Submission to the Australian Human Rights Commission consultation on the implementation of the Optional Protocol to the Convention Against Torture and Cruel, Inhuman or Degrading Treatment in Australia (OPCAT)

July 2017

1 Introduction

The National Aboriginal and Torres Strait Islander Legal Services (**NATSILS**) supports the Australian government's commitment to protect the rights of people in custody by ratifying the Optional Protocol to the Convention Against Torture and Cruel, Inhuman or Degrading Treatment in Australia (**OPCAT**) by December 2017.

The NATSILS welcomes the opportunity to make a submission setting out our experience and knowledge in relation to the treatment of Aboriginal and Torres Strait Islander people in places of detention nationwide. The NATSILS endorses the North Australian Aboriginal Justice Agency's *Submission on consultations for the OPCAT* (Appendix A), the Australian OPCAT Network's *Joint Submission to the Australian Human Rights Commission Consultation: OPCAT and Civil Society* and the Australian Childs Rights Taskforce's *Joint Submission to the Implementation of OPCAT.*

In this submission, we seek to respond to six of the seven questions raised in the Australian Human Rights Commission (**AHRC**) Consultation Paper.

This submission has arisen from seriously held concerns about the disproportionate imprisonment rate of Aboriginal and Torres Strait Islander people in every state and territory and the particular vulnerability of Aboriginal and Torres Strait Islander people to ill-treatment in places of detention. There is substantial evidence indicating both willful neglect and intentional harm of Aboriginal and Torres Strait Islander people while detained in both civil and criminal facilities.

The NATSILS welcomes OPCAT's broad definition of 'places of detention', which includes 'places where people are deprived of their liberty'. Concern extends to the treatment of detainees in other involuntary detention facilities, including:

- Police and court detention facilities and vehicles;
- Youth detention and rehabilitation facilities;
- Other places where children are held (including adult correctional facilities);
- Disability and aged care facilities;
- Secure welfare hostels relating to wards of the State;
- Secure wards in hospitals and psychiatric facilities;
- Secure drug and alcohol rehabilitation centres;
- Places of military detention; and
- Immigration detention and processing facilities (onshore and offshore).

The NATSILS recommends that the National Preventative Mechanisms (**NPMs**) have unrestricted access to all abovementioned places of detention.

It is critical that NPM bodies are determined in full and transparent consultations with civil society and others as recommended by the Subcommittee on Prevention of Torture (**SPT**). The NATSILS recommend that Aboriginal and Torres Strait Islander representation should be required in all oversight bodies and expert advisory panels.

2 What is your experience of the inspection framework for places of detention in the state or territory where you are based, or in relation to places of detention the Australian Government is responsible for?

The NATSILS is the peak national body for Aboriginal and Torres Strait Islander Legal Services (ATSILS).

The NATSILS advocates at the national level for the rights of Aboriginal and Torres Strait Islander peoples within the justice system. The NATSILS brings together over 40 years' experience in the provision of legal advice, assistance, representation, community legal education, advocacy, law reform activities and prisoner through-care to Aboriginal and Torres Strait Islander peoples in contact with the justice system. The ATSILS are the experts on the delivery of effective and culturally competent legal assistance services to Aboriginal and Torres Strait Islander peoples. This role also gives us a unique insight into access to justice issues affecting Aboriginal and Torres Strait Islander peoples. The NATSILS represents the following ATSILS:

- Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (ATSILS Qld);
- Aboriginal Legal Rights Movement Inc, SA (ALRM);
- Aboriginal Legal Service (NSW/ACT) (ALS NSW/ACT);
- Aboriginal Legal Service of Western Australia (Inc.) (ALSWA);
- Central Australian Aboriginal Legal Aid Service (CAALAS);
- North Australian Aboriginal Justice Agency (NAAJA);
- Tasmanian Aboriginal Community Legal Service (TACLS); and
- Victorian Aboriginal Legal Service Co-operative Limited (VALS).

A number of ATSILS have identified specific deficiencies in the current inspection framework for places of detention, some of which are canvassed below.

2.1 Limitations of current oversight bodies to inspect

The Office of the Inspector of Custodial Services (OICS) in Western Australia has been commended as an independent oversight body that is most compliant with OPCAT. However, the effectiveness of OICS as an oversight body, is currently limited due to an inability of OICS to ensure that the Western Australian Government respond to recommendations made in OICS Reports. The NATSILS submit that enabling legislation giving effect to OPCAT should require a mandatory response by Governments concerned, where the NPMs have identified issues or made recommendations.

This limitation of the OICS to ensure its recommendations are heeded is highlighted in the case study below.

Case Study: Mr Ward and previous recommendations of OICS

> *Prior to the death of Mr Ward in 2008, an Aboriginal elder who died from heatstroke while being transported from Laverton to Kalgoorlie by Department of Corrective Services' contractors, OICS had warned that the use of the vehicle used to transport Mr Ward would be inhumane for anything other than a short trip. Mr Ward died on 27 January 2008 after suffering heat stroke in the rear pod of an unventilated prisoner transport vehicle during a 4.5 hour journey from Laverton to Kalgoorlie in remote Western Australia, in circumstances where the air conditioning failed. The outside temperatures that day were over 40 degrees Celsius. On arrival at the Kalgoorlie hospital, Mr Ward had a large burn on his abdomen from contact with the pod's metal surface and a core temperature of over 41 degrees Celsius*

In 2012, OICS reported concerns in relation to excessive lock downs at the Banksia Hill Detention Centre. OICS stated that excessive lockdowns were a casual factor in the 2013 riot at Banksia Hill. We note that OICS is not currently empowered to inspect police lock-ups or the Kath French Centre, a secure care facility under the Children and *Community Services Act 2004 (WA*), opened in May 2011 to hold children aged from 12 to 18 deemed at risk of self-harm or a risk to the community for as long as six weeks at a time. These limitations fundamentally restrict the ability of OICS to ensure the prevention of inhumane and degrading treatment in all places where individual liberty is deprived. We are highly concerned about the restrictions and limitations of OICS.

To this effect, the NATSILS submit that any enabling legislation giving effect to OPCAT must ensure that state based NPMs are entitled to inspect a broader range of places of detention, so as to ensure all places involving the deprivation of liberty are subject to oversight. The NATSILS submit that a non-exhaustive list of 'places of detention' would allow for flexibility in inspections of places of detention.

The NATSILS further submit that any guidelines or legislation aimed at regulating inspections must comply with the United Nations Standard Minimum Rules for the Treatment of Prisoners (Minimum Rules). Further discussion of this recommendation is at paragraph 4.4.

2.2 Inadequate complaints process for young detainees

Complaint processes in places of detention must be supported by mechanisms that enable and encourage young persons in detention to detail their concerns in relation to alleged mistreatment.

This is a particular concern in Northern Territory Youth Detention facilities, where complaint processes are rarely utilised by young persons to detail concerns of alleged mistreatment.

The North Australian Aboriginal Justice Agency (NAAJA) and Central Australian Aboriginal Legal Aid Service (CAALAS) have witnessed significant shortcomings in the current oversight, complaints and monitoring mechanisms operating in the Northern Territory.

The current safeguard for youth detainees in the Northern Territory is articulated under section 163 of the *Youth Justice Act 2005* (NT). This safeguard entitles a detainee or their responsible adult to make a complaint about the treatment of a young person. A complaint must be made in writing (with the assistance of staff if the detainee is unable to do so personally) and must go directly to the Superintendent.

Writing requirements represent a significant barrier for many young people who experience language or literacy limitations. In the absence of adult assistance outside the Corrections system, young detainees have very limited ability to complain confidentially. Young people face significant cultural barriers to utilising the complaints system and could potentially be silenced by the power imbalance that exists between themselves and the Corrections system.

Similarly, NATSILS has concerns about the complaint process for juvenile detainees in Western Australia. While detainees can make a complaint to the Superintendent or their delegate *(Youth Custodial Rule 203*) orally or in writing, the Rule provides that 'all attempts shall be made to resolve any requests, complaints or grievances at the lowest level of authority possible'. Detainees have told ALSWA that detention staff sometimes throw the complaint forms in the rubbish bin.

Limitations to the accessing and utilising complaints processes must be addressed so as to ensure that the oversight and prevention of inhumane and degrading treatment is not limited to those who are able to understand and respond to complaint processes. In particular, for children and young people to feel comfortable to make a complaint of misconduct, it is essential that they have regular access to trusted and child-friendly advocates or support persons.

2.3 Lack of independence of investigations

It is essential for NPMs and oversight bodies to have organisational and functional independence. The NATSILS raise concern that many jurisdictions do not have an office with a statutory mandate, guaranteed independence in access to resources, powers of access to information and places of detention, protection from removal and the ability to have urgent recommendations addressed by the relevant decision-makers, including ministers, departments, agencies and NGO providers.

Queensland's oversight bodies, for example, lack independence in relation to their process of inspection and reviews. The Office of the Chief Inspector in Queensland is empowered by the *Corrective Services Act 2006* (Qld) to undertake inspections and reviews of the operations of Corrective Services facilities and to provide independentscrutiny regarding the operational practices, standards and the treatment of detainees.

However, the Office of the Chief Inspector is within the portfolio of the Queensland Correctional Services, which reports to the Honourable Bill Byrne MP, Minister for Police, Fire and Emergency Services and Minister for Corrective Services (**Minister for Police**). The Minister for Police provides reports made by the Chief Inspector to Parliament. The

NATSILS hold concerns that the process for investigation is not independent, essentially amounting to an internal review.

Although in February 2017, the Palaszczuk Government recognised the need for an independent inspectorate to report finding and recommendations directly to Parliament, this has yet to be legislated.

NATSILS recommends that the independence of all inspectorates be contained within legislation.

3 How should key elements of OPCAT implementation in Australia be documented?

3.1 Legislation

The Australian government has indicated that it does not intend to create new legislation to implement OPCAT into federal law. The NATSILS regards this position as unsatisfactory, legislation being absolutely necessary to establish and ensure the continued implementation of and compliance with OPCAT in Australia.

To guarantee that monitoring bodies comply with the requirements of the OPCAT, it is imperative that their mandate, powers and independence are anchored in legislation.

Providing statutory definition of the role, expectations, powers and financial independence of the NPM can be particularly important for monitoring bodies that have a broad institutional remit. Legislation should also set out the process of selecting NPM bodies.

Whilst not intended to be an exhaustive list, legislation to give effect to the OPCAT should include the following features:

(a) A mandate to undertake regular preventive visits (Articles 4(1) and 19(1));
(b) Organisational and functional independence from government, including independence of NPM members and staff and financial autonomy;
(c) Multidisciplinary and diverse expertise, including gender balance and representation of ethnic and minority groups, specifically Aboriginal and Torres Strait Islander people;
(d) Free and unfettered access (to all places of detention, whether announced or unannounced; to all relevant documents and information; and to all persons including public employees and privately engaged contractors, including the right to conduct private interviews);
(e) The power to make recommendations to authorities, accompanied by a corresponding obligation for authorities to examine recommendations and enter into dialogue about their implementation;
(f) The power to submit proposals and observations to Parliament or the public concerning existing or proposed legislation;
(g) Appropriate privileges and immunities (no sanctions or reprisals for communicating with the NPM; confidential information should be privileged); and

(h) Ability to directly contact the SPT.

