Submission to the Australian Human Rights Commission concerning the Optional Protocol to the Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Protocol, or OPCAT). For convenience, we will use 'cruel treatment' as an abbreviation of 'torture and other cruel, inhuman or degrading treatment or punishment'.

CCL is grateful for the extension of time given to us to complete our discussion of these matters.

Trust and training.

The Protocol does not set out to merely add another layer of supervision to existing bodies overseeing institutions that detain people. Rather than seeking out cruel treatment and exposing, punishing or firing the perpetrators, its focus is on the prevention of mistreatment before it starts, through constructive dialogue. Exposure and punishment merely tell people what they must not do; but what is required is that they develop appropriate attitudes, look for and recognise alternatives, and learn to choose appropriately between courses of action that are available to them.[1]

For this purpose, the cooperation of both detainees and those who detain them is essential. Prison staff, police who hold accused persons in cells, drivers and guards who transport detainees, staff at immigration detention centres, nurses and assistants in aged care facilities, nurses and doctors in mental health hospitals—these people must learn to trust, rather than just to fear, supervision by National Preventative Mechanism (NPM) bodies. Also important is the trust of prisoners, accused persons, mentally ill patients, refugees/asylum seekers, and aged persons subject to involuntary care.

Since the state and territory governments seem to be intent on using existing oversight bodies to perform Protocol inspection functions, it will be part of the task of the central coordinating NPM to ensure that those bodies understand the differences between their new role and those they have so far had, and to support them in their new tasks. Depending on the culture and experience of those bodies, training may be desirable. Equally, the staff of the Commonwealth Ombudsman's Office, or whatever body is designated the central coordinating NPM, may also need some support before they take up their new role.

Importantly, all those bodies will need to increase the frequency with which they visit institutions, especially remote ones such as Yongah Hill and Christmas Island. Constructive dialogue, especially with suspicious staff, cannot readily be engaged in at a distance.

Expert support.

NPMs at all levels will need additional expert staff, in accordance with Article 18 (2), to provide 'the required capabilities and professional knowledge'. They and the Government must systemically incorporate expert medical input (including mental health expertise) into the planning, design and implementation of monitoring and oversight systems.

By contrast, only a narrow scope of expertise has so far been involved in oversight and monitoring by the Commonwealth Ombudsman. While medical expertise has at times been sought, it has been on an ad hoc and occasional basis (and has tended to be reactive rather than preventive). This must change.

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[1] As has been well established in the contexts of the rehabilitation of prisoners and the discipline of school children, such an approach is far more effective than merely punishing or sacking wrongdoers.

Independence and financial security.

The first article of the Protocol reads 'The objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.' The theme of independence is taken up later, in article 18:

'1. The States Parties shall guarantee the functional independence of the national preventative mechanisms as well as the independence of their personnel.' And:
'3. The States Parties undertake to make available the necessary resources for the functioning of the national preventative mechanisms.'

Thus to implement the Protocol in even a token way, the national preventative mechanism (NPM) with oversight of the states mechanisms must both be independent of government and secure in its funding. It must not be at risk of "punishment" by the reduction of its funding, as, for instance, has happened recently to the ABC, and it should be free from interference with its functions and its practice. It should be established, and if possible, its funding guaranteed, by an Act of Parliament, and it should be able to report to parliament on its findings, not just to a minister, and not just in general terms but on specific institutions.

While the Commonwealth Ombudsman has considerable investigative powers, an OPCAT detention monitoring role is not expressly established in legislation. Even less is an OPCAT role in recommending and insisting on actions that will prevent cruel treatment developing—the core of the OPCAT requirements—established in legislation. The Ombudsman, or whatever body undertakes the central oversight role, needs these powers.

The protections guaranteed under Article 21, that 'no authority or official shall order, apply or permit or tolerate any sanction against any person or organisation for having communicated to the national preventative mechanism any information, whether true of false, and so such person shall be otherwise prejudiced in any way' can only be guaranteed by legislation.

