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20 September 2021

Brooke Craven

Director, Strategic Legislation and Policy

Dear Ms Craven,

OPCAT Implementation Bill 2021

Thank you for the opportunity to provide feedback on the draft *OPCAT Implementation Bill 2021* ("the Bill").

The Tasmania Law Reform Institute ("TLRI" / "the Institute") supports the Government's policy of implementing relevant provisions of the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* ("OPCAT").

The Institute agrees that policy is best achieved by standalone legislation and clearly articulated powers.

The Institute notes the Government's leadership in this space and the potential benefit for all Tasmanians, especially those who are, or may in the future be detained by the state.

The Institute however does not consider that these laudable aims will be realised unless sufficient resourcing, funding and statutory independence are provided for in the present Bill.

The Institute lists recommendations for the draft Bill below. In summary the Institute considers the Bill will be most effective if the following principle-based amendments are incorporated into the draft Bill:

1. The Tasmanian National Preventative Mechanism ("TNPM") should be prescribed as an independent statutory body, rather than a person sole, consistent with OPCAT Article 3.
    a. A multi-member mechanism would be better able to achieve the mandate of OPCAT across the wide range of potential places of detention with due consideration to the particular vulnerabilities of specific cohorts who are likely to be detained. It would also reduce potential for co-dependencies, actual or perceived conflicts and institutional incapacity due to underfunding and understaffing.
    b. The Institute is particularly concerned about the policy of broadening the responsibilities of, and creating further regulatory burdens on an existing individual who is already principally responsible for the administration of seven separate public offices.
2. Appropriate funding and staffing for the office of the TNPM be specified within the principal Bill or consequential amendments.
3. The reporting role of the office of the TNPM to the Parliament be broader and articulated in greater detail to ensure effective scrutiny of Ministerial and Departmental compliance with OPCAT in accordance with Tasmania's system of representative and responsible government.
4. Clearer and stronger protections against reprisal must be provided for under the legislation to ensure persons who are, or have been detained are not punished or prejudiced for communicating with NPMs or any officer acting under the authority of the Bill.

If you would like further information or explanation of our response, please contact Dr Gogarty (03) 6226 7562 or Brendan.Gogarty@utas.edu.au

Yours sincerely,

Brendan Gogarty	**Heidi White**	**Siobhain Galea**
Director	Ad hoc Advisor (OPCAT)	Research Associate

For the **Tasmania Law Reform Institute**

Recommended clause amendments

Clause	Issue	Recommendation	Pinpoint
5	Meaning of *place of detention*	Add specific reference to the range of possible institutional facilities where vulnerable people are regularly detained. Clarify that private premises which are used as places of detention under a contract, at the order, or direction of a detaining authority, are places of detention under clause 5.	[81]-[84]
5(1)	Meaning of *place of detention* (*Forensic Disability Facility)*	Remove the words "lawfully" and "for a period of 24 hours or more".	[84]
5(3)	Meaning of *place of detention (vehicle)*	Clarify that vehicle includes a vehicle that conveys a person to a place of detention (regardless of whether they were detained at the point of departure).	[84]
7	Relationship to other laws	Broaden its application to ensure that the TNPM is not limited in its ability to undertake its functions by inserting the words "or legislative instrument" after the words "A provision of any other Act".	[86]
8(1)	Tasmanian NPM	Remove the word "person" and insert language consistent with the establishment of an independent multi-member body (council/secretariat/multi-member commission). Note that references to the TNPM as a "he or she" throughout the Bill will need to be amended accordingly.	[26]
7 & 8	Accountability	Clarify that the Governor may not plead or address the Parliament for the suspension or removal of the TNPM (or members of the TNPM) on the same, or substantially similar grounds to those which Parliament has not previously admitted.	
9(1)(k)	Accountability	To enhance accountability add "and report from time to time and as necessary to Parliament and its committees on matters relevant to this Act and compliance of state authorities with the provisions of OPCAT" after the words "to publish".	[50]

10	Independence	To ensure that all individuals working within the remit of the TNPM are captured, insert "or delegates" after the words "and any staff".	[27]
12	Staff	Add to clause 12(4) a requirement that the TNPM prioritise making efforts to recruit and retain staff who are Aboriginal and Torres Strait Islander and people with a disability.	[30]
15(1)	Access to persons	Remove "at all reasonable times". Alternatively clearly specify what is reasonable and unreasonable and provide an independent arbiter provision to enable the prompt resolution of disputes over refusal of access.	[64] and [65]
15(2)(a)	Access to persons	Remove the provision and replace with: "must allow the Tasmanian national preventive mechanism to conduct a private interview with 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 national preventive mechanism believes may supply relevant information".	[67]
18(4)	Accountability	Remove the word "may" and replace it with "must"; and insert "and table in Parliament" after "send to the Premier and the responsible Minister".	[50]
19(3)	Accountability	Remove the word "may" and replace it with "must".	[50]
20(1)	Opportunity to be heard	Insert "or material which would create a serious risk to the health and safety of a person" after the words "contains adverse or derogatory comments".	n/a
23	Accountability	Remove the provision and replace with: "(2) The Tasmanian national preventive mechanism is required to submit an annual report within the period of 4 months after 30 June in each year to: (a) the National Preventive Mechanism Coordinator; and (b) Parliament."	[50]
24(3)	Accountability	Add a new subclause: "(i) to parliament"	[50]
28(2)(f)	Monitoring by the Subcommittee on Prevention	To be consistent with contemporary statutory language about people who are below the age of majority, remove the word "juveniles" and replace with "children".	n/a
28(1)	Ministerial arrangements	Consistently with clause 9(1)(h) of the Bill, after "Optional Protocol" insert "and taking	n/a

		into consideration the norms of the United Nations".	
34	Protections for provision of information	Add a provision penalising the victimisation of or reprisals against any person who, in good faith, provide information to the TNPM.	[70]

Recommended additions

Issue	Recommendation	Pinpoint
Resourcing	Insert the following provision: "The NPM must be provided with the resources reasonably required for exercising its functions under this Schedule and the *OPCAT Implementation Act 2021*"	[42]
Independence	Insert provisions regarding security of tenure, remuneration, period of appointment, and conditions for dismissal of staff.	[27]

1. Structure, Constitution & Independence

- TLRI recommends the TNPM be prescribed as an independent statutory body, rather than a person sole consistent with OPCAT Article 3.

1. The Institute welcomes Clause 10 of the Bill which states that the TNPM and its staff are "authorised and required to act independently and impartially". However, the Institute does not consider that this realises the intended purpose of Article 18(1) of OPCAT, which states that: "States Parties shall guarantee the functional independence of the national preventative mechanisms as well as the independence of their personnel".

2. The OPCAT Guidelines on National Preventive Mechanisms ("NPM Guidelines"),[1] issued by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Subcommittee on Prevention") relevantly state at paras 8, 9 and 18 the following:

> [T]he operational independence of the NPM should be guaranteed
>
> …
>
> [T]he relevant legislation should specify the period of office of the member/s of the NPM and any grounds for their dismissal. Periods of office, which may be renewable, should be sufficient to foster the independent functioning of the NPM.
>
> …
>
> [T]he State should ensure the independence of the NPM by not appointing to it members who hold positions which could raise questions of conflicts of interest.

