

# Tasmanian national preventive mechanism Implementation project

## Consultation paper 1

Tasmanian Government

16 March 2023

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## Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.<sup>1</sup>

The ALA office is located on the land of the Gadigal of the Eora Nation.

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<sup>1</sup> [www.lawyersalliance.com.au](http://www.lawyersalliance.com.au).

## Introduction

1. The ALA welcomes the opportunity to have input in shaping the Tasmanian national preventive mechanism (NPM) approach to identifying places where people are or may be deprived of their liberty. Also, we welcome the establishment of the Tasmanian NPM under standalone legislation.
2. Having ratified OPCAT in December 2017, the Australian Government has obligations to establish a system of regular preventive visits of places of detention by independent bodies known as National Preventive Mechanisms (or NPMs). It also requires that signatories accept and allow visits from the UN Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (or the SPT for short); the international monitoring body established under OPCAT consisting of 25 international experts with professional experience in a range of specialities including medical and legal expertise, human rights and monitoring experience.
3. When Australia ratified OPCAT in December 2017, it elected to exercise its right to make a formal declaration delaying the commencement of part of these obligations for three years. Specifically, Australia delayed the full implementation of its NPM, but did not postpone its obligation to accept and allow visits from the SPT.<sup>2</sup>
4. The OPCAT requires the establishment of an independent National Prevention Mechanism (NPM), to review treatment of detained persons with a view to strengthening protections against torture and cruel, inhuman or degrading treatment or punishment. Strengthening protections can be achieved by the NPM or members of the SPT visiting places of detention and having confidential meetings with detained persons and anyone else who might have relevant information.<sup>3</sup>
5. The OPCAT stipulates that NPMs must have guaranteed access to all places under the Governments' jurisdiction and control, where persons are or may be deprived of their liberty by order of any judicial, administrative or other authority (in both public and private custodial settings). Within the criminal legal system, these places include prisons, youth

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<sup>2</sup> Commonwealth Ombudsman, 'Implementation of OPCAT in Australia – An update', (2020 Future Justice and Corrections Summit, 19 February 2020) [https://www.ombudsman.gov.au/data/assets/pdf\\_file/0013/110560/Future-Justice-and-Corrections-Summit-2020.02.pdf](https://www.ombudsman.gov.au/data/assets/pdf_file/0013/110560/Future-Justice-and-Corrections-Summit-2020.02.pdf)

<sup>3</sup> Ibid.

detention centres, police cells, court cells, correctional centres, correctional work camps, supported bail accommodation, modes of transport and places where people are temporarily detained (such as hospitals). Within the immigration detention system, these places include immigration detention centres, alternative places of detention, and other places where people are temporarily detained (such as in transit and in hospitals).

6. The ALA believes that independent, adequately resourced and culturally competent National Preventative Mechanisms (NPMs) are a vital tool in addressing the mass incarceration of Aboriginal and Torres Strait Islander peoples in particular, in order to prevent the unacceptable number of First Nations deaths in custody and to reduce the egregious number of human rights abuses within places of detention. We note the urgent need to reduce, and prevent, breaches of human rights in youth detention centres.<sup>4</sup>
7. In our submission below, we assert the importance of the NPM operating within a human rights-based framework, including the guarantee of operational independence to ensure the NPM is OPCAT-compliant and can effectively fulfil its functions.

**What places in Tasmania does your organisation consider the NPM should visit as a matter of priority?**

8. The ALA proposes that Risdon Prison, and particularly maximum-security units are subject to monitoring of an NPM.
9. The ALA also emphasises the need for NPM oversight of police station cells across the state. In this respect, the Tasmanian Government should consider the joint statement by UN Special Rapporteur on Torture, Nils Melzer, and three former special rapporteurs:

“It is well-known that the risk of torture and other ill treatment is significantly greater during the first hours of police custody. To prevent torture during this heightened period of risk, safeguards must be put in place and implemented in practice ... We call on every State to invest in safeguards to prevent torture and other forms of ill treatment.”<sup>5</sup>

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<sup>4</sup> Nick McKenzie, ‘Outrage at children locked in solitary confinement for 22 hours a day’, The Age March 6 2023.

