

Your Ref:
Our Ref: 870

17 September 2021

GINNA WEBSTER
Secretary
Department of Justice

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

Dear Secretary

Re: OPCAT Implementation Bill 2021

Thank you for the opportunity to comment on the OPCAT Implementation Bill 2021 (the draft Bill).

I take particular interest in this important area of law reform given my independent statutory functions to promote and protect the rights and wellbeing of children and young people in Tasmania. These functions include assisting in ensuring the State satisfies its national and international obligations in respect of children and young people generally people in Tasmania.¹

My [February 2021 submission](#) providing comment on a previous version of the draft Bill (the previous draft) is available on the Commissioner for Children and Young People website.

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

Arising from feedback received in this process, and in further discussion with the Custodial Inspector and other governmental stakeholders, amendments have been made to the draft Bill.

...

In summary, this Bill changes the legislative approach to the NPM framework by establishing the body under standalone legislation (the previous draft made amendments to the *Custodial Inspector Act*). The form of this framework generally follows the *Custodial Inspector Act 2016*, with substantive, general and administrative changes to reflect Tasmania's obligations under OPCAT. The Bill aims to improve clarity over the previous draft by providing greater detail on the NPM's powers and obligations.

In addition to the NPM component, this Bill also introduces a new Part 3 addressing inspections by the United Nations Subcommittee on Prevention of Torture (SPT). The provisions in this Part are modelled on an earlier Bill, the *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2013*, which was prepared through a national inter-jurisdictional model law working group process but did not become law because Australia at that time had not ratified OPCAT.

¹ *Commissioner for Children and Young People Act 2016*, s8(1)(f)



Comment

I am pleased to see that much of my feedback on the previous draft has been incorporated into the draft Bill. In particular, the draft Bill now proposes the establishment of the Tasmanian National Preventive Mechanism (NPM) by standalone legislation. It also provides greater clarity regarding the NPM's functions and powers, including its ability to publish reports, provide advice, and communicate with the SPT.

Importantly, rather than limiting the NPM's inspections to 'specified facilities', the draft Bill provides that the NPM may access, inspect and review *any* place of detention (proposed s.13). A place of detention is defined by s5 as '...any place, subject to the jurisdiction and control of Tasmania, the Subcommittee must be allowed to visit under Article 4 of the Optional Protocol'.

I do have some additional comments on the draft Bill. However, given the short timeframe in which to provide feedback, my comments are necessarily brief. They are also not intended to be exhaustive.

1. Resourcing and expertise

As I said in my submission on the previous draft Bill:

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 am pleased to note that proposed s12(4) of the draft Bill requires that in appointing or employing staff, the NPM is to take account of whether the staff have the required capabilities and professional knowledge required to undertake their duties, and whether the staff adequately represent the balance of gender, ethnic and minority groups. In this respect, the Bill should also explicitly require adequate representation of Aboriginal and Torres Strait Islander people and people with disability.

Article 18(3) of the OPCAT provides that an NPM must be provided with the necessary resources to perform its functions. I would support inclusion of a provision to the effect that the NPM must be provided with the resources reasonably required for exercising its functions.² Although I acknowledge that a provision of this type would not impose an enforceable duty on government, it would nevertheless signal a commitment to ensuring the NPM role can be carried out in a manner contemplated by OPCAT, which would include the ability to engage those with specialist expertise to conduct effective inspections of places where children and young people are deprived of their liberty.

2. Legislation must be clear

As I said in my comment on the previous draft, legislation - especially that which promotes and protects the rights of vulnerable people in our community - should be easy to read and understand. While the draft Bill provides far greater clarity - for example around my ability to

² For example, see the OPCAT Implementation Bill 2021 (SA), Schedule 1.



proactively share information with the NPM than was the case in the previous draft - there are still some matters that would benefit from further clarification.

2.1 Requirements

I have some difficulty understanding precisely how the provisions in the draft Bill which would permit the NPM to require information are intended to operate in conjunction with those under the *Commissioner for Children and Young People Act 2016*. In particular, it is not entirely clear how proposed s.16 (Requiring of documents &c.) and s.25 (Offence not to comply with requirement of Tasmanian NPM) of the draft Bill would operate in conjunction with s.17(3) of the *Commissioner for Children and Young People Act 2016*. This may benefit from further clarification.

2.2 Protection from reprisals

As per my comments on the previous draft Bill, there is a need to ensure that those who provide information to or communicate with the NPM are protected from victimisation, reprisals, or sanction. I note that the draft Bill proposes consequential amendments to the *Public Interest Disclosures Act 2002* (see Schedule 2). Inclusion of a specific provision protecting against reprisals such as is the case in section 50 of the *Inspector of Custodial Services Act 2003* (WA) would make it clearer to everyone that those who wish to communicate with the NPM are protected from victimisation.

Conclusion

I would welcome the opportunity to discuss my comments in more detail if that would be of assistance.

Yours sincerely

Leanne McLean

Commissioner for Children and Young People

cc *Hon Elise Archer MP, Attorney-General, Minister for Justice, Minister for Corrections*
Hon Jeremy Rockliff MP, Minister for Health, Minister for Mental Health and Wellbeing
Hon Sarah Courtney MP, Minister for Children and Youth, Minister for Disability Services
Hon Roger Jaensch MP, Minister for Aboriginal Affairs
Hon Jacqui Petrusma MP, Minister for Police, Fire and Emergency Management