



Australian
Human Rights
Commission

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

Submission to the Queensland Legal Affairs and Safety Committee

09 January 2023

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Legal Affairs and Safety Committee

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1 Introduction

1. The Australian Human Rights Commission (the Commission) welcomes the opportunity to make this submission to the Queensland Legal Affairs and Safety Committee with respect to its consideration of the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022 (Bill).
2. Under the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), State Parties agree to establish an independent National Preventive Mechanism (NPM) to conduct inspections of all places of detention and closed environments, and to also agree to international inspections of places of detention by the United Nations Subcommittee on the Prevention of Torture (UN SPT).
3. Australia ratified OPCAT in 2017 and has chosen to adopt a multiple-body monitoring system, with each state and territory asked to designate their own NPM within their respective jurisdictions.¹
4. At the time of ratification, Australia made a declaration under Article 24 of OPCAT delaying the obligation to establish an NPM for three years. This extension formally ended on 20 January 2022. However, on 20 December 2021, the Commonwealth Government formally requested a postponement for an additional year.
5. The main reasons cited for the postponement request were the COVID-19 pandemic and considerations relating to Australia's federal system of government. The formal request was granted by the United Nations Committee against Torture (UN Committee), and 20 January 2023 was set as the new date for compliance.
6. In February 2017, the then Commonwealth Attorney-General invited the Commission to lead a consultation on how Australia should implement OPCAT.
7. On 29 June 2020 the Commission published *Implementing OPCAT in Australia*. This was the final step for the Commission's OPCAT project, and followed extensive consultations conducted by the Commission in 2017 and 2018. The final report contained 17 recommendations as to how Australia should implement OPCAT.
8. On 9 September 2022, the Commission partnered with the RMIT University College of Business and Law to hold a National OPCAT Symposium in Melbourne.² The aim of the Symposium was to bring together relevant

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stakeholders from the Commonwealth, State and Territories to take stock of what has been achieved to date; identify any existing barriers to progress; and highlight what remains to be done to reach full OPCAT compliance in Australia by the extended deadline.

9. Informed by the National OPCAT Symposium, the Commission produced a *Road Map to OPCAT Compliance*,³ providing key information and principles as well as five recommendations to help guide the implementation process.
10. While the Commission is not a designated NPM or NPM-coordinator (and therefore has no formal implementation responsibilities), continuing to promote OPCAT compliance and providing an independent perspective on the actions Australia needs to take to ensure compliance with our international human rights obligations under OPCAT falls within our broader statutory mandate.

2 The OPCAT Bill

11. The Commission strongly supports the introduction of dedicated legislation that facilitates visits by the UN SPT to places of deprivation of liberty in Queensland. The Commission notes in particular the removal of the legislative barriers that restricted the UN SPT from physical access to inpatient units of authorised mental health services under the *Mental Health Act 2016* and to the forensic disability service under the *Forensic Disability Act 2011*.⁴
12. Many provisions of the Bill are consistent with the objective of OPCAT. The Bill enables the UN SPT to make unannounced visits and conduct private interviews with detainees and any person they wish to interview. It also prohibits reprisal or sanction against anyone assisting the UN SPT in its functions through the inclusion of a protections from reprisal clause.⁵
13. The Commission endorses these elements of the Bill. In other respects, however, the Commission considers that the Bill could be strengthened.
14. The Commission's recommended amendments to the Bill are as follows.
15. **First**, the Bill currently defines 'places of detention' that fall within its scope to include a community corrections centre, prison or work camp; a youth detention centre; inpatient unit of an authorised mental health service; a forensic disability service; a court cell; a watch-house; a holding cell or another place in a police station where a person is detained; a place where a person is detained, other than a private residence, prescribed by

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regulation as a place of detention; a vehicle primarily used or operated for the purpose of transporting a person who is detained to or from a place.⁶