<sup>5</sup> Nils Melzer et al (26 June 2017) Invest in Safeguards to Prevent Torture. Accessed 21 November 2020 from [www.apt.ch/content/files/OpenLetter\\_26June\\_UN\\_SRTs\\_InvestinSafeguardstoPreventTorture\\_EN.pdf](http://www.apt.ch/content/files/OpenLetter_26June_UN_SRTs_InvestinSafeguardstoPreventTorture_EN.pdf)

10. The ALA notes that the UN SPT is very clear that “the State should allow the NPM to visit all, including any suspected, places of deprivation of liberty, as set out in Articles 4 and 29 of the Optional Protocol, which are within its jurisdiction ... [and] should ensure that the NPM is able to carry out visits in the manner and with the frequency that the NPM itself decides”.<sup>6</sup>

**What is important for the NPM to consider in order for its functions to be responsive to the populations that your organisation represents? (needs, risks, barriers)**

Identifying urgent risks of harm

11. Article 4 of OPCAT broadly defines places of detention as including ‘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’. The ALA therefore supports a broader interpretation to define ‘places of detention’ and at the same time, a need to identify and prioritise the most urgent risks of harm as the initial focus of NPM bodies. We draw attention to the distinctive groups of people who are exposed to these risks more than others owing to complex social, economic, cultural and health factors.

12. Noting Article 18 of the OPCAT, states must guarantee the functional independence of the NPMs as well as the independence of their personnel. Therefore, the ALA supports an evidence-based approach to determining the most urgent risks of harm for prioritisation; a function that must be left to the independent NPM bodies and coordinated through established mechanisms, such as an OPCAT council. The process should involve a thorough mapping of all places where people are deprived of their liberty, and a comprehensive risk analysis to determine those most at risk of harm.<sup>7</sup>

13. The ALA proposes that an empirical approach to risk assessment should consider the complex interaction between individual vulnerability, institutional risk and socio-cultural factors that together determine the level of risk within a particular place of detention. The ALA supports the

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<sup>6</sup> Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Guidelines on national preventive mechanisms (UN Doc CAT/OP/12/5, 9 December 2010), 10 para 24-25.

<sup>7</sup> Victorian Equal Opportunities and Human Rights Commission, Submission to the Australian Human Rights Commission OPCAT Implementation in Australia Consultation Stage 2 (September 2018). Accessed at <[https://humanrights.gov.au/sites/default/files/202006/4.\\_victorian\\_equal\\_opportunity\\_and\\_human\\_rights\\_commission.pdf](https://humanrights.gov.au/sites/default/files/202006/4._victorian_equal_opportunity_and_human_rights_commission.pdf)>.

utilisation of human rights organisations, institutions and academics who should be consulted in this process to ensure any NPM operates within an OPCAT compliant framework at all times.

### Aboriginal and Torres Strait Islander peoples in detention

14. The ALA urges future NPM bodies to have particular consideration for Aboriginal young people in youth detention. On an average day in 2020–21, there were 337 Indigenous and 300 non-Indigenous young people aged 10–17 in detention. Expressed as a population rate, 23 young people aged 10–17 were in detention per 10,000 population for Indigenous Australians, compared with 1.3 per 10,000 population for non-Indigenous young people aged 10–17.<sup>8</sup>
15. In Tasmania, Indigenous young people aged 10–17 were 18 times as likely as non-Indigenous young people in the same age group to be in detention.<sup>9</sup> The number of Indigenous prisoners on average per day in 2021-2022 in Tasmania’s adult prison system was 154 of a total of 633 prisoners.<sup>10</sup>
16. Aboriginal young people are also incarcerated younger at all stages of the Tasmanian youth justice system compared to non-Aboriginal people. A range of factors contribute to the over-representation of Aboriginal people in youth justice, such as historical and ongoing political and social conditions, intergenerational trauma and loss, broken connection to culture, country and community, systemic discrimination (e.g. police bias, racial profiling and over-policing), inadequate resourcing of Aboriginal legal services and marginalisation from mainstream culture.
17. The ALA posits that all these factors must be taken into consideration by a specialising, independent human rights body or commission in order for these factors to be effectively understood and monitoring to be culturally aware and trauma-informed. Otherwise, the ALA is concerned that there may be a risk of further harm. The Association for the Prevention of Torture’s guide to monitoring places of detention states that, during visits, “confidentiality, security and sensitivity should be kept in mind. Poorly planned or prepared visits... can actually

