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22 October 2016

Commissioner Margaret White AO
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Royal Commission into the Protection and Detention of
Children in the Northern Territory
PO Box 4215
Kingston ACT 2604

Dear Commissioners,

Submission to Royal Commission into the Protection and Detention of Children in the Northern Territory

Thank you for the opportunity to make a submission by 28 October 2016 to the Royal Commission into the Protection and Detention of Children in the Northern Territory, as advised on the Royal Commission website at
https://childdetentionnt.royalcommission.gov.au/Submissions/Pages/default.aspx

This submission focuses upon four distinct areas or themes relevant to the work of the Royal Commission and within its terms of reference:

. The Subcommittee on the Prevention of Torture and Cruel Inhuman and Degrading Treatment or Punishment and the National Preventive Mechanism under the *Optional Protocol to the Convention Against Torture;*

. The desirability of introducing a Northern Territory Statutory Charter of Human Rights from the perspective of creating a legislated human rights cultural change agent in the delivery of Northern Territory government functions in youth detention;

. Expansion of the criminal offences relating to torture in Division 274 of the *Criminal Code* (Cth) to include an offence relating to cruel, inhuman or degrading treatment or punishment;

. Issues relating to the paramountcy of Commonwealth legislative power in relation to the Northern Territory, including:

. Repeal and modification of Northern Territory laws, including reservations of subject matters from the jurisdiction of the Northern Territory Legislative Assembly and Northern Territory Executive (by legislation and regulation)

. Temporary Commonwealth legislative intervention in the Northern Territory

. Examination of law making power of the Northern Territory Legislative Assembly by the Commonwealth Parliamentary Joint Committee on Human Rights (PJCHR) under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth)

. Modification of the law making powers of the Northern Territory Legislative Assembly to include legislative processes involving a statement of human rights compatibility for introduced bills and a Legislative Assembly Parliamentary Committee to examine bills for compatibility with human rights and to report to the Assembly on this issue.

. Royal Commission – Letters patent and terms of reference – *Royal Commissions Act 1902* (Cth)

In identifying the above areas or themes, this submission is grounded upon select aspects of the Commission's powers to inquire into nominated matters specified in the Letters Patent, viz:

(c) whether any such treatment during the relevant period may:

(i) amount to a breach of the *law of the Commonwealth*; or
(ii) amount to a breach of a *law in force in the Northern Territory*

(iv) be inconsistent with, or contrary to, a human right or freedom that:

(A) Is embodied in *a law of the Commonwealth or of the Northern Territory*; and
(B) Is recognised or declared by an *international instrument*; or (emphasis added)

(v) amount to a breach of a rule, policy, procedure, standard or management practice that applied to any or all of the relevant facilities;

(d) both:

(i) what oversight mechanisms and safeguards (if any) were in place during the relevant period at the relevant facilities to ensure that the treatment of children and young persons detained is appropriate; and

(ii) whether those oversight mechanisms and safeguards have failed, or are failing, to prevent inappropriate treatment, and if so, why…

(g) what measures should be adopted by the Government of the Northern Territory, or enacted by the Legislative Assembly of the Northern Territory, to prevent inappropriate treatment of children and young persons detained at the relevant facilities, including:

(i) law reform; and …

(iii) reform of oversight measures and safeguards

In particular, it is noted that paragraph (j) extends the Commission's terms of reference to 'any matter reasonably incidental to a matter mentioned in paragraphs (a) to (i)'.

As such, paragraph (j) provides an ancillary capacity to deal with and engage subjects and topic matters necessary to fulfil and effectuate the main matters in the terms of reference.

. Board of Inquiry- *Inquiries Act* (NT)

Similarly, this submission is also grounded in the reference in the document titled 'Northern Territory of Australia *Inquiries Act* Appointment of Board of Inquiry' dated 3 August 2016 made under section 4 of the *Inquiries Act* (NT) that

To avoid doubt, the Board is, for the purposes of the inquiry and report, to consider the following, and to take (or refrain from taking) any action that the Board considers appropriate arising out of the consideration:

(a) the need to establish mechanisms to facilitate the timely communication of information, or the furnishing of evidence, documents or things including, for example, for the purpose of enabling the timely investigation and prosecution of offences

. Optional Protocol to Convention Against Torture and Other Forms of Cruel Inhuman or Degrading Treatment or Punishment

The *Optional Protocol to the Convention Against Torture and Other Forms of Cruel Inhuman or Degrading Treatment or Punishment* – which includes the UN Sub-Committee on the Prevention of Torture and the National Preventive Mechanism – is relevant to the present breaches in human rights in youth detention through monitoring processes and site visits.

. *OPCAT* – the basics – refer:

http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/OPCATIntro.aspx

http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/OPCATIndex.aspx

Australia signed the *Optional Protocol to the Convention Against Torture and Cruel Inhuman and Degrading Treatment or Punishment* on 19 May 2009. It is yet to ratify the *OPCAT*, and thus the OPCAT obligations do not apply as yet in Australia and consequentially in the Northern Territory.

Two mechanisms exist under *OPCAT*, which had it been ratified and in operation in Australia and the Northern Territory, may well have prevented the historical youth detention incidents in the Northern Territory, from escalating to the present point of serious and systemic breaches of human rights and provided earlier alert mechanisms, intervention and remediation.

. Sub-Committee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment:

Refer: http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/OPCATIntro.aspx

See also Parts 1-III of *OPCAT*, Articles 1-16.

The Sub-Committee on the on the Prevention of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment is established under Article 2 of *OPCAT* has two main functions. First 'it may undertake visits to States parties, during the course of which it may visit any place where persons may be deprived of their liberty…the SPT has unrestricted access to all places where persons may be deprived of their liberty…and to all relevant information…The SPT is able to interview in private persons deprived of their liberty and any other person who in the SPT's view may be able to assist it with relevant information, including Government officials, NPMs, representatives of national human rights institutions, non-governmental organizations, custodial staff…'[1]

Second, 'it has an advisory function which involves providing assistance and advice to States Parties on the establishment of National Preventive Mechanisms (NPM) which OPCAT requires that they establish, and also providing advice and assistance to both the NPM and State Party regarding the working of the NPM'.[2]

. National Preventive Mechanisms:
Refer: http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/NationalPreventiveMechanisms.aspx

Refer:
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/OP/12/5&Lang=en

See also Part IV of *OPCAT*, Articles 17-23 and Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment *Guidelines on national preventive mechanisms* UN document CAT/OP/12/5

National Preventive Mechanisms are required to be established under Art 17 of *OPCAT* and are granted powers to examine the treatment of persons deprived of their liberty in places of detention, to make recommendations to relevant authorities to improve the treatment of persons deprived of their liberty and to prevent torture and cruel, inhuman or degrading treatment and to submit proposals and observations concerning existing or draft legislation. (Art 19).

