



Phone: (07) 4721 5511 Fax: (07) 4721 5499
Address: Unit 2, 181 Sturt Street, Townsville QLD 4810
Postal Address: PO Box 807, Townsville QLD, 4810
Email: info@townsvillecommunity.law
Website: townsvillecommunity.law

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The Chair
Legal Affairs and Safety Committee
Parliament House
George Street
BRISBANE QLD 4000

By email: lasc@parliament.qld.gov.au

Dear Chair,

LEGAL AFFAIRS AND SAFETY COMMITTEE

MONITORING OF PLACES OF DETENTION (OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE) BILL 2022

Thank you for providing an opportunity to comment on the Bill.

We consent to our submission being published and can provide oral evidence in support of our contentions should the Committee wish to call us to give evidence.

Recommendations

Townsville Community Law recommends as follows:

1. Clause 4 of the Bill is amended to include 'Residential Aged Care Facilities' as defined by the *Aged Care Act 1997* (Cth), or in the alternative to 1;
2. Residential Aged Care Facilities are included by way of regulation pursuant to Clause 4(1)(h) of the Bill, or in the alternative to 1 or 2;
3. If doubt arises in respect of the necessity for adopting recommendations 1 or 2, that a further Statement of Compatibility is prepared in accordance with Part 3 of the *Human Rights Act 2019*; and
4. Particular attention be given in that further Statement of Compatibility to the position of residents of Residential Aged Care Facilities in respect of human rights issues detailed herein.

Furthermore, Townsville Community Law supports the broader civil society concerns raised and reiterates those concerns at the final part of this submission.

Contextual Comments

In our view, the Bill is deficient in its scope and ought to be amended to properly reflect Queensland's State Party obligations under the *Convention Against Torture and Other*

Cruel, Inhuman or Degrading Treatment or Punishment (CAT),¹ the Optional Protocol to the Convention Against Torture (OPCAT),² and other human rights norms.

Queensland's State Party obligations, and its obligations under Queensland Law, are to ensure that older persons are not deprived of liberty, and are to be protected from torture and cruel, inhuman or degrading treatment. In some instances, the setting of Residential Aged Care will enliven these obligations, and the experiences of older Queenslanders may include violations of their human rights.

The recent report of Claudia Mahler, the Independent Expert on the enjoyment of all human rights by older persons on 'Older persons deprived of liberty'³ provides important contemporary context:

*... the Independent Expert recognizes the broad definition of deprivation of liberty and places of detention as understood in general comment No. 35 of the Human Rights Committee and in article 4 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Despite the emphasis on deprivation of liberty within the criminal justice system in the Optional Protocol, the Subcommittee on the Prevention of Torture takes the view that the phrase "places of detention" in article 4 has a broad meaning, extending beyond mainstream places of detention. It establishes that "places of detention" can encompass all places where individuals, including older persons, may be deprived of their liberty, such as prisons, pre-trial detention facilities, police stations, **caregiving establishments**, psychiatric institutions and hospitals, mental health centres and immigration detention centres.⁴ (Emphasis added)*

Furthermore, the Independent Expert considered the 'context of care' noting that:

21. Whether older persons are deprived of liberty in the context of care, States have the duty to take appropriate measures to protect their right to liberty, including by non-State actors and in private settings (including private care, health facilities and private homes).⁵

The Independent Expert's position is reinforced by General Comment 35 on Article 9 of the *International Covenant on Civil and Political Rights (ICCPR)*:

7. States parties have the duty to take appropriate measures to protect the right to liberty of person against deprivation by third parties. States parties must protect individuals against abduction or detention by individual criminals or irregular groups, including armed or terrorist groups, operating within their territory. They must also protect individuals against wrongful deprivation of liberty by lawful organizations, such as employers, schools and hospitals. States parties should do

¹ UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <https://www.refworld.org/docid/3ae6b3a94.html> [accessed 5 December 2022].

² UN General Assembly, Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, 9 January 2003, A/RES/57/199, available at: <https://www.refworld.org/docid/3de6490b9.html> [accessed 5 December 2022].

