



**Tasmanian Aboriginal Legal Service (“TALS”) Written Submission:**  
Tasmanian National Preventive Mechanism (NPM)  
March 2023

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## Recommendations

**Recommendation 1:** The Tasmanian National Preventive Mechanism (NPM), in genuine partnership with Aboriginal Community Controlled Organisations, should consult with Tasmanian Aboriginal communities to develop an understanding of what Aboriginal Tasmanians, including people sitting at the intersection of multiple marginalised identities, consider to be cruel, inhuman or degrading treatment across the full range of detention settings identified by this consultation process.

**Recommendation 2:** The Tasmanian NPM should proactively work not simply to end bad practice, but to instil the highest standards of good practice in the treatment of all Tasmanians deprived of liberty, including Aboriginal Tasmanians.

**Recommendation 3:** The Tasmanian NPM's mandate should extend to social care facilities, including facilities and restrictive contexts in the areas of out-of-home care, aged care, and disability care, including special schools for children with disability; non-hospital health care facilities, in particular mental health facilities; and facilities on the fringe of the justice system, including health facilities (particularly mental health facilities) within prisons and youth justice bail units.

**Recommendation 4:** The Tasmanian NPM should visit as a matter of priority all custodial environments associated with the adult and youth justice systems and out-of-home care facilities.

**Recommendation 5:** After consultation with the Tasmanian community, including Tasmania's Aboriginal communities, the NPM should adopt a model that ensures adequate human resourcing to meet the full range of the Mechanism's responsibilities.

**Recommendation 6:** The Tasmanian Government should appoint a dedicated Commissioner for Aboriginal Children and Young People.

**Recommendation 7:** Funding and resourcing for the NPM (based on their own assessment) should be guaranteed in legislation, with resources provided by government to be in a single, dedicated budget line item to allow the NPM determine its internal budget allocations.

**Recommendation 8:** All Tasmanian NPM staff and practice should be culturally competent and trauma-informed.

**Recommendation 9:** Aboriginal expertise should be incorporated in all aspects of the NPM through ongoing genuine engagement and co-design with all Tasmania's Aboriginal communities.

## Introduction

Thank you for soliciting our submission in relation to the design and scope of the Tasmanian National Preventive Mechanism (NPM) under the Optional Protocol to the Convention Against Torture (OPCAT).

The Tasmanian Aboriginal Legal Service (TALS) is a member-based, independent, not-for-profit community legal centre that specialises in the provision of criminal, civil and family law legal information, advice and representation for Aboriginal and Torres Strait Islander peoples across Tasmania. We are an Aboriginal Community Controlled Organisation incorporated under the Office of the Registrar of Aboriginal Corporations.

In this submission, any reference to Aboriginal people is understood to also encompass Torres Strait Islander people.

TALS provides culturally safe, holistic and appropriate services that are inclusive and open to all Aboriginal Tasmanians. We understand that the most vulnerable people needing access to legal assistance are often also those who face the most difficulties asking for help, and we work hard to ensure everyone can access our services within and outside of traditional legal settings.

We also are an advocate for law reform and for justice, equality and human rights for all First Peoples in Tasmania. Our goal is to halve Aboriginal Tasmanians' rate of negative contact with the justice system in a decade.

In this submission, we will address the four questions posed by the consultation paper. As a starting point, however, we wish to address two key aspects of the mission of Tasmania's NPM: the understanding of what constitutes cruel, inhuman or degrading treatment or punishment (CIDT), and the understanding of what falls within the proper scope of prevention.

### Mission of the Tasmanian NPM.

In principle, the Tasmanian NPM's mission is already clear. As noted in the consultation paper, Tasmania's *OPCAT Implementation Act 2021*, Section 9(1) lays out the purpose of NPM visits as being:

- (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.

While in general agreement with this definition, we argue that this mission should not be interpreted minimalistically. In particular, we argue that the Tasmanian NPM should adopt and proceed from:

### An inclusive understanding of what constitutes cruel, inhuman or degrading treatment.

The concept of cruel, inhuman or degrading treatment or punishment (CIDT) is sometimes differentiated from the concept of torture through the principle of intentionality: torture is behaviour intended to cause harm, while CIDT can include negligent behaviour which fails to take harm into account.<sup>1</sup> Torture prevention advocates have noted that when negligence persists in the face of clear evidence of its harm, the line between it and intentional harm can become blurred.

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<sup>1</sup>[https://www.researchgate.net/publication/363614377\\_Entangling\\_Intentionality\\_Reflections\\_on\\_Torture\\_and\\_Structure\\_Entangling\\_Intentionality\\_Reflections\\_on\\_Torture\\_and\\_Structure](https://www.researchgate.net/publication/363614377_Entangling_Intentionality_Reflections_on_Torture_and_Structure_Entangling_Intentionality_Reflections_on_Torture_and_Structure)

In contrast to torture, which is clearly defined in the UN Convention Against Torture,<sup>2</sup> CIDT is less clearly codified, although equally clearly prohibited.<sup>3</sup> This fluidity to some extent reflects an understanding in the torture prevention community that a wide range of justice system practices, ranging from police procedures (interrogation practices, searches) to structural practices such as imprisonment, can have differing impacts on different groups, due to:

