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Ms Brooke Craven
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Dear Ms Craven

Custodial Inspector Amendment (OPCAT) Bill

Thank you for the opportunity to comment on the draft *Custodial Inspector Amendment (OPCAT) Bill 2020* (the draft Bill).

I note that I have previously made a submission regarding the Optional Protocol for the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) in Australia, as part of the Australian Human Rights Commission (AHRC) consultation on the implementation of OPCAT in Australia.

I have attached that submission for your reference.

Scope of the draft Bill

The draft Bill sets out that inspections are limited to closed psychiatric facilities, custodial centres, forensic disability facilities and police stations.

In our previous submission (to AHRC) I noted that inspections conducted under the *Custodial Inspector Act 2016* (Tas) (Custodial Inspector Act) do not include non-traditional places of detainment such as:

- aged care facilities
- dementia or other mental health units
- group home facilities for children
- hospitals
- police and emergency transport vehicles (other than those connected with a custodial centre)
- court cell complexes

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It is difficult to say that the objectives of OPCAT will be achieved by the draft Bill in its current form. The purpose of the treaty is to establish a preventative approach in environments where people are 'deprived of their liberty'¹.

It is my view that the draft Bill seeks to implement OPCAT according to its narrowest interpretation. While an extension of the Custodial Inspector's duties is a good starting point as a National Preventative Mechanism (NPM) in Tasmania, it does not go far enough.

The United Nations Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment encourages a broad approach to the definition of detention, stating²:

The preventive approach underpinning the Optional Protocol means that as extensive an interpretation as possible should be made in order to maximize the preventive impact of the work of the national preventive mechanism.

The Subcommittee therefore takes the view that any place in which persons are deprived of their liberty, in the sense of not being free to leave, or in which the Subcommittee considers that persons might be being deprived of their liberty, should fall within the scope of the Optional Protocol, if the deprivation of liberty relates to a situation in which the State either exercises, or might be expected to exercise a regulatory function. In all situations, the national preventive mechanism should also be mindful of the principle of proportionality when determining its priorities and the focus of its work.

I consider that the Custodial Inspector is the appropriate body to monitor the facilities set out in the draft Bill. Nonetheless, if this is the only measure taken by the Tasmanian Government to implement OPCAT, it will fail to ensure a genuine preventative approach is implemented and, to this end, it will not achieve the comprehensive system of checks and balances as intended by OPCAT.

I submit that the Tasmanian Government has the opportunity to provide a new benchmark for treatment of significantly vulnerable population groups in our state, many of whom are detained in the list of places set out above. If the Government were to extend the scope of this legislative development and establish other NPMs, this would demonstrate leadership and a commitment to upholding and protecting the human rights of all Tasmanians who are deprived of their liberty.

¹ *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, opened for signature 4 February 2003, 2375 UNTS 273 (entered into force 22 June 2006) art 1 ('OPCAT').

² United Nations Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Ninth Annual Report*, UN Doc CAT/C/57/4 (22 March 2016), 19, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/059/73/PDF/G1605973.pdf?OpenElement>>

A wider approach has been adopted by New Zealand, which has enabled the monitoring of non-traditional settings, such as aged care facilities and dementia units. This was done through including 'health and disability places of detention' as facilities falling within the scope of the monitoring activities of the relevant NPM.³

I refer to the Australian Commonwealth Ombudsman's report of September 2019 in which it is stated that NPM bodies should visit 'all places, parts of places and suspected places where deprivation of liberty occurs.'⁴ On this basis, the limited approach proposed in Tasmania may not be consistent with the scope of monitoring envisioned by the Commonwealth Ombudsman (the NPM Coordinator).

Further to this, a report published by the Victorian Ombudsman explores the definition of detention under OPCAT, and confirms that it has a 'broad scope'.⁵ In relation to the definition of detention, the report said:

The definition also covers what is sometimes referred to as 'de facto detention'. These are situations where a person is not subject to any detention order, but finds themselves effectively deprived of liberty under administrative or other arrangements. A typical example would be a nursing home or disability residence where residents are not free to leave because the doors are locked, or they would be restrained by staff, or they are only allowed to leave under close supervision.

I note that the draft Bill is applicable only to situations where people are lawfully detained, which arguably does not include 'suspected places where deprivation of liberty occurs'.⁶ For example, it excludes situations in nursing homes where clients with dementia are segregated and subject to physical and chemical restraints against their will. This arguably falls within the scope of the type of incidents an NPM would be monitoring (and seeking to prevent) and does not appear to be covered by the current proposed approach.

Relevantly, in 2018 South Australia amended⁷ the *Ageing and Adult Safeguarding Act 1995* (SA) to establish an Adult Safeguarding Unit.

³ New Zealand Human Rights Commission, *OPCAT in New Zealand 2007 – 2012, A review of OPCAT implementation by New Zealand's National Preventative Mechanisms*, (2013) 9-10, <https://www.hrc.co.nz/files/2214/2398/7100/Opocat-2013_web.pdf>.

⁴ Michael Manthorpe, *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* (2019) Commonwealth Ombudsman, 17, <https://www.ombudsman.gov.au/_data/assets/pdf_file/0025/106657/Ombudsman-Report-Implementation-of-OPCAT.pdf>.

⁵ Deborah Glass OBE, *Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre* (2017) Victorian Ombudsman, 22, <<https://apo.org.au/sites/default/files/resource-files/2017-11/apo-nid121441.PDF>>.

⁶ Manthorpe, above n 17.

