knowmore
free legal help for survivors

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

Submission to the Legal Affairs and Safety Committee

11 January 2023

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About knowmore

Our service

knowmore legal service (knowmore) is a nation-wide, free and independent community legal centre providing legal information, advice, representation and referrals, education and systemic advocacy for victims and survivors of child abuse. Our vision is a community that is accountable to survivors and free of child abuse. Our aim is to facilitate access to justice for victims and survivors of child abuse and to work with survivors and their supporters to stop child abuse.

Our service was established in 2013 to assist people who were engaging with or considering engaging with the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission). From 1 July 2018, knowmore has been funded to deliver legal support services to assist survivors of institutional child sexual abuse to access their redress options, including under the National Redress Scheme (NRS). knowmore also receives funding to deliver financial counselling services to people participating in the NRS, and to work with other services in the NRS support network to support and build their capability. From 1 January 2022, our services were expanded to assist survivors who experienced child sexual abuse in non-institutional settings. From 1 March 2022, we have also been funded to provide legal and financial counselling support to people engaging with the Territories Stolen Generations Redress Scheme (Territories Redress Scheme).

knowmore uses a multidisciplinary model to provide trauma-informed, client-centred and culturally safe legal assistance to clients. knowmore has offices in Sydney, Melbourne, Brisbane, Perth, Adelaide and Darwin. Our service model brings together lawyers, social workers and counsellors, Aboriginal and Torres Strait Islander engagement advisors and financial counsellors to provide coordinated support to clients.

knowmore is funded by the Commonwealth Government, represented by the Departments of Attorney-General and Social Services and the National Indigenous Australians Agency.

Our clients

In our Royal Commission-related work, from July 2013 to the end of March 2018, knowmore assisted 8,954 individual clients. The majority of those clients were survivors of institutional child sexual abuse. Almost a quarter (24%) of the clients assisted during our Royal Commission work identified as Aboriginal and/or Torres Strait Islander peoples.

Since the commencement of the National Redress Scheme for survivors of institutional child sexual abuse on 1 July 2018 to 30 November 2022, knowmore has received 79,339 calls to its 1800 telephone line and has completed intake processes for, and has assisted or is currently assisting, 13,369 clients. More than a third (35%) of knowmore's clients identify as Aboriginal and/or Torres Strait Islander peoples. About a fifth (18%) of clients are classified as priority clients due to advanced age and/or immediate and serious health concerns including terminal cancer or other life-limiting illness.

Our clients in Queensland

knowmore has a significant client base in Queensland — 30 per cent of our clients reside in Queensland. Many of these clients experienced sexual abuse as children while in places of detention.

knowmore also assists many survivors of child sexual abuse who have been detained in prisons as adults. During the Royal Commission, for example, we assisted 936 clients who were detained in Queensland prisons. Of these clients, almost half (445 clients) had been sexually abused in youth detention.

We therefore have a strong interest in reforms that impact on places of detention in Queensland.

knowmore's submission

As a legal service dedicated to helping victims and survivors of child sexual abuse, knowmore seeks to make institutions safer for children and is especially concerned by the heightened risk of abuse for children in places of detention.[1] We broadly support the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022 (the Bill) and recommend that the Bill be passed, with some amendments.

knowmore's overall views on the Bill

knowmore broadly supports the Bill, which aims to facilitate improved monitoring of places of detention in Queensland. We consider that the Bill has significant potential to improve Queensland's compliance with international human rights standards and to contribute to ongoing efforts to prevent child abuse in places of detention in Queensland.

While the Bill is a step in the right direction, we consider that the Bill as presently drafted has some significant limitations and falls short of guaranteeing full compliance with the Optional Protocol to the Convention Against Torture (OPCAT). We recommend amendments to the Bill to ensure improved compliance with OPCAT and greater safety for children and adult survivors of child abuse in places of detention.

In the first part of our submission below, we seek to assist the Committee by providing information about the heightened risk of sexual abuse for children in places of detention and the importance of OPCAT in addressing this risk. Our submission then focuses on the following key areas of the Bill, which are informed by our work with victims and survivors:

- access to places of detention
- access to information
- interviews
- protections for people who provide information to the UN Subcommittee
- provisions specific to youth detention centres.

