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[REDACTED] [Child Safety Reform Implementation Monitor Tasmania]

Dear Secretary

Commission for Children and Young People Bill 2024

Thank you for the opportunity to provide feedback on the *Commission for Children and Young People Bill 2024* (the **Bill**), which will establish the Commission for Children and Young People (the **Commission**) and replace the existing Commissioner for Children and Young People. I also thank you for extending my time to make this submission.

As Tasmanian National Preventive Mechanism (**NPM**), it is a function of my office under section 9(1)(j) of the *OPCAT Implementation Act 2021* (the **OPCAT Act**) to submit proposals and observations concerning existing or draft legislation that relates to detainees or places of detention. Subsection 9(1)(l) of the *OPCAT Act* further provides that I am to engage in consultation in relation to policy relating to detainees or places of detention with a responsible Secretary or a responsible Minister. These provisions broadly capture my advisory function, set out at Article 19 of the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**).

I submit this feedback in compliance with this function, and to fulfil my overall mandate of preventing torture and other cruel, inhuman or degrading treatment or punishment in Tasmania.¹

I want to begin by reiterating my commitment to implementation of the recommendations of the Commission of Inquiry into the Tasmanian Government's responses to child sexual abuse in institutional settings (the **COI**). All children and young people in our state deserve to live and

¹ OPCAT Act, section 3; OPCAT, Article 3.

grow in a society that is free from any risk of abuse, and which supports and uplifts them to reach their full potential. This requires effective independent oversight across all places where children and young people receive care and support, to ensure that conditions and treatment meet or exceed Australia's international obligations and continue to align with contemporary best practice.

This submission reflects the results of significant work completed since I was appointed Tasmanian NPM, in February 2022, to see this objective become a reality for the many children and young people across our state who are or may be deprived of their liberty. This includes children and young people receiving health and social care support, in mental health facilities and hospitals, under police and court custody, detained in youth detention, and imprisoned in adult custody centres.

As you know, the COI recommendations related to oversight of children and young people in youth detention and out of home care relate directly to my current appointments as Tasmanian NPM and Custodial Inspector. Specifically, COI recommendation 12.38 provides that oversight of youth detention shift from my Custodial Inspector office to the Commission,² and recommendation 12.39 provides that the Commission be brought into Tasmania's NPM framework.

Following the release of the COI report, my project to implement the Office of the Tasmanian NPM has included thorough consideration of its related recommendations. I have also considered the role of the forthcoming Disability Commissioner under the *Disability Rights, Including and Safeguarding Act 2024* and related response by the Tasmanian Government to the Final Report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (the **Disability Royal Commission**), which likewise includes recommendations related to NPM implementation.³ In brief, throughout my implementation analysis I have focused my attention on effective implementation of the Tasmanian NPM having regard to the requirements of OPCAT, and, importantly, cognisant of related reform projects and Tasmania's unique circumstances.

The 12 recommendations in my Tasmanian NPM implementation reports, released in December 2023 and November 2024, present the results of extensive research, community consultation, and expert analysis. They have been developed fully cognisant of COI analysis and recommendations, are designed to support the Commission's operations, and will best position the Tasmanian NPM, Commission, and our Disability Commissioner to protect all Tasmanians deprived of their liberty from harm. I again call on the Tasmanian Government to accept these recommendations in full.

As noted in my 2024 Annual Report,⁴ on 23 December 2023 I wrote to the Attorney-General seeking an opportunity to provide a briefing and feedback in relation to the establishment of

² Recommendation 12.38.

³ Chiefly, recommendations 8.2, 11.7, 11.11, 11.16 which relate to NPM implementation.

⁴ Tasmanian NPM, *Preventing torture and ill-treatment in Tasmania: Supplementary report to the Tasmanian Government focusing on health and social care and update on the implementation of the Tasmanian National Preventive Mechanism under the OPCAT Implementation Act 2021* (Supplementary Report), page 16.

the new Commission and my Tasmanian NPM office, and to engage with the Department in relation to their respective implementation. Given that my reports present the results of Australia's most comprehensive NPM implementation analysis to date, I considered that my office was uniquely placed to contribute value to the Commission's design and implementation.

Regrettably, we are now 12 months on from that letter and I still have not been invited by a Department to contribute feedback beyond providing a submission through this public consultation process. Nor have I received a response to any of my implementation recommendations. I take this opportunity to emphasise that OPCAT obliges states to examine the recommendations of NPMs and enter into dialogue with them on possible implementation measures.⁵ I note that prior to the release of this Bill no high-level policy materials were disseminated, such as a discussion or options paper. As such, the extent to which my Tasmanian NPM implementation recommendations have been considered in the development of this Bill, if at all, is unknown.

The COI observes in its report that Tasmania's oversight and complaint environment is fragmented and difficult for laypeople to navigate. Its recommendations are intended to simplify and enhance this environment for children and young people. The Commission's creation sits against a significant and complex reform landscape, being progressed to improve safeguarding and government service delivery, in response to state and national enquiries. It is essential that policy development is not segmented. A coordinated, holistic policy design approach is needed to ensure that the entire reform package is fit for purpose, clear, and achieves its long-term objectives. Unfortunately, limited background detail has been released with the Bill to explain how the proposed Commission fits within this landscape and is intended to engage with existing oversight bodies to simplify oversight.

I am aware that many stakeholders intend to provide feedback on the Bill relevant to their subject matter expertise and experience. It is encouraging to see that there is significant interest in the Bill. I understand the prevailing view among my counterparts is that further engagement, feedback, and refinement is required before the Bill may be considered satisfactory for promulgation. Despite this, I have been informed at officer level that the Bill has been earmarked for tabling in early March. If this is the case, I infer that limited opportunity may exist for further engagement. I consider that this would be a missed opportunity to engage in best practice policy development through meaningful consultation with key stakeholders. I strongly encourage the Tasmanian Government to engage in further consultation to ensure that the Commission is best placed to safeguard and uplift children and young people.

This submission focuses on the Bill and its relationship with implementation of COI recommendations 12.38 and 12.39. I note that the Bill and surrounding documents included on the consultation website do not provide policy insight on implementation of COI recommendation 12.39. This is notwithstanding that the Tasmanian Government has announced that both recommendations will commence in 2026. The apparent lack of coordination between these two recommendations is difficult to reconcile. The Tasmanian NPM's jurisdiction in relation to children and young people, and with that recommendation

⁵ OPCAT, Article 22. Reflected in the OPCAT Act at section 18(2) and 19(3).

12.39, captures and far exceeds the scope of recommendation 12.38. The Bill's proposed oversight function for children and young people in youth detention or custody settings is accordingly only a small part of a much larger oversight jurisdiction that the COI has recommended for the Commission. Hence, I consider that any policy development to implement recommendation 12.38 *must* include and be coordinated alongside implementation of recommendation 12.39.

I take this opportunity to restate my primary recommendation that the Tasmanian NPM and the Custodial Inspector be established as a new specialised institution, separate from the Ombudsman, and is collocated with the Commission.⁶ As I explained during the Commission of Inquiry process, with seven jurisdictions to administrate my capacity is stretched and it is difficult to keep track of everything. I relevantly emphasise that the COI accepted this evidence and cited it as a key consideration when recommending that oversight responsibility for youth detention shift to the new Commission. My view that I hold too many jurisdictions still stands and has only continued to crystalise. Shifting a portion of my Custodial Inspector jurisdiction to the Commission, as the Bill proposes, does not in any way allay my pressing issue of being overburdened with jurisdictions, or address related concerns expressed by the COI. In fact, this issue is only set to be exacerbated if you consider that my Tasmanian NPM implementation analysis concludes that this office will require at least 24 FTE to operate effectively.⁷

Accordingly, retaining the Tasmanian NPM and Custodial Inspector jurisdictions alongside my Ombudsman and other jurisdictions will effectively double the size of my existing office. The combined outputs from all offices would make my workload all but unsustainable without a comprehensive restructure that would very likely negate any cost savings the Government may consider likely to arise from preserving the status quo. Retaining my existing office structure would also ignore views expressed by the COI that I am currently unable to dedicate sufficient time to each of my many jurisdictions. I take this opportunity to highlight that the COI likewise said that consideration should be given to the appointment of a Health Complaints Commissioner who is separate from the Ombudsman.⁸

It is entirely appropriate and supported by the implementation analysis that my proactive monitoring functions as Tasmanian NPM and Custodial Inspector should be separated from my reactive complaint taking functions. This would go a long way to enabling me to manage my jurisdictions more effectively and reduce conflict of interest risks.

To improve public confidence in our integrity entities it is essential that clear lines of authority and responsibility exist between jurisdictions, functions, and services delivered, which can be effectively communicated to the public. There is a real risk that without thorough planning the current reforms on foot may not improve this situation, and government agencies will find themselves overburdened by substantively similar information requests and inspections by different oversight bodies. Additionally, within the Commission itself, without governance planning there is a risk that conflicts of interest will arise between advocacy activities, inspections, complaint investigations, inquiries, and regulatory oversight. To that end, and

⁶ Implementation Report, Supplementary Report, Recommendation 1.