**Differing cultural standards and practices.** The idea of what constitutes CIDT extends from a universal core to a culturally-dependent periphery.<sup>4</sup> While cultural differences can be deliberately exploited in psychological torture,<sup>5</sup> they also can play a more subtle part in disproportionate harm. For example, the UN Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) notes that the culturally specific practice of deprivation of liberty hardly appears in the repertoire of indigenous justice, and that the mere fact of depriving someone of his/her liberty can have an acute negative effect on members of indigenous groups or communities due to the rupturing of links between individuals, communities and ancestral lands and resultant damage to cultural and spiritual identity; as a result, for many indigenous people, deprivation of liberty is a form of double punishment that can constitute CIDT and indeed torture.<sup>6</sup> These observations have been upheld in the Australian Aboriginal context by the final report of the 1991 Royal Commission into Aboriginal Deaths in Custody and supporting research papers, which noted the distinctive and disproportionate psychological and emotional impact of incarceration, and particularly solitary confinement, on Aboriginal people Australia-wide.<sup>7</sup>

**Differing levels of vulnerability to systemic failures and individual malpractice.** Due to the physical and emotional legacies of the Aboriginal experience of dispossession, dispersal, discrimination and disproportionate incarceration, Aboriginal Tasmanians have the potential for greater vulnerability to a range of situations within settings of detention. For example, higher-than-average levels of ill health leave Tasmanian Aboriginal people in detention more vulnerable to inadequate provision of health care in detention, particularly in the absence of culturally appropriate healthcare – both of which have been cited as a factor in Aboriginal deaths in custody and a potential breach of Australia’s OPCAT obligations.<sup>8</sup> Meanwhile, studies have shown Aboriginal adolescents to have higher anxiety about custody than non-Aboriginal adolescents,<sup>9</sup> leaving them more vulnerable to menacing behaviour and the inducing of fear – identified by the UN Special Rapporteur on Torture and CIDT as the most rudimentary and widespread form of psychological torture/CIDT<sup>10</sup> -- on the part of justice system staff and fellow inmates. And racist

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<sup>2</sup> <https://cti2024.org/resource/un-convention-against-torture-and-other-cruel-inhuman-or-degrading-treatment-or-punishment-and-the-optional-protocol/>

<sup>3</sup> <https://irct.org/wp-content/uploads/2022/11/Volume-16-No.-3.pdf>

<sup>4</sup> For background, see <https://www.humiliationstudies.org/documents/evelin/CorePeriphery.pdf>

<sup>5</sup> <https://www.seattletimes.com/nation-world/guantnamo-bay-female-interrogators-tactics-airod/>

<sup>6</sup> [https://www.corteidh.or.cr/sitios/observaciones/OC-29/16\\_SPT\\_ONU.pdf](https://www.corteidh.or.cr/sitios/observaciones/OC-29/16_SPT_ONU.pdf), cited in [https://www.apr.ch/sites/default/files/publications/UN%20Submission\\_Indigenous%20women\\_v2.pdf](https://www.apr.ch/sites/default/files/publications/UN%20Submission_Indigenous%20women_v2.pdf)

<sup>7</sup> See for example

[https://www.researchgate.net/publication/265142700\\_The\\_Design\\_of\\_Safe\\_and\\_Humane\\_Police\\_Cells\\_A\\_Discussion\\_of\\_some\\_Issues\\_relatin\\_g\\_to\\_Aboriginal\\_People\\_in\\_Police\\_Custody](https://www.researchgate.net/publication/265142700_The_Design_of_Safe_and_Humane_Police_Cells_A_Discussion_of_some_Issues_relatin_g_to_Aboriginal_People_in_Police_Custody), cited in volume 3 of the Royal Commission’s report (<https://www.austlii.edu.au/cgi-bin/sinodisp/au/other/cth/AURoyalC/1991/3.html?stem=0&synonyms=0&query=Royal%20Commission%20into%20Aboriginal%20Deaths%20in%20Custody#Heading2053>)

<sup>8</sup> <https://nit.com.au/01-02-2022/2636/justice-advocates-note-lack-of-progress-on-opcat-as-anniversary-lingers> ;

[https://www.researchgate.net/publication/355629131\\_Europe\\_Monitoring\\_Bodies\\_for\\_the\\_Prevention\\_of\\_Ill\\_Treatment](https://www.researchgate.net/publication/355629131_Europe_Monitoring_Bodies_for_the_Prevention_of_Ill_Treatment)

<sup>9</sup> [https://www.researchgate.net/publication/247495181\\_Psychological\\_impact\\_on\\_custody\\_on\\_the\\_Aboriginal\\_adolescent](https://www.researchgate.net/publication/247495181_Psychological_impact_on_custody_on_the_Aboriginal_adolescent)

<sup>10</sup> <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/070/73/PDF/G2007073.pdf?OpenElement>

language and “disparagement humour”<sup>11</sup> in detention settings contribute to the cumulative racial trauma of Aboriginal Tasmanians.

