



Human
Rights
Law
Centre.

Submission on the Tasmanian *OPCAT Implementation Bill 2021*

About us

Change the Record is Australia's only First Nations-led national justice coalition. We are comprised of organisations with legal and human rights expertise, and community controlled organisations that deliver essential legal, health and family violence prevention services around the country. Our mission is to end the mass incarceration of, and disproportionate rates of family violence experienced by Aboriginal and Torres Strait Islander peoples.

The **Human Rights Law Centre**, a founding member organisation of Change the Record, uses a combination of strategic legal action, policy solutions and advocacy to support the work of Aboriginal and Torres Strait Islander organisations to help create a fair legal system that is free from racial injustice.

The **Tasmanian Aboriginal Legal Service (TALS)** is an Aboriginal and Torres Strait Islander Legal Service (ATSILS) providing quality, culturally appropriate, accessible, equitable, and non-judgemental services to Aboriginal & Torres Strait Islander people. TALS specialises in criminal, civil, family law matters including community legal education, advocacy, and policy changes to support Aboriginal people in the justice system. We are a member-based, independent, not-for-profit, and incorporated organisation that advocates for law reform. Our goal is to halve Aboriginal Tasmanians' rate of negative contact with the justice system in a decade.

Our submission

We appreciate the opportunity to provide feedback on the draft *OPCAT Implementation Bill 2021*.

It is our view that independent, adequately resourced and culturally competent National Preventive Mechanisms (**NPMs**) are a crucial tool in addressing the mass incarceration of Aboriginal and

Torres Strait Islander peoples, preventing the unacceptable number of First Nations deaths in custody and reducing the egregious number of human rights abuses within places of detention.

We welcome the decision of the Tasmanian Government to establish the Tasmanian NPM under standalone legislation and acknowledge work done to date to incorporate feedback received on the previous draft *Custodial Inspector Amendment (OPCAT) Bill 2020*.

In our submission below we set out a number of ongoing concerns with provisions in the draft Bill in respect of the NPM's operational independence, and suggest additional amendments aimed at ensuring the NPM is OPCAT compliant and can effectively fulfil its functions.

Summary of recommendations

1. Development of the NPM should have regard to the "Key Principles for an effective NPM" set out in this document.
2. Clarify as a matter of urgency who will be ultimately responsible for administering the Act, when this administration will begin, and legislate this responsibility so it does not rest with the Corrections Minister as the default.
3. Remove Section 20 from the Bill.
4. Amend Section 19 to remove any restriction on the NPM's ability to report to the Parliament.
5. Provide the NPM the power to be able to require a response from government or detaining authorities by adding it to Section 9.
6. Amend Section 12 to include a requirement that NPM staff and Official Visitors be free of direct and indirect conflicts of interest with respect to the functions they perform.
7. Include a requirement for the NPM themselves to provide timely disclosure of any direct and indirect interests and any possible conflicts.
8. Guarantee funding and resourcing for the NPM (based on their own assessment) in legislation, with resources provided by government to be in a single, dedicated budget line item to allow the NPM determine its internal budget allocations.
9. Amend the Bill to explicitly include Aboriginal and Torres Strait Islander peoples and people with disability as groups to be adequately represented within the NPM's staffing profile.
10. Amend the Bill to include provisions relating to protection from victimisation or reprisal.

11. Amend Section 5 (1)(a) to remove any temporal limit and remove the word "lawfully".
12. In developing the NPM, commit to serious and appropriate engagement with Aboriginal and Torres Strait Islander peoples, representative bodies, Aboriginal and Torres Strait Islander Legal Services, people with lived experience and families in community consultation and co-design processes.

Key Principles for an effective NPM

Recommendation 1: Development of the NPM should have regard to the "Key Principles for an effective NPM" set out in this document.

There are a number of key principles which are essential to ensuring that the NPM fulfills the requirements of OPCAT and is sufficiently independent and robust to have the confidence of those in custody and the broader community.

These principles require that any body that is designated an NPM:

1. Be established with full and transparent consultations with civil society, with Aboriginal and Torres Strait Islander peoples and others as recommended by the Subcommittee on Prevention of Torture (SPT);
2. Aboriginal and Torres Strait Islander representation is included in all oversight bodies and expert advisory panels to ensure NPMs are established in a culturally safe way, and with the trust of community;
3. Have a statutory basis and be independent of government and the institutions they oversee;
4. Be adequately and jointly resourced by Federal, State and Territory Governments;
5. Make findings and recommendations publicly available and require a response from governments and detaining authorities. These responses should also be made public;
6. Be empowered to undertake regular and preventative visits;

7. Have free and unfettered access (to all places of detention, whether announced or unannounced; to all relevant documents and information; and to all persons including public employees and privately engaged contractors, including the right to conduct private interviews);
8. Have the power to submit proposals and observations to Parliament or the public concerning existing or proposed legislation; and
9. Be afforded appropriate privileges and immunities to ensure there are no sanctions or reprisals for communicating with the NPM.