⁷ *Office for the Ageing (Adult Safeguarding) Amendment Act 2018* (SA).

Various functions⁸ of the Unit are:

...

- (d) to receive reports relating to the suspected abuse of vulnerable adults; and
- (e) to assess reports relating to the suspected abuse of vulnerable adults; and
- (f) to investigate reports relating to the suspected abuse of vulnerable adults; and
- (g) to coordinate responses to reports relating to the suspected abuse of a vulnerable adult with State authorities and other persons and bodies; and
- (h) to refer reports relating to the suspected abuse of a vulnerable adult to appropriate persons and bodies; and
- (i) to follow up on reports that have been assessed or investigated where it is appropriate to do so; and
- (j) to collate data on matters relating to the abuse of vulnerable adults; and
- (k) to advise Ministers, State authorities and other bodies (including non-Government bodies) on matters relating to the abuse of vulnerable adults at a systemic level; ...

I submit that in the context of implementing OPCAT, Tasmania is well placed to introduce similar legislation and such legislation could operate as an NPM to monitor non-traditional places of detainment such as:

- aged care facilities
- dementia or other mental health units
- group home facilities for children
- hospitals

This monitoring mechanism could be achieved through an amendment to the *Anti-Discrimination Act 1998* (Tas), or via a new piece of legislation based on the South Australian approach.

In any case, I propose that expanding the functions of the Anti-Discrimination Commissioner by creating a Commissioner for Ageing is a sensible approach which could be achieved expediently and efficiently, as it would be a matter of resourcing, rather than creation of a whole new organisational infrastructure. This approach could operate similarly to the Ombudsman, who also holds the position of Custodial Inspector and Health Complaints Commissioner.

By doing this, the Tasmanian Government would comprehensively implement OPCAT into state-based legislation, by creating an NPM to monitor places of detainment not able to be included under the Custodial Inspector Act. This would also demonstrate that the Government is taking proactive steps to address the stories of abuse and neglect that have been exposed throughout the Royal

⁸ *Ageing and Adult Safeguarding Act 1995* (SA) s 15.

Commission into Aged Care Quality and Safety and the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability.

All Tasmanians who are detained deserve the protection of OPCAT and this type of approach allows the state to be more responsive to emerging issues and incorporate OPCAT with a more holistic approach. Instead of limiting places of inspection, the Government should seek to uphold the objectives of OPCAT by ensuring monitoring across all facilities where people may be deprived of their liberty.

Expertise of NPM

Professional knowledge of the team undertaking inspections is also a consideration. OPCAT is a human rights treaty and will deal specifically with vulnerable groups. A person inspecting a facility where people with disability are detained will need to be informed as to the unique issues experienced by people with disability in order to carry out the monitoring mechanism effectively.

This is set out in article 18.2 of the treaty where it states:

... the experts of the (NPM) have the required capabilities and professional knowledge. They shall strive for a gender balance and the adequate representation of ethnic and minority groups in the country.

The importance of representation is also set out in the Commonwealth Ombudsman's report⁹, which outlines the current staffing make-up in the Custodial Inspector's office, being 2 Caucasian females.¹⁰

At present, it is not clear what measures the Tasmanian Government is taking to ensure ethnic and minority representation is ensured. I note that this may fall outside the scope of the draft Bill and be outlined through further policy development, however I reiterate that having informed and representative inspecting teams is essential to the effective operation of any NPM.

Section 21 of the Custodial Inspector Act

I refer to the Commonwealth Ombudsman's report which states that after review of NPM recommendations, authorities should involve the NPM in possible implementation measures, proposed policy changes and legislative reforms.¹¹

There are no proposed changes to section 21 of the Custodial Inspector Act, however I am concerned that this provision limits the opportunity of the Custodial Inspector, while acting in the role of NPM, to be involved in giving effect to recommendations. As it stands, discretion is left with the responsible Secretary to determine the appropriate response to recommendations and the Custodial Inspector

⁹ Manthorpe, above n 17.

¹⁰ Ibid 113.

¹¹ Ibid 18.

is only empowered to take any action in situations where no appropriate steps have been taken.

I am of the opinion this section should be amended to enable the Custodial Inspector to be actively involved in any proposed changes that arise as a result of recommendations made, and such involvement should not be restricted to situations where no appropriate steps have been taken by the relevant Department.

Concluding comments

As set out above, it is imperative that steps to implement OPCAT in Tasmania, through the establishment of NPMs, are undertaken to effect the widest possible protection from torture and other cruel, inhuman or degrading treatment or punishment.

As Article 3 of OPCAT stipulates, the establishment of NPMs is for the prevention of such conduct. The intention of NPMs is not that they are responsive bodies, but that they exist to ensure human rights are being upheld in places subject to monitoring.

As such, all Tasmanian facilities where deprivation of liberty occurs, whether lawful or unlawful, should be included in the Tasmanian Government's approach to OPCAT.

This is particularly evident when considering the stories of inhumane and degrading treatment that have been exposed in recent years as occurring in non-traditional settings where people are deprived of their liberty. The intent of the treaty, to prevent torture, cannot be truly upheld if these types of facilities are excluded.

If you have any questions, please contact me on (03) 6165 7515 or EOT.Commissioner@equalopportunity.tas.gov.au.

Yours sincerely



Sarah Bolt

ANTI-DISCRIMINATION COMMISSIONER

11 December 2020

Enc: Submission by the Anti-Discrimination Commissioner (Tas) to Australian Human Rights Commission consultation on the implementation of OPCAT in Australia, September 2018