Legislation must clarify the residual authority of the NPMs to visit and inspect all places of deprivation of liberty, including private and 'unofficial' places of detention, as noted by the Consultation Paper at paragraph 34, on page 7. This will include new powers to inspect locations such as locked aged care facilities and group disability homes, to which there is not currently an effective NPM body, as well as guaranteeing the financial independence of NPM, specifically with regard to functions they will be performing under OPCAT.

NATSILS further recommends that the legislation setting out the structure and powers of NPMs should include a requirement of adequate Aboriginal and Torres Strait Islander representation.

Simple designation of existing inspecting institutions without accompanying legislation can also have implications in terms of the resourcing of NPMs and the impetus for institutional reform to ensure that the NPMs become OPCAT compliant.

The creation of novel Commonwealth legislation is necessary as it will also ensure the Central Coordinating NPM (of which the Australian Government has suggested will be the Commonwealth Ombudsman (**the Ombudsman**)) is vested with the necessary additional powers.

The introduction of Commonwealth legislation is also essential in providing a model for the implementation of coordinating legislation among the states and territories. This is particularly relevant as the coordinating mechanism of each state and territory will need to be vested with additional powers in order to properly implement OPCAT locally.

3.2 Implementation of formal agreements

The nature of Australia's federal system and its constitutional underpinnings mean that intergovernmental cooperation on implementing the OPCAT is essential. The Australian Government has already indicated that a 'mixed model' will be adopted for the preventive monitoring framework, whereby the Commonwealth creates and empowers a national coordinating NPM and the States and Territories create subsidiary NPMs to cover places of detention within their own jurisdictional authority.

It is crucial, however, that arrangements are formalised, documented and transparent to drive national coordination and consistency and ensure momentum in the implementation process is maintained across jurisdictions.

Such an agreement should incorporate an inter-governmental agreement, as well as agreements between the government, the NPM and Non-Governmental Organsiations (NGOs) and civil society and include the creation of national standards with regards to key subjects such as rights of inspection and conditions of detention.

NATSILS submits that such a formal agreement regarding the implementation of OPCAT between the Commonwealth, states and territories, must set out which level of

Government has primary responsibility for each place of detention in order to avoid confusion between the jurisdiction of complaint and inspection bodies.

At paragraph 69 on page 14, the Consultation Paper notes 'the national coordinating mechanism will need to establish working methods that ensure that it is satisfied at the adequacy of the individual inspection frameworks at the state and territory level, and to ensure that they are compliant with the requirements of OPCAT. These reporting requirements would be best set out in a formalised agreement detailing with the processes and procedures to be undertaken by each state and territory in reporting to the Commonwealth, as well as by the NPM and any NGOs engaged in the implementation process. The agreement should clarify the respective roles and responsibilities of all parties, therefore minimising the potential for future disputes and differing interpretations of the implementation of OPCAT.

The Consultation Paper goes on to propose nine different models to implement OPCAT across the Commonwealth, states and territories, with at least nine corresponding NPM inspection bodies. An agreement coordinating these nine programs will be essential in ensuring that all systems meet the standards set out in the OPCAT.

4 What are the most important or urgent issues that should be taken into account by the NPM?

4.1 Detainees with a disability

People with a disability are vastly overrepresented in all places of detention, with some data indicating that in excess of 60% of people in detention have cognitive impairment[1]. Despite the high prevalence of disability within the justice system, justice policy largely ignores the impact of disability on justice outcomes and the health and wellbeing of those who are detained.

Aboriginal and Torres Strait Islander people with disability are particularly susceptible to imprisonment. Aboriginal and Torres Strait Islander people with disability who are in detention typically have co-occurring disabilities, such as: hearing loss, which is usually bi-aural; higher rates of psychological distress; an unstable housing and social support environment; and exposure to trauma and violence. They have also faced a lifetime of systemic barriers to their early childhood development, schooling and further education, and employment prospects. The interaction of discrimination and systemic barriers they have faced over their life as a person who is both Aboriginal and has disability effectively places them on pathway towards detention.[2]

It is critical that the experiences and circumstances of Aboriginal and Torres Strait Islander people with a disability fall within the scope of a NPM. In addition to scrutiny over the supports provided to people with disability whilst in detention, the mandate of

[1] For example, NSW Juvenile Justice's '2015 Young People in Custody Health Survey' has recorded that 57.3% of young people in custody have intellectual disability.

[2] First Peoples Disability Network (2016) 'The life trajectory for an Aboriginal and Aboriginal or Torres Strait Persons with disability'. Chapter 2. Aboriginal and Torres Strait Islander Perspectives on the Recurrent and Indefinite Detention of People with Cognitive and Psychiatric Impairment.

the NPM should be sufficiently broad to include whether community based disability supported program is a more just and humane alternative to custodial detention in the first place.

Case Studies from NATSILS Submission to Senate Inquiry into Indefinite Detention of People with a Cognitive and Psychiatric Impairment[3]:

(a) *'Sam' a 10 year old Aboriginal boy from Broome with foetal alcohol syndrome and other behaviour issues, spent five days in police custody in August 2010. Whilst in custody he was allegedly mistreated by police who threatened to withhold food and take away his blanket. Sam was in custody for breaching bail conditions arising from a stealing charge.*

(b) *'Mary' is a CAALAS client who suffers from a cognitive disability. Mary is from Central Australia, but was found unfit to plead in WA and detained there indefinitely. By agreement between the WA and NT Governments, Mary was released from detention in WA and returned to Central Australia where public housing accommodation had been arranged. Unfortunately Mary was taken back into police custody following the commission of further offences. CAALAS was able to take instructions from Mary in relation to these offences, and the matter resolved to a plea with Mary receiving a term of imprisonment. In CAALAS' observation, being detained indefinitely due to a question of fitness to plead was far more distressing and traumatic for Mary than receiving a finite term of imprisonment. Whilst indefinitely detained, Mary was extremely frustrated and upset and would frequently ask her lawyer when she was getting out, and when she was going home. CAALAS observed the lack of certainty to be utterly tortuous for her.*

These particular case studies provided highlight the unique and complex vulnerabilities of Aboriginal and Torres Strait Islander people with a disability in places of detention that must be monitored and addressed with sensitivity by oversight bodies. Aboriginal and Torres Strait Islander people with a disability should be provided with adequate care to ensure the particular needs of those in detention are addressed so as to ensure safety and the prevention of inhumane and degrading treatment. This is particularly important where substandard conditions of detention and inhumane treatment can aggravate and worsen the impact of disability for a person whilst in detention.

4.2 Treatment of children and young people in detention

More than half of juvenile detainees between the ages of 10 and 17 are of Aboriginal or Torres Strait Islander descent. In 2013-14, Aboriginal and Torres Strait Islander young

[3] National Aboriginal and Torres Strait Islander Legal Services, Submission to the Senate Inquiry into the indefinite detention of people with cognitive and psychiatric impairment in Australia, April 2016, pg. 9. Found online at: http://www.natsils.org.au/portals/natsils/NATSILS%20Submission%20Indefinite%20Detention%20080416.pdf?ver=2016-04-15-192658-320

people were 26 times more likely to be in detention than the general population.[4] Overrepresentation, among other factors, makes young Aboriginal and Torres Strait Islander people particularly vulnerable to ill-treatment.

From Barwon in Victoria, to Cleveland in Queensland. From Don Dale in the Northern Territory to Cobham in New South Wales and Banksia Hill in Western Australia, over the past year we have heard story after horrifying story of children being mistreated in our youth justice system.

In South Australia, children at Cavan Youth Detention Centre were reportedly self-harming and being locked down for extended periods due to understaffing. In July last year, police investigated the alleged assault of a child in Ashley Young Detention Centre in Tasmania. In October, it was reported that children at Cobham Youth Detention Centre in Sydney spent up to 23 hours a day in cells and were handcuffed during their one hour of recreation. In Victoria, reports emerged that a child spent 10 days in solitary confinement.

It took graphic images of the dehumanising abuse of 17 year old Dylan Voller at the Don Dale Youth Detention Centre in Darwin to arouse public outrage and political action. However, countless young people have been subjected to similar treatment in places of detention across the country.

Images of children in restraint chairs. Staff charged with assaulting a child. Footage of children being tear gassed by guards in a former adult jail. Images of children being intimidated by dogs. Evidence of children left in prolonged solitary confinement, often due to chronic staffing shortages and lack of staff training. Staff forcibly stripping children at risk of self-harm, leaving them to lie naked and alone on the floor of a concrete cell.

Case study: Young people and the Banksia Hill Detention Centre

ALSWA has highlighted particular concerns about the treatment of young people in detention in Banksia Hill Detention Centre. In a 2012 report of the OICS, concerns were expressed about the use of management or regression regimes where juvenile detainees were placed in solitary confinement for 22-23 hours per day and isolated for extended periods. In one instance between late 2011 and early 2012 a juvenile detainee was isolated under various management regimes for 95 consecutive days. The President of the Children's Court described his treatment as amounting to 'psychological punishment' and 'psychological subjugation'.[5] ALSWA continues to receive instructions from young people in Banksia Hill that demonstrate that the practice of solitary confinement continues.

[4] Amnesty International, *A brighter tomorrow: Keeping Indigenous kids in the community and out of detention in Australia* (2015) 5 https://static.amnesty.org.au/wp-content/uploads/2016/02/A_brighter_future_National_report.pdf?x85233.
[5] Colleen Egan, 'Compo for teenage inmate who hit guards' *The West Australia* (online) 3 December 2016 https://thewest.com.au/news/wa/compo-for-teenage-inmate-who-hit-guards-ng-ya-124647.

As recently as 17 July 2017 the OICS published its report on the practices at Banksia Hill Detention Centre and made a number of findings/observations that support the need for greater independent oversight. The reports states that:[6]

- Behaviour management in juvenile detention 'is a longstanding concern for us';
- Banksia Hill (as the sole juvenile detention centre for entire state) does not have sufficient dispersal options;
- In 2016 there were a number of incidents of serious damage and self-harm 'reached unprecedented levels';
- Responses to 'critical incidents have conflicted with a rehabilitative, trauma-informed model' – some detainees have been denied their legislatively mandated time out of cell for exercise every day;
- There have been increases in 'restraint use and high level tactical response, and the centre continues to increase physical security, making the environment more punitive';

The report makes 17 recommendations, all of which demonstrate that the management practices in Banksia Hill fall far short of acceptable standards and that greater accountability and transparency is required. Specifically, the report recommended that the use of lockdowns for staff training and staff shortages should be minimised. While ALSWA has grave concerns about the use of solitary confinement as a behaviour management tool, it is unacceptable that children are confined to their cells because there is insufficient staff due to under-resourcing. There are also various recommendations concerning the need for improved record keeping practices as well as a recommendation to 'evaluate the safest and most humane way to deal with young people who spit and implement any required changes'.