Operational independence

Recommendation 2: Clarify as a matter of urgency who will be ultimately responsible for administering the Act, when this administration will begin, and legislate this responsibility so it does not rest with the Corrections Minister as the default.

We are concerned that the Bill as drafted does not provide for sufficient operational independence. A lack of independence undermines the ability of any NPM to carry out its functions effectively and have the trust and confidence of the individuals and communities whom it is designed to protect.

An effective NPM must be both independent from government and the institutions they inspect and monitor for compliance, and be seen to be independent.

Section 38 of the Bill temporarily assigns administration of the Act to the Minister for Corrections and Department of Justice. In our view, this creates a clear perceived or real issue of independence as the NPM is responsible for monitoring facilities which fall within the responsibility of the Minister and their Department. For this section of the Act to be compliant with OPCAT, it is our view that the government must clarify as a matter of urgency who will be ultimately responsible for administering the Act, when this administration will begin, and legislate this responsibility so it does not rest with the Corrections Minister as the default.

Reporting and 'Opportunity to be heard'

Recommendation 3: Remove Section 20 from the Bill.

Recommendation 4: Amend Section 19 to remove any restriction on the NPM's ability to report to the Parliament.

Recommendation 5: Provide the NPM the power to be able to require a response from government or detaining authorities by adding it to Section 9.

A key principle that underpins the effective operation of OPCAT is for reporting to be entirely independent. We are concerned by reporting provisions in the draft Bill which restrict the NPM's ability to make timely and independent reports and assessments of governments and institutions.

We are particularly concerned by Part 2 Section 20. Section 20 (2) requires the NPM to withhold recommendations, advice, reports and/or publications which make adverse findings about a government department, unless it has provided the Secretary and relevant officers with the opportunity to have an audience, and the Secretary with a draft copy of a report. This is contrary to the principle of institutional independence and operational autonomy. The determination of policies and procedures for providing an individual, institution, body or government with the opportunity for a right of reply in the case of adverse findings or commentary is a matter for the NPM. We note that the South Australian OPCAT Implementation Bill 2021 contains no similar provision. We recommend Section 20 be removed from the Bill.

In respect of Part 2 Section 19 (2), we support the NPM having the power to make reports directly to the Parliament. We don't believe its ability to do so should be contingent on having already provided a report to a Minister or relevant authority, as the Bill is currently drafted. The Bill should be amended to remove this restriction on the NPM's ability to report to the Parliament.

We also note that while Part 2 Section 19 (3) provides that the Minister 'may prepare a response to the report and provide it to the Tasmanian national preventive mechanism', the NPM does not have the power to require a response from government or detaining authorities. This power should be added to the functions of the NPM in Section 9.

Conflicts of interest

Recommendation 6: Amend Section 12 to include a requirement that NPM staff and Official Visitors be free of direct and indirect conflicts of interest with respect to the functions they perform.

The UN Office of the High Commissioner for Human Rights (**OHCHR**) has stated members of an NPM ‘should be personally and institutionally independent of state authorities.’¹

Part 2 Division 1 Section 12 (2) of the Bill as drafted allows for individuals employed in Departments responsible for the administration and operation of places of detention to be employed by the NPM to carry out its functions. Section 12 (3) allows these individuals to ‘serve’ the NPM ‘in conjunction with State Service employment’. Further, Section 11 enables the NPM to delegate any of its powers and functions to such an employee.

These provisions create the conditions for clear actual, potential and perceived conflicts of interest and undermine the core principle of personal and institutional independence. We recommend Section 12 be amended to include a requirement that NPM staff and Official Visitors be free of direct and indirect conflicts of interest with respect to the functions they perform, for example being an employee of, or on leave from, the Department of Corrections or any other relevant Departmental or Ministerial office.

Declaration of interests

Recommendation 7: Include a requirement for the NPM itself to provide timely disclosure of any direct and indirect interests and any possible conflicts.

¹ UN Office of the High Commissioner for Human Rights (2018), *Preventing Torture: The Role of National Preventive Mechanisms, A Practical Guide*, p17, https://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/NPM_Guide.pdf, accessed 15 September 2021.

The Bill as currently drafted also does not include a requirement for the NPM itself to provide timely disclosure of their direct and indirect interests and any possible conflicts. We recommend provision for this be included in the Bill.

Resourcing

Recommendation 8: Guarantee funding and resourcing for the NPM (based on their own assessment) in legislation, with resources provided by government to be in a single, dedicated budget line item to allow the NPM determine its internal budget allocations.