⁷ Supplementary Report, pages 36 and 113.

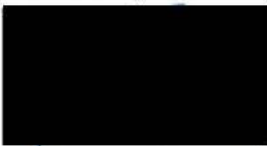
⁸ COI report, Ch 15, section 6.2.8.

notwithstanding my view that I hold too many jurisdictions, from a governance perspective I note that I have been well served by each of my jurisdictions having a separate legislative basis, clearly delineated boundaries, individual offices, and resource allocations.

Because I currently lead multiple jurisdictions associated with the Commission of Inquiry reform process, to maintain the independence of each jurisdiction when submitting consultation feedback I have delegated authority for preparing the technical components of this submission, below, to my office Director. The feedback is accordingly enclosed with this letter. Views and recommendations expressed in this submission are those of the Office of the Tasmanian NPM. I encourage you and the Tasmanian Government officers leading this important reform project to consider my implementation reports and this submission in detail, prior to any tabling of the Bill in Parliament.

I look forward to an opportunity to discuss this feedback further, and to engage proactively with the Tasmanian Government as these important reforms continue to progress. I note that this submission is exempt from publication under the Tasmanian Government's public consultation policy. I reserve my right to self-publish this document.

Sincerely



Richard Connock

Tasmanian National Preventive Mechanism

24 December 2024



Introduction:

This submission focuses primarily on the Bill's proposed monitoring functions and powers for the Commission,⁹ which overlap with the Tasmanian NPM and Custodial Inspector's functions and powers under the *OPCAT Implementation Act 2021* (the **OPCAT Act**), and *Custodial Inspector Act 2016* (the **CI Act**) respectively.

I take this opportunity to acknowledge that in forming the views in this submission the Office spoke with the Implementation Monitor, Independent Regulator, the Interim Disability Commissioner, and the Acting Commissioner for Children and Young People, and received a briefing from policy officers in the Department of Justice and Department of Premier and Cabinet. I am grateful for their time and willingness to share their views. I understand that the Department of Justice (**DOJ**) is leading legislative development, with policy development and instructions coming from the Department of Premier and Cabinet (**DPAC**).

Throughout this submission I will refer to two reports regularly, each of which is available to download at www.npm.tas.gov.au:

1. *Preventing torture and ill-treatment in Tasmania*: Report to the Tasmanian Government on the Implementation of the Tasmanian National Preventive Mechanism under the *OPCAT Implementation Act 2021* (the **Implementation Report**); and
2. *Preventing torture and ill-treatment in Tasmania*: Supplementary report to the Tasmanian Government focusing on health and social care and update on the implementation of the Tasmanian National Preventive Mechanism under the *OPCAT Implementation Act 2021* (the **Supplementary Report**).

I will also refer to the Tasmanian NPM's *expectations on the treatment of children and young people deprived of their liberty*, which is available to download at <https://npm.tas.gov.au/home/our-expectations> (the **Expectations**).

The submission proceeds in four sections, preceded by an overall summary:

1. Background to the Tasmanian NPM
2. The Tasmanian NPM Implementation Project and the COI
3. The Bill
4. Recommendations

As a relatively new statutory body created in 2021, I understand that there is unfamiliarity within government about the Tasmanian NPM's purpose, functions, and powers. Sections 1 and 2 of this submission are therefore aimed at assisting policy officers by providing a concise overview of the NPM mandate and the Act, as well as relevant outcomes and recommendations arising from the implementation reports as they relate to those in the COI report.¹⁰ However, I strongly recommend that the Implementation Report and Supplementary Report are reviewed before

⁹ At Division 3 and Division 4 of the Bill.

¹⁰ Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings (Report, 31 August 2023).

proceeding to consider amendments to the Bill and implementation of recommendation 12.39.¹¹

Summary of submission and recommendations:

To summarise the feedback provided in this submission, starting at a high level, the Bill's overall policy narrative currently is unclear and would benefit from further consultation and refinement prior to tabling. I note that the Bill does not include an introductory provision setting out its purpose.

The Bill sets up the forthcoming Commission as an omnibus institution that integrates a large number of different functions and corresponding powers. Apart from the Independent Regulator,¹² the intention appears to be to consolidate all powers and functions within the one legislative framework (the Bill). However, with respect to oversight, many of these powers and functions already exist in dedicated legislation, notably the CI Act and OPCAT Act. No policy guidance has been provided to explain why this legislation was not utilised, or why certain provisions were adopted but modified before being inserted into the Bill.

Importantly, the Bill and accompanying explanatory materials do not provide clarity on how the Commission will be structured to exercise its many functions in practice. These functions, which include Independent Regulator, monitoring body, individual advocate, community visitors, and conducting in-depth inquiries, carry a significant conflict of interest risk. While the COI expressed a view that these conflict risks could be managed,¹³ the Bill provides limited rules or guidance in relation to governance, information barriers, or the sequencing. This is essential because when exercising its different functions, the Commission will regularly obtain or have access to highly sensitive information, including confidential and privileged identifying materials about children and young people and their conditions and treatment, along with potentially sensitive information about different service providers.

In that regard it is relevant to point out that the Office of the Ombudsman and Health Complaints Commissioner, which currently exercises omnibus jurisdictions, operates in a regulatory environment where each jurisdiction is self-contained within its own legislation, has its own staff, and is subject to clear information sharing controls. Nonetheless, conflicts can arise at times, such as when a matter being reviewed by the Custodial Inspector is also the subject of a separate Ombudsman complaint. When this occurs, the presence of clearly legislated regulatory and governance processes is essential to upholding the integrity of each independent process of review. Conflicts like these will almost certainly arise within the Commission as proposed under the Bill, which would benefit from further direction to steer how they should be managed.

It is also unclear how the Commission is expected to interact with other independent bodies with whom it will share jurisdiction under overlapping mandates. With respect to monitoring

¹¹ The Implementation Report contains a detailed analysis of the COI recommendations related to the NPM at sections 5.2.4.4 and 5.3.4.

¹² The Bill, clause 7(2)(b).

¹³ COI report,

and oversight, which is the focus of this submission, no guidance or direction is provided in relation to engagement with the Disability Commissioner and Senior Practitioner, Ombudsman, Tasmanian NPM and Custodial Inspector. Notably, the Bill contemplates integration under the Tasmanian NPM framework, which is recommendation 12.39 in the COI report and is addressed in detail in the next section.

In the briefing with DPAC and DOJ representatives, it was unclear if the DPAC officers leading policy development on the Bill were familiar with the Tasmanian NPM jurisdiction, had considered the Implementation Report, or had sought to coordinate the implementation of COI recommendations 12.38 and 12.39. As drafted, the Bill fails to reconcile that the substantive scope of recommendation 12.38 is captured in full through implementation of recommendation 12.39. This is because the Tasmanian NPM mandate includes and is broader than youth justice monitoring. The primary function of the Tasmanian NPM includes regularly visiting and examining the conditions and treatment of children and young people deprived of their liberty in:

- disability support services and related places where restrictive practices are applied
- mental health facilities and hospitals;
- education settings;
- out of home care;
- police and court custody;
- adult custody centres; and
- youth justice facilities.

Accordingly, implementation of recommendation 12.39 will directly affect the Bill's proposed creation of a new inspection function for the Commission to monitor youth detention, as well as related functions with respect to out of home care. Despite this jurisdictional overlap, the Bill omits any reference to the Tasmanian NPM or the Custodial Inspector—from whom it is intended to assume responsibility for inspecting youth detention settings.¹⁴ If the Commission is to exercise its oversight functions effectively, the congruity and practical operation of recommendations 12.38 and 12.39 must be considered together, as part of a holistic analysis that incorporates other related COI recommendations, ongoing concurrent reforms related to oversight, and how the Commission will interact with existing oversight frameworks.

Overall, on its face the Bill appears to have been considered in the absence of such a holistic analysis and relevant stakeholder consultation. As such, there are no transitional, consequential, or related provisions to inform how various existing oversight bodies will interact with the Commission once this new jurisdiction is established. The creation of new functions and powers in the Bill, rather than empowering the Commission by inserting it into existing frameworks, infers an expectation that it will work on its own. As a small state, there are some practical limitations to pursuing such a model that do not appear to have been fully considered through a cost-benefit analysis. These limitations are explored in section 2.

¹⁴ The Bill, Division 4.

Moreover, some of the Commission's powers in the Bill are more restrictive than those already granted to the Custodial Inspector and Tasmanian NPM, whose mandates likewise include oversight of children and young people. When recommendation 12.39 is implemented, this power dichotomy is likely to create persistent internal conflict for the Commission, because it will need to continuously reconcile whether to follow a more restrictive power in its own legislation (the Bill), or the overlapping and more expansive equivalent provided in the OPCAT Act. If the latter option is followed, some of provisions in the Bill related to inspecting youth justice facilities and monitoring out of home care are likely to go unused and become superfluous.

