

Submission to the *Tasmanian national preventative mechanism Implementation project: Consultation paper 2* of May 2023.

Meg Webb MLC

July 2023.

Introductory Comments

I welcome the opportunity to provide comment to this second consultation paper on the Tasmanian national preventative mechanism (TNPM) Implementation project.

At the outset I wish to acknowledge and commend the work undertaken by the TNPM team to establish a rigorous state national preventative mechanism swiftly, and in accordance with the intent and spirit of the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT), particularly in light of the delay by Australia, following its 2017 ratification of the Protocol as the State signatory, to establish the National Preventative Mechanism for four years.

Further, it is also worth acknowledging that since the passage and commencement of the Tasmanian *OPCAT Implementation Act 2021*, the state has already hosted a visit by the UN Subcommittee on Prevention of Torture (SPT) which, apparently, successfully visited six state locations where Tasmanians deprived of their liberty were held, prior to the SPT's extraordinary and unfortunate suspension of its Australian-wide visit in October last year, and which was finally terminated in February this year.

As noted in the joint-statement signed by all members of the Australian National Preventative Mechanism (NPM), including the Tasmanian NPM, responding to the formal termination of the SPT,

*"Australian governments, detaining authorities, civil society organisations and other oversight bodies have lost a valuable opportunity to work cooperatively with the SPT to progress our shared goal of protecting the human rights of people in detention."*¹

However, the same statement included a commendable commitment by Australia's network of NPMs to continue their, *"work of identifying risks of ill-treatment in places of detention and making recommendations for improving the treatment and conditions of people who are detained."*²

I also note the recent correspondence from the Tasmanian NPM to Tasmanian Parliamentarians providing progressive updates on the implementation project, the latest being that of 29 May this year, which is much appreciated. As elected representatives of the Tasmanian community, while we may not necessarily individually possess specific expertise relating to the TNPM's role and functions, we do have a responsibility to keep ourselves informed of developments impacting the human rights of Tasmanian citizens. Further, we have a responsibility to be receptive to advice from the TNPM, while also require accountability of the government of the day regarding how it upholds Tasmania's obligations under OPCAT specifically, and human rights obligations more broadly.

It is the human rights ramifications of the Tasmanian NPM implementation project which this submission will focus upon.

¹ Joint Statement – *Subcommittee on Prevention Of Torture Decides To Terminate Visit To Australia*, Members of The Australian National Preventive Mechanism (NPM), February 2023.

² Ibid.

Scope of Submission

The second consultation paper requests feedback to the following four questions:

1. What does your organisation see as the core issues affecting populations that you represent in places of detention, that the Tasmanian NPM should consider as a matter of priority?
2. What does your organisation see as the main barrier(s) to preventing torture and ill-treatment in places of detention, and to people in these places engaging with the Tasmanian NPM?
3. Are there any international obligations or other materials missing from this consultation paper that your organisation considers the Tasmanian NPM should have regard to when exercising its functions?
4. Are there any examples of best practice in preventing torture and ill-treatment that you consider the Tasmanian NPM should have regard to during the development of its operating policies and procedures?³

It is beyond the scope of this submission to provide detailed responses to each of the above questions, instead it will focus on three themes which are pertinent to all the above questions:

- The need to develop a human rights culture within Tasmania;
- Strengthened engagement with civil society; and
- Integration of the TNPMS's educative role within its implementation stages.

Investing in a Human Rights culture within Tasmanian Agencies

Currently Tasmania lacks a coherent and consistent human rights framework. In fact, a Tasmania Law Reform Institute (TLRI) report into whether Tasmania needed a Human Rights Act recommended such legislation on the grounds that Tasmanian's human rights protections are fragmented, and that:

*"... the protections offered by these sources are disjointed and incomplete. Even for those with legal expertise, working out what rights are protected in Tasmania, when and how, is a complex task."*⁴

While it is not the role of the TNPM to address this situation on its own, it is important that in undertaking its work and functions, it does so explicitly recognising the fragmented human rights protections framework in which it will be operating.

Despite the lack of a formal and coherent Tasmanian human rights framework, we need to behave as if there were one in place.

This can be done by incorporating a human-rights-centric approach when developing operational policy and procedures, educative materials and when engaging with civil society, media, government agencies, and other stakeholders. For example, the consistent integration of the Australian Human Rights Commission's identified principles, including positive duty and participation duty on public authorities, into the implementation project would be consistent with OPCAT as well as 'leading by example' to contribute to the development of a robust human rights culture across Tasmanian agencies.⁵

Such an approach would be consistent with the AHRC's recent submission to the UN SPT which states, "*that 'merely adjusting the current processes for detention inspections cannot be an end in itself. Instead, the*

³ *Tasmanian national preventive mechanism: Implementation project - Consultation paper 2: Australia's international obligations related to the prevention of torture and ill-treatment*, May 2023, pg: 10.

⁴ TLRI, *A Charter of Rights for Tasmania*, Report No 10, October 2007: pg 28.

