



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref:HRC:PWcm1380791

7 July 2017

Mr Jonathan Smithers
Chief Executive Officer
Law Council of Australia
DC 5719 Canberra

By email: natasha.molt@lawcouncil.asn.au

Jonathan

Dear Mr Smithers,

Australian Human Rights Commission OPCAT in Australia Consultation Paper

Thank you for your memorandum dated 24 May 2017 requesting input for a Law Council submission in relation to the Australian Human Rights Commission (AHRC) Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) Consultation Paper. The Human Rights Committee has contributed to this submission.

The Law Society supports ratification and implementation of OPCAT, establishment of a national preventative mechanism (NPM) and the appointment of suitable bodies to conduct inspections of all places of detention. However, we are concerned that existing NSW inspection mechanisms may not be OPCAT compliant and consider that the AHRC would be a preferable national oversight body.

Arrangements in NSW

In NSW, responsibility for the inspection of correctional facilities currently lies with the Inspector of Custodial Services. In addition:

- the NSW Ombudsman has an officer responsible for visiting inmates and receiving complaints in NSW;
- the Inspector of Custodial Services oversees "Official Visitor" programs conducted in correctional facilities and juvenile justice centres. The role of Official Visitors is to receive grievances and complaints from inmates and report on custodial conditions, and each Official Visitor visits their designated facilities once a fortnight;
- section 10 of the *Inspector of Custodial Services Act 2012* (NSW) empowers the Inspector of Custodial Services to enter into an arrangement with the NSW Ombudsman regarding a complaint, inquiry, investigation or other action under the *Ombudsman Act 1974* (NSW).

It is not immediately clear how or why some functions are divided between the Inspector of Custodial Services and Official Visitors, or under what circumstances the NSW Ombudsman might take over some of the functions of the Inspector of Custodial Services. We consider

the presence of both bodies confusing and inefficient. Instead, for the purposes of OPCAT, it would be preferable to have a single NPM reporting body in NSW which in turn reports to a federal body (either the Commonwealth Ombudsman or AHRC) to avoid the dilution of responsibility and improve accountability and transparency with regards to inspection standards.

The NSW Government would need to have regard to how it may implement and adapt existing principles such as the Standard Guidelines for Corrections in Australia¹ in order to make state-based bodies OPCAT compliant.

Consideration would also need to be given to whether Official Visitors under the *Mental Health Act 2007* (NSW) should be subsumed into a single NSW NPM body. Currently, it is our understanding that Official Visitors to mental health inpatient facilities operate separately to Official Visitors who visit correctional facilities and juvenile justice centres, and report to the Principal Official Visitor and Minister for Health (NSW).

It would also be necessary to ensure that the inspection teams have suitably trained mental health staff, especially when visiting forensic hospitals and high risk management units such as the High Risk Management Correctional Centre in Goulburn to ensure that inmates circumstances can be professionally assessed.

National NPM body

The Law Society considers that the AHRC is a preferable national oversight body given its human rights expertise and engagement with international human rights jurisprudence. In addition, we are concerned that the Commonwealth Ombudsman is not currently sufficiently resourced to perform OPCAT functions.

However, should the Commonwealth Government prefer to establish the Commonwealth Ombudsman as the designated national NPM body, we suggest that consideration should be given to:

- amending the *Australian Human Rights Commission Act 1986* (Cth) to schedule the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- establishing regulations under the *Ombudsman Act 1976* (Cth) to permit the Ombudsman to share or delegate some or all of its inspection functions to the AHRC (in light of its expertise and resources);
- or, alternatively, permitting the Commonwealth Ombudsman and AHRC to enter into a memorandum of understanding for the same.

The purview of any national NPM should cover offshore detention, including regional processing centres such as Nauru and Manus Island and any other newly created regional processing centres. In our view, it is untenable for the Commonwealth Government to maintain that such facilities are outside of jurisdiction when it in fact maintains “effective control” of each.²

We consider that the conditions of regional processing centres and some Australian immigration detention centres are tantamount to “cruel, inhumane and degrading treatment” and should be inspected as a matter of urgency, in close consultation with the AHRC which

¹ Australian Institute of Criminology, *Standard Guidelines for Corrections in Australia* (2012) available at: http://www.aic.gov.au/media_library/aic/research/corrections/standards/aust-stand_2012.pdf

² For a discussion of whether the Commonwealth has “effective control” of offshore detention centres, see the decision in *S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483.

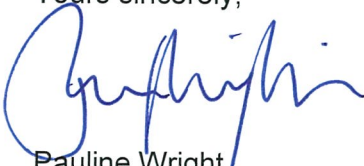
has already reported on conditions in immigration detention centres and the Commonwealth's OPCAT obligations.³

Show cause notices

Finally, we consider that both state and federal enabling legislation for each NPM should be amended to grant the relevant body the power to issue "show cause" notices to a detention facility where an issue is identified as being in breach of OPCAT or CAT (see for example section 33 of the *Inspector of Custodial Services Act 2003* (WA)).

Please do not hesitate to contact Chelly Milliken, Principal Policy Advisor, on 02 9926 0218 or chelly.milliken@lawsociety.com.au if you have any questions in relation to this letter.

Yours sincerely,



Pauline Wright
President

³ AHRC, *Human rights standards for immigration detention* (2013) available at: https://www.humanrights.gov.au/sites/default/files/document/publication/HR_standards_immigration_detention%20%284%29.pdf; AHRC, *Asylum seekers, refugees and human rights: Snapshot report* (2nd Edition) 2017, p.16 available at: https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_Snapshot%20report_2nd%20edition_2017_WEB.pdf