

Your Ref:
Our Ref: 934

6 May 2024

Mr Richard Connock
Tasmanian National Preventive Mechanism
By email: enquiries@npm.tas.gov.au

Dear Mr Connock,

Submission – Draft Tasmanian National Preventive Mechanism Expectations on the treatment of Children and Young People deprived of their liberty

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's (NPM) draft Expectations on the treatment of children and young people deprived of their liberty (expectations). Thank you also for the extension of time in which to respond, in order that my response could be informed by the recent OPCAT Symposium in Hobart.

I recognise that the Tasmanian NPM, in accordance with the *Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT) and consistent with the *OPCAT Implementation Act 2021* (Tas) ("the Act"), intends to establish a system of regular visits to places where children and young people are or may be deprived of their liberty. I also note that you have been informed in the development of the expectations by submissions I made in March and July 2023 regarding deprivation of liberty settings for children and young people¹ and other feedback provided by my office.

I appreciate that in developing the expectations, and consistent with the Act, the NPM has adopted a broad interpretation of places in which children may be deprived of their liberty to include: youth detention; adult prisons; police and court custody; police and custodial transport; remand; secure residential or out-of-home care (for example children residing under a Special Care Package); secure mental health settings; education settings, where restrictive practices may be used; and, health and social care settings (for example, in a hospital children's ward, or in disability care).

¹ See <https://childcomm.tas.gov.au/resource/tasmanian-national-preventive-mechanism-implementation-project-consultation-paper-1/> (March 2023) and <https://childcomm.tas.gov.au/wp-content/uploads/2023/07/2023-07-07-CCYP-Comment-Tasmanian-NPM-Consultation-paper-2-.pdf> (July 2023).



Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings

Since I last provided feedback to inform your work, the Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings (Commission of Inquiry) has released its final report and recommendations.² The Commission of Inquiry makes extensive observations and recommendations directly regarding the implementation of the Tasmanian NPM, and the issues affecting the rights and wellbeing of children and young people deprived of their liberty in institutional settings. The Tasmanian NPM is explored and discussed in Volume 5 (Book 3), Chapter 12 of the Commission's final report. Ultimately, Recommendation 12.39 provides that:

The Tasmanian Government should:

- a. appoint the Commission for Children and Young People (Recommendation 18.6) as an additional National Preventive Mechanism under the United Nations Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), with expertise in child rights, child trauma, the prevention and identification of child abuse, the needs of Aboriginal children and young people and the needs of children and young people with disability, and with power to inspect places where children and young people are detained;
- b. resource Tasmanian National Preventive Mechanisms sufficiently to allow them to effectively fulfil their functions under OPCAT.³

The proposed Commission for Children and Young People — a new statutory body proposed to have responsibilities including monitoring and inspecting youth detention and other residential youth justice facilities⁴ — is projected to be a child-specific NPM. Importantly, the Commission of Inquiry also says that “the Commission for Children and

² Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings (Report, August 2023).

³ Commission of Inquiry, *Volume 5: Children in youth detention (Book 3)* (August 2023): p. 283.

Recommendation 12.39 ought to be read in connection with Recommendation 12.38, which states:

“The Tasmanian Government should ensure the Commission for Children and Young People (Recommendation 18.6):

- a. has functions and powers to monitor the operation of youth detention centres and other residential youth justice facilities, and the safety and wellbeing of, and the provision of services to, children and young people in detention, and in the youth justice system more broadly, by
 - i. regularly monitoring and reviewing custodial population data and information on serious or adverse incidents (such as child sexual abuse, assaults, attempted suicide, self-harm, riots, escapes and property damage) and the use of isolation, force, restraints and searches
 - ii. conducting regular onsite inspections of youth detention and other residential youth justice facilities
 - iii. conducting own-motion systemic inquiries into issues that are identified through monitoring
 - iv. conducting own-motion inquiries into the youth justice services received by an individual child or group of children
- b. has the power to enter adult prison facilities to visit children and young people in those facilities to monitor their safety and wellbeing
- c. is adequately resourced on an ongoing basis to fulfil its systemic monitoring functions.”