Young people must be safeguarded from the profound and lasting impacts of ill-treatment. In light of the persisted ill-treatment of young offenders, NPMs should prioritise inspection of youth detention facilities, with close scrutiny upon the practices at Banksia Hill Detention Centre.

Oversight to ensure children are not transferred to adult prisons

Related to the ill-treatment of young people is the practice of children being transferred to, and detained in, adult prisons. In accordance with Australia's reservation to article 37(c) of the *Convention on the Rights of the Child*, there is no obligation to separate children from adults in places of detention, making them vulnerable to various forms of abuse. The small number of children in adult prisons means that when they are separated, children are essentially held in solitary confinement.

In 2012, the Victorian Ombudsman reported on a 16 year old Aboriginal boy who was transferred to Port Phillip Prison from a youth detention centre following an attempted escape, during which staff were injured. The child spent 99 days in the prison's extreme-security unit in solitary confinement. He was allowed outside his cell for two hours per day, at which time he was handcuffed and shackled. In August 2016 in Queensland,

[6] Office of the Inspector of Custodial Services, 'Behaviour management practices at Banksia Hill Detention Centre' (2017) http://apo.org.au/system/files/98616/apo-nid98616-356086.pdf.

footage emerged of a 17 year old boy in an adult prison being manhandled by seven guards. He was shackled, cuffed and forced into a mask. Late last year, the Victorian government transferred children from Melbourne Youth Justice Centre at Parkville to Barwon prison, a maximum security adult prison. The subject children reported extended solitary confinement, ongoing handcuffing and denial of proper education. The Victorian Aboriginal Legal Service (VALS) challenged the transfer, and were ultimately successful with the Victorian Supreme Court ruling that detaining children at the Barwon maximum security adult prison was unlawful. However, legislation still permits the transfer of children to adult prisons in certain circumstances.

Children should not be placed, at any time, with adult prisoners, nor should they be subject to extended solitary confinement and other forms of ill-treatment. NPMs should prioritise monitoring the practice of transferring young offenders to adult facilities.

4.3 The need for complementary access to independent complaints mechanisms which are sensitive to the needs of Aboriginal and Torres Strait Islander people

In addition to the need for a mandate-holder to focus on pro-active, preventative measures, there is also a need to ensure that corresponding, reactive complaints mechanisms exist and are accessible and responsive to the particular needs and rights of Aboriginal and Torres Strait Islander people. Complaint mechanisms within most places of detention are woefully inadequate in that they often lack independent investigation frameworks and are not accessible, nor trusted, to Aboriginal and Torres Strait Islander people, including young people.

Independence will be enhanced when it can be seen that the investigation has not been directed towards minimising the seriousness of the conduct involved, or diminishing the responsibility for misconduct or inappropriate behaviour or camouflaging poor performance.

The ability to assess these matters is in turn impacted by:

a) the quality of the initial fact gathering undertaken by the investigator – this task is crucial part of an investigation and any inadequate execution of such can compromise the entire investigation and the later process of making findings; and

b) generally, the level of transparency afforded into the investigation process.

Investigations that are carried out by an internal body are not, by reason of that fact alone, immune from being independent. However, achieving an acceptable level of independence both substantively and in terms of perception in such circumstances typically requires safeguards to be in place, such as a strong oversight agency. Sadly many jurisdictions fall short.

For example, complaints concerning allegations of physical assault at the hands of staff in correctional facilities in South Australia can be made by the person involved via a complaints handling process which does not mandate a response to the complainant.[7]

4.4 Improved prison conditions

The chronic lack of investment in detention facilities has led to substandard prison conditions. Under-resourcing and inadequate training combined with rising incarceration rates has resulted in overcrowding and unsatisfactory material conditions, including poor lighting and ventilation, bedding, and hygiene and sanitary conditions. Such conditions dehumanise detainees and strain relations among and between detainees and staff, increasing the likelihood of individual cases of abuse, neglect, self-harm and suicide.

In February 2017, the Aboriginal Legal Rights Movement (ALRM) drafted a submission to the Select Committee on The Administration of South Australia's (SA) Prisons (Appendix B).[8] In that submission, the ALRM expressed concerns regarding the state of SA's prisons. Particular concern was raised about the continued practice of doubling or tripling up in cells designed to accommodate a single person. The cells are outdated and do not have adequate floor space, particularly the cells in B Division at Yatala, which was built in the 1850s and has been the subject of many tragic deaths in custody.

In *Collins v State of South Australia* [9] the practice of doubling up detainees in the Adelaide Remand Centre was challenged. The challenge was based on the *United Nations Standard Minimum Rules for the Treatment of Prisoners*. Rule 9(1) of the *Minimum Rules* states:

> Where sleeping accommodation is in individual cells or rooms, each prisoner shall occupy by night a cell or room by himself. If for special reasons, such as temporary overcrowding, it becomes necessary for the central prison administration to make an exception to this rule, it is not desirable to have two prisoners in a cell or room.

However, Millhouse J confirmed:

> The Minimum Rules are not a convention, treaty of covenant. They do not impose obligations upon signatories. They merely declare principles. Consequently there are no obligations in International law flowing from them.[10]

The ALRM also holds significant concerns about the continued occurrence of preventable deaths in SA prisons because of the failure to implement numerous coronial recommendations about removing hanging points from inherently unsafe cells. Collins also highlights the fact that the UN minimum rules, now the Mandela Rules, are not accepted in Australian law as a standard against which Australian prisons can be judged or inspected. The case highlights the need for proper inspection standards to be adopted

[7] http://www.ombudsman.sa.gov.au/wp-content/uploads/correctional_services_audit_2012.pdf
[8] Aboriginal Legal Rights Movement, Submission to the Select Committee on The Administration of South Australia's Prisons, 13 February 2017.
[9] *Collins v State of South Australia* (1999) 74 SASR 200.
[10] *Collins v State of South Australia* (1999) 74 SASR 200, 207-8.

in Australian states and territories and applied by an independent monitoring body under the NPM.

NPMs are the practical means by which the preventative functions of OPCAT are realised. It is fundamental that NPMs acknowledge that lack of investment in detention paves the way for violence, abuse and neglect. While the issue is complex and pervasive, NPMs are best placed to bring the consequences of under-resourcing to the attention of government stakeholders, and work towards ensuring adequate expenditure on existing institutions.

Legislation giving effect to OPCAT should allow NPMs unrestricted access to detention facilities and access to any other document or material that may assist the NPM in forming a view as to the adequacy of prison conditions. The legislation should set out non-exhaustive national standards for the material conditions of detention, of which NPMs should be required to inspect. In the absence of a federal human rights act, it is fundamental that these standards comply with the *Minimum Rules*, which set out basic standards of accommodation, lighting, heating and ventilation, sanitation and hygiene, clothing, bedding, food, exercise and healthcare. NPMs should also be entitled to inspect evidence of funding, staffing and expenditure. The NPMs must have the requisite expertise and/or training in order to identify deficiencies make appropriate recommendations in this regard. We reiterate that NPMs should have Aboriginal and Torres Strait Islander representation.

4.5 Culturally responsive health and wellbeing services

Inadequate or culturally inappropriate health and wellbeing services is a common experience for Aboriginal and Torres Strait Islander people in places of detention, in both criminal and civil settings including hospitals.

This inadequacy perpetrates the physical and mental suffering and ill-treatment of Aboriginal and Torres Strait Islander detainees. In regards to the criminal justice system, it also hinders prospects of rehabilitation and reintegration. This is especially concerning for young Aboriginal and Torres Strait Islander detainees, who have a particular vulnerability to come into contact with the criminal justice system as a result of complex factors including socioeconomic disadvantage and systemic racism.

Case study: Ms Dhu's treatment as a young Aboriginal woman

> *ALSWA's Civil and Human Rights Law Unit acted for some of the members of the family of Ms Dhu at the Coronial Inquest into her death .Various experts gave damning evidence in relation to the quality of the medical care provided to Ms Dhu by staff at the Hedland Health Campus. The Director of the WA Centre for Rural Health gave evidence that Ms Dhu's complaints would have been taken more seriously if she were a white, middle class woman. An emergency department specialist noted that Ms Dhu's imprisonment, her prior drug use, and her rib injury, provided "distractions" for the medical staff in assessing how ill she really was. The inescapable truth is that Ms Dhu was shruggedoff as "faking it" by doctors and police, precisely because of compounding inequalities: she was*

a woman, poor, Aboriginal, in custody, living in a remote part of Australia and was a victim of domestic violence. [11]

As is well known, imprisonment has a deleterious effect on the physical and mental health and wellbeing of detainees. The health of those incarcerated is generally worse than that of the broader population, but it is especially the case for Aboriginal and Torres Strait Islander detainees.[12] A review of deaths in custody two decades after the landmark Royal Commission into Aboriginal Deaths in Custody found that the number of Aboriginal deaths in custody had increased over the previous five years. The report found that most of the deaths were due to natural causes, replacing self-harm as the leading cause of deaths in custody.[13] This is a particularly concerning trend in the justice system that must be addressed through the provision of culturally sensitive and supportive health care.

Aboriginal and Torres Strait people in correctional settings are more likely to experience elevated levels of mental illness and psychosocial distress. High rates of depressive episodes, anxiety and post-traumatic stress disorder were recently observed among Aboriginal and Torres Strait Islander people in prison. In one study, Aboriginal and Torres Strait Islander detainees reported receiving unclear information about their medications and less than a third reported custodial assuagement of their psychological distress.[14]

The provision of culturally appropriate care is also lacking in other places of detention, such as secure welfare facilities, hospitals, aged care facilities and psychiatric wards. Aboriginal and Torres Strait Islander people experience poorer health than other Australians and report greater dissatisfaction with health and welfare services. A study of 755 Aboriginal Victorian adults found one-third (29%) had experienced racism in health settings in the previous 12 months.[15]

The inadequacy of health and wellbeing services in places of detention may be attributed to a number of factors including lack of culturally responsive service provision, poor clinician-patient cross-cultural communication, a mistrust of Western clinicians/medicine and/or an inability to accommodate Aboriginal and Torres Strait Islander models of health and holistic therapy.[16]

Well-resourced, culturally responsive care on an organisational, systemic and individual level would work towards a greater level of wellbeing and more effective and targeted treatment for Aboriginal and Torres Strait Islander people. This is essential for ensuring Aboriginal and Torres Strait Islander people detained involuntarily are treated safely and with respect. Aboriginal and Torres Strait Islander people may then trust in the capacity

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[11] Aboriginal Legal Service of WA Inc, Annual Report: Royal Commission into Aboriginal Deaths in Custody 25 Years On, 2016, pg. 17-18. Found online at: http://www.als.org.au/wp-content/uploads/2015/06/2016-ALSWA-ANNUAL-REPORT-FINAL-PRINTERS-VERSION.pdf

[12] Australian Institute of Health and Welfare, 'Diverting Indigenous offenders from the criminal justice system' (2013) 3 http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129545614.

