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Dear Mr Santow

Response to the Australian Human Rights Commission's May 2017 'OPCAT in Australia Consultation Paper'

Thank you for the opportunity to provide our comments in response to the Australian Human Rights Commission (AHRC)'s May 2017 'OPCAT in Australia Consultation Paper' ('the consultation paper') regarding how the United Nations (UN) Optional Protocol to the Convention against Torture (OPCAT) should be implemented in Australia.

Our comments do not address all of the questions for discussion at 5.1 of the consultation paper, but rather focus on the questions (and other issues) that we consider most relevant and appropriate for the ACT Human Rights Commission ('HR Commission') to provide information and input on at this stage of the process. These issues are: the current oversight framework for places of detention in the ACT, any apparent gaps in that framework that will need to be addressed in order for the ACT to be OPCAT-compliant, our proposals regarding the ideal model for the ACT OPCAT preventative mechanism, and the recommended next steps to prepare the ACT for the Federal Government's ratification of the OPCAT in December 2017.

The OPCAT and its relevance to the ACT Human Rights Commission

The OPCAT is an international agreement aimed at preventing torture and cruel, inhuman or degrading treatment or punishment. It requires state parties to establish domestic mechanisms – referred to as National Preventative Mechanisms (NPMs) – to conduct preventive oversight of all places of detention within their jurisdiction and control. State parties which are federations, like Australia, often designate a federal level coordinating NPM and several State or Territory level NPMs. Preventive monitoring involves regularly visiting places of detention to identify risk factors that can lead to abuse and ill-treatment and working collaboratively with detaining authorities to address them. International experience indicates preventive monitoring is an effective way to prevent abuse and uphold the rights of persons deprived of their liberty.

The HR Commission is an independent agency established by the *Human Rights Commission Act 2005* (ACT). The HR Commission includes:

- The President and Human Rights Commissioner;
- The Public Advocate;
- The Children and Young People Commissioner;

- The Disability and Community Services Commissioner;
- The Discrimination Commissioner;
- The Health Services Commissioner; and
- The Victims of Crime Commissioner

The main object of the HR Commission is to promote the human rights and welfare of people in the ACT, and we work to create an inclusive community that respects and realises everyone’s rights. Accordingly, we have a central function and mandate to protect and promote the human rights and dignity of people in detention in the ACT, including those who may experience vulnerability as a result of their condition or situation, for example children and young people, Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds, elderly people, and people with mental health conditions and disabilities.

Overview of places and categories of detention in the ACT

Adult correctional centres operated by ACT Corrective Services (ACTCS) include the Alexander Maconochie Centre (AMC), Symonston Periodic Detention Centre and any tribunal, Magistrates Court and Supreme Court cells. The ACT’s youth detention facility is Bimberi Youth Justice Centre (Bimberi), which is operated by the ACT Community Services Directorate. Mental health facilities which would fall within the ambit of OPCAT include the Adult Mental Health Unit (AMHU) at Canberra Hospital, Dhulwa Mental Health Unit (Dhulwa), the Brian Hennessy Rehabilitation Centre (Brian Hennessy), the Older Persons Mental Health Inpatient Unit (OPMHIU) and Ward 2N at Calvary Public Hospital. Further, there are a number of residential and social care facilities (including disability care, aged care, and child protection residential care facilities), court cells, police cells and situations involving transportation to and between places of detention which fall within the broad ambit of “places of detention” under the OPCAT.

Broad overview of the inspection framework for places of detention in the ACT

ACT bodies with inspection, oversight and/or complaint-handling powers in relation to one or more places of detention in the ACT include, but are not limited to:

- the ACT HR Commission, comprising the President and Human Rights Commissioner (HR Commissioner); the Discrimination, Disability and Community Services, and Health Services Commissioner; and the Public Advocate and Children and Young People Commissioner;
- the ACT Auditor-General;
- Official Visitors (OVs); and
- the ACT Ombudsman

Several bodies also have broad investigation or own motion powers in relation to one or more places of detention, including the HR Commission, the Auditor-General, and the ACT Ombudsman. For example, s 41 of the *Human Rights Act 2004* (ACT) (‘HR Act’) vests the HR Commission with a broad power to review the effect of Territory laws, including the common law, on human rights and to report in writing to the Minister. This power has been exercised in relation to adult corrections twice¹ and youth justice twice.² The ACT Ombudsman has an own motion power in respect of maladministration. The HR Commission

¹ ACT Human Rights Commission, ‘Human Rights Audit on the Operation of ACT Correctional Facilities under Corrections Legislation’ (Report, July 2007); ACT Human Rights Commission, ‘Human Rights Audit on the Conditions of Detention of Women at the Alexander Maconochie Centre’ (Report, April 2014).

