

**OPCAT in Australia: Consultation
paper, stage 2**

**Legal Aid NSW submission to the
Australian Human Rights Commission**

September 2018

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Legal Aid 
NEW SOUTH WALES

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 32 community legal centres and 29 Women's Domestic Violence Court Advocacy Services.

A range of Legal Aid NSW specialist services provide legal assistance to people in places of detention, and have contributed to this submission.

The Civil Law practice provides legal advice, minor assistance, duty and casework services to people through the Central Sydney office and 13 regional offices. The Civil Law Human Rights Group specialises in the areas of human rights, discrimination, false imprisonment and judicial review.

The Immigration Service provides legal advice, assistance and representation about family, refugee and humanitarian visas and Australian citizenship. The service also gives advice on detention, removal, cancellation procedures and exclusion periods.

The Mental Health Advocacy Service (MHAS) advises in all areas of mental

health law, including discharge from a mental health facility and the legal implications of the *Mental Health Act 2007* (NSW). The MHAS also provides representation before the Mental Health Review Tribunal.

The Children's Civil Law Service (CCLS) provides a targeted and holistic legal service to young people identified as having complex needs.

The Children's Legal Service (CLS) advises and represents children and young people involved in criminal cases in the Children's Court. CLS lawyers also visit juvenile detention centres and give free advice and assistance to young people in custody.

The Prisoners Legal Service (PLS) provides representation in hearings at the State Parole Authority, prison discipline offences before a Visiting Magistrate, and reviews of segregation directions. The PLS also provides general legal advice and minor assistance to prisoners by way of a visiting advice service to most gaols and responding to letters and telephone calls from or on behalf of prisoners.

Legal Aid NSW welcomes the opportunity to make a submission to the Australian Human Rights Commission in relation to the *OPCAT in Australia* Consultation Paper, Stage 2. Should you require any further information, please contact:

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Introduction

This submission supplements, and should be read in conjunction with, Legal Aid NSW's submission in response to the Commission's first consultation paper. Our initial submission is attached at the end of this response for ease of reference.

Where aspects of our earlier submission are directly related to the questions asked in the current consultation paper, we have noted our views in this submission.

Question 1: Preventing harm to people in detention

In our first submission, we noted our view as to priority issues that should be addressed by the National Preventive Mechanism (**NPM**) in order to identify and respond to the most urgent risks of harm. Those issues are summarised and expanded on below.

Places of detention

Legal Aid NSW submits that the following should be prioritised for inspection:

- the Forensic Hospital at Malabar
- the Long Bay Hospital
- juvenile detention facilities
- the High Risk Management Correctional Centre within the Goulburn Correctional Complex
- extremely remote onshore immigration detention centres
- the Mum Shirl Unit at Silverwater Correctional Complex, and
- the Mental Health Screening Unit at Silverwater Correctional Complex.

In relation to Long Bay Hospital, we note that this facility, which is within the Long Bay Correctional Centre, is declared as a mental health facility for the purposes of the *Mental Health Act 2007 (NSW)*. In this capacity, the facility detains 'forensic patients' and 'correctional patients' who require treatment in a mental health facility.¹

The Royal Australian and New Zealand College of Psychiatrists opposes the use of involuntary treatment within a correctional setting. Their policy position is that where a patient becomes so mentally unwell that they require involuntary treatment, they should be transferred to a mental health facility outside of a correctional centre.² At the heart of this position is the 'principle of equivalence', that is, that a mentally ill person should be treated the same regardless of their status. This principle is set out in the United Nations

¹ Under the *Mental Health (Forensic Provisions) Act 1990 (NSW)*, a forensic patient is a person who is unfit to be tried, or who has been found not guilty by reason of mental illness. A correctional patient is a prisoner who is a 'mentally ill person' and who requires treatment in a mental health facility.

²[https://www.ranzcp.org/Files/Resources/College_Statements/Position_Statements/PS-93-Involuntary-mental-health-treatment-in-c-\(2\).aspx](https://www.ranzcp.org/Files/Resources/College_Statements/Position_Statements/PS-93-Involuntary-mental-health-treatment-in-c-(2).aspx)

Standard Minimum Rules of the Treatment of Prisoners (the Nelson Mandela Rules),³ the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care⁴ and the United Nations Convention on the Rights of Persons with Disabilities.

Australia's obligations under these instruments create an impetus for urgent review of Long Bay Hospital by NPM bodies. The partially heard inquest into the death of Mr David Dungay at this facility may result in recommendations that will assist NPM bodies in this process.

In relation to the Mental Health Screening Unit at Silverwater, although this unit is not a designated mental health facility, prisoners detained in the unit often have serious mental illness, and may be subject to involuntary treatment through a Community Treatment Order.

Issues for consideration during inspection of specialised units that detain people with mental illness should include whether officers have appropriate training in dealing with inmates with mental health issues.

Detention practices

Legal Aid NSW is concerned about the use of seclusion in correctional centres, juvenile detention facilities and mental health facilities, and consider that this practice requires urgent attention. Our initial submission noted the following issues of concern:

- the routine use of seclusion for some forensic and involuntary civil patients, and in a number of cases, the use of seclusion on an ongoing basis for many years.
- the use of 'dry cells' in adult correctional centres for inmates on suicide watch. We have not had recent reports of this occurring, but would still recommend this practice be considered by any NPM.
- the use of segregation units in adult correctional centres as punishment, without review.
- the use of isolation as a behaviour management approach for juvenile detainees. Our understanding is that practices have improved in this area in NSW, but we still consider this to be a priority for inspection given that these practices have disproportionately affected Aboriginal young people in detention, and young detainees with intellectual disabilities and mental health problems.

