



Submission to the Inquiry into Tasmanian Adult Imprisonment and Youth Detention Matters

March 2023

INTRODUCTION

The Optional Protocol on the Convention Against Torture (OPCAT) shines light into dark places through independent monitoring and civil society oversight. OPCAT, of which Australia is a signatory country, offers a new opportunity to do better in how we take care of one another and how we build a culture of respect and informed action to prevent torture and cruel, inhuman, and degrading treatment.

The Tasmanian OPCAT Network welcomes the initiative of the Legislative Council to call for an *Inquiry into Tasmanian Adult Imprisonment and Youth Detention Matters (Imprisonment Inquiry)*. This is a large and important task for the Committee of the Legislative Council and if there are ways we can contribute beyond the submission we will be glad to do so.

We begin by acknowledging that the Government has made progress in matters related to this Imprisonment Inquiry with the *OPCAT Implementation Act 2022* and with the Attorney-General's support of the initiative of the Anti-Discrimination Commissioner to co-ordinate the Alliance for a Tasmanian Human Rights Act (ATHRA) including a public rally on 26 November 2022.

However, it was clear during House of Assembly and Legislative Council debates on the OPCAT Implementation Bill, that there is a low level of knowledge of government obligations with respect to human rights generally and to OPCAT in particular. There was certainly scarce comprehension of concepts of "prevention", or "binding" obligations, or of proportionality and what that might mean for managing resources when there are competing human rights. Tasmania lacks a Human Rights Act, human rights knowledge, and human rights culture in government and in community, which the National Preventive Mechanism (NPM) requires to be effective.

We refer the present Committee to two key publications with which we largely agree. First, the Australian Human Rights Commission's, *Free and Equal a National Human Rights Act for Australia* (AHRC, 2023), which provides a value statement and that discusses principles and processes relevant to crime and criminal justice reform. Second, the Justice Research Initiative's (JRI), *State of Incarceration Tasmania's Broken Criminal Justice System* (Justice Reform Initiative, 2021) advocates for reduction in the use of incarceration and the continued waste of taxpayers' money associated with current policies.

We are hopeful that the Committee has plans for public hearings and/or sessions for expert witnesses, such as TOPCAT and JRI, to be called. In part, this is because we simply do not have the capacity, as distinct from the will or expertise, to address all the terms of reference at this time. A significant omission for TOPCAT, for example, is separating issues of adults and youth in detention, consistent with the title of the Inquiry. We hope that there will be other opportunities to address this matter especially regarding Ashley Youth Detention Centre.

HUMAN RIGHTS MATTERS

A key concern of TOPCAT is the importance of a rights-based approach to incarceration and punishment generally. We take further the JRI position that an alternative to the present incarceration policy will be rights-based. Set out below are key issues relating to a Human Rights Act and public administration that is embedded in rights.

Human Rights Act

The AHRC proposal for a Human Rights Act gives us access to *International Covenant on Economic, Social and Cultural Rights* and to the remaining six key treaties relevant to addressing the causes of crime. The Public Sector Briefing Notes of obligations in international law (Attorney-General's Department, 2023) explains the six main treaties that Australia has ratified, together with relevant principles such as proportionality, and progressive implementation. "Proportionality" recognises that not all rights are absolute, and that accommodation will be made to balance competing rights, and resources. "Progressive implementation" recognises that rights reform will take time to embed but that first steps can usually be taken. Just as there is a great deal of information about policies that have led to low incarceration and recidivism rates, among adults and children and young people, so too is there is evidence of better policy making, and outcomes, where there is commitment to international obligations of ratified treaties, and a human rights act.

In Australia and in the proposals by ATHRA in Tasmania, a human rights act is a dialogue model that empowers government and parliament rather than reduce its role. *Free and Equal* proposes a model that enhances, and does not disturb, Parliament (AHRC, 2023). A human rights act is a pathway for how to consider and then how to process. In Tasmania, it is the pathway and process that needs to come forward in this Imprisonment Inquiry.

The purpose of such an Act is to change the public service culture of decision making and embed transparent, human rights-based decisions. The outcome needs to be that laws, policies and decisions are made through a human rights lens and it is the upstream, preventive, aspect, that is so crucial to change.

