



Law Council
OF AUSTRALIA

Response to Consultation Paper

OPCAT in Australia: Stage 2

Australian Human Rights Commission

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Table of Contents

About the Law Council of Australia	3
Acknowledgement	4
Executive Summary	5
Preliminary comments	7
Response to questions	7
Question 1: How should OPCAT be implemented to prevent harm to people in detention? How should the most urgent risks of harm be identified and prioritised?	7
Implementation in other jurisdictions	7
Implementation in Australia	9
Implementation in Victoria	9
Functions of the NPM.....	10
Areas of priority	11
Question 2: What categories of ‘place of detention’ should be subject to visits by Australia’s NPM bodies?	16
Offshore detention facilities	17
Aged care facilities	18
Police prisons.....	19
Detention facilities utilised for persons who are considered mentally impaired	20
Education facilities	20
Question 3: What steps should be taken to ensure that measures to implement OPCAT in Australia are consultative and engage with affected stakeholders?	21
Staffing and professional expertise required for visiting inspections	21
Question 4: What are the core principles that need to be set out in relevant legislation to ensure that each body fulfilling the NPM function has unfettered, unrestricted access to places of detention in accordance with OPCAT?	22
Question 5: Do you have any comments about the proposals to ensure Australia complies with its obligations under OPCAT?	24

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council of Australia acknowledges the assistance of its National Human Rights Committee, the Law Society of South Australia, the Law Society of New South Wales, and the Law Institute of Victoria in the preparation of this submission.

Executive Summary

1. The Law Council of Australia is grateful for the opportunity to provide a submission to the Australian Human Rights Commission (**AHRC**) in response to the 'OPCAT in Australia Consultation Paper: Stage 2' (**Consultation Paper**).
2. On 26 July 2017, the Law Council provided the AHRC with a comprehensive submission in response to its earlier consultation on this issue.¹ The Law Council draws on this earlier submission and notes that the positions outlined in that work remain current, with the present submission further building on these views.
3. On 21 December 2017, Australia took a positive step in the campaign to end torture, through the ratification of the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**). OPCAT is designed to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment. It requires the Australian Government to establish a system of regular visits, to be undertaken by independent international and national bodies, to all places of detention in Australia, including prisons, youth and immigration detention and mental health facilities.
4. The Law Council has long pressed for this ratification, as it is envisaged that OPCAT will assist in preventing torture from occurring in any place of detention in Australia, as well as encouraging a culture of transparency and accountability. The State's obligation not to impose such treatment or punishment or to expose anyone to the real risk of such treatment or punishment is an obligation which cannot be derogated from in any circumstances.¹
5. Accordingly, the Law Council welcomes the AHRC's further Consultation Paper as an important part of facilitating consultations with civil society to provide advice back to the Australian Government. The Consultation Paper sets out a series of key questions based on issues being considered in planning how OPCAT should operate in Australia, based on proposals put forward in the AHRC's 'OPCAT in Australia Interim Report to the Commonwealth Attorney-General' (**Interim Report**).²
6. Key recommendations of the Law Council in responding to the consultation questions include:
 - OPCAT should be implemented under compliance frameworks with clear accountability and transparency mechanisms. These frameworks should be developed by each state and territory, in consultation with the Commonwealth Government;
 - core elements of OPCAT implementation in Australia should be documented in legislation or, at minimum, in a formal agreement;
 - the central coordinating National Preventive Mechanism (**NPM**) should establish formal arrangements with civil society representatives during the early stages of OPCAT implementation;
 - there should be an expansive interpretation of the definition of 'places of detention', noting that ratification presents a unique opportunity to develop a

¹ Law Council of Australia, *Response to Consultation Paper: OPCAT in Australia* (26 July 2017), at <www.lawcouncil.asn.au/resources/submissions/response-to-consultation-paper-opcat-in-australia>.

² Australian Human Rights Commission, *OPCAT in Australia, Interim Report to the Commonwealth Attorney-General* (September 2017).

systematic and cohesive oversight system across both private and public institutions where people are subjected to the care or authority of others; and

- the NPM should prioritise issues such as current practices on seclusion and restraint, conditions in immigration and youth detention, and the treatment of Aboriginal and Torres Strait Islander peoples in detention.
7. The Law Council would be pleased to discuss its submissions further with the AHRC, should it assist.

Preliminary comments

8. The existence of OPCAT is indicative of the collective acknowledgement that the existing system of human rights may not be enough to protect vulnerable people from ill treatment in places of detention. Signatory countries have agreed that a preventative approach is required to better safeguard compliance with human rights.
9. OPCAT focuses on preventing ill-treatment in places of detention through existing human rights. It is not a reactive treaty that focuses on new or continued mechanisms for addressing ill-treatment through the identification of human rights. The distinction is profound and should form the basis of the Australian mandate that establishes the NPM. As a preventative measure, OPCAT is unique in its purpose and, as a global solution to preventing ill-treatment in places of detention, OPCAT should remain distinct from other mechanisms that are ultimately reactive. The primary focus when implementing OPCAT must always be to maintain the intention of the treaty as a preventative measure.
10. Furthermore, OPCAT encourages a global approach to the prevention of torture and other cruel, inhuman or degrading treatment or punishment through the United Nations Subcommittee on the Prevention of Torture (**SPT**). The benefits that follow a global cooperative approach through the SPT, which is based on international experts and international best practices that have the benefit of continually describing torture and ill treatment in a changing world, cannot be overstated.

Response to questions

Question 1: How should OPCAT be implemented to prevent harm to people in detention? How should the most urgent risks of harm be identified and prioritised?

11. The objective of OPCAT, as outlined in Article 1, is 'to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, to prevent torture and other cruel, inhuman or degrading treatment or punishment'.³
12. The Law Council supports the establishment of an NPM as a means of conducting inspections of places of detention, to ensure Australia is meeting its responsibilities under the OPCAT. The Law Council therefore welcomes the approach contained in the Interim Report which encourages the establishment of an NPM system that is adequately resourced, independent, transparent in its operation, and has formal engagement with civil society and human rights institutions.

Implementation in other jurisdictions

13. The NPM will underpin the effective, transparent and independent monitoring of places of detention. The role of the NPM will be complemented by the work conducted by the SPT. The SPT will, on occasion, send independent experts to visit detention facilities of a State party to OPCAT and offer guidance to the NPM.

³ UN General Assembly, *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 9 January 2003, A/RES/57/199, Article 1.