Our initial submission also noted overcrowding, frequent movement of detainees, and under-resourcing of mental health care as critical issues in prisons. In our experience, using shared cells as a result of overcrowding increases the risk to detainees, including the risk of sexual assault by cellmates.

³ See for instance United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) A/RES/70/175, Rule 109.

⁴ Adopted by General Assembly resolution 46/119 of 17 December 1991.

In relation to immigration detainees, we suggest that urgent consideration should be given to the random and arbitrary movement of detainees, the use of prolonged and indefinite detention, and access to psychiatric treatment. We suggest that greater accountability on the part of detention centres is required, including maintenance and inspection of records relating to the use of force against detainees, self-harm by detainees, and treatment provided to detainees who have self-harmed.

Categories of detainees

Our first submission noted our particular concerns in relation to:

- immigration detainees
- mentally ill detainees
- young people
- inmates with high risk classifications

In addition to the above individual categories of detainees, we submit that immediate focus should be on oversight of people who are detained under more than one regime, that is, people with 'dual detention status'.

Dual detention status might arise in the following scenarios:

- Correctional patients who are both prisoners and involuntary patients under the *Mental Health Act 2007 (NSW)* (see Long Bay Hospital above).
- Forensic patients with mental illness who are detained in prisons due to a lack of beds in the Forensic Hospital and to a lesser degree, other less secure mental health facilities. There are consistently 20-30 forensic patients in NSW who require care and treatment in a mental health facility, but who cannot be transferred due to a shortage of beds. Some patients remain in prison for up to four years while waiting for a bed, often within mainstream prison populations or within the Mental Health Screening Unit at Silverwater Correctional Centre. These patients have not been convicted of any crime, and detention within a prison environment may constitute a breach of article 9 of the International Covenant on Civil and Political Rights.
- Similarly, forensic patients with cognitive impairments are improperly detained in prisons due to a lack of alternative accommodation. These patients are particularly vulnerable to abuse, but often spend a long time in custody because there are inadequate pathways to help them transition to community life. In turn, the preventative detention regime for forensic patients in NSW is more likely to apply to these individuals, because they have not had an opportunity to demonstrate that they can be safely released into the community. This is a problem that has persisted in NSW for many years and is likely to continue in the absence of independent oversight and intervention.

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- Older forensic patients who are detained in the Kevin Waller unit at Long Bay Correctional Complex. These patients are often at increased risk of harm to themselves and to others, due to their age and cognitive impairment. Despite this risk, we are aware that inmates in this unit share cells. Further, oversight of the unit is by Corrective Services NSW, rather than Justice Health & Forensic Mental Health Network.
 - Immigration detainees who are transferred to mental health facilities for treatment as involuntary patients under the *Mental Health Act 2007* (NSW). In these cases, there can be considerable differences of opinion between Serco guards and health professionals as to how supervision is implemented in a secure health care environment. We understand that Serco, under the direction of the Australian Border Force, insists on line of sight supervision at all times within the mental health facility. This includes during medical examinations and procedures, and while the patient uses the shower or toilet. This can be especially distressing where the patient's illness involves delusional thoughts about the guards.

The NPM bodies should develop coordinated responses to the risks posed to people detained under multiple regimes.

Other priorities

There have been a number of coronial inquests into deaths in places of detention in NSW in recent years. We suggest that it should be a priority for the NPM bodies to review and monitor the recommendations made in coronial inquiries of this nature.

Question 2: Places of detention

Legal Aid NSW submits that the categories of 'place of detention' that are subject to visits should be as broad as possible, to facilitate accountability and transparency across all circumstances where a person is involuntarily detained.

We suggest that the following primary places of detention should be included:

- correctional facilities
- juvenile detention facilities
- immigration detention centres, including offshore centres
- police lock-up facilities
- mental health facilities that accommodate involuntary patients
- forensic mental health facilities.

We note the Australian Government's indication that OPCAT implementation will focus on primary places of detention. Based on our casework experience, we agree that primary places of detention should be a priority for inspection. However, we agree with the Commission's suggestion in the Interim Report that any definition should be flexible enough to allow for all places of detention to be considered and inspected if required. In

particular, we consider the following secondary categories of places of detention should be included:

- court holding cells
- vehicles used to transport people to or from a place of detention
- secure community accommodation facilities for people exiting prison.

Question 3: Consultation

Civil society organisations and detainee advocates have an important role to play in providing ongoing input to the NPM bodies.

A relationship of trust can be an essential prerequisite for detainee disclosures about ill-treatment. Those tasked with inspecting places of detention are unlikely to obtain a full picture of the issues faced by detainees, who may be hesitant to make full disclosures to strangers, especially those who may be viewed as part of the institutional framework.

This is evident from the Chisholm Behaviour Program, which we discussed in our initial submission. The program operated for 12 months, and reportedly involved the isolation of juvenile detainees for 22-23 hours per day. Despite the existence in NSW of an Official Visitors scheme, and an Inspector of Custodial Services, the problems with the program only came to light when detainees made complaints to their trusted lawyers at the Aboriginal Legal Service and Legal Aid NSW.

Organisations and individuals who have established ongoing relationships of trust with detainees are likely to be a valuable source of information regarding the conditions detainees face. This may include mental health professionals and other medical staff who have contact with detainees.

We submit that the NPM bodies should work in partnership with such organisations, including Legal Aid NSW.

Question 4: Core principles

Legal Aid NSW suggests that all NPM bodies should be governed by a consistent human rights-based legislative framework, which includes the following items:

- A description of the membership of the inspection body, including a requirement that membership include people with a range of qualifications, including a psychiatrist or a psychologist
- A description of the body's powers, including unfettered access to places of detention, and the power to privately interview detainees, officers and other staff
- Confidentiality provisions protecting communications with informants
- Explicit reference to the body's mandate under OPCAT and the relevant purposes of inspection
- Clear reporting obligations, and requirements for agencies to engage with the NPM in relation to implementation

-
- Information sharing provisions as required.

