aims to "'rationalise and streamline' the Indigenous affairs program and grant funding."[142] The implementation of the IAS, however, does not yet appear to have resulted in better outcomes in the criminal justice system for Aboriginal and Torres Strait Islander peoples.[143] The Senate Inquiry, after reviewing the IAS, stated that "[f]or all of the upheaval created, the outcome appears to be that organisations funded previously have, by and large, been funded to do the same activities with less money" and

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more than one notice. These numbers do not take into consideration those released on bail, brought to court, or released unconditionally. *Id.*

136. *See* Social Justice and Native Title Report 2016, *supra* note 118, at 44.

137. *See* Kevin Hamdullahpur et al., *A comparison of socioeconomic status and mental health among inner-city Aboriginal and non-Aboriginal women*, 76 Int'l J. Circumpolar Health 1, 3 (2017).

138. *See* Social Justice and Native Title Report 2016, *supra* note 118, at 51.

139. *See id.* at 26.

140. *See id.*

141. *See id.* at 27.

142. *See id.* at 35.

143. *See id.* at 38.

that, as such, greater uncertainty and less resources have plagued the Indigenous community since the initiation of the IAS.[144]

Another limited effort by the Australian government to address the over-incarceration and increased sentences of Aboriginal and Torres Strait Islander peoples was the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) in the 1990s.[145] The RCIADIC was a commission that wrote reports, both regional and national, evaluating police and custodial practices.[146] The RCIADIC highlighted that the high number of deaths of Aboriginal and Torres Strait Islander peoples was directly related to the disproportionate incarceration rate of these people.[147] However, these recommendations made twenty-five years ago have led to few implemented changes, if any.[148] Australia's decision in mid-2016 to provide $3.8 billion to prisons over the next four years demonstrates that it does not expect incarceration rates to decrease in the near future.[149] Furthermore, the over-incarceration of Aboriginal and Torres Strait Islander peoples currently costs $7.9 billion a year and is projected to cost the Australian government $19.8 billion a year by 2040.[150] These statistics verify the concern that the current actions of the Australian government are continuing to increase disproportionate percentages of Aboriginal and Torres Strait Islander incarceration.

2. The International Community Calls on Australia to Address its Over-Incarceration of Aboriginal Peoples

The international legal community has demonstrated concern for the prison conditions and over-incarceration of Aboriginal and Torres Strait Islander peoples in Australia. In 2009, a U.N. Special Rapporteur, Anand Grover, made specific recommendations to protect Aboriginal and Torres Straight Islanders in Australian prisons.[151] During the Universal Periodic Review of Australia in 2011, conducted by the U.N. Human Rights Council, multiple nations

144. *See id.*
145. *See id.* at 24.
146. *See id.*
147. *See* SOCIAL JUSTICE AND NATIVE TITLE REPORT 2015, *supra* note 119, at 29.
148. *See* SOCIAL JUSTICE AND NATIVE TITLE REPORT 2016, *supra* note 118, at 39.
149. *See id.*
150. *See Indigenous Prison Overrepresentation Costs Australia $7.9bn a Year, Data Shows,* GUARDIAN (May 24, 2017), https://www.theguardian.com/australia-news/2017/may/25/indigenous-prison-overrepresentation-costs-australia-79bn-a-year-data-shows [https://perma.cc/MY56-2MQS].
151. *See Prisoners and Prison Conditions,* HUM. RTS. L. CTR., http://www.humanrightsactionplan.org.au/nhrap/focus-area/prisoners-and-prison-conditions (last visited Dec. 19,

recommended that Australia ratify the OPCAT to address human rights violations.[152]

While it is Australia's stance that the State "accepted" these recommendations, there is little evidence Australia has actually adopted recommendations relating to prisons, particularly with respect to over-incarceration of Indigenous persons and humane treatment of prisoners.[153] The over-incarceration and lack of access to services for Aboriginal and Torres Strait Islander peoples is still repeatedly mentioned in Australia's most recent Universal Periodic Review[154] as well as the Addendum to the Review.[155] Australia stated in the Universal Periodic Review that it was supporting communities through the IAS,[156] "committed to equal access services for Indigenous Australians,"[157] and "actively considering the ratification of the OPCAT."[158] However, two years later, minimal changes to Australian policy and incarceration outcomes suggests the government's stagnation.