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<sup>8</sup> Australian Institute of Health and Welfare, Contact with the criminal justice system. Accessed at <https://www.indigenoushpf.gov.au/measures/2-11-contact-criminal-justice-system>

<sup>9</sup> Australian Institute of Health and Welfare 2021. Youth detention population in Australia 2020. Cat. no. JUV 135. Canberra: AIHW.

<sup>10</sup> Productivity Commission, Report on Government Services 2023, Table 8A.6.

do more harm than good.”<sup>11</sup> It states that detainees’ “safety should always be kept in mind by visitors, who should not take any action or measure which could endanger an individual or a group.”<sup>12</sup>

#### A comprehensive preventative approach

18. The ALA strongly supports the adoption of a comprehensive approach to the prevention of torture and other ill treatment in Australia. Such an approach recognises that no single measure alone is sufficient to prevent torture, and includes a combination of monitoring, legislative, administrative, judicial and other measures to ensure ill treatment is prevented.<sup>13</sup>

Characteristics of an integrated preventative strategy include:

- Thematic examinations of systemic issues
- Advocacy, such as commenting on draft and implementing legislation
- The provision of education to detention providers, detainees and the general public
- Capacity-building
- Active engagement with State authorities
- Dialogue with international human rights bodies.<sup>14</sup>

19. The ALA supports urgent commencement of inspections that observe the ‘do no harm’ principle to ensure the effectiveness of the NPM in securing the prevention of ill-treatment of those subject to detaining measures. We emphasise the importance of developing NPMs that comply with criteria under the OPCAT, including coverage of prison-related environments that are not currently monitored by existing mechanisms, such as vehicles transporting people between prisons.<sup>15</sup> The ALA notes the danger of narrow definitions of

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<sup>11</sup> Association for the Prevention of Torture (2012) Detention Monitoring Brief No.4: Mitigating the risks of sanctions related to detention monitoring, at 6-7.

<sup>12</sup> Ibid.

<sup>13</sup> *Optional Protocol to the Convention Against Torture*, Preamble.

<sup>14</sup> Subcommittee of the Prevention of Torture (2018). Eleventh annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhumane Punishment

<sup>15</sup> See Bronwyn Naylor, ‘Protecting Human Rights in Detention. Rights, Monitoring and OPCAT’ (2016) 41(3) *Alternative Law Journal* 151, 153–4.

detention that limit the scope of NPMs power to monitor environments where liberty is deprived. In this regard, the Australian Human Rights Commission's OPCAT Paper, notes:

“...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.”<sup>16</sup>

In addition, the Subcommittee on Prevention of Torture (SPT) has stated that it “is the responsibility of the SPT and of NPMs to respond in imaginative and creative ways to the novel challenges they face in the exercise of their OPCAT mandates,”<sup>17</sup> and to “safeguard the public, detention staff, detainees and themselves.”<sup>18</sup>

23. The ALA also supports the implementation of an OPCAT framework that features multiple NPM bodies selected from existing domestic monitoring bodies in Tasmania. The ALA supports states and territories utilising their own human rights or equal opportunity commission to coordinate the functions of NPMs, including those in Tasmania with an independent body such as the Australian Human Rights Commission having oversight of that system.
20. Diversification of NPMs representing different groups of vulnerable members of society who are deprived of their liberty also fulfils obligations under Article 18 of the OPCAT which stipulates that NPM bodies must be composed of persons with the necessary capabilities and professional knowledge. This ensures best use of existing expertise within independent entities that currently perform oversight roles in places of detention.
21. The ALA believes an OPCAT framework featuring multiple NPM bodies will require a mechanism to ensure overarching priorities and goals, and to coordinate the actions of those mechanisms in pursuit of those goals. An overarching mechanism would also be responsible for sharing information and expertise, including the publication of required NPM annual reports, and additional thematic reports.

