



Tasmanian Council of Social Service Inc.

Submission on Custodial Inspector Amendment (OPCAT) Bill 2020

December 2020



**INTEGRITY
COMPASSION
INFLUENCE**

About TasCOSS

TasCOSS's vision is for one Tasmania, free of poverty and inequality where everyone has the same opportunity. Our mission is two-fold: to act as the peak body for the community services industry in Tasmania; and to challenge and change the systems, attitudes and behaviours that create poverty, inequality and exclusion.

Our membership includes individuals and organisations active in the provision of community services to low income Tasmanians living in vulnerable and disadvantaged circumstances. TasCOSS represents the interests of our members and their service users to government, regulators, the media and the public. Through our advocacy and policy development, we draw attention to the causes of poverty and disadvantage, and promote the adoption of effective solutions to address these issues.

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Introduction

Thank you for the opportunity to make a submission on the *Custodial Inspector Amendment (OPCAT) Bill 2020*. The Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) is designed to improve state practice in the prevention of torture. Its implementation therefore should not be treated simply as a technical exercise of identifying existing public bodies and giving them additional responsibility. National Preventative Mechanisms (NPMs) must be adequately resourced, including with relevant human rights expertise, functionally independent and be transparent in operations and reporting.

This submission is informed by principles of human rights, the knowledge and expertise of our members, including case studies of people who have been detained, and research and analysis of promising practice.

Key Issues

TasCOSS welcomes the establishment of a NPM in Tasmania. The OPCAT inspection system is designed to provide an ‘early warning system’ to prevent human rights abuses arising or worsening. Because it provides a protective, preventive mechanism for Tasmanians who may have their liberty deprived, it will therefore be an important addition to Tasmania’s human rights framework.

TasCOSS does however have concerns with the Bill as it is currently drafted. Those concerns relate primarily to adding additional functions to the Custodial Inspector’s existing role. We believe this will result in an under-resourced and under-powered NPM which is unable to fulfil its preventive mandate. Our four main concerns are addressed below.

1. Restriction to primary places of detention

Evidence from the Aged Care and Disability Royal Commissions are shocking reminders that horrific abuse occurs in environments where people are deprived of their liberty, despite many not being traditionally regarded as places of detention.¹

TasCOSS is concerned that the proposed Bill restricts the operation of the NPM to ‘primary places of detention’. Under Article 4 of OPCAT, the mandate of NPMs “must extend to all places where people are, or may be, deprived of their liberty, for example in the sense of their not being free to leave.... The preventive approach underpinning the Optional Protocol means that the interpretation of ‘places where

¹ The Disability Royal Commission’s report on experiences of people with disability during COVID-19 found restrictions on visiting limited formal and informal oversight, increasing the risk of abuse, neglect and exploitation, disability.royalcommission.gov.au/system/files/2020-11/Report%20-%20Public%20hearing%205%20-%20Experiences%20of%20people%20with%20disability%20during%20the%20ongoing%20COVID-19%20pandemic.pdf, p.27.

the persons are or may be deprived of their liberty should be as extensive as possible in order to maximise the preventive impact of the work of NPMs.”²

Under existing legislation, the role of the Custodial Inspector is to carry out inspections and report on the treatment of, and conditions for, prisoners and detainees in custodial centres in Tasmania. Centres currently subject to the oversight of the Custodial Inspector are:

- Ron Barwick Minimum Security Prison
- Risdon Prison Complex (medium and maximum security)
- Mary Hutchinson Women’s Prison
- Hobart Reception Prison
- Launceston Reception Prison
- Ashley Youth Detention Centre.³

The proposed Bill expands the places of detention which the Custodial Inspector can currently inspect to include inspections of police stations, closed psychiatric facilities and closed forensic disability facilities. It is TasCOSS’s view, however, that deprivation of liberty occurs in a far broader range of settings and that these should also fall under a NPM inspections regime. These include a police cell, court cell, a hospital, treatment centre, a secure facility, a residence for protective custody, any secure transport, aged care facilities, and supported accommodation for people with disability where restrictive practices are being employed.

