

Tasmanian national preventive mechanism Implementation project

Consultation paper I

**Approach to OPCAT Article 4:
identifying places of detention**

January 2023

About: This consultation paper invites stakeholders to have their say in shaping the Tasmanian national preventive mechanism's (NPM) approach to identifying places where people are or may be deprived of their liberty. Stakeholders are also invited to provide important feedback on places relevant to their populations, and key issues.

The Tasmanian NPM forms part of Australia's ratification of the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT). OPCAT is an international human rights agreement that complements and enhances compliance with the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).

Additional background information about OPCAT and the Tasmanian NPM is available at www.npm.tas.gov.au.

Key anticipated outcomes from this consultation paper are:

- The development of a shared understanding among stakeholders and the Tasmanian NPM of the scope of its visiting function;
- Identification of potential opportunities for civil society to prioritise resources or assist the Tasmanian NPM, to prevent torture and ill-treatment; and
- Identification by the Tasmanian NPM of places of detention, and related priority issues for vulnerable communities who are or may be deprived of their liberty in those places.

Stakeholder feedback is sought on the questions included in this document, as well as in relation to the analysis contained in this consultation paper generally.

Enquiries related to this consultation may be made to Mark Huber, Project Manager, OPCAT Implementation Project, at enquiries@npm.tas.gov.au.

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Acronyms and key words

CAT	<i>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.</i>
Civil society	This includes a wide range of organisations, including non-governmental organisations and associations, professional associations, trade unions, academia, and faith-based groups.
Custodial centre	A prison within the meaning of the <i>Corrections Act 1997</i> ; and a detention centre
Deprivation of liberty	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, Article 4(2))
ECtHR	European Court of Human Rights
Ill-treatment	All forms of cruel, inhuman or degrading treatment or punishment.
NPM	National preventive mechanism.
OHCHR	Office of the High Commissioner for Human Rights
OPCAT	<i>Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.</i>
Paris Principles	Principles relating to the Status of National Institutions
Place of detention	Any place under [a State Party'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 its instigation or with its consent or acquiescence. (OPCAT, Article 4(1))

SPT	Subcommittee on Prevention of Torture.
‘the Act’	<i>OPCAT Implementation Act 2021</i> (Tas).
UN	United Nations
Vienna Convention	<i>Vienna Convention on the Law of Treaties</i> (1969)

How to respond to this consultation paper

Stakeholders are invited to respond to this consultation online, at www.npm.tas.gov.au.

Alternatively, submissions can be provided via email as follows:

Address: enquiries@npm.tas.gov.au

Subject: 'Submission – consultation paper 1'

A summary of this consultation round will be included in the Tasmanian NPM's implementation report. Individual consultation responses will not be published, however stakeholders that provide a submission will be acknowledged. Please indicate in your expression of interest if you would prefer that your participation in this consultation process be treated as confidential. Stakeholders are welcome to publish their submissions to this consultation process on their respective websites.

This consultation round will close on **28 February 2022**. Please contact us before this date if you require an extension of time to make a submission.

Background information about the Tasmanian NPM and OPCAT is provided at www.npm.tas.gov.au

Enquiries related to this consultation, including a request for extension of time, may be made to Mark Huber, Project Manager, OPCAT Implementation Project, at enquiries@npm.tas.gov.au.

I. Foreword

It is a privilege to release this first consultation paper, on OPCAT Article 4, which will shape the implementation and fulfilment of my role as Tasmanian national preventive mechanism (NPM).

On 28 February 2022, I was appointed inaugural Tasmanian NPM by the Governor of Tasmania, the Honourable Barbara Baker. My appointment forms part of Australia's overall ratification of the *Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT). As its name suggests, OPCAT is an optional treaty, which in accordance with its Article 27 may be joined by any State that is already a Party to its parent treaty, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).