Question 5: The Commission's interim report

Legal Aid NSW is broadly supportive of the Commission's proposals, as outlined in the Interim Report, subject to the comments below.

Proposal 4 – resourcing of NPM activities

OPCAT is a nationally binding instrument. To be a catalyst for improvement and prevention, the framework should be implemented in a uniform way throughout Australia. The Australian's Government's stated preference is for a 'mixed-model' NPM, which, in our view, carries some risk of inconsistency in implementation. If a mixed model approach to the NPM is taken, Federal Government oversight and funding of OPCAT will be critical to mitigate this risk.

Proposal 7 – minimum conditions of detention

We suggest that the minimum standards should be based on Australia's obligations under international law, and informed by non-binding international instruments. For example, they should be linked with the Nelson Mandela Rules, the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, and the United Nations Convention on the Rights of Persons with Disabilities.

Standards related to the provision of essential services such as health care should include explicit reference to mental health services.

As we noted in our initial submission, specific standards should be developed in relation to the detention of young people. Inspection processes should be also be tailored to ensure that they are appropriate for children and that they give children an opportunity to be heard.

Proposal 8

Legal Aid NSW suggests that the independent body should also retain people with expertise in mental health and disability for the purposes of developing national standards.

Proposal 11

We suggest that Legal Aid NSW would be a useful stakeholder to include on any advisory committee established to support implementation. We represent clients who are detained across the spectrum of detention environments. Our diversity of experience with different places of detention would be a beneficial resource to NPM bodies.

Proposal 12

In Proposal 12, the Commission proposes that federal, state and territory governments assign overarching policy responsibility for OPCAT compliance and detention policy, as

well as co-ordination, to the department or agency in each jurisdiction that has responsibility for overseeing human rights compliance and that has a broad mandate in relation to detention. The discussion in the Consultation Paper suggests that this would be the Department of Justice in NSW.

Legal Aid NSW would have some concerns about this course. OPCAT requires that inspection bodies must have functional and structural independence from the departments that they scrutinise. Our initial submission outlined our concerns in relation to the independence of existing inspection bodies in NSW, and the need for these shortcomings to be remedied as part of the implementation process. In our view, assigning policy and/or oversight responsibility for OPCAT to the NSW Department of Justice raises similar concerns. The Department of Justice manages adult correctional centres and juvenile detention centres in NSW. We therefore consider there to be a risk of perceived and actual conflict of interest if the Department of Justice is given policy responsibility for OPCAT. Further, while the Department of Justice has a mandate in relation to places of detention in the criminal justice system, it does not have responsibility for mental health facilities or immigration detention facilities. This may limit the ability of OPCAT to achieve the stated objective of coordinating and harmonising detention policy.

If one body in each jurisdiction is to be given policy responsibility for OPCAT, we recommend that the body be independent from the services it inspects. Given that no agency in NSW has a clear mandate for overseeing human rights compliance, or has a mandate in relation to all places of detention, further consideration as to the appropriate agency to undertake this role is required. We suggest this occur once more is known about the NPM model and how it will operate and impact on existing NSW agencies. One option may be to consolidate existing inspection bodies in NSW under a different agency, such as the NSW Ombudsman, and give that agency responsibility for OPCAT.

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About Legal Aid NSW

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Introduction

Legal Aid NSW welcomes the Australian Government's announcement that it intends to ratify the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)* by December 2017. We appreciate the opportunity to contribute to the development of the National Preventive Mechanism (NPM). The implementation of a national framework with consistent standards for inspection bodies will help to prevent torture and other cruel, inhuman or degrading treatment. This submission examines some of the current inspection frameworks for adult and juvenile correctional facilities and mental health facilities in New South Wales. It outlines the inspection frameworks and responds to Question 1 (our experience of the inspection framework in NSW). It identifies some of the ways in which these frameworks may not comply with the standards set out in the OPCAT. It also responds to Question 3 (important and urgent issues that should be taken into account by the NPM).

Legal Aid NSW notes the Government's stated intention to vest the NPM function across multiple federal, state and territory bodies, and to allow states to 'harness and adapt existing inspection mechanisms'.¹ Legal Aid NSW does not object to this approach, but notes that each of the inspection mechanisms will need to meet OPCAT requirements in order for the NPM to be compliant (OPCAT, art 17).

Existing inspection and monitoring framework

The following bodies or schemes currently inspect and monitor places of detention in NSW:

- The NSW Inspector of Custodial Services
- Official visitors to correctional facilities and juvenile detention centres
- The NSW Ombudsman
- Official visitors in mental health facilities
- Authorised officers who inspect mental health facilities
- The Commonwealth Ombudsman, and
- The Australian Human Rights Commission.

In responding to Question 1, this submission will focus on the Inspector of Custodial Services (**ICS**), the official visitor scheme for adult correctional facilities under the *Crimes (Administration of Sentences) Act 1999* (NSW) (**CAS Act**), the official visitor scheme under the *Children (Detention Centres) Act 1987* (NSW) (**CDC Act**), and the official visitor scheme under the *Mental Health Act 2007* (NSW) (**Mental Health Act**).

An explicit human rights mandate

We note that no New South Wales inspection body has an explicit human rights mandate. At a minimum, to be a component of the NPM, the statute of the inspection body should refer to the OPCAT and to the body's responsibility to inspect places of detention in order

¹ AHRC, *OPCAT in Australia*, Consultation Paper May 2017, 8

to prevent torture and other forms of cruel, inhuman or degrading treatment. This would ensure that inspection bodies are active in ensuring human rights are respected, rather than merely responding to problems raised by inmates. Complaint based mechanisms have their place, but detainees, particularly juveniles and people with mental illness, are not always willing or able to identify breaches of human rights.