An important related policy consideration is the coordination of bodies visiting places where out of home care services are being provided. This is a service environment in which independent bodies have historically had limited oversight powers granted to them. Recent policy reform commitments have now changed this landscape to one in which multiple bodies will have overlapping oversight mandates across the sector. The coordination of these mandates and their implementation merits further planning. To provide an overview, the Tasmanian NPM currently possesses jurisdiction over out of home care settings where a child or young person is or may be deprived of liberty. This will include the Commission under recommendation 12.39. Overlapping with this are the Senior Practitioner's functions under the new *Disability Rights, Inclusion and Safeguarding Act 2024*, which capture inspecting out of home care services involving restrictive practices and children and young people.¹⁵ Adding to this landscape, the Bill currently proposes that the Commission's functions will also include monitoring the treatment of children and young people in out of home care, and the proposed independent community visitor scheme managed by the Child Advocate envisages that laypeople engaged from the community will be empowered to conduct in-person visits.¹⁶

It is important to reflect on the fact that most out of home care settings are people's private family homes as foster or kinship care providers, and importantly they are the child's home too. It is unclear from the Bill and supporting materials how these oversight bodies are envisaged to function together in a trauma informed and child centred way, but it is critical that visits are coordinated appropriately. Poorly prepared or planned visits may do more harm than good.¹⁷ Prescribing visit regularity obligations in regulations, as the Bill proposes for the community visitor scheme, could make it difficult for the respective bodies to manage and coordinate activities.¹⁸

Designing the Commission to operate efficiently, effectively, economically, and in active cooperation with related entities will be essential to improving safeguarding in practice. The COI affords flexibility in how its recommendations should be implemented. It recommends the creation of a new Commission, but it does not mandate the creation of a new legislative framework for oversight to replace the CI Act or the OPCAT Act. It certainly does not advocate for a framework with reduced oversight powers when compared to those that currently exist. The Tasmanian Government has committed to implementing and fully funding all COI

¹⁵ *Disability Rights, Inclusion and Safeguarding Act 2024*, section 58.

¹⁶ The Bill, Division 6.

¹⁷ Implementation Report, Part 4.

¹⁸ The Bill, clause 30.

recommendations.¹⁹ However, given that independent oversight bodies are currently underfunded and considering the current economic climate, it is difficult to foresee the Commission being fully resourced to function effectively on its own, including as a separate NPM entity. Active collaboration, and its enablement under legislation, will be essential to the Commission's success and the future success of related bodies.

As an example, the Office of the Custodial Inspector is currently resourced four full-time equivalent (**FTE**) staff to visit and inspect all of Tasmania's custody centres and youth detention. Without effective collaboration, the Commission will require an equivalent FTE load to exercise the inspection functions proposed in Division 4 of the Bill.

However, once recommendation 12.39 is implemented, if the Commission is to work on its own as a separate NPM body it will likely require more than 15 FTE to visit and examine all the different places in the state where children and young people are or may be deprived of their liberty, outlined above. This is in addition to the approximately 20 FTE that the Office of the Tasmanian NPM would require to exercise its functions in respect of adults. Preliminary assessments through the Tasmanian NPM implementation project identified over 100 individual places around the state where children and young people are or may be deprived of their liberty, and therefore come within the scope of COI recommendation 12.39. Many of these are places where services are also provided to adults, however, creating significant overlap with the balance of the Tasmanian NPM mandate under the OPCAT Act, and are places where children and young people with disability reside and restrictive practices are applied, overlapping with the Disability Commissioner.

Having regard to these factors, the Tasmanian NPM Implementation Report and Supplementary Report recommended designing the Commission to exercise its oversight and NPM functions as part of a single, collocated NPM body that also includes the Custodial Inspector and Disability Commissioner. This model was assessed as being able to provide significant substantive and financial benefits to Tasmania, notably through higher quality and more effective outputs and requiring fewer proactive overall monitoring staff (compared with separate bodies) by enabling the creation of thematic monitoring teams and agile visit planning.²⁰ It is unclear if these and other practical implementation matters were considered in the development of the Bill.

Finally, it is noted that the Bill seeks to establish a new Joint Committee of the Tasmanian Parliament to oversee the Commission. As detailed below at section 4, if the Tasmanian NPM implementation recommendations are adopted this is likely to result in the Commission being subject to two Joint Committees, potentially giving rise to duplication and/or fragmentation of Parliamentary oversight. This is because implementation of recommendation 12.39 will result in the Commission's activities also falling under the Joint Standing Committee on Integrity.

Overall, the Bill's substantive focus in respect of oversight should be to give effect to COI recommendations that are not already captured by suitable existing legislative frameworks,

¹⁹ COI Report, Volume 1, section 6.2.3.

²⁰ When compared to operating as a separated multiple-NPM framework (i.e. separately under the Commission and Ombudsman).

where the Commission may be added to that framework with minor amendments. For example, the Bill does not seek to duplicate or amend, but rather plugs into the *Child and Youth Safe Organisations Act 2023*. This should be the preferred policy approach for recommendations 12.38 and 12.39. Accordingly, it is recommended that the Bill be revised in consultation with stakeholders to clarify the powers of each oversight function to be exercised by the Commission, manage potential conflicts of interest, and encourage collaboration with related independent bodies.²¹

Recommendations are as follows:

1. The *Commission for Children and Young People Bill 2024* be revised to provide coordinated implementation of COI recommendations 12.38 and 12.39, having regard to the results of the Tasmanian NPM implementation project and ongoing work to establish the Office of the Disability Commissioner.
2. That Division 4 and related provisions in the Bill be removed, and that the *Custodial Inspector Act 2016* and *OPCAT Implementation Act 2021* be utilised to provide the Commission with requisite functions to implement recommendations 12.38 and 12.39, respectively.
3. The *Commission* be defined as an integrity entity under the *Integrity Commission Act 2009* and subject to Joint Standing Committee on Integrity oversight.
4. That the Tasmanian Government commit to further consultation on this Bill, including with my office, prior to tabling in Parliament.

1. Background to the Tasmanian NPM and Custodial Inspector

The Tasmanian NPM is an independent oversight body set up to help prevent abuse being perpetrated on vulnerable people. It is a creature of statute established under the *OPCAT Implementation Act 2021*. The Act and its formation of the Tasmanian NPM is designed to give effect to Tasmania's obligations arising from Australia's ratification of OPCAT, in 2017.

OPCAT establishes a system where regular visits and examinations are completed by independent bodies to places where people are or may be deprived of their liberty, to prevent people in these places being subjected to torture and other cruel, inhuman or degrading treatment or punishment. Such acts are prohibited under international law, reflected in Australian statutes, and constitute serious violations of human rights. Parties to OPCAT agree that:

“the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment can be strengthened by

²¹ If there is an intention for the Commission's functions to extend beyond those available under existing frameworks, then the preferred approach would be for the existing framework to be amended as appropriate rather than creating a new power for the Commission. For example, section 5(3) of the OPCAT Act enables the Minister to prescribe a place, such as all out of home care settings, as within the scope of the Tasmanian NPM's jurisdiction.

non-judicial means of a preventive nature, based on regular visits to places of detention.²²

One of these bodies that OPCAT requires parties establish is an NPM.

The NPM operates proactively, regularly visiting and examining the conditions and treatment of people deprived of their liberty. Its activities are generally unannounced. It is not a complaint assessment body or regulator. Under OPCAT, the NPM is empowered to achieve its mandate through the exercise of four overarching functions:

1. visiting and regularly examining the conditions and treatment of people deprived of their liberty;²³
2. ongoing cooperation and engagement with government and relevant authorities to monitor and support implementation of advice and recommendations;²⁴
3. providing advice and recommendations to relevant authorities;²⁵ and
4. leading education programmes to enhance public knowledge on human rights and other topics related to the prevention of torture and other cruel, inhuman or degrading treatment or punishment.²⁶

The first function is the NPM's central and most resource-intensive function. In practice, NPMs typically plan and prioritise their outputs under functions 2–4 having regard to the results of visit and examination activities. The core powers of the NPM that enable it to exercise its first function, which states are required to provide, are:

- access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;
- access to all information referring to the treatment of those persons as well as their conditions of detention;
- access to all places of detention and their installations and facilities;
- the opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the national preventive mechanism believes may supply relevant information;
- the liberty to choose the places they want to visit and the persons they want to interview;
- the right to have contacts with the Subcommittee on Prevention, to send it information and to meet with it.²⁷

²² OPCAT, Preamble.

²³ OPCAT, Article 19(1).

²⁴ OPCAT, Article 19(2).

²⁵ OPCAT, Article 19(3).

²⁶ OPCAT, Preamble; Article 26.

²⁷ OPCAT, Article 20.