Fundamental to the CAT is a commitment by States to ensure that no one shall be subjected to torture or to ill-treatment, and to take effective measures to criminalise and prevent its occurrence. Australia became a party to the CAT in 1989. Ratification of OPCAT is one such measure that complements and enhances compliance with the CAT. Recognising that torture and ill-treatment is more likely to occur in places not subject to external scrutiny, OPCAT establishes a system of regular visits, carried out by independent bodies, to places where persons are or may be deprived of their liberty. A key objective is to strengthen the protection of persons deprived of their liberty and maintain full respect of their human rights. OPCAT does not create new human rights obligations.

Treaties are a formal source of international law. They are binding on States that ratify them. Australia's ratification of OPCAT, in 2017, brings with it a set of binding obligations. The core obligations are twofold: to receive visits by members of a United Nations treaty body, the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT); and, to establish a domestic national preventive mechanism. My appointment flows from this second obligation.

Whilst it is often the case in Australia that treaty ratification occurs at the national level, led by Commonwealth law, in this instance each state and territory—as well as the Commonwealth—has agreed to give effect to OPCAT separately. Accordingly, for Tasmania, the requirements of OPCAT have been legislated under the *OPCAT Implementation Act 2021* (Tas) (the Act), pursuant to which I have been appointed. I am pleased to see that Tasmania's legislation aligns with OPCAT, follows standards provided under the Paris Principles, and has been well received by stakeholders. I am also encouraged by the Tasmanian Government's expressed commitment to appropriately resource this new independent body.

Stakeholders may be aware that in addition to my appointment as Tasmanian NPM, I also currently serve as Tasmanian Ombudsman, and as the Custodial Inspector. It is important to emphasise that, consistent with OPCAT, my role as Tasmanian NPM will complement rather than replace these existing systems of oversight, operating as a separate independent office.

As Tasmanian NPM, my mandate is to prevent future occurrences of torture and ill-treatment, in accordance with the Act. NPMs are required to fulfil their mandate through the exercise of four key functions: *visiting*, *advisory*, *educational*, and *cooperation*. Each function is carried out through a proactive, preventive lens, rather than by responding to specific events, allegations or complaints.

Chief among these functions is the visiting function. NPMs are required to regularly examine places of detention with the objective of identifying any root causes of ill-treatment and other human rights problems, understanding issues, and finding ways to address them. Following OPCAT and SPT guidelines, my focus will be on systemic improvement (rather than on any particular individual), and will involve ongoing dialogue with relevant authorities. Consistent with OPCAT, the Act provides me with unfettered access to these places.

Understanding the scope of this visiting function is the focus of this consultation paper.

Section 9(1)(a) of the Act specifies my visiting function, which is to ‘regularly examine the treatment of persons deprived of their liberty in places of detention’. This mirrors the text of OPCAT, at Article 19. Consistent with Article 19, sections 4 and 5 of the Act further define these key terms ‘deprivation of liberty’ and ‘place of detention’, by reference to the definition found in OPCAT, at Article 4.

Article 4 of OPCAT defines places of detention and deprivation of liberty in broad terms. This reflects that torture and ill-treatment can occur in a wide range of settings, and that the first hours of detention are often considered as being a time period where persons are the most at risk of this happening. Notably, these definitions extend beyond custodial centres, which I currently inspect as Custodial Inspector. Acknowledging this breadth, the Act provides an illustrative list of additional places. However, as this consultation paper identifies, other places in Tasmania are also likely to fall within my mandate.

Collaboration with stakeholders is essential to developing a robust understanding of OPCAT Article 4, and its application in Tasmania. In addition to shaping how I perform this function, at this early stage in the establishment of my office, feedback provided will also inform how this office is designed, and its resourcing needs.

Equally, it is my desire that through this consultation process stakeholders will advance their own understanding of the scope of my visiting function, enabling them to better assess how the Tasmanian NPM may be relevant to their activities and the populations they represent, provide relevant feedback, and consider potential opportunities to work together to prevent torture and ill-treatment. It is well known that minority and vulnerable communities are disproportionately represented in places of detention, and that understanding their priority issues is important to the work of the NPM. Ongoing engagement and collaboration between my office and stakeholders will be essential to the successful fulfilment of my mandate.