D. *Australia's Failure to Ratify the OPCAT with Urgency*

After Australia's signing of the OPCAT in 2009, then Attorney-General Nicola Roxon stated that "[t]orture is wholly inconsistent with the Australian Government's fundamental responsibility to protect the rights and dignity of all individuals," and that the ratification of the OPCAT would solidify Australia's position of upholding these "obligations seriously."[159] Despite this initial promise of

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2017) [https://perma.cc/9BJW-WPHA]. Specifically, Mr. Grover was interested in improving health conditions in prison, recommending to the following actions:

> [I]ncrease engagement with community health providers by prisons, which would improve continuity of care and facilitate reintegration into the community; increase resource allocation for diagnosis, treatment and prevention of mental illnesses within prisons; assess and invest in the primary health care sector throughout the prison system; and undertake research regarding Aboriginal and Torres Strait Islander incarceration issues as a matter of urgency.

Id.

152. *See* Human Rights Council, Rep. of the Working Group on the Universal Periodic Rev.: Austl., U.N. Doc. A/HRC/17/10, ¶ 86.1 (Mar. 24, 2011).

153. *See id.* There is particular concern that Australia has not responded to recommendations 86.3, 86.5, 86.71, 86.90, and 86.93 of the Human Rights Council. *See Prisoners and Prison Conditions*, *supra* note 151.

154. *See* Human Rights Council, Rep. of the Working Group on the Universal Periodic Rev.: Austl., U.N. Doc. A/HRC/31/14 (Jan. 13, 2016).

155. *See* Human Rights Council, Rep. of the Working Group on the Universal Periodic Rev.: Austl. Add., U.N. Doc. A/HRC/31/14/Add.1 (Feb. 29, 2016).

156. *See id.* at 4.

157. *See id.*

158. *See id.* at 2.

159. *See* Pierce, *supra* note 23, at 164–65.

ratification, Australia did not ratify the OPCAT until nearly eight years later.[160]

In March 2004, the Joint Standing Committee on Treaties (JSCOT) of the Parliament of Australia began to explore the possibility of Australia becoming party to the OPCAT.[161] The JSCOT conducted a vote in the same year evaluating the "appropriateness" of OPCAT ratification and a 9–7 majority thought there was "no immediate need" for Australia to ratify the OPCAT.[162] The JSCOT had at least two major concerns with the OPCAT.[163] First, Australia was apprehensive that the final draft of the OPCAT had not been adopted by consensus within the United Nations.[164] Historically, Australia has had a "strong preference" for human rights treaties to be adopted by consensus within the United Nations as a demonstration of "broad support[ ]."[165] The second concern was that Australia did not want to give the SPT the ability to visit any detention facility at any time, instead wishing to require a "compelling reason" for a visit.[166]

The structure of Australia's government also contributed to the delay in ratification of the OPCAT. Australia's government consists of nine political entities, comprising of the federal or Commonwealth government, six State governments (Western Australia, South Australia, Tasmania, Queensland, Victoria, and New South Wales), and two Territory governments (the Northern Territory and the Australian Capital Territory).[167] This decentralized government structure likely stymied ratification of the OPCAT.[168] Finally, the terms of the protocol itself may have served as an obsta-

160. *See Status of Treaties: 9.b Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 22.

161. *See Australia*, Ass'n for Prevention Torture, http://www.apt.ch/en/opcat_pages/opcat-ratification-3/?pdf=info_country (last visited Dec. 19, 2017) [https://perma.cc/95L8-SYMH].

162. *See id.* Seventeen of the twenty submissions to the JSCOT urged Australia to ratify the OPCAT. *Id.*

163. *See id.*

164. *See id.* The OPCAT was not entered into force until June 22, 2006. *See Status of Treaties: 9.b Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 22.

