



The Hon Elise Archer MP,
Minister for Justice,
Government of Tasmania

Dear Minister,

The TasOPCAT Network is pleased to attach a submission with regard to the Custodial Inspector Amendment (OPCAT) Bill 2020.

TasOPCAT is located within the Tasmanian Institute of Law Enforcement Studies (TILES) and is a research stream of the Law Enforcement and Public Health (LEPH) program.

The Optional Protocol to the Convention against Torture and Cruel and Degrading Treatment (OPCAT) gives rise to exploration of the rights of Tasmanian citizens in unprecedented ways. TasOPCAT recognises the challenges that implementation of OPCAT presents in times of great resource constraints.

We would be glad to offer to you the expertise of the TasOPCAT Network. We can offer research, legal advice and the capability to engage civil society. The submission process has already given rise to conversation across stakeholders from different sectors and we hope that constructive dialogue will continue.

Thank you for the opportunity to make this submission.

Yours sincerely,

TasOPCAT Network
Val Kitchener; Rajan Venkataram; Penelope Weller

7 November 2020

TasOPCAT Network:
<https://www.utas.edu.au/tiles/research/research-streams/law-enforcement-and-public-health/tasopcat-network>

SUBMISSION IN RESPONSE TO THE *CUSTODIAL INSPECTOR AMENDMENT (OPCAT) BILL 2020*

By TasOPCAT

December 2020

ABOUT THE TASMANIAN OPCAT NETWORK

The TasOPCAT Network (TasOPCAT) was founded in April 2020 by Tasmanian members of the Australian OPCAT Network (AON). TasOPCAT objectives are to: share information about the Optional Protocol Against Torture (OPCAT)¹ the Tasmanian stakeholders; promote the benefits of preventive monitoring; and promote implementation of OPCAT in Australia and in Tasmania with a focus on the State's economic and social circumstances. TasOPCAT is located within the Tasmanian Institute of Law Enforcement Studies (TILES) and is a research stream within the Law Enforcement and Public Health (LEPH) program. This submission was written by Val Kitchener, Rajan Venkataraman and Penelope Weller.

ACKNOWLEDGEMENTS

The Tasmanian OPCAT network acknowledges the traditional owners of the unceded land on which this publication is produced- the Muwinina people. We pay our respects to those who have passed and acknowledge the Tasmanian Aboriginal People as custodians of the land.

¹ Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199 entered into force on 22 June 2000.

INTRODUCTION

The OPCAT² recognises that people who are deprived of their liberty are vulnerable to human rights abuse. OPCAT seeks to prevent the occurrence of torture and other cruel inhuman or degrading treatment or punishment in places of detention by introducing preventive monitoring undertaken by specialist bodies known as National Preventive Mechanisms (NPMs).

The purpose of an independent NPM is to prevent human rights abuse across a broad range of closed environments.³ The NPM does this by examining and understanding organisational and administrative procedures from the human rights perspective, in order to ensure respect for the inherent dignity of the person.

Recent events in Tasmania's detention facilities and other institutions underscores the importance of supporting a strong commitment to preventive monitoring. A preventative approach will protect the human rights of the most vulnerable people in Tasmania.

Implementation of OPCAT in Tasmania provides an opportunity to develop a uniquely Tasmanian NPM that addresses our priority issues in a timely and sustainable manner.

The TasOPCAT network welcomes the decision of the Tasmanian Government to provide a legislative basis for a National Preventive Mechanism in Tasmania but does not support the approach outlined in the draft Bill.

TasOPCAT urges the Government to reconsider its approach by engaging, consulting and collaborating with civil society and other stakeholders.

Recommendation 1: TasOPCAT recommends that the Government:

- Convene a consultation with civil society and other stakeholders about the implementation of OPCAT in Tasmania;
- Positively identify, in consultation with stakeholders and those with lived experience of deprivation of liberty, places that are or may be associated with deprivation of liberty;
- Outline robust policy settings and dedicated funding for a Tasmania NPM;
- Recognise the developments in other areas on international human rights law; and
- In collaboration with civil society and other stakeholders, develop a new legislative framework to support a Tasmanian NPM.

²Ibid.

³ Adam Fletcher, Australia and the OPCAT (2012)37(4) *Alternative Law Journal* 236.

COMMENTS ON THE *CUSTODIAL INSPECTOR AMENDMENT (OPCAT) BILL 2020*

All legislation purporting to implement OPCAT should align with the obligations contained in the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*.

In its current form the draft Bill adds the NPM function to the Custodial Inspector role, which in turn was tacked onto the Ombudsman's duties.

Wherever it sits and however it is organised, the NPM function must be properly resourced to be effective.