[13] Mathew Lyneham and Andy Chan, 'Deaths in custody in Australia to 30 June 2011: Twenty years of monitoring by the National Deaths in Custody Program since the Royal Commission into Aboriginal Deaths in Custody' (2013) http://www.aic.gov.au/media_library/publications/mr/mr20/mr20.pdf

[14] Stephane Shepherd, James Ogloff and Stuart Thomas, 'Are Australian prisons meeting the needs of Indigenous offenders?' (2016) 4:13 *Health and Justice* 6.

[15] M Kelaher, A Ferdinand and Y Paradies (2014) 201:1 'Experiencing racism in health care: The mental health impacts for Victorian Aboriginal communities' *Medical Journal of Australia* 142.

[16] Shepherd et al, abve n 12.

of the service to meet their needs. Practical measures include adopting an approach of trauma-informed care and ensuring staff understand verbal and non-verbal communication styles and respect family structures, culture and life circumstances.

Under OPCAT, NPMs will be in a unique position to monitor the provision of culturally responsive care in a range of places of detention. NPMs will be able to identify specific deficiencies and work collaboratively with the detention facility to make targeted recommendations. In doing so, NPMs can assist in not only preventing ill-treatment, which may arise as a result of prejudice, cultural incompetency and/or poor oversight, but also promoting the health and wellbeing of Aboriginal and Torres Strait Islander people.

In order to achieve this purpose, NPMs should be comprised of Aboriginal and Torres Strait Islander people and culturally trained health and welfare professionals. Aboriginal and Torres Strait Islander people should have ongoing involvement with the implementation of any recommendations. Aboriginal and Torres Strait Islander people who are involuntarily detained should have the opportunity to consult directly with NPMs on a voluntary and anonymous basis to report their personal experiences.

4.6 Culturally appropriate rehabilitation programs

The NATSILS holds similar concerns regarding the lack of culturally appropriate rehabilitation programs for Aboriginal and Torres Strait Islanders in places of detention. This extends to any place of detention that provides rehabilitation services, including prisons and youth detention facilities, secure welfare facilities, psychiatric wards, drug and alcohol rehabilitation centres.

Culturally appropriate rehabilitation services should not only be available in youth detention facilities and prisons, but also secure welfare facilities, psychiatric wards, drug and alcohol rehabilitation centres and any other involuntary detention facility purporting to provide rehabilitation services.

Aboriginal and Torres Strait Islander people who are pushed into the criminal justice system often do not qualify for rehabilitation programs. This is because they are frequently held on long periods of remand and those who are serving sentences are often serving sentences of less than 12 months for comparatively minor offences.[17] However, Aboriginal and Torres Strait Islander people are often more likely to experience sustained contact with the criminal justice system. Prison rehabilitation programs are often generic and do not accommodate the complex and unique rehabilitation needs of Aboriginal and Torres Strait Islander people.

The provision of rehabilitation services in both a criminal and civil setting should be holistic in approach and adaptive to the specific needs of Aboriginal and Torres Strait Islander people. Rehabilitation programs should recognise the impact of historical and socio-cultural factors and incorporate Aboriginal and Torres Strait Islander values and

[17] Queensland Corrective Services, 'Rehabilitation needs and treatment of Indigenous offenders in Queensland' 2010 7 https://www.premiers.qld.gov.au/publications/categories/reports/assets/rehabilitative-needs.pdf.

communication styles. Both children and adults should have access to culturally sensitive educational initiatives so as to facilitate self-determination.

When conducting inspections, NPMs should assess the adequacy of rehabilitation facilities and programs for Aboriginal and Torres Strait Islander people. All NPMs should comprise of Aboriginal and Torres Strait Islander people and/or Aboriginal and Torres Strait Islander people with expertise in the provision of rehabilitation services. Other members of NPMs should receive training in culturally responsive rehabilitation services.

5. How should the Australian NPM bodies work with key government stakeholders?

The NATSILS acknowledges that the relationship between NPMs and government stakeholders should be centered on cooperation, goodwill and constructive dialogue. However, concerns are raised as to whether findings and recommendations of NPMs will be met with government inaction and resistance. At the very least, government stakeholders should be required to respond to the recommendations of NPMs, a requirement which could be embodied in legislation or a formal agreement.

There is a lack of public reporting in Australia on issues identified during visits by monitoring bodies. At present, some monitoring bodies publish reports of monitoring visits and some do not. Regular public reporting would be an important tool for the development and implementation of effective preventative standards.

Further, it is essential that NPM bodies and the standards they adopt are informed by a human rights-based approach. In developing a human-rights based approach, we recommend that NPM bodies be required to liaise closely with human rights bodies. In this regard, we recommend that the Aboriginal and Torres Strait Islander Social Justice Commissioner be a key stakeholder.

For matters concerning children and young people, we recommend that the National Children's Commissioner, as well as Children's Commissioners, Guardians and Advocates in each state and territory, should be key stakeholders that NPM bodies engage with. We recommend that consideration be given to the appointment of a Commissioner for Aboriginal and Torres Strait Islander Children and Young People or similar position in each jurisdiction and that the Commissioner should act as a key stakeholder, particularly in relation to specific inspection standards required for Aboriginal and Torres Strait Islander children. To ensure the effectiveness of engagement between NPM bodies and key stakeholders, it is imperative that key stakeholders are provided with additional resources to enable meaningful engagement with NPM bodies.

Finally, we also consider it desirable for NPM bodies to liaise with and observe the recommendations made by Aboriginal and Torres Strait Islander community controlled organisations, relevant royal commissions, parliamentary inquires and other reviews to inform the development of human-rights based standards.

6. How can Australia benefit most from the role of the SPT?

The role of the SPT is fourfold; to visit places of detention, to advise and assist State Parties and NPMs with their establishment and functioning, to maintain contact with NPMs and offer training and technical assistance and provide advice on the protection of people in detention and to cooperate with other international, regional and national organisations and institutions.

Since it is expected that the SPT will only conduct a visit to Australia once every 7-10 years, the greatest benefit of the SPT lies in the latter three functions. In particular, the SPT will provide independent international oversight and a platform for collaboration and information sharing between the SPT, NPMs and government stakeholders. This will enable Australia to implement best practice standards of detention based on the experiences in other jurisdictions.

In paragraph 31 of the Consultation Paper it is stated that the 'SPT maintains strict confidentiality and will provide a confidential report to the Australian Government which will only be made public with the express permission of the Australian Government'. NATSILS recommends that it is important for NGOs to be provided with access to information contained in reports developed by the SPT.

7. After the Government formally ratifies OPCAT, how should more detailed decisions be made on how to apply OPCAT in Australia?

The Australian government has indicated that it intends to implement OPCAT over a three year period and that during this time, there will be a more detailed analysis of a broader range of issues. The AHRC has stated that it is open to undertaking a second round of community and stakeholder consultation in this second phase and we strongly support this.

It is critical that any future decisions are not made without extensive consultation with the community and stakeholders and in particular, NGOs representing the interests of vulnerable groups. It is fundamental that people with lived experience of detention, particularly Aboriginal and Torres Strait Islander people, play an active role in the ongoing consultation, design and implementation process. All oversight bodies should have Aboriginal and Torres Strait Islander representation.

Further we recommend that NPMs work closely with Aboriginal and Torres Strait Islander Legal Services, including NATSILS as their representative body.

The NATSILS would welcome the opportunity to provide further consultation, whether this be through a formal submission process, further stakeholder roundtables or targeted questions for relevant NGOs and civil society groups and experts.

Appendix A:

North Australian Aboriginal Justice Agency Submission on consultations for the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

North Australian Aboriginal Justice Agency

Submission on consultations for the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)

North Australian Aboriginal Justice Agency submission to the Australian Human Rights Commission.

July 2017

Thank you for the opportunity to make a submission to the consultation. The structure of our submission is based in response to the questions presented in the consultation paper.

We note that some of the issues raised in the consultation paper and our response may relate to issues raised as part of the Royal Commission into the Protection and Detention of Children in the Northern Territory. Our submission does not seek to explore these matters, and we await the final report to be handed down in the coming months that may also inform the OPCAT consultation process.
Our submission is as follows:

What is your experience of the inspection framework for places of detention in the state or territory where you are based, or in relation to places of detention the Australian Government is responsible for?

Based on NAAJA's experiences, the inspection framework in the Northern Territory (NT) for places of detention would need to be substantially improved to be OPCAT-compliant. Of particular concern is the overwhelming need for an independent statutory body to be established to identify systemic issues in the delivery of correctional services.[18]

Similar to other jurisdictions across Australia, Official Visitors in the NT have an important role in overseeing, monitoring and reporting on the treatment and conditions of prisoners in correctional and custodial facilities. Under the current framework, the Minister for Correctional Services appoints a minimum of three Official Visitors who visit custodial correction facilities at least once a month.[19] In this capacity, the Official Visitor can inquire into the treatment, behaviour and conditions of the prisoners and write a report to the Minister. They are not permitted to interfere or give instructions regarding the control or management of prisoners.

Despite the importance of their role, Official Visitors lack functional independence which is an essential requirement under OPCAT. As Article 1 of OPCAT states, the protocol's objective is to establish a system of regular visits undertaken by independent bodies. The Official Visitor's lack of independence is particularly highlighted by how they can be subject to conditions the Commissioner for Corrections deems appropriate. There is also no information surrounding how this service is made culturally appropriate for Aboriginal and Torres Strait Islander (ATSI) people. For example, whether prisoners are provided with an interpreter when they meet with the Official Visitor is not addressed under legislation.