States parties to *OPCAT* undertake to grant to National Preventive Mechanisms, in order to enable them to fulfil their mandate access to all places of detention, access to information about the persons deprived of their liberty, the number of places and location of detention, to information referring to the treatment of those persons and the conditions of detention, the opportunity to have private interviews with persons deprived of their liberty, the liberty to choose the places they want to visit and persons they want to interview and the Right to have contact with the Subcommittee on Prevention, and to send information to and to meet with the Subcommittee (Art 20).

Discussion of prospective Australian ratification of the *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment*, with its attendant obligations in relation to the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the National Preventative Mechanism, needs to be prefaced by acknowledging the existence of three important preceding inquiries into youth detention in the Northern Territory. These inquiries are the Office of the Children's Commissioner Inquiry *Own Initiative Investigation Report Services Provided By The Department of Correctional Services At The Don Dale Youth Detention Centre* (August 2015) (Gwynne report); the *Review of the Northern*

[1] See information under above web link
[2] See information under above web link

Territory Youth Detention System Report (January 2015) (Vita Report) and the as yet unreleased Office Of the Children's Commissioner Report on Youth Detention 2012 (Bath Report).[3]

The important point is that the obligations upon ratification of the *OPCAT*, the *OPCAT* bodies - the Sub-Committee and the National Preventative Mechanism - would have access to these extensive preceding reports to inform their activities, site visits, interviews, reports and recommendations in relation to youth detention facilities in the Northern Territory. [4]

The reports and recommendations of the Sub-Committee and the National Preventive Mechanism additionally become relevant to two further United Nations human rights mechanisms applicable to Australia in the present context - Universal Periodic Review (as conducted by the Human Rights Council) and States Parties reporting to, and follow up responses to the Concluding Observations of the Committee Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment in the periodic reporting cycle.

The significant point is that the functions of *OPCAT* bodies – the Sub-Committee and the National Preventative mechanism- in both accessing the preceding existing reports regarding Northern Territory youth detention and in fulfilling the duties applicable under *OPCAT* – would then be leveraged into further UN accountability mechanisms over which the Commonwealth has direct reporting obligations.

This relevance and importance is increased in the present context of youth detention in the Northern Territory, because of the unique and distinctive constitutional relationship of the Commonwealth with the Northern Territory. Under these *OPCAT* and *OPCAT* and UN human rights related processes, the Commonwealth has direct legislative and executive power to commit itself to remediation of human rights issues, such as treatment in youth detention, in the Northern Territory.

The benefit of the above *OPCAT* Sub-Committee and National Preventive Mechanism approaches in relation to youth detention issues in the Northern Territory is that they engage processes associated with domestic imput and international attention, remedial recommendations and censure; and that they necessarily engage the Commonwealth Government in fulfilling specific United Nations international human rights law obligations in relation to the Northern Territory.

In relation to Universal Periodic Review, critical *imput* into the review process is provided through two summary reports: a stakeholders summary of submissions made to Universal Periodic Review prepared by the Office of the United Nations High Commissioner for Human Rights[5] and a UN

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[3] See Martin McKenzie Murray 'There was political support for this' *The Saturday Paper* July 30-August 5 2016, 11: 'In turn, Vita's report reflected the concerns of Gwynne's predecessor, Bath. He had completed a report – not his only one- on youth detention in 2012, which is yet to be tabled by the government. Legislation prevents him discussing its contents. "I very much regret the fact that the report has not been made public', Bath tells me.' This report appears to be listed on the Commission's 'Index of Previous Reports' as Item 31 'Confidential Report under s 43 (2) and (5) of the *Children's Commissioner Act 2013* – relating to Youth Detention Practices'. A further relevant report is the *Review of the Northern Territory Youth Justice System: Report* (September 2011) (Carney report).

[4] On the repeated preceding warnings raised by these reports about the Northern Territory treatment of juvenile offenders, see Simon Thomsen, 'The truly shocking thing about the NT's juvenile detention abuse is how many times the alarm was raised and ignored' Briefing – the *Business Insider* 26 July 2016.

[5] See UN Document A/HRC/WG.6/23/AUS/3 10 August 2015 Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21. The relevant stakeholders were the UN accredited National Human Rights Institution, namely the Australian Human Rights

Charter Based bodies and Treaty Based bodies compilation of information 'contained in reports of the treaty bodies (which includes the CAT Committee) and special procedures, including observations and comments by the State concerned, in reports of the United Nations High Commissioner for Human Rights, and in other relevant United Nations documents'.[6] Significantly, both the Report of the Working Group on Universal Periodic Review[7] and the Australian States Party Response to that Report – Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review,[8] would provide clear opportunities to highlight issues, respond to the Human Rights Council recommendations and to offer remediation of youth detention issues in the Northern Territory.

In the States Party Reporting process under CAT, important mechanisms exist around the submission of the periodic states party report, the presentation and dialogue around that report and the Concluding Observations of the CAT Committee.[9] These processes are the List of issues made prior to the submission of the Australian state party report,[10] and the follow up responses of Australia to the Concluding Observations of the Committee against Torture.[11] Each provides further opportunities for interaction and response on individual issues such as human rights treatment in youth detention in the Northern Territory.

. Contemporary Commonwealth Government initiatives in relation to OPCAT

A useful summary of contemporary moves towards Australia's ratification of OPCAT and the implementation of OPCAT obligations (including the National Preventive mechanism) is set out by the Human Rights Law Centre[12] in a recent submission to the UN Committee Against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment:

> Australia signed OPCAT on 19 May 2009. Since that time, progress on ratification and implementation has been slow, despite considerable investment in negotiations between state and territory governments and the Australian Government to arrive at a model bill for implementation of detention monitoring and oversight obligations.

Commission, and a range of human rights orientated community based organisations and non- government organisations.

[6] See UN Document A/HRC/WG.6/23/AUS/2 31 August 2015 Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21.

[7] See UN Document A/HRC/31/14 13 January 2016 Report of the Working Group on the Universal Periodic Review Australia

[8] See UN Document A/HRC/31/14/Add.1 29 February 2016 Report of the Working Group on the Universal Periodic Review Australia Addendum Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review

[9] See UN Document CAT/C/AUS/CO/4-5 23 December 2014 Committee Against Torture Concluding observations on the combined fourth and fifth periodic reports of Australia

[10] See UN Document CAT/C/AUS/Q/5 15 February 2011 List of issues prior to the submission of the fifth periodic report of Australia CAT/C/AUS/5 Specific information on the implementation of articles 1 to 16 of the Convention, including with regard to the Committee's previous recommendations.