16. In clarifying the scope of the Bill, the Explanatory Note states 'the Bill does not operate to prevent the Subcommittee from visiting other places where a person may be deprived of their liberty'.⁷ While this explanation is welcome, the Commission notes other Australian jurisdictions have included a direct reference in their definition to the UN SPT's authority to visit any place that the Subcommittee must be allowed to visit under Article 4 of the Optional Protocol, that is subject to the jurisdiction and control of the relevant State or Territory.⁸
17. The importance of adopting this broad approach was recently emphasised by the UN Committee in its Concluding observations on the sixth periodic report of Australia. The UN Committee 'reminds the State party of its commitment to ensure that unfettered access to all places of deprivation of liberty in all jurisdictions is granted to the Subcommittee so that it can carry out its mandate in line with the provisions of the Optional Protocol'.⁹
18. The Commission strongly recommends that the Bill be amended to ensure that the scope of the UN SPT's access to places of deprivation of liberty within Queensland is not limited to the list of places currently identified in proposed s 4.
19. **Secondly**, under proposed s 9, the Bill allows the responsible Minister for a place of detention to temporarily object to the UN SPT visiting that place, and does so in a manner consistent with the reasons outlined in Article 14(2) of OPCAT.¹⁰ Proposed s 10 goes on to allow a detaining authority to temporarily prohibit or restrict access to a place of detention on grounds relating to the 'security, good order and management of the place of detention; or health and safety of a person in the place of detention (including a member of the subcommittee and an accompanying person)'.¹¹
20. The Commission recommends the grounds contained in proposed s 10(2)(a)(i) and (ii) be explicitly linked to the 'serious disorder in the place of detention' ground in proposed s 9(2)(d) to avoid the perception of objectionable grounds beyond those contained in Article 14(2) of OPCAT.
21. The Commission also recommends that proposed s 10(2)(b) be omitted from the Bill. The term 'essential operations' is broad and general in nature and could include (for example) scenarios where an objection arises from a place of detention being under broad lock downs because of insufficient staffing on the day of the visit. In such a scenario, it would be

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even more important to ensure that the UN SPT was granted access to visit and allowed to fulfil its mandate.

22. Noting there may arise occasions where the UN SPT and the detaining authority may disagree that an objection is 'necessary and appropriate', the Commission recommends a clause be added to proposed s 10(4) to grant the responsible Minister the power to override a temporary objection by a detaining authority. This additional clause is consistent with the UN SPT guidelines in relation to visits to States parties that advise delegations to contact the relevant Minister where 'the intervention of the focal point does not solve the problem',¹² in circumstances where a delegation encounters difficulties when exercising its mandate during a visit to a place of detention.
23. **Thirdly**, the Bill prohibits the UN SPT from accessing detainee information in a place the UN SPT has not yet visited.¹³ The Commission notes an identical prohibition is made in Victoria's OPCAT legislation.¹⁴
24. The Bill recognises that the UN SPT requires access to information to enable it to make an 'evaluation of any needs or measures that should be adopted to strengthen the protection of people deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment'.¹⁵
25. During a UN SPT visit, State Parties are obliged to provide the Subcommittee 'with all necessary information, including all documentation that it requests, both prior to and during the visit'.¹⁶ The restriction in proposed s 14 contradicts the requirements of OPCAT.¹⁷ In particular, this prohibition gives rise to concerns about possible reprisals against detainees going unaddressed.¹⁸
26. If, for example, the UN SPT is made aware that an individual or group of people are transferred from a facility they are visiting prior to or soon after their arrival, this provision prohibits them from accessing the information of those persons at the site of transfer (if they have not visited that site) to determine whether the transfer was potentially an act intended to frustrate the UN SPT's mandate.
27. The UN SPT's policy on reprisals additionally states that, 'when allegations of intimidation or reprisals are received, and with the consent of the individual or group concerned when appropriate, the Subcommittee will, as appropriate, contact the State party to request information'¹⁹ and 'take steps to ensure that they are provided with all relevant information relating to those allegations'.²⁰ In such a scenario, the proposed s 14 of the Bill directly frustrates the purposes of proposed s 13 and can be

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considered as undermining the reprisal protections provided in proposed s 19 of the Bill.

