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Ms Ginna Webster
Secretary
Department of Justice
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CC: 
Director, Strategic Legislation and Policy
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Dear Ms Webster

Custodial Inspector Amendment (OPCAT) Bill 2020 (Tas)

I am writing in response to the recent statement by Ms Elise Archer, Tasmanian Attorney-General and Minister for Corrections that the Tasmanian Government plans to nominate the Custodial Inspector as the National Preventive Mechanism (NPM) for places of detention under the control of the Tasmanian Government in line with Australia's ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

Following Ms Archer's announcement, the Government commenced public consultation on the Custodial Inspector Amendment (OPCAT) Bill 2020, which seeks to amend the Custodial Inspector's jurisdiction to include new responsibilities as the Tasmanian NPM. My comments on the Bill are set out below.

My Office's role – NPM and Coordinator

You may be aware my Office has been nominated by the Commonwealth Government to be the NPM for places of detention under the control of the Commonwealth, as well as the NPM Coordinator. In its Coordinator role, I envisage my Office will be responsible for coordinating and facilitating engagement between the network of Australian NPMs, once they are nominated. I look forward to working constructively with all relevant bodies at the Commonwealth, State and Territory level to advance implementation of OPCAT in Australia.

As it stands, the network currently consists of my Office (as the Commonwealth NPM) and the WA Ombudsman and WA Office of the Inspector of Custodial Services (as the WA NPM). With the January 2022 deadline for Australia's implementation of OPCAT fast approaching, I look forward to the Custodial Inspector joining the NPM network.

In September 2019, in my capacity as NPM Coordinator, I published a report about each jurisdiction's baseline readiness to implement OPCAT. This assessment was based on input from existing oversight agencies in each jurisdiction about if, and to what extent they considered their organisation met the core requirements for NPMs, set out in Part V of the OPCAT. Specifically:

- a preventive visiting mandate (Article 19a)
- independence—financial and functional, including no perceived conflicts of interest (Article 18)
- composition—gender-balanced and representative (Article 18)
- unrestricted access to places of detention (Article 20c)
- unfettered access to information (Article 20a and b)
- unrestricted access to persons, including staff (Article 20d)
- the ability to make public reports and recommendations (Article 23)
- privileges, immunities and protections from reprisals (Article 21)
- the ability to communicate with the SPT (Article 20f).

My full report is at

https://www.ombudsman.gov.au/data/assets/pdf_file/0025/106657/Ombudsman-Report-Implementation-of-OPCAT.pdf.

In my report, I concluded that all jurisdictions have existing entities which are empowered to conduct, and report on inspections of places of detention. Further, I noted it was likely that one or more of the existing bodies in each jurisdiction would meet the NPM obligations, noting it may be necessary to amend some elements of their operation, structure or legislation to ensure full compliance with the terms of OPCAT.

With respect to Tasmania, I commented:

The Custodial Inspector, Mental Health Official Visitor and Prison Official Visitor [Visitors administered by Ombudsman Tasmania] have an inspection function, are functionally independent, have the ability to make post-visit reports and are mandated to publish annual reports. In some cases other reports are also mandated, for example the Principal Official Visitor is required to report on some matters under the Mental Health Act 2013. These bodies have the ability to access information, people and records. The Official Visitor schemes do not have legislative bases to make post-visit recommendations, or to require a relevant authority to engage with those recommendations or make submissions on relevant legislation. However, under section 165 of the Mental Health Act 2013 and section 10 of the Corrections Act 1997 Official Visitors can report to the relevant Minister on various matters. The Official Visitor schemes have limited protections against reprisals and do not have a clear ability to engage with the SPT.

The Bill

In respect of the OPCAT considerations for NPMs, I note the draft *Custodial Inspector Amendment (OPCAT) Bill 2020*:

- Amends the *Custodial Inspector Act 2016* (the Act) to 'to enable the Custodial Inspector to fulfil the role' of a NPM within the meaning of OPCAT.
- Expands the definition of 'places of detention' beyond prisons to include police stations, closed psychiatric facilities and closed forensic disability facilities.
- Provides for 'regular' inspection of those places of detention, but removes the requirement for mandatory inspections every three years (s 25C(2)).
- Requires publication of guidelines and standards (on a website operated by the Custodial Inspector s 6(2)).
- Inserts a requirement for the NPM to report to the Commonwealth Ombudsman, as NPM Coordinator, on its activities annually (s 25D).
- Permits the disclosure or communication of relevant information to the NPM by a person or body.

- Enables the referral of matters by the NPM to another person or existing body for investigation (such as the Health Complaints Commissioner – who is also the Ombudsman and Custodial Inspector – s 29).

These amendments provide a strong starting point for the establishment of an NPM. However, on my Office's review, there are aspects of the draft Bill where it is not clear that the proposed arrangements fully align with the requirements set out in OPCAT.

- Section 25A defines a 'specified facility' as a closed psychiatric facility, custodial centre, forensic disability facility, or police station. However, I note the existing s 4 of the Act provides a definition of 'custodial centre' that excludes any police station or court cell complex. Your department may wish to review the intersection between the existing s 4 and the proposed s 25A and consider whether either needs revision.

