

Your Ref:
Our Ref: 870

15 February 2021

Ginna Webster
Secretary
Department of Justice

By email to: legislation.development@justice.tas.gov.au
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Dear Secretary

Re: Custodial Inspector Amendment (OPCAT) Bill

Thank you for the opportunity to comment on the Custodial Inspector Amendment (OPCAT) Bill (the Bill) and for providing an extension of time within which to lodge this comment.

My consideration of the Bill has been greatly assisted by the willingness of officers from the Department of Justice to discuss the proposed legislative framework for Tasmania's National Preventive Mechanism (NPM).

Role of the Commissioner

My role as Commissioner for Children and Young People is governed by the *Commissioner for Children and Young People Act 2016* (CCYP Act).

Section 8 of the CCYP Act outlines my functions as follows:

- (a) advocating for all children and young people in the State generally;
- (c) researching, investigating and influencing policy development into matters relating to children and young people generally;
- (d) promoting, monitoring and reviewing the wellbeing of children and young people generally;
- (e) promoting and empowering the participation of children and young people in the making of decisions, or the expressing of opinions on matters, that may affect their lives;
- (f) assisting in ensuring the State satisfies its national and international obligations in respect of children and young people generally; and
- (g) encouraging and promoting the establishment by organisations of appropriate and accessible mechanisms for the participation of children and young people in matters that may affect them.



In performing my functions, I am required to:

- do so according to the principle that the wellbeing and best interests of children and young people are paramount;
- observe any relevant provisions of the United Nations *Convention on the Rights of the Child*; and
- give special regard to the needs of children and young people who are disadvantaged or vulnerable.

Background to the Bill

According to correspondence accompanying the invitation to comment on the Bill:

The Government intends to introduce legislation in proposing a number of amendments to the *Custodial Inspector Act 2016* in compliance with Australia's ratification of the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT).

Australia ratified OPCAT on 21 December 2017; it came into force on 20 January 2018.

Part IV of the OPCAT requires States to nominate a body or bodies to fulfil the role of a 'National Preventive Mechanism' (NPM). The NPM(s) will regularly examine the treatment of persons deprived of their liberty in places of detention for the purpose of preventing torture and other cruel, inhuman or degrading treatment or punishment.

Consistent with Part IV of OPCAT, each Australian jurisdiction has agreed to nominate a body or bodies to fulfil the role of NPM. Australia's NPM network is required to be operational by January 2022.

The Tasmanian Government has nominated the Custodial Inspector as its NPM.

The Bill amends the *Custodial Inspector Act 2016* by providing for the establishment of Tasmania's NPM in accordance with OPCAT.

The Bill will expand the places of detention which the Custodial Inspector can currently inspect under the Act to include police stations, closed psychiatric facilities, and closed forensic disability facilities.

The specific changes in the Bill include provisions for:

- The regular inspection of places of detention, which includes prisons, police stations, closed psychiatric facilities, and closed forensic disability facilities;
- The publication of guidelines and standards;
- Annual reporting to the Commonwealth Ombudsman, and information sharing with the United Nations Subcommittee for the Prevention of Torture;
- Permitting the disclosure or communication of relevant information to the NPM by a person or body; and
- Enabling the referral of matters by the NPM to another person or a body existing under law for investigation where appropriate (such as the Health Complaints Commissioner).

Consistent with my statutory functions, my comments focus on matters that are particularly relevant to promoting and protecting the rights, wellbeing and best interests of children and young people in Tasmania - in this context, those children and young people who are deprived of their liberty in places of detention and who, as a consequence, come within the inspection regime contemplated by OPCAT.



Comment

1. General approach

- a) I support designation of the Custodial Inspector as Tasmania's National Preventive Mechanism (NPM) - see proposed section 25B(1) and also proposed section 3(b) of the Bill. I recommend, as has been done with proposed section 3(b), that proposed section 25B(1) also includes the words "within the meaning of OPCAT".
- b) I have reservations about the legislative framework proposed by the Bill.

In my view, legislation – especially that which promotes and protects the rights of vulnerable people in our community - should be easy to read and understand.

As is outlined on the Australian Government Attorney-General's Department website¹:

Complex legislation can create uncertainties about the law. This can impose unnecessary burdens on business and restrict the ability of those affected by the law to understand their legal rights and obligations.....

Laws that are clear and easy to understand are an essential part of an accessible justice system. Clearly written laws can be better understood, complied with and administered.