Notably, all of these factors can exist in intersection with other vulnerabilities, for example in relation to age, sexual orientation and gender identity.<sup>12</sup> For example, the Chilean Public Criminal Defense Service has noted that indigenous women prisoners suffer doubly in coping with a system designed ideologically, physically and in its normative structure for non-indigenous men;<sup>13</sup> closer to home, the high levels of violence and sexual assault experienced by Aboriginal women prisoners Australia-wide make strip-searching especially traumatic.<sup>14</sup> Meanwhile, people sitting at the intersection of Aboriginal and LGBTI+ identities can face especially high risk of verbal and physical abuse.<sup>15</sup>

**Recommendation 1: The Tasmanian NPM, in genuine partnership with Aboriginal Community Controlled Organisations, should consult with Tasmanian Aboriginal communities to develop an understanding of what Aboriginal Tasmanians, including people sitting at the intersection of multiple marginalised identities, consider to be cruel, inhuman or degrading treatment across the full range of detention settings identified by this consultation process.**

**An ambitious understanding of strengthening protection against torture.**

The concept of protection against, or prevention of, torture can be interpreted in a minimalist fashion as the prevention of bad practice, or in a more inclusive fashion to embrace the promotion of good practice. For example, we note the functions of New Zealand’s NPM, which include (in line with the language of Article 19 of OPCAT itself<sup>16</sup>):

- to make any recommendations it considers appropriate to the person in charge of a place of detention:
  - for *improving* the conditions of detention applying to detainees;
  - for *improving* the treatment of detainees; and
  - for preventing torture and other cruel, inhuman or degrading treatment or punishment in places of detention.<sup>17</sup>

Notably, ‘improvement’ is not limited here to the cessation of existing bad practice, but to the creation of conditions of good practice that reduce the likelihood of such prohibited behaviour in the future through positive example as well as through sanction.<sup>18</sup> This approach stands in contrast to the current language

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<sup>11</sup> <https://theconversation.com/psychology-behind-the-unfunny-consequences-of-jokes-that-denigrate-63855>

<sup>12</sup> [https://www.apr.ch/sites/default/files/publications/PRI\\_DMT%20Older%20persons\\_WEB.pdf](https://www.apr.ch/sites/default/files/publications/PRI_DMT%20Older%20persons_WEB.pdf) ;  
[https://www.apr.ch/sites/default/files/publications/thematic-paper-3\\_lgbti-persons-deprived-of-their-liberty-en.pdf](https://www.apr.ch/sites/default/files/publications/thematic-paper-3_lgbti-persons-deprived-of-their-liberty-en.pdf) ;  
[https://www.apr.ch/sites/default/files/publications/thematic-paper-2\\_women-in-detention-en.pdf](https://www.apr.ch/sites/default/files/publications/thematic-paper-2_women-in-detention-en.pdf)

<sup>13</sup> [https://www.apr.ch/sites/default/files/publications/UN%20Submission\\_Indigenous%20women\\_v2.pdf](https://www.apr.ch/sites/default/files/publications/UN%20Submission_Indigenous%20women_v2.pdf)

<sup>14</sup> <https://www.smh.com.au/national/what-we-can-do-to-stop-indigenous-deaths-in-custody-20210405-p57gnq.html>

<sup>15</sup> <https://theconversation.com/new-research-shows-how-indigenous-lgbtq-people-dont-feel-fully-accepted-by-either-community-161096>

<sup>16</sup> <https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-against-torture-and-other-cruel>

<sup>17</sup> <https://www.ombudsman.parliament.nz/resources/expectations-conditions-and-treatment-residents-health-and-disability-places-detention>

<sup>18</sup> See, for example, New Zealand Ombudsman (2022), *OPCAT -- expectations for conditions and treatment of residents in health and disability places of detention – aged care*. <https://www.ombudsman.parliament.nz/resources/expectations-conditions-and-treatment-residents-health-and-disability-places-detention>. See also

Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Visit to New Zealand undertaken from 29 April to 8 May 2013: observations and recommendations addressed to the State party.

[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FOP%2FNZL%2F1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FOP%2FNZL%2F1&Lang=en)

of the Tasmanian NPM's purpose, which is described as examining with a view to strengthening protections only *if necessary* (emphasis added).

This point is particularly salient for Aboriginal people across Australia, including in Tasmania, as a consequence of the intergenerational legacy and continuing experience of ill-treatment across a range of institutions. Continuous progress towards ensuring that institutions treat people well, rather than simply not treating them badly, will be vital in the creation of institutions that the Tasmanian Aboriginal community can trust.

In this regard, we note the particular importance of the NPM's educative function, particularly in relation to the training and professional development of police and custodial staff to ensure that the spirit of the Convention Against Torture flows through to situations where people are not detained, but could reasonably feel their liberty to be curtailed (see below, question 3).

**Recommendation 2: The Tasmanian NPM should proactively work not simply to end bad practice, but to instil the highest standards of good practice in the treatment of all Tasmanians deprived of liberty, including Aboriginal Tasmanians.**

The consultation questions.

Places where people may be deprived of their liberty.

**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)?**

We note that the Australian Human Rights Commission has recommended that:

Recommendation 4: Governments adopt an inclusive approach to the interpretation of 'places of detention', ensuring that both 'primary' and 'secondary' places of detention are included within the scope of all NPMs.

In line with the consultation paper, we believe that the UN SPT's 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"<sup>19</sup> extends the NPM's mandate to 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. We further believe that it also extends to situations where, despite a place not being regulated by the State, it receives support such as through grant funding or specific subsidies.

With these points in mind, we would suggest that the NPM's mandate extend to a range of settings of concern to Tasmania's Aboriginal communities.

Social care facilities.