The AHRC defines the key principles to human rights as democratic, preventative, protective, and effective. To be democratic, calls for parliamentary sovereignty, accountability for upholding the rule of law, participation to ensure the voices of all are heard in debate, and balance are vital because we know that there will be intersections between a Human Rights Act and other legislation. To be preventive means to be proactive; to be protective means to ensure there are safeguards against contraventions of rights; being effective means ensuring best practice decision making and ensuring equality of access to effective interventions.

Participation and Less Secrecy

We call on Government, and Parliament, to make better efforts to promote participation and to reduce secrecy in Tasmania because incarceration and recidivism rates will not improve within a closed system.

The Ombudsman and Custodial Inspector has shown us systemic weaknesses - and lack of resources - through commitment to detailed reporting about Right to Information and conditions within custodial centres. In Tasmania, we have seen the evidence of secrecy through the *Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings*. A former Premier in response to exposure of longstanding abuse of children in Ashley Detention Centre, lamented that Tasmania has a culture where people are not believed and where information is withheld from Ministers (ABC, 2023). This problem extends to whistle-blowers who try to expose secrecy, some of whom have suffered significantly from insensitive and inappropriate responses by government agencies and ministers.

We must learn from the accumulation of evidence of the recent past that Tasmania needs more transparent and open government.

Prevention, and Scrutiny Mechanisms

Free and Equal (AHRC, 2023) emphasises the importance of structures dedicated to human rights protection together with education programs and tasks to implement rights action plans in all agencies. We argue further that more needs to be done to allow the three silo human rights offices to work together to provide governance and leadership to Tasmania.

In Tasmania, scrutiny mechanisms of the custodial centres include legislation and related offices of: Ombudsman/Custodial Inspector; Anti-Discrimination Commissioner; and Commissioner for Children. The Custodial Inspector has oversight of the Official Visitors Prisons Program under the

Custodial Inspector Act 2016 (Department of Justice, 2016), and prepares Annual Reports and conducts regular inspections of detention centres, including Ashley Detention Centre.

Together, the Ombudsman and the Commissioners are the default human rights commission for Tasmania though each is confined to the silo of their founding legislation. If we do not have a human rights act, we must behave as if we do and, at the least, ensure prevention of contraventions of rights through strong scrutiny mechanisms.

The Ombudsman/Custodial Inspector/Tasmanian NPM Office needs reform. The numerous reports, including from the Custodial Inspector, over past years and in 2022, show that the organisation of the Ombudsman/Custodial Inspector/Tasmanian NPM where he administers several, sometimes competing, pieces of legislation, and Official Visitor Programs, is limited in capacity to be preventive, protective, and effective consistent with the proposed AHRC principles for a human rights act.

Public Disclosures and Whistle-blowing

The Ombudsman, and the Integrity Commission in certain circumstances, administer the *Public Disclosures Act 2002* (PIDA). *Guidelines on Blowing the Whistle* (Ombudsman, 2023) set out the broad scope of the Act and refer to Ombudsman's powers to act in the case of "detrimental action", or reprisals – that is, if a whistle-blower, as a result of a complaint, is dismissed at work, or disciplined, or harassed.

Whistle-blowing is a key matter to shining light on flaws in the justice system. The extensive list of witness reports to the *Commission of Inquiry into the Government's Responses to the Sexual Abuse of Children in Public Institutions* (Commission of Inquiry into Child Sexual Abuse, 2023) shows us how closed, and secret, was the culture at the Ashley Youth Detention Centre and therefore how difficult it would be for a whistle-blower to trust the system sufficiently to make a disclosure. We register our concerns at social media reporting, including through former Premier David Bartlett, of whistle-blowers' distress, and seeming ill-treatment, because of acting on concerns about the Ashley Youth Detention Centre.

We observe that oversight so far leaves us wondering whether the legislation and the Guideline recognise the need for a rights-based, human-centred approach to support those who wish to make public disclosures. The Objects of the Act do not suggest a duty to support a whistle-blower. Also, there is a complaint form which, we suggest, might be above the known literacy standard in Tasmania and potentially daunting for a complainant to complete.