In my respectful opinion, the legislative framework proposed by the Bill is somewhat confusing, in that the Bill specifies that some of the provisions of the *Custodial Inspector Act 2016* (Custodial Inspector Act) do not apply to the Custodial Inspector when fulfilling the NPM function², while others do.³ I also understand, from discussions at officer level, that because the Bill defines the role of the NPM as being "within the meaning of OPCAT" (proposed section 3(b)), it is unnecessary to include specific provisions on some aspects of the NPM's role, on the basis that articles in OPCAT cover the situation. By way of an example, I understand that it is intended that the NPM may provide inspection reports and make recommendations directly to Tasmanian authorities responsible for places of detention consistent with Article 19(b) of OPCAT (power to make recommendations to relevant authorities) and Article 22 (dialogue with relevant authorities), even though there is no provision in the Bill to this effect. This makes it difficult to gain a clear picture of the NPM framework for Tasmania.

Given the above, it would be preferable for there to be stand-alone legislation which clearly outlines the functions and powers of the NPM and related matters, in accordance with the requirements of OPCAT.⁴ At the very least, I recommend that the full text of OPCAT be included as a Schedule to the Custodial Inspector Act.

My comments below also touch on other matters which are relevant to my reservations about the proposed legislative framework.

¹ <https://www.ag.gov.au/legal-system/access-justice/reducing-complexity-legislation>

² Proposed section 25C(2).

³ Proposed section 25D(2).

⁴ Refer to *Guidelines on National Preventive Mechanisms*, Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Geneva 15-19 November 2010; see also



2. Inspections – “specified facility”

OPCAT requires signatory states to establish a system of regular visits to places where people are deprived of their liberty in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.⁵

Article 4 of OPCAT provides that “deprivation of liberty” means “any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority”.

In his *Baseline Assessment of Australia’s OPCAT Readiness*⁶, the Commonwealth Ombudsman said:

1.20. OPCAT adopts an expansive definition of places in which people are deprived of their liberty. In ratifying OPCAT the Australian Government indicated that the initial focus for NPMs would be narrower and focus on primary places of detention. The definition of primary places of detention suggested by the Commonwealth includes:

- adult prisons.
- juvenile detention facilities (excluding residential secure facilities).
- police lock-up or police station cells (where people are held for equal to, or greater than, 24hrs).
- closed facilities or units where people may be involuntarily detained by law for mental health assessment or treatment (where people are held for equal to, or greater than, 24hrs).
- closed forensic disability facilities or units where people may be involuntarily detained by law for care (where people are held for equal to, or greater than, 24hrs).
- immigration detention centres.
- military detention facilities.

However, as I understand the situation, there is an intention to gradually expand the scope of inspections to all places where people are deprived of their liberty in Australia.

Proposed sections 25B and 25C(1) of the Bill limit the inspection regime of the Tasmanian NPM to “each specified facility”. “Specified facility” is defined in a way which appears to be generally reflective of the Commonwealth’s policy position regards gradual implementation, with an initial focus on primary places of detention.

Proposed section 25C provides:

When fulfilling the role of a national preventative mechanism, the Inspector is to carry out regular inspections of each specified facility.

⁵ Article 1, OPCAT. See also *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – Baseline Assessment of Australia’s OPCAT Readiness*, September 2019, pages 16-19 https://www.ombudsman.gov.au/_data/assets/pdf_file/0025/106657/Ombudsman-Report-Implementation-of-OPCAT.pdf

⁶ *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – Baseline Assessment of Australia’s OPCAT Readiness*, September 2019 https://www.ombudsman.gov.au/_data/assets/pdf_file/0025/106657/Ombudsman-Report-Implementation-of-OPCAT.pdf pages 8-9.



“Specified facility” is defined⁷ to mean:

- (a) a closed psychiatric facility;
- (b) a custodial centre;
- (c) a forensic disability facility;
- (d) a police station.

“Forensic disability facility” is defined to mean:

- (a) a facility at which a person with intellectual or cognitive disabilities may lawfully be detained for a period of 24 hours or more; or
- (b) a place prescribed as a forensic disability facility –
but does not include a closed psychiatric facility;

“Custodial centre” is defined in the Custodial Inspector Act to mean:

- (a) a prison within the meaning of the Corrections Act 1997; and
 - (b) a detention centre.
- but does not include any police station or court cell complex.

“Detention centre” is defined in the Custodial Inspector Act to mean:

a detention centre within the meaning of the *Youth Justice Act 1997*.