28. The Commission recommends that proposed s 14 be removed from the Bill.
29. **Lastly**, the Commission acknowledges the Queensland Government's obligation to designate a National Preventive Mechanism (NPM)²¹ under OPCAT remains 'outside the bill's scope' and is subject to 'continuing discussions with the Commonwealth'.²²
30. The UN Committee recently emphasised the importance of ensuring that Australia is in 'full compliance with its obligations under the Optional Protocol by the agreed deadline.'²³
31. The Commission strongly encourages the Queensland Government to designate its NPM(s) promptly, before the 20 January 2023 extended deadline, giving due consideration to the 'Paris Principles'²⁴ and providing a legislative basis for all NPM activities. Enabling legislation should provide unfettered powers of access to all places of deprivation of liberty by the NPM; provide a clear foundation for those visits; ensure access to information; and secure the continued, long-term, and effective operation of the NPM.²⁵
32. Legislation should require the NPM to regularly examine the treatment of people deprived of their liberty,²⁶ as well as enabling the NPM to make unannounced visits, offer recommendations to improve the treatment of people deprived of their liberty, and conduct private interviews with detainees and any person they wish to interview.²⁷
33. Legislation should also provide for the outward-facing functions of the NPM, including the ability to make proposals on existing and draft legislation and policy; and the ability to regularly publish reports.²⁸
34. Legislation should additionally safeguard the functional independence of the NPM by ensuring the NPM is not subject to the direction or control of a Minister, as well as introducing eligibility and conflict of interest criteria for NPM staff.²⁹
35. In establishing its NPM(s), the Queensland Government is also encouraged to incorporate the 'Principles for Best Practice' contained in the Commission's *Road Map to OPCAT Compliance*.³⁰

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3 Recommendations

36. The Commission makes the following recommendations.

Recommendation 1

The Commission recommends that proposed s 4 be amended to ensure that the scope of the UN SPT's access to places of deprivation of liberty within Queensland is not limited to the list of places currently identified in the proposed section.

Recommendation 2

The Commission recommends the grounds contained in proposed s10(2)(a)(i) and (ii) be explicitly linked to the 'serious disorder in the place of detention' grounds in proposed s 9(2)(d) to avoid the perception of objectionable grounds beyond those contained in Article 14(2) of OPCAT.

Recommendation 3

The Commission recommends that proposed s 10(2)(b) be omitted from the Bill.

Recommendation 4

The Commission recommends a clause be added to proposed s 10(4) to enable the responsible Minister the power to override a temporary objection by a detaining authority.

Recommendation 5

The Commission recommends that proposed s 14 be removed from the Bill.

Recommendation 6

The Commission recommends that the Queensland Government, as a matter of priority and before the 20 January 2023 extended deadline, designate its NPM(s) giving due consideration to:

- the 'Paris Principles',
- providing a legislative basis for all NPM activities; and,
- incorporating the 'Principles for Best Practice' contained in the Commission's Road Map to OPCAT Compliance.

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Endnotes

- ¹ Commonwealth of Australia, *Senate Legal And Constitutional Affairs Legislation Committee, Official Committee Hansard*, Wednesday, 23 May 2018, 122.
https://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/3cae4e3c-b6d4-4b18-b464-b5e055c40682/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2018_05_23_6149_Official.pdf;fileType=application%2Fpdf "Ultimately it will be up to each state and territory to set up its own mechanism. As part of a collaborative and cooperative process, the Commonwealth is engaging with states and territories to seek to coordinate both their own establishment of the NPM and then the broader range of elements that will be necessary to implement the NPM obligations under OPCAT."
- ² Australian Human Rights Commission, *National OPCAT Symposium*, 9 September 2022.
<https://www.youtube.com/watch?v=104KclS6eRY>
- ³ Australian Human Rights Commission, *Road Map to OPCAT Compliance*, 17 October 2022.
https://humanrights.gov.au/sites/default/files/opcat_road_map_0.pdf
- ⁴ United Nations Office of the High Commissioner for Human Rights. *UN torture prevention body suspends visit to Australia citing lack of co-operation*, 23 October 2022.
<https://www.ohchr.org/en/press-releases/2022/10/un-torture-prevention-body-suspends-visit-australia-citing-lack-co-operation>
- ⁵ Article 11(a), 14(c), 14(d) and 15, OPCAT; proposed ss 7, 8, 16, 18, 19, 20.
- ⁶ Proposed s 4.
- ⁷ Queensland Government, *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022 Explanatory Notes*, 2.
<https://documents.parliament.qld.gov.au/tp/2022/5722T2033-B2C3.pdf>
- ⁸ See *OPCAT Implementation Act 2021* (Tas), s5, *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018* (ACT), s7 and *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018* (NT), s 4.
- ⁹ United Nations Committee against Torture, *Concluding observations on the sixth periodic report of Australia* CAT/C/AUS/CO/6, 05 December 2022 [44]
<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsoQ6oVJgGLf6YX4ROs1VbzEru4wycL%2FqQolrzLep%2BJZyT2klvroOhuMbjG1ioCx4Z3eXyrZ%2FkEdUDMwgHAnBoh0v9T4FjuSgv4v9weZd7XDc>
- ¹⁰ Proposed s 9.
- ¹¹ Proposed s102(a)(i) and (ii).
- ¹² United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in relation to visits to States parties under article 11 (a) of the Optional Protocol*, CAT/OP/5, 4 February 2015 [27]
<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhspBWXPdWhQqIYvylvHUnwYTNUa95ebiVInneI3MWTd20LX%2BU0Q4IfaZ9lpVJ%2FKvxfMha1rxo4Rqlz%2BhcUdballU%3D>
- ¹³ Proposed s 14.