165. *See* John Rutherford, *Inquiry into the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Submission to the Joint Standing Committee on Treaties* 6 n.9 (Jan. 14, 2004), http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jsct/opcat/subs/sub3.pdf [https://perma.cc/Q3HT-FEP3].

166. *See Australia*, *supra* note 161.

167. *See* Harding & Morgan, *supra* note 68, at 115.

168. *See id.*

cle for the OPCAT's ratification.[169] The Australian High Court previously ruled that a treaty regime must be defined with sufficient specificity to be relied upon by the State to support a law made under the external affairs doctrine.[170]

After the November 2007 election, the new government formed under Prime Minister Kevin Rudd expressed a renewed interest in the OPCAT.[171] After meeting for a periodic report under the Convention Against Torture in 2008, the U.N. Committee against Torture suggested to Australia that the OPCAT should be ratified as quickly as possible.[172] The Attorneys-General's Department in Australia asked for submissions from stakeholders in Australia in May 2008 to evaluate whether or not Australia should adopt the OPCAT.[173] After receiving submissions from multiple institutions, including the Australian Human Rights Commission, Australia signed the OPCAT on May 19, 2009.[174] Then, various organizations were considered to serve as NPMs and Australia conducted a national consultation on human rights; reports from multiple organizations continually requested that Australia ratify the OPCAT to prevent the cruel detention of individuals in Australia.[175] The ratification of the OPCAT continued to be delayed.[176]

During a routine examination by the Human Rights Council in February 2011, the Australian delegation to the United Nations relayed that it wanted to ratify the OPCAT.[177] The ratification of the OPCAT was supported by the Australian federal government and on February 28, 2012, the OPCAT was submitted to the Commonwealth Parliament for a recommendation for ratification.[178]

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169. *See id.* at 118.

170. *See id.*

171. *See Australia*, *supra* note 161, at 3; Jason Koutsoukis, *Rudd Romps to Historic Win*, AGE (Nov. 25, 2007), http://www.theage.com.au/news/federal-election-2007-news/rudd-romps-to-historic-win/2007/11/24/1195753376406.html [https://perma.cc/H4F7-4W7V].

172. *See Australia*, *supra* note 161 ("[T]he [Committee Against Torture] 'note[d] with appreciation the State Party's commitment to become a party to the Optional Protocol to the Convention,' and also encouraged Australia to speedily conclude its internal consultation in order to ratify as soon as possible.").

173. *See id.*

174. *See Australia*, *supra* note 161.

175. *See id.*

176. *See id.*

177. Mr. Peter Woolcott, the Australian Permanent Representative to the United Nations and the Conference on Disarmament in Geneva, stated that "Australia is committed to ratifying the Optional Protocol to the Convention against Torture as a matter of priority." *Statement 159: Response of Australia to Recommendations of The United National Human Rights Council*, AUSTL. PERMANENT MISSION & CONSULATE-GEN. (Jan. 31, 2011), http://geneva.mission.gov.au/gene/Statement159.html [https://perma.cc/8TDZ-YLZE].

178. *See* Pierce, *supra* note 23, at 164–65.

The JSCOT initiated actions on the treaty, and in June 2012, they unanimously recommended binding action.[179] The JSCOT, a bipartisan committee, argued that the ratification of the OPCAT was in the best interests of the country, would lead to better outcomes for those being detained, and would save the government money spent on remedies and litigation for court cases.[180] The JSCOT's recommendations are generally followed, but are not "strictly binding."[181]

On February 8, 2017, the Attorney-General of Australia, George Brandis, stated that the OPCAT would be ratified by the end of 2017, stating that "[t]he Government is of the view that the ratification and effective implementation of OPCAT will encourage continuous improvement of inspection and conditions of detention."[182] Australia delayed ratification until a mere two weeks before the end of the year despite continued pressure from the international community and Australian citizens to do so earlier,[183] and the Commonwealth Attorney-General has suggested incorporating potential government bodies into the structure of the OPCAT.[184] Even though the OPCAT has been ratified, the development of effective NPMs for Australia will prove to be challenging and may delay implementation.