3. This is further supported by the Principles relating to the Status of National Institutions ("Paris Principles"),[2] which the Australian Human Rights Commission has recognised "provide guidance on the attributes of independent, robust national human rights institutions":[3]

> In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be

[1] 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).

[2] *Principles relating to the Status of National Institutions (The Paris Principles)*, GA Res 48/134 (20 December 1993).

[3] Australian Human Rights Commission, *Human Rights at your fingertips,* <https://humanrights.gov.au/our-work/commission-general/foreword-human-rights-your-fingertips>

> effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the *pluralism of the institution's membership is ensured*.[4] [emphasis added]

Office of TNPM

4. Under Clause 8 the Bill designates a sole nominated independent executive officer as the Tasmanian National Preventative Mechanism (TNPM). The Institute understands the Government's intention is to invest the TNPM in the same person who is the Tasmanian Ombudsman and Custodial Inspector. The Institute is concerned about this approach for several reasons.

5. Firstly, the term 'mechanism' is inapt a descriptor for a statutory officer sole. Put simply, a person is not a mechanism.[5] Given this the OPCAT itself does not seem to envision a single office holder being described as a mechanism it is unnecessary to describe the relevant office holder as such and the TLRI advises against adding such a term to the Tasmanian statutory lexicon.[6]

6. The text of OPCAT and the NPM Guidelines are addressed to mechanisms as bodies or networks, not individuals.[7] That is an organisation, framework or network rather than a single individual.[8] For instance, OPCAT, Article 18 refers to "experts of the [NPM]"; and the NPM Guidelines speak broadly of "the NPM, its members and its staff" as separate entities. The linguistic inapplicability of designating the "NPM" a "person" is evident by substituting the latter term for the former in the Convention and NPM Guidelines. In a broader sense investing the NPM in a person means that some degree of distortion is required to map the international legal obligations on NPMs on a statutory officer. Regardless, there is a clear terminological clash between OPCAT and the Bill.

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[4] https://humanrights.gov.au/our-work/commission-general/principles-relating-status-national-institutions-paris-principles-human

[5] Mechanism connotes a 'system or framework' by which a 'means or effect or result is produced'. See Oxford English Dictionary 3rd Edition (OED, 2001).

[6] The term is not presently used to describe any Tasmanian public officer or office. See https://www.service.tas.gov.au/tasmanian-government-organisations

[7] This is reflected in Article 17 of OPCAT which commits states to establishing 'one or several independent national preventive mechanisms for the prevention of torture at the domestic level'. That is, a body corporate rather than an person sole

[8] Mechanism connotes a 'system or framework' by which a 'means or effect or result is produced'. See Oxford English Dictionary 3rd Edition (OED, 2001).

7. Given OPCAT does not require that a person be denoted a mechanism, the Bill should use appropriate, plain-English terminology consistent with other Tasmanian statutes. The Institute notes the broader problem of a proliferation of descriptive terms for subordinate legislation in Australian law which has given rise to unnecessary complexity and generates uncertainty in statutory review and supervision.[9] Such a proliferation of terminology should not be permitted to occur across public offices. Tasmanian law should, wherever possible, be structurally and textually consistent and uniform: like offices should be described in like terms.

8. In this case, the Bill in substance establishes an entity which has the characteristics of an investigative commission, albeit invested in a single commissioner. For plain-English, textual and linguistic statutory clarity it would be preferable to refer to any person responsible for the TNPM as a TNPM *Commissioner(s).* Alternative titles appropriate to a statutory officer sole might include TNPM:

    - *Monitor* to borrow from the language of the OCHR; or
    - *Inspector(s),* consistent with the arrangements for custodial inspection in Tasmania.

9. This would also be textually consistent with the designation of the Commonwealth Ombudsman as NPM *Coordinator.*[10]

10. If there is policy of investing the entire NPM responsibility for Tasmania in this statutory office sole, any ambiguity as to the role's connection to OPCAT can be overcome by clearly stipulating in the Bill that, for instance, "the NPM Commissioner is designated as a national preventive mechanism for the purposes of Article 17 of the Convention".

11. Secondly, and relatedly, the nature role and functions of an NPM warrants the investment of the statutory office in a body corporate, rather than a person sole.

[9] Stephen Argument "Parliamentary Scrutiny of Quasi-legislation" (1992) *Papers on Parliament No. 15* (1993) Department of the Senate Parliament House, Canberra),, 22.

[10] *Ombudsman Amendment (National Preventive Mechanism) Regulations 2019* (Cth).

12. The subject matter of OPCAT is broader than mere involuntary detention. Rather it is concerned with "cruel, inhuman or degrading treatment or punishment" that occur within places of institutional detention.

13. As clause 5 of the Bill properly reflects, institutional detention occurs in a wide range of contexts, most notably in connection with the criminal justice system, but also health, mental health, and disability services. The Institute would include youth justice, educational, aged care, rehabilitation and quarantine services as common places of detention [see para 83]. The needs of such groups and the basis and rationale for their detention differ significantly. As such, what amounts to degrading, cruel or inhumane treatment may, in many circumstances, be cohort specific. For instance, the manner and form with which basic necessities of life, such as food, water, hygiene, may be different for a prisoner serving a custodial sentence than who is cognitively impaired or physically disabled.

14. As the NPM Guidelines specify, the "members of the NPM should collectively have the expertise and experience necessary for its effective functioning", and that "its staff have between them the diversity of background, capabilities and professional knowledge necessary to enable it to properly fulfil its NPM mandate. This should include, *inter alia*, relevant legal and health-care expertise". As the Commonwealth Ombudsman urged in 2019:

> Not only have we as a nation signed up to OPCAT, but recent high-profile examples of poor practices in places of detention nationally have shown that a systematic, well-resourced and preventive inspection regime is required. Implementing OPCAT should not merely involve re-badging existing bodies, without also having regard to the resourcing, legislative and operational implications.[11]

15. The NPM Guidelines specify that: "the NPM should complement rather than replace existing systems of oversight and its establishment should not preclude […] the operation of other such complementary systems".

[11] Commonwealth Ombudsman (September 2019) Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; (OPCAT) Baseline Assessment Of Australia's OPCAT Readiness, p3.

16. In the Institute's view, the appointment of a person sole does not reflect the expectation of a heterogeneous entity constituted of a broad diversity of background, capabilities and professional knowledge.

17. While the Bill does provide for the appointment of staff to the TNPM to "exercise his or her functions under this Act" (cl 12), the scope of the subject matter jurisdiction under the Bill means the TNPM would not be able to fulfil its mandate without a very significant contribution from a large staff of experts and specialists.

18. Given the funding and staffing challenges faced by the existing specialist commissions and public offices in Tasmania it seems unlikely the TNPM would be able to secure sufficient funding to support such a broad office portfolio.