These core functions and powers are broadly expounded at section 9 and Division 2 of the OPCAT Act.²⁸ Critically, OPCAT defines the jurisdiction of the NPM and the places it can visit and examine by reference to the experience of the person in the place, rather than by reference to a place's stated purpose.²⁹ For instance, a house or a school may be a place of detention if it is used, even temporarily, to restrict a person from leaving. Extensive guidance is provided by the United Nations Subcommittee on the Prevention of Torture regarding the scope of the NPM jurisdiction under OPCAT,³⁰ which is considered in depth across the Implementation Report and Supplementary Report.³¹

OPCAT does not create any new human rights or deprivation of liberty standards. It is designed to monitor compliance with and provide education on existing rights and standards, as updated from time to time through international and domestic treaty/policy processes. In practice, NPM's usually publish consolidated documents that describe these existing rights and standards relevant to the place being visited, to help people understand some of the matters that will be considered when exercising its functions. These are generally known as 'expectations' documents because they set out how the NPM expects people deprived of their liberty to be treated, so that torture and other cruel, inhuman or degrading treatment or punishment does not occur. The Tasmanian NPM has published expectations documents in relation to the main types of places and populations it will visit and examine.³²

The position at international law is that human rights standards are a *di minimis* benchmark that states cannot fall below but may build upon (i.e. to further enhance rights). It is therefore open to Australia (and Tasmania) to afford greater rights and protections than those which are agreed at international law, so long as by doing so they remain consistent with a treaty's object and purpose. This is an important characteristic of the international rules-based system and human rights, because the evolution of international norms is often incremental: beginning with actions first taken by individual states, which are subsequently implemented by likeminded groups that builds the momentum needed for broadscale adoption by the wider international community.

It is therefore open to Tasmania to implement its NPM framework in a way that goes beyond OPCAT's minimum requirements.³³ The *OPCAT Implementation Act 2021* provides opportunity for this to occur. Relevantly, Tasmania is not precluded from prescribing an entire system or

²⁸ In addition, OPCAT requires that people be protected from reprisal for interacting with the NPM. This is reflected in the offence created at section 36 of the OPCAT Act.

²⁹ OPCAT, Article 4(2) "deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority". OPCAT Act, section 5(2): "a place of detention is any place, subject to the jurisdiction and control of Tasmania, that the Subcommittee must be allowed to visit under Article 4 of the Optional Protocol."

³⁰ See Supplementary Report, Appendix 2.

³¹ See Implementation Report, Part 2; Supplementary Report, Part 1.

³² See: <https://npm.tas.gov.au/home/our-expectations>. In relation to children and young people, the Tasmanian NPM engaged former National Children's Commissioner, Ms Megan Mitchell AM, to prepare expectations that focus specifically on the conditions and treatment of children and young people deprived of their liberty. This includes children and young people in youth detention and other custody settings, and has replaced the Office of the Custodial Inspector's inspection standards.

³³ Likewise, Tasmania can provide conditions and treatment of people deprived of their liberty that exceed Australia's minimum human rights obligations.

sector as being within the Tasmanian NPM's remit in circumstances where its jurisdiction may be limited. Such an approach should be regarded as preferable in circumstances where it will improve efficiencies, enhance safeguarding, and in the context of this submission may provide greater consistency in how COI recommendations are implemented.

In this regard, OPCAT may be said to provide the overarching minimum requirements of what an NPM needs to look like; it is the central pillar around which a state may build a framework and provides flexibility for the NPM to be shaped to align with domestic circumstances and maximise its impact. This is a significant consideration because it gives Tasmania flexibility to implement the Tasmanian NPM in a way that best suits the state, having regard to a range of factors including:

- different deprivation of liberty settings within the NPM jurisdiction and geographic spread;
- existing oversight bodies or human rights institutions, their mandates, and NPM compatibility;
- related but not implemented commitments that overlap with or include the NPM; and
- the wider political, economic, and social environment.

It is relevant to note, however, that when evaluating how best to establish an NPM, OPCAT³⁴ sets out some core operational requirements, including: ³⁵

- The NPM office and its staff must be operationally and financially independent and free from all conflict.³⁶ If the NPM is attached to an existing body, the NPM's staff, finances and operations must be separated from the body's other activities and personnel.
- NPM staff and experts need to have the required capabilities and professional knowledge necessary to fulfil all functions. The office shall strive for a gender balance and the adequate representation of ethnic and minority groups in the country.³⁷
- The NPM must receive the resources needed to fulfil its functions.³⁸ This includes receiving secure ongoing funding to have its own staff and premises, in order to be independent of Government and not be subject to financial control which might affect its independence, to effectively plan activities over multiple years, and to provide job security for staff.³⁹

³⁴ Within OPCAT itself, and under Article 18(4), which imports the Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights (the 'Paris Principles'). See: <https://www.ohchr.org/en/instruments-mechanisms/instruments/principles-relating-status-national-institutions-paris>

³⁵ The UN Subcommittee on Prevention of Torture provides a useful Guide and Checklist to help states evaluate if their NPM meets core requirements. See UN Office of the High Commissioner for Human Rights, Preventing

Torture: The Role of National Preventive Mechanisms – A Practical Guide, UN Doc HR/P/PT/21 (2018).

³⁶ OPCAT Act, section 10. OPCAT, Article 18(1). The Tasmanian Government currently lists OPCAT resourcing as a separate line item in the Budget.

³⁷ OPCAT Act, section 12(4); OPCAT, Article 18(2).

³⁸ OPCAT, Article 18(3).

³⁹ See: Paris Principles.

- The creation of the NPM should not replace but complement existing oversight entities.

This last point bears particular relevance to the existing Custodial Inspector jurisdiction and the CI Act. The Custodial Inspector is an independent monitoring body established under legislation. It was established mindful of OPCAT, and is set up to effectively exercise the primary function of an NPM (visits and examinations) in custodial centres and youth justice facilities. Many of the CI's functions and powers meet the minimum requirements of OPCAT. Accordingly, the Tasmanian NPM implementation project has involved consideration of how best to integrate the Custodial Inspector so that both offices function effectively.

These same considerations need to be assessed when implementing recommendation 12.39. Among the other issues identified in this submission, the Bill proposes the creation of a new inspection function for youth detention that does not appear to be OPCAT compliant. If legislated as currently drafted, these provisions will create conflict between implementation of recommendations 12.38 and 12.39. This is addressed further at section 2, below.

Between 2022 and 2024 the Tasmanian NPM conducted extensive research, consultation, and analysis to understand the scope and application of its functions in Tasmania, and the factors and requirements described above. This included considering the Tasmanian NPM's relationship with the Custodial Inspector, implementation of the COI recommendations, creation of the Disability Commissioner, and Disability Royal Commission outcomes.

Relevant to this submission, the analysis involved a detailed assessment of how to practically implement the Tasmanian NPM in light of COI recommendations 12.38 and 12.39, which involves shifting part of the Custodial Inspector's jurisdiction to the forthcoming Commission, while simultaneously integrating the Commission into the Tasmanian NPM framework. In addition to these directly relevant considerations, the implementation project also included an evaluation of Tasmania's other independent bodies whose functions include consideration of peoples' rights, including the Ombudsman, Anti-Discrimination Commissioner, and current Commissioner for Children and Young People. The project followed international guidance and evaluated each body's:⁴⁰

- legislation or other basis of establishment;
- existing mandate and jurisdiction;
- existing powers, including in relation to both public and private places of deprivation of liberty;
- independence (both real and perceived);
- existing human, financial and logistical resources;
- relations with the authorities and other relevant actors;
- working methods, and existing practices and experience, including in relation to detention monitoring; and
- immunities and privileges of both elected and hired members and staff.

⁴⁰ Implementation Report, section 5.2.4.

The results of this work shaped development of an operating model and proposed implementation roadmap for the Tasmanian NPM, which are supported through 12 overarching recommendations:⁴¹

- Recommendation 1:** That the Tasmanian NPM be established as a new specialised institution, separate from the Ombudsman.
- Recommendation 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.
- Recommendation 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.
- Recommendation 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.
- Recommendation 5:** That the Tasmanian NPM and Commissioner for Children and Young People be co-located in a purpose designed office setting.
- Recommendation 6:** That the Tasmanian NPM establish a formal and permanent Civil Society Advisory Council, which is integrated into its governance structure.
- Recommendation 7:** That the Tasmanian NPM's corporate services are provided by an agency over which it will not exercise oversight.
- Recommendation 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.
- Recommendation 9:** That the *OPCAT Implementation Act 2021*, section 5(3) be amended to include reference to aged residential care facilities and disability support residences or similar.
- Recommendation 10:** That the Tasmanian NPM be appropriately resourced to exercise its functions at disability support and aged residential care places of deprivation of liberty assessed as having a heightened risk of torture or ill-treatment.
- Recommendation 11:** The Tasmanian NPM establish an office in Launceston to support the delivery of functions in the North and North-West regions. And that this office space be made available for use by staff of the Commission for Children and Young People, and Disability Commissioner.

⁴¹ Supplementary Report, page 41.

Recommendation 12: That the *Integrity Commission Act 2009* be amended to include the Tasmanian NPM as a defined integrity entity, and extend the functions of the Joint Standing Committee on Integrity to include scrutiny and approval of integrity entity budgets.