[11] See UN Document CAT/C/AUS/CO/3/Add.1 20 January 2014 Consideration of reports submitted by States parties under article 19 of the Convention Addendum Follow up response of Australia to the concluding observations of the Committee against Torture (CAT/C/AUS/CO/3)

[12] Human Rights Law Centre *Torture and Ill-treatment in Australia* Submission to the UN Committee on the issues to be included in Australia's List of Issues prior to Reporting (June 2016)

The Attorney-General's Department produced a 'National Interest Analysis' Report on OPCAT which recommended ratification and implementation of OPCAT in 2012 (NIA Report). On 21 June 2012, Privacy [redacted]

National model legislation has been developed to establish the necessary legislative arrangements in each jurisdiction to allow for inspection of places of detention in Australia, following ratification of OPCAT. This legislation was developed by an inter-jurisdictional working group led by NSW and overseen by the Standing Council of Law and Justice. To date, implementing Bills have been introduced in Tasmania, the Northern Territory and the ACT. As a large amount of consultative and preparatory work has been completed to ensure that Australia will be compliant with OPCAT, the Australian Government should complete the last steps in the process by ratifying OPCAT and providing leadership on necessary implanting legislation in each jurisdiction.[13]

. Legislating for OPCAT – legislative issues specific to the Northern Territory (and other jurisdictional examples)

As indicated in the above extracted Human Rights Law Centre document, a bill – the *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) (National Uniform Legislation) Bill 2013* was introduced into the Northern Territory Parliament on 22 August 2013. Similar bills were introduced into the ACT Legislative Assembly on 21 March 2013 and into the Tasmanian Parliament on 17 September 2013. Neither of the ACT nor Tasmanian bills proceeded beyond the second reading speech to enactment.

In the second reading speech of the Northern Territory bill,[14] the Attorney General, Mr Elferink[15] stated:

Parliamentary Privilege [redacted]

Parliamentary Privilege [redacted]

[13] Ibid., 2.
[14] Northern Territory Legislative Assembly Hansard 22 August 2013.
[15] Mr Elferink, as the Corrections Minister, was the Northern Territory Minister responsible for the Don Dale Youth Detention Centre.

Parliamentary Privilege

Parliamentary Privilege

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However, on 17 September 2015, the *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) (National Uniform Legislation) Bill 2013* was withdrawn from the Legislative Assembly, with the support of the Labor Opposition. On that day, Mr Elferink in the Northern Territory Legislative Assembly invoked Parliamentary Privilege [16].

It may be of interest to the Royal Commission that Mr Elferink refers to Parliamentary Privilege

Parliamentary Privilege

[16] Parliamentary Privilege

Parliamentary Privilege [redacted]

Parliamentary Privilege [redacted]

Mr Elferink's comment is interesting in that indicates a potential level of Commonwealth government culpability for the Don Dale Youth Detention centre incidents of probable torture (in limited examples) and in more broadly multiple demonstrable examples of cruel, inhuman and degrading treatment or punishment, by further delaying and ultimately dropping the legislative framework for site visits by the UN Subcommittee on Prevention, and further delaying the establishment of a National Preventive Mechanism within the Northern Territory (contingent upon OPCAT ratification), confirmed by Mr Elferink's earlier comments on the introduction of the bill on 22 August 2013:[17]

Parliamentary Privilege [redacted]

In contrast, the official position of the Commonwealth government regarding *OPCAT* in its interactions with the CAT Committee periodic reporting process and with the Human Rights Council in Universal Periodic Review appears somewhat different. In the former, the Australian states party report noted that

> The Australian Government and State and Territory Governments are currently working together to prepare legislation that would facilitate compliance with the Optional Protocol by enabling monitoring visits by the United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to be undertaken.[18]

The response by the CAT Committee in its Concluding Observations was

> While welcoming the State party's signing of the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 19 May 2009, and its commitment to ratification of the Optional Protocol as a matter of priority, the Committee encourages it to adopt all necessary measures to accelerate the process of ratification in order to become a party to the Optional Protocol as soon as possible.[19]

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[17] Parliamentary Privilege [redacted]

[18] Consideration of reports submitted by States parties under article 19 of the Convention pursuant to the optional reporting procedure Fourth and fifth periodic reports of States parties due in 2012 UN document CAT/C/AUS/4-5 (31 July 2013)

[19] Concluding observations on the combined fourth and fifth periodic reports of Australia UN Document CAT/C/AUS/CO/4-5 (23 December 2014). This extract makes reference to paragraph 31 of the Report of the Working Group on the Universal Periodic Review UN Document A/HRC/17/10 (24 March 2011) 'The delegation emphasised that Australia is committed to ratifying the Optional Protocol to the Convention against Torture as a matter of priority'.

In the latter, it was noted in the first round Universal Periodic Review in 2011 that 'Australia is committed to ratifying the Optional Protocol to the Convention against torture as a matter of priority'[20] that 'Australia signed the Optional Protocol to CAT in 2009 and is proceeding towards ratification'[21] and 'The Australian Government is working with the States and Territories to take the necessary steps towards ratifying the Optional Protocol'.[22]

In contrast, the Government position on *OPCAT* in the second round Universal Periodic Review had decidedly shifted:

> The Australian Government is considering whether it will ratify the Optional Protocol to the Convention Against Torture and therefore bring it into force in Australia. Australia's places of detention are currently under independent scrutiny by a range of bodies at the federal, state and territory levels- including by the Commonwealth Ombudsman, state and territory ombudsmen and the AHRC. If the Australian Government decides to pursue ratification it will consider the suitable bodies to undertake the domestic inspection role as part of the National Preventative Mechanism.[23]

It was noted by the Working Group on Universal Periodic Review that 'Australia, responding to recommendations, noted that it was actively considering the ratification of the Optional Protocol to the Convention against Torture and its implementation in a federal system'[24] and that 'Australia is actively considering the ratification of OPCAT'.[25] These statements need to be measured against the statements of Mr Elferink of 17 September 2015 that Parliamentary Privilege [redacted]'[26] and also from contrasting the language of the Commonwealth from 2011 to 2015, changing the commitment of prioritising ratification of *OPCAT* to a position of ambivalence and an apparent retraction of an earlier commitment.

In particular, the protracted process since the signature of *OPCAT* in 2009 leading to the failure to ratify and sequentially implement in Australian jurisdictions, including the Northern Territory, visits by the Sub-Committee on Prevention and activation of the National Preventive Mechanism, has visibly contributed to the lack of a timely and effective independent and external monitoring and review mechanism which the these bodies would have provided, particularly as an intervention circumventing the escalation of human rights abuses in the Don Dale Youth detention centre.

The Commonwealth's dilatoriness and ambivalence regarding OPCAT has contributed to this situation, which need not have evolved to the serious and sustained level of human rights abuses that

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[20] Report of the Working Group on the Universal Periodic Review UN Document A/HRC/17/10 (24 March 2011), 6.

[21] National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1: Australia UN Document A/HRC/WG.6/10/AUS/1 (5 November 2010), 8

[22] Report of the Working Group on Universal Periodic Review Australia Addendum Views on conclusions and/or recommendations, voluntary commitments and replies presented by State under review UN Document A/HRC/17/10/Add.1 (31 May 2011), 2.