19. The TLRI is also concerned that the investment of TNPM responsibilities in a sole statutory officer may follow current practice and nominate a person who already holds several such responsibilities. Specifically, the present Custodial Inspector – the person whom the TLRI understands may be appointed to the TNPM role[12] – also acts as the: Health Complaints Commissioner; Ombudsman; Electricity Ombudsman; *de facto* Privacy, Public Interest Disclosure (whistleblowing) and RTI Commissioner(s);[13] the Mental Health Official Visitor and Prison Official Visitor; and is responsible for resolving complaints made under the Water and Sewerage Industry Act and reviewing police interception and surveillance order compliance.[14] While resources, including staff are provided to support each of these portfolios/independent offices, each reports substantial underfunding. The 2020-2021 Custodial Inspector Report, for example, noted:

> as I have consistently reported ... 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, as well as the need to cancel scheduled inspection [of a state prison] […]

[12] Elise Archer, Attorney-General and Minister for Corrections " Expanding the Custodial Inspector's role" Press Release "16 November 2020 http://www.premier.tas.gov.au/site_resources_2015/additional_releases/expanding_the_custodial_inspectors_role

[13] As the principle statutory officer responsible for the administration and review of complaints under the *Right to Information Act*, the *Personal Information Protection Act* and *the Public Interest Disclosures Act*

[14] Under *Telecommunications (Interception) Tasmania Act 1999*, the *Police Powers (Controlled Operations) Act 2006* and the *Police Powers (Surveillance Devices) Act 2006*

> only one research task [has been undertaken] since the inspectorate commenced […] due to workload demands. There are many research tasks which would assist the inspectorate in its understanding of best practice to provide well researched advice and recommendations.
>
> Monitoring tasks have also been negatively impacted by the inspectorate's inadequate staffing […] [including] monitoring of vulnerable units.

20. Given this is the case in respect of the narrower remit of the Custodial Inspector it is questionable that the same statutory office will be able to fulfil the needs of a much broader NPM mandate within the same statutory, resourcing and operational framework.

21. Whilst the Custodial Inspector, as Ombudsman is also responsible for a number of statutory offices relevant to the broader subjects of involuntary detention (including health complaints, mental health and prison inspectorates), the existing lack of resourcing across each of these public offices suggests that the divide between the TNPM and those offices would, very understandably, be somewhat porous. That is, the only way to accommodate the broader mandate of the office would be to move specialist staff from one office into the other. Whilst technical compliance with OPCAT may arguably be achieved by such secondments, the broader administrative arrangement would in the TLRI's view be contrary to the spirit of OPCAT, namely the expectation that "NPM functions should be located within a separate unit or department, with its own staff and budget", and involve a plurality of expertise relevant to the broad range of subjects of institutional detention.[15]

22. In the Institute's view the inability or incapacity of specialist state bodies to effectively carry out their scrutiny functions is a core concern within the TNPM mandate. Indeed, the ability of detainees to access fundamental administrative services or rights, the timeliness of state bodies to respond to or investigate administrative issues, and the sufficiency of investigation and review have direct and substantial impact on the human rights of persons in detention. It is for this reason that the Convention directs States to "take effective measures to prevent acts of torture and other cruel, inhuman or degrading treatment" through "various legislative, administrative […] and other measures".[16] Furthermore:

[15] NPM Guidelines [32].

[16] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Article 2

- The lack of regular visits by the appropriate state inspection bodies may be part of the broader reason that facilities for detention degrade to an inhuman level is relevant to the failure of the state to "keep under systematic review […] arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment".[17]
- Delays in obtaining administrative review of a public officer's failure or refusal to conduct inspections, or the inability to obtain inspectors or right to information about the sufficiency of inspections themselves is relevant to the failure of the state to ensure that "any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities".[18]

23. Investing all of these roles in a single person, along with the TNPM role, leads to potential for actual or perceived conflicts, internal co-dependencies and regulatory capture. In sum, such factors would serve to undermine public confidence in the TNPM's ability to freely and independently pursue its mandate.

24. In the Institute's view there are two statutory frameworks available that are: more in line with the objectives of OPCAT; more easily mapped to its obligations and NPM guidelines; and better able to avoid the perceived or actual conflicts set out above without generating unnecessary regulatory or financial burdens on the state. These are set out in the Appendix [see p 30]. In summary these are:

- **A council model** which designates a secretariat overseen by a Council of public and civil society offices headed by an independent statutory officer.
  - Such a model is used in the United Kingdom, and an Australian statutory analogue is the Administrative Review Council, which was serviced by a secretariat staff.
  - The secretariat would allow a combination of existing and future statutory offices to work individually or collaboratively or individually to prevent cruel, inhumane and degrading treatment across Tasmania, led by the Tasmanian Ombudsman.

[17] Ibid, Article 11.

[18] Ibid. Article 13

- Such a Council could be constituted of, at a minimum, the Children's Commission, Anti-Discrimination Commissioner. Additional Council members may include:
    - The Public Guardian;
    - Delegates (who are not the Ombudsman) of the Custodial Inspector and Health Complaints Commissioner (who are both the same person as the Ombudsman);
    - Civil society representatives [see paras 31-34 p 13], including Tasmanian aboriginal representatives, and experts in elder abuse and disability rights;
    - A member of the Tasmanian Law Society and/or Tasmanian Bar;
    - Commonwealth officers holding appointments relevant to places of detention for which there are shared federal and state responsibilities.[19]
- The Institute considers this is the most cost-effective multi-membership model which also allows for expansion over time and potential to incorporate a broader range of public office holders and civil society representatives.

- **A multi-member Commission** established as a statutory authority (body corporate with perpetual succession), constituted specialist members responsible for subject matter jurisdiction relevant to OPCAT.
    - A Tasmanian analogue is the multi-member Tasmanian Liquor and Gaming Commission, which is constituted of three specialist commissioners, assisted by inspectors that monitor prescribed premises for compliance with the Act. A similar model could easily be substituted for the single Commissioner found in the current Bill.[20]
    - Given the OPCAT mandate, the TLRI would recommend a commission constituted of at least four members with expertise in: criminal justice, detention, and/or prisons; mental health care; disability rights; Children and young people; aged care and the rights of older people.
    - The Institute favours this model as the most appropriate to the mandate of OPCAT.

[19] The Institute also understands that there is no legal or constitutional bar to the appointment of persons holding executive office at the Commonwealth level to the membership of a Tasmanian statutory office. Thus, for instance, Commonwealth Officers responsible for aged care could participate in the Council, so long as they were: permitted to do so under Commonwealth law; and the appointment does not give rise to legal conflicts under Tasmanian law. Indeed, the plurality of membership of a Council Secretariat model would ensure that an individual has power to regulate the potential conflicts of those carrying out functions in their roles as 'officers' of the NPM, in addition to ensuring that those with appropriate qualifications, diversity and background are executing those functions.

[20] Noting the Liquor and Gaming Commission is not statutorily independent and the TNMP must be.

25. The Institute notes that, whilst the collaborative model pursued in other Australian jurisdictions is more pluralist in its membership, it has concerns about structural independence, autonomy and resourcing set out above, at least in the Tasmanian context. The Institute does not favour such a model for Tasmania.