⁴ Commission of Inquiry, *Volume 5: Children in youth detention (Book 3)* (August 2023): p. 280.



Young People’s National Preventive Mechanism function should be funded and resourced *separately* from its other functions” (my italics).⁵

The Commission of Inquiry’s recommendation with respect to the appointment of a child-specific NPM (the proposed Commission for Children and Young People) differs from the model envisaged by the Report to the Tasmanian Government on the Implementation of the Tasmanian National Preventive Mechanism under the OPCAT Implementation Act 2021 (November 2023) (Implementation Report). This report, the first produced by the Tasmanian NPM, “presents the results of comprehensive research, analysis, and consultation to develop an NPM implementation model that is most appropriate for Tasmania and satisfies the requirements of OPCAT. It makes eight recommendations to establish an independent Tasmanian NPM framework that complements existing oversight bodies, adopts a multi-disciplinary approach to prevention, and engages actively with civil society” (p. 8). Unlike the Commission of Inquiry’s final report, the Tasmanian NPM implementation report does not recommend the appointment of a child-specific NPM, but rather recommends, among other things:

1. That the Tasmanian NPM be established as a new specialised institution, separate from the Ombudsman.
2. That the person appointed as Tasmanian NPM concurrently serve as Custodial Inspector, which is also to be separated from the Ombudsman, and the offices combined under the recommended governance model.
3. That the Tasmanian NPM delegate authority to the Commissioner for Children and Young People and establish a joint process agreement for the exercise of functions pertaining to children and young people.
4. That the Commissioner for Children and Young People and the Custodial Inspector be specifically resourced to contribute to the delivery of the Tasmanian NPM.
8. That the Tasmanian NPM and Commissioner for Children and Young People engage cooperatively and provide advice to Government on an agreed approach to the implementation of Commission of Inquiry recommendations related to OPCAT and youth justice inspections.

There are several key differences between the final report of the Commission of Inquiry and the implementation report of the Tasmanian NPM, including whether the Commissioner for Children and Young People (and its projected successor, i.e. the new Commission for Children and Young People) ought to be appointed as a child-specific NPM as part of a multi-NPM model, or whether it should be delegated authority via a “joint process agreement” with a single designated NPM. I note that the Tasmanian Government has committed to completing implementation of recommendation 12.39 by July 2026. I look forward to engaging in further conversations regarding the implementation of the NPM as it pertains to children and young people, and inspections of youth justice facilities and other residential youth justice facilities.

The Implementation Report presents a compelling case that the NPM can and will play a crucial role in strengthening protections against the unlawful detention of children, and prevention of cruel, inhuman, or degrading treatment or punishment of children and young

⁵ Commission of Inquiry, *Volume 5: Children in youth detention (Book 3)* (August 2023): p. 283.



people detained in varied settings. I hope the two options presented to the Tasmanian Government can be reconciled and an effectively resourced, evidence-based, trauma-informed, and child-safe Tasmanian NPM service is able to be delivered. I look forward to discussing the relative merits of the options and assisting the Government to arrive at a favoured position.

Expectations on the treatment of Children and Young People deprived of their liberty

I note that the Tasmanian NPM engaged Ms Megan Mitchell AM as an expert in the development of the expectations on the treatment of children and young people deprived of their liberty. I find the draft expectations document sets out a compelling guide on how the Tasmanian NPM expects children and young people to be treated and cared for in places where they are not free or able to leave at will. I also commend that specific expectations have been “*developed for children due to their inherent vulnerabilities and distinct developmental needs*” (p.4). The expectations also aim “*to ensure independent and objective assessments of outcomes for children, reflecting that treatment should take into account [children’s] rights, their developmental stage and vulnerability, and the care due to any child*” (p. 4).