[23] National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21 UN Document A/HRC/WG.6?23/AUS/1 (7 August 2015), 15

[24] Report of the Working Group on the Universal Periodic Review Australia UN Document A/HRC/31/14 (13 January 2016), 6.

[25] Report of the Working Group on the Universal Periodic Review Australia Addendum Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review UN Document A/HRC/31/14/Add.1

[26] Parliamentary Privilege [redacted]

occurred in the Don Dale Youth Detention Centre. It is noted that that both the Australian Human Rights Commission[27] and the Human Rights Law Centre have given prominence to the OPCAT ratification matters in submissions to the Committee Against Torture and Cruel Unusual and Degrading Treatment or Punishment for a List of Issues Prior to Reporting in the forthcoming Australian States parties reporting round.[28]

. A Northern Territory Statutory Charter of Human Rights as an agent of human rights cultural change for Northern Territory public authorities

Indigenous Northern Territorians have previously expressed the need for constitutional entrenchment of a range of human rights as a pre-condition to support for Northern Territory constitutional statehood, based around a de facto veto over a statehood process exercised through the Northern and Central Land Councils, as approximately 27 per cent of the Northern Territory population is indigenous.[29]

In 1998, Northern Territory indigenous communities produced two documents from constitutional conventions, the Kalkaringi Statement[30] and the Batchelor Statement,[31] collectively known as the Indigenous Constitutional Strategy: Northern Territory.[32] Importantly, the Indigenous Constitutional Strategy includes Parliamentary Privilege [redacted] which relate to rights and interests to be recognised, including human rights, protected and enhanced in a new or revised Northern Territory *Constitution*.[34] Such human rights would ordinarily include ICCPR rights and of particular relevance to present circumstances for the Royal Commission would be Art 7,[35] Art 10[36] and Art 24[37] of the *ICCPR*.

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[27] As an 'A status' national human rights institution established and operating in accordance with the Paris Principles.

[28] *Information for List of Issues Prior to Reporting- Australia* Submission By The Australian Human Rights Commission 27 June 2016; *Torture and Il-treatment in Australia* Submission to the UN Committee on the issues to be included in Australia's List of Issues prior to Reporting Human Rights Law Centre June 2016

[29] In this part of the submission, refer generally to Greg Carne, 'We of the Never Never?: Constitutional Misconceptions and Political Realities in Pre-Constituting the State of the Northern Territory' (2013) 16 *Southern Cross University Law Review* 41.

[30] Constitutional Convention of the Combined Aboriginal Nations of Central Australia *Kalkaringi Statement* , Kalkaringi (17-20 August 1998)

[31] Northern Territory Indigenous Constitutional Convention *Resolutions of Northern Territory Aboriginal Nations on Standards for Constitutional Development* Batchelor (December 1998) (Batchelor Statement).

[32] *Indigenous Constitutional Strategy: Northern Territory* include as Annexure 6 to Northern Territory Statehood Steering Committee, Northern Territory Legislative Assembly, *Constitutional Paths to Statehood* Community Discussion Paper (Northern Territory Statehood Steering Committee, 2007), 1

[33] Parliamentary Privilege [redacted]

[34] The *Indigenous Constitutional Strategy* variously seeks recognition, protection, provision for or guaranteeing of a range of rights in the Northern Territory *Constitution*, including the human rights in the principal United Nations human rights conventions, as well as the Genocide Convention.

[35] Art 7: No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment

[36] Art 10 (1) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person Art 10 (3) The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

The Don Dale Youth Detention Centre incidents raise the issue of the desirability of a Northern Territory Charter of Rights to drive institutional change in the non-litigious areas of policy formation and planning, program delivery and ongoing human rights education of public service providers and decision makers.

It is the reformative effect of Charters of Rights in these areas – in establishing and embedding human rights principles across all aspects of legislative and administrative governance, which produces greater human rights observance, providing both a comparative check on any emergence of human rights abuses and a method of remediation should they occur. As the former Victorian Attorney General who introduced the Victorian Charter of Rights and Responsibilities, Rob Hulls observed in the wake of the Don Dale incident:

> …the benefits can be found in small decisions that make a big difference to ordinary people. This is because the charter encourages rights considerations to be built in at the outset. Accordingly, decisions or policies which may harm certain individuals or communities are identified, or corrected at an earlier stage.
>
> What's more, I'm confident that these provisions would have something to say about the inhumane treatment of children in custody; that if there were an equivalent mechanism in the Northern Territory – one which ensured development of appropriate policies and processes from the outset – this outrageous abuse would not have occurred.[38]

The two existing statutory charters in the ACT and Victoria incorporate provisions relating to the legal responsibilities of public authorities in such a way as to establish these intersections of policy formation and program delivery with human rights principles and observance.[39]

Section 40B of the *Human Rights Act 2004* (ACT) provides that public authorities must act consistently with human rights,[40] and provides for legal proceedings in relation to public authority actions in contravention of human rights.[41] Likewise, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) applies human rights standards to the conduct of public authorities[42] and provides a capacity to raise in legal proceedings against public authorities grounds of unlawfulness arising under the Charter.[43]

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[37] Art 24 (1) Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

[38] Rob Hulls 'NT scandal shows why we need charter of rights' *The Australian* July 29 2016.

[39] *Human Rights Act 2004* (ACT) *Charter of Human Rights and Responsibilities Act 2006* (Vic).

[40] *Human Rights Act 2004* (ACT) s.40B (1) It is unlawful for a public authority (a) to act in a way that is incompatible with a human rights or (b) in making a decision, fail to give proper consideration to a relevant human right

[41] *Human Rights Act 2004* (ACT) s.40C (1) This section applies if a person (a) claims that a public authority has acted in contravention of section 40B and (b) alleges that the person is or would be a victim of the contravention (2) The person may – (a) start a proceeding in the Supreme Court against a public authority or (b) rely on the person's rights under this Act in other legal proceedings…(4) The supreme Court may, in proceedings under subsection (2), grant the relief it considers appropriate except damages

[42] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s.38 (1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right, or in making a decision, to fail to give proper consideration to a relevant human right

[43] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s.39 (1) If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the

In addition, various review and other reports of both the ACT and Victorian Charters have observed and commented upon the improvements and changes to policy formation, the legislative process and service delivery in the realisation of human rights and in human rights compliance through the application of Charter obligations and provisions.