26. Noting what is above, the Institute recommends removing the refence to "a person" in clause 8 and inserting language consistent with the establishment of a body. References to the TNPM as a 'he or she' will need to be replaced throughout the Bill with appropriate reference to the TNPM as a body.

27. The Institute also recommends inserting the words "or delegates" after the words "and any staff" in clause 10 to ensure that all individuals working within the remit of the TNPM are captured. Independence would also be enhanced by the addition of provisions regarding security of tenure, remuneration, period of appointment, and conditions for dismissal.

Staff

28. Clause 12 of the Bill designates staffing arrangements for the TNPM.

29. To fulfil its functions, the NPM needs to have a deep understanding of the particular challenges and risks faced by those most vulnerable to deprivation of liberty. Recruiting NPM staff with these lived experiences and/or cultural knowledge will strengthen the mechanism's effectiveness as well as the level of trust that the public places in its work. Of particular concern to TLRI is the lack of mandated representation of Tasmanian Aboriginal[21] or disabled people or their carers in the membership or staffing of the TNPM.[22]

30. The Institute therefore recommends adding to clause 12(4) a requirement that the TNPM prioritise making efforts to recruit and retain staff who are Aboriginal and Torres Strait Islander and people with a disability.

[21] According to the Australian Bureau of Statistics, on 30 June 2020, Aboriginal and Torres Strait Islander prisoners made up 29 percent of all prisoners in Australia; and in Tasmania Aboriginal and Torres Strait Islander prisoners increased by 4 percent from 140 to 145.
[22] In its Disability Inclusive National Preventive Mechanism Position Paper, Disabled People's Organisations Australia also noted that: "People with disability are significantly over-represented in places of detention and experience much higher rates of all forms of violence, torture and ill-treatment".

Civil Society provisions

31. More broadly the Institute encourages the Government to incorporate express provisions for the involvement in, and contribution to, the TNPM by Tasmanian civil society.

32. Although OPCAT does not explicitly state NPMs need to establish formal partnerships with civil society, there is ongoing recognition from the Subcommittee on Prevention that this is best practice.[23] Norway offers an example of how this can be reflected in the legislation: Chapter 4, Section 19 of the *Civil Ombudsman Act* stipulates the appointment of an advisory committee, which is to contribute expertise and advice to the NPMs work. That committee is comprised of 18 members representing organisations with expertise in areas such as: human rights; children; equality and anti-discrimination; user experience from different sectors and conditions for various groups of people who are deprived of their liberty. The advisory committee meets as part of the NPM three times a year, and maintains a continuous dialogue as needed.

33. In Australia, the Commonwealth Ombudsman has noted that:

> The work of the NPM network is likely to be informed by the views of civil society and by lived experience of detention. NPMs may seek to apply civil society's knowledge and expertise. Once NPMs are established, they may wish to consider whether relevant civil society representatives could inform their inspection regimes, such as through the establishment of formal advisory committees, or informal ad hoc advice or submissions. It may also be appropriate in some circumstances for civil society representatives to participate in inspections.[24]

34. The Australian Human Rights Commission has similarly noted that "formal cooperation agreements between the NPM bodies and civil society organisations set out both how civil society organisations can feed into the inspection process and how the NPM bodies can rely on civil society expertise".[25]

[23] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, SPT Observation Report to New Zealand, CAT/OP/NZL/1 (2017); Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, SPT Report to the NPM of Spain, CAT/OP/ESP/2 (2018).
[24] Commonwealth Ombudsman (September 2019) Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; (OPCAT) Baseline Assessment Of Australia's OPCAT Readiness, p43 3.14 https://www.ombudsman.gov.au/__data/assets/pdf_file/0025/106657/Ombudsman-Report- Implementation-of-OPCAT.pdf.
[25] Australian Human Rights Commission (2020) Implementing OPCAT in Australia, p11. https://humanrights.gov.au/sites/default/files/document/publication/ahrc_2020_implementing_opc at.pdf

35. As noted above [see para 24], civil society representatives could participate in a Council / Secretariat model. Alternatively, a Board or Committee of the TNPM constituted of civil society representatives, could be established to assist the office in the exercise of its functions.

2. Resourcing

- TLRI recommends that appropriate funding and staffing for the office of the TNPM be specified within the principal bill or consequential amendments.

36. The Institute has set out several concerns about the potential for staff and resourcing shortages to undermine the efficacy of the TNPM and its capacity to pursue its legislative and international law mandate [see paras 21-24]. In addition, the Institute also highlights that, under clause 38, the administration of this Act is assigned to the Minister for Corrections, and the department responsible to that Minister in relation to the administration of this Act is the Department of Justice.

37. As the continuing funding challenges faced by the Ombudsman / Health Complaints Commission / Custodial Inspector has shown, the reliance on annual funding allocations from regular discretionary funding allocations from the Department or Minister makes an independent inspectorate highly vulnerable.

38. The Commonwealth Ombudsman has noted that:

> The [Subcommittee on Prevention] has previously been critical of inspectorates housed within their respective ministries, or connected financially, logistically or in a supervisory capacity within their ministries and reiterates that '[f]inancial independence and the ability to make budgetary allocations according to priorities is another key requirement for NPMs'.[26]

39. Article 18 of OPCAT provides that the "States Parties undertake to make available the necessary resources for the functioning of the national preventative mechanisms". The NPM Guidelines further stipulate:

> States parties 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. Financial autonomy is a fundamental prerequisite for independence. The legislation providing for the establishment of NPMs should also

[26] Commonwealth Ombudsman (September 2019) Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; (OPCAT) Baseline Assessment Of Australia's OPCAT Readiness, p17 2.7.

> include provisions regarding the source and nature of their funding, and specify the process for the allocation of annual funding to the NPMs.[27]

40. In relation to establishing legislation, the Subcommittee on Prevention recommends that: "[t]he mechanism's legal framework should […] provide for outward-facing functions of the NPM […] and require a separate budget line in the State budget for the funding of the NPM, in order to ensure its continuous financial and operational autonomy".[28] Similar requirements for financial and administrative autonomy may be found in the *Paris Principles*.

41. In addition to attending places in which persons are deprived of their liberty, the TNPM may reasonably be required to perform a number of ancillary duties, including commenting on existing and draft legislation, engaging relevant stakeholders in ongoing human rights education and training, consulting with civil society stakeholders, and revising existing standards for the various forms of detention within the NPM remit. As such, it is imperative that the Tasmanian NPM's legal framework guarantees the required resources and funding independent of a department to which it is responsible for monitoring and reporting.

42. The Institute recommends adding provisions that guarantee that the TNPM is provided with adequate resources. The Institute recommends adding the following provision, which exists in each of the three Schedules of the South Australian *OPCAT Implementation Bill 2021*:

> **Staff and resources**
>
> The NPM must be provided with the resources reasonably required for exercising their functions under this Schedule and the *OPCAT implementation Act 2021*.

[27] https://www.ohchr.org/Documents/Publications/NPM_Guide_EN.pdf, page 16.

[28] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (12 December 2019) Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of Turkey, CAT/OP/TUR/1, paragraph 21.