Inspector of Custodial Services

The scheme

The Inspector of Custodial Services is a statutory office established by the *Inspector of Custodial Services Act 2012* (NSW) (**the ICS Act**). The functions of the ICS include inspecting each adult custodial centre at least once every five years, inspecting each juvenile justice centre and juvenile correctional centre at least once every three years, reviewing any custodial service at any time, overseeing official visitor programs under the CAS Act and the CDC Act, and reporting to Parliament.²

The powers of the Inspector of Custodial Services are extensive. He or she:

- is entitled to full access to the records of any custodial centre (including health records)
- may visit and examine any custodial centre at any time
- may require custodial centre staff members to supply information, produce documents, or answer questions
- may refer matters relating to a custodial centre to other appropriate agencies for consideration or action, and
- is entitled to be given access to persons in custody, detained or residing at any custodial centre for the purpose of communicating with them.³

Administrative support for the Inspector of Custodial Services resides within the NSW Department of Justice.

The Inspector of Custodial Services and OPCAT

The Inspector of Custodial Services is a valuable mechanism for protecting the rights of detainees. However Legal Aid NSW has identified the following issues that would need to be addressed for this inspection mechanism to be OPCAT compliant.

OPCAT art 18(1): functional independence

The Inspector of Custodial Services has an element of independence, as required by article 18 of the OPCAT. He or she holds office for five years and can only be removed for incapacity, incompetence, misbehaviour or unsatisfactory performance.⁴ However, the former Inspector has commented that the placement of the office within the same department as Corrective Services NSW and Juvenile Justice NSW, the agencies covered

² *Inspector of Custodial Services Act 2012* (NSW) s 6.

³ *Inspector of Custodial Services Act 2012* (NSW) s 7.

⁴ *Inspector of Custodial Services Act 2012* (NSW) s 4 and Sch 1

by the inspection mandate, compromises ‘the real and perceived independence of this office’.⁵ Legal Aid NSW agrees that the office would be better placed elsewhere, such as within the Department of Premier and Cabinet for administrative purposes.

OPCAT art 18(3): resources

Article 18(3) requires the inspection body to have the ‘necessary resources for the functioning’ of the NPM. The former Inspector has reported that at the current level of resourcing, the Inspector of Custodial Services is not likely to be able to meet its legislative obligations, including making site visits to centres in order to verify the reported progress against recommendations.⁶ Legal Aid NSW solicitors have also observed that the Inspector of Custodial Services is not sufficiently resourced to undertake its duties.

The Inspector of Custodial Services is the only agency able to visit Category AA male inmates, Category 5 female inmates, extreme high risk restricted inmates and national security interest inmates,⁷ and has commenced an examination of the management of ‘radicalised inmates’ in five maximum security centres.⁸ However, as these detainees cannot be visited by official visitors (discussed further below), Legal Aid NSW has concerns that the Inspector may not be properly resourced to regularly visit these detainees and inspect their conditions.

Similarly, the Inspector is the only agency responsible for inspecting court custody centres, police cells and the transport of detainees.

The former Inspector of Custodial Services has noted that the office is responsible for inspecting 47 court cell complexes across NSW and they are ‘widely dispersed, which makes the logistics of inspecting them all challenging’.⁹ The former Inspector has also raised concerns that those detained in court cells ‘can be a volatile mix of persons with drug and alcohol dependency, persons needing to be separated from other inmates because of their alleged offences, ‘first-timers’, those at risk of self-harm, young people, women and the physically and mentally ill’.¹⁰ In light of the vulnerability of these detainees, it is important that the responsible inspection body be properly resourced.

OPCAT art 20: access to information

While the Inspector is entitled to full access to the records of any custodial centre, it is not clear that he/she is entitled to consolidated information ‘concerning the number of persons deprived of their liberty in places of detention’ and ‘the number of places and their location’, as required by art 20(a).

⁵ Inspector of Custodial Services *Annual Report 2014-15*, 14.

⁶ Inspector of Custodial Services *Annual Report 2014-15*, 14.

⁷ *Inspector of Custodial Services Act 2012* (NSW) s 7(f).

⁸ Inspector of Custodial Services *Annual Report 2015-16*, 7. See also <http://www.custodialinspector.justice.nsw.gov.au/Pages/current-inspections/management-of-radicalised-prisoners-nsw-correctional-centres.aspx>

⁹ Inspector of Custodial Services *Annual Report 2014-15*, 9.

¹⁰ Inspector of Custodial Services, *Full House: the growth of the inmate population in NSW* (2015) (“Full House”) [4.42].

The Inspector is entitled to be given access to persons in custody for the purpose of communicating with them,¹¹ but the opportunity to have private interviews, as required by art 20(d), does not appear to be guaranteed.