14. Currently, 62 states party to OPCAT have implemented NPMs in varying forms.⁴ The two predominant forms of NPMs are either a single or multi-agency structure.⁵ There are challenges in implementing OPCAT in accordance with either structure in a federalised country. Nonetheless, the Law Council considers that the adoption of a coordinated multi-agency structure better aligns with Australia's institutional environment. Countries such as Sweden, Argentina, the Netherlands, Brazil, New Zealand and the United Kingdom have set-up multi-body NPMs.⁶
15. The United Kingdom has 21 statutory bodies that jointly form the NPM and are coordinated by the central NPM body, Her Majesty's Inspectorate of Prisons for England and Wales.⁷ Specialised inspectorates or commissions such as the Children's Commissioner for England and Criminal Justice Inspection Northern Ireland monitor places of detention that fall within their respective remits. Similarly, New Zealand's Human Rights Commission serves as the central NPM and has a coordinating role with respect to four NPM statutory agencies with thematically divided remits.⁸ The division and respective roles comprising New Zealand's NPM are:
- the Ombudsmen: prisons and those in the custody of the Department of Corrections, health and disability places of detention including privately run aged care facilities, Immigration premises, children and young persons' residences, Public Protection Order residences, court facilities;
 - the Independent Police Conduct Authority: police custody including court facilities;
 - the Children's Commissioner: children & young persons' residences; and
 - the Inspector of Service Penal Establishments: Defence Force.
16. As noted by the Association for the Prevention of Torture (**APT**), such a thematic division of NPM responsibilities is an option for states that 'wish to harness the capabilities of existing monitoring mechanisms with mandates to visit particular types of places of detention'.⁹ However, the APT also states that one such body should be designated with a broad mandate in order to cover places of detention that are not otherwise monitored by the thematically divided agencies. In line with this approach, the Law Council suggests that Australia implement a multi-agency, thematically focussed NPM in consultation with existing statutory bodies at the state and territory level.
17. The Law Council submits that drawing from established institutional capacity in Australia will better tailor the functions of the individual NPM bodies. Inspectorate functions will likely be enhanced where a body has expertise with a particular type of facility, as the approach to monitoring should be relatively adaptive, flexible and responsive in line with the differing conditions encountered.¹⁰ Further, long-term improvement in the conditions

⁴ Office of the High Commissioner for Human Rights, *National Preventive Mechanisms*, at <www.ohchr.org/en/hrBodies/opcat/pages/nationalpreventivemechanisms.aspx>.

⁵ Association for the Prevention of Torture, *Implementation of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Federal and other Decentralised States*, at <www.apr.ch/content/files_res/OPCAT%20and%20Federal%20States%20-%20Eng.pdf>.

⁶ Natalie Pierce, 'Implementing Human Rights in Closed Environments: The OPCAT Framework and the New Zealand Experience' (2014) 31 *Law in Context* 187.

⁷ See, National Preventive Mechanism (UK), <www.nationalpreventivemechanism.org.uk/about/background>.

⁸ See, Human Rights Commission (NZ), *Monitoring Places of Detention/OPCAT*, at <www.hrc.co.nz/your-rights/human-rights/our-work/opcat>.

⁹ Association for the Prevention of Torture, *Implementation of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Federal and other Decentralised States*, at <www.apr.ch/content/files_res/OPCAT%20and%20Federal%20States%20-%20Eng.pdf>.

¹⁰ Natalie Pierce, 'Implementing Human Rights in Closed Environments: The OPCAT Framework and the New Zealand Experience' (2014) 31 *Law in Context* 187.

of detention will largely depend on consistent, constructive and open dialogue with the staff and management of places of detention. This consultative dialogue is a critical feature of effective OPCAT implementation and the Law Council considers that it will likely be more appropriate and responsive within a multi-agency structure.

18. Harnessing the resources, both human and financial, of existing statutory bodies to perform the role of an NPM may be more effective than establishing a single agency to perform all NPM functions. Germany provides an example of the difficulty in creating a single body to effectively perform the broad functions of an NPM. In 2010, the Special Rapporteur on Torture noted that Germany served as '[a] particularly worrying example...where the [NPM] has an alarming lack of human and financial resources'.¹¹

Implementation in Australia

19. As noted in the Interim Report, the Australian Government has indicated that it will engage in a consultative process with state and territory governments on OPCAT's implementation, recognising that the majority of Australia's places of detention are run by the states and territories. A combination of state, territory and federal bodies will fulfil the role of the Australian NPM. The Commonwealth Ombudsman will be responsible for coordinating the relevant state and territory bodies and will itself perform inspections of places of detention which fall within the federal jurisdiction.
20. The Office of the Commonwealth Ombudsman currently undertakes inspectorate duties within immigration detention facilities. This role has now expanded in accordance with OPCAT to encompass the undertaking of inspections of other Commonwealth places of detention such as federal police cells and Defence detention facilities.¹² The Ombudsman is liaising with state and territory bodies that already perform similar inspectorate functions to determine the capabilities of the respective bodies in comprehensively performing the functions of an NPM. As indicated in the Interim Report, states and territories are likely to nominate their respective bodies that will serve as an NPM.
21. The Law Council suggests that each NPM should be free to determine which facility they inspect within the OPCAT framework without being limited by legislation. There have been specific concerns raised by Law Council members, including the Law Institute of Victoria (LIV), that any limitation placed on NPMs in this respect, may result in Australia not complying with its obligations under OPCAT.

Implementation in Victoria

22. The Law Council notes particular input received from the LIV pointing out the following specific aspects of implementation in the Victorian context, which the Law Council suggests may well have relevance to other jurisdictions.
23. The LIV contends that the coordinating body of the NPM in Victoria should possess the institutional knowledge, resources and statutory independence necessary to fulfil Australia's obligations under OPCAT. The LIV notes that the current framework of

¹¹ Special Rapporteur on Torture, Interim report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN.DOC A/65/273, 10 August 2010, §83.

¹² This expansion came into effect on 1 July 2018. See Commonwealth Ombudsman Media Release, *Commonwealth Ombudsman to be National prevention mechanism Coordinator for OPCAT* (15 December 2017), at <www.ombudsman.gov.au/news-and-media/media-releases/media-release-documents/commonwealth-ombudsman/2017/14-documents-commonwealth-ombudsman-to-be-national-preventative-mechanism-coordinator-for-opcat>.

Victorian oversight bodies has significant gaps or overlaps in responsibilities, and this has led to inefficient and ineffective oversight of places of detention.

