LEGAL AFFAIRS AND SAFETY COMMITTEE

Members present:
Mr PS Russo MP—Chair
Mrs LJ Gerber MP
Ms SL Bolton MP (virtual)
Ms JM Bush MP
Mr JM Krause MP
Ms K Richards MP

Staff present:
Mrs K O'Sullivan—Committee Secretary
Ms K Longworth—Assistant Committee Secretary
Ms M Telford—Assistant Committee Secretary

PUBLIC BRIEFING—INQUIRY INTO THE MONITORING OF PLACES OF DETENTION (OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE) BILL 2022

TRANSCRIPT OF PROCEEDINGS

MONDAY, 30 JANUARY 2023

Brisbane

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The committee met at 11.41 am.

CHAIR: Good morning. I declare open the public briefing for the committee's inquiry into the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022. My name is Peter Russo, the member for Toohey and chair of the committee. I would like to respectfully acknowledge the traditional custodians of the land on which we meet today and pay our respects to elders past and present. We are fortunate to live in a country with two of the oldest continuing cultures in Aboriginal and Torres Strait Islander peoples whose lands, winds and waters we all share.

With me here today are: Laura Gerber, member for Currumbin; Sandy Bolton, member for Noosa via teleconference; Jonty Bush, member for Cooper; Kim Richards, member for Redlands, who is substituting for Jason Hunt, member for Caloundra; and Jon Krause, member for Scenic Rim.

The purpose of today's briefing is to assist the committee with the examination of the bill, which was introduced in the Queensland parliament on 1 December 2022 and referred to the committee for consideration. Only the committee and invited witnesses may participate in the proceedings. Witnesses are not required to give evidence under oath, but I remind witnesses that intentionally misleading the committee is a serious offence.

These proceedings are similar to parliament and are subject to the Legislative Assembly's standing rules and orders. In this regard I remind members of the public that under the standing orders the public may be admitted to, or excluded from, the briefing at the discretion of the committee. I also remind committee members that departmental officers are here to provide factual and technical information. Any questions seeking an opinion about policy should be directed to the Attorney-General or left to debate on the floor of the House.

These proceedings are being recorded by Hansard and broadcast live on the parliament's website. Media may be present and are subject to the committee's media rules and my directions at all times. You may be filmed or photographed during the proceedings and images may also appear on the parliament's website or social media pages. I ask everyone present to turn your mobile phones off or to silent mode.

BANDARANAIKE, Ms Sakitha, Director, Strategic Policy and Legal Services, Department of Justice and Attorney-General

HAIGH, Ms Nicala, Acting Principal Policy Officer, Strategic Policy and Legal Services, Department of Justice and Attorney-General

ROBERTSON, Mrs Leanne, Assistant Director-General, Strategic Policy and Legal Services, Department of Justice and Attorney-General

CHAIR: I now welcome witnesses from the Department of Justice and Attorney-General: Mrs Leanne Robertson, Assistant Director-General of Strategic Policy and Legal Services; Ms Sakitha Bandaranaike, Director of Strategic Policy and Legal Services; and Nicala Haigh, Acting Principal Policy Officer. I invite you to brief the committee on the bill, after which committee members will have some questions for you.

Mrs Robertson: In opening, I too would like to acknowledge the Jagera and Turrbal people, the custodians of the land on which we meet for this hearing this morning, and pay my respects to elders past, present and emerging. At the committee's request, my opening statement is going to focus on some of the key issues raised by stakeholders.

The bill reflects the government's policy position on scope. It specifically defines the places of detention within its scope to provide certainty as to the procedures to be followed for a visit. Defining specific places of detention is consistent with the approach in Victoria, as opposed to other jurisdictions which have a broad definition. The bill will address the existing legislative barriers that prevented physical access to authorised mental health services and the Forensic Disability Service, highlighted when the subcommittee visited last year. Clause 4(1)(h) allows the Governor in Council to make a regulation to prescribe other places of detention, other than a private residence, to be within scope of the bill. It is intended that the bill does not prevent the subcommittee from visiting a place outside the bill's scope. This would be by consent and in accordance with any relevant legislation.