³ A/HRC/51/27.

⁴ Ibid, para 11.

⁵ Ibid, para 21.

their utmost to take appropriate measures to protect individuals against deprivation of liberty by the action of other States within their territory.

8. When private individuals or entities are empowered or authorized by a State party to exercise powers of arrest or detention, the State party remains responsible for adherence and ensuring adherence to article 9. It must rigorously limit those powers and must provide strict and effective control to ensure that those powers are not misused, and do not lead to arbitrary or unlawful arrest or detention. It must also provide effective remedies for victims if arbitrary or unlawful arrest or detention does occur.⁶

The Royal Commission into Aged Care Quality and Safety also canvassed this issue, noting that “[T]he Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT) may also be relevant in the context of restraints in residential aged care.”⁷

It is against this backdrop that Queensland’s Parliament must ensure that the Bill is not deficient in its scope and application to older Queenslanders and fails to address the guarantees it has given to the international community.

How the Bill is Deficient in its Scope

Townsville Community Law submits the Bill is deficient in not identifying the proper scope of article 4 as including Residential Aged Care Facilities as ‘a place of detention’.

The Attorney-General’s speech introducing the Bill suggests that it seeks “to facilitate a consistent approach to UN subcommittee visits to places of detention in Queensland”,⁸ and further, that “the bill demonstrates our ongoing commitment to human rights and ensures that fair and equitable treatment of individuals in places of detention is upheld.”⁹

The Attorney-General noted that:

Places of detention that are defined in the bill are: prisons; community correction centres and work camps; youth detention centres; in-patient units with an authorised mental health service; the forensic disability service; court cells, police watch houses, police holding cells, or other places in a police station where a person is detained; any vehicle primarily used or operated for the purpose of transporting a detainee; and any other place other than a private residence prescribed by regulation where a person is a detainee.¹⁰

Townsville Community Law submits that the Bill should be amended to include Residential Aged Care Facilities and related institutions. There are two critical aspects to this issue.

Firstly, CAT and OPCAT applies to aspects of all Residential Aged Care Facilities through Queensland and indeed Australia. While this conclusion appears to be contested by the

⁶ CCPR/C/GC/35, paras 7-8.

⁷ Royal Commission into Aged Care Quality and Safety, Restrictive Practices in Residential Aged Care in Australia, Background Paper 4 May 2019, P.20.

⁸ Hansard, Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 1 Dec 2022, 3844.

⁹ Ibid, 3845.

¹⁰ Ibid, 3845.

Australian Government, the analysis of domestic and international experts, and the acceptance of this issue by other States Parties cannot be ignored.

Secondly, in respect of Residential Aged Care Facilities operated by the State, specific obligations are also owed under the *Human Rights Act 2019* (Qld) (the HRA).¹¹ The Explanatory Note to the Human Rights Bill 2018 explicitly noted that section 17 (then clause 17) implements our obligations under the ICCPR and CAT.¹²

Despite this, the Bill's current Statement of Compatibility is silent on this issue other than to note that places of detention include, "another place where a person is detained (other than a private residence) prescribed by regulation;".¹³

Accordingly, for the Queensland Government to deny that Residential Aged Care Facilities can be a place of detention is incompatible with human rights under the HRA that arise in the context and setting of Residential Aged Care Service Facilities, including:

- section 15 (Recognition and equality before the law)
- section 16 (Right to life)
- section 17 (Protection from torture and cruel, inhuman or degrading treatment)
- section 19 (Freedom of movement)
- section 25 (Privacy and reputation)
- section 29 (Right to liberty and security of person)
- section 30 (Humane treatment when deprived of liberty) and
- section 37 (Right to health services)

Application of OPCAT to Residential Aged Care Service Facilities

In *Public Advocate v C, B* [2019] SASFC 58 the Full Court of the Supreme Court of South Australia noted that places of 'civil detention' include closed aged care facilities, in particular specialist dementia care units (SDCUs).

