

7 July 2017

Our ref: VK+NDC-CrLC

Dr Natasha Molt  
Senior Legal Advisor, Policy Division  
Law Council of Australia

By email: [REDACTED]

Dear Dr Molt

**Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment Consultation Paper**

Thank you for the opportunity to provide comments on the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) Consultation Paper. Queensland Law Society (QLS) appreciates being consulted on this important issue.

We refer to specific issues outlined in the Consultation Paper below:

***Inspection framework for places of detention in Queensland***

The current inspection framework for places of detention in Queensland is multifaceted and a number of agencies have overlapping responsibilities and functions. This has led to a somewhat fragmented system of oversight for places of detention in Queensland.

The Department of Justice and Attorney-General may receive complaints in relation to Corrective Services and Youth Justice Services. If the complainant is dissatisfied with the outcome, he or she may pursue the complaint through the Queensland Ombudsman.

The Queensland Ombudsman is an independent statutory body with broad powers to conduct investigations into an administrative action of an agency, including Corrective Services, under Part 4 of the *Ombudsman Act 2001*.<sup>1</sup> This role is limited to administrative actions and does not extend to the review of operational decisions or conduct.<sup>2</sup>

The Crime and Corruption Commission (CCC) is a statutory body with powers to investigate police and public sector misconduct, including complaints of misconduct by officers, staff and management of prisons.<sup>3</sup> A CCC investigation may result in criminal charges being laid or disciplinary action being taken. The CCC may also make recommendations around anti-corruption strategies.

<sup>1</sup> *Ombudsman Act 2011* (Qld), s 26.

<sup>2</sup> See *Ombudsman Act 2011* (Qld), s 7.

<sup>3</sup> *Crime and Misconduct Act 2001* (Qld).

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The *Corrective Services Act 2006* (Qld) provides for the appointment of official visitors. Under section 290 of the Act, an official visitor must investigate a complaint made by a prisoner about an act or omission of the chief executive, a person purportedly performing a function or exercising a power of the chief executive or a corrective services officer.

An official visitor has powers to enter the relevant facility at any time, interview a prisoner out of the hearing of other persons and inspect and copy any document relating to the complaint being investigated, except where legal professional privilege applies. The official visitor must then provide a written report to the chief executive.<sup>4</sup>

The *Corrective Services Act 2006* (Qld) also provides for the appointment of a Chief Inspector.<sup>5</sup> The Chief Inspector is responsible for providing “independent scrutiny regarding the treatment of prisoners, and the application of standards and operational practices within the State’s correctional centres”.<sup>6</sup>

In relation to youth detention, the Office of the Public Guardian and the Queensland Family and Child Commission also perform some role in the oversight of places of detention.

Many of the current oversight mechanisms rely on a complaint being made.<sup>7</sup> In contrast, the National Preventive Mechanism (NPM) is designed to take a preventive approach, by identifying problematic detention issues before they escalate.<sup>8</sup>

The recent Independent Review of Youth Detention Centres Report in Queensland made reference to recent comments by the National Children’s Commission on the Victorian and Queensland model of oversight:

*“Victoria and Queensland have detailed inspection regimes run from within internal government departments. However, the lack of independence from the departments responsible for administering the detention of children and young people means these arrangements would not fully meet the OPCAT requirements”.*<sup>9</sup>

The overlap and gaps in the current inspection framework are significant and legislative change would be required for a Queensland NPM inspection body to be OPCAT compliant.

### **Central Coordinating National Preventive Mechanism**

In our view, the Australian Human Rights Commission would be the most appropriate agency to fulfil the role of Central Coordinating NPM. The Commission have a statutory responsibility to ensure compliance with human rights and would be well placed to ensure compliance with OPCAT in relation to places of detention within Australia.

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<sup>4</sup> Ibid, s 292.

<sup>5</sup> Ibid, ss 291 and 296.

<sup>6</sup> The Queensland Government, *Independent Review of Youth Detention Centres Report*, 194.

<sup>7</sup> Ibid, 204. See comments by Amnesty International.

<sup>8</sup> Australian Human Rights Commission, *OPCAT in Australia Consultation Paper*, (2017), page 5.

<sup>9</sup> The Queensland Government, *Independent Review of Youth Detention Centres Report*, 185.



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### ***OPCAT implementation in Australia***

The Society submits that transparency and accountability in relation to the processes and objectives of any body, agency or persons charged with facilitating the inspection framework is of paramount importance.

Independence and accountability is key, not only to ensure efficiency, but to safeguard integrity and credibility of the system from both a domestic and international perspective.

