Criminal Lawyers Association of the Northern Territory (CLANT)

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Submission re: Monitoring of Places of Detention (*Optional Protocol to the Convention Against Torture*) Bill 2018

Should the Bill be passed?

CLANT supports the implementation of this Bill, which deals with one of the core parts of the OPCAT, namely, facilitating inspections by the UN Subcommittee ('the Subcommittee') in NT places of detention. CLANT is confident this will introduce greater transparency and accountability for the treatment of people who are deprived of their liberty in places of detention.

The other core part of the OPCAT deals with developing local mechanisms called preventive mechanisms in Australia for independent inspects of places of detention. Given the Subcommittee is only expected to visit every 5-10 years, while supporting the Bill, CLANT also urges the NT Parliament to enact legislation to establish an Independent Custodial Inspector, a measure which has been undertaken in various other Australian jurisdictions, and which CLANT has long supported. These two changes together will more effectively advance the principles that underlie the objects of the OPCAT.

CLANT further recommends, in conjunction with the Bill, that mechanisms are put in place now to inform detaining authorities and detainees about the OPCAT, and to explain the Bill.

CLANT does not agree that it is best to wait until the NT government knows the Subcommittee is coming to inform those who are in detention about the changes.[1] Knowledge that the Subcommittee could attend in the future may have important flow on effects and ensure better compliance with human rights standards by detaining authorities. For example, educating relevant people about the OPCAT and the reasons behind the Bill may assist in developing a greater understanding of human rights standards, and how compliance with these standards should guide decision-making in places of detention. Greater education may have a positive impact on the operation of places of detention, the treatment of detainees, and the conditions at detention facilities.

CLANT sees utility in using this Bill as an opportunity for creating a greater dialogue about human rights and freedoms between the NT Government, detaining authorities and detainees. This would be of particular benefit in correctional centres, prisons and youth detention centres. Similar recommendations have been made by the Royal Commission into the Projection and Detention of Children in the Northern Territory (see page 214 of Chapter 5 of the Final Report).

[1] See page 7, public briefing transcript, Monday 28 May 2018.

This is an important opportunity for the NT Government to clearly articulate the human rights standards outlined in the OPCAT to detaining authorities and detainees; and to include a program of education about human rights into places of detention. CLANT suggests this information is designed and communicated in a form and language that can be readily understood and is incorporated into the program detention centres. This could be an opportunity to start developing a program of education about human rights. For example, in introductory material given to children and young people when they enter the youth detention system (see page 214 of Chapter 5 of the final Report)

Proposed amendments to the Bill

In recommending the following amendments, CLANT have reviewed the Bill passed by the ACT, and the New Zealand *Crimes of Torture Act 1989*.[2]

1. Amendment to clause 3

The definition of 'detaining authority' should clearly state it also includes services engaged by or on behalf of a detaining authority or the Territory to provide services under a contract.

A definition similar to ACT is suggested:

detaining authority, for a place of detention:
(a) means the entity in charge of the place of detention; and
(b) includes any entity responsible for the day-to-day care, control, health and safety of detainees in the place of detention.

(2) For this Act, an entity engaged by or on behalf of a detaining authority or the Territory to provide services under a contract as, or on behalf of, a detaining authority is taken to be a detaining authority.

2. Amendments to clause 4

Similar to New Zealand (see section 16 of the *Crimes of Torture Act 1989)* clause 4 of the Bill could include more specific examples of places of detention in the Northern Territory for example

- Secure care facilities; and
- people in statutory out of home care.

3. Amendment to clause 11

CLANT suggests changes to the way Article 14(2) of the Optional Protocol has been implemented into clause 11 of the Bill. As it currently stands, a detaining authority may indefinitely prohibit and restrict access to a place of detention. Further, there are no written notice requirements to the Subcommittee for objections.

[2] ***Crimes of Torture Act 1989*** **(NZ)** added sections 18-20 to enable the Subcommittee to fulfil its mandate set out in Article 11 of the Optional Protocol.

Given the Subcommittee must notify any party concerned in writing in advance of the planned dates of a visit there is no need for a detaining authority to prohibit or restrict access to a place of detention so that the Attorney-General of the Commonwealth may be requested to object. This unnecessarily provides control to detaining authorities to restrict access, and may be used as a mechanism to delay access.

To ensure greater clarity and transparency, it is suggested s11(2) and (3) be amended follow the New Zealand Act, as follows:

(2) the Attorney-General of the Commonwealth may by notice in writing to the Subcommittee, object to the Subcommittee having access to any place of detention ***for a temporary period*** *if the Attorney General of the Commonwealth believes (a) there is an urgent and compelling reason on one of the following grounds:*

(i) national defence; or
(ii) public safety; or
(iii) natural disaster; or
(iv) serious disorder in the place of detention; and

(b) that ground ***temporarily*** *prevents access to the place of detention.*

(3) On receiving a notice under subsection (1), the Subcommittee ***must delay*** *its visit to the place of detention* ***to a later date.***

The inclusion of the emboldened sections ensures restrictions on access are only temporary.

4. Amendments to clause 12

This clause unnecessarily restricts the information that is to be provided to the Subcommittee. CLANT submits there should be no discretion provided to the responsible Minister or detaining authority to decide what information is relevant. Rather, access to any information requested by the Subcommittee should be provided. It is suggested clause 12 is amended as follows in line with the New Zealand Act:

12. Access to information

(1) The responsible Minister and detaining authority for a place of detention must permit the Subcommittee to have unrestricted access to the following information in relation to places of detention in the Northern Territory:

(a) the number of places of detention
(b) the location of places of detention
(c) the number of detainees
(d) the treatment of detainees
(e) the conditions of detention applying to detainees.

CLANT submits it is necessary to provide information to the Subcommittee about the location and number of places of detention (subsections (a) and (b)) to ensure full compliance with article 20 of the Optional Protocol: *(a) Access to all information*

concerning the number of persons deprived of their liberty in places of detention as defined in article 4, ***as well as the number of places and their location.***

Similar to the ACT Bill, detainees should have the right to consent or not to the inspection of their personal information. This is not a protection afforded by the Bill in its current form.

Clause 12(2) could read:

(2) Access to which the Subcommittee is entitled under this section does not include the right to inspect any record that is personal information of a detainee, under the NT Information Act, unless the detainee consents to the inspection.

This inclusion would ensure the right to privacy on the rare occasions that the subcommittee requests personal information. This means the Minister or detaining authority will need to seek a detainees consent to disclose that information. CLANT believes such amendment properly recognises and has regard for the rights and liberties of individuals and ensures the right to privacy of personal information is maintained.

5. Amendment to clause 13 (4)

The Bill in its current form allows detaining authorities to object to being interviewed by the Subcommittee to participate in an interview.

Article 20 of the OPCAT envisions the Subcommittee has liberty to choose the places they want to visit and the persons they want to interview. Article 14 protects the persons deprived of their liberty and detaining authorities, by ensuring they are provided an opportunity to be interviewed without witnesses.

Given the object of the Bill is to highlight generic and systemic issues CLANT submits that the detaining authorities should not be given an option to object to being interviewed. Clause 14 safeguards detaining authorities who are subject to an interview against any civil or criminal action.

Of course, the ability to object and the requirement for consent should be afforded to detainees.

It is suggested (4) be amended as follows: *Nothing in this section requires* ***a detainee*** *who objects to, or who does not consent to, being interviewed by the Subcommittee to participate in an interview.*

Marty Aust
President
4 June 2018