Supporting analysis for these recommendations is provided in the Implementation Report and Supplementary Report. Relevant to this submission, it is necessary to highlight that at least⁴² 200 places were identified around Tasmania where people, including children and young people, are or may be deprived of their liberty and a heightened risk of torture or ill-treatment was assessed.⁴³ This significant number of places required a detailed service, governance, and organisational design assessment to create an office framework that could effectively and efficiently perform all NPM functions while remaining economical.

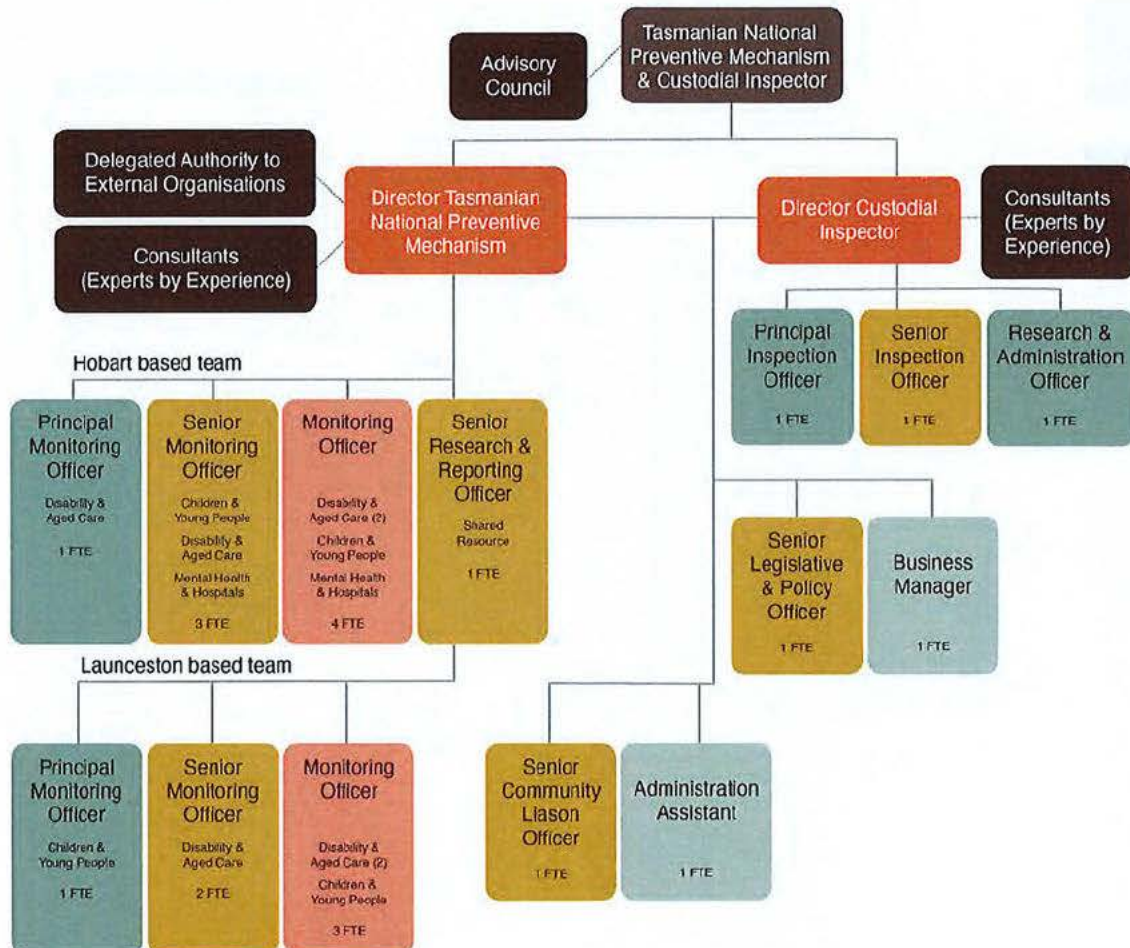
A key outcome of the implementation project is the recommendation that Tasmania establish the Tasmanian NPM as a new specialised institution that includes the existing Custodial Inspector. Having regard to COI recommendations 12.38 and 12.39, the analysis recommends that the Commission be delegated authority to manage a team of specialised staff within the NPM office, who will lead examinations of all places of deprivation of liberty in which only children and young people are present (e.g. youth justice, out of home care, and education settings); and accompany other NPM staff on visits to all places with mixed-aged populations (e.g. custody centres, mental health facilities, and health and social care places). The Custodial Inspector office will continue to lead all visits and inspections of custody centres, and add to its remit police and court cells to cover all justice related settings.

Coordinating NPM office staff on visits to places with mixed-aged populations is seen as the most effective way of ensuring appropriate diversity and multidisciplinary expertise on visits, while promoting productivity by avoiding duplication of staff or activities across offices. With respect to people with disability deprived of their liberty, the analysis recommended active engagement with the Office of the Disability Commissioner to develop a similar approach to the Commission (whereby it will also manage a strategic team of visit staff). To realise these efficiency gains, the report relies on the Office of the Tasmanian NPM being colocated with the Commission and the Disability Commissioner. This model is designed to avoid the jurisdictional overlap that will inevitably arise if NPM activities are split up and allocated to different bodies.

⁴² Supplementary report, Part 2.3. This did not include out of home care services and education facilities where information about the use of restrictive practices was unable to be obtained. Accordingly, the number of places that the Tasmanian NPM will need to regularly visit is likely to be greater than 200.

⁴³ The Supplementary Report identifies 438 aged residential care and disability support settings where deprivation of liberty is or may be occurring. Assessing each setting for risk, 158 places were evaluated as featuring a heightened risk of torture or ill-treatment that should be prioritised by the Tasmanian NPM. On top of these settings are justice related settings, mental health facilities and hospitals, which the Tasmanian NPM will always need to regularly visit. See: Supplementary Report, Part 4.

From a governance perspective, the report recommends that the office be led by a single, accountable, and identifiable Tasmanian NPM to manage the office and is ultimately responsible for all outputs. Meanwhile, responsibility for oversight coordination and prioritisation of activities is to be shared with the Commission and Disability Commissioner through delegations.⁴⁴ The organisation model arising from this assessment is visualised in the figure below.⁴⁵



This model breaks the office of the Tasmanian NPM down into three components:

1. Corporate office: the Tasmanian NPM, Directors, and business administration.
2. Office-based substantive staff: legislation and policy, research, and community liaison officers.
3. Visit and examination staff.

The visit and examination component of the office, its largest and most resource intensive, is divided into four thematic workstreams streams, who will operate from offices in Hobart and Launceston:

⁴⁴ OPCAT Act, section 11.

⁴⁵ Supplementary Report, Part 5, page 114.

1. Children and young people (4 FTE)
2. Custodial Inspector (existing jurisdiction, 3 FTE)
3. Disability support and aged residential care (8 FTE)
4. Mental health and Hospitals (2 FTE)

Each stream's FTE calculation reflects the outcomes of in-depth analysis that consider the number and locations of places to be visited, their size, the populations in those places, and the types of examinations that will be conducted. Each stream will be responsible for managing and updating the expectations materials relevant to the places and cohorts that they will examine. The Supplementary Report provides a detailed breakdown of how each stream is intended to operate.⁴⁶

With respect to the children and young people stream, its implementation in accordance with the recommendations in the implementation report will give effect to both recommendations 12.38 and 12.39. Staff will be recruited by the Commission and managed in coordination with the Tasmanian NPM.

Over 100 places will be regularly visited and examined by these subject matter expert staff. This will include leading examinations of youth justice settings, including Ashley Youth Detention Centre, consistent with recommendation 12.38. And it will support staff in other thematic streams by providing subject matter expertise on visits and examinations of settings where children and young people are or may be deprived of their liberty alongside adults. These places include police and court cells, adult custody centres, education settings, mental health facilities and hospitals, and disability support residences. As of August 2024, information provided by the Office of the Senior Practitioner indicates that approximately 21% of individuals supported by the NDIS with approved restrictive practices are children and young people.⁴⁷ Staff in this stream will have carriage of the Tasmanian NPM's expectations on the treatment of children and young people deprived of their liberty.

Four FTE are recommended:

- 1 FTE Principal Monitoring Officer (Band 7);
- 1 FTE Senior Monitoring Officer (Band 6); and
- 2 FTE Monitoring Officer (Band 5).

Despite the significant number of places that will be visited regularly by this stream, a 4 FTE baseline staff requirement was assessed as satisfactory for this stream to function because many of its visit activities (i.e. outside of youth detention monitoring) will occur in coordination with other thematic stream staff. This agile approach to staffing relies on all thematic streams being appropriately resourced and staffed. Staff in this stream will be divided between Hobart and Launceston, with the Principal based in Launceston until such time as Ashley Youth Detention Centre closes and youth detention services are relocated to the south.

⁴⁶ Supplementary Report, page 114 – 122.