Turning to the issue now about access to places of detention, the bill requires that the minister with responsibility for the place of detention, in clause 7, and the detainee authority, in clause 8, ensures that the subcommittee has unrestricted access to any part of the place of detention. Under clause 9, the responsible minister may object to a visit on the grounds of national defence, public safety, natural disaster and serious disorder. This mirrors the grounds of objection in article 14.2 of OPCAT itself.

Consistent with Victoria, clause 10 enables a detaining authority to temporarily prohibit or restrict access to all or part of a place of detention in exceptional circumstances that threaten the safety, security or wellbeing of people detained, staff and others, including the subcommittee. Given the subcommittee's visiting itinerary is confidential, this allows a detaining authority to respond to critical incidents that may arise at the time of the visit. Examples are provided in the department's response to submissions. Clause 22 provides that a detaining authority is subject to the direction of a responsible minister. While the exercise of this power is a matter for the relevant minister, a minister could direct in the department's view a detaining authority not to restrict subcommittee access.

I turn now to issues around access to information. As a general rule, clause 13 provides the subcommittee with unrestricted access to information relevant to their purpose. This applies regardless of whether the subcommittee visits the facility or not. Clause 14 allows the subcommittee access to identifying information, including confidential information, about a person in a place of detention if the committee has visited that place. The subcommittee must obtain the consent of the detainee under clause 15 to retain, copy or take notes of the identifying information, including confidential information. We note that legislation in other jurisdictions ties the subcommittee's access to information to a facility visit.

The next issue is around interviews and consent by a legal guardian. Clause 16 provides that the subcommittee may, with consent, interview any person the subcommittee believes can provide information related to the detention of a person. The department notes that that is consistent with the approach in Victoria. The policy intent of clause 16(2)(b) is to facilitate an interview where a person may not have capacity to consent. This is the same for clause 15(2) regarding consenting to the subcommittee retaining identifying information. However, given submissions on this issue by stakeholders, the department will give some further consideration to these provisions to ensure that they reflect the policy intent.

Looking at the issue of protections and offences, clause 19 protects any person who has provided information or other assistance to the subcommittee against reprisals, and clause 20 makes it an offence to take a reprisal. As noted in the department's written response on the submissions, we are also going to give further consideration to the grounds for reprisal—in particular, the inclusive definition of 'detriment' to determine if clause 19 should include broader examples. I think we have tried to give an overview of the main issues raised in the public hearings. We are happy to take questions.

CHAIR: On that last point, did you hear the definition that was provided by knowmore during the public hearing? From memory, so someone correct me if I have misquoted, they suggested that the definition that was referred to in the Royal Commission into Institutional Responses to Child Sexual Abuse be adopted here.

Ms Bandaranaike: I would have to check, but my understanding was that knowmore's submission was around clause 21, which was if a person provides information or assistance to the subcommittee then they are protected from criminal or civil liability. I think what Leanne's opening statement referred to was raised by Sisters Inside around clause 19. We have an inclusive definition of 'detriment' in terms of the reprisal provision in clause 19. I think their submission was that it should have broader examples more relevant to detainees. I could be mistaken, but I think knowmore's submission was related to clause 21 about the protection from civil and criminal liability.

CHAIR: Where are we at with that?

Ms Bandaranaike: In relation to knowmore's submission?

CHAIR: Yes.

Ms Bandaranaike: I guess in short the policy intent of that section is really to give a person who in good faith gives information or assistance to the subcommittee protection against criminal or civil liability. It is a similar provision, but not exactly the same, to the ACT, the Northern Territory and Tasmania. They have a similar but not exactly the same provision. That is the effect of that provision.

Mr KRAUSE: In your opening statement, you gave reasons why a visit could be denied, and one of the reasons was national defence. Is that a decision made at the Queensland government level or is it made in consultation with the Commonwealth? How does that work? It is not an area of policy that the state generally goes with.

Ms Bandaranaike: Those grounds that clause 9 picks up that you are referring to apply to all places of detention in Australia. I imagine that one would be more relevant to facilities within the jurisdiction of the Commonwealth.