² ACT Human Rights Commission, ‘Human Rights Audit of Quamby Youth Detention Centre’ (Report, June 2005); ACT Human Rights Commission, ‘The ACT Youth Justice System 2011: A Report to the ACT Legislative Assembly by the ACT Human Rights Commission’ (Report, July 2011).

can also investigate and report on systemic issues in relation to matters related to its functions across multiple places and categories of detention under the 'Commission-Initiated Consideration' power vested in it by s 48 of the *Human Rights Commission Act*.

There are regular oversight agency meetings in relation to some of the larger places of detention in the ACT, which allow key oversight agencies to meet – both with and without detaining authorities present – to share information and discuss concerns. For example, representatives of the ACT Ombudsman, the Public Advocate, the HR Commissioner and OVs attend regular oversight agencies meetings with the AMC General Manager and other staff convened by ACTCS. A number of the AMC oversight bodies also regularly attend separate AMC oversight meetings at their offices. Similarly, several agencies attend monthly Bimberi oversight meetings.

Additionally, advocates such as OVs and the Public Advocate have a regular presence at many places of detention, including the AMC, Bimberi, and mental health facilities. In relation to the latter, for example, the Public Advocate regularly attends AHMU, Dhulwa, Brian Hennessy, Ward 2N at Calvary Public Hospital and the OPMHIU.

Proposals for a Custodial Inspectorate in the ACT

On 16 February 2017, the ACT Government indicated its commitment to establish an 'Inspectorate of Custodial Services' to oversee the ACT adult corrections system. This proposal was part of the Government's response to the independent inquiry into the treatment in custody of Steven Freeman, a young Aboriginal man who died in custody at the AMC.³ The Government has indicated that it expects the Inspectorate function will be operational by the end of 2017. The details of the proposed model for the Inspectorate function – including its mandate, jurisdiction and location – are not yet publically available.

Potential gaps and overlaps in the ACT oversight framework

The OPCAT sets out a number of requirements for NPMs, including (but not limited to):

- functional independence and independence of their personnel;
- necessary resources for functioning;
- access to places of detention;
- a mandate to undertake regular preventive visits;
- access to information concerning the number of people detained and places of detention;
- access to information on treatment and conditions of people in detention;
- the right to conduct private interviews with detained people and others; and
- experts with required capabilities and professional knowledge.

There are a number of aspects of the ACT oversight framework that will need to be addressed in order to ensure compliance with the OPCAT. Some potential issues are set out below.

Resources

While several entities are empowered to address systemic issues through various audit powers, own motion powers, annual reporting processes, or informal engagement with authorities, these bodies are not sufficiently resourced to use these powers with the regularity and consistency required of a NPM. As

³ ACT Justice and Community Safety Directorate, *Inquiry into the Treatment in Custody of Detainee Steven Freeman* <<http://www.justice.act.gov.au/news/view/1709/title/inquiry-into-the-treatment-in>>

the OPCAT itself requires, it will be highly important that any ACT NPM be adequately resourced to fulfil its mandate.

Specific places and situations of detention where oversight is minimal

There are specific places and categories of detention in the ACT where oversight is minimal. In the corrections area, some examples include court cells, police cells and watch-houses and transportation to or between places of detention. While some oversight bodies do have the jurisdiction to attend court cells, from our experience this does not regularly occur in practice. In relation to police cells, watch-houses and transportation in the ACT, one issue contributing to the lack of oversight may be that, given the arrangement whereby the Australian Federal Police provides policing services to the ACT, ambiguities sometimes arise regarding which jurisdiction's agencies have oversight mandate and powers. Court cells and transportation to and between correctional facilities operated by ACTCS will presumably fall within the scope of the ACT Inspectorate once that office is established; however, it is unclear as to whether the ACT Inspectorate will have the power to inspect police cells and watch-houses and oversee police transportation. In our opinion it is important that any ACT NPM be given clear and specific powers to inspect and oversee court and police custody and transportation regularly, and to have full OPCAT-compliant access to information in relation to such places and situations.

As was raised at the ACT OPCAT consultations facilitated by the AHRC on 1 June 2017, aged care is widely recognised to be an area where there is inadequate preventative oversight. As aged care facilities are federally funded, the oversight jurisdiction of ACT bodies in relation to aged care facilities in the ACT is limited (however, the ACT Health Services Commissioner does have own motion investigation and complaint-handling powers in relation to the provision of health services in such facilities). It will be necessary to ensure that an oversight body with sufficient powers in relation to aged care facilities in the ACT be part of the federal NPM structure and have a regular presence in ACT aged care facilities.