OPCAT art 22, 23: authorities to enter into dialogue, publish reports

While the ICS Act does not impose an obligation on authorities to examine recommendations and enter into dialogue regarding implementation measures (art 22), this is perhaps implied by the Inspector's power to include an evaluation of the response of authorities to the recommendations, and from the obligation on the Joint Committee to examine each report and to report to Parliament on matters arising from it.¹² The tabling of the report in Parliament amounts to publication, and therefore complies with art 23. However the former Inspector of Custodial Services reported that in 2014-15, only 55 per cent of recommendations regarding adult correctional centres were accepted, and 59 per cent regarding juvenile detention centres.¹³

Official visitors to correctional facilities

The scheme

The CAS Act provides for the Minister for Corrections to appoint official visitors and to assign them to specific correctional complexes and centres, so that there is at least one official visitor for each complex and centre.¹⁴ They must visit their centre at least monthly for the purpose of giving interviews to staff and inmates and to examine the centre.¹⁵ The Governor must notify all correctional officers and inmates (with exceptions, discussed below) of the date and time when an official visitor will be at the centre.¹⁶

Official visitors must receive and deal with complaints and report to the Minister and Inspector of Custodial Services at least every six months.¹⁷

Official visitors under the CAS Act and OPCAT

Legal Aid NSW considers that official visitors play an important role in answering enquiries and resolving complaints in these facilities. However, in our view, it would not be appropriate for official visitors to have formal responsibility for monitoring Australia's compliance with the Convention against Torture. In our view, the role of the NPM sits best with independent statutory authorities, such as the Inspector of Custodial Services. We set out below some concerns around the official visitor scheme's inconsistency with the role of NPM under OPCAT.

¹¹ *Inspector of Custodial Services Act 2012* (NSW) s 7(f).

¹² *Inspector of Custodial Services Act 2012* (NSW) s 17.

¹³ *Inspector of Custodial Services Annual Report 2014-15*, p12.

¹⁴ *Crimes (Administration of Sentences) Act 1999* (NSW) s 228(1), (4).

¹⁵ *Crimes (Administration of Sentences) Act 1999* (NSW) s 228(5)(a).

¹⁶ *Crimes (Administration of Sentences) Regulation 2014* cl 165(1).

¹⁷ *Crimes (Administration of Sentences) Act 1999* (NSW) s 228(5)(c), (d).

OPCAT art 18(1): functional independence, required capabilities

Official visitors may be removed from office 'at any time for such cause as to the Minister seems sufficient'.¹⁸ This may not be compliant with art 18 of the OPCAT which requires the NPM to have 'functional independence'.

OPCAT requires that the NPM ensure that 'the experts of the NPM have the required capabilities and professional knowledge' and there should be gender balance and adequate representation of ethnic and minority groups: art 18(2). The CAS Act does not prescribe any qualifications for official visitors,¹⁹ and Legal Aid NSW is not confident that the current appointment process would necessarily ensure compliance with art 18(2).

OPCAT art 19 and 20: powers and access to detainees

In addition to their (at minimum) monthly scheduled visits, official visitors may visit the centre at any other time 'unless, in the opinion of the Commissioner, a visit would be undesirable for reasons of order or security'.²⁰ This exception is very broad. It is not clear that the official visitor can access all parts of the centre or interview all inmates during these unscheduled visits. Art 14(2) of OPCAT provides for a much more limited exception: 'unless urgent and compelling grounds of national defence, public safety, natural disaster or serious disorder in the place to be visited that temporarily prevent the carrying out of such a visit'. Official visitors are not guaranteed private interviews with inmates, as required by art 20(d) of the OPCAT.

Category AA male inmates, Category 5 female inmates, extreme high risk restricted inmates and national security interest inmates are not entitled, and are not to be permitted to speak with an official visitor, and the official visitor is not permitted to deal with complaints or inquiries from these inmates.²¹ Art 20(e) of the OPCAT requires the NPM to have the liberty to choose the persons they want to interview.

The CAS Act official visitor scheme does not provide for inspections of court custody centres, police cells or transport of detainees. Only the Inspector can inspect these locations. Legal Aid NSW has particular concerns about the transport of detainees. Our clients have reported that the police have placed them in police vehicles without seatbelts and then driven fast and erratically.

Official visitors under the CAS Act do not have access to 'all information referring to the treatment of persons' deprived of their liberty, as required by art 20. They should, at minimum, have guaranteed access to the record of punishments that governors are required to keep under section 61 of the CAS Act.

OPCAT art 21: confidentiality

The CAS Regulation requires an official visitor to send to the Commissioner an official visitor's record form containing particulars of action taken in relation to a complaint or

¹⁸ *Crimes (Administration of Sentences) Act 1999* (NSW) Sch 4 item 5.

¹⁹ They must not be staff of Corrective Services, or other persons with a conflict of interest: *Crimes (Administration of Sentences) Act 1999* (NSW) s 228(3), Sch 4 cl 4.

²⁰ *Crimes (Administration of Sentences) Act 1999* (NSW) s 228.

²¹ *Crimes (Administration of Sentences) Regulation 2014* cl 166, 169(5).

inquiry.²² This record would necessarily include details of the complaint or inquiry, and means that a complaint or inquiry cannot be made on a private or confidential basis. It is not clear that this is compliant with art 21(2) of the OPCAT. This could inhibit prisoners from disclosing problems to the official visitor, particularly where (rightly or wrongly) they fear retribution for disclosure.

OPCAT art 22, 23: authorities to enter into dialogue, publish reports

Official visitors must report to the Minister and Inspector of Custodial Services at least every six months.²³ There is no requirement for the Minister or any other government authority to enter into dialogue with regard to those reports, or to publish those reports, as required by arts 22 and 23 of the OPCAT.

Official visitors to children's detention centres

The scheme

An official visitors scheme is established under the CDC Act and is intended to ensure the protection of rights, improve advocacy, and enhance other forms of assistance related to the welfare and treatment of young people in custody.²⁴ Official visitors under this Act are appointed to particular detention centres and may:

- enter and inspect the detention centre at any reasonable time
- confer privately with any person who is resident, employed or detained in the detention centre, and
- furnish to the Minister advice or reports on any matters relating to the conduct of the detention centre.²⁵

A detainee may be visited at any time by the official visitor for the centre (as well as by officers of the NSW Ombudsman and the Inspector of Custodial Services).²⁶

The centre manager of each detention centre must keep a complaints register (in relation to complaints made to the centre manager or to staff members of the centre) which is to be available for inspection by the official visitor and the Inspector of Custodial Services.²⁷

Official visitors under the CDC Act and OPCAT

As with official visitors assigned to correctional facilities, Legal Aid NSW has reservations about official visitors to children's detention centres playing a formal or primary role as part of Australia's NPM. These official visitors make an important contribution to the welfare of young people in detention. However they are ultimately community members

²² *Crimes (Administration of Sentences) Regulation* cl 166(1)(d).