To achieve a closer alignment with the OPCAT framework, the draft Bill should, at a minimum:

1. establish an independent body;
2. adopt a comprehensive definition of 'place of detention';
3. provide the NPM with appropriate powers to undertake its tasks;
4. enshrine the positive OPCAT obligations on state parties contained in legislation;
5. provide for communication and cooperation with the Subcommittee on the Prevention of Torture (SPT)⁴, including visiting and inquiry permissions; and
6. Annex OPCAT.

1. Establish an independent body

The purpose of OPCAT is to "establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment" (articles 1 and 17).

Visiting bodies for the prevention of torture and other cruel inhuman and degrading treatment or punishment are referred to as the "National Preventive Mechanism" (NPM). NPMs must have functional independence (article 18(1)) and be adequately resourced (article 18(3)).

The principle of independence means 'where existing bodies are being designated as NPMs, their OPCAT function must be clear and separate from their other functions. There must be structural and political independence from government and detaining agencies.'⁵

Jurisdictions are required to develop appropriate mechanisms to facilitate the development of effective preventive monitoring capable of identifying and addressing systemic issues and developing a human rights approach to laws policies and practices associated with the deprivation of liberty.

⁴ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture

⁵ Michael White (2019) The role and scope of OPCAT in protecting those deprived of liberty: a critical analysis of the New Zealand experience, *Australian Journal of Human Rights*, 25:1, 44-65. DOI: 10.1080/1323238X.2019.1588055

Preventive monitoring requires a high degree of independence and accountability. It is a unique task that encompasses processes that identify risk and extends to proposing practical solutions to systemic problems in law, policy and detention practice.⁶

The current proposal “adds” an NPM mandate to the current powers of the Custodial Inspector. This approach will not provide independence of office or support the creativity required of an effective NPM (see s3(b) purpose, s6 Function).

Recommendation 2:

Re-draft the Bill to establish a truly independent NPM. If the NPM role is to be performed by an existing body, the OPCAT function must be clearly separate from its other functions.

2. Adopt a comprehensive definition of ‘place of detention’

OPCAT requires state parties to allow visits... ‘to any place ... where persons are or may be deprived of their liberty’ (article 4(1)). 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’ (article 4(2)).

The OPCAT definition therefore covers any place in Tasmania where persons are or may be deprived of liberty now or in the future, such as, for example, detention or custody in a prison, a police cell, a court cell, a hospital, a treatment centre, a secure facility, a residence for protective custody, an aged care or disability facility, immigration detention facilities, facilities for quarantine or isolation, and any secure transport.

The *Custodial Inspector Act 2016* (Tas) (‘the Act’) currently applies to prison and detention centres but not police stations or court cell complexes. Moreover, the Act only applies to those who have been lawfully detained (Definition s4). This is a serious limitation that avoids scrutiny of systemic issues which result in unlawful detention.

The draft Bill would add ‘specified facilities’ to the list (Definitions part 4A). Specified facilities are:

- a closed psychiatric facility;
- a custodial centre;
- a forensic disability facility; and
- a police station.

⁶ Ben Buckland & Audrey Olivier-Muralt (2019) OPCAT in federal states: towards a better understanding of NPM models and challenges, *Australian Journal of Human Rights*, 25:1, 23-43, DOI: 10.1080/1323238X.2019.1588061

The definition is unduly restrictive. It also makes no provision for any future developments that lead to other places of detention being created. A better approach would be to adopt the definition contained in OPCAT Article 4. For example, equivalent legislation in the ACT – the *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018* – defined place of detention:

s7 **place of detention**, means any place that the subcommittee must be allowed to visit under the Optional Protocol, article 4, that is subject to the jurisdiction and control of the Territory.

TasOPCAT notes, in addition, that the obligations under other treaties intersects with OPCAT. For example, the Convention on the Rights of Persons with Disabilities (CRPD) ‘requires monitoring of **all facilities and programmes** that serve persons with disabilities in order to prevent all forms of exploitation, violence and abuse’ (CRPD article 16(3) – emphasis added).⁷

Recommendation 3:

Adopt a comprehensive definition of ‘place of detention’ and ‘deprivation of liberty’ that mirrors the requirements of OPCAT.

Recommendation 4:

In line with the above recommendation, remove the reference to ‘lawful’ in relation to detention in the parent act.