Grenfell notes that the Public Advocate case highlighted that, if a person is ordered to reside in a closed unit where their movement is restricted, they are subject to a form of detention, regardless of whether the restriction is total or partial.¹⁴

Grenfell directly addresses the debate as to whether SDCUs in aged care facilities, as an example, should be considered 'places of detention' for the purpose of OPCAT monitoring:

As aged care facilities are (partially or wholly) funded by government and/or subject to regulations and government oversight, they meet OPCAT's first criterion of being under the government's jurisdiction and control. They also meet the second and third criteria: they deprive persons of their liberty; and this deprivation

¹¹ See https://www.health.qld.gov.au/__data/assets/pdf_file/0032/719780/appena-1819-v1.0.pdf including: Karingal Nursing Home, Mt Lofty Nursing Home, Glenbrook Residential Aged Care Facility, North Rockhampton Nursing Centre, Dr E A F McDonald Nursing Home, Cooina House, The Oaks Nursing Home, Parklands Residential Aged Care Facility, Waroona Multipurpose Centre, Westhaven Nursing Home, Forest View Residential Care Facility, Eventide Nursing Home Sandgate, Eventide Home Rockhampton, Eventide Charters Towers, Milton House, Redland Residential Care Facility

¹² <https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2018-076>

¹³ <https://documents.parliament.qld.gov.au/tp/2022/5722T2034-DE12.pdf>.

¹⁴ Laura Grenfell (2019) Aged care, detention and OPCAT, *Australian Journal of Human Rights*, 25:2, 248-262, DOI: 10.1080/1323238X.2019.1642998, p.248-249

is 'either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence'.¹⁵

Further, in a separate analysis, Grenfell, Mackay and Debeljak note that:

Denying 'detention' status under OPCAT for some closed environments, such as RACFs, is a missed opportunity to ameliorate the increased risk that residents of RACFs will be subjected to such ill-treatment, or their right to life deprived, through independent investigation and external oversight. Given the similarity of the high risk with other places of detention, the lower level of accountability in RACFs is not acceptable.¹⁶

As briefly noted earlier in this submission, the acceptance of OPCAT's application to Residential Aged Care Facilities is not controversial in other jurisdictions. In New Zealand OPCAT monitoring of aged care began in 2020¹⁷ after significant consideration of the scope of places of detention.¹⁸ The implementation of this scheme in New Zealand should be considered by the Committee and within any further Statement of Compatibility.

The Federal Government's Position

As noted, the Australian Government has suggested that Residential Aged Care Facilities are not places of detention.¹⁹ During the process of post-OPCAT ratification, much has been made about Government's focus on places of primary detention. This has occurred in a way that wilfully ignores the actual application of CAT and OPCAT to other places, and ultimately, we suggest in a way detrimental to consideration of the actual breadth of article 4 of OPCAT.

Despite this, the Commonwealth Ombudsman has noted:

For example, the mandate of the New Zealand Ombudsman was recently extended to include privately run aged care facilities and court cells.¹⁶ Given that OPCAT is not restricted to primary places of detention it will be necessary over time to consider all places where people are deprived of their liberty in Australia.²⁰

The approach of New Zealand should be adopted and recognised by inclusion in the Bill, howsoever that is needed to be reflected.

¹⁵ Grenfell, p.255-256

¹⁶ Grenfell, Laura; Mackay, Anita; Debeljak, Julie (2022): Human Rights Accountability for Systems of Ill-Treatment in Residential Aged Care. Monash University. Journal contribution. <https://doi.org/10.26180/20341488.v2>, p.2.

¹⁷ See NZ Ombudsman Factsheet OPAT Aged Care Inspections Programme: A three year programme of work (October 2019), <https://www.ombudsman.parliament.nz/sites/default/files/2019-11/factsheet-agedcare-outlineandprogress.pdf>

¹⁸ See M. White, *He Ara Tika, A pathway forward - The scope and role of the Optional Protocol to the Convention against Torture (OPCAT) in relation to Aged care and disability residences and facilities*, New Zealand Human Rights Commission, June 2016, p.29.