This consultation paper summarises my understanding of OPCAT Article 4, and includes relevant indicators that I intend to have regard to when considering if a place is a place of detention. Accompanying this summary is a series of key consultation questions, relating to

the identification of places of detention in Tasmania and related issues. I invite stakeholders to provide feedback on the analysis, and a response to the consultations questions. Stakeholders may also provide any other information that they consider relevant to this consultation.

In forming this understanding of OPCAT Article 4, I wish to acknowledge the valuable communication and assistance I have received from experts, including Ms Regina Weiss, Dr Alice Edwards, Mr Ben Buckland, the office of the New Zealand Ombudsman, my NPM counterparts, and members of the SPT whom I met during their recent visit to Australia.

While effort has been made to prepare this consultation paper in plain terms, I am conscious that certain language used and concepts discussed are complex. If stakeholders would like assistance with the document or have related questions, they are welcome to contact my project manager, Mr Mark Huber, at enquiries@npm.tas.gov.au.

Finally, I thank stakeholders for their ongoing support of OPCAT, their consideration of this consultation paper, and their enduring efforts to eradicate torture and ill-treatment. I look forward to receiving feedback on this consultation paper and working collaboratively on the implementation of my office.

Sincerely

A handwritten signature in black ink, consisting of a large, stylized 'C' followed by a smaller 'R' and a long horizontal stroke.

Richard Connock

Tasmanian National Preventive Mechanism

2. Summary and consultation questions

The analysis in this consultation paper provides an overview of the broad scope of the OPACT visiting function, and the many factors that the Tasmanian NPM may take into account in determining if a setting or place is one that it may examine under the Act.

The analysis reveals that in light of OPCAT's object and purpose, any evaluation of whether a place or setting is a 'place of detention' as defined at Article 4 should be approached in an open manner. This definition includes not only the traditional criminal detention facilities such as prisons and police cells, but also civil facilities (e.g. medical treatment), social care places, temporary places, and transportable places, irrespective of whether they are public or private.

In addition, no time limits or restrictions should be placed on the related definition of 'deprivation of liberty', which covers all circumstances in which a person is (or may be) held against their will, even if that will was initially surrendered voluntarily or is temporary in nature. Finally, the link between the place where deprivation of liberty occurs on the one hand, and the involvement of a public authority on the other hand, does not need to be direct. If a private place operates subject to government regulations or standards; or, operates with implied approval (such as by receiving a grant, subsidy or similar), that may satisfy the threshold.

Against this background, the Tasmanian NPM seeks stakeholder input on the application of its visiting mandate in Tasmania, and in the design of its office. Feedback is requested in response to the following questions:

1. Are you aware of any places in Tasmania where populations that your organisation represents are or may be deprived of their liberty (other than places listed at section 5(3) of the Act)?
2. What places in Tasmania does your organisation consider the NPM should visit as a matter of priority?
3. What is important for the NPM to consider in order for its functions to be responsive to the populations that your organisation represents? (needs, risks, barriers)
4. What cultural attributes does the office of the NPM require to ensure that the intent of OPCAT is realised?

3. Introduction

In Australia, a treaty does not automatically have force of law when it is signed. For a treaty's obligations to take effect, the process of ratification requires that it be incorporated into the legal system. This applies to OPCAT.

OPCAT, at Article 3, requires that States “set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment” as the national preventive mechanism (NPM). In Australia, each state and territory government and the Commonwealth government have agreed to create their own NPM in conformity with the requirements of OPCAT. Collectively, these bodies will form the Australian NPM. The Commonwealth NPM has been given the additional task of coordinating all NPM bodies and submitting an annual report to the SPT on their behalf.