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179. *See id.* at 165. The Australian Human Rights Commission's President, Catherine Branson QC, stated as follows:

> Approval of the *Optional Protocol* is to be welcomed. We now look forward to full ratification of OPCAT as soon as possible . . . The sooner Australia ratifies OPCAT, the sooner we will have a national monitoring system in place that will help protect the human rights of thousands of people in prisons, juvenile detention facilities, immigration detention centres and secure psychiatric facilities. Liberty is a fundamental human right and when we deprive someone of it, we have a responsibility to ensure that the conditions of detention do not undermine the fundamental human dignity of the person who is detained . . . Ratification of OPCAT will provide Australia with the tools it needs to ensure we meet this responsibility.

Id.

180. *See Australia*, *supra* note 161.

181. *See id.*

182. *See* Alexandra Beech, *OPCAT: Australia Makes Long-Awaited Pledge to Ratify International Torture Treaty*, ABC AUSTL. (Feb. 8, 2017), http://www.abc.net.au/news/2017-02-09/australia-pledges-to-ratify-opcat-torture-treaty/8255782 [https://perma.cc/U7J6-9KJ9].

183. Sixty-four non-governmental organizations, including several Australian groups, signed this joint letter urging Australia to ratify OPCAT in 2014. *Open Letter to the Attorney-General Regarding the Optional Protocol to the Convention Against Torture*, CASTAN CTR. FOR HUM. RTS. L., https://castancentre.com/2014/09/16/open-letter-to-the-attorney-general-regarding-the-optional-protocol-to-the-convention-against-torture/ (last visited Dec. 19, 2017) [https://perma.cc/52UD-USNW].

184. For example, the Commonwealth Attorney-General announced that the Commonwealth Ombudsman would serve the function of NPM. *See Australia*, *supra* note 161.

II. Analysis

Australia has delayed the ratification of the OPCAT due to multiple hurdles: the multilevel government structure, the ruling of the High Court in Australia requiring a sufficiently specific treaty regime for adoption, the concern over giving power to the SPT, and the lack of consensus on the final draft of the OPCAT at the time of signing.[185] However, by modeling the Australian OPCAT regime after New Zealand's framework, the State should be able to successfully address these concerns after ratifying the OPCAT.

As stated previously, disproportionate incarceration rates for Aboriginal and Torres Strait Islander peoples remain a serious concern; Australia's levels of incarceration of people in these groups have increased since Australia signed the OPCAT.[186] From 2009, when Australia signed the OPCAT, to 2015, the last available year with data, the number of Aboriginal and Torres Strait Islander peoples incarcerated in Australia has grown by over thirty-three percent, from 7,387 people to 9,885 people.[187] The number of non-Indigenous Australians incarcerated in the same time period has only grown by just under twenty-two percent.[188]

While this difference may not seem meaningful, when examined in context it is striking; the number of Aboriginal and Torres Strait Islander peoples incarcerated in Australia nearly doubled between 2005 and 2015,[189] while the number of non-Indigenous Australians increased by just under one-third during the same period.[190] Moreover, the incarceration rates were already substantially higher for the Indigenous groups, which suggests recent efforts were not providing a remedy.[191] The lack of representation of Indigenous peoples in the Australian government and Australia's minimal response to the international community for these problems have partially led to this continued increase in incarceration rates. To decrease the incarceration rate of Aboriginal and Torres Strait Islander peoples Australia needed to ratify the OPCAT and the logical precursors for successful implementation of the OPCAT would be (1) the adoption of the Redfern Statement and (2) the establishment of independent National Preventive Mechanisms.

185. *See supra* Part I.D.

186. *See 4517.0 - Prisoners in Australia, 2015: Table 2, Prisoners, Selected Characteristics, 2005-2015*, *supra* note 19.