In relation to the ACT charter, a variety of positive, non-curial and non-litigious aspects have been observed:

> …The experience of the HRA is that its impact on policy-making and legislative processes has been more extensive and arguably more important than its impact in the courts. Its main effects have been on the legislature and executive, fostering a lively, if sometimes fragile, human rights culture within government…the HRA has operated in subtle ways to enhance the standing of human rights in the ACT. One of the clearest effects of the HRA has been to improve the quality of law-making in the Territory, to ensure that human rights concerns are given due consideration in the framing of new legislation and policy.[44]
>
> Over the first five years of its operation the HRA has had a tangible and positive impact on the fulfilment of human rights of people living in the ACT. The HRA has led to improvements in laws and policies. It has had a positive impact on political debate and consideration of policy issues by Government. It is steadily changing the Culture of the public service, particularly since the commencement…of the direct obligations on public authorities.[45]
>
> The first six years of operation of HRA have shown that it has not led to a flood of litigation, vexatious or otherwise, and that the major impact of the HRA has been in ensuring that executive government, the legislature and the courts give regular and more focused attention to the human rights issues raised by specific laws, policies and proposals.[46]

In relation to the Victorian Charter, similar comments have emerged about positive non- curial and non-litigious effects:

> …As familiarity with the Charter has grown, government agencies and other public authorities are taking steps to address human rights issues before they arise. For many agencies, their understanding of the Charter and human rights has matured, enabling them to engage in a more rigorous assessment of the human rights implications of their practices. By training their staff and developing rigorous human rights assessment and evaluation tools, public authorities are identifying and responding to potential issues when they make laws, develop policies and deliver services to the public.[47]
>
> Public authorities undertake significant work to ensure that their actions are not incompatible with human rights and that human rights are properly considered when making decisions…The

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ground that the decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter … (3) A person is not entitled to be awarded any damages because of a breach of this Charter

[44] The Human Rights Act 2004 (ACT) The First Five Years of Operation A Report To The ACT Department of Justice and Community Safety ACT Human Rights Research Project Australian National University May 2009, 6.

[45] Government Response Australian National University Human Rights Research Project Report *The Human Rights Act 2004 (ACT): The First Five Years of Operation* March 2012, 2.

[46] Australian Capital Territory Economic, Social and Cultural Rights Research Project Report September 2010, 15

[47] Victorian Equal Opportunity and Human Rights Commission Protecting us all 2012 report on the operation of the Charter of Human Rights and Responsibilities, 5.

> Charter helps to shape everyday decisions, putting the person at the centre of government's interactions with the community. The Charter can also be used to hold a public authority accountable for considering human rights in its interactions with the community.[48]
>
> …After eight years of operation, the use of the Charter has matured beyond simple compliance with the law. The Charter is not only part of 'everyday business' for many public authorities, but drives important human rights initiatives to address systemic issues. In this way it prompts organisations to take a proactive, rather than reactive, approach to their operations and the way they engage with the community.[49]
>
> The Government is strongly committed to the principles of human rights and considers that legislative protection for those rights provides a tangible benefit to the Victorian community.[50]
>
> The Charter sets our fundamental human rights clearly in one place and makes it a legal obligation for government to comply with them. This has improved transparency and accountability in government by giving all Victorians the tools to question and challenge laws, policies and decisions made by public authorities that have the potential to impact their human rights.
>
> People are achieving real outcomes outside the courts because they are raising their human rights concerns directly with public authorities. This can happen through one-off discussions to rectify a particular case, or through more robust negotiations to rectify serious systemic issues.[51]
>
> The Charter is primarily about the relationship between Victorian state and local government and the community, ensuring that public authorities take people's human rights into account when they provide services.[52]

There is a strong case to develop a statutory charter of rights – enacted by the Northern Territory Parliament – to foster a transformative culture within Northern Territory institutions responsible for youth custody, detention and corrections, setting a direction towards more human rights compliant practices.

The existence of statutory charter models in the ACT and in Victoria (and further available information relating to specific improvements in custodial practices in those jurisdictions in relevant reports) producing these transformative cultural reform in relation to public authorities program planning and delivery, provides strong evidentiary experience and a compelling rationale for the introduction of a Northern Territory Charter of Rights as a matter of priority.

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[48] Victorian Equal Opportunity and Human Rights Commission 2013 Report on the operation of the Charter of Human Rights and Responsibilities, 4-5.

[49] Victorian Equal Opportunity and Human Rights Commission 2014 report on the operation of the Charter of Human Rights and Responsibilities, 1.

[50] Parliament of Victoria Review of the Charter of Human Rights and Responsibilities Act 2006 Victorian Government Response 14 March 2012, 2.

[51] Victoria Equal Opportunity and Human Rights Commission Victoria's Charter of Human Rights and Responsibilities web page. Refer also to the Commission's Protecting Us All website for case studies showing practical human rights outcomes of the operation of the Charter: http://www.humanrights.vic.gov.au/

[52] From Commitment to Culture The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006 Summary report, 3.

. The addition of an offence to Division 274 of the *Criminal Code* (Cth) of inflicting or engaging in cruel, inhuman or degrading treatment or punishment

A further advisable reform would be an expansion of the criminal offences in Division 274 of the *Criminal Code* (Cth) to include an offence relating to the infliction or administration of cruel, inhuman or degrading treatment or punishment – given the relationship of the *Youth Justice Amendment Act 2016* (NT) amendments, the human rights abuses in the Don Dale Youth Detention Centre, and the more limited domestic implementation in 2011 of Australia's international obligations under the CAT through the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth), which amended the *Criminal Code* (Cth).[53]

In 2011, the Commonwealth enacted Div 274 torture offences, comprising ss.274.1 to 274.7 of the *Criminal Code* (Cth). Division 274 closely implements the articles of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, including a reliance on the meaning of torture in Article One of the Convention.[54] This is reflected in the two offences created under ss 274.2 (1) and (2) of the *Criminal Code*. As reflected in the implementation of the Convention obligations, the concept of torture requires a certain threshold of suffering, that mental as well as physical suffering is included, that the act of torture has to be inflicted intentionally, that the torture must be inflicted for a prescribed purpose and that the infliction of pain and suffering be done by or at the instigation of, or with the consent of, a public official or other person acting in an official capacity.

There are some events disclosed in the Don Dale incidents – such as prolonged solitary confinement and the tear gassing of innocent detainees confined to their cells and their post tear gassing treatment – which might *prima facie* meet the requisite threshold of suffering[55] and the other requirements to establish the *Criminal Code* offence of torture, and therefore warrant investigation as to the possibility of criminal prosecution for the *Criminal Code* offence.

However there are a range of other incidents – such as shackling and hooding in the restraining chair, strip searching with assault as an intrinsic part of such searches and various other forms of assault and physical handling – which may evidentially fall short of the requisite level of severity in physical or mental suffering, instead constituting incidences of cruel, inhuman or degrading treatment or punishment under Art 16 of the CAT.

Unfortunately, an additional offence of inflicting, administering or participating in cruel, inhuman or degrading treatment or punishment was not enacted under the Division 274 reforms to the *Criminal Code* (Cth). The presence of such an offence might well have captured many of the most egregious

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[53] See generally, Greg Carne, 'Is Near Enough Good Enough?- Implementing Australia's International Torture Criminalisation and Prohibition Obligations In The *Criminal Code* (Cth)' (2012) 33 *Adelaide Law Review* 229.

