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Dear Commissioner Middlebrook

Submission – Correctional Services Bill 2014

1. The Northern Territory (**NT**) Government proposes to introduce the most recent version of the Correctional Services Bill 2014 (**the Bill**). The Bill will govern the operation of custodial facilities and the management of prisoners throughout the NT. The Human Rights Law Centre (**HRLC**) is a national organisation that works in close collaboration with Aboriginal and social justice organisations around the country and in the NT. The HRLC is concerned that aspects of the Bill are incompatible with Australia's human rights obligations.
2. Australia is a party to a number of key international human rights treaties. Australia's ratification of these instruments obliges it to adopt such legislative or other measures as may be necessary to give effect to the rights contained in the various treaties.¹
3. The international human rights framework makes it clear that federal, state and territory authorities, including the NT Government, have responsibilities in relation to the realisation of human rights.² This means that in Australia, all branches of government, at all levels – national, state, territory and local – must act to respect, protect and fulfil human rights.³

¹ See, for example, article 2 of the International Covenant on Civil and Political Rights (ICCPR), and article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

² In particular, article 50 of the ICCPR expressly provides that, in federations such as Australia, the obligations of the ICCPR are binding on the federation as a whole and must extend across all parts of that federation, without any limitations or exceptions.

³ UN Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13 (2004), 4. See also, article 27 of the Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27

4. The HRLC endorses the submissions made by the Criminal Lawyers Association of the NT (**CLANT**) and the Aboriginal Legal Services, the North Australian Aboriginal Justice Agency (**NAAJA**) and the Central Australian Aboriginal Legal Aid Service (**CAALAS**), and echoes concerns that the Bill fails to safeguard important human rights. The HRLC submission focusses on a number of key issues, and supports the comments made by NAAJA, CAALAS and CLANT in relation to other aspects of the Bill not referred to in this submission.
5. This submission provides an overview of the human rights obligations relevant to the Bill; and outlines key principles that are essential to promoting community safety by respecting and protecting the rights of both people in the community, and people that are imprisoned. In doing so, the HRLC submits that:
 - a) An objects clause should be included which incorporates human rights principles, including that the purpose of the corrections system is, amongst other things, to promote the rehabilitation and reintegration of offenders back into the community
 - b) The search powers, specifically in relation to strip searches, should be further confined and safeguards included
 - c) Adequate safeguards and review mechanisms should be included in relation to misconduct hearings
 - d) Forced separation of prisoners from other prisoners should not be used as a form of punishment
 - e) The provisions allowing for forced medical treatment should be amended, and
 - f) Provisions providing for mental health treatment should be included.

1. An objects clause informed by human rights obligations

6. An objects clause is critical to articulate the overarching aims of the legislation, to expressly provide for the rights of prisoners, and to provide guidance as to the scope and nature of the powers conferred.
7. The HRLC submits that an objects clause, informed by human rights obligations, should be included.
8. There are a number of international instruments that apply in either a general or specific sense, to both custodial settings and the rights of prisoners, and are therefore relevant to the Bill. These include:
 - (a) The International Covenant on Civil and Political Rights (**ICCPR**):
 - (i) the right to life (article 6)
 - (ii) protection from torture and other cruel, inhuman or degrading treatment or punishment (article 7)
 - (iii) when deprived of liberty, to be treated with humanity and with respect for the inherent dignity of the human person (article 10), and

January 1980), which provides that a state party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.

- (iv) the right to a fair trial (article 14).
 - (b) The United Nations Convention against Torture (**CAT**), which contains a broad definition of freedom from cruel, inhuman and degrading treatment or punishment, and
 - (c) The United Nations Standard Minimum Rules for the Treatment of Prisoners 1955, which details what is internationally accepted as being good principle and practice in the treatment of prisoners and in the management of institutions.
9. Aboriginal people are disproportionately represented in the NT Correctional system. Australia has endorsed the United Nations Declaration on the Rights of Indigenous Peoples (**Declaration**).⁴ The Declaration was adopted by the United Nations General Assembly in 2007 and is a landmark document. Australia's endorsement of the Declaration represents an important acknowledgement of the fundamental human rights of Aboriginal and Torres Strait Islander peoples in Australia.

