ACT INSPECTOR OF CORRECTIONAL SERVICES
P 1800 932 010 | E ICS@act.gov.au | GPO Box 158, Canberra City ACT 2601

Mr Edward Santow
Human Rights Commissioner
GPO Box 5218
SYDNEY NSW 2001

Dear Mr Santow

Submission to Stage 2 Consultation on the implementation of the Optional Protocol to the Convention against Torture (OPCAT)

Thank you for the opportunity to provide feedback in response to the Australian Human Rights Commission's (AHRC) paper *OPCAT in Australia: Consultation Paper: Stage 2*.

About the ACT Office of the Inspector of Correctional Services

The Office of the ACT Inspector of Correctional Services was established through the passage of the *Inspector of Correctional Services Act 2017* (ACT) (the ICS Act). The Act provides for the appointment of an Inspector of Correctional Services in order to promote the continuous improvement of correctional centres and services in the ACT. My office carries out systematic review and scrutiny of correctional centres and services, and reports directly to the ACT Legislative Assembly. I was appointed to the role of Inspector in March 2018 as a part time statutory office holder, and the Office currently employs 0.8 substantive FTE and 0.5 FTE administrative support though there is the capacity to engage contractors with diverse and/or specialised expertise. By December 2019 my jurisdiction will expand to youth justice facilities in the ACT.

Importantly, and of relevance to this consultation, the model of prison oversight implemented through the establishment of my office aims to capture the requirements and expectations around the establishment of a national preventive mechanism (NPM) under the OPCAT in the ACT, and reflects stakeholder consultation within the ACT on the most appropriate preventive oversight mechanism.[1] I am therefore following with great interest discussions at a Federal and ACT level about implementing OPCAT in Australia.

I respond to each of the questions posed in the consultation below.

Question 1: ***How should OPCAT be implemented to prevent harm to people in detention? How should the most urgent risks of harm be identified and prioritised? The NPM may, for example, include a focus on particular: categories of detainees ... ; detention practices ... ; places of detention; jurisdictions.***

[1] Explanatory Statement, *Inspector of Correctional Services Bill 2017* (ACT), 2.

It is useful to consider good practices from other OPCAT jurisdictions in order to realise OPCAT's maximum potential for reducing risks of ill-treatment in places of deprivation of liberty in Australia. There are a number of implementation measures to take place prior to the NPM being designated and ones post NPM designation, including importantly, letting the NPM determine the most urgent risks of harm.

Pre-NPM designation

As noted in Proposal 3 as part of your Interim Report, there is a need for **technical assessment** to be carried out in all jurisdictions, to ensure that all potential places where persons are or may be deprived of liberty are considered for OPCAT-style oversight, and to examine existing oversight functions and whether they have powers and guarantees required by OPCAT for preventive oversight. This initial technical assessment would help ensure the NPM model adopted in each jurisdiction is comprehensive (i.e., it covers all places were persons may be detained by virtue of a judicial or administrative order, or with the consent or acquiescence of the State) and efficient (i.e., the work of NPMs compliment rather than replicate existing preventive oversight functions.

I understand that the Commonwealth Ombudsman is currently conducting a baseline assessment to inform its functions as Central Coordinating NPM. It is important that an assessment is carried out at a Federal level so that there is a holistic national overview of the existing framework of both oversight entities *and* places of deprivation of liberty. Notwithstanding this, and as noted in AHRC's Proposal 3, each jurisdiction may be well served to conduct their own technical assessments given that legislative and operational arrangements for deprivation of liberty and oversight of places of deprivation of liberty is likely to be very complex, and best undertaken by entities with familiarity of jurisdictional structures.

Proposal 3 in your interim report on OPCAT notes the State and Territory governments carry out this mapping. I note however, it need not essential that it be done by government if it can be done in a comprehensive and objective way. An excellent example of scoping and baseline assessment in Victoria is contained in Part 1 of the Victorian Ombudsman's report *Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre* (November 2017).[2]

Following the completion of a technical assessment, good practice would include conducting a **consultation process** involving key stakeholders within the jurisdiction based on the technical assessment, with the objective of hearing views on places of deprivation of liberty that should be included in the NPMs mandate, and the most appropriate structure for an NPM. Stakeholders should ideally include:

- the lead ministries / directorates responsible for NPM designation and others that have responsibility for detention (for example, health, and community services);
- operational areas of government with responsibility for detention (for example, corrective services, health, justice health, children youth and families etc);
- existing oversight entities (for example, human rights commissions, ombudsman's offices, official visitors etc); and
- civil society organisations that carry out work in relation to closed environments both at an operational and policy level, persons with lived experience of closed environment or their carers and families, academia etc.