Without functional independence it is evident that prisoners and detainees are reluctant to trust the systems in place or they may feel that their complaints are not leading to a resolution. For example, in NAAJA's experience and based on evidence provided to the recent Royal Commission, young people in detention centres believe it is not worth complaining because the complaints are not addressed.[20]

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[18] This issue was raised was raised in North Australian Aboriginal Justice Agency and Central Australian Aboriginal Legal Aid Service, submission to the National Children's Commissioner, *On the Optional Protocol to the Convention against Torture (OPCAT) in the context of Youth Justice Detention Centres*, June 2016, 3.
[19] *Correctional Services Act* 2014 (NT) s 29.
[20] North Australian Aboriginal Justice Agency and Central Australian Aboriginal Legal Aid Service, submission to the National Children's Commissioner, *On the Optional Protocol to the Convention against Torture (OPCAT) in the context of Youth Justice Detention Centres*, June 2016, 3; Evidence to the Royal

In addition to the official visitor, the Ombudsman can also investigate places of detention and handle complaints. The Ombudsman has the power to enter and inspect premises occupied by a public authority as well as access or copy documents on that premises and require staff to give reasonable help in accessing information. Whilst the Ombudsman has sufficient independence and impartiality,[21] it does not have a specific mandate to visit and inspect detention facilities. It is also evident that the Ombudsman's services may be underutilised by ATSI people, a concern raised in their recent annual report.[22]

In terms of youth detention centres, NAAJA's view on the roles and shortcomings of the Children's Commissioner and the Superintendent can be found in the recent joint submission with CAALAS to the Children's Commissioner in June 2016.
Seeing as the model identified by the Commonwealth will primarily rely on states and territories inspection process, we are of the view the NT's framework in its current state is unsuitable under OPCAT. The NT would benefit from an independent custodial inspector, similar to the Western Australian Inspector of Custodial Services. Adopting the WA model could rectify some of the issues that have been outlined. For example, the WA Office of the Inspector of Custodial Services focuses on institutional and systemic issues rather than individual complaints. Their reports on inspections and reviews are also tabled to Parliament and made publicly available.

NAAJA also believes that having ATSI people involved in the inspection and monitoring process is crucial. This should not only be encouraged in relation to internal staff within these processes but also specific consultative mechanisms need to be in place. In regards to whether health or mental health professionals should be included on visiting teams, such staff would need expertise in terms of ATSI people perspectives. For example, many psychological tools including assessing risk used for ATSI people are not 'normed' on Indigenous Australian perspectives but are seen as the most relevant tool.

To ensure government accountability and OPCAT-compliance, we strongly recommend that an independent statutory body be established in the NT.

How should the key elements of OPCAT implementation in Australia be documented?

As stated, we are of the view that a Custodial Inspector is required and similar to the Western Australia scheme. We are of the view specific legislation to enable this is important. We further recommend that the legislation set out the structure including for adequate Aboriginal representation across the facets and levels of a proposed structure (including, if the Inspector is not Aboriginal, for a Deputy Inspector to be an Aboriginal identified position and for other representations across the structure).
In our experience, the governance arrangements for Aboriginal people who constitute a significant proportion of the prison and detention populations (commonly between 80% – 100%) requires specifically set out legislation mandating Aboriginal involvement in this way. This is to ensure a level of genuineness and authenticity in the purported, stated approach of relevant agencies in relation to Aboriginal matters.

Commission into the Protection and Detention of Children in the Northern Territory, Alice Springs, 14 December 2016, 25 (Jamal Turner).
[21] *Ombudsman Act* 2009 (NT) s 12.
[22] Ombudsman NT, 'Annual Report 2015/2016' (Presented to the Chief Minister under s 152 of the *Ombudsman Act* for tabling in the Legislative Assembly) 14.

What are the most important or urgent issues that should be taken into account by the NPM?

In the NT, a Judge may declare a defendant unfit to stand trial if they lack the mental capacity to understand the charges, court proceedings and the instructions from their counsel.[23] If a person is declared unfit to stand trial, there are few options left for defendants with cognitive disabilities. There is often nowhere for the justice system to house these people and they frequently end up incarcerated and in prison for much longer than the recommended prison sentences for the original offences.[24] This is because the Northern Territory prison system does not provide the necessary mental health treatment for these intellectually impaired offenders and where access to country and family is fully integrated into treatment. This problem is compounded in the Aboriginal population which suffers from high rates of foetal alcohol syndrome disorder (FASD), which impairs cognitive abilities.[25]

The indefinite detention of Aboriginal people with intellectual disabilities in prisons simply because the government lacks the facilities to provide treatment is in violation of OPCAT's objectives. NAAJA recommends mental health facilities and mental health services be made available in prison or outside the correctional system to provide these offenders with the services they need to stand trial.

OPCAT is concerned with preventing torture and preventing other acts of 'cruel, inhuman or degrading treatment or punishment'. We note the discussion paper refers to a specific definition of torture under Article 1 of the *Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment* (paragraph 48), 'but that what constitutes 'cruel, inhuman and degrading treatment' is not strictly defined in international human rights law' (paragraph 50).

The discussion paper refers to an Australian Government interpretation of 'cruel or inhuman treatment or punishment' in section 4 of the Migration Act as an act or omission by which:

a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or

b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature.

The operative word 'reasonably be regarded' is subjective and can differ substantially depending on the world-view of the person interpreting the words of 'pain or suffering, whether physical or mental' that is 'intentionally inflicted'. It is very important to recognise that many Aboriginal people have different world-views and interpretations of words can differ substantially to other people's views.

We note at a foundational level a concern raised by community about the lack of respect towards Aboriginal laws and perspectives which is evident both within prison and detention facilities and through the operation of the Western legal system. This can

[23] Criminal Code Act, Section 43J, Northern Territory
[24] Steward, John "Aboriginal woman's jailing highlights plight of intellectually impaired Aboriginal offenders" 13, March, 2014, http://www.abc.net.au/news/2014-03-12/intellectually-disabled%C2%A0aboriginal-people-stuck-in-legal-limbo/5316892
[25] See National Indigenous Alcohol Committee, submission on the harmful use of alcohol in Aboriginal and Torres Strait Islander communities, *Addressing fetal alcohol spectrum disorder in* Australia, 2012, 8.

be degrading towards Aboriginal people and damage the relationship between Aboriginal communities and the law.

For example, the Galiwin'ku Community Statement on how to address domestic violence highlights the Western legal system's lack of acknowledgement to the Yolngu legal perspective. It states that Yolŋu Rom (law) is a path that follows the peaceful and balanced way of living together, which happens through the kinship system that ties everything together. Yolŋu Rom is deeply connected to land and comes out through land, stories, songs, paintings and ceremony. However, the Statement outlines that:

> When Balanda (Western) law does not respect Yolŋu law, young people learn not to respect Yolŋu law and start to disrespect each other…
> Jail does not teach people how to be a proper Yolŋu. It does not teach us how to act towards our kin and the roles and responsibilities that we must carry to ensure peaceful co-existence. In many instances, jail makes the problems worse, and young people come out and return to causing problems.[26]

The statement also stresses the need for cross cultural awareness as ignorance has a damaging effect on the community. Better communication and understanding is essential for improving relationships and productive pathways.[27] For instance, the statement says:

> Court is an incredibly difficult process for Yolŋu. We don't understand the roles of all the Balanda law people, because our law people are organised very differently. To us, it feels like we have no say. It seems like a dictatorship type of law that we can't influence.

The lack of respect and understanding of Aboriginal law and culture shows the added layer of vulnerability faced by Aboriginal people in the justice system and detention environments which may be interpreted as 'cruel and degrading treatment'. These different perspectives must be considered by the NPM bodies and highlighted as real issues for the way we collectively understand and interpret these words.

How should Australian NPM bodies engage with civil society representatives and existing inspection mechanisms (eg, NGOs, people who visit places of detention etc)?

The SPT recommends that:

> The national preventive mechanism should be established by a public, inclusive and transparent process, including civil society and other actors involved in the prevention of torture; where an existing body is considered for designation as the national preventive mechanism, the matter should be open for debate, involving civil society.[28]

Civil society organisations have valuable insight to offer Australian NPM bodies. Therefore it is important not to isolate these organisations and to make sure that they are aware and engaged in the processes under OPCAT in Australia. As has already been discussed, the current existing inspection mechanisms in the NT would not be

[26] David Suttle and Yirriṉiṉba Dhurrkay (eds), 'A Galiwin'ku Community Statement to Prevent Family Violence' (May 2016) 10.
[27] David Suttle and Yirriṉiṉba Dhurrkay (eds), 'A Galiwin'ku Community Statement to Prevent Family Violence' (May 2016) 14.
[28] SPT, *First Annual Report*, UN Doc. CAT/C/40/2, 14 May 2008, para. 28.

appropriate under OPCAT and NAAJA again stresses need to establish an independent statutory body in the NT.

Civil society representatives are in a unique position to offer first-hand observations about the situations in detention facilities for people deprived of their liberty. Regular consultation and liaison would be best to ensure that such organisations are engaged in the process. It is imperative that these consultations are meaningful and genuine, especially throughout the process of implementing OPCAT.[29]

Guidelines regarding confidentiality and information sharing should also be drafted. Additionally, establishing formal referral processes would help ensure that civil society organisations are able to effectively refer detainees and prisoners to the correct bodies for assistance.

Once OPCAT is implemented, civil society actors can be involved as advisory bodies, although this must not be merely symbolic.[30] Alternatively, civil society representatives could participate in NPMs in a personal capacity and provide their expertise.

Aboriginal Legal Services such as NAAJA have a broad range of people with access to, and working inside, prisons and detention centres including regular liaison with prisoners and across legal and other services such as prison support and Throughcare.

We recommend in line with the proposal for a statutory body that is OPCAT compliant that provisions are made for liaison with relevant NGOs during visits and as an informal meeting to inform the NPM process. This insight may assist and complement the key role of NPM to inspect and ensure prisons and detention centres are OPCAT compliant and can assist in practical advice for certain centres.

For the NPM bodies to be effective, civil society representatives must see them as credible. Accountability and transparency will be key to involving civil society organisations in the OPCAT process. For example, reports and publications produced by OPCAT-designated bodies should be made available publicly.

As the Association for the Prevention of Torture states:

> By distributing and discussing the findings and recommendations of the NPM and monitoring any related progress in the latter's implementation civil society will actively help support the ongoing work of the national monitoring body.[31]

Establishing effective linkages between the different monitoring and inspection bodies with civil society organisations will not only help provide oversight of detention facilities but will also assist in preventing torture and ill-treatment.

How should the Australian NPM bodies work with key government stakeholders?

In our view it is important a legislative framework sets out a process that is as transparent and accountable as possible including reports and information from an

[29] Association for Prevention of Torture, *Civil Societies and National Prevention Mechanisms under the Optional Protocol Against Torture* (June 2008) 8.
[30] Association for Prevention of Torture, *Civil Societies and National Prevention Mechanisms under the Optional Protocol Against Torture* (June 2008) 15.
[31] Association for Prevention of Torture, *Civil Societies and National Prevention Mechanisms under the Optional Protocol Against Torture* (June 2008), 19.

NPM provided publicly and to stakeholders broader than the relevant government department and responsible ministers.

We raise concerns that some of the issues and concerns raised in the 4 Corner's program 'Australia's Shame' on 25th July 2016 were reported in media and publicly and known to relevant Ministers in the period leading up to the program, but that it was the program that prompted a far-reaching response including legislative reform to ban the use of 'spit hoods[32]'.

