

Your Ref:
Our Ref: 934

3 March 2023

Mr Richard Connock
Tasmanian National Preventive Mechanism

By email: enquiries@npm.tas.gov.au

Dear Mr Connock,

Subject: Submission – Tasmanian National Preventive Mechanism Implementation Project, Consultation Paper 1

I am grateful for the opportunity to advocate on behalf of all Tasmanian children and young people by commenting on the 'Tasmanian National Preventive Mechanism (NPM) Implementation Project, Consultation Paper 1'. Thank you also for the short extension of time in which to provide my comments.

The Tasmanian NPM forms part of Australia's ratification of the *Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT). OPCAT is an international human rights agreement that complements and enhances compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). I recognise that the Tasmanian NPM, in accordance with OPCAT and under the *OPCAT Implementation Act 2021* (Tas) ("the Act"), is intending to establish a system of regular visits to places where persons are or may be deprived of their liberty.

The Tasmanian NPM seeks stakeholder input on the application of its visiting mandate in Tasmania, and in the design of its office. Specifically, feedback is requested in response to four questions, and accordingly I will address each of the questions in turn:

1. Are you aware of any places in Tasmania where populations that your organisation represents are or may be deprived of their liberty (other than places listed at section 5(3) of the Act)?

Over and above the places listed in section 5(3) of the *OPCAT Implementation Act 2021*, the places where children and young people are or may be deprived of their liberty include:

- Places where children and young people in out-of-home care reside under a Special Care Package. These government-funded care packages are the most intensive care type for children in out-of-home care. They are designed to provide specific supports to children and young people that are not available through other care options. They are delivered to a single child or young person (or sibling group) on a 24-hour rostered care basis provided by out-of-home care providers in a home-like environment (e.g., rental accommodation). Additional specialist support services or therapeutic interventions may



also be provided. In my view, arrangements made for the care of children placed in Special Care Packages, which can include the use of security guards and restrictive practices, may bring these placements within the definition of a place of detention for the purposes of the Act.

- Places where children and young people in out-of-home care live in government-funded residential care. Some children and young people in care are placed in group-based accommodation with an out-of-home care provider. Care is provided by paid staff on a rostered 24/7 basis. Arrangements made for the care of children placed in residential care can include restrictive practices and may bring the placement within the definition of a place of detention for the purposes of the Act.
- Designated bail rooms or waiting areas in court houses in Tasmania. Following an order made in court for bail or sentence, a child or young person may be directed to wait in a designated area (e.g., outside the courtroom or in a bail room at the Hobart Magistrates Court) to await documentation. Sometimes children are detained with adults in a locked 'bail room' under the supervision of court security guards. Further, I am aware that court matters may be 'stood down' from time to time, with a direction that a child wait in an allocated area of the court precinct until their matter can be revisited. In my view, the situation created by the processes described above may bring court precincts within the definition of a place of detention for the purposes of the Act.
- Proposed bail support accommodation. The final draft of Tasmania's Youth Justice Blueprint 2022 proposes a range of appropriate bail support options, including accommodation options. It says:

"Bail support programs that assist children and young people charged with committing a crime to remain in the community with appropriate accommodation are critical to ensuring that they are not detained unless absolutely necessary. Consultation with stakeholders also suggested that bail support must include more than simply accommodation, with strong support for a supported accommodation model which could include therapeutic staffing and day programs linked to education, health, and wellbeing."¹

While bail accommodation and support options are yet to be established, these facilities may be within the definition of a place of detention for the purposes of the Act. For example, children may be subject to conditions of bail that require them not to be absent from the bail support premises between certain hours or except in the company of a specific person.