24. The LIV states that the Victorian Ombudsman has successfully conducted a pilot OPCAT inspection into the conditions and management of the Dame Phyllis Frost Centre (**DPFC**) in Victoria.¹³ The Victorian Ombudsman is a statutory authority that has conducted regular visits to prisons, youth justice centres, secure welfare service facilities for young people in the child protection system and Victoria's secure forensic mental health hospital, the Thomas Embling Hospital, over the past 30 years. The Victorian Ombudsman has noted that inspection of the DPFC was time and resource intensive, and in order to comply with OPCAT any office performing inspections would need to be provided with sufficient resources and as well as expertise.¹⁴
25. The LIV considers the Office of the Inspector of Custodial Services (**OICS**) in Western Australia to be a best practice model and has endorsed the establishment of similar oversight bodies to fulfil the obligations under OPCAT in other jurisdictions. The OICS conducts inspections into prisons, detention centres, court custody centres and prescribed lock ups at least every three years.¹⁵ Unannounced and short follow-up inspections occur outside of the three-year cycle to accommodate for circumstances where there is a critical event or a deterioration of conditions within the institution.¹⁶ Each institution is served by an Inspection and Research Officer acting as a liaison between the OICS and the institution.¹⁷ This ensures that expertise is retained within the OICS as the Officer builds an ongoing relationship with the institution.
26. The OICS has the autonomous authority to decide which facilities to inspect and can also be referred matters from Parliament.¹⁸ The LIV contends that establishing similar bodies in other jurisdictions will ensure compliance with OPCAT as it will be independent and driven by expertise.
27. The Law Council notes that the Inspector of Custodial Services in Western Australia has, however, recently expressed frustration regarding a lack of government follow-through in responding to problems identified with the Banksia Hill Youth Detention Centre, noting that 'has lurched from crisis to partial recovery and then back into crisis' during his nine years in office.¹⁹ This underlines the need not only to establish oversight bodies, but for need for clear, consistent government commitments to act on any recommendations made by such bodies.

Functions of the NPM

28. It is submitted that the NPMs of the federal, state and territory governments will be more effective in precipitating a positive change in conditions of detention where there is a robust dialogue shared with the management and staff overseeing places of detention.

¹³ Victorian Ombudsman, *Implementing OPCAT in Victoria: Report and Inspection of the Dame Phyllis Frost Centre* (November 2017), at <www.ombudsman.vic.gov.au/getattachment/432871e4-5653-4830-99be-8bb96c09b348>.

¹⁴ *Ibid*, 39.

¹⁵ Office of the Inspector of Custodial Services (WA), *How We Inspect*, at <www.oics.wa.gov.au/how-we-inspect/?doing_wp_cron=1535947120.0502109527587890625000>.

¹⁶ *Ibid*.

¹⁷ *Ibid*.

¹⁸ *Inspector of Custodial Services Bill 2003* (WA) section 17.

¹⁹ Office of the Inspector of Custodial Services (Western Australia), '2017 Inspection of Banksia Hill Detention Centre' (Report No 116, Government of Western Australia, February 2018), vi-vii.

In line with guidelines adopted by the NPM in New Zealand,²⁰ the Law Council considers the NPM agencies in Australia should:

- determine the specific objectives of the visit and collect preparatory information prior to the visit taking place;
- alongside comprehensive interviews with detained individuals, speak with management and staff about the state and functioning of the facilities;
- after the visit takes place, discuss the NPM's findings with relevant staff and allow the institution an opportunity to provide an initial response; and
- present the NPM's report and recommendations to the relevant authorities, with the report forming the basis for future dialogue with the inspected institution.

Areas of priority

29. The AHRC has asked for input on how the most urgent risks of harm should be identified and prioritised. In its previous submission to the AHRC, the Law Council has raised a number of areas where existing inspection frameworks were deemed inadequate and should be prioritised under the OPCAT.²¹ These included:

- correctional facilities;
- police cells;
- youth justice centres;
- youth remand centres;
- children in residential care; and
- aged care facilities.

30. The Law Council draws the AHRC's particular attention to its earlier submissions in relation to issues regarding current practices on seclusion and restraint,²² immigration detention²³ and youth detention,²⁴ and submits that these areas remain of concern. Drawing on further input from its Constituent Bodies, the Law Council notes the following additional matters of particular importance:

Aboriginal and Torres Strait Islander prisoners

31. The rate of incarceration for Aboriginal and Torres Strait Islander peoples in both the adult and youth detention systems is grossly in excess of the general population, and the devastating impacts of this overrepresentation on communities around Australia is well documented.

32. The treatment of Aboriginal and Torres Strait Islander peoples in detention continues to be a serious concern to the Law Council, and it is particularly alarming to note that it has been 27 years since the Royal Commission into Aboriginal Deaths in Custody reported its finding and yet there has been a notable lack of progress in improving the interactions between this group and the justice system.

²⁰ Human Rights Commission (NZ), *OPCAT in New Zealand 2007-2012: A Review of OPCAT Implementation by New Zealand's National Preventive Mechanisms* (July 2013), <www.hrc.co.nz/files/2214/2398/7100/Opcat-2013_web.pdf>.

²¹ Law Council of Australia, *Response to Consultation Paper: OPCAT in Australia* (26 July 2017), [86]-[141].

²² *Ibid*, [89]-[113].

²³ *Ibid*, [114]-[133].

²⁴ *Ibid*, [134]-[137].

33. The Law Society of South Australia (**LSSA**) in particular has pointed to the Aboriginal Legal Rights Movement in South Australia where there have been significant concerns raised about Aboriginal people not being adequately protected in the South Australia prison system, particularly at Port Augusta prison. Specific issues of concern with respect to Aboriginal prisoners include a lack of interpreters, the inadequacy of training of prison officers in relation to cultural difference and the extremely disproportionate number of Anangu prisoners even when compared to the number of Aboriginal prisoners.
34. The Law Council directs the AHRC to its previous submissions in relation to this critical area for OPCAT implementation in Australia.²⁵ It also refers to its Justice Project final report chapters on:
- (a) Aboriginal and Torres Strait Islander persons;
 - (b) Prisoners and Detainees;
 - (c) Children and Young People; and
 - (d) Broader Justice System Players.²⁶
35. These chapters contain key statistics and findings regarding the over-representation of Aboriginal and Torres Strait Islander peoples in prisons and youth detention, concerns regarding poor conditions and treatment in these facilities, a lack of interpreters throughout the justice system and the need for training and increased cultural competence amongst key corrections personnel.
36. While there are many relevant findings in this regard, it is worth particularly noting that, as reflected in the Prisoners and Detainees chapter:
- (a) according to the 2016 Census, Aboriginal and Torres Strait Islander people represent only 2.8 per cent per cent of Australia's population.²⁷ However, 27.4 per cent of Australia's prison population are Aboriginal and Torres Strait Islander people;²⁸
 - (b) based on census night statistics, Aboriginal and Torres Strait Islander people were 12.5 times more likely to be in prison than non-Indigenous people;²⁹
 - (c) the number of Aboriginal and Torres Strait Islander people in prison has also grown at a significantly faster rate than that of the non-Aboriginal and Torres Strait Islander population over the past decade – 70.5 per cent compared with 46.4;³⁰

²⁵ Ibid, [138]-[141].