²³ *Crimes (Administration of Sentences) Act 1999* s 228(5)(c), (d).

²⁴ 'Official Visitors' *Juvenile Justice*

<http://www.juvenile.justice.nsw.gov.au/Pages/Juvenile%20Justice/minister/officialvisitors.aspx>

²⁵ *Children (Detention Centres) Act 1987* (NSW) s 8A.

²⁶ *Children (Detention Centres) Regulation* cl 28.

²⁷ *Children (Detention Centres) Regulation* cl 55.

appointed by the Minister, and do not necessarily have the skills, training or experience to take on the role of NPM. We would prefer that this responsibility rest with an independent body such as the Inspector of Custodial Services, with official visitors playing a supportive information gathering and liaison role where possible. We set out below a brief analysis of the official visitor scheme under the CDC Act against some of the requirements of OPCAT.

OPCAT art 18(1): functional independence

The CDC Act official visitor scheme is described as providing 'independent monitoring' of juvenile detention centres, and visitors report to the Minister, independently of the agency.²⁸ There is no provision for removal of an official visitor, which creates some independence. However they are appointed for 'such period as specified in the instrument of appointment'.²⁹ Administration of the scheme is within Juvenile Justice, the agency covered by the inspection mandate.

OPCAT art 19 and 20: powers and access to detainees

The powers of the official visitors under the CDC Act are reasonably broad. However they are not entitled to consolidated information about the number of persons deprived of their liberty, or access to all information referring to the treatment of those persons, as required by art 20. Access to such information would improve transparency with regard to programs such as the Chisholm Behavioural Program and the Detainee Risk Management Plans, discussed below.

OPCAT art 22, 23: authorities to enter into dialogue, publish reports

Official visitors under the CDC Act may report to the Minister and Inspector of Custodial Services.³⁰ There is no requirement for the Minister or any other government authority to enter into dialogue with regard to those reports, or to publish those reports, as required by arts 22 and 23 of OPCAT.

Official visitors under the Mental Health Act

The Minister for Mental Health may appoint a principal official visitor, who oversees the official visitor programs, reports to the Minister regarding the official visitors programs, refers matters raising significant public mental health, patient safety, care or treatment issues to the Minister or other appropriate person, and acts as an advocate for consumers to the Minister.³¹

The Minister for Mental Health must appoint official visitors. Their functions are to:

- refer matters raising any significant public mental health issues or patient safety or care or treatment issues to the principal official visitor or any other appropriate person or body

²⁸ 'Official Visitors' *Juvenile Justice*

<http://www.juvenile.justice.nsw.gov.au/Pages/Juvenile%20Justice/minister/officialvisitors.aspx>

²⁹ *Children (Detention Centres) Act 1987* (NSW) s 8A(3).

³⁰ *Children (Detention Centres) Act 1987* (NSW) s 8A(4)(c).

³¹ *Mental Health Act 2007* (NSW) s 128.

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- act as an advocate for patients to promote the proper resolution of issues arising in the mental health system, and
 - inspect mental health facilities as directed by the principal official visitor.

Official visitors must visit mental health facilities, inspect every part of the facility, make inquiries about the care, treatment and control of patients, examine documents produced to them and report to the principal official visitor about each visit.³² Superintendents and administrators must allow access, permit official visitors to see patients, answer questions and produce documents.³³

Official visitors perform a valuable role. By taking complaints and advocating for inpatients, they have contributed to the improvement of their conditions. However, the Mental Health Act does not provide for the functional independence of the official visitor scheme (OPCAT art 18). It does not require the Minister to appoint a principal official visitor (such appointment is discretionary). Official visitors (including the principal official visitor) are appointed by the Minister for a term of up to four years, may be removed by the Minister at any time, and are paid 'such remuneration ... as the Minister may from time to time determine'.³⁴

The scheme is placed within NSW Health. We note the former Inspector of Custodial Services' comment that the independence of an inspection agency is enhanced if it is placed outside the department that it scrutinises.

Official visitors are not guaranteed the power to have private interviews with patients, as required by art 20 of the OPCAT. There is no requirement for authorities to enter into dialogue with the official visitor scheme, or for it to authorities to publish reports of the scheme (arts 22 and 23).

Question 3: important and urgent issues

Places of immediate concern

Legal Aid NSW considers that the following should be prioritised for inspection.

- 1) The Forensic Hospital at Malabar. The Forensic Hospital provides specialist mental health care for mentally ill patients who have been in contact with the criminal justice system and 'high risk civil patients'.³⁵ People detained here include those found not guilty by reason of mental illness, those unfit to plead, mentally disordered offenders or those at risk of offending. Our concerns are outlined below under 'Seclusion and restraint'.

³² *Mental Health Act 2007* (NSW) s 131.

³³ *Mental Health Act 2007* (NSW) s 132.

³⁴ *Mental Health Act 2007* (NSW) Pt 3 and Sch 4 items 2, 3.