We support the view of the UN Sub-committee on the Prevention of Torture that the NPM should publicise opinions and findings through annual and thematic reports, make submissions to government and Parliament on relevant legislation and policy and contribute to UN work. The report, which is to be produced by the Central Coordinating NPM, should include the information provided by the State/Territory NPM inspection bodies in each jurisdiction as well as information in relation to any areas of offshore detention. The report should set out all relevant information which is reasonably required to appropriately report on the state of human rights and compliance with the Convention Against Torture. This will ensure that Australia's adherence to the Convention can be understood, examined and publically assessed.

Mechanisms that will assist in providing a high level of transparency and accountability include regular mandatory reporting to the Commonwealth Attorney-General, with a requirement that the Attorney table the report in Parliament within a certain period of time.<sup>10</sup>

### ***Assessment of existing inspection mechanisms***

The Society agrees that an assessment of existing inspection mechanisms should occur urgently to identify where OPCAT requirements are met and to uncover any gaps. We note that the Victorian Ombudsman has commenced a process of reviewing existing inspection mechanisms to ascertain what practical changes are required to implement OPCAT, and suggest that other jurisdictions should commence a similar process.

### ***Definitional issues***

The Society submits that clear and unequivocal definitions for the terms 'torture' and 'cruel, inhuman and degrading treatment or punishment' should be developed, to ensure that each definition aligns with international human rights standards and is supported by the United Nations Human Rights Committee.

We note that the *Migration Act 1958* (Cth) sets out definitions of "cruel or inhuman treatment or punishment" and "torture". These definitions may be adopted in amended form, following consultation with appropriate human rights bodies and experts, including for example the Human Rights Council of Australia and Amnesty International Australia.

The definition should be sufficiently broad to capture acts or omissions which may have a particular impact as a result of that person's ethnicity, religious beliefs or sexual or gender orientation.

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<sup>10</sup> We note the views of the Western Australian Inspector in the submission to the Youth Detention Review dated 25 October 2016 regarding direct reporting to Parliament.

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### ***Progressive implementation***

We note that an initial three year implementation period is provided for the NPM. The Society supports progressive implementation.

However, it is critical that appropriate milestones be set down so that each jurisdiction is cognisant of the expected implementation rate, and progress can be measured against these indicators accordingly. The SMART goal system may be one such methodology.

Again, we submit that leading human rights bodies and experts ought to be consulted in the development of any goal system for progressive implementation.

### ***Issues that should be taken into account by the NPM***

In the Society's view, there are a range of issues which warrant attention by the NPM. We wish to highlight several issues which are particularly critical and should be taken into account by the NPM as a matter of urgency:

- ***Youth detention***

In August 2016, the Queensland government announced an independent review into Queensland's youth detention centres. The final report was released in April 2017. In response to the report, the government acknowledged the "significant trauma that many young people in the youth justice system have experienced".<sup>11</sup>

Although the special vulnerability of children and young people is recognised within criminal justice frameworks, concerning treatment of young people in detention continues to be raised across Australia, including in relation to inappropriate restraints, excessive force and isolation.

We additionally note that the December 2016 report of the Australian Institute of Health and Welfare into the youth detention population indicated that while some small improvement to the number of children in detention has been shown, the data indicates that the rates remain relatively stable.

- ***Aboriginal incarceration***

The over-representation of Aboriginal and Torres Strait Islander peoples in prisons and the devastated impacts of this on communities around Australia is well documented. The Commonwealth Attorney-General announced that the ALRC would conduct an inquiry into incarceration rates of Aboriginal and Torres Strait Islander peoples in late 2016. The final report is due December 2017.

We submit that any protocols developed as part of the OPCAT implementation relevant to this group should, as a requirement, be reconciled with the recommendations of the ALRC report after its release.

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<sup>11</sup> Department of Justice and Attorney-General, *Government Response to the Independent review of youth detention*, (2017).



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- **Asylum seekers**

The Society refers to the final report of the Inquiry by the Australian Human Rights Commission '*The Forgotten Children: National Inquiry into Children in Immigration Detention 2014*', which was provided to the Commonwealth Attorney-General on 11 November 2014. The Attorney tabled the report in Federal Parliament on 11 February 2015. The report questions the lawfulness of mandatory detention of children and provides comprehensive detail around the negative impacts and unique suffering for children subject to mandatory detention as a result of seeking asylum.

Implementation of OPCAT protocols to investigate and improve the management of asylum seekers, and particularly children, should be urgently attended to in the rollout of this framework.

Thank you for the opportunity to comment on the consultation paper.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Policy Solicitors, Natalie De Campo on 07 3842 5889 or [n.decampo@qls.com.au](mailto:n.decampo@qls.com.au) or Vanessa Krulin on [REDACTED] or [REDACTED]

Yours faithfully

[REDACTED]  
Christine Smyth  
**President**