3. Accountability

- TLRI recommends that the reporting role of the office of the TNPM to the Parliament be broader and articulated to ensure effective scrutiny of Ministerial and Departmental compliance with OPCAT in accordance with Tasmania's system of representative and responsible government.

43. OPCAT directs States to invest NPMs with a range of powers of recommendation and reporting about the treatment and conditions of persons detained. NPMs are to variously report to "relevant authorities"[29] with the aim of ensuring those authorities "enter into a dialogue […] on possible implementation measures" to improve those conditions.[30] NPMs are also to produce, publish and disseminate annual reports to the Parliament.[31]

44. The Institute welcomes the inclusion of clause 9 of the Bill which sets out the functions of the TNPM which include, *inter alia*, "to publish reports, recommendations, advice or findings in relation to detainees or places of detention". It also welcomes the provisions in clauses 18, 23 and 24 of the Bill which, with some adjustment, will support a TNPM with accountability measures that will enhance the positive impact of the Bill.[32]

45. Clause 18 of the Bill makes provision for the TNPM making recommendations or providing advice with respect to an inspection carried out of a place of detention. Clause 18(4) specifically addresses circumstances where it appears to the TNPM that "no appropriate steps have been taken within a reasonable time". After "considering any comments made by or on behalf of the relevant authority to whom the recommendation was made or advice was

[29] Article 19(b) and (c)

[30] Article 22.

[31] Article 23 of OPCAT provides: "The States Parties to the present Protocol undertake to publish and disseminate the annual reports of the national preventative mechanisms". This is further elaborated in the NPM Guidelines at para 29: The State should publish and widely disseminate the Annual Reports of the NPM. It should also ensure that it is presented to, and discussed in, by the national legislative assembly, or Parliament. The Annual reports of the NPM should also be transmitted to the SPT which will arrange for their publication on its website

[32] Clause 23 of the Bill provides for an annual report to be submitted by the TNPM to the Commonwealth Ombudsman (or another body nominated as the National Preventive Mechanism Coordinator from time to time) with that report to include a description of the TNPM activities, an evaluation of the response of relevant authorities to the TNPM recommendations or advice; and any recommendations for legislative change or administrative action.

provided", the TNPM is to send to the Premier and the responsible Minister "[a] copy of that recommendation or advice together with a copy of any such comments".

46. Beyond this the Institute notes that the Bill requires a higher level of obligatory reporting to the Tasmanian Parliament. There is not, for instance, any legislative mechanism by which the TNPM can report to the Parliament at the same time it reports to the Premier and responsible Minister, or alternatively if the Premier and responsible Minister do not themselves take appropriate steps "within a reasonable time". More broadly the TNMP should prosecute its constitutional obligation to parliament at any time it is reporting to other state, commonwealth or international authorities.

47. TLRI reiterates that this Bill is to be enacted by the Parliament as part of its commitment to preventing cruel, inhumane and degrading treatment. The Parliament has a direct and legitimate interest in being regularly appraised of the executive's conduct in all aspects of government across the state and whether that conduct complies with the legislative framework which it has enacted to regulate that conduct. Indeed, given Tasmania is a subdivision of a state of Australia in which a dualist system of implementation for the purposes of international law, the responsibility of Ministers of the Crown for compliance with the Bill, and the international legal obligations it subsumes into Tasmanian law are, as a matter of constitutional principle first and foremost to the Parliament. Within a system of representative and responsible government the executive owes its duties and accountabilities to Parliament which holds it to account for non-compliance with statute. As the plurality of the High Court emphasised in *Egan v Willis:*

> A system of responsible government traditionally has been considered to encompass "the means by which Parliament brings the Executive to account" so that "the Executive's primary responsibility in its prosecution of government is owed to Parliament […] [it is] the task of the legislature "to watch and control the government: to throw the light of publicity on its acts" […] whilst "the primary role of Parliament is to pass laws, it also has important functions to question and criticise government on behalf of the people" and that "to secure accountability of government activity is the very essence of responsible government".[33]

[33] *Egan v Willis* [1998] HCA 71, per Gummow, Gaudron & Hayne JJ at [41].

48. In the Institute's view, this Bill provides a unique opportunity for Parliament to broaden its supervisory function on behalf of all the people of Tasmania, but especially the most vulnerable. Indeed, it is the Institute's view that Parliament must be the principal scrutiny body by consequence of the constitutional law of the state.

49. Finally, the Institute is concerned that the Parliament be the arbiter of the termination or suspension of the TNPM. If the Governor pleads for the suspension of the office (or members, if the TNPM is not a person sole) on grounds the Parliament rejects, then the Governor should not be permitted to suspend on the same grounds unless substantially new material relevant to the suspension is found.

50. The Institute recommends the following amendments to the clauses of the Bill as they are currently articulated to bring them in line with and fulfil the aims of OPCAT:

- In clause 9(1)(k), the Institute recommends inserting "and table in Parliament" after the words "to publish"
- In clause 18(4), the Institute recommends:
  - Removing the word "may" and replacing it with "must"; and
  - Inserting "and table in Parliament" after "send to the Premier and the responsible Minister"
- In clause 23, amend sub-clause (2) to read as follows:

  > (2) The Tasmanian national preventive mechanism is required to submit an annual report within the period of 4 months after 30 June in each year to:
  >
  > (a) the National Preventive Mechanism Coordinator; and
  >
  > (b) Parliament.
- The Institute recommends adding a new subsection (i) to clause 24(3): "to Parliament"
- Clauses 7 and 8 should clarify that the Governor may not plead or address the Parliament for the suspension or removal of the TNPM (or members of the TNPM) on the same, or substantially similar grounds to those which Parliament has not previously admitted.

4. Compliance with the TNPM and Protection Against Reprisals

- TLRI recommends that there is a clear requirement for a detaining authority and its staff to comply with a TNPM request relevant to the exercise of TNPM functions.
- TLRI recommends clearer and stronger protections against reprisal must be provided for under the legislation to ensure persons who are, or have been detained are not punished or prejudiced for communicating with NPMs or any officer acting under the authority of the Bill.

Compliance with the TNPM

51. In its current form, clause 25(2)(b) is a circular provision which undercuts the essence of the TNPM's role and effectiveness. Clause 25(2)(b) provides that non-compliance with a request or requirement of the TNPM is an offence, except where compliance would require the person to provide information, answer questions or produce documents that may incriminate that person in an offence.

52. Firstly, it is unclear whether this Bill intends to refer to offences under the Bill, or instead refer to an offence under Tasmanian or Commonwealth law generally, excluding an offence under the Bill.

53. If this Bill intends the former, then it needs to specify that it means an offence *other than an offence under the Bill*, because under the Bill non-compliance with a TNPM request or requirement is itself an offence. In particular, clause 26(a) makes it an offence for a person to wilfully fail, to comply with any lawful requirement of the Tasmanian national preventive mechanism, or a member of his or her staff, *except as specified in section 25,* or unless they have a "reasonable excuse".

54. If, on the other hand, this Bill intends to refer to an offence under Tasmanian or Commonwealth law generally, then this presents a fundamental impediment to the TNPMs ability to fulfil the purpose of OPCAT, which is to identify and prevent the torture and cruel, inhuman or degrading treatment or punishment of people being deprived of their liberty.