These are matters on which we suggest the Imprisonment Inquiry needs more information.

PARADIGM CHANGE IN PUBLIC ADMINISTRATION

The paradigms of public administration need to embrace a model of engagement that is human-centred. Where this approach has been adopted, these appear to be diverse and practiced within silo departmental structures and not holistically embraced by all public authorities. A whole-of-public sector, valued-based approach is vital to give effectiveness to public policy. Public servants will benefit from whole-of-public-sector training that will enhance their performance as they transfer within and across departments.

Where there is a Human Rights Act, there will be a culture of human rights that embeds people into the centre of government decision-making. *Free and Equal* makes the point that evidence shows that while human rights are often presented through the prism of law, there must be at least equal, positive, cultural change in how legislation and public administration is undertaken.

Within a framework of legislating policy that is compatible with human rights, the Human Rights Act proposed by the Australian Human Rights Commission establishes concepts of “positive duty”, “proper consideration” and “participation”, which require public authorities to embed rights into public policy. These are practical tools that policy analysts have shown to be effective in rights-based countries, and in Victoria and Queensland, with special reporting in the ACT.

CONCLUSION

A Human Rights Act and adequate whistle-blower protections along with a well-resourced monitoring system, will promote leadership and governance, within principles that are democratic, preventive, protective, and effective to address institutional responses to crime. Human rights legislation will also both provide the pathway for good public administration and could be promoted to ensure the best possible practice.

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REFERENCES AND FURTHER READING

- ABC. (2023). Former Tasmanian premier David Barlett speaks with abuse survivor, says department secrecy stopping ministers from acting. *ABC Online*. Retrieved from <https://www.abc.net.au/news/2022-11-30/tas-former-premier-david-bartlett-speaks-out-on-abuse-inquiry/101714396>
- AHRC. (2023). *Free and Equal A National Human Rights Act for Australia*. Retrieved from https://humanrights.gov.au/sites/default/files/free_equal_hra_2022_-_main_report_rgb_0_0.pdf
- Attorney-General's Department. (2023). *Public Sector Guidance Sheets, Rights and Protections*. Retrieved from <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-humane-treatment-detention>
- Caruso, G. D. (2017). *Public Health and Safety: The Social Determinants of Health and Criminal Behaviour*. UK: ResearchersInks Books.
- Commission of Inquiry into Child Sexual Abuse. (2023). *Commission of Inquiry into Tasmanian Government Responses to Child Sexual Abuse in Institutional Settings*. Retrieved from <https://www.commissionofinquiry.tas.gov.au>
- Department of Health. (2022). *Our Healthcare Future Advancing Tasmania's Health* Retrieved from <https://www.health.tas.gov.au/sites/default/files/2022-12/Advancing%20Tasmania%27s%20Health%20-%20December%202022.pdf>
- Department of Justice. (2016). *Custodial Inspector Act 2016*. Retrieved from <https://www.legislation.tas.gov.au/view/html/inforce/current/act-2016-030>
- Justice Reform Initiative. (2021). *State of Incarceration: Tasmania's Broken Criminal Justice System*. Retrieved from https://assets.nationbuilder.com/justicereforminitiative/pages/249/attachments/original/1619164039/JRI_Tasmania_report_FINAL.pdf?1619164039
- Ombudsman. (2023). *Blowing the Whistle in Tasmania*. Retrieved from <https://www.ombudsman.tas.gov.au/public-interest-disclosures/blowing-the-whistle-in-tasmania>
- TASCOSS. (2023). *Wellbeing First: A budget proposal to ease the cost of living and invest in the long-term wellbeing of Tasmanians*. Retrieved from <https://tascoss.org.au/wp-content/uploads/2023/03/TasCOSS-2023-24-Budget-Priorities-Statement—Wellbeing-First-Summary.pdf>
- World Health Organisation. (2023). *Social Determinants of Health*. Retrieved from https://www.who.int/health-topics/universal-health-coverage/social-determinants-of-health#tab=tab_1