



North Australian Aboriginal Justice Agency

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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.¹

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.² 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

¹ 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.

² *Correctional Services Act 2014 (NT)* s 29.

provided to the recent Royal Commission, young people in detention centres believe it is not worth complaining because the complaints are not addressed.³

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,⁴ 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.⁵

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

³ 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 Commission into the Protection and Detention of Children in the Northern Territory, Alice Springs, 14 December 2016, 25 (Jamal Turner).

⁴ *Ombudsman Act 2009* (NT) s 12.

⁵ 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.

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.

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.⁶ 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.⁷ 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.⁸

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:

⁶ Criminal Code Act, Section 43J, Northern Territory

⁷ 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>

⁸ 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.

- 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 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 Yolngu 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. Yolngu 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 Yolngu law, young people learn not to respect Yolngu law and start to disrespect each other...

Jail does not teach people how to be a proper Yolngu. 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.⁹

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.¹⁰ For instance, the statement says:

Court is an incredibly difficult process for Yolngu. 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

⁹ David Suttle and Yirriṅṅba Dhurrkay (eds), 'A Galiwin'ku Community Statement to Prevent Family Violence' (May 2016) 10.

¹⁰ David Suttle and Yirriṅṅba Dhurrkay (eds), 'A Galiwin'ku Community Statement to Prevent Family Violence' (May 2016) 14.

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.¹¹

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 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.¹²

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.¹³ 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

¹¹ SPT, *First Annual Report*, UN Doc. CAT/C/40/2, 14 May 2008, para. 28.

¹² Association for Prevention of Torture, *Civil Societies and National Prevention Mechanisms under the Optional Protocol Against Torture* (June 2008) 8.

¹³ Association for Prevention of Torture, *Civil Societies and National Prevention Mechanisms under the Optional Protocol Against Torture* (June 2008) 15.

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.¹⁴

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 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'¹⁵.

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.

¹⁴ Association for Prevention of Torture, *Civil Societies and National Prevention Mechanisms under the Optional Protocol Against Torture* (June 2008), 19.

¹⁵ 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>

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.

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.