In line with the consultation paper, we note the inclusion by the UN Office of the High Commissioner for Human Rights (OHCHR) "social care homes provided by the State or subject to State regulations or

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<sup>19</sup> 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>.

licensing” in their list of illustrative examples of places of deprivation of liberty.<sup>20</sup> Key among such facilities include:

- *Out-of-home care facilities.* As of 30 June 2021, there were 403 Tasmanian Aboriginal children and young people in out-of-home care – 37% of the total children and young people in out-of-home care.<sup>21</sup> We note that a range of out-of-home care facilities, including residential care and 24-hour rostered placement, involve environmental or physical restrictions to a child’s freedom of movement and mechanisms under which a child who is absent can be returned, both of which constitute a deprivation of liberty with strong parallels to detention. Indeed, New Zealand has included residential out-of-home care in the list of facilities to be visited by the NPM.<sup>22</sup>
- *Aged care facilities.* Many residents of aged care facilities, particularly those with disability or dementia, face conditions of effective detention. Notably, dementia is more prevalent among Aboriginal Australians than the rest of the Australian population; for example, one study reported that 12.4% of Aboriginal and Torres Strait Islander people in the Kimberley region aged 45 years and over were living with dementia, compared to 2.4% of the rest of the Australian population.<sup>23</sup> This fact notwithstanding, Tasmanian Aboriginal people are starkly under-served by aged care services, both residential and in their own homes<sup>24</sup>—a situation, according to the Royal Commission into Aged Care, is reflected across Australia, in part due to the fact that Aboriginal people do not feel secure and culturally safe in existing facilities and that members of the Stolen Generations may have a fear of being ‘caged in.’<sup>25</sup> The Royal Commission’s final report indeed documented instances of racial abuse by carers towards older Aboriginal people as well as significant cultural insensitivity in assigning male care workers to older Aboriginal women for intimate care.<sup>26</sup> We note, as per the consultation paper, that New Zealand has included privately run aged care facilities in the list of facilities to be visited by the NPM.<sup>27</sup>
- *Disability care facilities, including special schools for children with disability.* Disability care facilities have been recognised internationally as potential sites of torture, with residents effectively or explicitly detained in many if not most instances.<sup>28</sup> Australia-wide, disability is twice as common among Aboriginal people, with around 38% of Aboriginal people living with disability, compared to around 18% of the Australian population.<sup>29</sup> Advocates have argued that suffering of people with disabilities will continue as long as monitoring bodies ignore disability-specific detention facilities, and have called for torture prevention bodies to embrace monitors with disabilities as a core part of their practice.<sup>30</sup> Meanwhile, Nationally, in 2015 rates of severe disability were 5.9% among Indigenous children aged 0-14, compared to 3.9% for non-Indigenous

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<sup>20</sup> [https://www.ohchr.org/sites/default/files/Documents/Publications/NPM\\_Guide\\_EN.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/NPM_Guide_EN.pdf)

<sup>21</sup> ROGS 2022, Community Services, Child Protection, Table 16A.41

<sup>22</sup> [https://www.ohchr.org/sites/default/files/Documents/Publications/NPM\\_Guide\\_EN.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/NPM_Guide_EN.pdf)

<sup>23</sup> [https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-volume-3a\\_0.pdf](https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-volume-3a_0.pdf)

<sup>24</sup> In 2022, Aboriginal people made up 5.4% of Tasmania’s aged care target and planning population, but only 1.1% of aged care facility residents, 2.8% of Commonwealth Home Support Programme recipients, 4.2% of level 1-2 home care packages, and 3.6% of level 3-4 home care packages. ROGS 2022, Part F, Section 14, Table 14A.29.

<sup>25</sup> [https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-volume-2\\_0.pdf](https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-volume-2_0.pdf)

<sup>26</sup> [https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-volume-2\\_0.pdf](https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-volume-2_0.pdf)

<sup>27</sup> Designation of National Preventive Mechanisms - 2018-go2603 - New Zealand Gazette

<sup>28</sup> [https://www.researchgate.net/publication/254245917\\_Disability\\_torture\\_and\\_ill-treatment\\_Taking\\_stock\\_and\\_ending\\_abuses](https://www.researchgate.net/publication/254245917_Disability_torture_and_ill-treatment_Taking_stock_and_ending_abuses)

<sup>29</sup> ABS National Aboriginal and Torres Strait Islander Health Survey (NATSIHS) 2018-2019, ABS Survey of Disability Ageing and Carers (SDAC) 2018

<sup>30</sup> [https://www.researchgate.net/publication/254245917\\_Disability\\_torture\\_and\\_ill-treatment\\_Taking\\_stock\\_and\\_ending\\_abuses](https://www.researchgate.net/publication/254245917_Disability_torture_and_ill-treatment_Taking_stock_and_ending_abuses)



children.<sup>31</sup> Facilities at special schools for children with disability are typically highly secured and can include lock-down rooms.