1.1 The objects clause should provide for the humane treatment of prisoners

10. International human rights law clearly establishes that a person imprisoned for committing a criminal offence should not suffer any punishment or treatment over and above the deprivation of liberty which imprisonment itself entails. All other basic human rights must remain protected. A useful example of prisoners' rights being protected in domestic legislation can be found in s 47 of the *Corrections Act 1986* (Vic).
11. The right to be treated humanely when deprived of liberty is protected in article 10 of the ICCPR. The right applies to anyone deprived of liberty under the laws and authority of the state, which includes prisons, police cells and youth detention facilities.⁵ The right relates largely to conditions of detention; and breaches of article 10 have been found in cases where prisoners are denied adequate bedding, food, exercise or medical attention; are exposed to unsanitary food/water and/or living conditions; physical abuse; extended periods of isolation; overcrowding; lack of educational opportunities, work or reading materials; and physical, psychological and verbal abuse.⁶
12. Article 10 of the ICCPR also complements the prohibition against torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the ICCPR and also in CAT. The purpose of article 7, according to the United Nations Human Rights Committee, is to 'protect both the physical and mental integrity ... and the dignity of the individual'.⁷ Article 7 therefore prohibits 'not only ... acts that cause physical pain but also ... acts that cause mental suffering to the

⁴ UN GAOR, 61st session, GA Res 61/295 ; UN Doc A/RES/47/1 (2007).

⁵ UN Human Rights Committee, *General Comment No 21 (Replaces General Comment 9) concerning Humane Treatment of Persons Deprived of Liberty* (1992), 2.

⁶ See, eg, *Robinson v Jamaica*, HRC, Communication No 731/1996, UN Doc CCPR/C/68/D/731/1996 (2000); *Sextus v Trinidad and Tobago*, HRC, Communication No 818/1998, UN Doc CCPR/C/72/D/818/1998 (2001); *Lantsova v Russian Federation*, HRC, Communication No 763/1997, UN Doc CCPR/C/74/D/763/1997 (2002); *Freemantle v Jamaica*, HRC, Communication No 625/1995, UN Doc CCPR/C/68/D/625/1995 (2000).

⁷ UN Human Rights Committee, *General Comment No 20: Replaces General Comment 7 concerning Prohibition of Torture and Cruel Treatment or Punishment* (2001) 1–2.

victim'.⁸ The United Nations Human Rights Committee has also stated that 'what constitutes inhuman or degrading treatment falling within the meaning of article 7 depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim'.⁹

13. The right to be free from cruel, inhuman or degrading treatment also extends to a duty to prevent, investigate and punish ill-treatment in detention. In this respect, independent monitoring and oversight of places of detention plays an important role in preventing ill-treatment and is an essential element in ensuring respect for articles 7 and 10 of the ICCPR and CAT. Importantly, the Human Rights Council, through the Universal Periodic Review, called on Australia to ensure the humane treatment of prisoners and the ratification of the *Optional Protocol to the Convention against Torture or other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT) on the treatment of prisoners.¹⁰
14. Mechanisms for investigation and inspection of places of detention by independent bodies are essential to ensure the effective prohibition of and protection against torture and other forms of ill-treatment. A comprehensive system of inspection and investigation is required *in addition to* a complaints-based system in order to adequately protect the human rights of persons deprived of their liberty.
15. The HRLC does not consider that the official visitor program, provided for in Part 2.3 of the Bill, meets such oversight requirements. In this respect, the HRLC is pleased to see the introduction in the NT of the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) (National Uniform Legislation) Bill 2013, and looks forward to the Bill being passed in Parliament.

1.2 The objects clause should commit to culturally relevant service provision, and should expressly provide for the rehabilitation of offenders

16. The Bill should take account of the high incarceration rates and the high Aboriginal prisoner population in the NT.
17. Aboriginal people represent approximately 30 per cent of the NT general population, yet over 85 per cent of the adult prison population, and over 95 per cent of the youth prison population.¹¹ Additionally, the NT has the highest incarceration rate in the country; has recorded the highest

⁸ Ibid, 2.

⁹ Ibid, 9.2; See also, *Ireland v United Kingdom* (1979-80) 2 EHRR 25, 162.

¹⁰ See, UN Human Rights Council, *Universal Periodic Review of Australia* (2011), recommendations at 86.1, 86.2, 86.3, 86.4, 86.5, 86.6 and 86.71.

