

11 February 2022

Robert Bradshaw PSM
Director, Policy Coordination
Solicitor for the Northern Territory
Department of the Attorney-General and Justice

By email only: robert.bradshaw@nt.gov.au

Dear Mr Bradshaw,

Submission on the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Amendment Bill 2022

1. Darwin Community Legal Service (DCLS)

DCLS is a non-profit community-based effort committed to legal and social justice and the protection and expansion of rights, fairness and wellbeing in the NT. We especially work with people who are vulnerable or marginalised. DCLS provides legal help, advocacy and support services; collaborates to understand obstacles to justice and try to achieve reform; and promotes understanding and acceptance of rights, justice and inclusion. Our Seniors and Disability Rights Service (SDRS) provides assistance to, and advocates for, older people and people with disabilities. This includes people who are deprived of their liberty in correctional centres, secure care facilities and community-based residences.

DCLS acknowledges the Larrakia people as the Traditional Owners of the Darwin region. We pay our respects to Larrakia elders past, present and emerging. We also acknowledge and pay our respects to the Traditional Owners of country throughout the NT and throughout Australia. We recognise their continuing connection to land, waters and culture. DCLS supports Voice – Treaty – Truth.

2. Executive Summary

We welcome this opportunity to provide feedback on the draft Bill and the Government's intention to establish the Northern Territory National Preventive Mechanism ('NT NPM') and its functions in legislation. While the Bill is an important step forward and is supported for the initiatives it does contain, we strongly recommend that the Bill be amended to include:

- Explicit coverage over non-traditional places of detention where a significant number of vulnerable people are deprived of their liberty;
- Criterion for the appointment of NPM staff which reflects the relevant experience and expertise required;
- Clarity regarding what constitutes 'reasonable assistance';
- A requirement upon the NT NPM to engage with relevant civil society groups to promote continuous improvement and transparency;
- A timeframe for the responsible Minister to provide the NT NPM with a response to their recommendations and further recourse where a Minister has not taken appropriate steps regarding these recommendations.

DCLS is also concerned about:

- The lack of detail accompanying the draft Bill regarding the funding and implementation of the NT NPM and the limited consultation undertaken with relevant civil society groups throughout the development of the draft Bill. Civil society groups are essential components in the creation of an effective, accessible and inclusive NPM and should have greater and ongoing involvement in the establishment of the NT NPM.
- Without appropriate funding and genuine engagement with civil society groups, the proposed amendments appear to be little more than a rebranding exercise of existing oversight mechanisms. Further, given the lack of detail, there are no assurances that the NT NPM will be an accessible or effective mechanism in preventing torture and ill-treatment in the NT.

3. Comments on the Bill

DCLS strongly recommends that the following adjustments be made to strengthen the Bill:

A. Scope of 'Places of Detention'

DCLS is concerned that, notwithstanding the general definition of 'places of detention' under section 4(1), the absence of certain places of detention from the list under section 4(2) will result in their practical exclusion from the jurisdiction of the NT NPM.¹ The language used by the NT Ombudsman, the interim NT NPM, supports a wider scope than currently envisaged by the draft Bill. The NT Ombudsman noted that places of detention will include 'closed environments in mental health, disability and aged care facilities'.² This is consistent with the Subcommittee's guidance which recommends that 'as extensive an interpretation as possible should be taken in order to maximise the preventive impact of the work of the national preventive mechanism'.³

The Royal Commission into Aged Care Quality and Safety and the current Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability has demonstrated that people in aged care and disability facilities experience torture and other cruel, inhuman and degrading treatment.⁴ This includes the use of behaviour modification and restrictive practices in aged care facilities, schools, disability and mental health facilities. Existing oversight mechanisms have been shown to be underdeveloped, slow to respond and ineffective in regulating the systems they are set up to oversee.⁵ As such, the Bill should make it clear that these facilities fall within the scope of the NT NPM and that they have the jurisdiction to monitor these facilities.

- **Recommendation 1:** That the Bill be amended to explicitly include the following as 'places of detention' under section 4(2):
 - Disability, mental health, general practice health facilities, compulsory drug and alcohol treatment centres and hospital emergency rooms where a person may be subject to restrictive practices;
 - Facilities in which people reside subject to residential restrictions by way of the *Guardianship of Adults Act*, Part IIA of the *Criminal Code* or other statutory orders (e.g. aged care facilities and secure care facilities);

¹ *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018* (NT) s 4.

² Northern Territory Ombudsman, *Annual Report 2020/21* (Report, 27 October 2021) 13
<https://www.ombudsman.nt.gov.au/sites/default/files/downloads/2020-21_annual_report_omb_final.pdf>.