Furthermore, gaps in the ACT oversight framework sometimes arise due to factual circumstances and jurisdictional issues connected to the ACT's unique situation as a small Territory completely surrounded by NSW. People in a range of places or situations of detention move across NSW/ACT boundaries often, for a range of reasons, and it can become unclear which jurisdiction's agencies have oversight jurisdiction. For example, there may be situations where detainees in the ACT are transported or transferred interstate to access specialists not available in the ACT or where people under the jurisdiction of NSW care and protection agencies are brought to temporary respite facilities in the ACT for a short respite stay but, for any number of reasons, remain in the ACT for a longer period of time than expected. Given these complexities, a cross-border protocol between the ACT and NSW in relation to all places of detention covered by the OPCAT may be required to effectively implement the OPCAT in both jurisdictions. Any such protocol would need to be consistent with the ACT HR Act.

Access to information

Furthermore, we are concerned that the various ACT bodies with oversight jurisdiction do not have the (legal or practical) level of access to documents or information that an ACT NPM will require. Some existing legislative powers to access information may be too broad or vague, leading to uncertainty about the nature and extent of the obligations of detaining authorities to provide access to information. In our view it will be very important that any ACT NPM be given clear and specific legislative power to access the information, interviewees, and resources it requires to be OPCAT-compliant.

Overlap and duplication

In a small jurisdiction like the ACT, where a number of bodies already have overlapping oversight jurisdiction over multiple places of detention, there is a risk of duplication in oversight and

disproportionate regulatory burden, which could be further complicated if the proposed ACT Inspectorate function is not appropriately designed and located. In particular, we consider it is important that the Inspectorate function be designed to have sufficient flexibility and independence to enable it to be an OPCAT-compliant NPM. In addition, we see merit in having the new Inspectorate function co-located with the HR Commission, and in this body having a wide enough mandate, powers and jurisdiction to become the *single* ACT NPM, overseeing *all* places of detention (not just adult correctional facilities).

The ACT as an OPCAT-compliant jurisdiction

As one of only two Australian jurisdictions with human rights legislation, the ACT could be a model jurisdiction in the implementation of the OPCAT. Outlined below are some of the main legislative changes and issues that the ACT will need to consider to prepare for ratification.

Legislation regarding the SPT

In order to implement the OPCAT, all Australian jurisdictions will be required to enact legislation that provides the framework for the UN Subcommittee on Prevention of Torture (SPT) to visit Australia. The ACT led the way in supporting Australia's ratification of the OPCAT with the tabling of the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2013 (ACT), which set out such a framework for the ACT. While the Bill lapsed in October 2016, it will be reintroduced before December 2017. There are some improvements that should be made to the Bill to make it OPCAT-compliant, including by ensuring the SPT has the level of access to documents it requires to fulfil its mandate under the OPCAT and that any examples of "places of detention" provided in the Bill are sufficiently wide in their scope. With these modifications, the ACT Bill will serve as a useful guide for other States and Territories in the drafting of equivalent legislation.

The ACT NPM

There are a number of possible models for an ACT NPM and we consider it necessary that the ACT community be adequately consulted regarding which of the possible models will be the most appropriate and beneficial for the ACT. Consultation with communities that are likely to be particularly affected by OPCAT obligations – including Aboriginal and Torres Strait Islander communities, who have disproportionately high incarceration rates in the ACT⁴ – will be particularly important. Our tentative stance on the ideal ACT NPM model is as follows:

1. A single ACT NPM

There would be clear advantages to designating a single body as the ACT NPM,⁵ rather than having several ACT NPMs with an ACT coordinating NPM sitting under the national coordinating NPM. A single body would ensure horizontal integration across all categories and places of detention in the ACT, and facilitate more effective vertical integration between the State and Territory NPMs and the national

⁴ As at 30 June 2016, Aboriginal and Torres Strait Islanders comprised 24% of the adult prisoner population in the ACT and the Aboriginal and Torres Strait Islander age standardised imprisonment rate was 18 times the non-Indigenous age standardised imprisonment rate: see Australian Bureau of Statistics, *Prisoners in Australia, 2016: Australian Capital Territory* (7 December 2016)

<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2016~Main%20Features~Australian%20Capital%20Territory~25>>

⁵ See, for example, *Implementing the Optional Protocol to the Convention against Torture: Options for Australia*, A report to the Australian Human Rights Commission by Professors Richard Harding and Neil Morgan (Centre for Law and Public Policy, The University of Western Australia), 2008, [6.12]-[6.24].

coordinating NPM. It would promote the efficient management of knowledge and information, as well as improve the means to identify and respond to cross-cutting issues. As a small jurisdiction, with relatively few places of detention, the ACT is one of the best-placed jurisdictions to harness (and feed into the federal NPM structure) the advantages of a single NPM structure.