Adequate resourcing is key to ensuring the financial and operational autonomy of the NPM. Per the OHCHR, 'states parties to OPCAT have a legal obligation to make a specific allocation of the resources necessary to allow NPMs to function effectively and independently and carry out all OPCAT-related tasks... The legislation providing for the establishment of NPMs should also include provisions regarding the source and nature of their funding, and specify the process for the allocation of annual funding to the NPMs.'²

Part 2 Division 1 Section 9 of the Bill comprehensively lays out the functions of the NPM, as is appropriate. The Bill does not, however, provide a guarantee of adequate resources to the NPM to fulfil its functions.

We note that the current Tasmanian Custodial Inspector (who is also the Tasmanian Ombudsman) highlighted resourcing and staffing constraints which were impeding his ability to perform the crucial functions of his office, including conducting onsite inspections and the timely publication of reports.³ Indeed, the Tasmanian Custodial Inspector asserted in both the 2018-2019 and 2019-2020 Annual Reports that he 'can only dedicate ten per cent of... time to the inspectorate.'⁴

² UN Office of the High Commissioner for Human Rights (2018), *Preventing Torture: The Role of National Preventive Mechanisms, A Practical Guide*, p16, https://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/NPM_Guide.pdf, accessed 15 September 2021.

³ Office of the Custodial Inspector Tasmania (June 2021) *Lockdowns Review 2021*, p4 https://www.custodialinspector.tas.gov.au/_data/assets/pdf_file/0009/615852/Lockdowns-Review-2021.pdf accessed 15 September 2021.

⁴ Office of the Custodial Inspector Tasmania (October 2019) *Annual Report 2018-2019*. Office of the Custodial Inspector Tasmania (October 2020) *Annual Report 2019-2020*.

This state of affairs cannot be allowed to continue and become an experience of the NPM. Funding and resourcing for the NPM should be independently determined by the NPM based on its assessment of what resources are required to carry out its functions. These resources should be guaranteed in legislation and provided by the government in a single, dedicated budget line item, with the NPM determining its internal budget allocations according to its own work plan.

Representation of Aboriginal and Torres Strait Islander peoples and people with disability in the NPM's staffing profile

Recommendation 9: Amend Section 12 (4) of the Bill to explicitly include Aboriginal and Torres Strait Islander peoples and people with disability as groups to be adequately represented within the NPM's staffing profile.

It is our view that OPCAT and the designation of independent, adequately resourced and culturally competent NPMs are a crucial tool in addressing the mass incarceration of Aboriginal and Torres Strait Islander peoples, and their deaths in custody. As discussed in the North Australian Aboriginal Justice Agency's submission to the Australian Human Rights Commission consultation on OPCAT, "cultural competence" goes beyond the basic requirements of ensuring access to interpreters, for example. It requires the consideration of Aboriginal and Torres Strait Islander peoples' needs, strengths, knowledge and worldview in all aspects of detention.⁵ Aboriginal and Torres Strait Islander expertise must be incorporated in all aspects of the NPM.

First Nations peoples and people with disability are significantly overrepresented within the criminal legal system in Australia and Tasmania, and the NPM appropriately includes within its scope disability-specific places of detention. People with disability, particularly people with intellectual and cognitive disability, are at significant risk of harm and abuse in institutional settings. From June 2019 to June 2020 Aboriginal and Torres Strait Islander people represented

⁵ North Australian Aboriginal Justice Agency (July 2017), *Submission to the Australian Human Rights Commission consultations on OPCAT*, p8, <https://humanrights.gov.au/sites/default/files/45.%20NAAJA%20Sub%2031%20July%202017.pdf>, accessed 15 September 2021.

more than 20% of the Tasmanian prison population⁶, despite making up 4.6% of the Tasmanian population at the last Census⁷.

Section 12 (4)(b) provides that the NPM is to take into consideration ‘whether the staff adequately represent a balance of gender, ethnic and minority groups.’ We recommend amending the Bill to explicitly include Aboriginal and Torres Strait Islander peoples and people with disability as groups to be adequately represented within the NPM’s staffing profile.

Protection from reprisal

Recommendation 10: Amend the Bill to include provisions relating to protection from victimisation or reprisal.

Article 21 (1) of OPCAT provides:

No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the national preventive mechanism any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.

Per the OHCHR’s Practical Guide on the Role of NPMs, the legislative act establishing an NPM should include prohibition of sanctions and reprisals for communicating with the NPM.⁸

Provisions relating to the prohibition of sanctions, victimisation or reprisals are contained in relevant legislation and bills from other Australian jurisdictions:

- Part 8, Section 50 of Western Australia’s *Inspector of Custodial Services Act 2003*⁹

⁶ Australian Bureau of Statistics (2020), ‘State/Territory: Tasmania’, *Prisoners in Australia*, <https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release#state-territory>, accessed 15 September 2021.