³⁵ NSW Government, Department of Health, 'Forensic health' <http://www.justicehealth.nsw.gov.au/our-services/forensic-mental-health-youth-services>

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- 2) The Long Bay Hospital (which has a mental health ward). This hospital is jointly administered by Corrective Services NSW and NSW Health. Again, our concerns are with the use of seclusion and restraint in this facility.
 - 3) Juvenile detention facilities. The issues around the treatment of juvenile detainees that have arisen recently in the Northern Territory, Queensland and New South Wales illustrates the vulnerability of these detainees.
 - 4) High Risk Management Correctional Centre (within the Goulburn Correctional Complex). Legal Aid NSW has observed the General Manager has wide discretion over the number of hours these offenders are kept in their cells, which can be up to 23 hours per day. The cells are very bare, with one small window, and the outdoor area is described by prisoners as a 'cage'. Many of the inmates would be classified AA, extreme high risk or national security, meaning that the official visitor for the centre cannot visit them. Some inmates are of non-English speaking background but are not allowed to have non-English writing materials or speak to visitors in languages other than English. These conditions can exacerbate mental health problems, and Legal Aid NSW has observed that inmates do not have meaningful access to mental health professionals. Access to a psychologist is only on an 'incident' basis, and there is no ongoing access to psychiatric treatment or psychiatric drugs. It is very common for Legal Aid NSW solicitors to be advised that inmates are not getting their prescribed medications.
 - 5) Extremely remote (onshore) immigration detention centres. Legal Aid NSW considers that their remoteness, and the separation of detainees from family and friends, creates serious risks, discussed further below.
 - 6) The Mum Shirl Unit at Silverwater. The unit is for female offenders with complex psychological, behavioural and personality issues. Legal Aid NSW does not have information about current conditions in this unit, but in the past, detainees have been held in cells with three concrete walls and one Perspex wall facing a corridor. Communication was through holes in the Perspex wall. An inspection of the unit should consider whether correctional officers are appropriately trained to deal with offenders with such complex issues.

Systemic issues

Overcrowding

In 2014, according to the Inspector of Custodial Services, 21 of 44 correctional services were operating over design capacity. Overcrowding results in increased tensions for both inmates and staff, and increases the risk of assault, self-harm and suicide, prisoner disorder and riot.³⁶ It also results in inmates being held in centres that do not match their

³⁶ Inspector of Custodial Services, Full House, at 10.

security classification, and being placed in centres outside their home region, making it difficult for them to maintain family and community ties.³⁷ Limited access to telephones also disrupts family and community ties and makes access to legal advice more difficult. Overcrowding creates a need for regular movement between centres which disrupts participation in rehabilitation programs. There are insufficient places in drug and alcohol, sex offender, and aggression and violence programs, and insufficient opportunities to work.³⁸ Pressures on the health system means that inmates' health needs are not met.³⁹ Due to overcrowding in correctional centres, inmates are sometimes kept in court cells for excessive amounts of time.⁴⁰

These issues, particularly in combination, raise a real risk of cruel, inhuman and degrading treatment.

Frequent movement of detainees

As noted above, overcrowding creates a need for frequent movement between centres. Our Prisoners Legal Service has observed that frequent movement affects inmates' ability to access scheduled legal advice, disrupts family contact and often leads to the misplacement of belongings which can, in turn, impact or aggravate the inmates' mental health. Inmates waiting for medical or specialist appointments often have a lengthy delay as a result of being relocated.

Mentally ill detainees

Legal Aid NSW has observed that there are insufficient staff to provide psychological treatment to detainees in adult correctional facilities. One consequence is that psychologists focus on detainees needing acute care and it is difficult for detainees with non-acute problems such as post-traumatic stress disorder or grief, which may have contributed to their offending, to access treatment. Even where inmates have been identified as needing treatment, they go untreated because of the lack of staff. The use of 'dry cells' and seclusion and restraint is discussed below.

Immigration detainees

Legal Aid NSW's Immigration Service is concerned about the random and arbitrary movement of immigration detainees. Detainees are regularly moved from places where they have family and/or other support networks, to more isolated places such as Christmas Island. These movements can impact on detainees' and their families' mental health, and detainees' ability to access lawyers and other professionals. Issues around the movement of detainees were canvassed in the case of *ATR15 v Minister for Immigration* [2016] FCCA 1954 (8 August 2016). In that case, the Federal Circuit Court held that it could not order the Minister to detain the applicant at Maribyrnong Detention Centre rather than at Christmas Island so he could see a psychiatrist in connection with his Bridging Visa cancellation appeal and to see his legal representative. This was on the basis that the

³⁷ Inspector of Custodial Services, Full House, at 11.

³⁸ Inspector of Custodial Services, Full House, at 13.

³⁹ Inspector of Custodial Services, Full House, at 12.

⁴⁰ Inspector of Custodial Services, Full House, at [4.43].

reference in section 256 of the Migration Act to 'reasonable facilities' means within the place of detention, not the place of detention itself.

Legal Aid NSW is also concerned about the use of prolonged and, in some instances, indefinite detention. Indefinite detention is less common than it used to be, but has arisen where people who are found to be refugees receive an adverse security assessment from ASIO and cannot be released. This can happen to people who have their visa cancelled and then apply for a protection visa. We are also concerned about detainees' access to psychiatric treatment.

Legal Aid NSW recommends that the managers of immigration detention centres should be required to keep a register of the use of force, and the NPM should inspect it.

Young people

The definition or interpretation of what constitutes torture and cruel, inhuman or degrading treatment or punishment needs to be child-specific when dealing with juvenile detention facilities. A uniform standard should not be applied to both adult and juvenile facilities.

The inspection framework should be tailored to ensure children's voices are heard in any inspection process. Children are less likely to trust an official visitor that they do not know and who appears to be part of the institutional framework. The Chisholm Behaviour Program case study, below, illustrates some problems with the current inspection regime for juvenile detention.