2. A locally based NPM

We consider that a locally based ACT NPM would be preferable to a wholly outsourced fly-in/fly-out NPM. As was noted by several stakeholders at the ACT OPCAT consultations on 1 June 2017, the successful implementation of the OPCAT framework in the ACT will require the NPM having regular access to places of detention (including unannounced visits) and being able to develop an ongoing constructive relationship with both detaining authorities and the ACT community, based on an understanding of the local context.

Where expertise is required that is not readily available within the ACT, there should be a system by which any ACT NPM can access expertise and fly in experts as required. This system has been used with success by Custodial Inspectorate agencies in other jurisdictions, including NSW. The implementation of the OPCAT across Australia would be greatly aided by the national coordinating NPM establishing and providing the State and Territory NPMs access to a body of experts to build their capacity and complement their resources and expertise in specific areas relevant to the OPCAT.

3. A NPM located at the ACT Human Rights Commission

The HR Commission contains a wealth of relevant expertise in human rights, discrimination, health services, mental health, disability services, advocacy and victims support, which could be readily shared with the NPM through co-location, without compromising independence. Further, the HR Commission has the necessary skills and local community connections to consult with vulnerable groups who are particularly affected by the OPCAT obligations due to the specific vulnerabilities that they experience, including children and young people, Aboriginal and Torres Strait Islander people, people with disabilities, and people with mental health conditions. The HR Commission's functions have been expanded as a result of the restructure of the Commission in 2016 to include the Public Advocate and the Victims of Crime Commissioner. The integration of these functions has increased opportunities for collaboration as well as provided for the clearer delineation of roles. Indeed, the experience of the new Commission to date has been that, while different oversight agencies may be able to work effectively across physical boundaries, appropriate information sharing is most effective when complementary roles are brought together.

Further, many of the existing oversight functions in relation to places of detention in the ACT are situated with the HR Commission, including the audit power under s 41 of the HR Act. The co-location of the NPM and the HR Commission will help prevent unnecessary duplication and overlap in the work of the entities.

Recommended next steps in the ACT

1. Audit into the practical changes required

The first step towards achieving OPCAT compliance should be to map out all places and categories of detention in the ACT against existing oversight jurisdiction and functions to identify gaps in the framework. A thorough audit or investigation into the necessary changes has been recognised as an important step to prepare for ratification in other jurisdictions: for example, in April 2017 the Victorian Ombudsman announced an investigation into the practical changes required to implement the OPCAT in Victoria.

2. Public consultation

As we have mentioned, in our opinion it is important that the ACT community (including relevant detaining authorities and all stakeholders who currently have oversight jurisdiction for places of detention in the ACT) is consulted on what body or bodies it considers should constitute the ACT NPM, how they think any ACT NPM should operate, and how the proposed Inspectorate function should fit and interact with the NPM function given the pending ratification of the OPCAT. Consultation of communities with disproportionately high detention rates in the ACT – including Aboriginal and Torres Strait Islander communities – will be particularly important.

3. Legislation establishing the ACT NPM

After the consultation process, specific legislation should be enacted to designate the ACT NPM and to vest it with the jurisdiction and full suite of powers it requires to fulfil its mandate under the OPCAT.

4. Reintroduction of the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2013 (ACT)

As discussed above, the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2013 (ACT) should be modified to make it OPCAT-compliant and reintroduced.

5. Development of necessary cross-border protocols and agreements

A cross-border protocol between the ACT and NSW in relation to the transportation and transfer of people across State/Territory borders to and from all places of detention covered by the OPCAT may be required to effectively implement the OPCAT in both jurisdictions. Further, an agreement between the Federal and ACT Governments (or another document) may be required to clearly establish which jurisdiction's agencies have oversight mandate and powers over police cells and police transportation in the ACT, and any other place or category of detention where there may be jurisdictional ambiguities. Any such protocols or agreements would need to be consistent with the ACT HR Act.

If you have any questions or would like more detailed information on any of the issues raised in these submissions, please do not hesitate to contact us on (02) 6205 2222.

Yours sincerely



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