55. Fundamentally, OPCAT is directed towards identifying and preventing serious breaches of human rights, many of which constitute a criminal offence. Article 1 of OPCAT articulates this in no uncertain terms:

> The objective of the present Protocol 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.

56. If a person refuses to provide information relevant to the mandate of the TNPM on the grounds that doing so would reveal criminal conduct towards a detainee, then the state is under a legal duty of care, as the ultimate custodian of that detainee, to investigate and stop the potential criminal activity.

57. Secondly, if a person were to use clause 25 as an exception for non-compliance, the TNPM would necessarily be aware that potentially criminal behaviour has been perpetrated by a detaining authority or staff. In fulfilling its mandate, the TNPM would then be compelled to investigate the activities of the detaining facility further, which may in turn be further obstructed by continued use of the clause 25(2) exception by the detaining authority or staff involved.

58. In addition to clause 21(1), which empowers the TNPM to refer a matter to a "relevant authority" (which includes a "public authority") in the course of exercising TNPM functions, the TLRI recommends that clause 25 be clarified and strengthened by replacing subclause 25(2) with a separate clause acknowledging existing rules or principles of law relating to privileges and immunities. The South Australian *OPCAT Implementation Bill 2021* offers an alternative in the following clause:

> **17 Protections, privileges and immunities**
>
> Nothing in this Act affects any rule or principle of law relating to—
>
> (a) legal professional privilege; or
>
> (b) "without prejudice" privilege; or
>
> (c) public interest immunity.
>
> (2) A person is excused from answering a question or producing a document or other material in connection with an inquiry if the person could not be compelled to answer the question or produce the document or material in proceedings in the Supreme 5 Court.

> (3) A person who provides information or a document to an NPM under this Act has the same protection, privileges and immunities as a witness in proceedings before the Supreme Court.
>
> (4) A person who does anything in accordance with this Act, or as required or authorised by or under this Act, cannot by so doing be held to have breached any code of professional etiquette or ethics, or to have departed from any acceptable form of professional conduct.

Powers and Immunities

59. Clause 15 of the Bill provides that the NPM is entitled to access a detainee "at all reasonable times". The qualification of the word 'access' in relation to a detainee being "at all reasonable times" is not defined in the Bill. The clause does not specify: what is reasonable, on what basis could access be refused; and how an assertion that the time of inspection is unreasonable might be challenged or reviewed.

60. Without specified criteria for what may constitute a "reasonable" time, this wording is problematic for both the TNPM as monitoring authority and the detaining authority. From the position of the detaining authority, it may seem reasonable to refuse access to a monitoring authority because of staff shortages, dangerous conditions for visitors, and other priorities or emergencies. Given the pressures that many public institutions are under, the detaining authority may legitimately believe that they have reasonable grounds for refusal. The refusal may however be perceived as a delaying tactic to cover up inappropriate conduct, if not by the TNPM, then by the public. Given the Bill has no provisions for resolving disputes about what is reasonable and what is not, a conflict between monitoring and detaining authorities is likely to be protracted, compounding issues of trust and confidence in one or both parties.

61. Article 20 of OPCAT sets out what States Parties undertake to grant the NPM to enable it to fulfil its mandate. This includes: "(c) Access to all places of detention and their installations and facilities". The NPM Guidelines further provide at para 25:

> The State should ensure that the NPM is able to carry out visits in the manner and with the frequency that the NPM itself decides. This includes the ability to conduct private interviews with those deprived of liberty and the right to carry out

> unannounced visits at all times to all places of deprivation of liberty, in accordance with the provisions of the Optional Protocol.

62. OPCAT does not limit the meaning of 'access' in the mandate that it says can be granted to the NPM. The NPM Guidelines also refer to the right of the NPM to "carry out unannounced visits at all times" which similarly connotes that the mandate of the NPM to have access should not be limited.

63. It is likely that the use of the word reasonable would impermissibly limit the ability of the TNPM to fulfil its mandate in a way that is OPCAT compliant. Particularly in the Tasmanian setting where there are shared unit settings, such as the public hospital where access to the mental health unit contained in that hospital could be rejected on an ostensibly reasonable basis where there may be staffing or resourcing limitations.

64. The TLRI recommends that the "reasonable times" provision is removed from clause 15. This would be consistent with the AHRC recommendations that the NPM "have unfettered access to places of detention and have the liberty to choose its visiting schedule".[34] It would also be consistent with the approach taken in South Australia,[35] which mediates any potential impact on the facility by obliging the NPM to, "take reasonable steps to ensure that the safe administration of the [...] facility is not compromised by the inspection". A similar obligation could be added to an "unfettered" clause 15.

65. If the removal of the "reasonable times" phrase from clause 15 is not accepted then the TLRI recommends that specific and discrete grounds to justify refusal of access by a detaining authority be set out in the Bill. Relatedly it should set out what would constitute an unreasonable excuse for refusing to comply with the TNPM or its staff – that is, wilfully obstructing, resisting or threatening an oversight body.[36] In both situations the Bill should

[34]Australian Human Rights Commission (2020) Implementing OPCAT in Australia, p28. https://humanrights.gov.au/sites/default/files/document/publication/ahrc_2020_implementing_opc at.pdf

[35] *OPCAT Implementation Bill 2021 (SA),* which in relation to the inspection of prescribed mental health facilities, prescribed custodial police stations, and the inspection of training centres permits the NPM to "inspect any part...in which detainees are detained and such other parts...as the NPM considers relevant to their functions...(and for that purpose may have free and unfettered access to the prescribed...facility)".

[36] Specifically, clause 26 'Offences against Tasmanian national preventive mechanism' - 'A person must not -- (a) without reasonable excuse, wilfully obstruct, hinder, resist or threaten the Tasmanian national preventive mechanism, or a member of his or her staff, in the exercise of functions under this Act; or (b) without reasonable excuse, refuse or wilfully fail, to comply with any lawful requirement of the Tasmanian national preventive mechanism, or a member of his or her staff, except as specified in section 25.

provide for an independent body, such as a judge or magistrate acting *persona designata,* to expeditiously resolve any dispute.

66. Article 20(d) of OPCAT provides that for the NPM to fulfil its mandate it must have:

> 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 national preventive mechanism believes may supply relevant information.

67. Clause 15(2)(a) should be amended so that it is consistent with the language in Article 20(d) of OPCAT to make clear that the interview is not only to be conducted "out of the hearing of any other person" but also without it being physically witnessed. The Institute therefore recommends the provision be removed and replaced with "must allow the Tasmanian national preventive mechanism to conduct a private interview with 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 national preventive mechanism believes may supply relevant information".

Protection Against Reprisals

- The TLRI recommends that the Bill add a penalty provision to clause 34 in order to strengthen protections for persons providing information to the TNPM.