TasCOSS has been informed of recent instances where people with disability in hospitals around Tasmania were not permitted to discharge themselves. Despite the fact there was no evidence of impaired or reduced decision-making capacity and they were legally entitled to self-discharge, at least one was threatened with being placed under emergency guardianship orders if they attempted to leave. Other people in otherwise open psychiatric facilities were denied permission to walk outside, ostensibly due to their heightened vulnerability to COVID-19, in what was an unreasonable restriction of their liberty and which resulted in immense harm and suffering.

NPM visits to such facilities could prevent this kind of abuse from occurring. Regular inspections would put such facilities on notice that they are ‘being watched’. The NPM also has power to obtain documents and information relating to the detention facility’s operations. This could include policies on restrictions on movement, use of restraints and so on.

TasCOSS recommends that Tasmanian NPM legislation include inspections of ‘non primary’ places of detention including in-patient health and psychiatric facilities, and disability and other care settings from which children and adults are not free to leave at will. This could be achieved by amending the

² UNHCR, OPCAT NPMs Guidelines, [ohchr.org/Documents/HRBodies/OPCAT/NPM/NPM_Guide.pdf](https://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/NPM_Guide.pdf). Article 4 (Paragraph 2) defines deprivation of liberty as “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.”

³ custodialinspector.tas.gov.au/frequently_asked_questions.

current Bill or, for reasons further discussed below, withdrawing the legislation and introducing a stand-alone Bill that establishes an independent NPM with broader inspection and other powers.

2. Reporting and recommendations

Section 25D of the Bill directs the Inspector to submit an annual report only to the Commonwealth Ombudsman in relation to inspections carried out. The Bill does not permit the Inspector to make recommendations under this section. This is at odds with the reporting requirements under the Inspector's other duties. Section 19 of the original Act states:

- (1) The Inspector may, at any time, provide a report to the responsible Minister on any matter relating to an occasional inspection and review and give advice or make recommendations as the Inspector considers necessary or appropriate in relation to the matter.
- (2) If, at any time after providing a report under [subsection \(1\)](#), the Inspector considers it necessary or appropriate to do so, he or she may table the report in each House of Parliament.
- (3) The responsible Minister may prepare a response to the report and provide it to the Inspector.⁴

TasCOSS believes that the Inspector's NPM role should include the same reporting requirements for two reasons. First, a body established to report on activities occurring in Tasmania under Tasmanian legislation should be obliged to report on its activities to the state's Parliament. Second, given the intent of OPCAT is to prevent torture and other cruel, inhuman or degrading treatment or punishment, relevant ministers should be alerted to issues at facilities under their responsibility and receive recommendations for preventing abuses from occurring at those facilities.

TasCOSS therefore recommends that the same reporting requirements should apply for the Inspector's NPM role as their other duties if the NPM is to remain with the Custodial Inspector. TasCOSS also strongly recommends that the current Bill be withdrawn and, after a consultation process, standalone legislation be drafted establishing the NPM as well as transparent reporting requirements.

3. Adequate resourcing

Although it falls outside the scope of the Bill, the issue of adequate resourcing of the NPM goes directly to the question of whether the Custodial Inspector can meaningfully carry out the role of NPM and whether the role should sit elsewhere, or be shared across multiple bodies as is the case in New Zealand.⁵

⁴ *Custodial Inspector Act 2016*, legislation.tas.gov.au/view/html/inforce/current/act-2016-030#GS19@EN.

⁵ Bodies appointed as NPMs in New Zealand include: the Ombudsman, the Independent Policy Conduct Authority, the Children's Commissioner, the Registrar of the Court Martial of New Zealand, and any other person, body or agency that is designated a NPM, legislation.govt.nz/act/public/1989/0106/latest/DLM192818.html.

The 2019/20 Annual Report of the Custodial Inspector is forthright in stating the office is currently under resourced, even before another significant responsibility is added to the role.

Having now completed a three-year cycle of inspections it is overwhelmingly apparent that additional staff are required. The inadequacy of staffing is reflected by the long delays between onsite inspections and the publication of reports...