### Non-hospital healthcare facilities

Globally, healthcare settings, non-hospital as well as hospital, have been identified as potential sites of behaviour tantamount to torture and CIDT, particularly for marginalised grounds such as indigenous people and people with psychosocial disabilities.<sup>32</sup> Due to disproportionate levels of ill-health as a consequence of a history of oppression, as well (as noted above) as disproportionate risk of psychosocial disability, Tasmanian Aboriginal people are at disproportionate risk of representation across the full range of health care facilities, where their vulnerability to CIDT is increased due to a lack of culturally appropriate and safe healthcare models. We note that the New Zealand Government's language in this regard identifies the NPM's mandate as including 'health care facilities,' with no limitation to hospitals. Particularly vulnerable settings include:

- *Mental health facilities.* While figures for the number and proportion of Aboriginal Tasmanians in mental health facilities are not available, in 2018-19 nearly a third (30.9%) of Aboriginal Tasmanians reported high to very high psychological distress,<sup>33</sup> a rate 2.3 times that of non-Indigenous Tasmanians (13.4%) in 2017-18.<sup>34</sup> Anecdotal evidence suggests that staffing turnover in mental health facilities often contributes to incidents that skirt the definition of CIDT, including failures to respect requests to cease physical contact and cases where patients' hopes of release have been repeatedly raised and then dashed.
- *Vehicles used to convey detainees exhibiting mental ill-health:* We argue that this category must include vehicles being used or operated by police or others to convey people exhibiting mental and behavioural disorders to hospitals or other mental health facilities. We note that in 2018-19, the rate per 100,000 of emergency department presentations for mental and behavioural disorders in Tasmania was 1,695.6 for Aboriginal Tasmanians, compared to 1159.9 for Tasmanians as a whole.<sup>35</sup>

### Facilities on the fringe of the justice system

- *Health facilities, in particular mental health facilities, within prisons.* The lack of culturally appropriate healthcare facilities for Aboriginal people has already been identified as a potential breach of OPCAT obligations.<sup>36</sup>
- *Youth justice bail units.* In 2021-22, Tasmanian Aboriginal children and young people, who make up approximately 10% of Tasmanian children and young people, made up 34% of the children and young people under the supervision of the youth justice system,<sup>37</sup> and 39% of Tasmanian children

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<sup>31</sup> <https://www.aihw.gov.au/reports/children-youth/australias-children/contents/health/children-with-disability>

<sup>32</sup> <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/105/77/PDF/G1310577.pdf?OpenElement>

<sup>33</sup> ABS 4715.0 National Aboriginal and Torres Strait Islander Health Survey, Australia, 2018-19, Table 3.3

<sup>34</sup> ABS 4364.0, National Health Survey: first results, 2017-18, Tasmania, Table 8.1

<sup>35</sup> PHIDU Social Health Atlas of Australia, Aboriginal and Torres Strait Islander Social Health Atlas of Australia.

<sup>36</sup> <https://nit.com.au/01-02-2022/2636/justice-advocates-note-lack-of-progress-on-opcat-as-anniversary-lingers> ;

[https://www.researchgate.net/publication/355629131\\_Europe\\_Monitoring\\_Bodies\\_for\\_the\\_Prevention\\_of\\_Ill\\_Treatment](https://www.researchgate.net/publication/355629131_Europe_Monitoring_Bodies_for_the_Prevention_of_Ill_Treatment)

<sup>37</sup> <https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2020-21/data>, Table S136a

and young people in detention.<sup>38</sup> We note that the new youth justice bail units under development, although self-contained, will still be securely managed, limiting freedom of movement.

- *Designated bail rooms or waiting areas in court houses.* Before appearing in Court (whilst on remand or serving a sentence) and once bailed or sentenced, a young person may be directed to wait in a designated area to await court or documentation. A young person may be directed to wait at court in a particular area, whilst a matter is stood down. Young people are often at these times under the supervision of security guards. These situations, may bring court precincts within the definition of a place of detention.

**Recommendation 3: The Tasmanian NPM’s mandate should extend to social care facilities, including facilities and restrictive contexts in the areas of out-of-home care, aged care, and disability care, including special schools for children with disability; non-hospital health care facilities, in particular mental health facilities; and facilities on the fringe of the justice system, including health facilities (particularly mental health facilities) within prisons and youth justice bail units.**

#### Priority places for visits

**What places in Tasmania does your organisation consider the NPM should visit as a matter of priority?**

All custodial environments associated with the adult and youth justice systems. These include prisons and youth justice centres, including health facilities (particularly mental health facilities) within these centres; police and court cells; and vehicles transporting people in custody. In light of reports on the lockdowns of young people in the Ashley Detention Centre (ACD), we note that in its visit to New Zealand in 2013, the UN Subcommittee on the Prevention of Torture observed that “prolonged exposure to inappropriate regime conditions, such as those which it observed for remand prisoners and youth, can constitute ill-treatment.”<sup>39</sup>

Out-of-home care facilities. In light of the findings of the Royal Commission into Responses to Institutional Child Sexual Abuse, residential facilities for children in out-of-home care are an obvious priority, and should include a particular focus on children with disability. We note there is no data on First Nations children with disability in out-of-home care is available; this information is contained in the AIHW’s Child Protection National Minimum Dataset, but is not public.<sup>40</sup>

**Recommendation 4: The Tasmanian NPM should visit as a matter of priority all custodial environments associated with the adult and youth justice systems and out-of-home care facilities.**

#### Considerations for the NPM

**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)**

In addition to stringent monitoring of existing practice, to effectively respond to the needs of Aboriginal Tasmanians and their communities the NPM will need to play a strong educative role across a wide range

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<sup>38</sup> <https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2020-21/data>, Table S136c

<sup>39</sup> [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FOP%2FNZL%2F1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FOP%2FNZL%2F1&Lang=en)

<sup>40</sup> <https://disability.royalcommission.gov.au/publications/infographic-first-nations-people-disability>

of settings as well as to engage in intersectional research and policy advocacy. For this to occur, the NPM will need adequate human and financial resourcing.