68. The NPM Guidelines note as a basic principle that "those who engage or with whom the NPM engages in the fulfilment of its functions under the Optional Protocol should not be subject to any form of sanction, reprisal or other disability as a result of having done so". This is consistent with Article 21(1) of OPCAT, as are the comments of the UN Office of the High Commissioner for Human Rights which notes in its Practical Guide on The Role of National Preventive Mechanisms, that:

> The relevant legislation (such as the legislative act establishing NPMs) should guarantee the prohibition of ordering, applying, permitting or tolerating any sanctions against any persons or organizations for having communicated with the NPMs any information, whether true or false, and no such persons or organizations shall be otherwise prejudiced in any way.[37]

[37] United Nations Office of the High Commissioner for Human Rights (2018) Preventing Torture, The Role of National Preventive Mechanisms, A Practical Guide Professional Training Series No. 21. p 19.

69. The NPM Guidelines further specify that:

> As regards members and staff of NPMs, legislation should also specify: - privileges and immunities of members and staff, which are necessary for the independent exercise of their functions; and - protection against reprisals against members or staff, their families or any persons who have communicated with NPMs.

70. In order to strengthen protections for any persons who, in good faith, provide information to the TNPM, the TLRI recommends that a penalty provision be added. Both South Australian and West Australian provisions on victimisation are appropriate.

- The South Australian *OPCAT Implementation Bill 2021* contains a "Victimisation" provision in Part 4, Section 14. This provides the following definition: "A person who causes detriment to another on the ground, or substantially on the ground, that the other person or a third person has provided, or intends to provide, information to an NPM under this or any other Act commits an act of victimisation" (s 14(1)). The South Australian Bill proscribes victimisation, with recourse either through tort law or through the complaint mechanism under the *Equal Opportunity Act 1984*.
- Part 8 Section 50 of Western Australia's *Inspector of Custodial Services Act 2003* also offers legislated protections from reprisal for people interviewed or providing information to the Inspectorate, setting out "victimisation" as an offence punishable by fine and a term of imprisonment. TLRI recommends adopting both civil and criminal liability provisions to deal with victimisation of witnesses:

> **50. Victimisation**
>
> (1) A person must not —
>
> (a) prejudice, or threaten to prejudice, the safety or career of; or
>
> (b) intimidate or harass, or threaten to intimidate or harass; or
>
> (c) do any act that is, or is likely to be, to the detriment of, another person because the other person —
>
> (d) has provided, is providing or will or may in the future provide information to the Inspector in the performance of a function of the Inspector; or
>
> (e) has performed a function of the Inspector in relation to the other person or is performing, or will or may in the future perform, any such function. Penalty: $8 000 or imprisonment for 2 years.
>
> (2) A person who attempts to commit an offence under subsection (1) commits an offence and is liable to the penalty set out in subsection (1).

(3) A person who — (a) intends that an offence under subsection (1) be committed; and (b) incites another person to commit the offence, commits an offence and is liable to the penalty set out in subsection (1).

5. Additional Clause-Based Recommendations: Scope and Power

- The Institute recommends clarifying that vehicles used to transport persons to places of detention should be included in the definition.

Clause 5, Meaning of Place of Detention

71. Clause 5 presently sets out an expansive list of institutional facilities relevant to OPCAT, Article 4. The Institute supports a broad definition of place of detention. The Institute suggests clarifying that private places of detention may also be included within the Bill, consistent with the definition of places of detention in Article 4, and also for internal textual consistency with clause 4(2) relating to private detaining authorities.

72. The Institute suggests clarifying within the Bill that private premises which are used as places of detention under a contract, at the order, or direction of a detaining authority, are places of detention under clause 5.

73. Noting TLRI's broad support for clause 5, the Institute considers two extended definitions may cause some confusion and uncertainty, notwithstanding they are expressed as without limitation on the general incorporating definition in clause 2.

74. Clause 5(1)(a) extends the definition of place of detention to a "forensic disability facility" at which a person with intellectual or cognitive disabilities may lawfully be detained for a period of 24 hours or more.

75. The Institute is unaware of any Tasmanian legislation which uses the term "forensic disability facility". To the extent that this Bill intends to introduce the term as an expansive definitional criteria operating on clause 5(2), it should be consistent with the objects and purposes of OPCAT which this Bill seeks to implement. Notably, OPCAT Article 4 specifies that places of detention are, under OPCAT:

> *any place under its jurisdiction and control* where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence [emphasis added].

76. Article 4(2) further clarifies that 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 [emphasis added].

77. These definitions do not limit the scope of OPCAT to specified: form of detention; length of detention; or requirement for the detention or the place of detention to be "lawful". Article 4 of OPCAT thus covers any Tasmanian public or private place in which a person with intellectual or cognitive disabilities is detained for any period of time at the direction order of any officer of the state, or person acting under the authority of the state regardless of whether the place of detention was technically lawful under state law or not.[38]

78. TLRI supports the Bill extending to such situations, given the vulnerability of persons with intellectual and cognitive disabilities and the particular risks to their health and wellbeing from any form of involuntary detention, however long. This position is consistent with the recommendations of the Australian Human Rights Commission that:

> there is no temporal limitation on the 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.[39]

79. TLRI also considers it to be essential that the TNPM be provided access to places where vulnerable people are detained regardless of whether they are, or are later declared to be, unlawful, because, for instance they are: non-compliant with legislative or regulatory standards prescribed for such a facility.

80. The temporal and legal elements set out in clause 5(1)(a) are therefore not consistent with OPCAT, nor justified in relation to the particular vulnerabilities of the cohort the provision applies to. TLRI accepts that the clause operates without limitation on the incorporating

[38] The reference to jurisdiction in OPCAT, Article 4 must be read within both the overall object of the Convention but also against the particular constitutional circumstances of the implementing state party. Namely, within the Australian context Article 4 extends to places of detention which are in the geographic (physical location) jurisdiction of the State of Tasmania as a division of the state party to the Convention, but which may not lawfully fall under the authority of an officer of the State of Tasmania as a consequence of jurisdictional error. Such an order may be unlawful under Australian law, but may be legally 'effective until set aside' and binding on both the subject of detention and other persons exercising obligations to detain that person under the authority of the order [*State of NSW v Kable* (2013) 252 CLR 118] ; the proposition applies to at least judicial orders resulting in deprivation of liberty. To the extent OPCAT extends to places controlled by the state where persons are subject to detention its order, instigation consent or acquiescence the fact that the consequences of detention (including the lawfulness of the place of detention) were the result of jurisdictional error are not relevant.

[39] Australian Human Rights Commission (2020) Implementing OPCAT in Australia, p44.

definition in clause 5(2). However, the Institute is concerned about the potential for confusion and misapplication of the Act in practice as a result of the textual inconsistency contained in this clause.

81. The Institute recommends removing from clause 5(1) both the requirement that the place be one which is "lawful" and that the detention be "for a period of 24 hours or more".

82. Clause 5(3) properly extends the Bill to vehicles. However, the definition is presently limited to vehicles which are "used or operated to convey detainees". Under clause 5 detainees are persons who are "in a place of detention". This suggests that only vehicles used to convey persons who are already detained (i.e. a prisoner from one place of custodial detention to another) are included. That is, the definition is not clear about, or does not include, persons who have not previously been detained, to places of detention.