[54] For the purposes of the Convention, Art 1 of CAT defines torture as meaning "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, where such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

[55] That is 'a certain severity in pain and suffering': Sarah Joseph, Jenny Schultz and Melissa Castan *The International Covenant on Civil and Political Rights Cases Materials and Commentary* (Oxford University Press, 2nd ed, 2005),196 and 'the infliction of severe pain or suffering': Herman Burgers and Hans Danelius, *The United Nations Convention Against Torture – A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff Publishers, 1988), 117.

instances of abuse as disclosed in the Don Dale Youth Detention Centre incidents. Such acts of cruel, inhuman and degrading treatment or punishment have been properly characterised as on a continuum linking these lesser activities and torture.[56]

Whilst the CAT does not define what constitutes cruel, inhuman or degrading treatment or punishment, it has been noted that cruel and inhuman treatment may be differentiated from the Art 1 definition of torture through the lack of one of the essential elements of torture or a falling short of the requisite severity or intensity of inflicted suffering.[57] Degrading treatment is associated with the humiliation of the victim, either from the victim's perspective or the perspective of others.[58] In particular, the infliction of cruel, inhuman or degrading treatment or punishment need not be for a specified purpose.[59] Consistent with these observations it has been noted that '[Art 16] acts fail to qualify as acts of torture for the purposes of the Convention either because they did not involve a sufficiently severe degree of pain or suffering or because they were not inflicted for a purpose'[60] and that 'no specific definitions of 'cruel', 'inhuman' or 'degrading' treatment have emerged under the ICCPR or CAT. The requirements of severity, intention and purpose are presumably applied more leniently in determining whether such treatment has occurred.'[61]

The foundations for the Commonwealth Parliament, through the purposive treaty implementation aspect of the s.51 (xxix) External Affairs power of enacting a *Criminal Code* offence of the infliction of cruel, inhuman or degrading treatment or punishment, are twofold.

First, whilst Art 16 (1) of CAT does not create a specific textual obligation of criminalisation, it employs the more general word of 'prevent' – leading to the formal obligations under Art 16 of CAT being identified as the prevention within states territorial jurisdiction of 'acts of cruel, inhuman or degrading treatment or punishment not amounting to torture, where such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.[62] This obligation applies where the victims 'consist of persons who are deprived of their liberty or who are otherwise under the factual power or control of the person responsible for the treatment or punishment'.[63]

Second, a further foundation for the criminalisation of cruel, inhuman and degrading treatment exists under Article 7 of the *ICCPR*. Cruel, inhuman or degrading treatment or punishment is included within the Article 7 prohibition, which is particularly significant given Article 7's non derogable status. In addition, the prohibition is not confined to circumstances of public official or official capacity involvement. In addition, General Comment 20 on Art 7 of the *ICCPR* highlights the duty to provide legislative and other preventative and punitive measures against prohibited Article 7 acts,

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[56] See CAT *General Comment 2* at paragraph 3, describing obligations to prevent torture and other cruel, inhuman or degrading treatment or punishment as 'interdependent, indivisible and interrelated', such that 'conditions that give rise to ill-treatment frequently facilitate torture…the measures required to prevent torture must be applied to prevent ill-treatment'.

[57] Manfred Nowak, *The UN Covenant on Civil and Political Rights CCPR Commentary* (NP Engel, 2nd ed, 2007), 162-163

[58] Nowak, 165

[59] Burgers and Danelius, 150

[60] Malcolm Evans, "Getting to Grips With Torture' (2002) 52 *International and Comparative Law Quarterly* 365, 375-376

[61] Joseph, Schultz and Castan, 209.

[62] Burgers and Danelius, 149.

[63] Burgers and Danelius, 149

whether in an official or private capacity.[64] Consequently, Article 7 of the ICCPR provides an alternative foundation to add an offence of engaging in cruel, inhuman and degrading treatment or punishment to Division 274 of the *Criminal Code* (Cth).

The fact that cruel, inhuman or degrading treatment is not defined in either the CAT or the ICCPR would not prevent a suitable legislative definition from being formulated from the relevant committee jurisprudence and the respective General Comments. Indeed, the earlier UN *Declaration Against Torture*[65] stated that alleged perpetrators of well-founded allegations of cruel, inhuman or degrading treatment or punishment shall be subject to criminal, disciplinary or other appropriate proceedings.[66]

The inclusion of such an offence of inflicting or engaging in cruel inhuman or degrading treatment or punishment in the *Criminal Code* (Cth) (which may be legislatively limited to custodial and detention situations of the type identified in the Don Dale incidents) would act as both a deterrent to recurrences of such behaviours, as well as a cultural change agent within the Northern Territory Youth Justice Detention system. It would form an important, arms-length Commonwealth level check (with Commonwealth prosecutorial discretion) on the conduct of Northern Territory public officials or other persons acting in an official capacity in the Northern Territory in relation to Northern Territory Youth Justice custodial arrangements.

Importantly, such amendments incorporated into the *Criminal Code* (Cth) might also be drafted in conformity with, and to pick up, the existing approach in sections 274.4 (a) and (b) of the *Criminal Code* (Cth) which prohibit the availability of necessity and superior orders as defences to *torture offences*, merely allowing those matters to be taken into account in determining sentencing[67] - this would be particularly apposite in relation to the matter of superior orders.

. Paramountcy principle of Commonwealth laws in relation to Northern Territory Parliament laws made under the *Northern Territory (Self Government) Act 1978* (Cth)

An important consideration in the making of recommendations regarding reform of the NT Legislative framework regarding youth detention facilities, the *Youth Justice Act* (NT) and the programs and practices arising therein, is the paramountcy principle inherent in the Commonwealth Parliament, as the superior parliament, and legislative creator of the Northern Territory Parliament, through its enactment of the *Northern Territory Self Government Act 1978* (Cth). Consistent with the nature of the s.122 *Commonwealth Constitution* territories power, the Commonwealth Parliament 'retains the power to override their laws and circumscribe or withdraw their powers'[68]

A further and related aspect of the paramountcy principle (is that an equivalent to s.109 of the *Commonwealth Constitution* governing the relationship between inconsistency of laws of the

[64] See *ICCPR General Comment 20* Paragraphs 2 and 8.
[65] *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* GA Res 3452, 30th sess (UN Document A/10408) (9 December 1975)
[66] Ibid Art 10.
[67] The existing Commonwealth provisions reflect the non-derogable nature of the prohibition against torture, as highlighted in Articles 2(2) and 2(3) of CAT: Art 2(2) No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture Art 2(3) An order from a superior officer or a public authority may not be invoked as a justification of torture
[68] See George Williams, Sean Brennan and Andrew Lynch *Blackshield and Williams Australian Constitutional Law and Theory Commentary and Materials 6th edition* (Federation Press, 2014), 333

Commonwealth with laws of the States) applies to the relationship of laws of the Commonwealth Parliament to the laws of the Northern Territory Legislature (the latter being a Parliament created under the authority of the *Northern Territory (Self-Government) Act 1978* (Cth), supported by the s.122 Territories power in the *Commonwealth Constitution*)