The *Ombudsman Amendment (National Preventive Mechanism) Regulations 2019*, which came into effect in April 2019 and confer the NPM function and NPM coordinator function on the Commonwealth Ombudsman, do not limit places of detention in the manner proposed in this Bill. Instead, Regulation 16 of the *Ombudsman Regulations 2017*⁸ provides:

National Preventive Mechanism Body function

- (1) For the purposes of paragraph 4(2)(a) of the Act, the National Preventive Mechanism Body function is conferred on the Ombudsman.
- (2) The National Preventive Mechanism Body function is to be performed for the purposes of giving effect to the Commonwealth's obligations under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the **Optional Protocol**), so far as those obligations relate to places of detention under the control of the Commonwealth.
- (3) The National Preventive Mechanism Body function includes the following:
 - (a) undertaking regular inspections of places of detention;
 - (b) giving information to the United Nations Sub-committee on Prevention of Torture and other Cruel or Degrading Treatment or Punishment to facilitate the inspection of places of detention by the Subcommittee;
 - (c) functions incidental to the function of National Preventive Mechanism Body.
- (4) For the purposes of this section, the Commonwealth's obligations under the Optional Protocol do not include the obligations of each of the States and Territories under the Optional Protocol.

⁷ Proposed section 25A.

⁸ <https://www.legislation.gov.au/Details/F2021C00027>



Although I appreciate the need for gradual implementation of the inspection regime contemplated by OPCAT, I do not believe it is necessary or consistent with our OPCAT obligations to limit the NPM inspection function to each “specified facility” as defined in the Bill. I therefore respectfully recommend the Bill be amended to refer to inspections of “places of detention”, consistent with OPCAT.

Alternatively, and acknowledging that there is guidance in the legislation on the sorts of places of detention intended to be covered by the NPM inspection regime, “specified facility” could be defined in a non-exclusive or non-exhaustive manner.

3. Use of the term “detainee”

The Bill provides, in proposed section 25B(2)(b), that for the purposes of fulfilling the role of NPM, the Custodial Inspector is to operate in accordance with the provisions of the Custodial Inspector Act, as if references to a detainee are references to a detainee of a specified facility. Rather than using the term “detainee”, it would in my opinion be preferable to refer to persons deprived of their liberty in a place of detention within the meaning of OPCAT.

4. Reporting

Reporting mechanisms are an important means of ensuring transparency and accountability – and this in turn contributes to the promotion and protection of the rights and wellbeing of children and young people in Tasmania.

The reporting requirements and options available to the Custodial Inspector when fulfilling the NPM function are not clear, a matter I have already referred to. I understand from discussions at officer level that proposed section 25E is intended to provide the NPM with discretion to disclose and communicate information in any way consistent with its role. In my opinion, the Bill should clearly acknowledge that the NPM may bring matters of concern or recommendations for improvement to the attention of relevant authorities in a timely manner and should also be able to publish reports of those inspections as and when the NPM determines is appropriate (see Article 19(b) and Article 22 of OPCAT).

Consideration could also be given to providing the NPM with the option to table reports of inspections in the Tasmanian Parliament.

Proposed section 25D(1) provides that the Inspector is to submit an annual report to the Commonwealth Ombudsman in relation to inspections carried out in fulfilment of the NPM function. Whether that annual report can be published prior to submission to the Ombudsman is not clear. It is also not clear whether material to be included in this report should (or could) also be included in the annual report required by section 26 of the Custodial Inspector Act.

It is proposed that section 22 of the Custodial Inspector Act would apply to reporting of the Custodial Inspector in fulfilment of the NPM function. Section 22 provides that the Custodial Inspector “must not disclose information” in a report if “on balance, the public interest considerations against disclosure outweigh the public interest considerations in favour of disclosure”. I am not entirely convinced that this is appropriate given the emphasis in OPCAT on the independent nature of the NPM function.



I also understand from discussions at officer level that proposed section 25E is intended to enable the NPM to communicate with the UN Sub-Committee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, consistent with Article 20(f) of OPCAT. In my opinion, it would be preferable for this to be made clear in the Bill.

5. Communication with the NPM

In the performance of its functions, the NPM should be able to receive information from those concerned about the conditions of persons deprived of their liberty in places of detention. This information could come from people deprived of their liberty, those working in places of detention or visiting places of detention (including in an official capacity), or from members of the community generally.

It would, in my opinion, be preferable for this capacity to communicate with the NPM to be made clear in the Bill, noting also that inclusion of such a provision would operate to raise awareness in the general community of the ability to communicate with the NPM.