Further, neither the definition at s 4 or the proposed s 25A includes police or court transit vehicles. Your department may wish to consider broadening the scope of the definition to include these, noting OPCAT covers any place where a person may be deprived of their liberty. By way of example I am aware that the Office of the Inspector of Custodial Services (NSW), although not a nominated NPM, oversees correctional centres, 24 hour court cell complexes, court cells, escort vehicles and detainee transport vehicles.

- Section 25A(1)(a) defines a 'forensic disability facility' as a 'facility at which a person with intellectual or cognitive disabilities may lawfully be detained **for a period of 24 hours or more**' (our emphasis). I acknowledge the Australian Government has indicated that, as Australia works toward full implementation of OPCAT, NPMs will initially focus on 'primary' places of detention where people are held for a period of 24 hours or more. However, this does not prevent NPMs from examining other places of detention and where people are held for shorter periods and, indeed, NPMs should consider how they will work towards this over time.

If legislation only permits NPMs to visit certain places of detention, I suggest there is a risk the scope of the NPM's role will be constrained, particularly in the longer term, in the absence of additional legislative reform. Further, a time-bound legislative definition of a place of detention is inconsistent with Articles 4(1) and 4(2) of OPCAT. I note the definitions in the amending legislation of 'specified facility' and 'closed psychiatric facility' do not have the same time-bound qualifier.

- Section 25C(2) removes certain provisions from the existing Act in relation to the Inspector in his capacity as the NPM. These are:
 - the removal of the requirement to conduct mandatory inspections at least once every three years (s 13)
 - the requirement to prepare an inspection report including recommendations on findings arising out of inspections, the requirement for the report to be tabled in Parliament, and the option for the responsible Minister to prepare a response to a tabled report (s 15)
 - the ability to provide a report arising out of occasional inspections and reviews and, if necessary or appropriate, table it in Parliament (s 19)
 - the ability to make recommendations in reports on mandatory or occasional inspections and reviews (s 21).

The amending legislation seeks to distinguish between the roles of the Custodial Inspector to mandatorily inspect and report on custodial centres as defined, and the role of the Inspector as NPM to conduct regular inspections of specified facilities. While I understand it is not intended to have this effect, the broad application of s 25C(2) could be construed as preventing the NPM from making recommendations and publically reporting on inspections in line with Article 19B of OPCAT.

I note the requirement in the proposed s 25D for the Inspector as NPM to submit an annual report to my Office. While I am open to receiving such reports to inform my role as NPM Coordinator, they should not act as a substitute for the NPM publishing reports and making recommendations in its own right. Further, I suggest the removal of the power to issue public reports and make recommendations under s 25C(2) could lead to the understanding that any report provided to my Office could not include material that would otherwise be provided in a public report.

- Section 25E is a broad provision allowing for disclosure and communication of information to the Inspector as NPM, despite other legislation to the contrary. However, it is not clear from this provision that the NPM could then subsequently disclose and communicate information to the UN Subcommittee on the Prevention of Torture (SPT). Noting its important role to monitor and report on member countries' compliance with OPCAT, your department may wish to include specific language to clarify the NPM is able to share information with the SPT.
- While the existing s 34 of the Act provides protections against offences or for breaching confidentiality agreements when disclosing information, it does not articulate protections against reprisal action if a person discloses information to the Inspector as NPM. The existing s 25 makes it an offence if a person wilfully obstructs, hinders, resists or threatens the Inspector in the performance of their functions under the Act, but this provision refers only to actions against the Inspector, not actions towards a third party discloser of information to the Inspector as NPM. Protection from reprisal is an important principle of OPCAT and should be captured in the Tasmanian framework.
- If it is the intention to import the balance of OPCAT Articles into this Act, you may wish to consider whether defining 'OPCAT' and 'NPM' in the draft amending legislation will suffice. Your department may wish to revise the draft Bill to include reference to the requirement for the NPM to conduct its oversight consistently with Australia's obligations under OPCAT or explicitly state that, when exercising a power or discretion conferred under the legislation, the NPM must have regard to Australia's obligations under OPCAT.¹
- Finally, references throughout the draft amendment bill (e.g. ss 4, 6(a)(ba), 7, 25B, 25C, 25D, 25E, 25F) refer to a 'national preventive mechanism' whereas OPCAT refers to a 'national preventive mechanism'. It is a small point of difference, but I suggest this be amended to ensure clarity and consistency with the broader framework.

I look forward to welcoming the Custodial Inspector to the NPM Network and trust that my comments will assist in strengthening the legislative protections of that role. I have also sent a copy of this letter to Chris Moraitis, Secretary, Commonwealth Attorney-General's Department.

¹ Edgar, Andrew; Thwaites, Rayner --- "Implementing Treaties in Domestic Law: Translation, Enforcement and Administrative Law" [2018] MelbJlntLaw 2; (2018) 19(1) Melbourne Journal of International Law 24 <http://classic.austlii.edu.au/au/journals/MelbJIL/2018/2.html>

If you would like to speak with me directly, I am available on [REDACTED]. If your staff would like to discuss the feedback above, they may contact Emma Cotterill, Senior Assistant Ombudsman, on [REDACTED]
[REDACTED]

Yours sincerely



Michael Manthorpe PSM
Commonwealth Ombudsman

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