187. *See id.*

188. *See id.*

189. *See id.*

190. *See id.*

191. *See id.*

A. *Australia Should First Adopt the Redfern Statement*

Like New Zealand, where a significant amount of preparatory work was done in the four years between signing and ratifying the OPCAT, Australia has done a significant amount of preparation in the eight years since signing the OPCAT.[192] However, unlike New Zealand, which has implemented nearly all of the U.N. human rights conventions in addition to numerous internal human rights laws,[193] Australia has not acted and has faced significant criticism relating to human rights violations, including its over-incarceration of Aboriginal and Torres Strait Islander peoples.[194]

The Australian Parliament should adopt the Redfern Statement, because doing so would send a clear message that the government will commit itself to the protection of Aboriginal and Torres Strait Islander peoples. Adoption of the Redfern Statement would result in committing considerable resources to Aboriginal and Torres Strait Islander organizations and leaders, including to "[r]ecommit to Closing the Gap in this generation, by . . . [s]etting targets . . . addressing . . . incarceration and access to justice."[195]

The Redfern Statement would also create a Department of Aboriginal and Torres Strait Islander Affairs, which would create the infrastructure necessary to strengthen the standing of these groups in Australian society.[196] The Department of Aboriginal and Torres Strait Islander Affairs would fill the gap of representation in the government for the minority groups, as they currently lack any substantial governmental recognition and therefore, assistance.[197] Adding this infrastructure to the Australian government prior to the establishment of NPMs would signal a shift in Australia's investment priorities towards minority rights, which is a key issue underlying Australia's ratification of the OPCAT.[198]

B. *Australia Should Subsequently Establish Independent NPMs*

To successfully implement the OPCAT, additional steps must be taken beyond simply adopting the Redfern Statement. The second step towards successful implementation would be to develop a sys-

192. *See* Pierce, *supra* note 23, at 164–65.
193. *See supra* Part I.B.
194. *See supra* Part I.C.
195. *See* Social Justice and Native Title Report 2016, *supra* note 118, at 27.
196. *See id.*
197. *See id.*
198. *See* Harding & Morgan, *supra* note 68, at 100–01 (detailing the steps taken by other Asia-Pacific countries to implement the OPCAT). This shift in investment priorities towards minorities rights is an issue that plagues other Asian-Pacific nations as well. *See id.*

tem of independent NPMs. This Section first discusses how a unique NPM structure is necessary for Australia to successfully implement the OPCAT. This Section then explains how the NPMs established by Australia could lead to the end of systemic over-incarceration of Aboriginal and Torres Strait Islander peoples.

1. Developing a NPM Structure

A variety of models exist for Australia to follow in establishing NPMs.[199] First, Australia could designate one Central NPM, such as a previously existing National Human Rights Commission or a new unit within an existing National Human Rights Commission.[200] Second, it could create a new institution altogether.[201] Third, Australia could create multiple NPMs with designated relationships and jurisdictions.[202] Fourth, it could implement a multi-agency model.[203] Fifth, Australia could create local preventive mechanisms, which focus on State bodies in a federal State.[204] As one commentator has noted, "one size does not fit all and it very much depends on the context of the particular State in question."[205]

Unlike New Zealand, which has one united government, Australia's federal system of government is divided into nine entities.[206] Critics of an independent NPM might argue that this decentralization prevents seamless adoption of the OPCAT.[207] However, an adoption of the Redfern Statement would have an equalizing effect similar to that of the Treaty of Waitangi in New Zealand because it would provide unity, constitutional recognition, and resources that are currently lacking.[208]

Australia would be more successful by merging two of the established NPM models: the structure of a Central NPM and local preventive mechanisms. Unlike New Zealand, which has a Central NPM with a primary objective to coordinate other NPMs that have expertise in certain areas,[209] Australia should have more indepen-

199. *See* Pierce, *supra* note 23, at 181.
200. *See id.*
201. *See id.*
202. *See id.*
203. *See id.*
204. *See id.*
205. *See id.* at 182.
206. *See* Harding & Morgan, *supra* note 68, at 115.
207. *Cf. id.* at 115 (explaining how competing interests between different Australian government entities create barriers to unity regarding proposed human rights laws).
208. *See id.*
209. *See* Pierce, *supra* note 23, at 181.