²⁶ Law Council of Australia, *Justice Project: Final Report* (2018), <<https://www.lawcouncil.asn.au/justice-project/final-report>>.

²⁷ Australian Bureau of Statistics, *2024.0 - Census of Population and Housing: Australia Revealed, 2016* (2017) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/2024.0>>.

²⁸ Australian Bureau of Statistics, *4517.0 - Prisoners in Australia, 2017* (2017) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>>.

²⁹ Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report No 133 (2018), 94-5.

³⁰ Australian Bureau of Statistics, *4517.0 - Prisoners in Australia, 2017* (2017) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>>.

- (d) Aboriginal and Torres Strait Islander women are incarcerated at more than 20 times the rate of non-Aboriginal and Torres Strait Islander women;³¹ and
- (e) more than half (58 per cent) of all young people in detention on an average day in 2016-17 were Aboriginal or Torres Strait Islander people and Aboriginal or Torres Strait Islander young people aged 10–17 were 24 times more likely to be in detention than young people who were not Aboriginal or Torres Strait Islander.³²

Prisoners with disabilities

37. The Law Council notes the recent report by Human Rights Watch into the neglect and abuse suffered by prisoners with disabilities.³³ This report found that people with disabilities, particularly a cognitive or psychosocial disability, are overrepresented in the criminal justice system in Australia, comprising around 18 per cent of the country's population, but almost 50 per cent of people entering prison.

38. The Justice Project's final report chapters highlight the concerns in the Human Rights Watch report, as well as further evidence of a striking over-representation of people with disability in the adult and juvenile corrections systems, including particularly Aboriginal and Torres Strait Islander peoples. For example, as noted in the Justice Project's People with Disability chapter:

- (a) according to Jesuit Social Service, a 2011 study by Corrections Victoria found that '42 percent of men and 33 percent of women (in a sample of the Victorian prison population) had been diagnosed with an [Acquired Brain Injury] ABI';³⁴
- (b) a 2017 report by the Mental Health Commission of New South Wales stated that 50 per cent of adult prisoners have been diagnosed with or treated for a mental health condition and 87 per cent of young people in custody have a past or present psychological impairment.³⁵ It estimated that between 8 and 20 per cent of prisoners have an intellectual disability and suggests that the rates of cognitive impairment among prisoners are likely to be higher, 'given that a significant number of inmates report ongoing neurological effects and psychological symptoms because of a traumatic brain injury';³⁶
- (c) a 2014 study of 65 per cent of youth detainees across eight detention centres in New South Wales revealed 45.8 per cent had borderline or lower intellectual functioning;³⁷

³¹ Australian Bureau of Statistics, *4517.0 - Prisoners in Australia, 2017* (2017) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>>.

³² *Ibid* 8.

³³ Human Rights Watch 'I Needed Help, Instead I Was Punished: Abuse and Neglect of Prisoners with Disabilities in Australia' (6 February 2018), at <www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities>.

³⁴ Jesuit Social Services, *Submission to the Justice Project*, cited in Law Council of Australia, *Justice Project Final Report* (2018). People with Disability chapter, [www< https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/People%20with%20Disability%20%28Part%201%29.pdf](https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/People%20with%20Disability%20%28Part%201%29.pdf)>.

³⁵ Mental Health Commission of New South Wales, *Mental Health Commission of New South Wales, Towards a just system: Mental illness and cognitive impairment in the criminal justice system* (2017).

³⁶ *Ibid*.

³⁷ Carol Bower et al, 'Foetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia' (2018) 8 *British Medical Journal Open* 1, 2.

- (d) a 2014 survey of 273 young people serving custodial orders in Victoria found 39 per cent had depression, 17 per cent had a positive psychosis screening and 22 per cent had engaged in deliberate self-harm within the previous 6 months;³⁸
- (e) Telethon Kids Institute recently conducted a prevalence study with respect to FASD among youth detainees at Banksia Hill Detention Centre in Western Australia. The study revealed 'unprecedented levels of severe neurodevelopmental impairment amongst sentenced youth', with 89 per cent or nine out of ten incarcerated young people having at least one form of severe neurodevelopmental impairment;³⁹
- (f) a 2010 Senate Inquiry found that approximately 98 per cent of Aboriginal and Torres Strait Islander inmates across all jurisdictions have a cognitive disability, commonly hearing loss, and in the Northern Territory, over 90 per cent of Aboriginal and Torres Strait Islander inmates experienced significant hearing loss;⁴⁰ and
- (g) a Victorian study showed that 92 per cent of Koori women in prison had a lifetime diagnosis of mental illness and nearly half were suffering from post-traumatic stress disorder.⁴¹

39. The Law Council submits that addressing these concerns in relation to prisoners and juvenile detainees with disabilities should be seen as a priority under the OPCAT framework.

Unsafe prison systems

- 40. The LSSA has submitted that the South Australian prison system is antiquated and requires investment and improvement. There have been a number of Coronial inquests into deaths in custody, in which recommendations have been made with respect to the need to upgrade unsafe prison cells.
- 41. This particularly applies to Yatala Labour prison, because of the non-removal of hanging points, the risk of fire, and delayed reaction times in getting to cells, after lockdown.⁴² The LSSA points out that B Division of that prison was constructed in the 1850s and is still in use today. It is noted in particular that, in the Varcoe inquest,⁴³ a specific recommendation was made for the adoption of Victorian safe cell design principles for all South Australian prison cells. It is understood that this recommendation has never been fully implemented.⁴⁴

³⁸ Ibid 2.

³⁹ Telethon Kids Institute, 'Nine out of ten young people in detention found to have severe neuro-disability' (Media Release, 13 February 2018) <<https://www.telethonkids.org.au/news--events/news-and-events-nav/2018/february/young-people-in-detention-neuro-disability/>>. See also Carol Bower et al, 'Carol Bower et al, 'Foetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia' (2018) 8 *British Medical Journal Open* 1, 2.

⁴⁰ Senate Legal and Constitutional Affairs References Committee, *Hear us*, [8.103]; Troy Vanderpoll and Damian Howard, 'Investigation into hearing impairment among indigenous prisoners in the Northern Territory', 3.

⁴¹ Human Rights Law Centre and Change the Record Coalition, *Over-looked and overrepresented*, 18; Australian Law Reform Commission, *Pathways to Justice*, 354.

⁴² Christopher J Charles, 'The Coroners Act 2003 (SA) and the Partial Implementation of RCIADIC: consequences for prison reform' *Australian Indigenous Law Review* [2008] volume 12 special edition 2, 75.