It has also been noted that 'a similar result would probably flow from covering clause 5 of the Constitution, which extends the binding effect of Commonwealth laws to the 'people…of every part of the Commonwealth'.[69]

In addition, as Lockhart J observed in *Attorney-General (NT) v Minister for Aboriginal Affairs* (1989) 90 ALR 59, 75:[70]

> It is beyond the power of the Northern Territory of Australia to make laws repugnant to or inconsistent with laws of the Commonwealth or to exercise powers conferred by the Northern Territory laws in a manner inconsistent with, or repugnant to laws of the Commonwealth. It is not a question of inconsistency between the two sets of laws which may otherwise be valid, rather it is a question going to the competency of the subordinate legislature to enact laws or to cause laws to operate in a manner inconsistent with or repugnant to laws of the paramount legislature. Nor can a provision of a law of the Northern Territory operate so as to prevent or curtail the enforcement or enjoyment of a right conferred by a law of the Commonwealth

In *Ex parte Japanangka* (1984) 158 CLR 395, 418-419, Brennan J said:

> It is beyond the capacity of the law of the Northern Territory or of the exercise of any power which such a law confers to affect the operation of a law of the Commonwealth or to destroy or to detract from a right thereby conferred unless a law of the Commonwealth so provides, expressly or by implication: see *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582, 588 and *Webster v McIntosh* (1980) 32 ALR 603, 605-606.

The above passage of Brennan J was cited with approval by Mason J in *University of Wollongong v Metwally* (1984) 158 CLR 447, 464. Sir Anthony also observed that

> It is significant that a conflict between a Commonwealth law and a Territory law, which is unaffected by the provisions of s.109, is resolved in favour of the primacy of Commonwealth law by reference to the same doctrine of inconsistency. The comment made by Brennan J …that 'It is beyond the capacity of a law of the Commonwealth to destroy or detract from a right thereby conferred' echoes the observations of Dixon J in *Stock Motor Ploughs Ltd v Forsyth*, when, speaking of s.109, he said that inconsistency will result if a State law varies, impairs or detracts from the operation of a law of the Commonwealth.[71]

. Options and initiatives from the doctrine of paramountcy of Commonwealth law able to be applied to Northern Territory laws relevant to the Don Dale youth detention incidents

Whilst the Commonwealth repealed the Commonwealth Executive disallowance for territory laws (formerly available under s.9 of the *Northern Territory (Self Government) Act 1978* (Cth)), through

[69] Williams, Brennan and Lynch, 334
[70] Williams, Brennan and Lynch, 334
[71] (1984) 158 CLR 447, 464.

the passage of the *Territories Self-Government (Disallowance and Amendment of Laws) Act 2011* (Cth), the remaining method of amendment is Commonwealth Parliament legislative override of Northern Territory legislation, founded upon the Commonwealth's territories power in s.122 of the *Commonwealth Constitution*.

Several options are canvassed below relevant to legislative remediation of the culture highlighted in the Don Dale Youth Detention Centre incidents:

. Commonwealth repeal or modification of parts of the *Youth Justice Act* (NT)

The repeal or modification of the provisions relating to the approval, authorisation and use of approved restraint devices included in the *Youth Justice Act* (NT)[72] by the *Youth Justice Amendment Act 2016* could simply be affected by carefully drafted Commonwealth override legislation.

Of course, such override legislation could also extend to the repeal or modification of other enabling powers within the *Youth Justice Act* (NT), such as the provisions relating to solitary confinement of youth offenders[73] and the broadly permissive language in the *Youth Justice Act* (NT) of use of force against detained youth offenders, when such force is applied for a reason other than discipline,[74] being for the safe custody and protection of persons under s.153(3)(c) of the *Youth Justice Act* (NT). In particular, this last aspect is drawn to the attention of the Royal Commission:

In *Edwards v Tasker* (2014) 34 NTLR 115, 126-127 and 128, Barr J of the Northern Territory Supreme Court, held in relation to the application of physical force to detainees under the *Youth Justice Act* (NT):

> It is clear from a reading of s.153(1) and (2) that s.153(3) is only concerned with the use of force to maintain discipline. It is not concerned with the use of force for purposes other than maintaining discipline. On its proper construction, s.153(3) limits force used for the purpose of maintaining discipline, and not force for other purposes…
>
> I am satisfied that the purpose of the conduct engaged in by the respondent …was not to maintain discipline at the detention centre, but rather to ensure the safe custody and protection of DV. Therefore, the restriction on the superintendent's use of force imposed by s.153(2) and (3)(a) did not apply, because they were restrictions on the use of force to maintain discipline. The only relevant restriction on the use of force against DV…implied by s.152(1), was that the use and extent of force had to be "necessary or convenient" for the performance of the superintendent's function to ensure the safe custody and protection of DV. Reasonableness was also implied, consistent with reg 71 (2) of the *Youth Justice Regulations*, but physical violence was not excluded.
>
> …the Act creates separate and distinct obligations on the part of the superintendent…and that the prohibition on the use of force only applies to one of them.

[72] See s.151AB , 152 (1A) (a), 153(4) and 158A of the *Youth Justice Act NT*

[73] See s.153 (5) of the *Youth Justice Act NT*

[74] See ss.153(2) and s.153 (3) of the *Youth Justice Act* (NT); Robert Gosford and Matt Punch, 'The most shocking thing about the Four Corners footage is that the abuse was legal' *The Northern Myth* 26 July 2016; *Edwards v Tasker* [2014] NTSC 56

. Further reservations of legislative and executive subject matters from the *Northern Territory (Self-Government) Act 1978* (Cth) in relation to youth justice and youth detention issues

In the alternative, the Commonwealth also has both legislative and regulatory capacity to remove entirely youth justice and youth detention issues from the jurisdiction of the Northern Territory Parliament. This principle is illustrated by five specific reservations of subject matters from the jurisdiction of the Northern Territory Parliament.[75]

Ministers of the Northern Territory have executive authority under s.35 of the *Northern Territory Self Government Act 1978* (Cth) in respect of matters listed in regulation 4 of the *Northern Territory (Self-Government) Regulations 1978* (Cth), which presently lists areas, inter alia, relevant to the instant Royal Commission inquiry - 'Maintenance of law and order and the administration of justice'; 'Correctional services'; and 'Child, family and social welfare'.

Where a sub-set or aspect of the listed area of executive authority in regulation 4 of the *Northern Territory Self Government Act 1978* (Cth) is intended by the Commonwealth to be withheld from the executive authority of Ministers of the Northern Territory, an additional subtracting sub clause has been included in regulation 4. This is the method by which uranium mining under the *Atomic Energy Act 1953* (Cth) and Aboriginal land rights under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) have been quarantined from an otherwise broad set of executive authority for Northern Territory Ministers.