### Education

As noted by OHCHR, among the four key functions of an NPM is an educational function, in the form of participation in training and development of educational and awareness-raising programmes in schools, universities and professional circles. This educative function will be an important additional resource in the battle to combat:

- **Police malpractice occurring in non-detention settings.** At TALS, we all too frequently encounter disturbing allegations of police behaviour that falls under the definition of degrading treatment but that has occurred in settings outside of detention (strip-searching of women in front of male police officers during home searches, for instance). As noted above in the discussion of prevention of torture, a move from simple prohibition of bad behaviour towards strong organisational cultures of best practice will be crucial to ensuring that the spirit of the Convention against Torture flows beyond institutional settings of deprivation of liberty to settings where people can reasonably feel their liberty to be curtailed – police stops or searches, for instance. Effective training of both existing and new staff can help to create organisational cultures that can rein in malpractice across the full range of settings and protect against the deliberate creation of loopholes – for example, questioning of suspects in unofficial locations.<sup>41</sup>
- **Racial and historical discrimination against Aboriginal people.** Whether occurring in or outside of settings of detention, racial discrimination falls under the definition of degrading treatment and torture – defined as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person ... *for any reason based on discrimination of any kind*”<sup>42</sup> (italics added) – that OPCAT is designed to prevent. As noted above, the European Court of Human Rights has indeed found that racial discrimination can constitute degrading treatment as prohibited by Article 3 of the European Convention on Human Rights.<sup>43</sup> The Queensland Human Rights Commission similarly notes that “cruel, inhuman or degrading treatment or punishment,” which does not necessarily have to be intentionally inflicted, can include acts that debase a person or cause a sense of inferiority.<sup>44</sup> NPM outreach has the potential to help Tasmanians contextualise such behaviour not only against Tasmanian law and norms, but also against the international human rights regime.

NPM outreach in a range of settings, including schools, has the potential not only to shape future attitudes, but also to challenge current behaviour within these settings. Not only TALS, but other community sector organisations such as the Youth Network of Tasmania hear disturbing allegations of staff members in a range of Tasmanian government-funded settings, including schools, engaging in racist behaviours that are prohibited at the level of organisational policy, but sanctioned by organisational subcultures. Contextualisation of such behaviour against Tasmania’s international obligations has the potential to bring home the seriousness of these situations.

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<sup>41</sup>[https://www.researchgate.net/publication/358032099\\_Human\\_Rights\\_Torture\\_prevention\\_Police\\_Strategies\\_for\\_Ensuring\\_Fair\\_Treatment\\_of\\_Persons\\_in\\_Police\\_Custody\\_Past\\_Present\\_and\\_Future\\_With\\_brief\\_sections\\_on\\_Brazil\\_India\\_and\\_Russia](https://www.researchgate.net/publication/358032099_Human_Rights_Torture_prevention_Police_Strategies_for_Ensuring_Fair_Treatment_of_Persons_in_Police_Custody_Past_Present_and_Future_With_brief_sections_on_Brazil_India_and_Russia)

<sup>42</sup> <https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-against-torture-and-other-cruel>

<sup>43</sup> [https://www.echr.coe.int/Documents/FS\\_Racial\\_discrimination\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Racial_discrimination_ENG.pdf)

<sup>44</sup> <https://www.qhrc.qld.gov.au/your-rights/human-rights-law/right-to-protection-from-torture-and-cruel,-inhuman-or-degrading-treatment>

### Intersectional research and policy advocacy

Globally, NPMs identify root causes of torture and other forms of ill-treatment and gaps in law and practices, make recommendations to the authorities and establish dialogue and cooperation with them on the implementation of their recommendations.<sup>45</sup> In the context of this function, NPMS have the ability to engage in intersectional research around vulnerable populations, including indigenous people, that can strongly inform policy across a range of areas. In the case of children, for example:

- In the United Kingdom, the NPM, which established a subgroup focusing specifically on children and young people, submitted a response to the Ministry of Justice consultation on the government proposal to transform the youth custodial system, focusing on the principles that should underpin best practice for children who are deprived of their liberty in a criminal justice context.
- In France, the NPM has issued a number of recommendations and opinions regarding children deprived of their liberty in a variety of settings. As an example, in 2013, following its visits to places of detention, the NPM issued a thematic opinion on young children in prison with their mothers, proposing amendments to applicable legislative and regulatory provisions.<sup>46</sup>

In order for NPMs to effectively engage in intersectional research and make recommendations on laws, policies and practices around the needs of Tasmania's Aboriginal community, they need to be able not only to monitor places where people are deprived of their liberty but also to conduct interviews, cooperate with a range of stakeholders, and draw on professional knowledge across a wide range of fields.<sup>47</sup>

### Adequate human and financial resourcing

Effective response to the needs of Tasmania's Aboriginal population, as noted above, requires a scope of activities across an extensive range of contexts that would appear to be well beyond the capacity of any individual. In this regard, we note, as observed in the consultation paper, that in other jurisdictions, inspection and monitoring responsibilities have been spread across multiple offices. In New Zealand, for example, the Human Rights Commission has been designated as the Central National Preventive Mechanism with a coordinating role, and four NPMs have been designated to inspect and monitor specific categories of places of detention, namely:

