



## Submission to the Social Policy Scrutiny Committee inquiry into the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2018

### 1. Contact information

For more information or to discuss the content of this submission, please contact Russell Goldflam on 0401 119 020 or at [Russell.goldflam@legalaid.nt.gov.au](mailto:Russell.goldflam@legalaid.nt.gov.au) or Alina Leikin on (08) 8999 3000 or at [alina.leikin@legalaid.nt.gov.au](mailto:alina.leikin@legalaid.nt.gov.au).

### 2. Introduction

- 2.1 The Northern Territory Legal Aid Commission (**Commission**) welcomes the *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill (Bill)* as an important step in the implementation of the Optional Protocol to the Convention Against Torture (**OPCAT**) in the Northern Territory.
- 2.2 The Commission understands that whilst such legislation is not strictly necessary to facilitate inspections by the Subcommittee and its access to information, the purpose of this Bill is to provide clarity and legislative certainty in the Northern Territory about the Subcommittee's mandate, powers and activities, including interaction with other Northern Territory legislation. The Commission supports this legislative intention and believes that this legislative framework will ensure a consistent understanding across the board of facilities' obligations in the context of a Subcommittee inspection.
- 2.3 The Commission anticipates that the Subcommittee is expected to only rarely visit Australia – perhaps once or twice a decade. Accordingly, the direct practical application of the Bill is likely to be limited. In order to effectively advance the principles that underlie the objects of both this Bill and the OPCAT, the Commission, while commending the Bill, also recommends that the Northern Territory Parliament enact legislation to establish an Independent Custodial Inspector, a measure which has been undertaken in various other Australian jurisdictions. This is discussed further below at paragraph 4.2.
- 2.4 The Australian Capital Territory is currently the only other jurisdiction which has passed similar legislation. A comparison shows that this Bill is substantively the same as the ACT legislation, except for a small number of minor differences, which, in our view, do not appear to raise any concerns.



## 3. Comments on the Bill

3.1 The Commission commends the Bill generally and notes the broad scope of the Subcommittee's access to places of detention and information, limited only to the extent permitted by the OPCAT.

### Definition of 'places of detention'

3.2 The Commission notes the definition of 'place of detention' in the Bill, which includes reference to Article 4 of the OPCAT. The definition also commendably explicitly includes police stations, court cells and transport vehicles. In our view, this is critical, particularly in the Northern Territory, because of the high risk (and high rates) of abuse and deaths in police custody, including in transport vehicles.

3.3 However, the Commission is concerned that some places of detention are not listed in section 4 and doubt may arise as to whether they are covered by the Bill. As such, the **Commission recommends** that the definition be expanded to explicitly include:

- privately owned and run facilities, such as aged care facilities, where residents are subject to residential restrictions by way of *Adult Guardianship Act*, Part IIIA of the *Criminal Code* or other statutory orders;
- secure care facilities;
- psychiatric treatment facilities;
- compulsory drug and alcohol treatment centres; and
- facilities for people with physical or intellectual disabilities.

3.4 Alternatively, the Explanatory Statement may clarify the breadth of the definition and note these additional examples and any other examples which may be relevant.

### Access to information

3.5 The Commission also notes that section 12(2) which deals with access to information requires a place of detention to permit the Subcommittee to have unrestricted access to a range of information '*in accordance with Ministerial arrangements*'. On its face, this section may suggest that Ministerial arrangements could alter or fetter the type of information which must be provided to the Subcommittee. The Commission recognises that section 9(3) requires that Ministerial arrangements be consistent with and reasonably appropriate and adapted for the purpose of implementing the OPCAT.

3.6 For the avoidance of doubt, the **Commission recommends** that section 9(3) or the Explanatory Statement further clarify that the use of the words '*in accordance with Ministerial arrangements*' must not be read to enable Ministerial arrangements to fetter or limit the scope of the Subcommittee's mandate in any way.



## 4. Domestic implementation of the OPCAT

4.1 Whilst the Commission welcomes the introduction of this Bill as it relates to the Subcommittee's inspections, the Bill is silent about domestic inspection mechanisms, otherwise referred to as National Preventative Mechanism(s) (NPM). The Commission understands that this will be considered and implemented in due course (and within the three years permitted for implementation).

4.2 In this regard, the Commission makes the following preliminary observations, which we would be pleased to consider or discuss in more detail:

### A. Legislative framework is necessary

As set out above, the Commission agrees with the imperative of this Bill in setting out a clear and consistent legislative framework to facilitate the work of the Subcommittee when it wishes to carry out inspections of places of detention in the Northern Territory.

Similarly, a legislative framework must be implemented to anchor the work of domestic inspection bodies for the same reasons that underpin this Bill. This is clearly set out in the Subcommittee's Guidelines on NPMs, where it states that the '*mandate and power of the NPM should be clearly set out in a constitution or legislative text.*'

The NPM(s) in the Northern Territory must have their mandate, functions and powers enshrined and clearly set out in legislation. Without a clear legislative basis, NPM(s) may encounter resistance, confusion or questioning of powers when seeking to inspect places of detention in the Northern Territory. We note that in Western Australia, the independent inspector draws its mandate from the *Inspector of Custodial Services Act 2003* (WA).

### B. Independence of domestic inspection body

The independence of the NPM(s) is central to its ability to act as a truly preventative inspection body. This includes both functional and financial independence from Government. It also requires that reports produced by the inspection body are published and made widely available to the public. The Committee may wish to look to the example of the Western Australia Inspector of Custodial Services (WA ICS) as a best practice example of an independent and preventative inspection body in Australia. The WA ICS reports to the Western Australian Parliament, and not the Government of the day, ensuring its vital role is not unduly curtailed by the Government.

### C. Risk of fragmentation



## Northern Territory Legal Aid Commission

During the Public Briefing in relation to this Bill, Mr Robert Bradshaw indicated that there may be a number of inspection bodies in the Northern Territory and that all NPMs are likely to be coordinated by the Commonwealth Ombudsman.

The Commission is concerned that fragmentation of the inspectorate role in the Northern Territory is likely to result in inconsistent inspection standards, dilution of expertise about OPCAT style inspections and insufficient resource allocation for a truly preventative inspection framework. Again, the West Australian Inspector of Custodial Services is a prime example of the efficiency and effectiveness of reposing inspection functions in a single inspection body.

### **D. Funding and resources**

One of the key requirements of the OPCAT is that NPMs receive the resources necessary for the performance of their functions. This requirement cannot be achieved by expecting existing bodies to undertake the NPM function – an entirely new function, which is preventative rather than reactive – within existing or slightly increased resource allocations. NPM funding should be dedicated specifically to preventative inspections and associated activities to ensure OPCAT compliance.

### **E. Expertise**

It is crucial that NPM's are led by suitably qualified experts who can bring rigour and expertise to the oversight function. This is especially important for highly vulnerable groups, such as Aboriginal and Torres Strait Islander detainees, female detainees and young people. In this regard, it is telling that Professor Neil Morgan is the current Independent Custodial Inspector in Western Australia, and Prof Richard Harding previously occupied the role.