- Places where children may be subject to restrictive practices.
 - Rooms or areas in schools in which children are or may be secluded or contained. It is my understanding that restrictive practices are in use in Tasmanian schools. For example, "seclusion" and "containment" are restrictive practices contemplated by the Department of Education's *Restrictive Practices Policy*² and *Restrictive*

¹ Tasmanian Government, (*Final Draft*) *Youth Justice Blueprint 2022: Building a connected and responsive youth justice system*, p. 23. Available at: <https://publicdocumentcentre.education.tas.gov.au/library/Shared%20Documents/Youth-Justice-Blueprint.pdf>

² Department of Education (Department for Education, Children and Young People), *Restrictive Practices Policy*, available at <https://publicdocumentcentre.education.tas.gov.au/library/Document%20Centre/Restrictive-Practices-Policy.pdf>



*Practices Procedure.*³ Seclusion is defined as the “solitary confinement of a student in a room or area from which their exit is prevented by a barrier or another person. Seclusion may also include situations where a student is left alone in a room or area and reasonably believes they cannot leave that room or area even if physically possible”. Containment is defined as “planned restrictive practice that involves a single student in a room or area for the purpose of engaging in learning. The room is secured by a fob or similar system (or other mechanism) and the student’s free exit is impeded. The student is always accompanied in the room, by at least one adult and the student is not left alone in that room or area.” It is my understanding that similar practices operate in the non-government school sector.

In my view, rooms or areas in schools in which children are or may be secluded or contained may bring schools or parts of schools within the definition of a place of detention for the purposes of the Act.

- Community-based accommodation for children with disability living away from their family home. Children and young people with disability may be subject to restrictive interventions, including personal and environment restrictions under the *Disability Services Act 2011* (Tas). Section 4 of this Act describes a restrictive intervention as any action that is taken to restrict the rights or freedom of movement of a person with disability for the primary purpose of the behavioural control of the person. It is my understanding that children and young people with disability living away from their family home in community-based accommodation are subject to “environmental restrictions” and “personal restrictions” (s.34) that restrict the “liberty of movement” of those persons. Therefore, placement within this accommodation may fall within the definition of a place of detention for the purposes of the Act.
- I note that while prisons are listed in s.5(3) of the Act, the NPM will also need to specifically consider how it monitors the rights and wellbeing of children living in the mother-baby unit at Mary Hutchinson Women's Prison.

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

I consider that the NPM should visit non-family-based out-of-home care settings and youth justice custodial settings as a matter of priority. Non-family-based out-of-home care settings include accommodation provided to individual children through special care packages and residential care (see above). Youth justice custodial settings may include detention centres, remand facilities, police cells, court complexes, and vehicles used or operated to convey children or young people in custody. Youth justice custodial settings should be interpreted broadly to include any place where a child is detained in association with the criminal justice system (e.g. children as young as 10 can be held in Tasmania Prison Service facilities or at the Wilfred Lopes Centre).

³ Department of Education (Department for Education, Children and Young People), *Restrictive Practices Policy*, available at <https://publicdocumentcentre.education.tas.gov.au/library/Document%20Centre/Restrictive-Practices-Procedure.pdf>



3. 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)?

The NPM will play a vital role in strengthening protections against the unlawful detention of children, and preventing cruel, inhuman or degrading treatment or punishment of children and young people in institutional settings.

In order for its functions to be responsive to the needs and experiences of children and young people, the NPM, as a new independent body, ought to adopt and implement a child-centred and child rights based approach to its various activities related to children and young people.

The Australian Human Rights Commission (AHRC) has developed principles for best practice for a child rights centred and expert NPM:

A child rights centred and expert NPM

- NPMs must be responsive to the different developmental needs of children and young people and monitor conditions of detention in light of their age and stage of development.
- NPMs must hold or have access as and when required to technical expertise about child development, children's rights, trauma and how detention can affect children and young people. NPMs should draw on the expertise of Australia and New Zealand's network of Children's Guardians and Commissioners in its work.
- NPMs must be able to visit all places where children are held and be responsive to rural and remote concerns.
- The work of NPMs must be informed by the lived experience of children and young people.
- NPMs must develop mechanisms to hear directly from children and young people.
- NPMs must ensure all rights are monitored including those enshrined in the Convention on the Rights of the Child. For example, education and health are critical to the development of children and young people.
- NPMs and the NPM Network must work in accordance with the National Principles for Child Safe Organisations.⁴