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<sup>16</sup> Australian Human Rights Commission, *Implementing the Optional Protocol to the Convention against Torture: Options for Australia* (2008). Accessed at <https://humanrights.gov.au/sites/default/files/document/publication/opcat.pdf>.

<sup>17</sup> Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic* (adopted on 25th March 2020).

<sup>18</sup> *Ibid.*

22. In particular, the ALA emphasises that NPMs must be culturally safe for Aboriginal and Torres Strait Islander peoples. This would mean, at a minimum, ensuring meaningful involvement in any councils or bodies established. Ensuring cultural safety will also require consideration of cultural rights under s 19(2) of the Charter and how those rights interplay with the NPM's role.

**What cultural attributes does the office of the NPM require to ensure that the intent of OPCAT is realised?**

23. The NPM is a domestic visiting body that must work constructively to improve conditions and treatment in detention, including by identifying the risk factors and the root causes of torture and ill-treatment and making recommendations to the authorities on how they can be addressed. In this regard, the ALA supports a human-rights based approach at all times and advocate for the following essential elements for an effective NPM:

- A connected and integrated system
- Independent oversight and monitoring
- Robust prevention and response elements
- Accessibility for people with disability
- Continuous system improvement through data.<sup>19</sup>

24. Ultimately, the goal of an NPM in Australia is to ensure that violations of human rights like those that were seen at the Ashley Youth Detention Centre and Don Dale Youth Detention Centre<sup>20</sup> and Oakden Older Persons Mental Health Facility are prevented from occurring at the outset. Whatever structure or model the Tasmanian NPM will take, there are numerous principles the NPM must satisfy.

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<sup>19</sup> Commonwealth Ombudsman, 'Monitoring Commonwealth Places of Detention - Annual Report of the Commonwealth National Preventive Mechanism under the Optional Protocol to the Convention Torture (OPCAT)' (1 July 2021 – 30 June 2022). Accessed at <[https://www.ombudsman.gov.au/\\_\\_data/assets/pdf\\_file/0022/290137/Commonwealth-NPM-Report.pdf](https://www.ombudsman.gov.au/__data/assets/pdf_file/0022/290137/Commonwealth-NPM-Report.pdf)>.

<sup>20</sup> Four Corners (2016) *Australia's Shame*. Accessed on the 19 November 2020 from <https://www.abc.net.au/4corners/australias-shame-promo/7649462>.

25. To ensure OPCAT-compliant NPMs, the ALA notes the following stipulations for an NPM:

An NPM must:

- have functional independence (Article 18(1))
- be composed of multidisciplinary experts, striving for gender balance and adequate ethnic and minority representation (Article 18(2))
- be adequately resourced (Article 18(3))
- be safeguarded from reprisal or sanction (including safeguarding anyone assisting it in its functions) (Article 21(1)).

An NPM must have the power to:

- regularly examine the treatment of people deprived of their liberty (Article 19(a))
- make unannounced visits to all places of deprivation of liberty (Articles 12(a), 14(c) and 20(c))
- choose the places they want to visit and the people they want to visit (Article 20(e))
- make recommendations to the authorities to improve the treatment of people deprived of their liberty (Article 19(b))
- submit proposals and observations concerning existing or draft legislation (Article 19(c))
- conduct private interviews with detainees and any person they wish to interview (Article 20(d))

## **Implementation models**

### The Danish Model

24. The ALA supports the Danish NPM implementation model as an effective model to replicate in Tasmania and other jurisdictions. The model consists of the Danish Parliamentary Ombudsman, in collaboration with DIGNITY (NGO) and the Danish Institute of Human Rights (DIHR).<sup>21</sup> The DIHR has been appointed by the Danish government as a human rights advisor to the Danish NPM. Cooperation between the three bodies is implemented through the OPCAT Council and OPCAT working group. The OPCAT working group consists of representatives from the three bodies who participate in inspections and report drafting by