⁴³ Inquest into the Death of AWK Varcoe (Unreported, SA Coroner's Court, State Coroner Chivell, 20 March 2003).

⁴⁴ Ibid.

42. In addition, the LSSA notes that the South Australian response to dramatically increased incarceration rates over the last 20 years has been to double up and triple up the occupation of prison cells which were designed for single prisoners. This has had an adverse effect upon the amenity of the cell accommodation and has been the subject of adverse comment by Coroners in subsequent inquests.⁴⁵
43. These concerns are reflected in the Justice Project's Prisoners and Detainees final report chapter, which notes that across Australia, the number of prisoners in custody has increased significantly over the past decade. From 2007 to 2017 the number of prisoners increased by 51 percent from 27,244 to 41,202 and the imprisonment rate increased by 26 percent from 171.1 to 215.9 prisoners per 100,000 adult population.⁴⁶ Over the same period, Australia's population has grown by a mere 18 per cent.⁴⁷
44. The chapter noted that key concerns arising from increased imprisonment include the overcrowding of prisons and police cells, poor conditions for prisoners and remandees, and added difficulty in accessing appropriate programs and services.⁴⁸ The chapter noted that In 2016-17, prison utilisation in Australia was 115.8 per cent and as high as 122.9 per cent in New South Wales.⁴⁹ According to the Productivity Commission, 'percentages close to but not exceeding 100 per cent are desirable'.⁵⁰ With respect to South Australia, the chapter reflected the Legal Services Commission of South Australia's advice that the surge in the prison population had led to inhumane conditions of incarceration, particularly for remand prisoners who can spend significant periods of time in police holding cells.⁵¹

Inadequate medical services

45. The LSSA has raised concerns with the provision of medical services to prisoners, noting the numerous coronial inquests have also dealt with the inadequate responses of the Prison Medical Service to prisoners suffering from heart attacks, as well as the inadequacy of facilities to properly house and maintain prisoners suffering from a mental illness in South Australia.⁵²
46. In addition, the practice of shackling moribund prisoners in hospital has been the subject of numerous adverse reports by the State Ombudsman of South Australia and is the subject of a current inquest.

⁴⁵ Ibid, at page 78 concerning the Carter inquest.

⁴⁶ Ibid.

⁴⁷ Australian Bureau of Statistics, *3101.0 - Australian Demographic Statistics, Jun 2017* (2017) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/30125843DE7F366ECA2582570013F5FE?opendocument>>.

⁴⁸ Law Council of Australia, *Justice Project: Final report* (2018), Prisoners and Detainees Chapter, <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Prisoners%20and%20Detainees%20%28Part%201%29.pdf>>.

⁴⁹ Ibid, citing Productivity Commission, *Report on Government Services 2018*, 8.14-8.15, table 8A.13. 'Prison utilisation' is defined as the annual daily average prisoner population as a percentage of the number of single occupancy cells and designated beds in shared occupancy cells provided for in the design capacity of the prisons.

⁵⁰ Ibid.

⁵¹ Email from Legal Services Commission from South Australia to the Law Council of Australia, 17 November 2017; Consultation, 03/04/2017, Adelaide, (Legal Services Commission of South Australia), cited in Law Council of Australia, *Justice Project: Final report* (2018), Prisoners and Detainees Chapter, <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Prisoners%20and%20Detainees%20%28Part%201%29.pdf>>.

⁵² See Inquests into the death of Koolmsatrie, Wilfred, Wassa, and Rigney, concerning inadequate responses to cases of heart attacks in prison including failings in the provision of defibrillators able to be used in emergencies in all South Australian prisons; and the Inquest into the death of Darryl Walker concerning inadequate provision of services for a prisoner suffering from schizophrenia in a regional prison.

47. A lack of funding in the prison system and a failure to implement coronial recommendations to enhance prison living conditions are of serious concern to the LSSA. As such, the LSSA submits that an area of focus for the NPM, particularly in South Australia, should be on the duty of care of the Department for Correctional Services in providing a safe prison environment and adequate medical services to prisoners.

Detention practices

48. The LSSA has further noted that, under the *Correctional Services Act 1982* (SA) (**Correctional Services Act**), a prisoner's right of appeal against findings by disciplinary Tribunals are limited to errors of law. There is no ground of appeal available that a finding against a prisoner was against the evidence or the weight of the evidence.⁵³ Similarly, under section 46 of the *Correctional Services Act*, a prisoner's right of appeal against penalties imposed by the Chief Executive is constrained by the fact that the Tribunal is allowed to increase the penalty. This provision may have the effect of deterring a prisoner from appealing unreasonable penalties.

Question 2: What categories of 'place of detention' should be subject to visits by Australia's NPM bodies?

49. The question of which places of detention should fall within the scope of Australia's OPCAT responsibilities was left open in the Interim Report. Article 4(1) of OPCAT defines places of detention to include where a person is or may be deprived of their liberty '...either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence'. Article 4(2) of OPCAT further defines the deprivation of liberty as '...any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority'.

50. Article 4 of OPCAT poses little issue for traditional places of detention such as prisons or detention centres. However, it becomes problematic for non-traditional places of detention where people are held on a voluntary basis or with their family's consent.

51. There are many people being deprived of their liberty, by virtue of their health and/or capacity, or the type of care, treatment or restrictive practices they are subjected to. Aged care facilities are an excellent example. They are closed environments where people may have restricted freedom of movement and are heavily dependent on their carers to provide them with basic life necessities like water, food and health care. The New Zealand Human Rights Commission, for example, has noted that '...aged care and residential disability care services – that is, situations in which people are or may be prevented from leaving at will – can be seen to fall within the ambit of Article 4 of the OPCAT'.⁵⁴

52. The Law Council has previously supported an expansive interpretation of Article 4 of the OPCAT, which defines places of detention, noting that ratification presents a unique opportunity to develop a systematic and cohesive oversight system across both private

⁵³ *Correctional Services Act 1982* (SA), section 47(1).

⁵⁴ Human Rights Commission (NZ), *He Ara Tika, A pathway forward: The scope and role of the Optional Protocol to the Convention against Torture (OPCAT) in relation to aged care and disability residences and facilities* (June 2016), at <https://www.hrc.co.nz/files/7414/7796/9537/He_Ara_Tika_2016_web.pdf>.

or public institutions where people are subjected to the care or authority of others.⁵⁵ This includes aged care and residential disability care situations in which people may be prevented from leaving at will.