My responses to this consultation are not intended to be exhaustive, and I appreciate that the draft expectations guide is intended to be an evolving document. I also acknowledge that “*the Tasmanian NPM welcomes feedback from all stakeholders on the draft document, particularly people with lived experience*” (p. 5). In this regard, I would like to again draw your attention to the views of children and young people with lived experience of the youth justice system in Tasmania through the ‘Voices of Young People in the Youth Justice System Project’.⁶ The Voices Project provides insights into the views of children and young people in the youth justice system, including about their experiences of police custody, reception prisons, and youth detention. Reports from these consultations with young people will be progressively published on my website. I look forward to sharing these reports with you in due course.

The voices of children and young people were also heard via my 2023 own motion investigation report, titled, “*A place at the Table: An investigation into a change to the case management of children and young people in care in Tasmania*”, which was published late last year.⁷ The report presents nine findings and makes seven recommendations that call on the Tasmanian Government to ensure that the out-of-home care system in Tasmania upholds the rights of children and young people in care. I would like to draw your attention to the report and its implications for the expectations on the treatment of children and young people deprived of their liberty in out-of-home care settings. For example, finding 5 of my report identifies the rights of children in care (as set out in the *Charter of Rights for Tasmanian children and young people in care*) that had been adversely affected:

“The change to case management had effects on the rights of children and young people in care. Applying the *Charter of Rights for Tasmanian children and young people in care*, the following effects were identified for many children through consultation with young people, Child Safety Service staff, and other stakeholders:

⁶ See <https://childcomm.tas.gov.au/everyone/major-programs/youth-justice/>

⁷ See <https://childcomm.tas.gov.au/wp-content/uploads/2023/11/Investigation-Report.pdf>



- Right 1: Children did not feel safe.
- Right 2: Children did not receive healthcare when needed.
- Right 3: Children were not consulted and listened to seriously about a decision that affected them.
- Right 4: Children did not have regular meetings alone with their workers.
- Right 5: Children were not treated respectfully.
- Right 7: Children did not have safe contact with family.
- Right 8: Children were less supported in their education and life skills development.”⁸

In addition to the projects discussed above, the voices of children were heard during the Commission of Inquiry, and in particular through the work undertaken by Tim Moore and Morag McArthur to inform ‘Children’s Report’ titled, “*Take notice, believe us and act!*”: *Exploring the safety of children and young people in government run organisations.*⁹ The latter report, relevantly for the Tasmanian NPM’s “Expectations on the treatment of Children and Young People deprived of their liberty”, highlights:

- Children’s lack of faith in adults and organisations preventing and adequately responding to their safety needs;
- Children not always being allowed or encouraged to contact independent advocates, or experiencing repercussions for doing so;
- Children’s poor experiences of and/or lack of confidence to engage in organisational complaints mechanisms;
- Children’s fears that if their peers and others knew they had been ill-treated that they would be treated differently, judged, or made to feel responsible;
- Unreasonable reliance on a child or young person making a complaint, as opposed to organisations proactively checking in on them.

The series of works outlined above, and the views and experiences they convey of children and young people with experience of the youth justice, out-of-home care, education and health systems in Tasmania, are a rich source of lived experience that should inform the final Tasmanian NPM’s ‘Expectations on the treatment of Children and Young People deprived of their liberty’.

It is vital that the preventive monitoring envisaged by the Tasmanian NPM encapsulates more than those settings that are sometimes referred to as primary places of detention. Less visible deprivation of liberty settings – which can include hospital, mental health, or disability care settings, and education settings – must not recede into the background due to inadequate resourcing or lack of dedication. Deprivation of liberty has the potential to occur in a range of settings including where child-centred independent oversight is limited or lacking. I am aware that deprivation of liberty, seclusion, restraint, and indeed maltreatment

⁸ Commissioner for Children and Young People (Tas) (2023), *A Place at the Table: An investigation into a change to the case management of children and young people in care in Tasmania*, p. 21.