As OPCAT deals with systems and general practice it is reasonable to propose a transparent and accountable process and to the extent that can be accommodated. In an age and time where prisons and detention centres have served century-old purposes but have substantially changed in practice over recent decades there is still some way to go to improving these centres so that they can reflect best practice in the rehabilitation and reintegration of prisoners. Increased transparency and accountability will encourage the various mechanisms of governments, parliaments and other mechanisms to be properly informed and involved in the process.

We also agree with the suggestions made by the United Nations Sub-Committee on the Prevention of Torture for the NPM as outlined on page 6 of the consultation paper.

Specifically for NAAJA's clientele base, it is important processes are put in place that adequately engage and consult with Aboriginal groups and leaders about best practice given the specific needs and circumstances of Aboriginal people. Language barriers, views of prisons as punishment, the overarching nature of many laws that impact Aboriginal people without taking into account Aboriginal cultural authority structures and alternatives to prison, the lack of qualified interpreters, the nature of sentences, the inability of Aboriginal prisoners to attend to cultural obligations including funerals and other matters are vitally important in considering cruel and inhuman treatment yet are often excluded from processes seeking to improve the prison and detention system. An NPM can serve a potentially important role if it is able to take these views on board and advocate and integrate them to broader systemic change and processes related to OPCAT.

How can Australia benefit most from the role of the SPT?

In our submission we have raised important issue relevant to Aboriginal people and particularly in relation to interpretation of words including 'cruel, inhuman and degrading treatment' (see page 5).

We note in the discussion paper the UN body SPT comprises 25 international experts on matters relating to OPCAT. We consider it important that views from an Aboriginal perspective that have currency internationally and that are related to the SPT can be identified amongst the 25 international experts. We have an opportunity to collaborate and learn from Aboriginal perspectives at an international level and through the SPT with appropriate representation.

[32] See Sky News 'NT to ban spit hoods in youth detention', 25 October 2016 http://www.skynews.com.au/news/politics/state/2016/10/25/nt-to-ban-spit-hoods-in-youth-detention.html

We note, at paragraph 31, the discussion paper states the 'SPT maintains strict confidentiality and will provide a confidential report to the Australian Government which will only be made public with the express permission of the Australian Government'. We are of the view that it is important NGOs such as NAAJA have access to information in the report to be aware of its contents and particularly as the Australian Government can potentially serve as an additional layer of accountability in the event prisons or detention centres in the NT are non-compliant with OPCAT.

After the Government formally ratifies OPCAT, how should more detailed decisions be made on how to apply OPCAT in Australia?

NAAJA would appreciate the opportunity to continue to be involved in discussions about applying OPCAT in Australia.

Appendix B:

Aboriginal Legal Rights Movement Submission to the Select Committee on The Administration of South Australia's Prisons.

13 February 2017

Ms Leslie Guy
Secretary, Legislative Council
Select Committee on The Administration of South Australia's Prisons
Parliament House, North Terrace Adelaide 5000

Dear Ms Guy

Submission of the Aboriginal Legal Rights Movement

The Aboriginal Legal Rights Movement (ALRM), makes a submission to the committee. ALRM is the peak body in South Australia for the representation of an advocacy on behalf of Aboriginal people in the state.

We have over 40 years experience in assisting Aboriginal prisoners and consider that we are uniquely placed to provide your committee with useful information and insight into current problems with the prison system.

I refer to your terms of reference.

Term of reference (a)
We enclose with this submission a copy of an article published by Dr John Paget in a journal, "Australian Policy Online ", entitled "More New South Wales Prisons: Evidence Free Public Policy" whilst the article was written in the context of New South Wales, it is in our submission equally applicable to South Australia. The tenor of Dr Paget's article is that there is no evidence to support an expansion of the prison system, that imprisonment is a very blunt and inefficient crime control measure and finally that the expansion of the prison estate at the expense of productive investment to increase community well well-being is a waste of public resources. We commend the article to the committee.

For your information, Dr Paget is a former Chief Executive Officer of the Department for Correctional Services of this state and may well have insights into the workings of the prison system in the state, as well as his comments arising from his former position as custodial inspector of New South Wales.

Put simply, the concern of ALRM is that the increasing rate of incarceration in South Australia is much too high and is directly attributable to legislative changes to the substantive criminal laws of the state, enacted by the Parliament. That this is so, is well understood by the Department for Correctional Services and we further understand, through Dr Hilde Tubex, an expert criminologist that the Department is able to measure increases in the incarceration rate, as determined by the introduction of more draconian criminal laws.[33] The cost of incarceration for a prisoner in the state is excessively high, and the increased number of prisoners as a debilitating effect upon the budget and upon the welfare of the citizens of the state.

[33] Law Society Bulletin, April 2016, page8."Symposium Calls For National Effort on Aboriginal Incarceration" by Christopher Charles.

ALRM invites the Committee to draw the comparison between Dr Paget's article and impulses in SA for justice reinvestment .ALRM will be happy to provide the Committee with information in oral evidence about that topic since ALRM is intimately involved in justice reinvestment work in this state.

Naturally ALRM is particularly concerned about the disproportionately high rate of Aboriginal incarceration, with South Australia recording the third highest rate in the Commonwealth.[34]

ALRM submits that the state should pursue an active policy of de incarceration and we note in that regard that recent amendments to the Sentencing Act are a step in the right direction, providing as they do for alternatives to incarceration.

Nevertheless the present state of overcrowding in South Australian prisons indicates that these measures have not in themselves affected the excessive incarceration rate. ALRM through its solicitors and field offices and from the voices of community members constantly hears of the bad consequences of that overcrowding. It dehumanises prisoners, it provides an unsafe and unsatisfactory custodial environment, and no doubt it places excessive and unreasonable demands on prison officers.

At the time of writing we are aware that aboriginal prisoners, particularly remandees are frequently incarcerated for lengthy periods of time in the City Watch House, Holden Hill Police Station Cells, Sturt Police Station Cells. and other designated police prisons. This practice is allow for as an emergency measure only by designation of police cells as police prisons under Part3 Division 1 *Correctional Services Act.*

That these cells are being routinely and consistently used as a remand prison was never the intention of the legislation and is an abuse which should not be contemplated or allowed for. The reasons are manifest.

1. Police cells do not provide proper access for visitors, for medical examination or treatment or for proper provision of food and exercise which are mandatory requirements both of the Correctional Services Act and of the United Nations Minimum Standards for the Treatment of Prisoners (The Mandela rules) , or the equivalent Australian standard, as discussed below.
2. Similarly they do not provide adequate resources for prisoners to have property in cells, for phone communication to relatives, friends and legal advisers and they do not provide for proper opportunities for employment, education, participation in projects and programs or other basic requirements for the humane and proper treatment of prisoners.

This is hardly surprising since the purpose of police cell is vastly different from that of a prison.

ALRM strongly recommends that the Committee seek information from the Department for Correctional Services on the actual statistics about the use of police cells, length of stay in them, degree of overcapacity and the failings in the provision of basic services to prisoners required by the *Correctional Services Act*.

This submission should not however be regarded as a plea for more and bigger prisons, to the contrary. ALRM is the view of the view that consistent with Dr Paget, this Committee should recommend a policy of de incarceration and justice reinvestment in South Australia.

[34] Ibid.

An issue that arose at the last Prevention of Aboriginal Deaths In Custody Forum Meeting, held at the Adelaide Remand Centre late last year, was the lack of provision of projects and programs for remand prisoners in that institution.

It might be thought that they are scarcely necessary for remand prisoners. To the contrary, again it is the experience of ALRM that many remand prisoners are held in custody because they are alleged domestic violence perpetrators, who have been remanded in custody because of their status as prescribed applicants due to the amendments to the Bail Act and the passing of section 10 A Bail Act.

It frequently occurs that these people, very many of whom are Aboriginal, serve time in custody on remand, and plead guilty on the first available opportunity. They are often released after a period of weeks or months on remand, with their family lives, their working lives and their social and cultural lives have been completely disrupted. It is those people who particularly need programs directed to cessation of domestic violence. To their credit, the executive officers of the Department are aware of this and are attempting to remedy it. But still not enough is being done, and there are no prospects for those who are held on remand in police cells. The Committee should seek information on this issue

In addition, ALRM has been concerned for many years that increasing capacity of existing prisons, simply by putting in more accommodation does not allow for the adequate provision of services to those prisoners.

Prisoners have rights under the Correctional Services Act.
They include rights to have visitors, to have mail, to have property in their cells, to have access to communications by telephone, and most importantly to have access to education, to projects and programs required for rehabilitation (often mandatory these days for the granting of parole), and to meaningful employment in the prison system.

From attending PADIC Forum meetings in all South Australian prisons for many years, ALRM is aware that there is a constant stream of complaints from Aboriginal prisoners that these basic humane requirements are not met and are consistently not met due to inadequacy of resources. Of particular concern is the fact that it is now commonplace for prisoners to not be able to apply for parole because they have not fulfilled their requirements for rehabilitation programs. They remain in custody and do not get parole because the programs were not available to them while serving their head sentence. That means that they always serve imprisonment well beyond the end of the non-parole period.

The other concerns mentioned above about basic rights are also frequently not met, after provision of new accommodation, the provision of services to prisoners simply does not keep pace with the increased demand due to increased prison numbers. An example is that when new accommodation was placed in the Adelaide Women's Prison, there were simply were not enough telephones to cater for the needs of the increased population to have access to their children and families by telephone communication. It is to be hoped that this has since been remedied.

Again ALRM recommends that the committee closely question departmental officers about the Department's ability or not to provide the basic services mentioned above and which are mandated by the Correctional Services Act.

Those rights include;

- a right to have visitors, s. 34 *Correctional Services Act*
- a right to vote in state elections
- rights to have mail, S. 33 *Correctional Services Act*

- a right to have access to legal aid, s35 *Correctional Services Act*
- a right to have goods in their cell, s33A *Correctional Services Act,* as affected by Standard Operating Procedures.

In addition it is implicit in the Act and its proper interpretation and implementation the prisoners should have a right to work, including remand prisoners (*section 29 Correctional Services Act*) and have access have access to education, section 30 *Correctional Services Act.*

In addition ALRM has been consistently concerned about the failure of the Department to provide safe and humane prison cells. These concerns were brought out most clearly in the Varcoe inquest of 2002 and the failure of the Department to be able to upgrade all cells in South Australia to the standard of the Victorian safe cell design principles, recommended for by the Coroner in that inquest is an ongoing concern.

Attached is that this submission is an academic journal article, on point.[35] ALRM also notes with great concern the continued practice of doubling up and tripling up in all cells in South Australian prisons.

This is a further consequence of prison overcrowding, and it is no answer to ALRM 's concern that for cells which are inherently unsafe, to say that at least the new double bunks do not have hanging points, since the unsafe cells contain many other hanging points, which tragically are used by prisoners for the purpose of self-harm. The Varcoe inquest, referred to above is such case.