⁴⁷ This data does not include children and young people deprived of their liberty in out of home care or schools subject to restrictive practices, which will also fall within the Tasmanian NPM's purview (and hence staff under this thematic stream). See Supplementary Report, part 2.3.

The alternative to this model is that the Commission operates separately to the Tasmanian NPM. As detailed in the next section, this approach was assessed as considerably more inefficient, likely to lead to significant duplication of work among the respective offices, and in the absence of significant resourcing very likely to result in lower quality outputs by the Commission which may not meet the requirements of OPCAT.

2. The Tasmanian NPM Implementation Project and the COI

Between September 2022 and September 2024, the Tasmanian NPM implementation project team embarked on in-depth research and analysis, and engaged subject matter experts to design the Tasmanian NPM. It met with NPM counterparts in other countries to understand how different NPM frameworks have operated in practice, and the strengths and weaknesses of different implementation models. To develop a Tasmanian approach to implementation, comprehensive data about deprivation of liberty in Tasmania was obtained through multiple rounds of consultation, which also enabled the project team to learn about the issues that will need to be addressed if the Tasmanian NPM is to build trust and succeed in achieving its mandate.

As outlined above, the COI report, released in September 2023, provides at recommendation 12.39 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.

This recommendation interrelates with recommendation 12.38, which relevantly provides that the Commission be given 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. These functions would transfer from the Custodial Inspector. The COI relevantly articulated that the oversight body responsible for systemic monitoring of youth detention should be child-focused and should specialise in working with children and young people and 'have expertise in child trauma and in preventing and identifying child sexual abuse.'⁴⁸

The Implementation Report and Supplementary Report consider these recommendations in detail.⁴⁹ This section is designed to provide a summary of key points in that analysis, relevant

⁴⁸ COI Report, Volume 5 (Book 3), Chapter 12, page 277.

⁴⁹ At Part 5 and Part 6, respectively

to the Bill. It begins with an overview of the COI recommendations, followed by an outline of why the implementation project outcomes and recommendations differ from the COI. I repeat the recommendation that these reports be considered in detail prior to any further policy development.

It is worth noting as a preliminary matter that the COI report does not take into consideration the results of the implementation project. Unfortunately, the COI was unable to consider the Tasmanian NPM implementation project team's analysis and findings in the development of its recommendations. This is simply because the project timelines did not align. By the time the implementation project team was undertaking its core analysis, following release of its second consultation paper,⁵⁰ the COI had substantively concluded its work and was in the process of finalising its report for publication. In May 2023, the project team and subject matter experts participating in the implementation project had the benefit of meeting with the COI, to outline the project's scope and purpose, however at this time it was not in a position to share findings or results.

Due to this sequencing and release of the COI report in September 2023, the implementation project included consideration of the COI report and recommendations 12.38 and 12.39. Noting the Tasmanian Government's acceptance of these recommendations prior to the release of the Implementation Report, an objective of the project included developing an operating model for the Tasmanian NPM that aligned with the spirit and purpose of these accepted recommendations while responding to the project's findings.

The COI's consideration of OPCAT and reasons underpinning recommendation 12.39 are brief.⁵¹ Background information indicates that the COI's analysis placed weight on several key observations:

- OPCAT (and the OPCAT Act) allows for the appointment of one or more NPMs in different contexts;
- Richard Connock had been appointed as Tasmanian NPM, alongside his many existing statutory appointments;
- At the time, limited work had been completed nationally and in Tasmania in relation to OPCAT;
- Richard Connock was stretched in his capacity as Ombudsman and with his other existing jurisdictions;
- The Northern Territory had proposed appointing its Children's Commissioner as an NPM, while the Victorian Children's Commissioner although not an NPM exercised an oversight function in respect of children and young people in detention; and
- The Commission, as a body with responsibility for monitoring the out of home care and youth justice systems under recommendation 12.38, would be an appropriate NPM for children and young people.

⁵⁰ Implementation Report, Appendix 3.

⁵¹ COI Report, Volume 5 (Book 3), Chapter 12, section 11.7.

Beyond these points, the COI report does not provide further detail about analysis, consultations, or other considerations that shaped its decision-making in relation to recommendation 12.39. This of course makes it difficult to compare the activities and findings of the implementation project to the COI report. Notably, it is unclear if the COI considered the scope of the NPM mandate beyond youth justice and custody settings. The following paragraph suggests that it is likely it did not:

We acknowledge that a small number of children may be sentenced to adult imprisonment, or may be transferred from youth detention to adult prison, and that the Commission for Children and Young People will not be a body with general expertise in the adult correctional system. Despite this, we consider that the significant number of children in youth detention who are also involved in the out of home care system makes the new Commission—a body with responsibility for monitoring the out of home care and youth justice systems—an appropriate National Preventive Mechanism for children and young people.⁵²

This is an important consideration because it provides an insight into how the COI potentially intended recommendations 12.38 and 12.39 to function. Recommendation 12.38 is, of course, limited to oversight of justice-related settings. In its discussion of recommendation 12.39, the COI similarly refers to children and young people who are ‘detained’, and notes the crossover between ‘detainees’ and children and young people in out of home care—which the Commission will also monitor—who encounter the youth justice system. It can be inferred that the COI may have viewed the scope of the NPM mandate in respect of children and young people as equal to the scope of oversight responsibilities already recommended for the Commission – notably under 12.38. Accordingly, it would have viewed these recommendations as being substantively similar in their scope.

This position echoes a ‘primary places of detention’ approach to OPCAT implementation, which is incomplete and merits explaining. Prior to the COI’s commencement, for some years an incorrect interpretation of OPCAT had been allowed to permeate in Australia, which focused restricting OPCAT to ‘primary places of detention’. This interpretation attempted to limit the NPM to only visiting custody settings where people were detained for 24 hours or longer. It was universally dismissed by stakeholders and the United Nations Subcommittee on Prevention of Torture (SPT) as incorrect and incompatible with OPCAT Article 4.⁵³

It is understandable, however, that the COI may have considered this view in forming its own in relation to OPCAT, because at the time it was completing its analysis no other implementation work had been completed to fully scope the application of the NPM jurisdiction.⁵⁴ Following the release of the COI report, the SPT released its General Comment

⁵² COI Report, Volume 5 (Book 3), Chapter 12, section 11.7, page 283.

⁵³ See Supplementary Report, Appendix 2.

⁵⁴ As the COI acknowledges in the third bullet point on the previous page. See COI Report, Volume 5 (Book 3), Chapter 12, section 11.7, page 282.

on OPCAT Article 4, providing clear authoritative guidance on the identification of places of deprivation of liberty.⁵⁵ It is recommended that policymakers review this document.

It is also relevant to highlight that neither did the Tasmanian Government accept the primary places of detention position, with the then Tasmanian Attorney-General noting in their Second Reading to the *OPCAT Implementation Bill 2021* that OPCAT must be interpreted broadly:

Under OPCAT, places of detention is [sic] defined in open terms, and this is appropriately reflected in the Bill. It is any place under Tasmania's 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 their own instigation or with their consent or acquiescence.

For clarity, the Bill provides a list of places of detention that the Government has assessed to be within the scope of this definition. These include:

- a correctional centre, prison, detention centre or similar;
- a hospital or similar;
- a closed psychiatric facility;
- a police station or court cell complex; and
- a vehicle used or operated to convey detainees.

In its General Comment, the SPT further observes that even in cases where national laws include non-exhaustive lists, national preventive mechanisms have generally gone beyond the listed facilities and visited other settings as part of their regular visiting programme.⁵⁶ It provides a long, illustrative list of the different places that NPM's commonly visit.⁵⁷ The Tasmanian NPM implementation project followed this SPT guidance throughout its project, with a view to accurately mapping and analysing all places of deprivation of liberty that the NPM will be expected to visit around the state.

As part of its wider assessment, and having regard to the results of its analysis that identifies in excess of 100 different places around Tasmania where children and young people are

⁵⁵ Supplementary Report, Appendix 2.

⁵⁶ Supplementary Report, Appendix 2, page 11.

⁵⁷ "[S]ome of the places that national preventive mechanisms around the world have visited and should continue to visit as part of their obligations under the Optional Protocol: adult prisons; pretrial detention centres; juvenile or socioeducational detention centres; police or other law enforcement units; mental health facilities; nursing homes; orphanages; residences for children and adolescents without parental care or who have suffered neglect or abuse; centres for persons with disabilities; migrant detention centres, such as first reception centres for adults and unaccompanied children and detention and removal centres for migrants; transit zones at international borders; military compounds; vehicles, ships and aeroplanes; coronavirus disease (COVID-19) hotels and other formal places of compulsory quarantine and isolation, or home confinement; rehabilitation and treatment centres for persons with drug use disorders; police training schools; State security service detention facilities; boarding schools and religious schools; public demonstrations; and any gatherings where police practices such as kettling are or may be carried out." See Supplementary Report, Appendix 2, page 12.

deprived of their liberty, each of the COI's key observations noted above were considered by the project team.