⁵ AHRC, *Free and Equal, A Human Rights Act for Australia*, December 2022.

changes required by OPCAT should be pursued in a way that promotes stronger and more consistent human rights protections for people who are detained across all jurisdictions.”⁶

Engagement with civil society

Clearly, engagement with civil society is a core role and responsibility of the TNPM. For the purposes of this submission civil society is taken to include professional entities and associations, non-government organisations, academics, and volunteer visitors.⁷

As was recognised by then-Attorney General George Brandis when announcing in 2017 that Australia would ratify OPCAT, civil society had driven the advocacy for OPCAT ratification for over a decade.

While I acknowledge the effort to engage with Tasmanian civil society thus far, as demonstrated by the current consultation process, however, there is scope for this to be developed into a more ongoing and interactive framework. This could be achieved by fostering the development of a Tasmanian network of civil society entities by holding meetings or workshops to foster a proactive and dynamic exchange of experience and insights.

Further, the establishment of a civil society advisory council should be considered and formalised through the implementation plan.

Such an advisory council can facilitate a shared understanding of a consistent human rights-centric conceptual and language architecture, which again is an investment in the TNPM’s identified proactive and preventative focus. Crucially, there needs to be a frank flow of information in both directions between the TNPM and the civil society network.

In this context, it is worth noting an early AHRC proposal relating to civil society engagement which recommended that:

“... [T]he federal agency responsible for NPM co-ordination establish formal arrangements with civil society representatives, such as an advisory committee, during the early stages of OPCAT implementation.”⁸

Although this proposal was presented for the national NPM, it is just as applicable to state and territory NPMs.

Additionally, it is important to recognise that civil society entities, such as volunteer Official Visitor programs, can actually fill the gaps that authorities are either unable or unwilling to provide:

“Leaders from women’s groups and cultural, ethnic or religious groups, for example, may be able to meet needs or provide guidance for detainees from different backgrounds in a way that authorities cannot.”⁹

Significantly, these civil society supportive roles and relationships can also contribute to detainees’ rehabilitation, both during and post release.

TNPM Draft Expectations

The development of the draft ‘Expectations’ for the defined five types of deprivation of liberty is an example of an opportunity by which to integrate and strengthen the working relationship between the TNPM and civil society (TNPM, 2023; pg 7). While it is commendable that the TNPM has engaged experts to lead the development of these draft ‘Expectations’ in response to stakeholder consultation, those experts need to involve and engage with local civil society organisations in an interactive manner.

⁶ AHRC, *Draft General Comment on Article 4 of Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT): Submission to United Nations Subcommittee on Prevention of Torture*, 12 April 2023, Pg: 2.

⁷ See Minty, R, 2019.

⁸ AHRC, 2017, *OPCAT in Australia – Interim Report to the Commonwealth Attorney-General*.

⁹ Minty, R, “Involving civil society in preventing ill treatment in detention: maximising OPCAT’s opportunity for Australia,” *Australian Journal of Human Rights*, Vol. 25, No. 1, 2019, pg: 96.

As observed by the ACT Office of the Inspector of Correctional Services, civil society organisations are crucial OPCAT stakeholders when delivering on the intent of the treaty:

“... engagement by civil society is essential for maximising the impact of the treaty, and ensuring that the entities designated to monitor under OPCAT, known as National Preventive Mechanisms (NPMs), have broad expertise and an understanding of experiences of vulnerable groups deprived of their liberty.”¹⁰

Again, this is reiterated by the AHRC 2017 *Interim Report* which also proposed:

“... the Australian Government commit to the development of national standards that govern how detention inspections should take place by the bodies performing the NPM function. These standards should... provide for community members to identify concerning detention practices... [and] ensure appropriate expertise among inspectors, including by working with specialists and civil society representatives.”¹¹

Considering the draft ‘Expectations’ flagged by the Consultation paper 2 would appear to have a similar function to the above referenced ‘national standards’, it would be consistent to incorporate civil society representatives to be involved in the development of those draft Expectations by working and liaising with the current experts involved.

Clearly there is a range of options as to how best utilise the skills and expertise which currently exists within Tasmania’s civil society. There needs to be a clearly articulated plan detailing how civil society is to be engaged as a key partner in delivering on OPCAT. The implementation stages of the TNPM is crucial to defining - in conjunction with civil society - the model by which civil society will be integrated in Tasmania’s OPCAT framework. For example, Minty identifies three broad categories:

“... direct incorporation of civil society into NPMs; civil society working in an informal or advisory capacity with the NPM; and civil society performing a ‘watchdog’ role to keep the NPM accountable”;

And goes on to suggest, *“... given the breadth of civil society groups working in closed environments, it may be that different CSOs within a jurisdiction fulfil each role – for example, a medical association could participate in a formal NPM advisory board, a disability organisation may be part of the NPM for certain visits, and a human rights law organisation may scrutinise the NPM’s work.”¹²*

Integration of the TNPM’s educative role within its implementation stage

A key best practice mechanism when engaging in public consultation is ‘closing the loop’.