Case Study – The Chisholm Behaviour Program

The Chisholm Behaviour Program operated for 12 months until May 2016 at Cobham Juvenile Justice Centre and Frank Baxter Juvenile Justice Centre. The program reportedly affected 66 young males aged between 16 and 21 years.⁴¹

According to documents obtained by Guardian Australia, 'teenagers in the program were allowed out of their cells for only an hour and a half a day. They were not allowed to socialise with other detainees, had meals in cells and had visits to psychologists and lawyers deducted from the time they were allowed out of their cells. The children were allowed only box visits from their family with "no hugs" permitted. All recreational activities, including basketball, were conducted in handcuffs.'⁴²

One Aboriginal boy spent up to six weeks locked in his cell for 22-23 hours a day, with his 'recreation' hours spent handcuffed in a small concrete enclosure. He was placed in

⁴¹ Lucy McNally, 'Juvenile justice: NSW Minister admits to providing wrong information about juvenile isolation practices' *ABC News Online* 4 November 2016.

⁴² P Farrell, 'Teenager waited hours for treatment after being injured by guards, documents say' *The Guardian Australia* 14 February 2017.

segregation because he trashed his cell after learning of his mother's death. He attempted suicide, and now has auditory hallucinations as a result of the isolation.⁴³

Even after the end of the program, there have been reports that 'detainee risk management plans' have seen child detainees confined to their cells for 23 hours per day for 10 days.⁴⁴

The Chisholm Behaviour Program was in operation for twelve months, despite the inspection regime under the CDC Act and fortnightly visits by official visitors. The problems with the program were brought to light when the young detainees made complaints to their lawyers at the Aboriginal Legal Service and Legal Aid NSW. This relationship of trust was central to the disclosure. This is important to note in any framework for the inspection and monitoring of children's detention facilities under OPCAT. Children, particularly Indigenous children, need time to establish a relationship of trust before they will engage with adults. It is not sufficient to send in a stranger to visit a facility and expect to get a full picture of conditions.

The case study above relies upon media reports because, two years after the program ceased, there is no publicly available information about these allegations, other than a brief reference in the Ombudsman's report to 'complaints alleging many boys were being kept isolated for lengthy periods' and 'evidence of lengthy periods of separation'.⁴⁵ The Ombudsman also noted that he should have been notified when a detainee is segregated for more than 24 hours, but this did not occur in the case of the Chisholm Behaviour Program.

There was no reference to the Chisholm Behaviour Program in the 2015-16 annual report of the Inspector of Custodial Services. On 4 November 2016 the Inspector began an inspection of 'the use of separation, segregation and confinement of detainees in juvenile justice centres', with particular reference to the Chisholm Behaviour Program and the use of detainee risk management plans. Legal Aid NSW welcomes this review.

Some of the problems with the program could have been prevented if the CDC Act required detention centres to publish information about their behaviour management programs, particularly those that involve the isolation of detainees. This would facilitate the proper inspection and monitoring of juvenile detention centres, and contribute to the effectiveness of the NPM.

Legal Aid NSW remains concerned that, even after the closure of the Chisholm Behaviour program, Juvenile Justice may be relying upon isolation to manage the behaviour of detainees. Detainee Risk Management Plans (DRMPs) can include isolation for up to 23 hours a day with restricted access to programs, no contact with other detainees, limited

⁴³ J Maley, P Begley, 'Kids self harm in custody, launch legal action against government' *Sydney Morning Herald* 4 November 2016.

⁴⁴ P Begley, J Maley, 'Corrections Minister signals rethink on isolation of children in custody' *The Border Mail* 14 July 2017.

⁴⁵ NSW Ombudsman *Annual Report 2015-16*, 74.

contact with staff, and the handcuffing of detainees when released for exercise. Our access to information about DRMPs is limited, but we are aware that many detainees who are on DRMPs are Aboriginal and/or have mental health concerns.

Conditions for inmates with high risk classifications

We have noted above our concerns about inmates held in the High Risk Management Correctional Centre at Goulburn. We also have concerns about inmates in other facilities who are categorised as high risk or, for example, 'Extreme Threat Inmates' (**ETI**). These people are frequently denied access to programs, have very limited access to telephone calls, may be held in isolation and whose visitors undergo high level vetting. Legal Aid NSW understands that ETI inmates are not entitled to reasons for their categorisation, and cannot initiate a review of that categorisation.

Seclusion and restraint

Legal Aid NSW is concerned about the use of seclusion and restraint in mental health facilities, particularly in the Forensic Hospital. We are concerned that the NSW Health policy on seclusion and restraint is not always complied with, and in particular, that seclusion and restraint have been used in a routine fashion for some detainees. At least two detainees have been subject to seclusion for years, despite recommendations made to the contrary by official visitors.

We also have concerns about the conditions under which people at risk of self-harm and suicide have been held in adult correctional centres. We suggested above that the Mum Shirl Unit should be a priority for inspection. In other facilities, 'dry cells' are used for those considered at risk of suicide. The inmate is stripped to underpants only and, in some cases, completely bare. The cell is completely bare apart from a toilet and one blanket that cannot be torn up. The concrete slab sometimes does not have a mattress. The cell is under 24 hours camera surveillance. The lights are on all day and night, and sometimes the cell is exposed to the yard where other inmates can see in through the Perspex door. As far as Legal Aid NSW is aware, the correctional centre officers are not given special training to manage severely mentally inmates who are on suicide watch.

Segregation units in adult correctional centres are also of concern. These are used as punishment. Under section 78A of the CAS Act, inmates can be kept separately from other inmates without the making of a 'segregated custody direction', meaning that no review is required.⁴⁶

⁴⁶ If an inmate is subject to a segregated custody direction for 14 days continuously, the inmate can apply to the Serious Offenders Review Council for a review of the order: *Crimes (Administration of Sentences) Act 1999* s 19.