dent localized mechanisms to address the unique geographic makeup of the State. The Central NPM in Australia would be directly responsible for some of the OPCAT inspections, and would report to the SPT to streamline detention visits; this differs from New Zealand's Central NPM which has no direct inspection role and acts primarily as a liaison with the SPT.[210] The Central NPM in New Zealand argued during the creation of its OPCAT framework that it should be allowed to inspect places of detention directly, but this was not adopted in legislation by the New Zealand government.[211] The lack of legislative approval for direct detention inspections has not created substantial problems in the context of New Zealand, but given the concerns over unity in creating any NPM in Australia, it would be important to mirror Australia's federalist government structure when dividing inspection power between the Central NPM and local preventive mechanisms.[212] The Central NPM's power to directly inspect prisons would be balanced against the power of local preventive mechanisms to monitor and make recommendations solely based on their own area's concerns in the nine units of Australia's government: the federal government, the six States, and the two Territories would each designate their own NPM.[213] This balance of power between the Central NPM and the local preventive mechanisms will be achieved through the separate and distinct power of inspection by each body in its respective jurisdiction.

Another benefit of a multi-tiered NPM structure is that the Central NPM and the local preventive mechanisms could make local decisions about the resources needed in each department based on the specific needs of the region.[214] This structure should also allow both the local preventive mechanisms and the Central NPM to report to the SPT directly if there are difficulties enforcing regulations under the OPCAT or accessing detention facilities.[215] Another strength to the fusion of these models is that it would allow the local preventive mechanisms to share their best practices, which, in turn, "forms part of a wider dialogue with the State party . . . to ensure the continued relevance and effectiveness of the model over time."[216]

210. *See* Harding & Morgan, *supra* note 68, at 108.
211. *See id.*
212. *See id.* at 107–08.
213. *See id.* at 115.
214. *See* Pierce, *supra* note 23, at 181.
215. *See The SPT in Brief*, *supra* note 50.
216. *See* Pierce, *supra* note 23, at 182.

Further, by adopting an accountability system similar to that of New Zealand, which requires at least an annual report of each NPM (with a copy to the Central NPM),[217] the federal government of Australia would be kept fully apprised of all of the functions of the NPMs (though, to maintain the independence of the NPMs, they should not be able to intervene). Independence is a crucial aspect of effective NPMs and would be maintained through clear and unequivocal access provisions in the establishing Acts for the NPMs, as explicitly laid out in Article 20 of the OPCAT.[218] In order to maintain the necessary independence to create these reports, Australian NPMs would need to be given unfettered access to places of detention and the people detained in them.[219]

The access and independence essential to the OPCAT would make NPMs more effective in combating the over-incarceration of Aboriginal and Torres Strait Islanders because NPMs may be imbued with "extensive legislative authority to perform their functions."[220] Following New Zealand's model of the Office of the Ombudsman, both the local preventive mechanisms and Central NPM in Australia should be given the ability to summon and examine information otherwise secret, members of government departments, as well as complainants.[221] If, like in New Zealand, these proceedings were privileged,[222] significant strides could be taken in determining the causes of the disproportionate incarceration of Aboriginal and Torres Strait Islander peoples and there would be no fear of information being leaked.

The Central NPM in Australia would further benefit by adopting functions of the New Zealand Human Rights Commission. The functions of the Human Rights Commission are to advocate for equal human rights and relationships of groups in New Zealand through the coordination of programs, the release of public statements, and the promotion of "a better understanding of the human rights dimensions of the Treaty of Waitangi."[223] Similar to the New Zealand Human Rights Commission, the Central NPM in Australia could promote a better understanding of the human rights dimensions of the Redfern Statement through the same coordination of programs, which would put recognition of the

217. *See id.* at 182–83.
218. *See id.* at 178.
219. *See id.*
220. *See id.* at 184.
221. *See id.*
222. *See id.*
223. *See id.* at 185–86.

over-incarceration of Aboriginal and Torres Strait Islander peoples on a national platform.[224] Once again, because New Zealand has a more established and successful human rights record,[225] Australia's Central NPM should also be given investigatory capabilities to address concerns of human rights violations.