The option, of course, therefore exists for the Commonwealth to amend regulation 4 (2) of the *Northern Territory (Self Government) Regulations 1978* (Cth) to subtract discrete aspects or subject matters of youth detention and youth custodial arrangements from the three areas of Northern Territory Ministerial Executive authority identified – namely "Maintenance of law and order and the administration of justice'; 'Correctional services' and 'Child, family and social welfare'.

. Further temporary Commonwealth regulatory legislative intervention into the Northern Territory

The Commonwealth similarly has legislative power to intervene temporarily and directly in the conduct and program delivery of youth justice and detention issues in the Northern Territory. This second principle is illustrated by the 2007 Commonwealth Northern Territory intervention following the release of the *Little Children Are Sacred* report[76] on child sex abuse in Northern Territory

[75] *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (national parks); s.53(5) of the *Northern Territory (Self Government) Act 1978* (Cth) (industrial relations); reg 4(2) of the *Northern Territory (Self Government) regulations 1978* (Cth) excludes from the matters in respect of which Northern Territory ministers have executive authority under reg 4(1), matters relating to the mining of uranium or other prescribed substances within the meaning of the *Atomic Energy Act 1953* (Cth) and rights in respect of Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). See also s.50 A of the *Northern Territory (Self-government) Act 1978* (Cth) which removes from the general s.6 peace, order and government law making power, 'the making of laws which permit or have the effect of permitting (whether subject to conditions or not) the form of intentional killing of another called euthanasia (which includes mercy killing) or the assisting of a person to terminate his or her life'.

[76] 'Little Children are Sacred' Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse 2007 Northern Territory Government 2007.

indigenous communities.[77] Both the initial and the subsequent intervention legislation[78] was supported by the s.122 territories power.

The question arising in the present circumstances is whether the human rights abuses detected in the youth custodial arrangements at the Don Dale are of sufficient comparative gravity to warrant a Commonwealth intervention (even of a more circumscribed magnitude) following the precedent of the Howard Government 2007 intervention, responding to serious child sexual abuse in Northern Territory indigenous communities.

. Commonwealth Parliament – Parliamentary Joint Committee on Human Rights – s.7(b) *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) inquiry into human rights compatibility of ss.6 and 35 of the *Northern Territory (Self-Government) Act 1978* (Cth)

A further option exists for the Commonwealth Parliament Parliamentary Joint Committee on Human Rights to exercise its powers under s.7 (b) of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), which enables the Committee 'to examine Acts for compatibility with human rights, and to report to both Houses of Parliament on that issue'. [79]

This provision would enable PJCHR to examine the *Northern Territory (Self-Government) Act 1978* (Cth) for compatibility with human rights – in particular, the traditional POGG plenary power (within the terms of the grant) form of legislative power granted to the Northern Territory Legislative Assembly under s.6 of the *Northern Territory (Self-Government) Act 1978* (Cth)[80] and the regulation making authority of the Commonwealth under the *Northern Territory (Self-Government) Act 1978* (Cth) regarding the specification of matters in respect of which the Ministers of the Territory are to have executive authority.[81]

A particularly useful focus for the PJCHR would be how the scope of these enabling legislative and executive powers and their exercise– in the passage of relevant Northern Territory legislation and in the exercise of Northern Territory executive authority in the form of laws underpinning the activities in the Don Dale Youth Detention facility – failed to meet compatibility standards with human rights, as defined in s.3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

This definition means the rights and freedoms declared by the seven major United Nations human rights treaties to which Australia is a party. The treaties of particular relevance to the present circumstances are the *Convention on the Elimination of all Forms of Racial Discrimination*, the *International Covenant of Civil and Political Rights*, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and the *Convention on the Rights of the Child*.

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[77] See *Wurridjal v Commonwealth* (2009) 237 CLR 309 regarding the interaction of s.122 and s.51 (xxxi) of the *Commonwealth Constitution*.

[78] *Northern Territory National Emergency Response Act 2007* (Cth), which was repealed by the *Stronger Futures in the Northern Territory Act 2012* (Cth).

[79] A capacity also exists for matters relating to human rights to be referred to PJCHR for inquiry and then report to both Houses of Parliament by the Attorney-General: s.7(c) of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

[80] S.6 'Subject to this Act, the Legislative Assembly has power, with the assent of the Administrator or Governor-General, as provided by this Act, to make laws for the peace, order and good government of the Territory'

[81] See s.35 of the *Northern Territory (Self-Government) Act 1978* (Cth).

. Inclusion of Statement of Human Rights compatibility and Human Rights Parliamentary Committee scrutiny function into the legislative procedures of the Northern Territory Legislative Assembly, by amendment of the *Northern Territory (Self-Government) Act 1978* (Cth)

One reform which might be usefully considered is to borrow, adapt and integrate the two major accountability mechanisms of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) – namely a statement of human rights compatibility for introduced bills, and a Parliamentary Committee to examine bills for compatibility with human rights and then to report to Parliament on the issue – and legislate them into the law making procedures of the Northern Territory Legislative Assembly.[82]

This reform could also include a further modest amended step that the presentation of a bill passed by the Legislative Assembly to the Administrator[83] for assent shall certify that a statement of human rights compatibility (assessing whether or not the bill is compatible with human rights) was prepared and presented to the Northern Territory Legislative Assembly on the introduction of the bill.

The effect of this measure in the instant circumstances would have been to compel the Northern Territory Government to assess and justify, at the point of introduction of the *Youth Justice Amendment Act 2016* (NT) to the Northern Territory Parliament, the compatibility of the approval, authorisation and use of mechanical restraining devices for restricting the movement of detainees with the seven major United Nations human rights conventions to which Australia is a party.

This measure would also have provided clearer Parliamentary opportunities in debate and at Parliamentary Committee level to assess and test for human rights compatibility one of the issues constituting a major infringement of human rights in the Don Dale matters – the use of mechanical restraining devices, and if not so compatible, to amend the bill relating to approval, authorisation and use issues in such a way that these provisions and practice under them would be human rights compliant.

This measure is also a more immediate and practically realisable amendment than the longer term desirability of the introduction of a Northern Territory Statutory Charter of Human Rights, to produce the requisite cultural change in relevant Northern Territory public authorities – this argument being presented under the earlier heading ‘A Northern Territory Statutory Charter of Human Rights as an agent of human rights cultural change for Northern Territory public authorities’.

I would be pleased to provide further information in relation to this submission to the Royal Commission or to provide evidence to the Royal Commission based on this submission.

Yours faithfully

Dr Greg Carne
Associate Professor

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[82] See s.6 of the *Northern Territory (Self-Government) Act 1978* (Cth). In the small Legislative Assembly of the Northern Territory, with 25 members and proportionately few backbenchers, it may make sense to allocate this formalised human rights compatibility and scrutiny role to the already established Northern Territory Parliament Legal and Constitutional Affairs Committee.

[83] See s.7 of the *Northern Territory (Self-Government) Act 1978* (Cth).

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