



Tasmanian Council of Social Service Inc.

Tasmanian NPM Implementation Project Consultation Paper 2: Australia's international obligations related to the prevention of torture and ill-treatment

June 2023



**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 Tasmanians on low incomes or living in vulnerable 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

TasCOSS welcomes the opportunity to provide feedback to the next stage of the OPCAT Implementation Project in relation to the Tasmanian National Preventative Mechanism ('the TNPM'), and 'Consultation Paper 2: Australia's international obligations related to the prevention of torture and ill-treatment' ('the Consultation Paper').

As the peak body for community services in Tasmania, TasCOSS advocates for the interests of Tasmanians who may be experiencing social exclusion and/or disadvantage, including those who may be detained in settings such as prisons, hospitals or police cells and who may be vulnerable to abuse and neglect. We also represent our member organisations, many of whom provide frontline advocacy, services and support to Tasmanians who are deprived of their liberty.

We have previously outlined our support for the implementation of OPCAT in Tasmania and for a robust, well-resourced TNPM.¹ We strongly believe a well-designed and adequately funded TNPM will support the human rights of all Tasmanians, by allowing for more comprehensive awareness and education about OPCAT and by ensuring our communities are equipped to respond to instances of potential abuse, neglect or ill-treatment. TasCOSS strongly supports a system which not only addresses instances of abuse, but also acts to prevent future human rights violations from occurring or abuses arising or worsening.

This submission responds to the questions posed in the Consultation Paper and should be read in conjunction with our previous submission in relation to the OPCAT Implementation Project.²

Core issues in places of detention

TasCOSS believes the work of the TNPM should be primarily focused on how to strengthen the human rights of all Tasmanians and provide support in preventing, as well as responding to, instances of abuse and neglect.

Awareness of rights and responsibilities

We believe one of the key issues to be addressed by the TNPM should be ensuring people who are detained — particularly in locations where abuse or violations of OPCAT are likely — have adequate information and understanding about an institution's obligations under OPCAT to ensure they are capable of identifying when violations of these obligations occur. For example, there is a wealth of information and research identifying prisons and police cells as locations in which people are particularly vulnerable to abuse;³ however, we are concerned no formal mechanisms or systems currently exist to ensure those who are detained in these locations are unaware of their rights or an institution's obligations in relation to their safety and/or wellbeing. This issue is particularly acute in the Tasmanian context, where the independent oversight of prisons has been significantly impacted by a lack of adequate resourcing for the Office of the Custodial Inspector which is impacting their ability to conduct inspections and provide

¹ TasCOSS, Submission on OPCAT Implementation Bill 2021 (September 2021); TasCOSS, Submission on Custodial Inspector Amendment (OPCAT) Bill 2020 (December 2020).

² TasCOSS, Submission on Tasmanian NPM Implementation Project Consultation Paper 1 — Approach to OPCAT Article 4: Identifying places of detention (February 2023).

³ For example, see see Mackay, Anita (2020), 'Human Rights Guidance for Australian Prisons: Complementing Implementation of the OPCAT,' 25 September 2020, *Alternative Law Journal*, accessed at journals.sagepub.com/doi/pdf/10.1177/1037969X20962863.

reports within the three year review cycle.⁴ Recent media reports also highlight concerns about conditions raised by inmates at custodial facilities in Tasmania, including increased use of ‘lockdowns’ and the impact these have on prisoner health and wellbeing.⁵

Adequate support to respond to concerns or instances of abuse

As well as being equipped to identify and articulate their rights, those who are detained must also be able to respond to violations of these rights. TasCOSS is concerned that those who are detained in certain settings may currently experience significant difficulty in accessing support or assistance to address their needs, given these are locations (such as prisons or psychiatric wards) where people are often isolated. We strongly support a model in which the TNPM has an active and ongoing presence in places where people are detained, to raise awareness of the TNPM’s role and encourage contact with their office. We also note there are several community organisations (including some of our member organisations, such as Advocacy Tasmania and Disability Voices Tasmania) who have well-established links within places of detention and high levels of trust with those who are detained. We strongly recommend the work of the TNPM include collaboration with these existing organisations to strengthen service delivery (for example, by developing clear referral pathways), as well as identifying issues or areas of concern where the TNPM can focus its work.