I note also that the AHRC has developed best practice principles for a disability informed and inclusive NPM.⁵

As the functions of the NPM include, among other things, accessing, inspecting and reviewing places of detention (s.9(1)(c)), interviewing child or young person "detainees" (s.9(1)(d)), publishing reports, recommendations, advice or findings in relation to "detainees" or places of detention (s.9(1)(k)), and engaging in consultation in relation to policy relating to "detainees" or places of detention (s.9(1)(l)), the NPM should be cognisant of the Child and Youth Safe Organisations Bill 2022 currently before the Tasmanian Parliament and proposed to come into effect in 2024.⁶ The proposed Child and Youth Safe Organisations Framework includes ten

⁴ Australian Human Rights Commission (2022), Road Map to OPCAT Compliance, https://humanrights.gov.au/sites/default/files/opcat_road_map_0.pdf

⁵ Ibid.

⁶ https://www.parliament.tas.gov.au/Bills/Bills2022/54_of_2022.html



Child and Youth Safe Standards which organisations must implement to protect the wellbeing and safety of children.

A recently published research report on children's views about safety in institutional settings commissioned by the Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings observed:

Children and young people characterised a safe organisation as one where they were surrounded by 'safe people' (including adults and peers) who were kind and caring, who were authentic and demonstrated, through their actions, that they took children's safety seriously. Safe people would step in when there were risks that a child was being harmed and responded appropriately when they had been abused... Children and young people felt safer when they had some control over their environments and where their *freedom of movement was not restricted*.

To be safe and feel safe, children and young people stressed the need to feel respected, valued and empowered. (my italics)⁷

The report found that young people in care and detention were of the view "that much needed to occur to foster children's safety in organisations."⁸

I understand that options for the optimal model for a child rights centred NPM are being considered as part of the NPM Implementation project and look forward to contributing my views on achieving the best model for children in due course.

An understanding of trauma by the NPM is also essential to protect children in care or in the youth justice system. A history of trauma increases a child's vulnerability to human rights violations⁹. As well as understanding the effects of trauma on children, a trauma-informed approach will also enable the NPM to effectively prevent harm and abuse in certain risk settings and to respond appropriately when harm and abuse happens.

A trauma-informed care approach to identifying and visiting places of detention and interviewing "detainees" involves educating all NPM staff at all levels across the organisation in trauma and trauma-informed practice, as well as supporting staff to apply trauma-informed techniques in their work. A trauma-informed approach is characterised by:

- Believing children and young people in detention, and telling them that they are believed;
- Listening to, supporting and understanding children and young people;
- Letting children and young people know that the unwarranted and unsanctioned deprivation of liberty is not their fault;
- Telling children and young people that they have done the right thing by telling someone;
- Explaining to children and young people what will happen next and why, and providing them with choice where appropriate; and

⁷ Moore, T., & McArthur, M., (2022). *Take notice, believe us and act! Exploring the safety of children and young people in government run organisations*. Melbourne: Institute of Child Protection Studies, Australian Catholic University, p. 9. Available at <https://www.commissionofinquiry.tas.gov.au/childrens-report>

⁸ Moore and McArthur, p. 12.

⁹ Australian Institute of Health and Welfare 2020. *Australia's children*. Cat. no. CWS 69. Canberra: AIHW, available at <https://www.aihw.gov.au/getmedia/6af928d6-692e-4449-b915-cf2ca946982f/aihw-cws-69-print-report.pdf.aspx?inline=true>



- Only discussing the situation with people dealing with the matter.¹⁰

Tasmanian children at risk of unlawful detention, cruel and degrading treatment or punishment, or torture ought to be guaranteed an evidence-based trauma-informed and child-safe service from the Tasmanian NPM.

