



23 December 2022

Committee Secretary
Legal Affairs and Safety Committee
Parliament House
George Street
Brisbane QLD 4000

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

Dear Committee Secretary

Thank you for the opportunity to comment on the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022.

As members of the Committee will be aware, as the Public Advocate for Queensland, I undertake systemic advocacy to promote and protect the rights and interests of Queensland adults with impaired decision-making ability.

The Bill sees Queensland making steps towards implementing the requirements of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), which Australia ratified in 2017. I have a number of points to make regarding how the Bill could better comply with OPCAT, and I have a clarification suggestion. I close with some comments concerning further steps the Queensland government could take regarding OPCAT compliance.

Places of detention

The purpose of the Bill is to facilitate visits by the United Nations Subcommittee on Prevention of Torture (the Subcommittee) to 'places of detention' in Queensland.

A 'place of detention' is defined in the Bill to include:¹

- '(a) a community corrections centre, prison or work camp under the *Corrective Services Act 2006*; or
- (b) a detention centre under the *Youth Justice Act 1992*; or
- (c) an inpatient unit of an authorised mental health service under the *Mental Health Act 2016*; or
- (d) the forensic disability service under the *Forensic Disability Act 2011*; or
- (e) a court cell; or
- (f) a watch-house; or
- (g) a holding cell or another place in a police station where a person is detained; or
- (h) another place where a person is detained, other than a private residence, prescribed by regulation as a place of detention; or
- (i) a vehicle primarily used or operated for the purpose of transporting a person who is detained to or from a place mentioned in any of paragraphs (a) to (h).'

While this is a reasonably extensive list of places of detention, which is broader than the definition contained in the *Inspector of Detention Services Act 2022*, it could be extended further to include those disability and aged-care settings where the utilisation of restrictive practices means that the residents in question are in effect detained.

¹ Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022 cl 4(1).

OPCAT requires (Article 1) the establishment of 'a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment'. In defining 'deprivation of liberty' Article 4 provides that this 'means any form of detention or imprisonment or the placement of a person in a public or private custodial setting in which that person is not permitted to leave at will by order of any judicial, administrative or other authority'.

The Australian Human Rights Commission (AHRC) has pointed out, in its *Implementing OPCAT in Australia* report (2020, p. 42), that 'OPCAT has broad application to any place where an individual cannot leave of their own free will, and where that place of detention is linked, either directly or indirectly, to a public authority'.

In Queensland such facilities would include places where the use of restrictive practices amounts to detention of the individuals involved – such as residential aged care facilities and disability services settings. Therefore, the definition of 'places of detention' in the Bill should be expanded to include such places to fully reflect the requirements of OPCAT.

Legal guardian

The term 'legal guardian' is used in the Bill in relation to the seeking of consent to copy, retain or take notes regarding a person or to interview a person, if the person themselves is 'unable to consent'.² Although I agree that appropriate mechanisms should be in place if a person lacks the capacity to consent, the use of the term 'legal guardian' may be confusing as it is not further defined in the Bill.

'Legal guardian' is often used in relation to an adult who has responsibility over a child. If the intention of the Bill is for this term to include substitute decision-makers for adults with impaired decision-making ability, it should clarify this term, as guardians under the *Guardianship and Administration Act 2000* are generally not referred to as 'legal guardians'. In fact, if applied in the context of the *Guardianship and Administration Act 2000*, the term 'legal guardian' may also be confused with a guardian for legal matters.

It is likely that the intention of the Bill is to allow substitute decision-makers for adults to consent to the copying, retention or taking of notes regarding a person or the interviewing of a person. If this is the case, the term 'legal guardian' will need to be rephrased or defined to clarify that this includes guardians under the *Guardianship and Administration Act 2000* or attorneys for personal matters under the *Powers of Attorney Act 1998*.

Full implementation of OPCAT

The facilitation of visits by the Subcommittee is important, and I support the Bill in its intention. However, to fully implement OPCAT, a fully compliant National Preventative Mechanism (NPM) is required. In Queensland, the recently created Inspector of Detention Services will go some way towards conducting the NPM role. However, as I have noted in the past, the creation of this office is not sufficient for Queensland to fully comply with OPCAT, as there are significant limitations placed on where inspections will happen.

I have been advocating for the full implementation of OPCAT for some time, including in my report, *Better Pathways: Improving Queensland's delivery of acute mental health services*,³ during my appearance at the "Inquiry into the opportunities to improve mental health outcomes for Queenslanders" held by the Mental Health Select Committee,⁴ and at an OPCAT forum that I recently hosted jointly with the Queensland Human Rights Commission and Queensland Advocacy for Inclusion on 1 December this year.⁵

² Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022 cls 15, 16.

³ Public Advocate, *Better Pathways: Improving Queensland's delivery of acute mental health services* (August 2022) 51.

⁴ Evidence to Mental Health Select Committee, Parliament of Queensland, Brisbane, 12 April 2022, 48.

⁵ Queensland OPCAT Forum, Brisbane, 1 December 2022.

This will require routine OPCAT-compliant visits to all places where people are detained with the imprimatur of the state. The implementation of OPCAT requirements by Queensland will be an important development in the state's advancement and protection of the human rights of all Queenslanders.

Thank you for receiving my comments on the Bill. Please do not hesitate to contact me if you would like me to discuss further any of the points raised here.

Yours sincerely

A black rectangular box redacting the signature of John Chesterman.

John Chesterman (Dr)
Public Advocate