53. In line with OPCAT's implementation in New Zealand and the United Kingdom, a 'place of detention' should be defined broadly so as to therefore include both 'traditional' and 'non-traditional' places of detention, including:⁵⁶

- correctional facilities;
- youth justice centres;
- youth remand facilities;
- residential support services;
- secure health facilities;⁵⁷
- immigration detention centres;
- places where people are detained temporarily, such as prison transport vehicles or court cells; and
- police cells.

54. The Law Council draws specific attention to the following areas of particular importance for when defining 'place of detention' under the framework:

Offshore detention facilities

55. The Law Council continues to hold the view that the purview of any national NPM should cover offshore detention, including existing regional processing centres and any other newly created regional processing centres. The Law Council has previously expressed the view that the Commonwealth retains responsibility, either wholly or in part, for the health and safety of asylum seekers transferred to other countries for offshore processing and assessment under the Convention relating to the Status of Refugees.⁵⁸

56. In this regard, the Law Council notes that a report presented to the UN Human Rights Council in April 2017 by the UN Special Rapporteur on the human rights of migrants states clearly that Australia's responsibilities under the OPCAT extend to individuals held in regional processing centres funded by the Australian Government.

All persons who are under the effective control of Australia — because, inter alia, Australia transferred them to regional processing centres, which are funded by Australia, and with the involvement of private contractors of Australia's choice — enjoy the same protection from torture and ill-treatment under the Convention

⁵⁵ Law Council of Australia, *Response to Consultation Paper: OPCAT in Australia* (26 July 2017), at <www.lawcouncil.asn.au/resources/submissions/response-to-consultation-paper-opcat-in-australia>.

⁵⁶ Victorian Ombudsman 'Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre', November 2017.

⁵⁷ See, Disabled People's Organisations Australia & People with Disability Australia, Submission No. 38 to Australian Human Rights Commission, *OPCAT in Australia 2017*, 28 July 2017, 2.

⁵⁸ Law Council of Australia, *Submission to the Select Committee on Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru* (12 May 2015), online at <http://www.lawcouncil.asn.au/lawcouncil/images/2988_-_S_-_Naru_Inquiry.pdf>; Law Council of Australia, *Serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre* (10 November 2016), online at <<https://www.lawcouncil.asn.au/resources/submissions/serious-allegations-of-abuse--self-harm-and-neglect-of-asylum-seekers-in-relation-to-the-nauru-regional-processing-centre>>.

*against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*⁵⁹

57. This finding was affirmed by the UN Human Rights Committee (**UNHRC**) in its concluding observations on the sixth periodic report of Australia published in November 2017,⁶⁰ with reference to the ‘power or effective control’ standard for jurisdiction contained in UNHRC General Comment 31 of 2004.⁶¹ In its concluding observations, the UNHRC also expressed concern about ‘[s]evere restrictions on access to and information regarding the offshore immigration processing facilities including lack of monitoring by the Australian Human Rights Commission’.⁶² These concerns can, and should, be addressed through unambiguously including offshore detention centres and regional processing facilities funded by the Australian Government within the scope of Australia’s NPM bodies.
58. The Law Council notes that the SPT serves a complementary function to NPMs, and has a dual mandate to advise NPMs on OPCAT implementation and conduct its own visits to places of detention that are under the effective control of States parties. Under the OPCAT, a State party is required to grant the SPT unrestricted access to all places of detention, unless there are “urgent and compelling grounds of national defence, public safety, natural disaster or serious disorder” to necessitate delaying the visit.⁶³
59. The Law Council is of the view that the SPT should be permitted to visit all places of detention that are under the effective control of the Australian Government – including regional processing centres – to monitor Australia’s implementation of OPCAT. Furthermore, the Australian Government should ensure that any agreement with a third country establishing a place of detention provides for the SPT and Australia’s NPM to have legal and practical capacity to visit those facilities in accordance with the provisions of the OPCAT, as recommended by the SPT in its ninth annual report in 2016.⁶⁴

Aged care facilities

60. The Law Council again encourages the AHRC to consider the appropriateness of including age care facilities in the list of places of detention that can benefit from OPCAT monitoring.
61. Issues regarding the deprivation of liberty and the use of restrictive practices in aged care settings were raised by some contributors to the Justice Project.⁶⁵ For example, the Victorian Office of the Public Advocate highlighted the ‘lack of a comprehensive

⁵⁹ UN Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru* (24 April 2017), 35th session, Agenda item 3, A/HRC/35/25/Add.3, 73.

⁶⁰ UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia* (9 November 2017), 121st session, Agenda item 5, CCPR/C/AUS/CO/6, 35.

⁶¹ UN Human Rights Committee, *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant* (26 May 2014), 80th session, CCPR/C/21/Rev.1/Add. 13, 10.

⁶² UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia* (9 November 2017), 121st session, Agenda item 5, CCPR/C/AUS/CO/6, 35.

⁶³ *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted on 18 December 2002 by UN General Assembly Resolution A/RES/57/199 (entered into force 22 June 2006), art 14.

⁶⁴ UN Committee Against Torture, *Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (22 March 2016), CAT/C/57/4, 26.

⁶⁵ Law Council of Australia, *Justice Project: Final Report* (2018), Older Persons chapter, citing Office of the Public Advocate Victoria, *Submission No 86*; Consultation, 21/09/2017, Teleconference (Older Persons – Experts Discussion). See also Townsville Community Legal Service, *Submission to Australian Human Rights Commission, OPCAT in Australia*, 19 July 2017.

framework governing matters involving deprivations of liberty'.⁶⁶ It submitted that it is common practice for aged care facilities to 'rely on informal consent of family members and/or their belief that a duty of care permits or requires them' to subject older persons with cognitive impairment or age-related disability 'to very high levels of supervision and other restrictions on their freedom, up to and including complete and continuous deprivations of liberty'.⁶⁷ The Office of the Public Advocate questioned 'the legality, necessity and justification for such practices'.⁶⁸

62. As noted by the Victorian Ombudsman, some OPCAT signatory countries inspect care facilities such as aged care homes where residents, whilst not legally detained, are deprived of their liberty in a *de facto* sense due to the presence of locked doors and other restraints.⁶⁹ The Law Council submits that the NPM should work in tandem with existing agencies, such as the Australian Aged Care Quality Agency, in order to monitor the conditions of these facilities in line with OPCAT's provisions.
63. The need for improved oversight of aged care facilities is particularly evident from the recent announcement from the Prime Minister that there is to be a royal commission into Australia's aged care system, which will primarily look at the quality of care provided in residential and home aged care to senior Australians, and also include young Australians with disabilities living in residential aged care settings.⁷⁰