¹⁹ Attorney General's Department Senate Standing Committee on Legal and Constitutional Affairs, Supplementary Budget Estimates 2019-20 (LCC-SBE19-141-OPCAT-National Preventive Mechanism) (4 November 2019).

²⁰ Commonwealth Ombudsman, Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) Baseline Assessment of Australia's OPCAT Readiness, September 2019, Report by The Commonwealth Ombudsman, Michael Manthorpe, Under the Ombudsman Act 1976, Report No. 03|2019, p.9.

Broader Civil Society Concerns

Townsville Community Law joins with other civil society organisations in raising several systemic concerns:

1. Coverage of OPCAT to all places of detention in Queensland

A NPM needs to ensure all places of detention in Queensland are monitored. Currently there is only coverage of prisons, watch houses and youth detention. OPCAT must extend beyond traditional sites of detention to include any place where a deprivation of liberty occurs. This includes mental health wards, aged care facilities, and disability specific institutions, such as the Forensic Disability Service and disability group homes.

2. Create a standalone independent statutory entity

A well-funded oversight body is needed to collate and monitor the recommendations and activities of the Inspectors of various places of detention. This body should be a separate stand-alone body, such as in the UK. Alternatively, the Queensland Human Rights Commission (QHRC) is already responsible for accepting complaints of torture, cruel, inhumane and degrading treatment under the Human Rights Act (2019) Qld and understands the systemic issues impacting the human rights of people in places of detention, making them an appropriate oversight body for this function.

3. Formal collaborations with Civil Society Organisations (CSOs)

CSOs can help strengthen the mandate of the NPM by exchanging information on best practice inspection processes and working together by forming formal coalitions on monitoring activities. We call for the formal integration of CSOs into a Queensland NPM as recommended by the Subcommittee on Prevention of Torture. This integration should include funding to participate in OPCAT monitoring and to prepare a shadow report to parliament.

4. Formal collaborations with people with lived experience of detention in monitoring activities

People who have personal experience in sites of detention provide invaluable insight as to where torture can occur in these settings. People in detention also find it easier to communicate with and express concerns to 'Experts by Experience.' We call for the establishment of transparent legislated and policy pathways for consultation with, and involvement of people with lived experience of detention in monitoring activities, including clear quantitative targets for engagement and a paid position for a prisoner to be a monitoring advocate.

5. Clear communications to people in detention

To make OPCAT real, people in detention need accessible communication to understand their human rights and to realise them via appropriate complaints mechanisms. Culturally appropriate and disability informed dialogue with people in detention must be a priority of the NPM, which must be culturally and disability inclusive from the outset.

6. Improvements to Inspector of Detention Services Act 2022 (Qld)

Increase the frequency of visits to places of detention to ensure adequate oversight is a legislative rather than political commitment.

When reports are made with concerns of torture or ill-treatment of a detainee, that detainees are provided with legal representation and a right of reply to submissions made by the responsible person before the Inspector decides whether further action is required. Expand the role of the Inspector to include:

- The power to investigate critical incidents;
- The power to submit proposals and observations on existing and draft legislation, and undertake public advocacy, awareness raising and capacity building;
- Access to information relating to proceedings of Cabinet or a committee of Cabinet.

Publish a framework about how the Inspector will interact with existing oversight agencies, including the Official Visitor Regime and the QHRC.

Consult with CSOs about the regulation which determines which areas of the detention facility will be inspected. This will ensure that all places susceptible to abuse receive appropriate oversight.

Conclusion

We commend our comments to you and submit that careful consideration should be given to the Bill's current deficiencies. In our view it would be problematic if the issue that the Bill sought to resolve (ensuring our compliance with OPCAT and treaty body monitoring) was only partially resolved.

Please do not hesitate to contact us to discuss this submission.

Yours sincerely,



William (Bill) Mitchell OAM HonLLD



Principal Solicitor

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