---

[2] Online at https://www.ombudsman.vic.gov.au/getattachment/432871e4-5653-4830-99be-8bb96c09b348 (accessed 16 August 2018).

Logically, the consultation would be led by the ministry/directorate responsible for determining which entity(ies) are to be NPM however, it could be led by other entities such as an oversight entity or civil society group.

Jurisdictions consider to the **legislative framework** required to meet OPCAT requirements. This framework should: define the scope of places of deprivation of liberty to be monitored, and include the required OPCAT powers and guarantees (independence from government, ability to access all places of detention, ability to access documents and registers etc.). It is also important, however, for entities to have the legal authority to focus on prevention, and to signal they are part of a national approach to prevention of ill-treatment. Capturing the OPCAT preventive focus in legislation would, for existing entities that are designated as NPMs, help avoid the risk that OPCAT work is 'business as usual' in cases where they carry out complaints-based or reactive work.

The ICS Act provides the ACT Inspector of Correctional Services all the OPCAT powers and guarantees and the framework for a proactive not reactive function in relation to corrective services. However, if my office were to be designated as NPM for prisons for example, the ICS Act could be amendment to specifically note this NPM role as to do so would assist in raising awareness about the OPCAT approach and signal that my office were part of a network of entities doing preventive monitoring. Furthermore, the ACT legislation that enables the UN Subcommittee for the Prevention of Torture (SPT) to visit places of deprivation of liberty in the ACT, the *Monitoring Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018* (ACT) could be amended to recognise the role of ACT NPMs, including potentially naming the ACT NPMs in a subordinate instrument. This approach would be similar to that taken in New Zealand with the *Crimes of Torture Act 1989* (NZ) that deals with designation of NPMs in section 26 of that Act and requires the name of NPMs to be published in the Gazette. If each jurisdiction in Australia had legislation that referred to OPCAT and nominated NPMs, as noted above, it would also provide a symbolic unifying element to link the NPMs across the Federation.

Post NPM Designation

Identifying and prioritising the most urgent risks of harm

Once NPMs have been designated and are operational in each jurisdiction there are a number of good practices to follow to maximise their effectiveness in prevention of harm and ill-treatment. Importantly, each NPM must be allowed to **determine their own priorities** (places to visit, practices to examine etc.) and their strategic approach, based on information they will receive from a range of sources.

Steven Caruana, a 2018 Churchill Trust Fellow recently completed an international study tour of NPMs and examined various NPM approaches. He reflected on the 'exemplary' approach of the Norwegian NPM, the Parliamentary Ombudsman, in relation to its pre-visit research and planning:

> The Ombudsman starts planning for a visit almost a year in advance when meeting to set its annual strategic plan. The NPM staff map out thematic topics for each of its detention sectors (prisons, mental health care institutions, child welfare institutions and immigration detention) and chooses the institutions to be visited. These decisions are informed by consideration of complaints received

> by the Ombudsman, media reports, other third-party information and to a degree geographical coverage of Norway. [3]

The NPMs themselves will be well placed to assess where the greatest risks of ill-treatment are, and strategies they can employ to address those risks (for example, thematic visits, follow up visits, tailored recommendations etc.). Furthermore, it is crucial to NPM independence for them to determine their own priorities, including places to visit within their legislative jurisdiction.

Question 2: ***What categories of 'places of detention' should be subject to visits by Australia's NPM bodies?***

All places of detention that come within the OPCAT definition of 'places of deprivation of liberty' should be subject to visits.