OPCAT provides flexibility as to how a state may establish its NPM. It may 'set up, designate or maintain' one or more bodies to fulfil the NPM functions. Globally, the majority of NPMs are a single body, often a national human rights institution. In Australia, owing to our federation and divided jurisdiction between the states and territories, and the Commonwealth, a multiple-NPM model was agreed. Accordingly, Tasmania is required to establish its own NPM, which alongside its counterparts will form the 'Australian NPM'. The OPCAT Act establishes Tasmania's NPM.

As part of its analysis the implementation project team thoroughly analysed the most appropriate operating model for the Tasmanian NPM. The results of this analysis did not support the creation of a multibody NPM framework in Tasmania. The main reasons for this outcome relate to Tasmania being a small jurisdiction, with limited compatible bodies that could be designated as NPMs to accurately capture all places of deprivation of liberty.

A key finding of the implementation project arising from analysis and community consultation was that the Ombudsman was not an appropriate person to concurrently serve as Tasmanian NPM, due to already being overburdened by jurisdictions and workload. This finding also aligned with the COI's own analysis of the many jurisdictions held by the Ombudsman. With the Ombudsman excluded from the assessment, however, there were no other independent Tasmanian bodies compatible with serving as an NPM that would cover all places of deprivation of liberty. This was primarily because most other bodies have been established to focus on a specific thematic area, such as custody centres with the Custodial Inspector, and preventing discrimination according to attributes by the Anti-Discrimination Commissioner.⁵⁸

A second key finding of the implementation project arising from consultation with NPMs around the world was that the multiple-NPM model was generally successful in circumstances where each component NPM had a large enough scale of places and people to visit. This scale would enable it to justify the recruitment of a large, multidisciplinary, and diverse team capable of assisting it to exercise all functions effectively. Smaller states adopted the multiple NPM model observed that offices were often under-resourced, typically did not meet OPCAT and SPT requirements in terms of staffing expertise and diversity, and had to recruit generalists who prioritised visits over the exercise of other functions, leading to less effective outcomes.⁵⁹ A primary reason for this is because in a multibody NPM each component part generally operates within its own jurisdiction, and seldom works closely with other components to coordinate activities and share resources. By way of example, the Netherlands first implemented its NPM as a multibody framework consisting of six separate NPMs, but more recently reorganised it into a single body framework led by its human rights commission.⁶⁰

Because Tasmania is a small state with limited places to visit among many key deprivation of liberty settings, and without compatible bodies to form a complete multibody NPM, a key

⁵⁸ Implementation Report, section 5.2.4.

⁵⁹ Implementation Report, section 5.2.

⁶⁰ See: <https://www.apt.ch/knowledge-hub/opcat/netherlands>

outcome of this analysis was that the most suitable operating model for the Tasmanian NPM was a new specialised body, led by its own head of office, who would exercise all powers of functions of the Tasmanian NPM. It is noted that there was no way for the project team to analyse the success of the Northern Territory model cited by the COI because it is still not fully operational, and because Victoria still does not have a functioning NPM.

Turning to COI recommendation 12.39, this outcome did not align with appointing the Commission as a separate NPM. In practical terms, it would mean that there would be two NPMs in Tasmania: one for all places where adults are deprived of their liberty, and one for children and young people. This would be likely to raise confusion for laypeople, who may struggle to understand why there are two bodies exercising the same powers and functions. Notably, looking beyond custody and out of home care settings, the analysis found that many community-based deprivation of liberty places and service providers around the state included both adults and children and young people. Two NPMs exercising their functions over these places would lead to significant duplication of work, resource needs, and overlapping information requests to the same government agencies and service providers.

The analysis also did not support multiple bodies exercising the same oversight over youth justice and adult custody centres. This would be the outcome if the Commission assumed jurisdiction for inspecting these places under recommendation 12.38, but did not become part of the Tasmanian NPM framework under recommendation 12.39. The analysis found that recommendations 12.38 and 12.39 are interrelated. Practically, to avoid creating overlapping jurisdictions or unnecessary functions, they must be implemented together and treated as indivisible. This is because the Tasmanian NPM jurisdiction includes oversight jurisdiction of youth justice and related settings captured under recommendation 12.38.

The implementation project's findings aligned with the COI's broader analysis that the Commission would possess appropriate subject matter expertise in relation to children and young people to participate in the Tasmanian NPM's operations, and that both the Tasmanian NPM and Commission should work together closely. With a view to implementing recommendations 12.38 and 12.39 collectively, the Implementation Report recommends an operating model where the Commission is responsible for managing a specific team in the Office of the Tasmanian NPM that focuses on children and young people, which leads inspections to youth justice settings, and that the offices be collocated to promote collaboration.⁶¹ In the Supplementary Report a similar approach is recommended for the Disability Commissioner.⁶²

3. The Bill

The Bill sets out numerous functions for the proposed Commission, including – broadly – the inspection functions set out in the CI Act. No mention is made of OPCAT, the Tasmanian NPM, or the OPCAT Act. Accordingly, the Bill seeks to implement recommendation 12.38 but not 12.39.

⁶¹ Implementation Report, section 5.3.2 – 5.3.4, page 126 - 137.

⁶² Supplementary Report, Part 5.

With respect to recommendations 12.38 and 12.39, however, there are some significant differences to the existing OPCAT Act and CI Act which could have implications for the inspection of youth justice facilities. These relate to the timing of inspections, location of inspections, frequency of inspections, access to information, and collaboration with the existing Custodial Inspector and NPM. Each is addressed in turn. Feedback is also provided in relation to the Child Advocate and Commission Inquiries roles, and the proposed Joint Standing Committee.

Timing of inspections

The Bill provides that an inspection of a detention facility may be conducted 'during the ordinary business hours of the detention facility', or by arrangement.⁶³

The Tasmanian NPM and the Custodial Inspector are empowered to visit places within their jurisdiction at any time, without notice, which is an important element of effective oversight. Custodial settings have different practices in place outside business hours, which can have ramifications for people detained. Restricting unannounced inspections to ordinary business hours also creates an inference that abuse of children and young people is less likely to occur at other times, which is false.

Restricting an NPM's access rights to certain hours is contrary to the requirements of OPCAT, and accordingly would not align with implementation of recommendation 12.39. As currently drafted, this provision also raises a possibility that the Commission, if it is denied entry after hours or wishes to undertake an unannounced inspection, would either call on the Custodial Inspector or (more likely) use NPM authority to lead a visit. It must be an unintended outcome to create such a situation.

Location of inspections

The Draft Bill further provides that inspections may be conducted at detention facilities.⁶⁴ Given the Government's proposed move towards increasing community-based youth justice facilities, particularly for young people on remand, this provision should be broadened to allow inspections to be conducted at any facility in which a young person is being accommodated within the justice system.

This provision is also incompatible with recommendation 12.39. The OPCAT Act currently provides flexibility for the Tasmanian NPM to visit any place of deprivation of liberty, which would include community-based youth justice facilities.⁶⁵

It is relevant to additionally note that the government is not precluded from extending the jurisdiction of the Tasmanian NPM, particularly to promote consistency of service delivery. At present, the Tasmanian NPM can visit and inspect out of home care settings where children and young people are or may be deprived of their liberty. It is open to the government under

⁶³ The Bill clause 22.

⁶⁴ The Bill, clause 22.

⁶⁵ OPCAT Act, section 5.

section 5(3)(f) to prescribe the entire out of home care system as within the Tasmanian NPM's jurisdiction.

Following implementation of recommendation 12.39 and the Tasmanian NPM's implementation recommendations, prescribing out of home care under the OPCAT Act would enable the Commission to visit and examine the out of home care system. This would obviate the need to create separate functions and powers in its own legislative framework.

Frequency of inspections

The Custodial Inspector Act requires 'a mandatory inspection of each custodial centre at least once every three years', and the OPCAT Act requires that the Tasmanian NPM 'regularly' examine the treatment of persons deprived of their liberty in places of detention.⁶⁶ By contrast, the Bill does not specify the frequency of inspections.⁶⁷

Without an expectation of regular, comprehensive inspections, there is a risk that oversight could become solely based on reactive events and day-to-day needs, at the expense of rigorous assessment against the *Expectations on the treatment of children and young people deprived of their liberty*.⁶⁸ In the context of inadequate resourcing, this is a significant risk. Former Commissioner for Children and Young People, Leanne McLean, noted in her evidence to the COI that resourcing for her office was 'a constant challenge' that 'constrained' her ability to perform several of her legislated functions.⁶⁹ Consequently, adequate resourcing to fulfil 'systemic monitoring requirements' is part of the Commission of Inquiry recommendation concerning the new Commission.⁷⁰

Adequate resourcing is essential to implement recommendation 12.39. The COI specifically recommended that the Tasmanian NPM should be resourced to allow it to effectively fulfil its functions under OPCAT.