The inspectorate started in 2016 with an initial 'establishment budget' which has since continued as the funding model. It was, and continues to be, inadequate for the inspectorate to adequately function.⁶

The Australian Human Rights Commission (AHRC) report *Implementing OPCAT in Australia* recommends that:

Australia's federal, state and territory governments should agree to provide sufficient resources to ensure NPM bodies can meet the initial costs of undertaking new NPM responsibilities, so that all NPM bodies can comply with OPCAT.⁷

It further recommends that:

Each NPM adopts mechanisms and processes to identify and prevent ill-treatment of vulnerable detainees, such as establishing thematic committees, and accessing the views of detainees, for example by directly surveying people with lived experience of detention.⁸

It is clear that the current resourcing of the Custodial Inspector means it is wholly inadequate to perform the role of a robust NPM, or in fact the role of an NPM in anything other than name only. TasCOSS therefore endorses the AHRC's recommendations and further recommends that the current Bill be withdrawn so that consultation can occur to determine the most appropriate body/bodies to perform the crucial role of NPM in Tasmania. For example, with adequate resourcing the Mental Health and Prison Official Visitors Programs as well as the Commissioner for Children and Young People could be considered as part of a multi-body NPM.⁹

⁶ *Custodial Inspector Annual Report 2019-20*, pp. 6-7.

custodialinspector.tas.gov.au/_data/assets/pdf_file/0008/588275/Tasmanian-Custodial-Inspector-Annual-Report-2019-20.pdf.

⁷ Australian Human Rights Commission, *Implementing OPCAT in Australia 2020*, Recommendation 8.

⁸ Australian Human Rights Commission, *Implementing OPCAT in Australia 2020*, Recommendation 3.

⁹ officialvisitors.tas.gov.au.

4. Human rights expertise including for vulnerable groups

Crucial to the effectiveness of a NPM is human rights and other relevant expertise, such as specialist expertise on the protection and promotion of children’s rights and wellbeing in detention.¹⁰ The AHRC report on implementing OPCAT in Australia recommends that each NPM should ensure that:

- Relevant officers receive human rights training on a regular and ongoing basis.
- Relevant officers receive training and education regarding the needs of vulnerable people in places of detention, including the impact of intersectional disadvantage.
- Inspection teams can access technical expertise on human rights in the exercise of their NPM functions as well as specific expertise and knowledge related to vulnerable detainees.¹¹

Under current resourcing, the office of the Custodial Inspector would be unable to provide the level of training and access to specialist expertise the AHRC recommends, and which is expected by signatories to OPCAT.¹² TasCOSS therefore recommends that the Tasmanian Government withdraw the current Bill and consult with relevant stakeholders about how to ensure a Tasmanian NPM incorporates the relevant training and expertise.

Recommendations

TasCOSS recommends:

1. That the Bill be withdrawn so that consultation can occur with community service, civil society groups and other relevant stakeholders on who is best placed to perform the NPM role in Tasmania, including with access to relevant training and expertise.
2. That any NPM legislation include non-primary places of detention.
3. That any NPM legislation incorporate all relevant AHRC recommendations on implementing OPCAT.
4. That a stand-alone Bill establishing a NPM be introduced that includes the above recommendations as well as a requirement that the NPM report to the Tasmanian Parliament as well as to the Commonwealth NPM.

¹⁰ Commissioner for Children and Young People Tasmania, *Submission: OPCAT in Australia Consultation Paper: Stage 2*, childcomm.tas.gov.au/wp-content/uploads/Submissions-2018-09-19-OPCAT-Submission-FINAL.pdf.

¹¹ Recommendation 1.

¹² United Nations Office of the High Commissioner for Human Rights, *Preventing Torture: The Role of National Preventive Mechanisms*: “NPMs should be able to exercise their mandates so as to contribute effectively to the prevention of torture and ill-treatment. This includes the States’ legal obligation of ensuring that members of NPMs have the relevant expertise, that these mechanisms have (i) sufficient financial and human resources, (ii) unrestricted access to all places where persons are, or may be, deprived of liberty...”, p. 1, ohchr.org/Documents/HRBodies/OPCAT/NPM/NPM_Guide.pdf.