The scope of 'places of deprivation of liberty' under Article 4.2 of the OPCAT is potentially very broad. A recent analysis of this prepared by Michael White, formerly Senior Legal Adviser with the New Zealand Human Rights Commission provides useful and arguably, definitive guidance (noting the UN Subcommittee for the Prevention on Torture provided specific interpretive guidance to the author on the scope of Article 4.2 of the OPCAT). White's analysis notes that places of deprivation of liberty extend to situations in which the State either exercises, or might be expected to exercise a regulatory function, and concludes:

> Drawing on the SPT's conclusion, any place where people may not be free to leave is subject to the regulation or oversight of the State – or should be the subject of the State's regulatory functions – and could potentially fall within the scope of Article 4. This would include facilities and residences which are subject to national standards, rules or guidelines administered by the State.[4]

In particular, it is vitally important that the first 24 hours of detention in police custody and in secure psychiatric facilities *not* be excluded from NPM visits as I understand has been flagged. It has been well-documented that the first 24 hours of detention is a period of high risk of abuse or ill-treatment for persons in a range of detention settings but particularly in police custody and secure mental health facilities due to potential vulnerabilities from a range of factors including anxiety, stress, disorientation, influence of drugs or drug withdrawal, risk of pressure to obtain confessions, underlying mental health condition and so on.[5] I also note that the OPCAT does not specify such exclusion of the first 24 hours, and to exclude the first 24 hours of such detention would be contrary to Australia's obligations under the OPCAT.

As noted above, each NPM should be the entity that determines the places or practices (subject to their statutory mandate) that should be visited, rather the current proposal from the Commonwealth government to limit NPMs initially to examining only 'primary' places of detention. The SPT notes:

---

[3] Steven Caruana (2018) 'Enhancing best practice inspection methodologies for oversight bodies with an Optional Protocol to the Convention Against Torture focus', Winston Churchill Memorial Trust, p 28.
https://www.churchilltrust.com.au/media/fellows/Caruana_S_2017_inspection_methodologies_for_oversight_bodies_with_an_OPCAT_focus.pdf Accessed 14 August 2018.

[4] Michael White (2016) 'He Ara Tika - A Pathway Forward: The scope and role of the Optional Protocol to the Convention against Torture (OPCAT) in relation to Aged care and disability residences and facilities', New Zealand Human Rights Commission, p 20. Online at https://www.hrc.co.nz/files/9314/7251/4226/He_Ara_Tika_Report_2016.pdf (accessed 14 August 2018).

[5] See, for example, Open Society Justice Initiative (2010) 'Pretrial Detention and torture – summary report', Ludwig Boltzmann Institute of Human Rights. Online: https://www.opensocietyfoundations.org/sites/default/files/pretrial-detention-and-torture-20130220.pdf

> As a tool of prevention, the NPM ought therefore to be able to access as broad a range of potential places of deprivation of liberty as possible in order to determine whether the State ought to be exercising such a regulatory function, as well as to examine the manner in which existing detention powers and regulatory functions are being exercised. In so doing, the NPM ought to be mindful of the principle of proportionality when determining its priorities and the focus of its work.[6]

Expanding the scope of 'visitable places' subject to visits by the ACT Disability Official Visitor

Of relevance to deliberations about the 'scope' of OPCAT in terms of visitable places is a proposal by the ACT Community Services Directorate (CSD) to expand the places that a Disability Official Visitors can access in order to monitor the welfare of potentially vulnerable persons in disability accommodation.

In the ACT there are a number of independent Official Visitors who monitor and investigate the wellbeing of persons in a situation of vulnerability in a range of settings. This function is partly reactive in that they assist to resolve complaints, and partly preventive in that they identify and report on systemic issues. Currently there are official visitors appointed for Corrections, Aboriginal and Torres Strait Islanders, Children and Young People, Disability, Mental Health and Homelessness.

Under the *Disability Services Act 1991* (ACT) a 'visitable place' for the purpose of Disability Official Visitor visits is currently defined as 'accommodation provided for a person with disability for respite or long-term residential purposes other than a private home', and includes a residential aged care facility that accommodates a person with disability who is less than 65 years old. In its consultation paper, CSD note that the introduction of the National Disability Insurance Scheme (NDIS) has resulted in management of disability accommodation moving from Government to non-government providers, including some Commonwealth-funded aged care providers. CSD notes:

> The current definition [of 'visitable place'] does not reflect all types of disability accommodation services that ought to be captured by the OV Scheme. It is proposed that the definition be updated to ensure that as many people as possible who are living in disability accommodation may be visited by the OVDS [Official Visitor for Disability Services], including younger people with a disability in Commonwealth-funded residential aged care. This could potentially include people who are living in a private home and who are reliant on services for support.[7]

These proposed amendments by CSD signal the importance of taking a broad, holistic approach to determining the scope of preventive oversight in order to ensure oversight can assist those most vulnerable. Some individuals receiving services through an NDIS package in their own home may be particularly vulnerable to abuse or mistreatment and thus the possibility of OPCAT-oversight should be entertained for these types of places.[8]

Question 3: *What steps should be taken to ensure that measures to implement OPCAT in Australia are consultative and engage with affected stakeholders?*

I support your proposals that relate to establishment of structures in Australia's NPM framework that allow stakeholder's views to be represented, and in particular civil society and persons with

---

[6] Ibid.