Mr KRAUSE: So it is some sort of uniform provision that has been pulled into it.

Ms Bandaranaike: Yes, it is grounds for objection that is listed in OPCAT.

Mr KRAUSE: In relation to the definition of the places of detention—and I do not think this has been touched on yet—a number of submitters were concerned that the definition in clause 4 was too narrow and that it should be expanded to include aged-care facilities and quarantine centres, such as hotels and people's homes. Are you able to comment on this? Have you seen those submissions? What is the department's view?

Mrs Robertson: There are a couple of things. In relation to quarantine facilities, that is a policy decision by government. I do not think I can take that any further. In relation to aged-care facilities—

Ms Bandaranaike: This is in our departmental written response to the submissions. Effectively, as Leanne said, it is a policy decision by government around the scope. At the moment, disability group homes and aged-care facilities are not included within the scope of the bill. In our written submission, we note the nature of the regulatory environment of disability group homes. Our understanding is that the Australian government has responsibility for registration of the majority of these places through the National Disability Insurance Scheme. In relation to aged-care facilities, they are funded and regulated by the Commonwealth government. Whilst it is a policy decision for government, our written submission notes that there may be some benefit in having a national discussion around some consistency on those issues, noting that not all jurisdictions in Australia even have legislation at this stage to facilitate subcommittee visits.

Mrs GERBER: To follow up on that, I appreciate that the written submission does provide a bit more detail in relation to aged-care facilities, but were quarantine facilities considered? There is nothing in the written submission to even suggest that it had formed part of your discussion paper.

Mrs Robertson: On the issue of quarantine facilities, the best I can say is what I have said before: it is a policy decision by government and I cannot take that any further.

Mrs GERBER: Did it come under consideration or not?

Mrs Robertson: The matters that the government considers in developing legislation is a policy decision for government.

Ms Bandaranaike: The only thing I can add is that the bill allows for a regulation to prescribe other places of detention. Obviously, it is a policy decision but there is ability there for a regulation to prescribe other places other than a private residence within scope.

Ms BOLTON: During the hearings, we heard that there was a lack of definition around privacy. Has there been thought given to including provision within the bill to give better reassurances around what privacy consists of, including a separate space?

Ms Bandaranaike: Can I clarify? Is that about the requirement for interviews to be held in private and the practical application of that?

Ms BOLTON: Yes. They felt the definition of privacy and private in relation to those interviews was not detailed enough to ensure that those interviews were conducted in a separate space privately and not just in a corner where someone may overhear.

Ms Bandaranaike: The example that was referred to by some submitters in the explanatory notes, which was about out of earshot, was meant to be provided as guidance only. As I understand it, it was informed by the subcommittee's recent visit to Australia. The actual clause, which is clause 18 of the bill, says that the detaining authority for a place of detention must allow the subcommittee to interview a person without any other person being present, other than support people and the like. We understand that interviews may be conducted in open areas when a private room or space may not be practically available or safe for the subcommittee to use. The application of that provision will probably depend on the circumstances of that particular place of detention. In the subcommittee's guidelines, they also have requirements around making sure that interviews are conducted privately.

Ms BUSH: I have four areas of interest. You have responded to the definition of places of detention, so thank you. I hear you on that. On issues around consent and guardianship approval—and you have obviously looked at the submissions—a lot of these people are under state care and we are the corporate guardians, so how do we deal with that conflict?

Ms Bandaranaike: As Leanne noted in her opening statement and we have noted in our written submissions, clause 16(2)(b) is about consent for interviews and 15(2)(b) is about consent for the subcommittee to retain identifying information. The policy intent of those provisions was not to prohibit

interviews in relation to kids as well as adults who might have impaired capacity but to facilitate them. Having heard the submissions, we have committed to looking at those particular provisions to ensure they give effect to the policy intent. We have looked at the other jurisdictions as well, particularly the ACT, the Northern Territory and Tasmania. We have committed to looking at it.