⁷ Australian Bureau of Statistics, ‘Aboriginal and Torres Strait Islander Population - Tasmania’, *2016 Census Data Summary*, <https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20Population%20-%20Tasmania~10006>, accessed 15 September 2021.

⁸ UN Office of the High Commissioner for Human Rights (2018), *Preventing Torture: The Role of National Preventive Mechanisms, A Practical Guide*, p19, https://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/NPM_Guide.pdf, accessed 15 September 2021.

- Part 3, Section 26 of the ACT's *Inspector of Correctional Services Act 2017*¹⁰
- Part 4, Section 14 of South Australia's *OPCAT Implementation Bill 2021*¹¹

The Tasmanian *OPCAT Implementation Bill 2021* as currently drafted does not include provisions relating to protection from victimisation or reprisal. We recommend the Bill be amended to include such a provision.

Temporal limitation on place of detention

Recommendation 11: Amend Section 5 (1)(a) to remove any temporal limit and remove the word "lawfully".

We note the government's efforts to adopt a more expansive definition of 'places of detention'. In order to provide the greatest protection to people whose liberty is constrained and fulfil OPCAT's preventive mandate, the NPM must have access to all places people are deprived of their liberty, for any amount of time.

We are concerned that the definition of a *forensic disability facility* in Part 1, Section 5 (1)(a) is inappropriately limiting: 'a facility at which a person with intellectual or cognitive disabilities may lawfully be detained for a period of 24 hours or more'.

It is well known the risk of ill treatment of people in custody is more acute in the first 24 hours of detention and that people with intellectual and cognitive disability are particularly vulnerable. We note the Australian Human Rights Commission has stated 'there is no temporal limitation on the

⁹ Part 8, Section 50, *Inspector of Custodial Services Act 2003*, Western Australia, https://www.legislation.wa.gov.au/legislation/statutes.nsf/main_mrtitle_458_homepage.html, accessed 15 September 2021.

¹⁰ Part 3, Section 26, *Inspector of Correctional Services Act 2017*, ACT, <https://www.legislation.act.gov.au/a/2017-47/>, accessed 15 September 2021.

¹¹ Part 4, Section 14, *OPCAT Implementation Bill 2021*, South Australia, https://www.legislation.sa.gov.au/LZ/B/CURRENT/OPCAT%20IMPLEMENTATION%20BILL%202021/B_AS%20INTRODUCED%20IN%20HA/OPCAT%20IMPLEMENTATION%20BILL%202021.UN.PDF, accessed 15 September 2021

concept of detention in OPCAT. Therefore, places where people are routinely detained for periods of less than 24 hours, should be included in the places open to inspection by NPMs.¹²

The temporal limitation of 24 hours or more is not compliant with OPCAT and we recommend it be removed. We further recommend removing the word 'lawfully' from the clause, to ensure protection of individuals who may be detained unlawfully.

Community consultation

Recommendation 12: In developing the NPM, commit to serious and appropriate engagement with Aboriginal and Torres Strait Islander peoples, representative bodies, Aboriginal and Torres Strait Islander Legal Services, people with lived experience and families in community consultation and co-design processes.

For the NPM to be effective, it must have the trust of the community and people with lived experience of detention. We are particularly concerned that Aboriginal and Torres Strait Islander peoples, and people in detention and their families, are consulted with and inform the development of the NPM's role. Without the trust and confidence of the community that they can approach, inform and interact with the NPM, it will not be able to fulfill its preventative function.

The Tasmanian government must commit to seriously and appropriately engaging Aboriginal and Torres Strait Islander peoples, representative bodies, Aboriginal and Torres Strait Islander Legal Services, people with lived experience and families in community consultation and co-design processes to ensure the development of the NPM and its ongoing activities have the confidence of the community and benefit from the expertise embodied in people's lived experience.

¹² Australian Human Rights Commission (2020) Implementing OPCAT in Australia, p44. https://humanrights.gov.au/sites/default/files/document/publication/ahrc_2020_implementing_opcat.pdf, accessed 15 September 2021.

We thank the Tasmanian Government for the opportunity to provide this submission, and would welcome the opportunity to engage further.

Yours sincerely,

Sophie Trevitt
Executive Officer, Change the Record
sophie@changetherecord.org.au

Adrienne Walters
Legal Director, Human Rights Law Centre
adrienne.walters@hrlc.org.au

Tracey Dillon
Chief Executive Officer Tasmanian Aboriginal Legal Service
Tracey.dillon@tals.net.au