ALRM suggests that this committee recommend that the coronial recommendations from the Varcoe inquest be implemented completely.

Term of reference (c)
One of the consequences of prison overcrowding and doubled up cells is that both the Department and the Prison Medical Service have less capacity to control the spread of infectious disease months prisoners. This is a matter which was agitated in the Marshall Carter inquest of 1999-2000. ALRM understands that selection of prisoners for double up cells no longer includes consideration of whether one or other of the prisoners to be doubled up has an infectious disease. This is clearly unsatisfactory and represents a further departure from proper standards of safety and humane incarceration.

In *Collins v State of South Australia* [36] an attack was launched on the practice of doubling up[37] prisoners in the Adelaide Remand Centre. The attack was based on the United Nations Standard Minimum Rules for the Treatment of Prisoners.[38] Rule 9(1) of the Minimum Standards states:

> Where sleeping accommodation is in individual cells or rooms, each prisoner shall occupy by night a cell or room by himself. If for special reasons, such as temporary overcrowding, it becomes necessary for the central prison

[35] The Coroners Act 2003 (SA) and the Partial Implementation of RCIADIC : Consequences For Prison Reform. By Christopher Charles volume 12 edition 2Australian Indigenous Law review 2008.
[36] *Collins v State of South Australia* (1999)74 SASR 200.
[37] Doubling up is a practice whereby two or more beds , usually a double bunk , are placed in what was formerly single cell and two , or more prisoners are place in a cell ,originally designed for one. It was the subject of adverse comment by the State Coroner is the Carter inquest: SA Coroner, *Finding of Inquest: Marshall Carter* (2000)
<http://www.courts.sa.gov.au/CoronersFindings/Lists/Coroners%20Findings/Attachments/120/CARTER%20Marshall%20Freeland.pdf>.
[38] ESC Res 663C, 24 UN ESCOR Supp. (No. 1) UN Doc E/3048 (31 July 1957); amended by ESC Res 2076, 62 UN ESCOR Supp (No 1) UN Doc E/5988 (13 May 1977).

> administration to make an exception to this rule, it is not desirable to have two prisoners in a cell or room"

Millhouse J said of the Minimum Rules that :

> The Minimum Rules are not a convention, treaty of covenant. They do not impose obligations upon signatories. They merely declare principles. Consequently there are no obligations in International law flowing from them.[39]

In so deciding on the status of the Minimum Rules, Millhouse J dismissed an important limb of Mr Collins argument and his case was unsuccessful. .

In so far as the Judge was referring to binding legal obligations, being imposed on the state of South Australia, and enforceable as rights, or even as legitimate expectations for prisoners he was correct.

But it is certainly true that moral obligations flow from the Rules and that their influence is felt in South Australian prison standards through the Australian Standard Guidelines for Corrections. South Australia is always subject to criticism for breaches. Such criticism is however political and moral criticism, and it for this reason that ALRM raises this issue in the public forum of Parliament.

A further consequence which reflect on administration of prisons, of doubling up and tripling up of cells is the lack of amenity of those cells for prisoner's habitation. This was discussed by the State Coroner in the Carter inquest[40] and the Coroner pointed out that if a prisoner chose not to sleep on a bunk but to sleep on the floor, they would be do so with their head adjacent to the toilet. This is clearly unsatisfactory, and is a consequence of such overcrowding. This should be borne in mind that all the cells referred to which are now doubled and tripled up were cells originally designed for one or at most two prisoners. They do not have adequate floor space and they are inadequate and outmoded, particularly themselves in B Division at Yatala, which was built in the 1850s and has been the subject of tragically many deaths in custody. Please see detailed discussion below. We enclose with this submission a letter sent to the Correctional Services Advisory Council by ALRM in 2007. That letter referred to total of 20 deaths in custody from 1994 two 2004 and included a total of nine deaths in Custody in Yatala, most of which were hangings.

With respect ALRM does not accept the Ministers assurance that the rate of death in custody for significantly decreased we do not accept it because preventable deaths continue to occur on account of the failure of government to implement coronial recommendations to stop preventable deaths.

From 2004 to the present there were 43 deaths in SA prisons (including police holding cells), excluding those deaths of which we are unaware and which have not yet been the subject of a coronial finding. Five of the deaths in SA prisons from 2004to the present are of Aboriginal people.

In addition to the above figures, there is the notable death of Kunmanara Cooper who died by hanging at Mimili Community whilst making return journey to Pipalyatjara from prison. Kunmanara Cooper[41] was not provided with a safe passage home to the community where he was required to reside as a condition of his bond. The Coroner

[39] *Collins v State of South Australia* (1999)74 SASR 200, 207-8.
[40] www.courts.sa.gov.au/coroner/fingdings/Marshall Freeland Carter
[41] www.courts.sa.gov.au/ coroner/findings/2005/kunmanara cooper

found that DCS did not fulfil an obligation to facilitate Kunmanara Cooper's return to the place where he was originally taken into custody & was subsequently required to reside.

The State Coroner said this on the topic of the Department's obligations to return ex-prisoners to their place of residence.

1.1. This is a difficult issue. It is true that when a person is no longer in [42]custody, he cannot be forced to return home to any place, whether on the Anangu Pitjantjatjara Lands or not. On the other hand, Kunmanara Cooper was taken from Pipalyatjara, in custody, more than 1500 kilometres away and then released with an obligation to live at Pipalyatjara. In those circumstances, in my opinion the Department for Correctional Services was under an obligation to facilitate his return from whence he came. Whether this should have been by air, or escorted in a department vehicle are matters for debate. In my opinion, the duty is more extensive than to supply a bus ticket to Marla.

ALRM is concerned that since that case, no more has been done by DCS to carry out this duty for prisoners returning to the APY Lands than to provide them with bus tickets to Marla Bore. The evidence in the Kunmanara Cooper case was that his home community was some 500 km west of Marla and that he died on the way home. ALRM submits that a recommendation should be made that a proper and effective repatriation policy be applied by DCS for Aboriginal prisoners

Of the above 6 Aboriginal deaths (including the death of Kunmanara Cooper), four of those were preventable - pending the coronial findings for the deaths of Kunmanara Ken and Mr Morrison.

Without wishing to pre-empt the coronial process we note that the death of Kunmanara Ken appears to be another distressing case where the cause of death may be by hanging and in B Division of Yatala Labour prison. In light of that case, and in light of the five other cases of death by hanging in Yatala Labour Prison and four in the Adelaide Remand Centre[43] and 1 in Pt Augusta Prison since 2003-4 , ALRM maintains its submission, to this Committee which it made in 2007 to the Correctional Services Advisory Council that preventable deaths still occur in South Australia prisons because of the failure of the Department to implement numerous coronial recommendations about removing hanging points from inherently unsafe cells. ALRM reiterates its observation that B Division of Yatala Labour prison, having been built in the 1850s is unsafe and should not be used to house prisoners.

Term of reference (d) (i)

Ms Amanda Lambden the Criminal Practice Manager of ALRM acts for the prisoner involved in this case She is writing separately to the Committee to express an interest in presenting oral evidence to the Committee in relation to the incident occurring on 15th July 2016.In particular her oral evidence will relate to:(d)(i) A Prisoner given Leave to attend a funeral but was prevented from re-entering Yatala Labour Prison at the appointed time.

[42] Ibid Kunmanara Cooper inquest

[43] The coronial case of Simon Schaer, death on 15.12.05, inquest findings 28.11.08 was a Suicide by jumping from height at the Adelaide Remand Centre

However she will say that her client has been charged with Unlawfully at Large pursuant to Section 254(1)(b) of the Criminal Law Consolidation Act 1935,a Major Indicatable Offence and that the matter is currently before the Central District Criminal Court and as such she cannot comment at this stage .However she indicate that she has an interest in presenting oral evidence to the Committee in relation to the incident occurring on 15th July 2016.

Term of reference (d)(ii)

ALRM is not aware of the circumstances surrounding any concerns that may apply to the specifics of this case.

We do however make a general submission. Put simply ALRM is concerned that if after proper psychological and criminogenic assessments, a long-term prisoner , convicted of murder and rape has been rehabilitated to the extent that they should be granted leave of absence under existing provisions of the *Correctional Services Act*, to umpire football matches, there is no good reason why such leave should not be granted. There is an additional consideration. It is frequently the experience of ALRM that long-term life prisoners become institutionalised in the course of their incarceration. This is hardly surprising. In order for them to be paroled they need to be re-socialised and whilst recent amendments to the Act allow for resocialisation after parole has been granted, there is no good reason why such prisoners should not be granted leave to umpire football matches in order to achieve resocialisation, if their progress in rehabilitation warrants it.

As a further example of this point, ALRM points out that in the in the recent 2015 bushfires, prisoners from Cadell Training Centre as part of the local CFS crew were very successful in supporting the CFS effort and were responsible for the saving of houses and livestock. That vital community service was carried out by prisoners, yet we hear no complaint of that and nor should we.

Term of reference (d)(iv)

ALRM acts for the family of the deceased in relation to the death in custody which is the subject of this term of reference. The matter is before the State Coroner. It is sub judice. ALRM makes no submission about it for that reason

In relation to terms of reference (d) (iii),(v)and (vi) ALRM makes no submission but points out that in relation to the alleged siege, it is likely that a number of prisoners will be charged with disciplinary offences before the visiting tribunal Port Augusta prison. As such those matters are also sub judice and it is submitted should not be discussed by the Committee until those matters are resolved.

Term of Reference (d)(vi) General Matters

(1) <u>Lack of accountability of DCS administration over visitors</u>

ALRM is most concerned by recent amendments to the *Correctional Services Act*, not as to the subject matter but as to the manner of the enactment and administration we refer to sections 85A and B Correctional Services Act which were inserted and substituted in 2005 and 2012.

Those sections deal with the exclusion of visitors and the power to search and arrest visitors. In terms of maintaining security of prisons and preventing passing of contraband to prisoners during visits, there are obviously good public policy reasons why such sections are required.

Never the less ALRM is concerned that there is no accountability in relation administration, which could be used to the prejudice of visitors, legitimately visiting their kin, but who are excluded on the basis of suspicion that they may bring in contraband or otherwise interfering with the good order or security of correctional institutions.

Draconian powers are given to the manager and the Chief Executive to exclude persons from visits "until for further order or for a specified period."[44]

ALRM submits that the legislation should impose specific time limitations on banning orders and that the existing power to vary or revoke exclusion orders under s85A subsection 2 should be made much more explicit by giving excluded persons a specific right of appeal and further that in relation to the power to ban visitors referred to above, it should have included in it a specific obligation on the manager and the Chief Executive to give statements of reasons for decisions to ban visitors. The need for statement of reasons is particularly clear because of the very breadth and lack of specificity in the very broad powers to exclude, referred to above.