Focus on priority populations

Although we believe the work of the TNPM must involve education and awareness raising for the whole community, we also recognise there is a need for targeted supports to address the needs of those who may be particularly vulnerable to OPCAT violations. This risk could arise from either being at an elevated risk of being within a place of detention (for example, someone with a significant mental health condition) or facing difficulty in accessing support or assistance in responding to a violation of rights. We recommend the TNPM prioritise engagement with the following communities, as well as the community and other organisations currently supporting them:

- **Tasmanian Aboriginal communities**

It is well-documented that Aboriginal people are overrepresented in the prison population in Australia, and the rates of Aboriginal people in prison in Tasmania are also disproportionately high.⁶ Aboriginal people in places of detention (including in custody) are also particularly vulnerable to human rights abuses and should therefore be a priority population for ongoing engagement with the TNPM. This should include working collaboratively with Aboriginal community-controlled organisations to appropriately identify and respond to systemic issues of abuse.

- **Tasmanians with disability**

People with physical disability, mental health conditions and/or cognitive impairment are also overrepresented in places of detention such as prisons, police cells, psychiatric inpatient facilities or group homes.⁷ Tasmanians with disability may also face additional barriers when

⁴ Office of the Custodial Inspector (2022), ‘Annual Report 2021-22,’ p. 4.

⁵ Inglis, R (2023), ‘Risdon Prison inmates pen letter decrying frequency of lockdowns, demand that changes be made,’ *The Mercury* (online, 6 June 2023), [themercury.com.au/news/tasmania/risdon-prison-inmates-pen-letter-decrying-frequency-of-lockdowns-demand-that-changes-be-made/news-story](https://www.mercury.com.au/news/tasmania/risdon-prison-inmates-pen-letter-decrying-frequency-of-lockdowns-demand-that-changes-be-made/news-story).

⁶ Justice Reform Initiative (2021), ‘State of Incarceration: Tasmania’s Broken Criminal Justice System’, April 2021, 1; Productivity Commission (2023), ‘Report on Government Services 2023 — 8A Corrective Services,’ Table 8A.6.

⁷ For example, in relation to prison see Justice Reform Initiative (2021), ‘State of Incarceration: Tasmania’s Broken Criminal Justice System,’ April 2021, p. 8.

identifying and responding to potential violations of their rights, such as communication challenges or difficulties in accessing services. The TNPM should therefore prioritise engaging with Tasmanians with disability both within inpatient settings and within the broader community.

- **Populations who face barriers when accessing support**

TasCOSS believes the TNPM should also prioritise engagement with those populations who face additional challenges in either identifying their rights, or in responding effectively to situations where their rights may have been breached. This includes groups such as migrants or refugees who may not be aware of their rights, or groups such as LGBTIQ+ Tasmanians who have a history of conflict and mistrust with the authorities who ostensibly exist to protect them (such as the police).

Main barriers to preventing OPCAT violations

As outlined above, TasCOSS believes one of the most significant barriers preventing the TNPM from effectively responding to allegations of abuse or ill-treatment is a lack of awareness of human rights or institutional responsibility. For this reason, we believe it is incredibly important for the TNPM to engage in widespread community consultation to raise awareness of OPCAT and their role, as well as how people can access the support or assistance of the TNPM when needed. A model where the TNPM is primarily responding to requests for assistance is unlikely to meet the needs of those who are most vulnerable, as they may be the people who are least aware of their rights, or able to appropriately respond or reach out for support. To assist with the issue of comprehensively identifying and then responding to instances of abuse or ill-treatment, we reiterate our previous recommendation that the Government engage in a broad mapping exercise to outline all places where people may be deprived of their liberty, and identify the current oversights and advocacy regimes that exist for these places.⁸ We believe this would allow the TNPM to recognise current gaps in oversight, as well as establishing priority settings for engagement and preventative work, ideally focusing primarily on those locations in which OPCAT violations are likely to occur or likely to otherwise remain unaddressed.