Consistent with this NPM model, in Tasmania legislation has been passed to give effect to OPCAT: the *OPCAT Implementation Act 2021*. This legislation establishes the Tasmanian NPM as a new independent body, sets out its functions, and addresses other matters related to OPCAT, such as visits to Tasmania by the SPT and protection from reprisal. Accordingly, the Tasmanian NPM's power comes from the Act, and not from OPCAT directly.

Article 19 of OPCAT requires that States grant NPMs at a minimum the power:

- (a) To regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in article 4, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment;*
- (b) To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;*
- (c) To submit proposals and observations concerning existing or draft legislation.*

For the Tasmanian NPM, these minimum powers and other related functions are outlined at section 9(1) of the Act:

- (1) A Tasmanian national preventive mechanism has the following functions:*
 - (a) to regularly examine the treatment of persons deprived of their liberty in places of detention with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment;*
 - (b) to require the provision of, or access to, or to copy and retain copies of, information held by any person concerning –*
 - (i) detainees, including the number and treatment of such detainees and the conditions of their detention; and*
 - (ii) places of detention, including the number of such places and their location;*
 - (c) to access, inspect and review places of detention in accordance with section 13 ;*

- (d) to interview detainees, and any other persons whom he or she believes may supply relevant information, in accordance with Article 20(d) of the Optional Protocol;*
- (e) to have contact, meet and exchange any information obtained in accordance with this Act with the Subcommittee and a national preventive mechanism of any other Australian jurisdiction;*
- (f) to refer matters relating to a detainee or place of detention to an appropriate agency for consideration or action;*
- (g) to receive information from any person, body or agency in relation to a detainee or place of detention;*
- (h) to make recommendations, and provide advice, to the relevant authorities with the aim of improving the treatment and the conditions of persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;*
- (i) to develop and publish guidelines and standards in respect of detainees or places of detention;*
- (j) to submit proposals and observations concerning existing or draft legislation that relates to detainees or places of detention;*
- (k) to publish reports, recommendations, advice or findings in relation to detainees or places of detention;*
- (l) to engage in consultation in relation to policy relating to detainees or places of detention with a responsible Secretary or a responsible Minister;*
- (m) such other functions as may be conferred or imposed on a Tasmanian national preventive mechanism under this or any other Act;*
- (n) to do all things necessary or convenient to be done in connection with, or incidental to, the exercise of his or her functions.*

The visiting function of the Tasmanian NPM, outlined at section 9(1)(a) above, requires that it regularly examine the treatment of persons ‘deprived of their liberty’ in ‘places of detention’. These two key terms are defined in OPCAT, at Article 4, which provides:

- 1. Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 to any place under its 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 its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.*
- 2. For the purposes of the present Protocol, 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.*

These key definitions are incorporated through sections 4 and 5 of the Act [emphasis added]:

4. Interpretation

(1) In this Act –

...

deprivation of liberty has the meaning that it has in the Optional Protocol

5. *Meaning of place of detention*

(1) *In this section –*

closed psychiatric facility means the following facilities within the meaning of the Mental Health Act 2013:

(a) an approved facility;

(b) a secure institution.

(2) ***In this Act, 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.***

(3) *Without limiting subsection (2), each of the following places that are subject to the jurisdiction and control of Tasmania and in which persons are deprived of their liberty is a place of detention for the purposes of this Act:*

(a) a correctional centre, prison, detention centre or other similar place (however described);

(b) a hospital or other similar place;

(c) a closed psychiatric facility;

(d) a police station or court cell complex;

(e) a vehicle used or operated to convey detainees;

(f) a place prescribed for the purposes of this section.

Stakeholders will notice that the definition of ‘deprivation of liberty’ at section 4 of the Act provides a direct reference to the definition provided in OPCAT, at Article 4.2.

By contrast, the definition of ‘places of detention’, at section 5(2) of the Act, includes an important qualification to the OPCAT definition. Whereas the OPCAT definition includes the words “under its jurisdiction and control”, referring to the State Party (in this instance, that is Australia), section 5(2) of the Act qualifies that the definition applies only to places “subject to the jurisdiction and control of Tasmania”. This reflects Australia’s ratification arrangement outlined above.