Ms BUSH: You did say that, Leanne, I apologise. The next one was the grounds for refusal to enter. Some submitters thought that was too broad and that issues particularly with workforce shortages may result in repeat refusals. Can you step us through that? I think some of the submitters implied that that would be negotiated and it would be 'maybe not today but tomorrow'. How would that look in practice?

Ms Bandaranaike: I think you are referring to clause 10 and the ability of the detaining authority—

Ms BUSH: Correct.

Ms Bandaranaike:—to restrict or temporarily prohibit access to a place or part of a place of detention during a visit for security, good order, health and safety, or essential operations. Given the subcommittee's itinerary is confidential, the policy intent of that clause is allowing a detaining authority to respond to an emerging or critical incident at the time of the visit. Victoria also has a provision like clause 10. We have noted in the explanatory notes some examples of where it might be used—for example, to allow the detainee to continue their routine or medical care or treatment in a youth or disability type setting; to facilitate meal times or where a large number of prisoners are being processed; and for safety issues regarding people entering the facility including the subcommittee.

There are some safeguards around that in that the restriction, if used, can only be used for the shortest period of reasonable time. The detaining authority also has to provide reasons to the responsible minister. Clause 22 of the bill provides that the detaining authority is subject to the direction of the responsible minister. Arguably, it is up to the responsible minister, but that could be used by the minister to direct a detaining authority not to restrict access.

In terms of a practical application, we were advised by Queensland Corrective Services that as part of the subcommittee's visit to Australia last year there was what they call a code yellow while they were visiting a facility. We understand this was managed without suspension of the visit. Some staff stayed with the subcommittee and other staff attended to what they call a code yellow and then the visit was resumed. That is a practical example of where it might be used.

Ms BUSH: Essentially, the oversight really is the minister. If they start to anticipate that a particular detention centre is refusing consistently, there would be an oversight mechanism.

Ms Bandaranaike: Yes. Also, if the UN subcommittee felt like the state party was not cooperating, they could also make public comments about that. There are reputational risks there, too.

Ms BUSH: The last one was around the ability for the subcommittee to access personal information for individuals in locations that they had not visited. I do not have the clause in front of me. It may in fact be a visitable location that they had not visited and they could not access information. Can you explain the rationale for that?

Ms Bandaranaike: We do not use the concept 'personal information' but I will try to explain how those provisions work. There is a general provision, which is clause 13, which basically says that the subcommittee has unrestricted access to any information other than excluded information that is in the possession or control of the responsible minister or the detaining authority that is relevant to their purpose. That is not connected to a visit. Clause 13 gives some examples of the type of information, such as number of people detained, treatment of those people at the facility, conditions and information about their health care.

Where the visit connectivity comes into it is in relation to the subcommittee accessing identifying information—so information that is going to identify the person—and that could include confidential information that has identifying information. If that is the case, they have to have visited the place to be able to access and view it. It is our understanding that, of those jurisdictions that have legislation to facilitate subcommittee visits, in some way they all tie access to information to a subcommittee visit.

Ms BUSH: I am still wrapping my head around it. I might come back to that.

Ms Bandaranaike: It is confusing.

Mr KRAUSE: I understand this bill has come about as a result of the Commonwealth ratifying an international treaty. I have looked at the explanatory notes and I cannot put my finger on this issue. Have there been a lot of costs incurred by the department in going through this process of seeking to comply with the treaty? If so, do you know how much?

Ms Bandaranaike: I can only comment in relation to the bill and the subcommittee visits. We have noted in the explanatory notes the estimated costs of government implementation and we have said that the subcommittee is responsible for costs associated with the visit to Australia including travel and accommodation costs. Relevant agencies will be responsible for carrying any costs incurred as a result of the visit.

Mr KRAUSE: What about the development of this bill? Is it within the departmental resources?

Mrs Robertson: That is business as usual.

Mr KRAUSE: If it does not comply with OPCAT in the eyes of some in whatever way, what is the consequence?

Ms Bandaranaike: I guess in short reputational risks to Australia and the Queensland government. As I mentioned, when a subcommittee visits a country, they produce reports and they can be released with the consent of the state party which in this case is the Australian government. In short, there are reputational risks.