A further issue relates to the staffing of the TNPM. As we have noted in previous submissions, the TNPM must be staffed in such a way to ensure, 'the expertise and experience necessary for its effective functioning.'⁹ The breadth of skills and experience needed with the TNPM team is extremely broad, as institutional detention and/or deprivation of liberty can occur in a very wide and differing range of contexts. Effective investigation and monitoring of these places of detention, as well as effective preventative education and engagement, will therefore require a wide range of professional experience and expertise.¹⁰ This includes (but is not limited to) expertise in working with children, people with backgrounds of trauma, people with intellectual disabilities and people from culturally diverse backgrounds. We view this as a significant barrier with the current model, and are concerned this is likely to remain a barrier unless a different model is adopted.

We also stress the importance of accountability for the effective functioning of the TNPM, particularly the ability for members of organisations and the general public to access timely and comprehensive information on compliance with OPCAT. TasCOSS strongly believes the public education and awareness

⁸ TasCOSS, Submission on OPCAT Implementation Bill 2021 (September 2021), p. 6.

⁹ Optional Protocol to the Convention against Torture, Cruel, Inhuman or Degrading Treatment or Punishment, Guidelines on national preventive mechanisms, 12th sess, UN Doc CAT/OP/12/5 (9 December 2010).

¹⁰ Commissioner for Children and Young People, Submission on OPCAT Implementation Bill (17 September 2021), p. 2.

raising functions of the TNPM will be reinforced if members of the community are able to access information on the compliance of institutions and organisations with OPCAT, as well as the recommendations for improvements or any issues identified in investigations or visits of the TNPM. We recommend the Government implement the recommendations of the Tasmanian Law Reform Institute in relation to how the provisions of the *OPCAT Implementation Act 2021* could strengthen the accountability function of the TNPM. These recommendations include:¹¹

- Allowing for reports from the TNPM with recommendations, advice or findings to be tabled in Parliament;
- Ensuring the TNPM submit a yearly annual report; and
- Including provisions to ensure the TNPM (or members of the TNPM) cannot be arbitrarily suspended by the Governor.

Other materials to be considered by the TNPM when exercising its functions

TasCOSS commends the Government for the comprehensive overview of human rights obligations and instruments contained in the Consultation Paper. The Consultation Paper also provides a broad view of concepts which are integral to understanding the importance and function of both OPCAT and the TNPM, as well as exploring how these obligations and instruments relate to other laws in Tasmania. However, we believe there is a need to also include recommendations and findings not only from international law, but also from local and national investigations into issues related to OPCAT and the function of the TNPM. This includes findings from Royal Commissions and Commissions of Inquiry, particularly those that relate to groups whose experience is likely to intersect with the work of the TNPM, such as the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, or the recent Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings.

TasCOSS believes the work of the TNPM is likely to be highly relevant to the Tasmanian Aboriginal community, particularly given the proportionately high numbers of Aboriginal people who have experience of being deprived of their liberty. The Consultation Paper references the Declaration on the Rights of Indigenous People, and we strongly recommend the Government also consider key documents and agreements outlining recommendations to uphold and defend the rights of Tasmanian Aboriginals, as well as the obligations of governments and institutions towards the Aboriginal community. This includes (but is not limited to) the recommendations of the Royal Commission into Aboriginal Deaths in Custody, as well as both national and state obligations under Closing the Gap.¹²

Finally, while the rights enshrined in human rights instruments are clearly relevant to the work of OPCAT and the TNPM, we believe that in order to provide effective guidance for individuals and organisations on how they can ensure compliance on a day-to-day basis more work needs to be done to map the relationship between human rights principles and standards, guidelines or rules in settings where people are or are likely to be deprived of their liberty. This should be done as part of the mapping exercise outlined above, and should include standards of practice or guidelines from hospitals or places where people receive health care, prison regulations, or standards of practice in aged or disability care. The mapping exercise should also show intersections between key rights enlivened by OPCAT (or key concerns likely to be relevant to the work of the TNPM) and other pieces of Tasmanian legislation which may be relevant, such as the *Mental Health Act 2013 (Tas)*, the *Guardianship and Administration Act 1995 (Tas)* or the *Corrections Act 1997 (Tas)*.