In practical terms, this qualification at section 5(2) of the Act means that the Tasmanian NPM does not have power to visit places that are under the jurisdiction and control of another state or territory, or the Commonwealth. It is noted that the Commonwealth NPM (the Commonwealth Ombudsman) will visit Commonwealth regulated places such as military and immigration detention facilities, and Australian Federal Police holding cells. Accordingly, if places such as these operate within Tasmania, they will be visited by the Commonwealth NPM.

In addition, section 5(3) of the Act provides a short list of categories of places of detention, including a power for a place to be prescribed, at paragraph (f). This list is provided for clarity, as outlined by the Attorney-General of Tasmania, the Hon Elise Archer MP, during the second reading speech supporting the *OPCAT Implementation Bill (2021)*:

Under OPCAT, places of detention is 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.

It is important to emphasise that this list is non-exhaustive. That is, the Tasmanian NPM has discretion to examine places not listed. In these circumstances (i.e. the place does not fall under one of the categories listed at section 5(3) of the Act) it will need to satisfy the meaning of place of detention provided in the Act, at section 5(2). This provision requires that the place:

1. Is subject to the jurisdiction and control of Tasmania; and
2. Can be characterised as a place of detention under OPCAT, at Article 4.

To make a decision under step 2, an analysis of Article 4 of OPCAT is required.

4. Background to treaty interpretation

Because OPCAT is an international treaty, ratified by the Commonwealth and incorporated into Tasmanian law, the process for interpreting OPCAT must follow both national and international rules.

In Australia, the interpretation and construction of legislation is governed by law. In Tasmania, this law is the *Acts Interpretation Act 1931* (Tas), and at the Commonwealth level it is the *Acts Interpretation Act 1901* (Cth).

In the same way, the interpretation and construction of treaties is also governed by a treaty: *Vienna Convention on the Law of Treaties (1969)* (Vienna Convention). Australia ratified the Vienna Convention in 1968. Relevantly, Articles 31 and 32 of the Vienna Convention have codified customary international law and have been applied in Australian courts, in line with Australia's treaty obligations.¹

Article 31.1 of the Vienna Convention requires that a treaty be interpreted in good faith, in accordance with the ordinary meaning of its terms in their context, and in light of the treaty's object and purpose. That is, consideration must foremost be given to the express terms of the treaty provisions (the words themselves) but considered in the treaty's context, object and purpose.² The 'good faith' element has been interpreted to justify express references to finding the intention of the parties. Additionally, the interpretation of a term should be preferred which gives it some meaning and role rather than one which does not.³

In Australia, the High Court has referred to treaty interpretation as a 'holistic exercise',⁴ which needs to be adopted domestically in a liberal manner. Australian courts have also determined that a treaty provision must be capable of providing assistance in construing the meaning and effect of national law.⁵

Although not binding, principles originating from relevant courts and judicial bodies internationally can also be relied upon for guidance to assist with the interpretation of treaties. International judicial bodies such as the International Criminal Court,⁶ and the International Court of Justice,⁷ operate under this rule so long as the relevant principles are

¹ *Commissioner of Taxation v SNF (Australia) Pty Ltd* [2011] FCAFC 74 at [113].

² As the Full Court of Appeal did in *El Greco Australia PTY Ltd v Mediterranean Shipping Co SA* [2004] FCAFC 202 at [142].

³ Gardiner, Richard, *Treaty Interpretation* (2nd Ed), p. 168, (Oxford Public International Law).

⁴ *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at [230 – 231], [240], [251-256] and [277].

⁵ *Al Kateb v Godwin* (2004) 219 CLR 562 at [238].

⁶ *Rome Statue of the International Criminal Court*, Article 21.