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¹⁴ *Monitoring of Places of Detention by the United Nations Subcommittee on Prevention of Torture (OPCAT) Act 2022* (Vic), s 13.

¹⁵ Proposed s 13(1).

¹⁶ United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Obligations of States parties to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to facilitate the visits of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Statement adopted by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment at its twenty-fourth session* (17–21 November 2014) CAT/OP/24/1, 09 December 2014 [2]

<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsjnEm13pVQ0icfTjppmRXmgbQREsSgOr7iTO8SZNvzwjQVMWVgLIiCbdJZdFma%2B0HRbC3uXqct4Esgj13s2JTG7s4q2jtxBNuU8zQdohmHx>

¹⁷ Article 11 (iii), 12(b) and 14(b), OPCAT

¹⁸ Article 15, OPCAT.

¹⁹ United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Policy of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on reprisals in relation to its visiting mandate* CAT/OP/6/Rev.1, 13 May 2016 [19]

<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsqHOQYAKuTnYaAWoeAID%2BPTkfdDvxglp1zLftO2g5%2BGM7yB7pEB4C3YneAVVY%2BV%2FuXMRBsRFXHfi7TuhfCBw%2FTruLPE6iFXvrMt%2Bwvef923>

²⁰ United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Policy of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on reprisals in relation to its visiting mandate* CAT/OP/6/Rev.1, 13 May 2016 [10]

<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsqHOQYAKuTnYaAWoeAID%2BPTkfdDvxglp1zLftO2g5%2BGM7yB7pEB4C3YneAVVY%2BV%2FuXMRBsRFXHfi7TuhfCBw%2FTruLPE6iFXvrMt%2Bwvef923>

²¹ Articles 17–13, OPCAT.

²² Queensland Parliament, *Record Of Proceedings, First Sessions of the Fifty-Seventh Parliament Thursday, 1 December 2022*, [3845]

https://documents.parliament.qld.gov.au/events/han/2022/2022_12_01_WEEKLY.pdf#page=29

²³ United Nations Committee against Torture, *Concluding observations on the sixth periodic report of Australia* CAT/C/AUS/CO/6, 05 December 2022 [41]

<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsoQ6oVJgGLf6YX4ROs1VbzEru4wycL%2FqQolrzLep%2BJZyT2klvroOhuMbjG1ioCx4Z3eXyrZ%2FkEdUDMwgHAnBoh0v9T4FjuSgv4v9weZd7XDc>

²⁴ Article 18(4), OPCAT.

²⁵ Australian Human Rights Commission, *Implementing OPCAT in Australia*, 29 June 2020, p 55 <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/implementing-opcat-australia-2020>

²⁶ Article 19(2), OPCAT.

²⁷ Articles 12(a), 14(c), 19(a), 20(c) and 20(d), OPCAT.

²⁸ Articles 19(c) and 23, OPCAT; See also Australian Human Rights Commission, *Implementing OPCAT in Australia*, 29 June 2020, 29–31 and 36 <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/implementing-opcat-australia-2020>

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[freedoms/publications/implementing-opcat-australia-2020](#). While OPCAT does not expressly require NPMs to publish reports of their visits, or recommendations to government, it does require States Parties to publish annual reports. The Commission considers that all reporting by the NPMs should be made public. Transparency with respect to the operation of NPMs is an important mechanism to ensure accountability, both of the NPM and authorities for places of detention. Reporting should therefore be regular and comprehensive.

²⁹ Article 18(1), OPCAT.

³⁰ Australian Human Rights Commission, *Road Map to OPCAT Compliance*, 17 October 2022, 12–15 https://humanrights.gov.au/sites/default/files/opcat_road_map_0.pdf