Mrs GERBER: During the course of the public submissions, knowmore and one other submitter raised the availability of spaces in detention facilities across Queensland to conduct private interviews, particularly during the inquiry into institutionalised sexual abuse of children. During that inquiry they encountered a problem of not having enough private spaces within the time frames required to conduct the necessary interviews. Has the department considered this in terms of the application of this bill and OPCAT? What is your response?

Ms Bandaranaike: I cannot comment practically as to how it might unfold across different places of detention. There is a bit of flexibility in the way the subcommittee might conduct those interviews. In terms of the department considering it, I can only talk about what happened with the visit last year. A lot of dialogue and information exchange happens well before the subcommittee announces their visit. Obviously we do not know their itinerary but we know their dates. There is a lot of information that states, territories and jurisdictions pass on to the subcommittee about the places and a dialogue happens between the subcommittee and the jurisdictions. The idea of that, as I understand, is to allow jurisdictions ahead of the visit to make practical arrangements. That is probably all I can say.

Mrs Robertson: I think that is it. At the end of the day if the subcommittee is not happy with that, as Sakitha outlined earlier, the subcommittee can include that information in a report which could be made public at the discretion of the state party, in this case the Commonwealth government in that sense. It is an ongoing dialogue in relation to the visit, although we do not know that they are going to go to a particular facility and a particular place. Obviously the particular detaining authority would be aware of the obligations it has under the legislation and OPCAT. We would hope that they would as much as possible be able to work within the dynamics of the particular place they are at. That is probably as far as we can take it.

Ms Bandaranaike: At the last visit, for example, there were focal points for places of detention. If there are issues there is a practical point where the subcommittee could talk to the focal point quickly if they had issues around access. I think that dialogue and information exchange is managed. It will vary, I imagine, depending on the place of detention and where it is located.

Ms BUSH: Am I right in assuming many of these places of detention already have some kind of visiting inspectorate oversight coming in and having conversations with people one on one? Is it a component of their legislation that they have to provide private spaces—the Ombudsman, the OHO, the OPG?

CHAIR: For an official visitor?

Mrs Robertson: I do not think we have that detail. We can take it on notice if you want that information, but we do not have that information before us.

Ms BUSH: I am okay.

CHAIR: I do not think it needs to be taken on notice.

Ms BUSH: I will come back to the information piece. Some of the submitters were saying there are particular times when it is really important to have oversight and reach into some of these places such as lockdowns. My reading of the bill is that they will still be able to access information held in these places of detention during those moments to have some optics over what is occurring and the practice decisions that are made during those moments of risk.

Ms Bandaranaike: Should a detaining authority refuse access because of some critical incident, for example, that would mean for a short period of time the subcommittee would not be able to physically access. However, the idea of the bill is that they should still be able to access information

that is relevant to that place of detention or detainees in there and/or be able to interview those people—that could be remotely, for example—whether that is a detainee or others who might have information that is relevant to the detainee in the place of detention. That is the idea—that they should still be able to access information and speak to people if for a short period of time they are unable to physically enter the place.

Mrs GERBER: Following on from the subcommittee being able to access information, I think Mr Krause asked the question of the Human Rights Commissioner about the membership of the subcommittee. I note that the UN's Committee against Torture membership includes the Russian Federation and China. Has the department considered safeguards that might be necessary or considered the fact that those two memberships of the subcommittee will have access to our places of detention and certain information?

Ms Bandaranaike: The members of the subcommittee are appointed in their individual capacities. They are meant to be 'independent and impartial'. They are available not to represent their countries but as part of the subcommittee. They are chosen from people—and I am reading from the actual OPCAT document—of 'high moral character, having proven professional experience in the field of the administration of justice, in particular criminal law, prison or police administration'.

CHAIR: That concludes this briefing. Thank you for your participation today. Thank you to the Hansard reporters. A transcript of this proceeding will be available on the committee's webpage in due course. There were no questions were taken on notice. I declare the public briefing closed.

The committee adjourned at 12.14 pm.