¹¹ Tasmanian Law Reform Institute, Submission on OPCAT Implementation Bill 2021 (September 2021), pp. 16-18.

¹² Tasmanian Government (2020), 'Closing the Gap: Tasmanian Implementation Plan 2021-23,' see also closingthegap.gov.au/national-agreement/national-agreement-closing-the-gap.

Examples of best practice

As stated above and in previous submissions, we believe one of the best ways to strengthen the ability of the TNPM to appropriately exercise its functions is to ensure the model is appropriate to fulfil the duties of the TNPM, as well as being adequately resourced and staffed. We have previously raised concerns about the current model, in which the Tasmanian Ombudsman (who is also the Custodial Inspector) is given the powers of the National Preventative Mechanism ('the NPM'),¹³ and these concerns are shared by several civil society organisations within Tasmania.¹⁴ We take this opportunity to reiterate our support of the recommendation of the Tasmanian Law Reform Institute that the Tasmanian NPM should be an independent statutory body,¹⁵ rather than the current model in which the functions of the NPM are held by the Tasmanian Ombudsman.

There are several examples of different models which could be more effective and so ensure the TNPM is equipped to perform its functions. For example, other jurisdictions have a multi-body national preventative mechanism, meaning these organisations can share resources and expertise to perform their oversight, investigation, education and prevention roles. New Zealand has adopted this model, where the role of the national preventative mechanism is coordinated by the Human Rights Commission and includes the Office of the Ombudsman, the Independent Police Conduct Authority, the Office of the Children's Commissioner and the Inspector of Service Penal Establishments of the Office of the Judge Advocate General of the Armed Forces.¹⁶ TasCOSS strongly supports a model in which existing organisations or entities with specialist experience and knowledge, as well as pre-existing relationships, are able to work together to perform the role of the TNPM, such as the model previously proposed by TOPCAT (formerly TasOPCAT).¹⁷

We also strongly support a model which allows for ongoing involvement with civil society groups and organisations. This should include formal partnerships with civil society organisations to contribute advice, expertise and feedback in relation to the TNPM's work. We reiterate our support for an OPCAT symposium, to give stakeholders the chance to come together to share and discuss academic expertise and research on OPCAT, as well as reflecting on current practice and planning for future developments in Tasmania. We also support a model for the TNPM which includes ongoing, formal partnerships with civil society organisations (such as the model proposed in TOPCAT's earlier submission),¹⁸ as well as the development of partnerships with other independent statutory authorities for training, information and skill sharing to allow the TNPM to be more responsive and effective in its work (for example, a partnership with existing entities, such as the Commissioner for Children and Young People Tasmania or the proposed Disability Commissioner for Tasmania who have specialised skills, knowledge and/or experience).

Consistent with our previous recommendations, we also support the following:¹⁹

¹³ TasCOSS, Submission on Tasmanian NPM Implementation Project Consultation Paper 1 — Approach to OPCAT Article 4: Identifying places of detention (February 2023).

¹⁴ See, for example, TasOPCAT and the Australian OPCAT Network (2021), 'Submission on OPCAT Implementation Bill,' 15 September 2021; Commissioner for Children and Young People (2021), 'Submission on OPCAT Implementation Bill', 17 September 2021.

¹⁵ Tasmanian Law Reform Institute (2021), 'Submission on OPCAT Implementation Bill', 20 September 2021, p. 4-13.

¹⁶ For information about the New Zealand model, see apt.ch/en/knowledge-hub/opcat-database/new-zealand.

¹⁷ TOPCAT and the Australian OPCAT Network (AON), Submission on OPCAT Implementation Bill (15 September 2021), Appendix 1.

¹⁸ Ibid.

¹⁹ TasCOSS, Submission on Tasmanian NPM Implementation Project Consultation Paper 1 — Approach to OPCAT Article 4: Identifying places of detention (February 2023).