[7] ACT Community Services Directorate, *Consultation Paper: Proposed Amendments to the Disability Service Act 1991* (2018) http://www.communityservices.act.gov.au/home/dsa-amendments-consultation-paper/consultation-paper. Accessed 14 August 2019.

[8] See generally, Disabled People's Organisations Australia, 2018 'Position Paper: Disability Inclusive National Preventive Mechanism (NPM)'. Online at http://pwd.org.au/campaigns/human-rights/opcat-optional-protocol-to-the-convention-against-torture/ . Accessed 16 August 2018.

lived experience of deprivation of liberty (Proposal 2, bullet point 4; Proposal 5, bullet point 3; Proposal 11; Proposal 13, bullet point 5).

It is also important that the entity in each jurisdiction with carriage for OPCAT and NPM designation engage with the authorities with operational responsible for places of deprivation of liberty, to increase their understanding of OPCAT monitoring and the preventive approach, as the engagement of these entities is central to the effectiveness of prevention (for example, in having NPM recommendations accepted and acted upon).

Awareness raising or capacity building training that brings together NPMs and the entities they oversight to formulate a join understanding of the OPCAT approach, expectations, and operational realities could make a strong contribution to effective outcomes under OPCAT.

Question 4: ***What are the core principles that need to be set out in relevant legislation to ensure that each body fulfilling the NPM function has unfettered, unrestricted access to places of detention in accordance with OPCAT?***

The core principles required by the OPCAT that should be protected in NPM legislation include:

- preventive mandate
- access to all places where persons are or may be deprived of their liberty, including the ability to visit unannounced;
- ability to talk in private with detainees, staff and other relevant persons;
- access to documents including current and timely general data on detainee profile; health records, registers (use of force, seclusion and restraint, lockdown etc.);
- independence from government (financial, functional and operational);
- importance of utilising staff or contractors with diverse expertise and backgrounds when monitoring (and ability to engage contractors for this purpose);
- requirement to publically report; and
- protection against reprisals.

The ICS Act may provide a useful example as a statute capturing most of these powers and guarantees.

Question 5: ***Comments on proposals in the AHRC's Interim Report to ensure Australia compiles with its obligations under OPCAT***.

I support the proposals contained in the AHRC's Interim Report.

I would like to reflect in particular, parts of Proposal 2, that Australia's NPM system

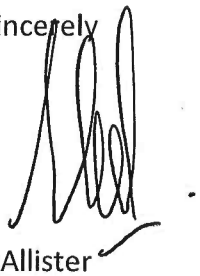
> 'has clear lines of communication between the various entities designated as NPM bodies'; and 'sets up formal paths of engagement with civil society organisation and human rights institutions'.

An example of this in practice in the ACT that I have observed is the Alexander Maconochie Centre (AMC) oversight group that meets bimonthly. This group, chaired by the President of the ACT Human Rights Commission, includes all entities that have an oversight role in relation to the ACT's

prison, the AMC. These include: the ACT Human Rights Commissioners (including the Human Rights Commissioner, Health and Disability Services Commissioner, Discrimination Commissioner and Public Advocate), ACT Ombudsman, Corrections and Aboriginal and Torres Strait Islander Official Visitors, and myself as Inspector of Correctional Services. It also includes civil society organisations including Winnunga Health and Community Services and Prisoners Aid. These meetings provide a forum for information sharing and in the months that my office has been operational have already been extremely useful for be to gain a better understanding of systemic issues in the ACT's prison.

I thank you for your work on OPCAT to date, and look forward to ongoing engagement as Australia moves along the path towards implementation.

Yours sincerely



Neil McAllister
ACT Inspector of Correctional Services

14 September 2018