Police prisons

64. The LSSA has noted that the use of police prisons in South Australia to detain remand prisoners after court hearings, is a practice condoned under the Correctional Services Act in South Australia.⁷¹ However, the LSSA has raised concern with police prisons being used for this purpose as a result of the overcrowding in the South Australian prison system. The LSSA highlights that a police prison is not suitable to provide the kinds of amenities and services required for prisoners being held in custody for extended periods.
65. Notwithstanding the significant upgrading of South Australian police watch houses as a direct result of the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**), the LSSA notes that deaths in police custody continue to occur in South Australian watch houses and the standard of care provided to police prisoners has been consistently found to be inadequate in these cases.⁷²
66. Similar concerns were recently raised in the Justice Project context by the Legal Services Commission of South Australia, which highlighted that insufficient prison facilities were resulting in inhumane conditions of incarceration, particularly for remand prisoners who can spend significant periods of time in police holding cells.⁷³

⁶⁶ Office of the Public Advocate Victoria, *Submission No 86*.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ Victorian Ombudsman *Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre* November 2017, at <www.ombudsman.vic.gov.au/getattachment/432871e4-5653-4830-99be-8bb96c09b348>.

⁷⁰ Prime Minister of Australia 'Media Release: Royal Commission into aged care quality and safety' (16 September 2018), at <www.pm.gov.au/media/royal-commission-aged-care-quality-and-safety>.

⁷¹ *Correctional Services Act 1982* (SA), sections 7(2a) and 18(1)(b).

⁷² State Coroner (SA), Inquest into the death of Colin Craig Sansbury, July 2007.

⁷³ Law Council of Australia, *Justice Project: Final Report* (2018), Prisoners and Detainees Chapter, citing Legal Services Commission of South Australia correspondence.

Detention facilities utilised for persons who are considered mentally impaired

67. The LSSA considers that places of detention that are utilised for persons who are considered mentally impaired under Part 8A of the *Criminal Consolidation Act 1935* (SA), should also be subject to inspection by NPM bodies.
68. Places of detention utilised under this provision often include disability housing provided by faith-based NGOs or Disability SA. If no suitable housing can be found, such persons are placed in prison. However, imprisonment should be considered a last resort.⁷⁴ An inspection by an NPM body may also consider whether such places of detention provide culturally appropriate services for Aboriginal people and others of diverse linguistic and cultural background, as well as appropriate services for those with disabilities.
69. The LSSA suggests that some consideration could be given to extending the remit of NPM bodies under the OPCAT to places of detention for those persons detained under section 32 of the *Mental Health Act 2009* (SA), with respect to the compulsory treatment of mental health conditions.
70. The Justice Project final report chapter on People with Disability highlighted particular concerns that people with disability who are subject to proceedings under Guardianship and Administration, and Mental Health legislation are often denied access to free legal assistance and representation, due to resource constraints on legal assistance services.⁷⁵
71. In Victoria, for example, the *Mental Health Act 2014* (VIC) permits people diagnosed with 'mental illness' to be detained for compulsory treatment. Victoria Legal Aid submitted that 'when people are detained and subjected to compulsory treatment they lose their liberty, their privacy and their freedom to make independent life decisions'.⁷⁶ It indicated that there are approximately 3000 people per day subject to compulsory treatment in Victoria and almost 7000 Mental Health Tribunal hearings held per year in Victoria.⁷⁷
72. These numbers suggest that ensuring adequate transparency and oversight over the facilities in which people are detained for such purposes is important.

Education facilities

73. Finally, the LIV has submitted that schools using the restraint and isolation of children with disabilities should be subject to visits by the NPM. In this regard, the LIV has suggested that the use of restrictive practices may fall within the definition of torture under Article 1 of the Convention Against Torture.⁷⁸ There continues to be insufficient formal and independent oversight of schools using these practices in Victoria, and the LIV contends that inspection under the OPCAT framework may help to improve these practices.

⁷⁴ *R v Kiltie* 14 SASR, per Bray CJ.

⁷⁵ Law Council of Australia, *Justice Project: Final Report* (2018), People with Disability Chapter.

⁷⁶ *Ibid*, citing Victoria Legal Aid, *Submission No 18*.

⁷⁷ *Ibid*.

⁷⁸ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, Article 1.

Question 3: What steps should be taken to ensure that measures to implement OPCAT in Australia are consultative and engage with affected stakeholders?

74. The Law Council acknowledges that there are many well-established Australian organisations that advocate on behalf of individuals or groups that are disproportionately represented in places of detention. The Law Council considers that the Government should continue to consult with relevant representative bodies or organisations both prior to and during the implementation of OPCAT in Australia.
75. In particular, the Law Council considers that civil society organisations such as Aboriginal and Torres Strait Islander Legal Services, Legal Aid Commissions, Offenders Aid and Rehabilitation Services, as well as prisoners and detainees themselves, should be consulted by the NPM. These types of organisations have a wealth of experience in protecting prisoners and safeguarding their rights during detention.
76. To this end, the Law Council supports the proposal in the Interim Report for the central coordinating NPM to establish formal arrangements with civil society representatives during the early stages of OPCAT implementation.⁷⁹ This could take the form of an NPM advisory council and/or a regular roundtable meeting on OPCAT implementation featuring stakeholders from civil society, academia, government and other relevant bodies.
77. The Law Council also supports the proposal outlined in the Interim Report for the Australian Government to coordinate with state and territory governments on education and awareness-raising about the implementation of the OPCAT, to ensure all stakeholders are informed and engaged.⁸⁰
78. Finally, the Law Council supports the proposal in the Interim Report for the Australian Government to commence engagement with the SPT to ensure effective implementation of the OPCAT in Australia.

Staffing and professional expertise required for visiting inspections

79. OPCAT requires that States should take necessary measures to ensure that the experts of the NPM have the required capabilities and professional knowledge; and should strive for gender balance and adequate representation of ethnic and minority groups.⁸¹ As such, the Law Council suggests that staff with expertise in working with culturally and linguistically diverse communities and individuals experiencing mental health and addiction should be employed in visiting inspection teams.
80. Further, the Law Council suggests that the following staff and professional expertise be included among visiting inspection teams.

- Aboriginal and Torres Strait Islander community members

The Law Council strongly recommends that visiting inspections teams have a dedicated role for a member/s from the Aboriginal and Torres Strait Islander community. It is crucial that Aboriginal and Torres Strait Islander communities are given significant opportunity to provide guidance to ensure NPMs are culturally informed and responsive to the needs of Aboriginal and Torres Strait Islander peoples.

⁷⁹ Australian Human Rights Commission, *OPCAT in Australia: Interim Report to the Commonwealth Attorney-General* (September 2017), proposal 11.

⁸⁰ *Ibid*, proposal 13.

⁸¹ UN General Assembly, *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 9 January 2003, A/RES/57/199, Article 18(2).