³ Office of the United Nations High Commissioner for Human Rights, *Preventing Torture: The Role of National Preventive Mechanisms A Practical Guide, Professional Training Series No. 21* (HR/P/PT/21 2018), pp 7, 22.

⁴ In Royal Commission into Aged Care Quality and Safety (Final Report, 1 March 2021) vol 2, 99, the Commission noted that the 'inappropriate use of unsafe and inhumane restrictive practices in residential aged care has continued', while the Interim Report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Interim Report, 30 October 2020) 236, 255 ('*Disability Royal Commission*') has identified areas of further inquiry relating to the use of restrictive practices in schools and the abuse, neglect and exploitation experienced by people with disability living in group homes and other forms of supported accommodation.

⁵ Royal Commission into Aged Care Quality and Safety (n 5) vol 2, 226; Disability Royal Commission (n 5) 19.

- Community-based residences (e.g. group homes, respite centres, supported accommodation); and
- Schools with seclusion areas and out-of-home care facilities, including safe care settings.

B. NPM Staffing and Appointment of Inspectors

Article 18(2) of the Optional Protocol requires that State Parties:

‘take the necessary measures to ensure that the experts of the [NPMs] have the required capabilities and professional knowledge... [and] strive for a gender balance and the adequate representation of ethnic and minority groups in the country’.⁶

Despite this, the Bill does not require that a person has the relevant experience and expertise before their appointment to the NT NPM. Given the function of the NT NPM, it is essential that they are staffed by people who are representative of the people most often deprived of their liberty in the NT. This includes Aboriginal and Torres Strait Islander people, people with a disability and people who experience mental ill health. Without this, the accessibility and inclusivity of the NPM will suffer and the people who it was designed to assist will face barriers to accessing it, barriers that might not be apparent to those who have not had the same lived experiences. Further, given the disproportionate representation of Aboriginal and Torres Strait Islander people in places of detention in the NT, Aboriginal and Torres Strait Islander people should be represented at all levels within the NT NPM.

The equivalent Tasmanian Bill reflects Article 18(2) and requires the Tasmanian NPM to take into consideration in their appointment or employment of staff whether they have the required capabilities and professional knowledge required to undertake their duties and whether they adequately represent a balance of gender, and of people identifying as belonging to diverse groups, including cultural and ethnic groups (including people who identify as Aboriginal or Torres Strait Islander and people living with a disability).⁷

- **Recommendation 2:** That the Bill be amended to ensure that the appointment of NPM staff is subject to the considerations of Article 18(2). The considerations should include a requirement that Aboriginal and Torres Strait Islander people and people with a disability are adequately represented.
- **Recommendation 3:** That the Bill be amended to ensure that senior roles within the NT NPM (e.g. NPM Inspectors and the Chief NPM Inspector) are established as Aboriginal and Torres Strait Islander identified positions.

C. Civil Society Engagement

DCLS is concerned regarding the insufficient engagement of civil society groups in the establishment of the NT NPM. The lack of engagement is particularly concerning in the context of an initiative which intends to promote greater transparency regarding the operations of places of detention in the NT, which assumedly extends to the mechanisms which oversee and monitor these places. It is unclear what engagement the NT Ombudsman has undertaken with relevant stakeholders, outside of engagement with oversight bodies affected by the proposed amendments. No public announcements appear to have been made by the NT Ombudsman regarding their appointment as interim NT NPM or how stakeholders can be involved in the development of the NT NPM.

Given this, DCLS believes that a legislated requirement that relevant civil society groups be engaged with by the NT NPM on a regular basis is necessary. A requirement to engage with civil society groups is consistent with the Subcommittee’s guidance that State Parties ensure ‘the full, effective and

⁶ *Optional Protocol to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) (*‘Optional Protocol’*) art 18(2)

⁷ See OPCAT Implementation Bill 2021 (Tasmania) s 12(4).

meaningful participation of... civil society organisations with relevant expertise on torture prevention throughout the process of drafting the NPM law and reviewing related legislation'.⁸

- **Recommendation 4:** That the Bill be amended to require the NT NPM engage with relevant civil society groups to assist in the development and ongoing improvement of the NT NPM.

D. Access to Interpreters

Many people deprived of their liberty in the NT require the use of an interpreter and/or support person. DCLS is concerned that the current references in the draft Bill to interpreters and support persons lacks specificity, particularly as to who is responsible for the provision and facilitation of this support. As an example, the draft Bill is silent as to whether the requirement of the detaining authority to provide 'reasonable assistance' to the NT NPM includes the provision of an interpreter or who's responsibility the provision of an interpreter would otherwise fall upon.