¹¹ Australian Bureau of Statistics, 'Indigenous People's Experience of Crime and Justice in the NT' (March 2010). At <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/1362.7Feature+Article1Mar+2010>.

increase in incarceration rates since 2002;¹² and has the highest recidivism rate, with almost 50 per cent of people released from prison being returned within two years.¹³

18. The over-incarceration of Aboriginal and Torres Strait Islander peoples has been the subject of repeated recommendations by a number of UN human rights bodies, including the UN Human Rights Committee, Committee on Economic, Social and Cultural Rights, the Committee against Torture, and the Committee on the Elimination of Racial Discrimination.¹⁴ Further, the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, in his Report on the situation of indigenous peoples in Australia, noted his concern about the 'alarmingly high levels of incarceration of Aboriginal and Torres Strait persons, including women and minors'.¹⁵
19. In recognition of the need to remedy the over-incarceration of Aboriginal people, the Canadian *Corrections and Conditional Release Act (1992)* (**Canadian Act**) contains Aboriginal specific provisions. These include the requirement to provide programs 'designed to particularly address the needs of aboriginal offenders';¹⁶ and the establishment of a 'National Aboriginal Advisory Committee' tasked with providing 'advice on the provision of correctional services to aboriginal offenders'.¹⁷
20. The HRLC recommends that an overarching and inclusive provision, similar to that contained in the Canadian Act, be included in the objects clause. The provision should state that, correctional policies, programs and practices should respect gender, cultural and linguistic differences, and are responsive to the special needs of women, Aboriginal people, and people with a disability, impairment and/or who require mental health care.¹⁸ A similar provision exists in the Queensland *Corrective Services Act 2006*, which states that the Act recognises 'the need to respect an offender's dignity, and the special needs of offenders by taking into account: an offender's age, sex or cultural background; and any disability an offender has'.¹⁹
21. Further, the objects clause should also clearly state that, correctional policies, programs and practices should be designed and delivered in ways aimed at increasing the successful rehabilitation and reintegration of offenders.
22. Article 10(3) of the ICCPR states that the penitentiary system shall comprise treatment of prisoners, the essential aim of which shall be their reformation and social rehabilitation. The

¹² Australian Bureau of Statistics, 'Prisoners in Australia, 2012' (2 April 2013). At <http://www.abs.gov.au/ausstats/abs@.nsf/Products/138443A6EDB15748CA257B3C000DCA24?opendocument>.

¹³ The Productivity Commission, *Report on Government Services*, 'Justice Preface' (29 January 2010), C11

¹⁴ UN Committee on the Elimination of Racial Discrimination, *Concluding Observations on Australia*, 20.

¹⁵ J Anaya, 'Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people: Situation of indigenous peoples in Australia' (June 2010), UN Doc A/HRC/15/37/Add.4, 14.

¹⁶ Section 81(2).

¹⁷ Section 82(1).

¹⁸ Section 4(g).

¹⁹ Section 3(3).

United Nations Human Rights Committee has also emphasised that every corrections system must seek to realise that aim and must not be 'only retributory'.²⁰

23. The Canadian Act stipulates one of its purposes as 'assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community'.²¹ The ACT *Corrections Management Act 2007* also states that the main object of the Act is to 'promote public safety and the maintenance of a just society, particularly by...ensuring detainees are treated in a decent, humane and just way, and by promoting the rehabilitation of offenders and their reintegration into society'.²²
24. While the HRLC recognises that one of the primary purposes of the Bill is the safe custody of offenders, the importance of humane and rehabilitative custodial environments for reducing the likelihood of reoffending and therefore increasing community safety, has been well documented; and therefore, the express purpose of rehabilitation, should be provided for in an objects clause.

2. Searches

25. Sections 47 and 48 of the Bill allow for prisoner searches involving the removal of clothing by correctional officers, otherwise known as strip searches. The HRLC acknowledges that the search provisions are intended to ensure the operation of safe and secure prisons by preventing the entry and availability of contraband. However, the HRLC submits that these provisions are too open-ended and arbitrary. They fail to specify the situations which would allow for the carrying out of a search and they do not require that the searches be carried out in the least intrusive manner possible.
26. The HRLC is specifically concerned that:
- a. The provisions are not linked to any suspicion of carrying contraband;
 - b. There is no requirement to take into account a prisoner's mental health, or other individual circumstances, in deciding whether or not to conduct a strip search;
 - c. There is no requirement that searches be conducted in the least intrusive manner possible, with regard to prisoners' dignity;
 - d. There is no obligation to seek alternative methods of detecting contraband; and
 - e. There is no obligation to balance security concerns with the potential harm caused by the search.
27. The HRLC notes that, under international law, the right to protection against inhuman or degrading treatment is an absolute right and is not subject to exceptions. The European Court of Human Rights has held that strip searches are only permissible where 'absolutely necessary' and where there are 'serious reasons' to suspect that a prisoner is concealing contraband.²³

²⁰ UN Human Rights Committee, *General Comment No 20: Replaces General Comment 7 concerning Prohibition of Torture and Cruel Treatment or Punishment* (2001), 10.