My experience with organisations and individuals who participate in public consultation processes, has provided an understanding of the degree of frustration when it is not apparent whether, or how, any input has been considered and utilised by the agency receiving the submissions. In worst case scenarios this frustration can result in disillusionment and disengagement.

Well established best practice public consultation processes can readily address that frustration, including the publication of submissions received (other than those requesting confidentiality) and the provision of a summary document providing a comparative analysis of key themes canvassed in those received submissions.

This is demonstrated by some government agencies when consulting on exposure draft legislation. Another recent example is the Tasmanian Integrity Commission’s public consultation process being undertaken on the proposed new lobbying oversight reforms.

Not only does this approach of ‘closing the loop’ when it comes to submission-based consultation processes provide some insight with how submission content is being considered and used, but it helps extend the

¹⁰ Minty, R, 2019, pg: 92.

¹¹ AHRC, 2017, *Interim Report*.

¹² Minty, R, 2019, pg: 98.

‘conversation’ with those engaged in the process and invests in maintaining that ongoing engagement and awareness.

As such it is also consistent with the TNPM’s educative role, as well as the preventative lens that it seeks to implement.

Rigorous Reporting

While recognising the various confidentiality and potential sensitivity requirements the TNPM must operate within, and its crucial independence, it is important to establish a clear precedent of informative annual and/or other periodic public reports. For example, I note the AHRC’s recommended principle that:

“The NPM networks annual reports should publish data and information relevant to drive law reform activities. For example, the NPM could publish the number of individuals on ‘unfit to plead’ orders.”¹³

By providing evidence-based and data driven report, this will then contribute to fostering the Tasmanian community’s awareness of the OPCAT principles and the TNPM’s work, while also playing a significant educative role for government agencies, parliamentarians, and media outlets.

Seeing in action the implementation of a human rights-driven approach applied to monitoring the conditions of those deprived of their liberty across the range of places of detention, is a key mechanism by which to deliver the stated goal of ongoing proactive engagement with, and education of, policy makers, stakeholders, as well as the broader community.

Concluding Comments:

Although not strictly falling under the four questions posed in the *Consultation Report No. 2*, I wish to take this opportunity to acknowledge the importance of adequate funding of the TNPM in order to fully comply with OPCAT. As stated by the AHRC,

“Resourcing should be provided in a way that enables NPM bodies to fulfil OPCAT’s core functions; respects the functional, structural and personal independence of NPM bodies; and ensures effective liaison with, and involvement of, civil society representatives and people with lived experience of detention in the OPCAT inspection process.”¹⁴

Clearly, the TNPM is not responsible for allocating its resourcing, however it is urged during the Implementation Project that all budgeting and resourcing needs are clearly assessed and identified, and if current funding is deemed inadequate that a submission is made to the State government as a priority. Additionally, it is recommended that any resourcing constraints which impact upon the TNPM from fulfilling all inspection, follow-up, effective liaison with civil society, and educative roles are cited explicitly in periodic public reports.

Community confidence in the TNPM will be maintained and boosted by proactive demonstration that all matters which may impact upon the TNPM’s capacity, including resourcing, to deliver on all its core roles and functions are being routinely examined in a frank and fearless manner. Clearly, inadequate resourcing and/or lack of community confidence that the TNPM has the capacity to fulfil its role would potentially become a barrier to Tasmanians deprived of their liberty in places of detention engaging with the TNPM as highlighted by the Consultation Paper’s second question.

In closing, the consultation regarding the TNPM Implementation Plan is to be commended, and hopefully this can be developed further particularly in the context of integrating a clear, transparent and accountable model for ongoing and interactive involvement of civil society within Tasmania’s OPCAT framework, as well as a robust parliamentary reporting regime.

¹³ AHRC, *Road Map to OPCAT Compliance*, 17 October 2022, Pg: 13.

¹⁴ AHRC, *Road Map to OPCAT Compliance*, 17 October 2022 Pg: 12.

Reference List

Australian Human Rights Commission (AHRC), April 2023, *Draft General Comment on Article 4 of Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT): Submission to United Nations Subcommittee on Prevention of Torture.*

Australian Human Rights Commission (AHRC), December 2022, *Free and Equal, A Human Rights Act for Australia.*

Australian Human Rights Commission (AHRC), October 2022, *Road Map to OPCAT Compliance.*

Australian Human Rights Commission (AHRC), 2017, *OPCAT in Australia – Interim Report to the Commonwealth Attorney-General.*

Minty, R, 2019, “Involving civil society in preventing ill treatment in detention: maximising OPCAT’s opportunity for Australia,” *Australian Journal of Human Rights*, Vol. 25, No. 1; pgs 92-112.

Tasmanian Law Reform Institute, October 2007, *A Charter of Rights for Tasmania*, Report No 10.

Tasmanian National Preventative Mechanism, May 2023, *Implementation project - Consultation paper 2: Australia’s international obligations related to the prevention of torture and ill-treatment.*