

Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022

Explanatory Notes

FOR

Amendments to be moved during consideration in detail by the Honourable Yvette D'Ath MP, Attorney-General and Minister for Justice and Minister for the Prevention of Domestic and Family Violence and Leader of the House

Short title

The short title of the Bill is the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022 (the Bill).

Policy objectives and the reasons for them

The objectives of the amendments to the Bill are to ensure the Bill:

- accurately reflects the policy intent that the United Nations Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the Subcommittee) can interview a detainee or another person without visiting the place of detention;
- does not inadvertently limit the ability of a person to provide consent to an interview or release identifying information to the Subcommittee; and
- includes further examples of detriment that may constitute a reprisal.

Interviews

Clause 16 of the Bill allows the Subcommittee to interview any person the Subcommittee believes may be able to provide information related to the detention of a person.

Clause 16(1) of the Bill outlines that the Subcommittee may interview: a person at a place of detention during a visit to that place of detention; and another person who the Subcommittee believes may be able to provide information related to the detention of a detainee, including about the treatment of the detainee and the conditions of detention to which a detainee is subject.

The policy intent of clause 16 of the Bill is to allow the Subcommittee to interview any person, including a detainee or staff member, for the purpose of its mandate. Clause 16 of the Bill as a whole is intended to allow the Subcommittee to interview any person at a place of detention it visits, as well as any other person it believes may provide information relevant to its purpose, including a detainee at a place of detention it does not visit.

To ensure the Bill does not inadvertently limit the ability of the Subcommittee to interview a detainee, clause 16 of the Bill will be amended to remove references to the Subcommittee interviewing a person during a visit.

Consent of a detainee

Clause 15 of the Bill provides that the Subcommittee may only retain, copy or include in any notes identifying information about a detainee if the detainee consents to the Subcommittee doing so. Clause 15(2)(b) provides that if the detainee does not have capacity to consent, the detainee's legal guardian may consent to the Subcommittee retaining, copying or including in any notes identifying information about a detainee.

Similarly, clause 16 of the Bill provides that a detainee must provide their consent to be interviewed by the Subcommittee. Clause 16(2)(b) outlines that if the detainee does not have capacity to consent, their legal guardian may consent on their behalf.

The policy intent of clauses 15(2)(b) and 16(2)(b) is to allow an authorised person for a detainee to consent on their behalf if the detainee does not have capacity to consent at the time of the Subcommittee visit. This is intended to allow a detainee to engage with the Subcommittee while ensuring the detainee's rights and interests are protected. For a detainee who may not have capacity to consent, it is intended that an authorised person, for example a guardian appointed for personal matters under the *Guardianship and Administration Act 2000*, could provide this consent.

During detailed consideration of the Bill by the Legal Affairs and Safety Committee (LASC), stakeholders flagged that the use of the term 'legal guardian' is confusing as it is not further defined in the Bill and may inadvertently limit the ability of a person to provide consent on behalf of a detainee and/or for a person to participate in an interview or release their identifying information.

To ensure the Bill reflects the policy intent, clauses 15(2)(b) and 16(2)(b) and specific reference to 'legal guardian' will be removed. Consent of a person is still required to participate in an interview or release identifying information to the Subcommittee. This amendment will not prevent consent being provided on behalf of a detainee by an authorised person, if the detainee is considered not to have capacity to consent at the time of the Subcommittee's visit.

Examples of detriment

Clause 19 of the Bill protects any person who has provided information or other assistance to the Subcommittee from reprisals and clause 20 of the Bill makes it an offence to take a reprisal.

During detailed consideration of the Bill by the LASC, stakeholders recommended including further examples of detriment in clause 19 of the Bill to recognise other methods of retaliation and to better reflect the experiences of people detained, including women in detention.

In response to this stakeholder feedback, clause 19 will be amended to include an additional example of detriment, namely prejudice to the person's wellbeing, including intimidation or harassment of the person.

This amendment does not change the operation of clauses 19 and 20 of the Bill but is intended to include examples that may be more relevant to a detention setting, noting the definition of detriment is an inclusive definition.

Achievement of policy objectives

The objectives will be achieved by:

- amending clause 16 to remove references to an interview occurring during a visit from subclauses 16(1)(a) and (5) to reflect the policy intent that the Subcommittee may interview any person without visiting the place of detention;
- removing 15(2)(b) and 16(2)(b) from the Bill to remove the specific reference to 'legal guardian' to avoid inadvertently limiting the ability of a person to provide consent; and
- expanding the examples of detriment in clause 19 of the Bill to better reflect the experiences of people in detention.

Alternative ways of achieving policy objectives

There are no alternative ways to achieve the policy objectives other than by legislative amendment.

Estimated cost for government implementation

As noted in the Explanatory Notes for the Bill, the Subcommittee is responsible for costs associated with a visit to Australia, including travel and accommodation costs for the visiting delegation. The relevant agencies will be responsible for covering any costs incurred as a result of a visit. The amendments to the Bill will not result in any additional costs for government.

Consistency with fundamental legislative principles

The amendments proposed to the Bill are consistent with the fundamental legislative principles in the *Legislative Standards Act 1992*.

Consultation

The amendments were developed in response to submissions made as part of the LASC's detailed consideration of the Bill including by: the Queensland Public Advocate; the Queensland Human Rights Commission; the Commonwealth Ombudsman; Sisters Inside; and Knowmore.

Notes on provisions

Amendment 1 amends clause 15(2) to remove the specific requirement that a legal guardian may provide consent if a person is unable to consent to the Subcommittee retaining, copying or taking notes of identifying information. The requirement for consent for the Subcommittee to retain, copy or take notes of identifying information is retained.

Amendment 2 amends clause 16(1)(a) to remove the words 'during a visit to that place of detention'. This will remove the limitation on when and where the Subcommittee conducts an interview with a person at a place of detention.

Amendment 3 amends clause 16(2) to remove the specific requirement that a legal guardian may provide consent if a person is unable to consent to an interview with the Subcommittee. The requirement for a person to consent to an interview will remain.

Amendment 4 amends clause 16(5) to remove the words 'during a visit'. This will remove the limitation on how and where the Subcommittee conducts an interview with a person.

Amendment 5 amends clause 19(6) to insert an additional example of 'detriment', to include other forms of reprisal that may be relevant to a detention context, namely prejudice to the person's wellbeing, including for example intimidation or harassment of the person.