Given that it is unclear how much additional funding will be allocated to the NT NPM to carry out their functions, the responsibility to provide such assistance should be clearly set out in the legislation. Failure to do so may result in a lack of engagement with the NT NPM due to its inaccessibility. This would negatively impact upon the credibility of the NT NPM as their reporting would be unrepresentative of the diversity of people who are deprived of their liberty in the NT.

- **Recommendation 5:** That the Bill be amended to ensure the requirement that the Minister and detaining authority provide 'reasonable assistance' to the NT NPM specifically includes the provision and facilitation of interpreters and support persons.

E. Resourcing Concerns

Article 18(3) of the Optional Protocol requires that State Parties 'undertake to make available the necessary resources for the functioning of the [NPMs]'.⁹ The Commonwealth Ombudsman has highlighted the need for additional funding for NPMs, specifically noting that:

'effective OPCAT implementation is not merely a matter of conferring further functions on existing oversight bodies, or renaming existing practices as being in accordance with OPCAT and assuming that these bodies can continue to operate in a business-as-usual model. In order to have an effective and regular preventive inspection regime, bodies will require new or expanded methods of operation. These will need commensurate increases in resourcing over time in most, if not all, jurisdictions'.¹⁰

The requirements of the NT NPM are significantly greater than the monitoring and oversight functions currently undertaken by existing bodies. The most recent indication regarding funding was given by the NT Ombudsman in their 2020-21 Annual Report where it noted that 'the question of resourcing for the NT NPM function has not at this time been settled'.¹¹ The supplementary information provided with the draft Bill does not provide any further clarity on this point.

DCLS is concerned that the existing oversight mechanisms proposed to come under the new NT NPM have not been allocated any additional funding. There are also no indications of their readiness to take up these functions (e.g. conducting OPCAT-complaint inspections) or the anticipated timeframe for the establishment of the NT NPM.

⁸ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the visit made by the Subcommittee for the purpose of providing advisory assistance to the national preventive mechanism of Turkey* (UN Doc CAT/OP/TUR/1, December 12 2019), 5 para 19-21.

⁹ *Optional Protocol* (n 6) art 18(3)

¹⁰ Commonwealth Ombudsman, *Baseline Assessment of Australia's OPCAT Readiness* (Report, September 2019) pp 41-42.

¹¹ Northern Territory Ombudsman, *Annual Report 2020/21* (Report, 27 October 2021) (n 2) 14.

- **Recommendation 6:** That the Bill be amended to ensure that the NT NPM is appropriately funded to carry out their functions.

F. Other Issues

While the draft Bill stipulates a timeframe for the provision of the report of the NT NPM to the responsible Minister and the tabling of the report in Parliament by the Minister, it is silent on when the Minister must provide the NT NPM with a response to their recommendations. South Australia's equivalent Bill provides that the Minister must respond 'within 8 sitting days of the expiration of 6 months after the report was laid before Parliament'.¹² Furthermore, there is no recourse for the NT NPM where it appears that no appropriate steps have been taken by the responsible Minister within a reasonable time. Tasmania's equivalent Bill provides that the Tasmanian NPM may send to the Premier and the responsible Minister a copy of the original recommendation or advice, along with any comments made by the relevant agency, where appropriate steps have not been taken.¹³

In addition, the NT NPM is not specifically empowered to refer matters raised by, or during, the exercise of their functions for further investigation (e.g. NT Police or the Independent Commissioner Against Corruption). If a referral can be made, it is not clear what, if any, effect an inquiry of another body would have. Examples of referral provisions are found in the equivalent Bills of South Australia and Tasmania.¹⁴

- **Recommendation 7:** That the Bill be amended to include a timeframe by which the responsible Minister must respond to the recommendations of the NT NPM
- **Recommendation 8:** That the Bill be amended to empower the NT NPM to escalate matters to the Chief Minister where no appropriate steps have been taken by the responsible Minister within a reasonable time in response to recommendations of the NT NPM.
- **Recommendation 9:** That the Bill be amended to permit the NT NPM to refer matters to relevant external authorities. A referral should not impact the ability of the NT NPM to exercise their functions in relation to the matter referred.

DCLS welcomes this opportunity to provide feedback on the proposed draft Bill. For any further information or inquiries regarding this submission, please contact Judy Harrison on (08) 8982 1111 or at info@dcls.org.au.

Yours sincerely,

DARWIN COMMUNITY LEGAL SERVICE INC.



Judy Harrison
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¹² OPCAT Implementation Bill 2021 (South Australia) ss 11(5), 12(4)

¹³ OPCAT Implementation Act 2021 (Tasmania) s 18(4)

¹⁴ Ibid s 21; OPCAT Implementation Bill 2021 (South Australia) s 10.