

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

Submission by Legal Aid Queensland

05 January 2023

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

### Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission regarding the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022.

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of “giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way” and is required to give this “legal assistance at a reasonable cost to the community and on an equitable basis throughout the State”. Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ’s services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ’s lawyers in the day-to-day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

In the below submissions we have provided comment on the clauses of the draft Bill most relevant to our legal representation services and client base drawing on the experience of lawyers from our Criminal Law Services including our Mental Health Review Tribunal Team.

### Submission

LAQ welcomes the introduction of the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022 (the Bill), which aims to address one of the two components of the Commonwealth Government ratified Optional Protocol to the Convention Against Torture (OPCAT).

LAQ notes that the Bill provides appropriate safeguards balancing the need to ensure appropriate access to facilities and information by the subcommittee against the need to protect confidential information relating to people detained in the subject facilities (Part 3 of the Bill). LAQ notes that the Bill does not impose any sanctions for inappropriate access to or use of information. Our understanding is that any such misuse of information (while unlikely) should come within the confidentiality and offence provisions of the legislation relevant to the administration of a particular facility.

LAQ also notes that the provisions relevant to interviewing people at facilities (Part 4) contain sufficient safeguards which appropriately recognise the vulnerabilities of people detained in facilities.

In relation to the provisions which may operate to restrict access by the subcommittee to places of detention (clauses 9 and 10), LAQ recognises that the guidelines in situations like this cannot be too prescriptive given the sometimes-unpredictable nature of events that can occur within and outside of a facility. The explanatory notes state that the guidelines reflect what is set out in Article 14(2) of OPCAT and provide some further guidance on the types of matters that may impact on a

proposed visit (page 3 of the explanatory notes). While there are no specific provisions for review of decisions or entitlement to reasons for a decision, LAQ's expectation is that any decisions made pursuant to clause 9 or 10 would be covered by the *Judicial Review Act 1991*.

LAQ notes that the definition of *place of detention* (clause 4) may not cover all instances of *deprivation of liberty* in accordance with article 4(2) of OPCAT. Relevant to the work undertaken by LAQ, our understanding of the clause 4 definition is that it would not apply to situations where a person is required to reside at the Wacol Contingency Accommodation (also known as the Wacol Precinct) pursuant to an order made under the provisions of the *Dangerous Prisoners (Sexual Offenders) Act 2003*. The relevant Victorian provision<sup>1</sup> appears to define 'place of detention' broadly enough to encompass this type of facility.

In LAQ's experience many of those housed at the Wacol precinct suffer a range of cognitive impairments and mental health conditions and are particularly vulnerable to mistreatment or being subjected to adverse living conditions. LAQ also notes that the Wacol precinct is an area that has significant restrictions on visits from outside agencies supplying legal, medical or counselling assistance to residents of that facility. Other types of facilities similar to the Wacol precinct also operate in Rockhampton and Townsville.

The clause 4 definition would not cover other facilities where people are effectively detained against their will – for example, a dementia patient who is housed in a nursing home and subject to a Forensic Order pursuant to the provisions of the *Mental Health Act 2016* or a child subject to curfew conditions and in residential care under the *Child Protection Act 1999*.

LAQ notes that the Bill has already been presented to Parliament and that a clear policy position has been adopted to exclude the types of facilities set out in the above examples. The explanatory notes (page 2) state that 'the Bill does not operate to prevent the Subcommittee from visiting other places where a person may be deprived of their liberty'. LAQ believes that having a legislative basis for access to a facility not only clarifies the ability of the Subcommittee to access information (such as provided for in part 3 of the Bill) but it also legitimises the purpose of a visit and would help to ensure that the Subcommittee is not faced with unnecessary impediments in the exercise of its functions. LAQ would appreciate some further insight into the rationale for the development of this policy position, particularly when it is viewed in the context of the much broader definition in the analogous Victorian legislation.

While LAQ welcomes the provisions relating to protection for reprisals (Part 5), our view is that the offence-creating provision (clause 20) should contain an imprisonment component to reflect the seriousness of this type of behaviour when it is perpetrated against a particularly vulnerable cohort of our society. In this regard, it is noted that the relevant Victorian provision<sup>2</sup> imposes a maximum penalty of 120 penalty units or 1 year imprisonment which LAQ believes is appropriate.

While not relevant to the Bill, LAQ notes that OPCAT was ratified in December 2017 and that there is still some work to be done in terms of achieving the second objective of establishing a domestic national preventative mechanism (NPM) to conduct regular visits to places of detention<sup>3</sup>. An official visitor scheme has been in place in relation to correctional facilities in Queensland for some time. During the consultation for the Inspector of Detention Services Bill 2021, LAQ observed that there

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<sup>1</sup> Section 4 of the *Monitoring of Places of Detention by the United Nations Subcommittee on Prevention of Torture (OPCAT) Act 2002 (Vic)*, particularly 4(1)(e).

<sup>2</sup> Section 15(1) of the *Monitoring of Places of Detention by the United Nations Subcommittee on Prevention of Torture (OPCAT) Act 2002 (Vic)*,

<sup>3</sup> First reading speech, Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill, Queensland Parliament 2022 "Record of proceedings (Hansard)" Decembe4 1, 2022, p3845.

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was no equivalent Independent Inspector tasked with reviewing Authorised Mental Health Services (some of which house prisoners who are subject to orders under the *Mental Health Act 2016*).

LAQ's expectation is that the NPM objective is something that will be attended to as a matter of priority (noting the time that has passed since the ratification of OPCAT) and that the relevant legislation should encompass a broader range of situations where people are detained against their will, consistent with the definition of *deprivation of liberty* in schedule 1 of the Bill which references Article 4(2) of OPCAT. We would appreciate the opportunity to participate in any further consultation on this very important issue.

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