²¹ Section 3(b).

²² Section 7.

²³ See *Frerot v France* [2007] ECHR 70204/01 (12 June 2007).

28. Strip searching has a particular impact on female prisoners. Between 40 and 89 per cent of any female prison population are victims and survivors of sexual and/or physical violence and/or abuse.²⁴ The practice of strip searching can replicate previous experiences of violence and abuse and the consequent trauma.²⁵ In many instances, women prisoners may forego visits from family or external medical treatment in order to reduce the number of searches.²⁶
29. The HRLC recommends that a provision, similar to that contained in s 50(1) of the Bill, which requires the reasonable belief that a prisoner is concealing a prohibited item, be inserted with respect to s 47 and especially s 48.
30. Further, provisions similar to regulations 69 and 71 of the Corrections Regulations 2009 (Vic) should be inserted, stating that the search:
- a. Must be 'conducted as expeditiously as possible and with regard to the decency and self-respect of the prisoner searched';
 - b. Must '...minimise the impact on the prisoner's dignity and self-respect'; and
 - c. Must 'be conducted in a private place...'
31. Further, the Bill should expressly articulate that searches should be conducted in the least invasive way possible.

3. Misconduct hearings

32. Division 3 of the Bill specifies the procedures relating to a charge of misconduct. The HRLC is pleased to see the insertion of s 71(5)(a) and (b) requiring proceedings to be conducted in accordance with the rules of natural justice.
33. Pursuant to this, the HRLC submits that:
- a. Misconduct proceedings should be conducted by an independent and impartial tribunal. As a minimum, prisoners should have a right of review by an independent tribunal.²⁷
 - b. Consideration should be given to removing s 72(4), which prohibits prisoners from accessing legal representation. Given majority of the prison population speaks English as

²⁴ See, for example, B Hockings et al, 'Queensland Women Prisoners' Health Survey' (2002), Department of Corrective Services, Queensland, 52-3; A George, 'Strip Searches: Sexual Assault by the State'. At http://www.aic.gov.au/media_library/publications/proceedings/20/george.pdf; D Kilroy, 'When Will You See the Real Us?' (2001) *Women in Prison*, 39.

²⁵ Federation of Community Legal Centres and Victorian Council of Social Service, 'Request for a Systemic Review of Discrimination against Women in Victorian Prisons' (2005). At <http://www.vals.org.au/news/submissions/33%20ExecutiveSummaryFinal%20Discrimination%20against%20women%20in%20prison.pdf>.

²⁶ Anti-Discrimination Commission Queensland, *Women in Prison: A Report by the Anti-Discrimination Commission Queensland* (2006) 52-3; Amnesty International, 'Not Part of My Sentence': *Violations of Human Rights of Women in Custody* (1999) 24-5.

²⁷ See, *R v Sussex Justices ex parte McCarthy*, Heward CJ, 1924 and *Delcourt v Belgium*, 17 January 1970.

either a second or subsequent language, many prisoners are unable to adequately represent themselves, or challenge the evidence against them.

- c. All prisoners facing misconduct proceedings should be provided with an interpreter to properly understand the allegations against them, to assist them in the proceedings, and to explain the review processes.
 - d. An independent and impartial review mechanism should be made available.²⁸
 - e. To avoid arbitrariness, there should be a requirement that penalties imposed be proportionate to the nature of the misconduct, with a view to parity of penalties. Further, the provisions should state the circumstances in which certain penalties may be imposed; and that penalties which involve a strong limitation on human rights should only be imposed in very exceptional circumstances.
34. Section 78(2)(b) allows for the separation of a prisoner from other prisoners as a means of punishment for up to seven days. The HRLC submits that this should be removed. The HRLC notes that, the ACT²⁹ and the European Prison Rules³⁰ explicitly prohibit the use of separation as a means of punishment.
35. Separation of a prisoner is a power which requires strict regulation as it is a severe restriction of the prisoner's liberties, which can be detrimental to mental health and wellbeing. If misused, separation offends the fundamental human right of freedom from cruel and inhumane treatment. This is recognised by the European Committee for the Prevention of Torture.³¹ Accordingly, where separation is used for purposes other than punishment, such as for the protection of a prisoner, it should be subject to strict oversight mechanisms and safeguards.
36. If separation orders are made, the decision maker should be required to take into account the impact of separation on the health and wellbeing of the prisoner, and any relevant cultural considerations.³² Additionally, the Bill should provide that prisoners subject to a separation order should be managed under the least restrictive conditions consistent with the reasons for their placement. The Bill should also mandate regular medical visits to prisoners subject to separation orders.³³
37. Further, the HRLC submits that the Bill should promote the use of culturally-relevant mediation practices to resolve disputes, rather than disciplinary procedures, which should remain the mechanism of last resort.³⁴

