ACT BAR ASSOCIATION

30 May 2018

Ms Karen Greenland
Deputy Executive Director
Legislation, Policy and Programs
Justice and Community Safety Directorate
GPO Box 158
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Dear Ms Greenland,

Human Rights Standards for ACT Corrective Services

Thank you for the opportunity to provide feedback on the draft Human Rights Standards for ACT Corrective Services.

The Bar Association as a matter of principle supports the identification of Human Rights Standards that will provide guidance to director-general and his/her delegate in exercising functions at Correctional Centres in the ACT. The Bar is not convinced that the Standards go far enough. In respect of remandees they are contrary to the specific terms of the *Human Rights Act 2004* (HRA) and seem to invite a breach of that Act. In respect of indigenous offenders more explicit provision should be made. Specific comments are set out below.

The Bar is concerned to ensure that the implementation of these standards is given a structure so that compliance with them can be monitored. These words appear in your referring letter:

> It is worth noting that these ACT Corrective Service Human Rights Standards are separate from any standards or expectations that the Inspector may produce or utilise, but concern similar subject matter given the mandate of the Inspector is to promote continuous improvement in ACT Correctional Centres.

It is unclear what this actually means. It creates in our mind some uncertainty as to how these aspirational standards will be given any "teeth" and whether appropriate accountability mechanisms will be put in place. The Standards themselves are equally opaque in this context. To speak of the Standards as "tool" to "guide" ACT Corrective Services in the performance of its functions under the *Corrections Management Act 2007* strips them of authority.

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The view of the Bar is that these Standards should be given appropriate status by implementing them through an appropriate legislative pathway. There are obvious ways of doing that. Section 20 of the *Inspector of Correctional Services Act 2017* for examples provides for the making of Ministerial Guidelines about a "matter" the inspector must review, examine or report on in relation to a correctional centre. These standards could be such a "matter". Similarly, section 13 of the *Corrections Management Act 2007* allows the Minister to give written directions to the director-general about the exercise of a function under that Act. Again, the Bar sees no obstacle to these standards and appropriate reporting mechanisms forming part of a direction under that section. Whilst the draft document refers to the Inspector's key role in identifying systemic issues in custodial facilities in the ACT, the document disappoints by not taking the next step of ensuring there is specific and mandatory direction given to the Inspector to ensure there is accountability built into the process of implementing these standards.

Such an approach if adopted would say that the Government is serious about ensuring these standards make a difference to the way inmates at correctional facilities are treated. It would also send a signal that that the Government is committed to implementing the recommendations of the *Moss Review* in a coordinated and committed way and will ensure that the Inspector of Correctional Services and the Human Rights Commissioner are working together to achieve shared aspirational targets.

The outcomes of the *Moss Review* and the Coronial Inquest into Steven Freemans' death highlight (if that was necessary) the particular challenges faced by indigenous prisoners. Although some limited mention is made of Indigenous detainees in the Standards, there is ample scope to more explicitly recognise their special needs. The recommendations of the *Moss Review* should, in our view, be given more specific expression in the Standards.

Additionally, we draw attention to the recommendations of the Australian Law Reform Commission in its recent report on Indigenous incarceration. Many of the report's 35 recommendations are relevant to the work of the AMC. However, the following recommendations are of significance and should be borne in mind when considering how success in meeting aims of the proposed Standards will be measured:

Recommendation 9–1 - State and territory corrective services agencies should develop prison programs with relevant Aboriginal and Torres Strait Islander organisations that address offending behaviour and/or prepare people for release. These programs should be made available to:

- prisoners held on remand;
- prisoners serving short sentences; and
- female Aboriginal and Torres Strait Islander prisoners.

Recommendation 9–2 - To maximise the number of eligible Aboriginal and Torres Strait Islander prisoners released on parole, state and territory governments should:

- introduce statutory regimes of automatic court-ordered parole for sentences of under three years, supported by the provision of prison programs for prisoners serving short sentences; and

- abolish parole revocation schemes that require the time spent on parole to be served again in prison if parole is revoked.

Recommendation 11–1 - Programs and services delivered to female Aboriginal and Torres Strait Islander offenders within the criminal justice system—leading up to, during and post-incarceration—should take into account their particular needs so as to improve their chances of rehabilitation, reduce their likelihood of reoffending and decrease their involvement with the criminal justice system. Such programs and services, including those provided by NGOs, police, courts and corrections, must be:

- developed with and delivered by Aboriginal and Torres Strait Islander women; and
- trauma-informed and culturally appropriate.[1]

Finally, in respect of remandees the Standards adopt an unfortunate compromise position between the requirements of the HRA and the outcomes of the *Moss Review* which in the view of the Bar is completely unacceptable. The proposed standards say:

> Remandees are treated in a manner appropriate to their status as unconvicted person (sic), including affording full opportunity to prepare their legal case, to offer but not compel them to participate in work, and mindful of the importance of maintaining links with the community.
>
> The placement of detainees is done primarily on an individual risk and needs assessment of the respective detainee.

The difficulty of the grammatical expression aside, the HRA is explicit as to how remandees are to be treated. Section 19 provides:

> **Humane treatment when deprived of liberty**
>
> (1) Anyone deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.
>
> (2) An accused person must be segregated from convicted people, except in exceptional circumstances.
>
> *Note* An accused child must also be segregated from accused adults (see s 20 (1))
>
> (3) An accused person must be treated in a way that is appropriate for a person who has not been convicted.

The draft Standards lift the wording of section 19(1) and 19(3) but chose to ignore the requirements of section 19(2). Section 9 of the *Corrections Management Act 2007* requires that functions under that Act must be exercised is such a way as to respect and protect the detainee's human rights. It is no acceptable to ignore the issue. The management of risk must be undertaken administratively but within the confines of the requirements of the HRA. The Bar can do no more than reiterate the conclusion reached in the Moss Review:

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[1] Australian Bureau of Statistics (ABS), 'Corrective Services, Australia – December Quarter 2017' (Cat No 4512.0, 2018) and Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report 133, 2017)

> 12.8.19 The Inquiry **concludes** further that, the claim so commonly made about the AMC being human rights compliant cannot be made in good faith. Until such time as male and female detainees are in separate facilities, and remanded detainees are segregated from sentenced detainees, the AMC cannot be said to be a human rights compliant correctional facility.

I reiterate that the Bar, whilst encouraged by the recognition that there needs to be standards put in place, is concerned that the mere circulation of such philosophies does not do enough to advance the substance of the human rights cause in the custodial setting.

Yours faithfully

Ken Archer

President

CC: **Mr Gordon Ramsay**
Attorney-General

Mr Shane Rattenbury
Minister for Corrections