2. The NPMs Will Decrease the Disproportionate Incarceration Rate

By adopting a structure with both a Central NPM and local preventive mechanisms, in conjunction with adopting the Redfern Statement, Australia would create the infrastructure needed to enact policies that may decrease the disproportionate incarceration rate of Aboriginal and Torres Strait Islander peoples. One of the most immediate changes that could be made is the implementation of Focus Units, similar to those in New Zealand,[226] where some have been proven effective.[227] Focusing on cultural recognition and supporting the difference in lifestyles of Aboriginal and Torres Strait Islander peoples would reduce recidivism rates of these prisoners. Over three out of every four Aboriginal and Torres Strait Islander prisoners have previously been imprisoned, compared to only one out of every two non-Indigenous prisoners.[228] Therefore, instituting cultural Focus Units as a gateway to other rehabilitative programs would reduce the risk of Aboriginal and Torres Strait Islander peoples returning to prison after their release.

Like in New Zealand, where the New Zealand Ombudsman's Office's use of Maori Focus Units led to the decrease in recidivism of Maori offenders because they had an increased interest in rehabilitation programs,[229] having Aboriginal and Torres Strait Islander Focus Units would also lead to a decrease in the recidivism of Aboriginal offenders because it would increase interest in rehabilitation programs. Furthermore, Australia could create rehabilitation programs that focus on the unique cultural identity of

224. *See id.*; *supra* Part I.B; Part II.A.

225. *See supra* Part I.B; Part I.C.

226. *See* Rept. of the Subcomm. on the Visit to New Zealand Undertaken from 29 April to 8 May 2013: Observations and Recommendations Addressed to the State Party, *supra* note 91.

227. *See* Department of Corrections: Managing Offenders to Reduce Reoffending, *supra* note 93 at 74.

228. *See Aboriginal and Torres Strait Islander Prisoner Characteristics*, *supra* note 16.

229. *See* Department of Corrections: Managing Offenders to Reduce Reoffending, *supra* note 93 at 73.

Aboriginal people, which would likely prove to be as effective as the Mauri Tu Pae rehabilitation program in New Zealand.[230]

Another way to decrease the over-incarceration of Aboriginal and Torres Strait Islander peoples would be to institute changes in the structure of the police departments and prisons in Australia. Like in New Zealand, where Maori police officers were included in the higher ranks of the police department through the creation of Maori Responsiveness Managers and a Deputy Chief Executive: Maori,[231] so would the creation of Aboriginal and Torres Strait Islander management and a Deputy Chief Executive decrease incarceration rates because this would create more cultural awareness within police departments and more cultural representation of a disenfranchised group.

The changes in the structure of the Australian police departments and prisons would build upon the rehabilitative programs in prisons to allow for more cultural awareness to the needs of Indigenous peoples. This would allow those in power to build relationships with Indigenous people, would encourage more effective community policing, and would increase trust among the Indigenous communities. In addition, this would allow local preventive mechanisms in Australia to determine the needs of their police precincts based on their demographics. For example, the Northern Territory, the area of the country that has the largest proportion of its population who are Aboriginal and Torres Strait Islander people (thirty percent),[232] would be given priority to fill these roles due to a more pressing need.

Furthermore, initiatives should be added based on the recommendations of NPMs and the SPT. Like in New Zealand, where the "Turning of the Tide" was implemented to use warnings and other alternatives to prosecutions for certain offenders, Australia could implement the same type of program.[233] This would be particularly useful in places like the Northern Territory, where the Police Administration Act allows police to arrest and hold a person for minor offenses not punishable by imprisonment.[234]

230. *See id.* at 74.

231. *See* A Review of Police and iwi/Maori Relationships: Working Together to Reduce Offending and Victimisation among Maori, *supra* note 101, at iv.