Proposed section 25E is intended to allow disclosure of information to and communication with the NPM despite the provision of any law:

Disclosure and communication to national preventative mechanism

Where a provision of an Act –

- (a) prohibits or restricts; or
- (b) authorises or requires the imposition of a prohibition or restriction on –

the disclosure or communication of information, that provision does not apply to, or in respect of, the disclosure or communication of information in a manner that will prevent or restrict the Inspector from fulfilling the role of a national preventative mechanism.

I understand from discussions at officer level that this would mean, for example, that despite confidentiality provisions in the *Commissioner for Children and Young People Act 2016*, I may refer a matter to the NPM, a position which I support. I do note that subsection 17(2) of the *Commissioner for Children and Young People Act 2016* provides as follows:

The Commissioner may refer any matter to the Ombudsman or to the Custodial Inspector appointed under section 5 of the *Custodial Inspector Act 2016* if the Commissioner thinks it appropriate to do so.

For consistency, I recommend amendment of the above provision to specifically provide that I may refer any matter to the NPM.

There is also a need to ensure, consistent with Article 21 of OPCAT⁹, that those who provide information to or communicate with the NPM are protected from victimisation and reprisals or sanction. I acknowledge section 34 of the *Custodial Inspector Act* provides some protection. However, in my respectful opinion, this would not protect a person who communicates with the NPM from harassment, victimisation or threats etc.

⁹ See also Paragraph 27 of the *Guidelines on National Preventive Mechanisms*.



From discussions at officer level I understand it is intended to rely on provisions in existing Federal or Tasmanian law, such as the Criminal Code. In my opinion, consideration should be given to providing specific protection from relevant conduct or action by including in the legislation a provision similar to section 50 of the *Inspector of Custodial Services Act 2003* (WA), which is extracted below:

50. Victimisation

- (1) A person must not —
 - (a) prejudice, or threaten to prejudice, the safety or career of; or
 - (b) intimidate or harass, or threaten to intimidate or harass; or
 - (c) do any act that is, or is likely to be, to the detriment of, another person because the other person —
 - (d) has provided, is providing or will or may in the future provide information to the Inspector in the performance of a function of the Inspector; or
 - (e) has performed a function of the Inspector in relation to the other person or is performing, or will or may in the future perform, any such function.
- Penalty: \$8 000 or imprisonment for 2 years.
- (2) A person who attempts to commit an offence under subsection (1) commits an offence and is liable to the penalty set out in subsection (1).
 - (3) A person who —
 - (a) intends that an offence under subsection (1) be committed; and
 - (b) incites another person to commit the offence,commits an offence and is liable to the penalty set out in subsection (1).

Inclusion of a specific provision such as section 50 of the Western Australian legislation would also operate to make it clear to everyone that those who wish to communicate with the NPM are to be protected from sanctions, harassment etc.

6. Referral to the NPM by the Minister

Section 28 of the Custodial Inspector Act, which will also apply to the NPM, provides as follows:

Request by responsible Minister

- (1) The responsible Minister may bring a matter to the attention of the Inspector and request that the Inspector carry out an inspection of a custodial centre in respect of the matter.
- (2) A request under subsection (1) is to be in writing.

I understand that, consistent with the independence of the NPM, such a request would not amount to a direction, a position which I support.

Conclusion

My comments above are not intended to be exhaustive, however I do hope they contribute to the development of legislation establishing Tasmania's NPM in accordance with OPCAT.



Consistent with OPCAT obligations, it is of fundamental importance that the Tasmanian NPM is appropriately resourced so that the NPM role can be carried out in the manner contemplated by OPCAT. Financial and functional independence, accompanied by an ability to engage those with the expertise required for the conduct of effective inspections from the perspective of those who are deprived of their liberty, is crucial. In particular, the inspection of places of detention in which children and young people are deprived of their liberty must be carried out by those who have expertise in child rights, and who can bring a child centred approach to their work.

I would welcome the opportunity to discuss my comments and to comment on the next iteration of the Bill.

Thank you for the opportunity to comment.

Yours sincerely

Leanne McLean
Commissioner for Children and Young People

- cc *Hon Roger Jaensch MP Minister for Human Services*
- cc *Hon Elise Archer MP, Attorney-General, Minister for Justice*
- cc *Hon Mark Shelton MP, Minister for Police, Fire and Emergency Services*
- cc *Hon Jeremy Rockliff MP, Minister for Mental Health and Wellbeing*
- cc *Hon Sarah Courtney MP, Minister for Health*