⁹ Moore, T., & McArthur, M., (2022). “*Take notice, believe us and act!*”: *Exploring the safety of children and young people in government run organisations*. Hobart: Tasmanian Commission of Inquiry into the Tasmanian Government’s Responses to Child Sexual Abuse in Institutional Settings: [Children’s Report \(commissionofinquiry.tas.gov.au\)](https://commissionofinquiry.tas.gov.au)



of children occurs in apparently therapeutic settings and these settings must be encompassed within the monitoring and advocacy work of the NPM:

“Deprivation of liberty means deprivation of rights, agency, visibility, opportunities and love. Depriving children of liberty is depriving them of their childhood.”¹⁰

Accordingly, significant resourcing should be applied to enable preventive monitoring of all settings in which children may be deprived of their liberty.

The twelve topics included in the ‘Summary of expectations’ are dealt with comprehensively. I appreciate the level of precision applied to the development of the expectations and the indicators. In terms of sustainable implementation of the expectations, however, I would also like to see the UN Committee on the Rights of the Child, the Commission of Inquiry’s final report, and the Tasmanian *Child and Youth Safe Organisations Act 2023* entwined into the preventive monitoring practice of the NPM.

As the functions of the NPM under the Act include, amongst 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)), I had anticipated that the Expectations would adopt and implement a more definitive and decisive child-centred and child-rights based approach. I note for example that the Australian Human Rights Commission’s Road Map to OPCAT Compliance is referred to in Attachment 1. However, there is further opportunity for the best practice principles for a child-rights centred and expert NPM to be more closely woven into the expectations. I would encourage the NPM to re-visit the usefulness of the AHRC principles:

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.

¹⁰ C Achmad, “A view from Aotearoa New Zealand: What does preventive monitoring mean for children and young people in health and social care?” quoting from the UN Global Study of Children Deprived of Liberty, (2019), 2024 OPCAT Symposium, 19 March 2024.



- 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.¹¹

For example, Principle 8 of the National Principles for Child Safe Organisations and Standard 8 of the Tasmanian Child and Youth Safe Standards states that, “*Physical and online environments promote safety and wellbeing while minimising the opportunity for children and young people to be harmed*”. This means children and young people are safe in physical and online spaces. The expectations on the prevention of cruel and degrading treatment of children and young people in deprivation of liberty settings arguably ought to consider online safety and risks in the online environment, such as online grooming, cyber bullying and technology-facilitated harmful sexual behaviours. Online environments in this context are any technological platforms that an organisation uses or controls, such as computers, phones, websites, intranet, and social media. If an organisation deprives a child of their liberty, but gives them access to an online environment, the organisation should be expected to ensure that the child’s online safety is assured. Further work is needed to ensure the expectations align with the National Principles for Child Safe Organisations, particularly with respect to online environments in deprivation of liberty settings.

At all stages of preventive monitoring, including preparation and reporting, the voices of children and young people should be amplified, and children and young people should be seen as genuine collaborators to effect change around prevention of ill-treatment and torture. Childrens’ voices must be meaningfully heard and their participation, rights and needs must be central to decision-making in places of detention. I echo the views of Claire

¹¹ Australian Human Rights Commission (2022), Road Map to OPCAT Compliance, https://humanrights.gov.au/sites/default/files/opcat_road_map_0.pdf. The Road Map to Compliance also identifies 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 managing expectations to avoid losing trust. The education process is continual obligation to build trust over time.



Achmad, New Zealand's Chief Children's Commissioner, who is a designated child-specific NPM in that jurisdiction:

“Ongoing systemic advocacy is essential so we see zero seclusion and restraint minimisation for children and young people in out-of-home care and health settings, and use of deprivation of liberty for shortest times only. Achieving these things is possible.”

Notwithstanding the status of the statutory office of the Commissioner for Children and Young People (and its projected successor) in terms of its role with respect to the Tasmanian NPM – i.e. as a designated child-specific NPM or as a delegated authority via a “joint process agreement” with the single designated NPM – the ‘Expectations on the treatment of Children and Young People deprived of their liberty’ suitably lay the groundwork to advance the rights, interests, participation and voices of children and young people. I am encouraged and fortified by the ongoing implementation project of the Tasmanian NPM, and the development of the expectations children and young people. I am strongly of the view that preventive monitoring via the NPM has the capacity to make a real and lasting difference in the lives of children and young people deprived of their liberty in Tasmania.

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