83. Given the role of clause 5(3) is to provide clarity for the public, institutions and government about places in which vulnerable persons are regularly detained in the state, the Institute also recommends that specific reference is made to:

- Youth detention centers;
- Educational institutions which use detention as a means of discipline or control;
- Residential (group home) facilities for children
- Quarantine facilities;
- Aged care facilities;
- Residential drug, alcohol and addiction rehabilitation facilities or services; and
- Disability accommodation, facilities or services.

84. The Institute recommends that the bill clarify that a range of other public and institutional facilities where vulnerable people are regularly detained are included in clause 5(3).

Clause 7, Relationship to other laws

85. Clause 7 deals with where there may be a provision of "any other Act" that would prevent or limit the exercise of any function by the TNPM or Subcommittee on Prevention. It provides that Act will have no effect or operation to the extent of any inconsistency with the Bill.

86. The Institute recommends broadening the application of this section to ensure that the TNPM is not limited in its ability to undertake its functions by inserting the words "or legislative instrument" after the words "A provision of any other Act".

Appendix 1 : Multi-member statutory models

87. **Collaborative model.** The South Australian *OPCAT Implementation Bill 2021* provides for a 'collaborative' NPM model. Section 5 of the South Australian Bill provides:

> 5—National Preventive Mechanisms for specified places of detention
>
> (1) Each official visitor under Part 3 Division 2 of the Correctional Services Act 1982 (as enacted by the Correctional Services (Accountability and Other Measures) Amendment Act 2021) will be taken to be an NPM in respect of the correctional 20 institution (within the meaning of that Division) for which they are appointed as an official visitor.
>
> (2) The Training Centre Visitor under the Youth Justice Administration Act 2016 will be taken to be the NPM in respect of training centres.
>
> (3) The Principal Community Visitor under the Mental Health Act 2009 will be taken to 25 be the NPM in respect of prescribed mental health facilities.
>
> (4) An official visitor under Part 3 Division 2 of the Correctional Services Act 1982 (as enacted by the Correctional Services (Accountability and Other Measures) Amendment Act 2021) designated by the Minister by notice in the Gazette as the NPM in respect of prescribed custodial police stations will be taken to be the NPM in 30 respect of prescribed custodial police stations.
>
> 6—Independence of NPMs
>
> (1) Despite a provision of any other Act or law, an NPM must act independently, impartially and in the public interest in the performance of functions, or the exercise of powers, under this Act. 35
>
> (2) Despite a provision of any other Act or law, an NPM is not subject to the direction and control of a Minister under this or any other Act in relation to the performance of functions, or the exercise of powers, under this or any other Act (including in relation to the content of any report or recommendation made by the NPM).

88. While this model ensures that pre-existing expertise can be utilised, it does not provide for a designated NPM so much as it identifies the office-holders who may take on NPM-designated duties. Clearly this does not align with the intention under OPCAT that "NPM functions should be located within a separate unit or department, with its own staff and budget". Nor does it appear to provide a framework to maintain independence and regulate conflicts of duty and/or interest. The model also raises some issues in the Tasmanian context

where the principle inspector and visitor roles are invested in the Tasmanian Ombudsman. A broader range of office holders might be necessary in Tasmania to ensure the model was truly 'collaborative'. Whilst the model evidence a more 'pluralistic' constitution of an NPM, the Institute does not favour such a model for Tasmania.

89. **Secretariat Model.** An arguably more sophisticated compromise, taking into account the expertise and resourcing reality in a smaller jurisdiction such as Tasmania, as well as the intended independence of the NPM, would be a 'secretariat' type model which designates a particular individual as TNPM overseeing a collection of pre-existing expert offices.

90. For instance, the UK NPM is a Council constituted of 21 separate statutory offices including, *inter alia*, the UK's Care Quality Commission; Children's Commissioner; Healthcare Inspectorate; Independent Monitoring Boards; Lay; Prison and Police Inspectorates; and Lay Observers.[40] Members coordinate and share resources, and may cooperatively inspect places of detention relevant to their jurisdictions. The NPM is Chaired by a HM Inspectorate of Prisons (England and Wales); with its members operating in subject-matter specific sub-groups, supported by an independent secretariat.

91. A statutory analogue of a Secretariat model may be found in the (now discontinued) Administrative Review Council ("the Council") was an independent policy advisory body established under the *Administrative Appeals Tribunal Act 1975* (Cth) to oversee the Commonwealth administrative law system and its institutions.[41]

92. Under s 49 of the Act the Council was composed of a President, members appointed by the Governor-General, and representatives of peak commissions and administrative bodies including the Ombudsman. Members were to be a group of experts from a diverse range of fields relevant to administrative law.[42] The Council's members were supported by a small staff and its function was to review the administrative law system, conduct inquiries, and make recommendations to the responsible Minister.

[40] https://www.nationalpreventivemechanism.org.uk/members/

[41] https://auspublaw.org/2021/05/the-kerr-reports-vision-for-the-administrative-review-council/

[42] Under s 50 of the Act, members of the Council must meet a standard for expertise, knowledge and experience.

93. Under s 49(2A) of the Act, the Governor-General appointed one of the members of the Council to be President. Members were appointed for a period not exceeding 3 years as specified in the instrument of their appointment, but they are eligible for re-appointment. Members were also appointed for the purposes of a particular project that was being, or was to be, undertaken by the Council.

94. The Secretariat model would allow a combination of existing and future statutory offices to work collaboratively or individually to prevent cruel, inhumane and degrading treatment across Tasmania. The TNPM would benefit from the Council's prescribed practice of appointing members as required where a project required particular expertise. For example, the Ombudsman could act as head of the TNPM Council, managing potential conflicts and directing its conduct under the bill with a range of statutory office holders; and civil society representatives as members .

95. **Multi-member commission.** The most developed option, of course, is to establish a full Commission as a body corporate with perpetual succession. Members could exercise all the powers, privileges and immunities under the current bill, attend inspections as necessary, and would be responsible for reporting under the Bill. Inspectors may be appointed to the Commission and exercise the current powers, privileges and immunities set out under the present Bill to inspect any place of detention in Tasmania.

96. Whilst there are a range of Tasmanian multi-member commissions to compare to, notably the multi member *Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings* established by the present Government under the *Commissions of Inquiry Act 1995*. That Commission is concerned with investigating the Government's current responses to allegations and incidents of child sexual abuse in institutions controlled or funded by the Government public (e.g. hospitals, public schools, youth detention centres, out-of-home care). Beyond evidencing the role of a multi-member commission in investigating abuse in institutional settings: the powers, functions and fixed-term reporting role of that Commission are substantially different to the role envisioned for NPMs in OPCAT.

97. A more appropriate analogue is the multi-member Tasmanian Liquor and Gaming Commission, which is a three member Commission established under Part 7 of the *Gaming Control Act 1993*. The Commission is assisted by inspectors (established under Part 8 of the

Act) who have the power entering prescribed premises "at any time" for the purposes of ensuring compliance with the Act. That includes *inter alia* "ascertaining whether the operation of those premises is being properly conducted, supervised and managed" and "ascertaining whether the provisions of this Act or any other Act are being complied with".