3. Provide the NPM with appropriate powers to undertake its tasks

The draft Bill should ensure that the NPM have the necessary powers and authority to undertake its task. For example, OPCAT provides that NPMs:

- Regularly examine the treatment of people deprived of their liberty (article 19(a));
- Make recommendations about improvements (article 19(b));
- Submit proposals and observations about draft legislation (article 19(c));
- Conduct private interviews with detainees and others (article 20 (d)); and
- Share information with the Subcommittee on the Prevention of Torture (article 20(f))

⁷ For an analysis of the intersection of OPCAT and CRPD see Penelope Weller (2019) ‘OPCAT monitoring and the Convention on the Rights of Persons with Disabilities’ *Australian Journal of Human rights* 25:1, 130-149. <https://doi-org.ezproxy.lib.rmit.edu.au/10.1080/1323238X.2019.1588056>

The OPCAT requirements for NPMs should be effectively and explicitly codified in legislation. For example, in New Zealand, the *Crimes of Torture Act 1989* establishes that NPMs:

- be functionally independent;
- be authorised to regularly examine the treatment of persons in places of detention;
- be composed of experts with the required capabilities and knowledge and to aim for gender balance and representation of minority groups;
- have access to relevant information and to all places of detention including access to those detained for private interviews;
- have authority to make recommendations to relevant authorities;
- be adequately resourced;
- have the right to engage with the SPT; and
- publish annual reports.

Recommendation 5:

Amend the draft Bill to include comprehensive power for the NPM in legislation, including those powers explicitly set out in OPCAT.

Furthermore, the draft Bill merely provides for an annual report to the Commonwealth Ombudsman (section 25D). It does not reflect the requirements of OPCAT and it does not provide for reporting to the SPT.

Recommendation 6:

Amend the draft Bill to provide for comprehensive reporting that could include, but not be limited to, (i) public reports tabled in Parliament, (ii) advice tabled in Parliament in relation to draft legislation and other instruments, and (iii) reporting to the SPT.

In article 18(2), OPCAT describes the importance of the NPM having the required capabilities and professional knowledge. It also emphasises the importance of gender balance and the adequate representation of ethnic and minority groups.

We strongly support this. It is essential that in Tasmania the NPM includes the representation of Tasmanian Aboriginal people, people with disabilities and women. Around Australia – including in Tasmania – Indigenous people are disproportionately represented in places of detention, there is a disproportionate rate of disability among prisoners and detainees, and women represent the fastest growing group of people in Australia’s prisoner population require.

These factors – and the wide range of places where people may be detained and deprived of liberty in Tasmania – highlight once again why a single designated body is incapable of properly performing the role of NPM in Tasmania.

Recommendation 7:

Amend the draft Bill to provide for a Tasmanian NPM that is responsive and truly representative – including representation of Tasmanian Aboriginal people, people with disabilities and women.

4. Enshrine the positive OPCAT obligations on state parties contained in legislation

States parties to OPCAT must provide for state visits by the SPT. In addition, states parties must grant to both the SPT (article 14) and the NPM (article 20):

- unrestricted access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location (article 14 (1)(a));
- unrestricted access to all information referring to the treatment of those persons as well as their conditions of detention (article 14(1)(b));
- unrestricted access to all places of detention and their installations and facilities (article 14 (c) (except in urgent or emergency circumstances) (article 14(2));
- the opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the Subcommittee on Prevention believes may supply relevant information (article 14(1)(d));
- the liberty to choose the places it wants to visit and the persons it wants to interview (article 14 (1)(e).

Recommendation 8:

Amend the draft Bill to reflect the above access requirements for both the NPM and the SPT.

Recommendation 9:

Amend the draft Bill to provide the protections for NPM (as per OPCAT article 21) and the SPT (article 15).

Recommendation 10:

Amend the draft Bill to require the Government to consider the recommendations of the NPM and enter into a dialogue with it on possible implementation measures (as per OPCAT article 22). Included in the requirement should be an obligation on the Government to publish responses to the recommendations made by the NPM within a defined timeframe.

5. Provide for communication and cooperation with the Subcommittee on the Prevention of Torture (SPT), including visiting and inquiry permissions.

OPCAT requires states parties to:

- receive the SPT in their territory and grant it access to the places of detention as defined in article 4 (Article 12(a));
- provide to the SPT all relevant information to enable the SPT to evaluate the needs and measures that should be adopted to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment (article 12(b));
- encourage and facilitate contacts between the SPT and the NPM (article 12(c); and
- enter into dialogue with the SPT on possible implementation measures (article 12(d)). In the absence of Commonwealth legislation, it is imperative that that state governments grant access permission to the SPT.

Recommendation 11:

Specifically include the requirements of OPCAT article 12 in the draft Bill.

6. Annexure OPCAT

The purpose of the legislation will be to implement OPCAT. Annexure of international treaties does not make the treaty binding in Australian law; however, including or recognising international treaties indicates a commitment to pursue treaty objectives. An example is found in the *Australiana Human Rights Commission Act 1986* (Cth).

Recommendation 12:

Annex OPCAT to the draft Bill.