If, as is proposed, the Commonwealth Ombudsman's Office is to be the site of the central coordinating NPM, then a separate section of that Office must be established, by law, and kept free from ministerial interference. It must be given extra resources, both of personnel, appropriately qualified, and of money, and guaranteed those resources.

Equally, since it is intended that existing State and Territory bodies will themselves be NPMs in addition to their existing inspectorial powers, their legislation too must be altered to reflect their expanded roles, and to guarantee their independence. They, too, will need extra resources to carry out their expanded roles; and may need to separate their NPM preventative functions from their current, investigative and reactive roles.

In this context, it is worth noting that the cost of Royal Commissions, such as that just announced into aged dare institutions, or the inquiry into juvenile detention in the Northern Territory to inquire into serious human rights breaches—that cost is far greater than it would be to ensure that the NPMs carry out their preventative work.

Reporting and transparency.

There is a lack of transparency and secrecy that surrounds some of the current inspection regimes and the outcomes of monitoring. This secrecy contrasts with NPMs in most overseas jurisdictions, who publicly report on the outcomes of monitoring. This lack of transparency clearly undermines the purpose of monitoring, and makes it difficult for those in detention to understand the purpose and value of engaging with monitoring bodies.

There is a broader lack of transparency around detention policies and procedures (e.g. protocols and procedures for the use of restraints). This is a barrier to effective monitoring and oversight; and even more is it a barrier to preventative procedures.

The lack of transparency extends to the standards used in detention monitoring. We know very little about the Commonwealth Ombudsman's inspection methodology and scope, including how factors affecting the health and mental health of detainees are systemically monitored. There needs to be greater accountability in detention monitoring, and this should include reporting against a set of detention monitoring standards (and these monitoring standards should, in turn, be informed by input from a range of medical experts).

The National Preventative Mechanisms, and especially the central coordinating NPM, should be provided by legislation with the power and the obligation to make their findings public, especially when that is necessary to prevent cruel treatment. Reports should be made of inspections of individual institutions, not merely summarised in annual reports.

Scope.

1. Under article 19 of the optional protocol, the NPM must be granted '**at a minimum** the power...(c) to submit proposals and observations concerning existing or draft legislation'. (Emphasis added.) This power must be granted by legislation, or there will be too much temptation on government figures to lean on the national NPM body or the state ones, to be silent about legislation. In CCL's view, if the Government is to continue with its proposal to make the Commonwealth Ombudsman the central coordinating NPM, it would be better for a formal, legislated link to be made to the Australian Human Rights Commission. For that body has both the experience and the obligation to make comment on legislation, while it has not been part of the mandate nor of the practice of the Ombudsman.

The legislation might draw on the example of Denmark, whose Institute of Human Rights works with the Parliamentary Ombudsman. Or it might imitate the arrangement in New Zealand, where the Human Rights Commission acts as the NPM coordinator, and works in close cooperation with Ombudsman's Office, which deals with inspections.

2. Under article 4, 'Each State Party shall allow visits in accordance with the present Protocol...to **any place** under its jurisdiction and control where persons are or many be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent of acquiescence.... (Emphasis added.) The mandate required to be provided, then, extends well beyond prisons, and immigration detention centres to alternative places of detention, hospitals, mental health facilities, transit facilities, or other locations where asylum seekers and refugees may be effectively held against their will; and to police cells, transport arrangements (where there are growing concerns about the inappropriate and excessive use of force and restraints), prison hospitals, aged care facilities, and closed psychiatric institutions—wherever people may be held against their will. The empowering legislation and the roles undertaken by NPMs must cover all of these.

3. Australia has continuing obligations under international law towards those who are detained here, then sent to offshore detention centres, such as those in Nauru and Manus Island. While the Nauruan and Papua New Guinea governments have undertaken some responsibility over those detained on their shores, Australia, despite assertions to the contrary, is also still responsible for the treatment of those people we send there. The NPM legislation, with the assistance of the governments of Nauru and Papua New Guinea, must empower the Ombudsman to conduct inspections and report on cruel treatment in these centres .