- Professionals with familiarity with the advancement of people who with disabilities

Noting the above submissions in relation to the disproportionate numbers of prisoners with disabilities in the criminal justice system, and the vulnerabilities these individuals face, there is a need for disability-informed and responsive professionals to form part of the inspecting teams under OPCAT.

For example, people with cognitive-behavioural difficulties such as acquired brain injury (**ABI**), have been identified as having more instances of incarceration and have spent more days incarcerated per episode when compared with non-ABI disability groups. Further, the presence of an ABI increased the number of instances of requiring protection while in custody, the number of offences committed while in custody, and rates of self-harm whilst in prison.⁸²

The invisibility of some disabilities can make individuals more vulnerable as their behavior can often be misinterpreted negatively by those that may lack sufficient awareness and training. The Law Council therefore recommends that the visiting inspection team has a dedicated role for a professional who has familiarity with the advancement of people who have a cognitive impairment and the law relating to their circumstances, such as the *Disability Discrimination Act 1992* (Cth) and the National Disability Insurance Scheme.

Question 4: What are the core principles that need to be set out in relevant legislation to ensure that each body fulfilling the NPM function has unfettered, unrestricted access to places of detention in accordance with OPCAT?

81. The Law Council's Justice Project has recommended that OPCAT should be implemented under compliance frameworks with clear accountability and transparency mechanisms. These frameworks should be developed by each state and territory, in consultation with the Commonwealth Government.⁸³
82. The Law Council considers that the key elements of OPCAT implementation in Australia should be documented in legislation. Legislation should be enacted in each jurisdiction to recognise the existence and role of the SPT and to establish the NPMs. Provision will also need to be made to ensure that NPMs have the relevant powers and privileges to undertake their functions under the OPCAT. This is consistent with guidelines on NPMs issued by the SPT. One of the basic principles identified by the SPT in the guidelines is that the mandate and powers of the NPM should be clearly set out in a constitutional or legislative text.⁸⁴
83. The Law Council therefore supports Proposal 9 of the Interim Report which recommends that the Australian Government incorporate OPCAT's core provision in a dedicated statute. If this proposal is not adopted, the Law Council supports the development of national standards that govern how detention inspections should take place by bodies performing the NPM function. The Law Council also supports additional legal means as noted in Proposal 10, including an intergovernmental agreement that

⁸² Suzanne Brown et al, *People with acquired brain injury and the Victorian criminal justice system* (Inkshed Press, 2015), 10.

⁸³ Law Council of Australia, *The Justice Project: Final Report* (August 2018), recommendation 6.2.

⁸⁴ Committee against Torture, *Fourth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 46th sess, UN Doc CAT/C/46/2 (3 February 2011).

sets out the structure of the NPM model, the scope of its application, how the agreement will be governed and provides for periodic review.

84. The Law Council notes that the Australian Government has announced that the Commonwealth Ombudsman will be the central coordinating NPM, an approach that is supported by the Law Council.⁸⁵ The Law Council submits that the AHRC should continue to play a role in inspecting places of detention, as it has done for many years. In this regard, it is submitted that consideration should be given to:

- amending the *Australian Human Rights Commission Act 1986* (Cth) to schedule the CAT;
- establishing regulations under the *Ombudsman Act 1976* (Cth) to permit the Commonwealth Ombudsman to share or delegate some of its inspection functions to the AHRC, in light of its expertise and resources; or
- permitting the Commonwealth Ombudsman and the AHRC to enter into a memorandum of understanding.

85. Responding to the requirements of OPCAT and reflecting the powers of the NPM in the United Kingdom, it is submitted that Australia's state and federal governments should introduce legislative provisions that safeguard the independent functioning of the NPM. It is submitted that the following provisions should be given legislative force in order to ensure the independent and effective functioning of Australia's NPM:⁸⁶

- (a) the statutory body performing the functions of the NPM must be fully independent of government and the institutions it monitors;
- (b) the statutory body must be provided adequate resources to fully perform the functions of an independent monitor;
- (c) the statutory body must have personnel with the necessary expertise and who are sufficiently diverse so as to represent the community in which it operates. Particular focus should be given to forming a body that encompasses members and representatives of marginalised groups that have an increased likelihood of coming into contact with places of detention such as individuals living with a disability and Aboriginal and Torres Strait Islanders.
- (d) the body performing the functions of the NPM must be empowered to:
 - (i) access all places of detention at its own discretion (including those operated by private providers);
 - (ii) conduct interviews in private with detainees and other relevant people;
 - (iii) choose which places it wants to visit and who it wishes to interview;
 - (iv) access information about the number of people deprived of their liberty, the number of places of detention and their location; and
 - (v) access information about the treatment and conditions of detainees.

⁸⁵ Commonwealth Attorney-General, 'Media Release - Improving oversight and conditions in detention', (9 February 2017).

⁸⁶National Preventive Mechanism (UK), *Powers*, <www.nationalpreventivemechanism.org.uk/about/powers>. See also, OHCHR 'Preventing Torture: The Role of National Preventative Mechanisms – A Practical Guide' (2018), 14.

Question 5: Do you have any comments about the proposals to ensure Australia complies with its obligations under OPCAT?

86. The Law Council notes paragraph 65 of the Interim Report and considers that it would be appropriate that the international human rights instruments specified inform the content of the national standards.
87. In addition, the Law Council also suggests that consideration should be given to the development of special inspection standards for high priority areas, including Aboriginal and Torres Strait Islander prisoners. Such standards would have regard to social and cultural susceptibilities, the need to maintain connection with kin and country, inspection standards that address racial discrimination and inspection standards that address Aboriginal prisoners' susceptibility to self-harm and suicide.
88. The Law Council notes that the Office of the Inspector of Custodial Services (WA) has published inspection standards for several areas requiring specific attention. This includes 'inspection standards for Aboriginal prisoners' in 2008, which could be used as a reference point nationally.⁸⁷
89. Finally, the Law Council notes that the Australian Government intends to implement OPCAT over three years. Progressive implementation is provided for by Article 24 of OPCAT, and the Law Council supports this approach. However, it is critical that appropriate milestones be set down so that each jurisdiction is cognisant of the expected implementation rate, and progress can be measured against these indicators accordingly. The SMART goal system may be one such methodology. The Law Council also suggests that leading human rights bodies and experts ought to be consulted in the development of any goal system for progressive implementation.

⁸⁷ Office of the Inspector of Custodial Services '*Inspection standards for Aboriginal prisoners*' (2008), at <www.oics.wa.gov.au/wp-content/uploads/2013/11/Final_Aboriginal_Prisoner_Standards_v_11.pdf>.