232. *See Population: Aboriginal and Torres Strait Islander Population*, *in* Austl. Bureau of Statistics: 1301.0 – Year Book Austl., 2012 (May 24, 2012), http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0~2012~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20population~50 [https://perma.cc/94SR-DDNP].

233. *See A Review of Police and iwi/Maori Relationships*, *supra* note 101, at 19–20.

234. *See* Social Justice and Native Title Report 2016, *supra* note 118, at 40.

The SPT's recommendations based on the reports from NPMs in Australia would allow the country to adopt prison and police policies based on changing incarceration rates. Because of the balance and division of power between the Central NPM and the local preventive mechanisms, targeted changes could be used based on the unique demographics of each locality, designing policies specific to each region to decrease incarceration rates.

Once the NPM structure is adopted by Australia along with the adoption of the Redfern Statement, Aboriginal and Torres Strait Islander peoples will have more political capital to influence legislative changes. As discussed previously, this group of people has had minimal representation in the federal Parliament and has no constitutional recognition[235]; these changes would allow them to strengthen their position in the Australian government. This position would also decrease the over-incarceration of Aboriginal and Torres Strait Islander peoples by empowering this group to advocate for additional legislative changes necessary to effectuate criminal justice reform.

The adoption of the Redfern Statement and the creation of a unique NPM structure could, by itself, start to address the over-incarceration of Aboriginal and Torres Strait Islander peoples, and would be a positive addition to the criminal justice system in Australia. These changes are now feasible because of propositions like the Redfern Statement, which shows the dramatic shift in the political landscape in Australia.[236] This makes it possible for Australia to successfully implement the OPCAT. This is the right time for ratification because Australia has been more responsive to the concerns of the international community.[237] The ratification of the OPCAT will likely increase Australia's standing in the international community and these mechanisms would enable Australia to achieve that goal while simultaneously improving the political representation and treatment of the Aboriginal and Torres Strait Islander peoples.

Conclusion

While Australia ratified the OPCAT on December 21, 2017,[238] the development of NPMs based on the current infrastructure in

235. *See* Gobbett, *supra* note 30.

236. *See* Social Justice and Native Title Report 2016, *supra* note 118, at 51.

237. *See OPCAT: Australia Makes Long-Awaited Pledge*, *supra* note 182.

238. *See* Joint Media Release from the Minister for Foreign Affairs and Attorney-General of Australia, Improving oversight and conditions in detention (Feb. 9, 2017), https://

Australia would likely be unsuccessful in decreasing the over-incarceration of Aboriginal and Torres Strait Islander peoples. By adopting the Redfern Statement, Australia would provide recognition and resources to a group of people severely lacking both. By implementing a NPM structure that focuses on one Central NPM along with regional local preventive mechanisms, the country would build the decentralized system it needs to implement changes based on the specific needs of each region. This would not only provide independence from the Australian government, but would also give the NPMs the freedom to dictate the allocation of resources and give the OPCAT the best chance to succeed. Adopting the Redfern Statement and implementing this unique NPM structure would enable Australia to successfully implement the OPCAT post-ratification and, in turn, would likely have made the road to ratification easier.

These changes would improve the lives of Indigenous individuals like that of sixteen-year-old Corey Brough, the Aboriginal juvenile who attempted to commit suicide while in solitary confinement.[239] If Corey had access to a Focus Unit while in prison, had the opportunity to be a part of a rehabilitative program, or had not been incarcerated at all because of programs like "Turning of the Tide," the young man may not have tried to take his own life. While Corey did not have those opportunities, Australian NPMs can outline the proper programs and infrastructure necessary to guarantee the end of a system targeting an overly incarcerated people.

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www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FirstQuarter/Improving-oversight-and-conditions-in-detention.aspx [https://perma.cc/8U3T-5729]; *see also* Ratification of OPCAT Caps Year of Significant Human Rights Achievements for Turnbull Government (Dec. 15, 2017), https://foreignminister.gov.au/releases/Pages/2017/jb_mr_171215b.aspx [https://perma.cc /RUA9-AZ6K].

239. *See Brough v. Austl.*, *supra* note 1, ¶ 2.10.