⁷ *Statute of the International Court of Justice*, Article 38.

not inconsistent with internationally recognised human rights.⁸ It is also well settled that guidance for treaty interpretation can be found in the *travaux préparatoires*, which are the preparatory works underpinning a treaty.⁹

In Australia, the *Acts Interpretation Act 1901* (Cth), at section 15AB(2)(d), expressly allows material that can be considered when interpreting the provision of an Act to include “any treaty or other international agreement that is referred to in the Act.” The High Court has referred to international decisions for guidance, despite their decisions not having a binding effect domestically.¹⁰

Following the principles founded in the Vienna Convention and High Court jurisprudence, the interpretation of the words ‘places of detention’ in this consultation paper has been approached in accordance with their ordinary meaning and in the context of the object and purpose of OPCAT.

To provide context, OPCAT includes at its Preamble an agreement by the State Parties that “further measures are necessary to achieve the purposes of the [CAT] and to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment”. In addition, OPCAT, at Article I, outlines that its objective is to:

establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

Relevant to the Preamble and this objective is the definition of ‘torture’ in the CAT, at Article 1.1:

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

⁸ Expressly stipulated in the *Rome Statue of the International Criminal Court* at Article 21(3), and implied under customary international law at the ICJ.

⁹ This can include deliberations and discussions of the drafting committees and bodies and can provide specific guidance regarding the intention of the insertion (or absence) of a particular provision or wording found in a treaty/foundation document.

¹⁰ *Macoun v Commissioner of Taxation* [2015] HCA 44 at [81]. See also impugned AAT decision at [204] AATA 155. Despite Deputy President Tamberline QC’s finding being overturned by the High Court, the principle at [56] was not: “It is appropriate to have regard to reasoned decisions in other jurisdictions, and to consider whether a decision is consistent with the reasoning in recent decisions of other superior courts which have considered the questions.” In this case, the High Court did so by referring to decisions of the Netherlands and France in the same matter.

In addition to this definition, the CAT, at Article 16.1, extends the obligation to prevent torture, to include ill-treatment:

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

In 2005, the then UN Special Rapporteur on Torture stated that whether a person's treatment amounts to torture or ill-treatment will depend on "the purpose of the conduct and the powerlessness of the victim rather than the intensity of the pain or suffering inflicted."¹¹ OPCAT applies equally to the prevention of torture and ill-treatment.

Importantly, these definitions in the CAT, at Articles 1 and 16, do not specify a minimum duration, nor do they restrict torture or ill-treatment to specific settings or places. Indeed, the CAT, at Article 5, obligates State Parties to criminalise acts of torture when the offences are committed "in any territory under its jurisdiction or on board a ship or aircraft registered in that State", among other situations.

It is also important to note that the legal prohibition against torture is non-derogable, that is, the prohibition cannot be waived, even in exceptional or emergency circumstances. It is an absolute and unrestricted human right. It was initially established under treaty in the *International Covenant on Civil and Political Rights* (ICCPR) in 1966, and is now well established customary international law and a norm of *jus cogens*, meaning it applies to the international community as a whole.

¹¹ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Doc. E/CN.4/2006/6 (23 December 2005), at [39].

5. Analysis of Article 4 of OPCAT

Having regard to the object and purpose of OPCAT, and the CAT, the SPT has advocated for a broad interpretation of Article 4:

The preventive approach which underpins the OPCAT means that as expansive an interpretation as possible should be taken in order to maximise the preventive impact of the work of the NPM.

OPCAT, at Article 4.1, requires that two elements (in addition to jurisdiction and control) be satisfied for a location to be a ‘place of detention’. In summary, these are places (including any suspected places) where:

1. Persons are or may be deprived of their liberty; and
2. That liberty is deprived either by virtue of an order given by public authorities or at their instigation or with their consent or acquiescence, within the jurisdiction of the States.¹²

Each element is analysed below, in turn.

1. Deprivation of liberty

As outlined above, OPCAT explicitly defines deprivation of liberty, at Article 4.2. The definition can be read as providing three separate circumstances, that is:

Any form of

- (a) Detention; or
- (b) Imprisonment; or
- (c) Placement 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.