- The Ombudsman – in relation to prisons, premises approved or agreed under the Immigration Act 1987, health and disability places of detention including privately run aged care facilities, and youth justice residences;
- The Independent Police Conduct Authority – in relation to people held in police cells and otherwise in the custody of the police;
- The Children's Commissioner – in relation to children and young persons in residences;
- The Inspector of Service Penal Establishments – in relation to Defence Force Service Custody and Service Corrective Establishments.<sup>48</sup>

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<sup>45</sup> [https://www.apt.ch/sites/default/files/publications/apt\\_briefin\\_unsrt\\_061114.pdf](https://www.apt.ch/sites/default/files/publications/apt_briefin_unsrt_061114.pdf)

<sup>46</sup> [https://www.apt.ch/sites/default/files/publications/apt\\_briefin\\_unsrt\\_061114.pdf](https://www.apt.ch/sites/default/files/publications/apt_briefin_unsrt_061114.pdf)

<sup>47</sup> [https://www.apt.ch/sites/default/files/publications/apt\\_briefin\\_unsrt\\_061114.pdf](https://www.apt.ch/sites/default/files/publications/apt_briefin_unsrt_061114.pdf)

<sup>48</sup> [https://www.ohchr.org/sites/default/files/Documents/Publications/NPM\\_Guide\\_EN.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/NPM_Guide_EN.pdf)

In the United Kingdom, meanwhile, the NPM is made up of 21 statutory bodies,<sup>49</sup> including independent, publicly appointed, unpaid lay observers.<sup>50</sup>

A detailed examination of the applicability of a range of models to the Tasmanian context will be necessary before the NPM settles on its final form. In this context, we renew our call for the Tasmanian Government, in acknowledgment of the special needs and vulnerabilities of Aboriginal children and young people as well as Tasmanian Aboriginal communities' right to self-determination, to appoint a dedicated Commissioner for Aboriginal Children and Young People who could serve as a component of the NPM. The creation of such an independent statutory position would ensure that the importance of Aboriginal culture to all areas of policy, including child protection, receives due recognition, and that proactive engagement and oversight in promoting and advocating for the rights and wellbeing of Aboriginal children and young people, including in relation to child protection, are done in a culturally safe and respectful manner. A new dedicated Commissioner could serve as a component of the NPM, as well as providing support and guidance for the management of new youth justice facilities.

Meanwhile, we reiterate concerns raised in TALS' submission on the draft OPCAT Implementation Bill 2021 around funding for the NPM. We note that the current Tasmanian Custodial Inspector (who is also the Tasmanian Ombudsman) has highlighted across the years resourcing and staffing constraints impeding his ability to perform the crucial functions of his office, including conducting on-site inspections and the timely publication of reports; the NPM must not replicate this situation. Funding and resourcing for the NPM should be independently determined by the NPM based on its assessment of what resources are required to carry out its functions. These resources should be guaranteed in legislation and provided by the government in a single, dedicated budget line item, with the NPM determining its internal budget allocations according to its own work plan.

**Recommendation 5: After consultation with the Tasmanian community, including Tasmania's Aboriginal communities, the NPM should adopt a model that ensures adequate human resourcing to meet the full range of the Mechanism's responsibilities.**

**Recommendation 6: The Tasmanian Government should appoint a dedicated Commissioner for Aboriginal Children and Young People.**

**Recommendation 7: Funding and resourcing for the NPM (based on their own assessment) should be guaranteed in legislation, with resources provided by government to be in a single, dedicated budget line item to allow the NPM determine its internal budget allocations.**

#### Cultural attributes of the NPM

**What cultural attributes does the office of the NPM require to ensure that the intent of OPCAT is realised?**

In our submission on the draft OPCAT Implementation Bill 2021, TALS has noted that:

“It is our view that OPCAT and the designation of independent, culturally competent NPMs are a crucial tool in addressing the mass incarceration of Aboriginal and Torres Strait Islander peoples, and their deaths in custody. As discussed in the North Australian Aboriginal Justice Agency's submission to the Australian Human Rights Commission consultation on OPCAT, “cultural

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<sup>49</sup> <https://www.nationalpreventivemechanism.org.uk/members/>

<sup>50</sup> <https://layobservers.org/about-us/>

competence” goes beyond the basic requirements of ensuring access to interpreters, for example. It requires the consideration of Aboriginal and Torres Strait Islander peoples’ needs, strengths, knowledge and worldview in all aspects of detention.<sup>51</sup> Aboriginal and Torres Strait Islander expertise must be incorporated in all aspects of the NPM.”

For the NPM to be effective, it must have the trust of the community and people with lived experience of detention. As with all entities in contact with Aboriginal Tasmanians, the office of the NPM requires culturally sensitive staff who are trauma-informed and trained in culturally appropriate support, with people who identify as Aboriginal available to support them as required.

We are particularly concerned that Aboriginal and Torres Strait Islander peoples, and people in detention and their families, are consulted with and inform the development of the NPM’s role. Without the trust and confidence of the community that they can approach, inform and interact with the NPM, it will not be able to fulfill its preventative function. The Tasmanian government must commit to seriously and appropriately engaging Aboriginal and Torres Strait Islander peoples, representative bodies, Aboriginal and Torres Strait Islander Legal Services, people with lived experience and families in community consultation and co-design processes to ensure the development of the NPM and its ongoing activities have the confidence of the community and benefit from the expertise embodied in people’s lived experience.