- Amendments to the legislation to ensure the TNPM is able to respond to OPCAT violations in a wide variety of settings and locations, including (but not limited to) the following:
 - Educational institutions which use detention as a means of discipline or control;
 - Residential (group homes) for children;
 - Quarantine facilities;
 - Aged care facilities;
 - Residential drug, alcohol and addiction rehabilitation facilities or services;
 - Disability accommodation, facilities or services;
 - Vehicles transporting a person to a place of detention; and
 - Private places, such as private homes or residences where a person may be receiving services or supports through the NDIS or Aged Care services.
- The redesign of the TNPM to ensure the model includes the following:
 - A statutory body independent from all arms of government;
 - The NPM should engage in and provide public information and education around the requirements of OPCAT, as well as preventative work;
 - Adequately staffed to ensure a breadth of expertise and experience, including representation from the Tasmanian Aboriginal community;
 - Sufficient accountability measures, including regular reporting from the Tasmanian NPM to the Tasmanian Parliament; and
 - Ongoing, formal partnerships with civil society organisations, to contribute advice, expertise and feedback.

TasCOSS also firmly believes the work of the TNPM would be significantly strengthened by the introduction of a Tasmanian Charter of Rights. We believe a Tasmanian charter would have wide-ranging impacts, including encouraging a cultural change in attitudes and beliefs, improved accountability and transparency, greater community awareness and empowerment, and as a tool for legal and social advocacy.²⁰ All of this work is crucial to the role of the TNPM, which includes public awareness raising around human rights, OPCAT and related issues, as well as making sure all Tasmanians have the education and information they need to respond in situations where their rights, or the rights of others, may have been violated.

Conclusion

TasCOSS remains extremely supportive of the implementation of OPCAT in Tasmania. We echo the support of other civil society organisations for the establishment of a properly resourced, effective and independent TNPM, whose functions include the promotion and advancement of the rights of all Tasmanians, together with a greater understanding of OPCAT and human rights more broadly.

²⁰ For a general discussion of the impact of the Victorian charter, see Human Rights Law Centre, *Victoria's Charter of Human Rights and Responsibilities in Action: Case studies from the first five years of operation* (March 2012).

Recommendations

1. The work of the TNPM should be primarily focused on how to strengthen the human rights of all Tasmanians and provide support in preventing, as well as responding to, instances of abuse and neglect;
2. The TNPM should have ongoing engagement with community organisations;
3. The TNPM should identify priority populations or cohorts who may be vulnerable to OPCAT violations — this includes (but is not limited to) Tasmanian Aboriginals, Tasmanians with disability, and people who face barriers when accessing assistance from mainstream supports;
4. The TNPM should engage in a mapping exercise to identify, and then respond to, existing gaps in knowledge, oversight or assistance in areas where people are deprived of their liberty;
5. The *OPCAT Implementation Act 2021* should be amended as per the recommendations of the TLRI to strengthen provisions relating to accountability, and should also include provisions to allow the TNPM to visit and report on the conditions in as wide a range of settings as possible;
6. The Government should also consider recommendations and findings from local investigations and inquiries, such as findings from Royal Commissions, as well as obligations under local agreements or policies such as Closing the Gap, provisions from relevant state and Commonwealth legislation, and guidelines/standards/rules from places or institutions in which people may be deprived of their liberty;
7. The Government should consider a model for the TNPM which allows for collaboration between several bodies/entities, as well as formal partnerships and ongoing engagement with civil society groups;
8. The TNPM should have the following attributes:
 - a. A statutory body independent from all arms of government;
 - b. The ability to engage in and provide public information and education around the requirements of OPCAT, as well as preventative work;
 - c. Adequate staffing to ensure a breadth of expertise and experience, including representation from the Tasmanian Aboriginal community;
 - d. Sufficient accountability measures, including regular reporting from the Tasmanian NPM to the Tasmanian Parliament; and
 - e. Ongoing, formal partnerships with civil society organisations, to contribute advice, expertise and feedback; and
9. The Tasmanian Government should enact a Charter of Rights to support the work of the TNPM.