(2) Prison inspection and the lack of standards against which South Australia prisons are judged.

A general observation, ALRM submits that the committee should recommend for the proper implementation in South Australia of the optional protocol on the Convention Against Torture. (OPCAT). The implementation of this convention would require the creation of a proper prisons Inspectorate in South Australia to monitor prisons against appropriate standards.

At the moment South Australian prisons are notionally measured against the Australian standard guidelines for corrections, based upon United Nations minimum standards for the treatment of prisoners, (the Mandela rules). The Australian Standard Guidelines for Corrections s are purely aspirational and are manifestly not met in South Australia, particularly having regard to what occurs in police prisons, and in doubling and tripling up of prisoners in cells as discussed above in relation to Mr Colllins case and in the Carter inquest .

The author Giffard said the following of the Minimum Rules:

> Furthermore, although the rules as a whole are not a legally binding document, some of the specific rules may reflect a broader legal obligations that do have binding status and provide guidance in their interpretation .For example SMR31 states that 'corporal punishment, punishment by placing in a dark cell, and all cruel, degrading or inhuman punishments shall be completely prohibited as punishments for disciplinary offences', clearly restating the general prohibition against torture and inhuman treatment (Rodley 1999:280-1)In its third report to the Human Rights Committee, Australia indicated that the principles in the Standard Minimum Rules were reflected in the *Standard Guidelines for Corrections in Australia*. These though not binding on Australian States and Territories, provide assistance to legislatures and prison authorities in the drafting of rules.[45]

[44] 85A (1) (a) (ii) and (b) Correctional Services Act
[45] Camille Giffard, 'International Human Rights Law Applicable to Prisoner' in David Brown and Meredith Wilkie (eds) *Prisoners As Citizens* (Federation Press, 2002) 177.

Prison inspection in South Australia now occurs under Part three Division two, section 20 of the Correctional Services Act.

This provision is woefully out of date and unsatisfactory. Section20(2) allows for the Governor on the recommendation of the Minister to appoint a "suitable person" to be an inspector. Frequently a Justice of the peace or retired lawyers take on the role. They have no specific training or expertise in prison inspection.

They do not inspect prisons against any appropriate inspection standard other than "whether the provisions of this act relating to the treatment of prisoners are being complied with" Section20(1) . This is a self-referential standard which does not address the question whether the Act and the administrative procedures under it, themselves comply with any appropriate standards, whether the Mandela rules or the Australian Standard Guidelines.

In addition under subsection 6 the inspector may only report to the Minister and may make recommendations to the Minister. There is no public scrutiny of the process and there is not even a direct obligation to report to the prisoner concerned regarding the results of any complaints.

ALRM commends to the Committee the Western Australian *Inspector of Custodial Services Act 2003* , which allows for properly trained prison inspectors to report to the Parliament and to make open and transparent and publicly available reports. In addition the Inspector creates inspection standards for prisons against which their operations are judged. For example the Western Australian Inspection Standards for the treatment of Aboriginal prisoners provide a high standard with the appropriate treatment of Aboriginal prisoners in institutions. A copy is attached to this submission and we commend it to the Committee.

(3) Youths in Adult Prisons

In South Australia, S 63&63A *Young Offenders Act* 1993 deal with the transfer of youths in detention to prison. By section 63(3) the matter is in the discretion of the Youth Court, and youths can apply to be transferred to prison from a training centre.

In general it is the policy of ALRM not to assist youths making such applications, because the consequences are very serious and there have been instances of deaths in custody arising from and consequential upon such transfers. The Committee is referred to the coronial cases of Marshall Carter and Goldsmith in that regard.

ALRM has a concern that youths are very vulnerable and notwithstanding their bravado and desire to be transferred to adult prison it is not appropriate in the vast majority of cases. Given the gross overcrowding of South Australia prisons and the attendant dangers and hazards of prison life, these concerns of ALRM are the more compelling.

We note with approval section 63A (2) to the effect that a youth, having served time on remand in an adult prison and not imprisoned for an adult offence, and who still has a youth sentence running must be transferred back to a training centre. This is an appropriate policy and should be maintained.

(4) Prisoners with chronic illnesses and disabilities

There is a long and proud history in South Australia of justified curial disapproval of using prisons as a detention place for people with intellectual disabilities and mental illnesses. The relevant cases were summarised by Judge Tilmouth of the District Court in the case of *R vT,JA* (2013) SADC.

Notwithstanding that, there is a continuing process of prisoners who have been found unfit to plead or mentally incompetent to be housed in prisons, pursuant to Part8A *Criminal Law Consolidation Act* ; refer to section 269V (2).

ALRM is particularly concerned that the Sentencing Advisory Council has recommended that, given the increasing number of persons found to be mentally incompetent or unfit to plead who do not have a mental illness, rather a an intellectual disability, they are not suitable to be housed in James Nash house, but they frequently find themselves imprisoned for lack of other suitable accommodation.

We also note that it was only after ALRM made representations to the Department in 2014 that arrangements were made for disability support pension is to be made available to prisoners who are eligible and able to receive it.

ALRM submits that this Committee should make a strong recommendation to the effect that the relevant recommendation of the Sentencing Advisory Council be implemented as soon as possible.

ALRM is also aware of the circumstances of Aboriginal prisoners who suffer from a variety of chronic illnesses and injuries. It is not suggested that the Prison Medical Service and the medical staff provide other than an adequate and competent service, however ALRM is aware that these Aboriginal prisoners suffer dreadfully in prison because of their fear of the consequences of their medical condition in the absence of appropriate community supports. They also suffer constant chronic pain as a result of the illnesses. This may make them difficult for other prisoners to live with. Thus their medical condition is compounded by the effects of ostracisation. In short the totality of their medical needs is not met in the prison environment.

(5) <u>Anangu prisoners, particularly in Port Augusta prison</u>

It was the experience of ALRM in the 1980s and 1990s that comparatively few Aboriginal people from the APY and Maralinga lands were imprisoned. At most there were four or five such prisoners in Port Augusta prison at any given time during that period.

Whether as a result of the Mullighan Inquiry or from the dramatically increased police presence on the APY lands since the petrol sniffing inquests of 2002 and 2005, the number of Anangu male prisoners in that prison now frequently exceeds 50 or 60. In addition there are a significant number of Anangu women in the Adelaide Women's Prison.

In 2013 ALRM wrote to the Department for Correctional Services expressing concern on behalf of these prisoners that there are few if any interpreting services available in the prison environment for these prisoners for whom English is a second language. As a consequence their life in prison was more difficult than for others. In addition ALRM had reason to be concerned that many of these prisoners likely suffered cognitive deficits as the result of petrol sniffing. Consistent with the coronial recommendations from2002 & 2005 ALRM recommended neuro psychological testing for such prisoners, since obviously their ability to participate in rehabilitation programs and in education would be affected by the degree of their cognitive deficits. ALRM is concerned that that recommendation was not carried out and that the vastly increased numbers of Anangu prisoners, particularly in Port Augusta are likely to suffer the terms of their imprisonment more harshly than other Aboriginal prisoners.

It is also of concern that an annual visit from elders and Aboriginal health workers from the APY lands which had formerly been arranged through the Nganampa Health Council

has been discontinued. ALRM continues to be concerned that this particular subgroup of Aboriginal prisoners experience imprisonment, and being taken away from their homelands more harshly than other prisoners. It is in that context that our concern over the inadequacy of the Department's repatriation policy for such prisoners, upon their release from prison, expressed above in this submission assumes even stronger force.

ALRM also notes with concern, that although recent amendments to the *Sentencing Act* allow for home detention in lieu of imprisonment, and although those amendments allow for home detention on Aboriginal Lands, effectively they are unusable on the APY lands, or at Yalata , or on the MT lands because of a lack of supervision arrangements or monitoring arrangements being available. We also note in that regard the non-implementation by government of the recommendation of the State Coroner in the petrol sniffing inquests for a small-scale correctional facility to be built on the APY lands.

(6) Prisoners complaints

The State Ombudsman has jurisdiction over prisoners complaints. There is also an arrangement whereby prisoners are able to access a free call prison telephone complaint service. Prisoners are expected to raise their concerns with Unit Managers and Case Management Coordinators before using the Departmental complaint procedure.

The 2013 14 DCS Annual Report discloses that the Ombudsman's recommendations about improving the internal complaints process have in many cases been adopted. ALRM is concerned however that, Departmental complaint procedures do not in themselves specify guarantees for prisoners that if they make complaints about officers, they will not be subject to victimisation or informal retribution.

This is in marked contrast with the Western Australian prison inspector's Inspection Standard for Aboriginal prisoners which mandates such guarantees. ALRM recommends that the Committee reviews the Departmental complaints procedure, and compares it with the standards arising from the Western Australian Custodial Inspectors.

Consistent with what has been said above about the inadequacy of the South Australian prison Inspectorate system, the South Australian prisoners complaints system is also unsatisfactory and for the same reason; that is, that there are few if any adequate and publicly available standards against which prison administration and the conduct prison officers can be judged.

ALRM does not assert that there are no standards, but submits that they should be placed into the legislation itself. ALRM reiterates the concern expressed by the late Commissioner Johnston QC in the RCIADIC case of Semmens[46] , that the South Australian *Correctional Services Act* does not contain any explicit or specific statement of the duty of care or prison officers toward prisoners.

(7) Women Prisoners

ALRM notes with concern the dramatically increased rate of incarceration for Aboriginal women in South Australia. ALRM consistently attends PADIC forum meetings held at the Adelaide Women's Prison . Apart from the concerns mentioned above about provision of basic services like telephones, ALRM continues to hear complaints and concerns by women prisoners about lack of consistently applied programs which are

[46] Commonwealth, Royal Commission Into Aboriginal Deaths In Custody*, Individual Death Report: Gordon Michael Semmens* (1991).

culturally appropriate to the women, and similarly in relation to suitable employment and appropriate visiting facilities for children and babies. We note that the Adelaide Women's Prison is an antiquated institution which had been marked down for replacement.

Concluding remarks

ALRM submits to this Committee that it now has an excellent opportunity to recommend to the government fundamental reforms of the South Australian prison and incarceration system.

ALRM does not recommend returning to the old proposal for a "mega prison" at Mobilong, since the impulses from RCIADIC suggest the need for many local prisons which are near to centres of Aboriginal population, and thus make visiting more easier for friends and relatives .

What ALRM does recommend however is the adoption of suggestions of Dr Paget for deincarceration, reducing the number of prisoners in South Australia significantly and expending resources on upgrading existing institutions to meet safe cell design standards. ALRM also recommends the adoption of the Western Australian model of a prison Inspectorate for this State.

ALRM would be happy to provide oral evidence to the Committee in support of this submission.

Yours faithfully

Cheryl A. Axleby
Chief Executive Officer