**Recommendation 8: All Tasmanian NPM staff and practice should be culturally competent and trauma-informed.**

**Recommendation 9: Aboriginal expertise should be incorporated in all aspects of the NPM through ongoing genuine engagement and co-design with all Tasmania’s Aboriginal communities.**

Thank you for the opportunity to comment on the National Preventive Mechanism. Please do not hesitate to be in contact if any points require clarification or elaboration.

Yours faithfully,



Hannah Phillips  
Acting State Manager  
**Tasmanian Aboriginal Legal Service**

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<sup>51</sup> North Australian Aboriginal Justice Agency (July 2017), Submission to the Australian Human Rights Commission consultations on OPCAT, p8, <https://humanrights.gov.au/sites/default/files/45.%20NAAJA%20Sub%2031%20July%202017.pdf>, accessed 15 September 2021.

**Places where children and young people may be deprived of liberty:**

Over and above the places listed in section 5(3) of the OPCAT Implementation Act 2021, the places where children and young people are or may be deprived of their liberty include:

- Places where children and young people in out-of-home care reside under a Special Care Package. These government-funded care packages are the most intensive care type for children in out-of-home care. They are designed to provide specific supports to children and young people that are not available through other care options. They are delivered to a single child or young person (or sibling group) on a 24-hour rostered care basis provided by out-of-home care providers in a home-like environment (e.g., rental accommodation). Additional specialist support services or therapeutic interventions may also be provided. In my view, arrangements made for the care of children placed in Special Care Packages, which can include the use of security guards and restrictive practices, may bring these placements within the definition of a place of detention for the purposes of the Act.
- Places where children and young people in out-of-home care live in government-funded residential care. Some children and young people in care are placed in group-based accommodation with an out-of-home care provider. Care is provided by paid staff on a rostered 24/7 basis. Arrangements made for the care of children placed in residential care can include restrictive practices and may bring the placement within the definition of a place of detention for the purposes of the Act.
- Designated bail rooms or waiting areas in court houses in Tasmania. Following an order made in court for bail or sentence, a child or young person may be directed to wait in a designated area (e.g., outside the courtroom or in a bail room at the Hobart Magistrates Court) to await documentation. Sometimes children are detained with adults in a locked 'bail room' under the supervision of court security guards. Further, I am aware that court matters may be 'stood down' from time to time, with a direction that a child wait in an allocated area of the court precinct until their matter can be revisited. In my view, the situation created by the processes described above may bring court precincts within the definition of a place of detention for the purposes of the Act.
- Proposed bail support accommodation. The final draft of Tasmania's Youth Justice Blueprint 2022 proposes a range of appropriate bail support options, including accommodation options. It says: "Bail support programs that assist children and young people charged with committing a crime to remain in the community with appropriate accommodation are critical to ensuring that they are not detained unless absolutely necessary. Consultation with stakeholders also suggested that bail support must include more than simply accommodation, with strong support for a supported accommodation model which could include therapeutic staffing and day programs linked to education, health, and wellbeing." While bail accommodation and support options are yet to be established, these facilities may be within the definition of a place of detention for the purposes of the Act. For example, children may be subject to conditions of bail that require them not to be absent from the bail support premises between certain hours or except in the company of a specific person.

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<sup>52</sup> Tasmanian Commissioner for Children and Young People (2023), Submission to the Tasmanian NPM Implementation Project.

- Places where children may be subject to restrictive practices.
  - Rooms or areas in schools in which children are or may be secluded or contained. It is my understanding that restrictive practices are in use in Tasmanian schools. For example, “seclusion” and “containment” are restrictive practices contemplated by the Department of Education’s Restrictive Practices Policy and Restrictive Practices Procedure. Seclusion is defined as the “solitary confinement of a student in a room or area from which their exit is prevented by a barrier or another person. Seclusion may also include situations where a student is left alone in a room or area and reasonably believes they cannot leave that room or area even if physically possible”. Containment is defined as “planned restrictive practice that involves a single student in a room or area for the purpose of engaging in learning. The room is secured by a fob or similar system (or other mechanism) and the student’s free exit is impeded. The student is always accompanied in the room, by at least one adult and the student is not left alone in that room or area.” It is my understanding that similar practices operate in the non-government school sector.

In my view, rooms or areas in schools in which children are or may be secluded or contained may bring schools or parts of schools within the definition of a place of detention for the purposes of the Act.

- Community-based accommodation for children with disability living away from their family home. Children and young people with disability may be subject to restrictive interventions, including personal and environment restrictions under the Disability Services Act 2011 (Tas). Section 4 of this Act describes a restrictive intervention as any action that is taken to restrict the rights or freedom of movement of a person with disability for the primary purpose of the behavioural control of the person. It is my understanding that children and young people with disability living away from their family home in community-based accommodation are subject to “environmental restrictions” and “personal restrictions” (s.34) that restrict the “liberty of movement” of those persons. Therefore, placement within this accommodation may fall within the definition of a place of detention for the purposes of the Act.

I note that while prisons are listed in s.5(3) of the Act, the NPM will also need to specifically consider how it monitors the rights and wellbeing of children living in the mother-baby unit at Mary Hutchinson Women's Prison.