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<sup>21</sup> Commonwealth Ombudsman, 'Monitoring Commonwealth Places of Detention - Annual Report of the Commonwealth National Preventive Mechanism under the Optional Protocol to the Convention Torture (OPCAT)' (1 July 2021 – 30 June 2022). Accessed at <[https://www.ombudsman.gov.au/\\_\\_data/assets/pdf\\_file/0022/290137/Commonwealth-NPM-Report.pdf](https://www.ombudsman.gov.au/__data/assets/pdf_file/0022/290137/Commonwealth-NPM-Report.pdf)>.

the OPCAT Council. The OPCAT Council meets bi-annually to discuss and prepare overall guidelines for NPM activities, reviewing the inspection manual and related activities. The Ombudsman performs secretariat functions to the working group and has overall responsibility for organising and coordinating NPM activities.

25. Under the Danish model, each of the three institutions may conduct independent research and educative functions in relation to detention environments. For example, researching into conditions of the inmates in Danish prisons; looking at the issue of solitary confinement and the presence of the inmates' children in the prison.
26. The ALA welcomes the opportunity to explore the potential role of the Australian Human Rights Commission and local Tasmanian NGOs within a coordinated framework such as the one outlined above.

#### The UK Model

27. The UK legal framework for an NPM is one of the oldest and most comprehensive. The NPM is currently composed of 21 institutions. The Crown's Inspectorate of Prisons (HMIP) acts as the coordinating body of the UK's NPM. Each designated institution has a specific thematic mandate under the OPCAT.
28. Since the UK NPM began its work in 2009, it has created four sub-groups to provide specific focus on areas of detention, this includes an NPM Chair, Secretariat, Steering Group and the Scottish Sub-group. The Steering Group helps to facilitate decision making across the NPM while the sub-groups feed into the work of the NPM as a whole, informing approaches and providing a space for sharing information and expertise.

#### The New Zealand Model

29. Like the UK, New Zealand was an early adopter of the Optional Protocol to the Convention Against Torture (OPCAT) and its unique preventive approach. It is now 14 years since New Zealand adopted a multiple body National Preventative Mechanism using horizontal accountability to fulfil its obligations under the OPCAT. It has a central monitoring body (the Central National Preventative Mechanism, which is the Human Rights Commission) that is responsible for coordination. This approach enables specialisation in different areas of detention impacting different groups of vulnerable people and in line with the specific area

of expertise of the relevant NPM.<sup>22</sup> Those NPMs also act collaboratively, by meeting regularly, sharing knowledge, and including persons from different NPMs on site visits.

30. The ALA invites the Tasmanian government to consider an integrated system of monitoring that allows oversight as well as independent, specialised engagement of domestic bodies that lend their expertise to varied environments where liberty is restricted.

## Conclusion

31. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the Tasmanian Government's NPM Implementation consultation paper.
32. The ALA has demonstrated that emerging and best practices have been developed by NPMs that have implemented new monitoring frameworks, and guidelines; adapting their approach to oversight and inspections over time. The ALA contends that any legal framework for a Tasmanian NPM must have a human rights-oriented approach at its core in order to be an effective OPCAT compliant mechanism for the prevention of ill-treatment and torture of those in detention. The expertise and diversification of independent bodies who comprise Tasmania's NPM will ensure risks of harm are identified and prioritised effectively.
33. The ALA strongly encourages the Tasmanian Government to provide a statutory framework for setting out protocols and standards governing places of detention from a rights-based perspective.
34. The ALA is available to provide further assistance on the issues raised in this submission.



**Rowena Macdonald**  
**Tasmanian President,**  
**Australian Lawyers Alliance**

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<sup>22</sup> Michael White (2019) The role and scope of OPCAT in protecting those deprived of liberty: a critical analysis of the New Zealand experience, *Australian Journal of Human Rights*, 25:1.