It is observed that this broad approach taken in OPCAT follows the broad approach adopted under international law. In particular, the catch all reference to ‘other authority’ indicates that a wide lens is to be applied to determining the degree of connection between a person not being permitted to leave at will, and the involvement of the State.

Turning to consider the words ‘detention’, ‘imprisonment’, and ‘placement’, the European Court of Human Rights (ECtHR)—although not binding in Australia but persuasive nevertheless—relevantly provides the following guidance with respect to the objective factors one must take into account when defining ‘deprivation of liberty’:

¹² Preventing Torture: The Role of National Preventive Mechanisms – A Practical Guide (OHCHR, 2018) at [6].

*Factors to be assessed are 'the existence of a possibility of leaving the restricted area, the degree of supervision and control over the person, his or her isolation, and the availability of social contacts.'*¹³

Importantly, a person who voluntarily gives up their liberty can still be deprived of it for the purposes of Article 4. This applies, for example, in places such as social care facilities where a person is not allowed to leave during certain hours, including those used for rehabilitation purposes. On this point, the ECtHR has also decided, in relation to a mentally incapacitated person kept in hospital as a 'voluntary patient', that:

*the right to liberty is too important in a democratic society for a person to lose the benefit of Convention protection for the single reason that he [the applicant] may have given himself up to be taken into detention, especially when it is not disputed that that person is legally incapable of consenting to, or disagreeing with, the proposed action.*¹⁴

Put simply, to have one's liberty deprived means the inability to freely leave a setting or place.¹⁵ That is, being held against their will. It follows that persons deprived of their liberty are vulnerable and at risk of human rights violations. It is not limited to places where people are deprived of their liberty, but where persons could be deprived of their liberty. This is reflected in OPCAT, at Article 4.1, through the use of the words "are or may be".

In determining whether a person's liberty has been deprived, the place in which this is occurring need not be purpose-built or solely used for that function. Rather, the qualification attaches to the use of a facility, which may be a point-in-time assessment. This would apply, for instance, to hotels or other like facilities used as temporary quarantine centres—as many were globally in response to the COVID-19 pandemic.

Importantly, there is no fixed duration after which deprivation of liberty can be said to have occurred; time is only one factor that may be considered among others, depending on the circumstances (such as type, effects, and manner of implementation of the measure in question).¹⁶ Research has shown that it is within the first three to four hours of detention—including from the moment of arrest—that the greatest risk of torture and other inhuman or degrading treatment is prevalent.¹⁷ In practical terms, for example, it is often in the first few hours of detention that searches are conducted, which at times include

¹³ *Guzzardi v Italy* App no 7367/76 (ECtHR, 6 November 1980) at [95].

¹⁴ *HL v the United Kingdom* App no 45508/99 (5 October 2004) at [90].

¹⁵ SPT, 'Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) UN Doc CAT/C/57/4, Annex on 'Compilation of advice provided by the Subcommittee in response to requests from national preventive mechanisms, at [3], available at <https://digitallibrary.un.org/record/1306972?ln=en>.

¹⁶ *Guzzardi v Italy* App no 7367/76 (ECtHR, 6 November 1980) at [92].

¹⁷ See in general CTI *Safeguards in the first hours of police detention* – UNCAT Implementation Tool 2/2017. Noting also the Joint Statement in 2017 by UN Special Rapporteur on torture, Mr. Nils Melzer and three former Special Rapporteurs on torture, Mr. Juan Méndez, Mr. Manfred Nowak, and Mr. Theo van Boven: "It is well-known that the risk of torture and other ill-treatment is significantly greater during the first hours of police custody."

invasive processes which put persons at risk of torture or other cruel, inhuman or degrading treatment or punishment. This risk is heightened for persons with vulnerabilities.