Access to information

Part 5 of the Bill provides powers for the Commission to request information from a person or Government entity.⁷¹ However, it provides that information does not need to be produced in satisfaction of a request if that information is subject to a lawful claim or right of privilege, or contains medical or other related health information.⁷² These provisions directly contradict powers granted to the Tasmanian NPM to request information. For instance, section 16(1) of the OPCAT Act provides that the Tasmanian NPM may request 'any information, document or

⁶⁶ OPCAT Act, section 9(1)(a).

⁶⁷ CI Act, section 6(a).

⁶⁸ Tasmanian National Preventative Mechanism and Office of the Custodial Inspector (Tasmania), *Expectations on the treatment of children and young people deprived of their liberty* (Version 1.1 – May 2024).

⁶⁹ Witness Statement of Leanne McLean to the Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings (12 April 2022) 9.

⁷⁰ Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings, *Who was looking after me? Prioritising the safety of Tasmanian children* (Report, August 2023) Recommendations 12.38.

⁷¹ The Bill, clause 43.

⁷² The Bill, clause 43(3).

thing' that the Tasmanian NPM considers relevant to an inspection; and subsections (3) and (4) preclude the Crown or another person from withholding information because it is privileged or would disclose legal advice.⁷³ Similar powers are granted to the Custodial Inspector.⁷⁴

It is unclear why these exemptions have been included in the Bill. As drafted, they are incompatible with recommendations 12.38 and 12.39.

A key part of proactive inspections is assessing matters that involve healthcare and related treatment in places of deprivation of liberty, as well as considering advice obtained by service providers and facilities that relate to people's conditions and treatment. The Custodial Inspector regularly inspects against key health and wellbeing standards, and topic 3 of the Tasmanian NPM's Expectations on the treatment of children and young people deprived of their liberty specifically addresses healthcare.

It is also noted that no provisions are provided to address information sharing internally, notably to avoid conflicts of interest between the Commission's functions. This must be addressed to ensure that any NPM staff within the Commission recommendation 12.39 are free from conflict and operate independently of staff exercising other functions.

Collaboration with Custodial Inspector and NPM

The Bill does not set out or provide clarity on how the Custodial Inspector and Tasmanian NPM will interact with the Commission in the exercise of its functions, or how these functions will align with recommendation 12.39. Notably, it does not clarify who will hold responsibility for preparing and publishing guidelines and standards in relation to the conduct of inspections, which is currently a function of the Custodial Inspector that it shares with the Tasmanian NPM through the publication of joint expectations.⁷⁵

Similarly, while the Bill includes provisions to provide information to other persons and prescribed entities under certain circumstances, these provisions do not provide clarity around the Custodial Inspector.⁷⁶ Given the Commission will be responsible for some of the functions presently fulfilled by the Custodial Inspector, and which overlap with the Tasmanian NPM, provisions explicitly allowing collaboration between these bodies would permit them to work together where this would be beneficial, and better align implementation with recommendation 12.39.

For example, while the Commission will have expertise concerning children and young people, the Custodial Inspector holds knowledge of custodial settings, including how the different

⁷³ "(3) The Crown may not prevent or obstruct information from being produced, or evidence from being given, for the purpose of an inspection carried out under section 13, even though it would be entitled to do so if the inspection were a legal proceeding held before a court.

(4) A person is not excused from giving information, producing a record or answering a question, when required to do so under this Act, on the ground that to do so would disclose legal advice furnished to an agency or instrumentality of the Tasmanian government or another authority to which this Act applies."

⁷⁴ CI Act, section 8(e).

⁷⁵ CI Act, section 6(c); OPCAT Act, sections 9(1)(i) and 9(2).

⁷⁶ The Bill clause 9; clause 42.

elements of these settings (such as staff, security and infrastructure) affect the wellbeing of people detained. This expertise would be particularly relevant in the context of young people being held in adult custodial settings, which are regularly visited by Custodial Inspector staff. Further, the Custodial Inspector is experienced in conducting inspections.

And, looking beyond custody centres, the Tasmanian NPM and Disability Commissioner will hold thematic expertise in relation to many community-based places where children and young people fall within the scope of recommendation 12.39. Notably, mental health facilities and hospitals, disability support services, and restrictive practices.

Child Advocate and Commission Inquiries

It is useful to briefly touch on the Child Advocate and Commission Inquiry functions proposed in the Bill. It is currently unclear how these functions will be coordinated alongside implementation of recommendation 12.39.

As outlined earlier in this submission, it is a key requirement of OPCAT that NPM staff be separate from other functions exercised by a body and free from conflict. The COI, in recommending that the Commission be brought within the Tasmanian NPM framework, does not go into detail about how this implementation should occur to ensure compliance with OPCAT. However, it would be inappropriate for the Commission as a whole to fall within the NPM purview because many functions it will exercise are not OPCAT-compatible. In respect of the Child Advocate and Independent Community Visitor Scheme,⁷⁷ it is noted that the individual advocacy functions exercised by these bodies do not align with the proactive oversight functions of the NPM under OPCAT, and it is important that they are appropriately separated to avoid conflict and ensure that NPM staff are functionally separate.

Part 3 of the Bill establishes a new inquiry function for the Commission. This power is welcomed, however could benefit from further refinement to improve compatibility with recommendation 12.39. As currently drafted, the Bill provides the Commission with a limited inspection and monitoring jurisdiction, reserving investigations of community-based and other settings for inquiries, such as in relation to education settings and out of home care. It is inferred that the intention is for inquiries to be less frequent, and potentially reactive to events or information obtained.

However, it is noted that many of these areas specifically listed in the Bill⁷⁸ are places where children and young people are or may be deprived of their liberty, and therefore fall within the Tasmanian NPM purview and by extension recommendation 12.39. These places will accordingly be visited regularly by the Commission and Tasmanian NPM staff in the exercise of their proactive mandate. Therefore, it is possible that this inquiry function may not be used as frequently as envisaged. This is not raised as an issue but to clarify to policymakers that upon implementation of recommendation 12.39 the Commission's proactive oversight jurisdiction will be considerably broader than currently envisaged under the Bill.

⁷⁷ The Bill, Division 6.

⁷⁸ The Bill, clause 34.

Joint Standing Committee

Finally, the Bill intends to establish a new Joint Standing Committee to scrutinise the Commission's activities.⁷⁹ The intention appears to be to give effect to COI recommendation 18.9. However, it is relevant to note the COI suggested that the Joint Standing Committee on Integrity (JSCI) may be an appropriate body to exercise oversight of the Commission.⁸⁰ It is submitted that this is a more appropriate approach.

At present, the Custodial Inspector is subject to JSCI oversight. Following this, the Tasmanian NPM has recommended that it also be included following the results of its implementation project.⁸¹ If this recommendation is accepted by Parliament, then upon implementation of recommendation 12.39 the Commission will also be captured under the existing JSCI framework as part of the Tasmanian NPM.

While this recommendation is of course subject to the view of Parliament, in the circumstances, amending the *Integrity Commission Act 2009* to include the Commission as a defined integrity entity would appear to be the more fitting reform option, rather than the Commission being subject to oversight by two joint committees.

4. Recommendations

The COI's recommendations related to oversight have been formulated against an oversight landscape that it observed was overcomplicated, and in which it found a lack of collaboration among related bodies. This Bill is a welcome attempt to address some of the COI's concerns and implement recommendations. However, in failing to consider the implementation of recommendation 12.39, and by seeking to implement recommendation 12.38 under a new framework separate to the CI Act, it is likely to have an unintended consequence of further complicating rather than simplifying the Tasmania's oversight landscape.

As a small jurisdiction, it is essential that oversight bodies are designed to fit and work together in a way that best serves Tasmanians. Without amendment this Bill is likely to negatively impact the operations of the Commission, the Tasmanian NPM and the Custodial Inspector by inserting jurisdictional uncertainty, which could potentially result in less effective monitoring of young people in youth detention and deprived of their liberty around the state, and impede the congruity of the post-COI reform process. As drafted this Bill and future establishment of the Commission is unlikely to be compatible with OPCAT, which may also hinder implementation of recommendation 12.39.

Against this analysis, four overarching recommendations are provided to improve the Bill and ensure that oversight functions and powers exercised by the Commission are best placed to improve the conditions and treatment of children and young people deprived of their liberty. Overarching recommendations are as follows:

⁷⁹ The Bill, Part 4.

⁸⁰ COI report, Volume 8, pg. 67.

⁸¹ Supplementary Report, recommendation 12.

1. The *Commission for Children and Young People Bill 2024* be revised to provide coordinated implementation of COI recommendations 12.38 and 12.39, having regard to the results of the Tasmanian NPM implementation project and ongoing work to establish the Office of the Disability Commissioner.
2. That Division 4 and related provisions in the Bill be removed, and that the *Custodial Inspector Act 2016* and *OPCAT Implementation Act 2021* be utilised to provide the Commission with requisite functions to implement recommendations 12.38 and 12.39, respectively.
3. The *Commission* be defined as an integrity entity under the *Integrity Commission Act 2009* and subject to Joint Standing Committee on Integrity oversight.
4. That the Tasmanian Government commit to further consultation on this Bill, including with my Office, prior to tabling in Parliament.