²⁸ See, Article 13 European Convention on Human Rights; *CEDH Wainwright v United Kingdom*, 26 September 2006; see also, *Boyle and Rice v United Kingdom*, 27 April 1988.

²⁹ *Corrections Management Act 2007* (ACT), s 89.

³⁰ Rule 37.

³¹ Committee for the Prevention of Torture, 2nd General Report on the Committee for the Prevention of Torture's Activities, para 56.

³² See, for example, s 90(2) *Corrections Management Act 2007* (ACT).

³³ See, Standard Guidelines para 1.76 and European Prison Rules, r 38(3).

³⁴ This is consistent with recommendations 56 to 62 of the European Prison Rules.

4. Forced medical treatment

38. Section 92 of the Bill allows for the provision of health care without consent.
39. Section 92 raises concerns with Australia's obligations under the right to health. Pursuant to article 12 of International Covenant on Economic, Social and Cultural Rights (ICESCR), Australia has an obligation to refrain from applying medical treatments without consent.
40. Further, the Bill fails to provide adequate safeguards, protections and access to legal assistance and judicial review, with respect to any proposed forced treatment. In other contexts, such as under respective state and territory mental health legislation, mental health care without consent is allowed, however strict safeguards and oversight mechanisms are provided, through, for example, the mental health review tribunals.
41. Additionally, the Bill provides for authorised persons to use 'reasonable force' in treating individuals. There appear to be no safeguards or guidelines as to what 'reasonable force' may entail. The HRLC is concerned that the unreasonable and unnecessary use of force – particularly in the absence of adequate safeguards or oversight – could amount to cruel, inhumane and degrading treatment under Article 7 of the ICCPR and Article 16 of the CAT.

5. Mental health services

42. The Bill does not provide for the provision of mental health services to prisoners.
43. In 2009, Australia was reviewed for its compliance with ICESCR, with the Committee noting its concern with 'the insufficient support for persons with mental health problems, as well as the difficult access to mental health services, in particular for Aboriginal and Torres Strait Islander peoples, prisoners and asylum seekers in detention.'
44. There is substantial evidence from across Australia that access to adequate mental health care in prisons is manifestly inadequate; that mentally ill prisoners are often 'managed' by segregation; and that such confinement – often for very long periods – can seriously exacerbate mental illness and cause significant psychological harm.³⁵
45. Following his visit to Australia in 2009, the United Nations Special Rapporteur on the right to the highest attainable standard of health, Mr Anand Grover, made the following specific recommendations relating to health services in prisons:
- a. Increase engagement with community health providers by prisons, which would improve continuity of care and facilitate reintegration into the community;
 - b. Increase resource allocation for diagnosis, treatment and prevention of mental illnesses within prisons;
 - c. Assess and invest in the primary health care sector throughout the prison system; and

³⁵ See, for example, Forensicare (Victorian Institute of Forensic Mental Health), 'Submission to Senate Select Committee on Mental Health' (May 2005), 4-5, 19-20.

- d. Undertake research regarding Aboriginal and Torres Strait Islander incarceration issues as a matter of urgency.

46. Similar recommendations were also made by the Committee on Economic, Social and Cultural Rights in 2009,³⁶ as well as the CAT Committee in 2008, which made recommendations relating to the insufficient provision of mental health care in prisons; and mentally ill inmates being subject to excessive use of separation.
47. The HRLC recommends that a provision be included requiring that reasonable health care, which includes access to mental health care, be provided.

6. Conclusion

48. Compliance with international human rights obligations is crucial to ensure the rights of prisoners are upheld, and in order to address the serious disadvantage and over-incarceration that is experienced by many Aboriginal people in the NT.
49. The HRLC is grateful for the opportunity to provide this submission, and would be pleased to discuss any aspect of it further.

Yours sincerely

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³⁶ UN Committee on Economic, Social and Cultural Rights, *Concluding Observations on Australia*, 29.