2. By virtue of a public authority

This element requires that the established deprivation of liberty be linked to a public authority. For some settings or places, such as those expressly listed at section 5(3) of the Act, satisfying this requirement will be a straightforward exercise. However, other settings or places may require a more nuanced assessment of the definition. Broken down into component parts, Article 4.1 provides three separate circumstances:

1. order of public authority (which may be Commonwealth, State or local government authorised body or agency); or
2. instigation (of a public official or person acting in an official capacity); or
3. by consent or acquiescence (of a public official or person acting in an official capacity).

In interpreting these options, it is important that a broad approach be followed, and that Article 4.1 be read together with Article 4.2. Notably, Article 4.1 does not require that a public authority be the operator of the setting or place, and it does not require that the place's staff be employed or contracted by a public authority. This is consistent with Article 4.2 of OPCAT, which specifically mentions, for instance, that deprivation of liberty may occur in either 'public or private' custodial setting.

In advice provided to the New Zealand NPM, the SPT has expressed its view that a connection to a public authority can be established "if the deprivation of liberty relates to a situation in which the State either exercises, or might be expected to exercise a regulatory function."¹⁸ Accordingly, this would include situations where a setting or place is subject to national (or Tasmanian) standards, rules or guidelines, which are managed by or with acquiescence of the State. It may also include situations where, despite a place not being regulated by the State, it receives support such as through grant funding or specific subsidies.

It is observed, for instance, that the New Zealand Government has expressly required its NPM (the Chief Ombudsman) to examine "health and disability places of detention including within privately run aged care facilities".¹⁹ It is noted that similar approaches have been taken by other State NPMs, and that the Office of the High Commissioner of Human Rights

¹⁸ SPT, 'Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) UN Doc CAT/C/57/4, Annex on 'Compilation of advice provided by the Subcommittee in response to requests from national preventive mechanisms, at [3], available at <https://digitallibrary.un.org/record/1306972?ln=en>.

¹⁹ New Zealand Government, Gazette, *Designation of National Preventive Mechanisms*, 2 July 2020. Available at <https://gazette.govt.nz/notice/id/2018-go2603>

(OHCHR) has specifically included social care homes on its non-exhaustive list of places that an NPM should visit (among other places that are subject to State regulations or licensing).²⁰

Finally, having regard to the breadth of this interpretation, the SPT has cautioned that NPMs should also “be mindful of the principle of proportionality when determining its priorities and the focus of its work.”²¹

This principle of proportionality relates to the need for NPMs to focus resourcing on areas of greatest risk when determining priorities with respect to their mandate. That is, to ensure that those places of detention which hold the highest risk of persons being exposed to torture or cruel, inhuman or degrading treatment or punishment. This is an exercise performed by the NPM itself, in its capacity as an independent body, based on its own strategy, resources and analysis of the situation.

²⁰ OHCHR, *Preventing torture: the role of national preventive mechanisms – a practical guide*, available at https://www.ohchr.org/sites/default/files/Documents/Publications/NPM_Guide_EN.pdf

²¹ SPT, ‘Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ (2016) UN Doc CAT/C/57/4, Annex on ‘Compilation of advice provided by the Subcommittee in response to requests from national preventive mechanisms, at [3], available at <https://digitallibrary.un.org/record/1306972/?ln=en>.

6. Information on the next consultation paper

The second consultation round is scheduled to commence in mid-March 2023. Its content will be informed by feedback provided in response to this consultation paper.

The second consultation round will relate to the development of the Tasmanian NPM's working methodologies. In focus will be the identification of applicable international and national standards (including of applicable human rights obligations, norms, and law), and related best practice. It is intended that feedback provided will assist the Tasmanian NPM in identifying key expectations through which it will examine places of detention, under its visiting function.

This will be an opportunity for civil society organisations to understand and contribute feedback on national and international obligations applicable to their populations, and identify best practice to prevent torture and ill-treatment. Insights provided will assist the Tasmanian NPM to develop appropriate visit methodologies, including themes for visits to places of detention, appropriate visit standards, and related guidelines.