

From: [NPM Coordinator](#)
To: [Legislation and Development](#)
Cc: [Rebecca Vonthethoff](#); [REDACTED] [NPM Coordinator](#)
Subject: OPCAT Implementation Bill 2021 - comment by the Office of the Commonwealth Ombudsman [SEC=OFFICIAL]
Date: Friday, 17 September 2021 4:35:14 PM

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To: [REDACTED], Director, Strategic Legislation and Policy

Dear [REDACTED]

Thank you for your letter inviting comment on the draft OPCAT Implementation Bill 2021 (Tas). On 10 December 2020, we provided comment on the original draft Custodial Inspector Amendment (OPCAT) Bill 2020 (Tas).

As both the National Preventive Mechanism (NPM) Coordinator for Australia and the Commonwealth NPM, the Office of the Commonwealth Ombudsman (the Office) looks forward to working constructively with NPMs at the State and Territory level, including from Tasmania, to advance implementation of OPCAT in Australia by 20 January 2022.

The proposed legislation provides a strong basis for the establishment and operation of Tasmania's NPM and implementation of OPCAT. This stand-alone legislation provides a clearer framework compared to the previously proposed amendments to the existing *Custodial Inspector Act*.

We have identified four areas your agency may wish to consider further:

Access to detainees 'at all reasonable times' (section 15)

The proposed qualifier to NPM access to detainees of 'all reasonable times' may be inconsistent with the OPCAT which refers to:

- Article 20(e): 'The liberty to choose the places they [the NPM] want to visit and the persons they want to interview'.
- Article 14(2), which provides that objections to visits to a particular place of detention should only be on a temporary basis and the existence of a declared state of emergency should not be invoked as a reason to object to a visit. While Article 14 is in respect of visits by the UN Subcommittee on Prevention of Torture (SPT), the SPT's recent advice relating to the Coronavirus Pandemic ([United Nations \(ohchr.org\)](https://www.ohchr.org/)) has made it clear that these considerations should also apply to visits by NPMs.

Section 15, as it is currently drafted, could impede the discretion of the NPM to decide who, when, where and how to interview persons deprived of their liberty, administrative and other staff of the facility, and their visitors. An NPM having this discretion is consistent with the UN Office of the High Commissioner for Human Rights' practical guidance on the role of NPMs and their access to persons ([NPM_Guide_EN.pdf \(ohchr.org\)](#)).

For context you may wish to consider sections 19 and 21 of the *Inspector of Correctional Services*

Act 2017 (ACT) which provide for the Inspector to speak to or privately interview a person at a correctional centre, a person involved in the provision of correctional services, a detainee (with that detainee's consent). 'Privately interview' is defined as speaking to a person without the presence of another and without surveillance. Section 21 enables the Inspector to talk to each detainee 'at any time'.

Referral to the Office for investigation (section 21)

The proposed section 21(1)(c) enables the Tasmania NPM to refer matters for investigation to the Office. The Office would not be able to act on such a referral unless it relates to a matter that is specifically within the Office's jurisdiction as set out in the *Ombudsman Act 1976* (Cth). You may wish to consider amending this subsection, or removing it and explicitly permitting information to be shared (as opposed to matters being referred for investigation) with the Office (see further my comments below regarding section 22).

Sharing information with the Office (section 22)

The proposed section 22 allows for bodies including the Office and the SPT, to provide information to the Tasmanian NPM. The section does not include a reciprocal arrangement to enable the Tasmanian NPM to share information with the Office. Section 23 requires the NPM to submit an annual report to the Office in the capacity of the NPM Coordinator, and section 31 provides for SPT access to information. However, the provision of information to the Office is not drafted in positive terms, but rather referenced at section 24(3)(e) being an offence provision where the general prohibition against disclosure of information does not include disclosure to among others, the Office.

You may wish to consider the inclusion of a clause that positively enables the NPM to share information with relevant bodies. For context, the recently introduced OPCAT Implementation Bill 2021 (SA) [South Australian Legislation](#) provides:

9 - NPMs may disclose information to other NPMs and NPM Coordinator

(1) Despite a provision of this or any other Act or law, an NPM may disclose information (including personal information) obtained in the course of performing functions or exercising powers under this or any other Act to another NPM or to the NPM Coordinator (or both).

(2) To avoid doubt, subsection (1) applies to NPMs in respect of the same or different kinds of places of detention.

Protections against reprisals (section 26)

Section 26 of the Bill makes it an offence to obstruct hinder, resist or threaten the NPM or its staff or make a false statement to mislead or attempt to mislead the NPM or its staff.

In our initial submission on 10 December 2020 we stated:

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.

We suggest that you consider including protection from reprisals in the Bill. For context you may

wish to consider section 50 of the *Inspector of Custodial Services Act 2003* (WA) that makes it an offence to prejudice, threaten to prejudice the safety or career of, or intimidate or harass, or threaten to do so another person because they have provided or will provide information to the Inspector, or incited another person to commit the offence.

Our Office as the NPM Coordinator looks forward to welcoming the Custodial Inspector as the Tasmanian NPM to the broader NPM Network and trust that our further comments will assist in further strengthening the legislative protections of that role.

If you would like to speak with me directly, my details are below. If your staff would like to discuss the comments above, they may contact [REDACTED] on [REDACTED]

Yours sincerely

Bec

Rebecca Vonthethoff

Senior Assistant Ombudsman | Assurance Branch

Commonwealth Ombudsman

Proud to be working on the lands of the Ngunnawal and Ngambri peoples

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The Office of the Commonwealth Ombudsman acknowledges the traditional owners of country throughout Australia and their continuing connection to land, culture and community. We pay our respects to elders past and present.

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