As the evidence heard by the Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings has demonstrated, trauma-informed and child-focused organisations are able to contribute positively to the feelings of safety that children and young people experience. The Tasmanian NPM ought to "*place children's safety at the centre and share responsibility to ensure that children's engagement with institutions (places of detention) are not traumatic or traumatising.*"¹¹

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

The office of the NPM must have in place culturally sensitive supports for children from Aboriginal and Torres Strait Islander backgrounds, and children from culturally and linguistically diverse (CALD) backgrounds. The NPM should put in place mechanisms to ensure that a child's views and their cultural identity, and their community connections are respected.

The AHRC has identified best practice principles for a culturally safe and inclusive NPM:

A culturally safe and inclusive NPM

- NPMs require a cultural lens at every stage including designation, implementation, and operationalisation. NPMs should ensure inspections are informed by Aboriginal and Torres Strait Islander approaches, which may include developing separate inspection standards and drawing on the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).
- The NPM network should undertake research on specific Aboriginal and Torres Strait Islander issues such as Aboriginal deaths in custody.
- NPMs must make special efforts to recruit Aboriginal and Torres Strait Islander staff, ensuring an appropriate gender balance is met and being cognisant of the community expectations placed on Aboriginal and Torres Strait Islander staff. Tailored and flexible support structures must be developed to support those staff.
- NPMs must ensure Aboriginal and Torres Strait Islander representation on any advisory boards and should ensure community consultations include Aboriginal and Torres Strait Islander people who have been deprived of liberty or were family members of people deprived of liberty.
- NPMs should develop resources that can be translated into appropriate languages, ensure all inspection reports are published in accessible formats and ensure communities are aware of the reports. NPMs must also make efforts to ensure appropriate interpreters (including Aboriginal sign language interpreters) are available when interviewing Aboriginal and Torres Strait Islander people.
- NPMs need to engage in significant community education with Aboriginal and Torres Strait Islander people about the role of the NPM. NPMs need to be very clear about

¹⁰ Adapted from Department for Education, Children and Young People, "Mandatory Reporting Training 2023".

¹¹ Moore and McArthur, p.13.



managing expectations to avoid losing trust. The education process is continual obligation to build trust over time.¹²

The proposed Child and Youth Safe Standards for Tasmania are complemented by a “universal principle” (clause 15, *Child and Youth Safe Organisations Bill 2022*), which provides that a child safe organisation must apply all ten standards in an environment that ensures the right to cultural safety for Aboriginal and Torres Strait Islander children and young people is respected. In order to achieve an appropriate level of cultural competence and ensure it is culturally safe and responsive to the needs of Aboriginal children and young people, and their families and communities, the NPM should recruit Aboriginal staff and work in partnership with Aboriginal community-controlled organisations.

Similarly, children and young people from CALD backgrounds should have their cultural safety and community connections respected. It is important that the NPM reflect the social and cultural diversity of the general Tasmanian community.

I support the general intent of the Tasmanian National Preventive Mechanism’s approach to OPCAT Article 4 and am encouraged by the Tasmanian Government’s commitment to appropriately resource the new NPM to prevent unlawful detention, torture and other maltreatment of children and young people who are deprived of their liberty.

I would be pleased to discuss my feedback in more detail should that be of assistance.

Yours sincerely

Leanne McLean
Commissioner for Children and Young People

cc: *The Hon. Elise Archer, Attorney-General*
The Hon. Roger Jaensch, Minister for Education, Children and Youth
Ginna Webster Secretary, Department of Justice
Tim Bullard, Secretary, Department for Education, Children and Young People

¹² Australian Human Rights Commission (2022), *Road Map to OPCAT Compliance*, https://humanrights.gov.au/sites/default/files/opcat_road_map_0.pdf