The heightened risk of child sexual abuse in places of detention

The Royal Commission found that children in places of detention are at heightened risk of child sexual abuse.[2] This heightened risk is linked to the fact that many places where

1 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 15, Contemporary Detention Environments*, 2017, pp. 20–21, <www.childabuseroyalcommission.gov.au/contemporary-detention-environments>.

2 Royal Commission, *Final Report: Volume 15, Contemporary Detention Environments*, pp. 20–21.

children have been, and continue to be, detained have characteristics of 'total' or 'closed' institutions.[3] These institutions 'are typically highly controlled and relatively closed to the outside world'.[4] The Royal Commission took a strong interest in total or closed institutions, due to the heightened risk of child sexual abuse in these places.[5]

The following characteristics of detention environments increase the risk of child sexual abuse:

- environmental characteristics, such as 'the deprivation of liberty and lack of privacy'
- operational characteristics, such as 'isolation and disconnection from family, friends, community and culture; lack of trusted adults; the power imbalance between adult staff and detained children; and the use of strict rules, discipline and punishment'
- cultural characteristics, such as 'a lack of voice for children and cultures of disrespecting children, tolerating the humiliating and degrading treatment of children, and engendering strong group allegiance among management staff'.[6]

While children are detained in a range of different detention environments,[7] the Royal Commission found that youth detention centres 'perhaps illustrate the highest level of risk'.[8] Of the 6,875 survivors the Royal Commission heard from in private sessions, 551 (8%) had been sexually abused in youth detention.[9] Experiencing sexual abuse in youth detention was particularly common for Aboriginal and/or Torres Strait Islander survivors (15.2%),[10] and survivors who were in adult prisons at the time of participating in their private sessions (32.7%).[11]

The Royal Commission summarised the ongoing risk presented by youth detention centres as follows:

> *All youth detention centres are closed, secure environments under the control of adults who exercise a high degree of power and authority over detained children. This power dynamic can also allow perpetrators to exploit opportunities to*

3 Royal Commission, *Final Report: Volume 15, Contemporary Detention Environments*, pp. 38–40.

4 Royal Commission, *Final Report: Volume 15, Contemporary Detention Environments*, p. 38.

5 Royal Commission, *Final Report: Volume 15, Contemporary Detention Environments*, pp. 39–40.

6 Royal Commission, *Final Report: Volume 15, Contemporary Detention Environments*, pp. 39–43.

7 Royal Commission, *Final Report: Volume 15, Contemporary Detention Environments*, p. 34.

8 Royal Commission, *Final Report: Volume 15, Contemporary Detention Environments*, p. 66.

9 Royal Commission, *Final Report: Volume 2, Nature and Cause*, 2017, p. 114, table 2.12, <www.childabuseroyalcommission.gov.au/nature-and-cause>.

10 Royal Commission, *Final Report: Volume 5, Private Sessions*, 2017, p. 400, table P.13, <www.childabuseroyalcommission.gov.au/final-report-private-sessions>.

11 Royal Commission, *Final Report: Volume 5, Private Sessions*, p. 434, table S.14.

> *sexually abuse children, prevent abuse from being identified and inhibit disclosure, both at the time of abuse and in the following years.*[12]

These issues are relevant in all states and territories, but especially in Queensland, which has the highest number of children in prison.[13] Both the number and rate of children in Queensland prisons have increased in recent years.[14] While we welcome the Bill's aim to facilitate improved monitoring of places of detention in Queensland, we hope that the Queensland Government will also prioritise steps to help keep children out of detention, including by raising the minimum age of criminal responsibility in Queensland from 10 to 14 years old.[15]

The importance of OPCAT and the background to the Bill

The Royal Commission highlighted independent oversight and monitoring as a key strategy for creating safer detention environments for children.[16] It specifically recognised that OPCAT 'is significant for all children in detention' — in part, because of the preventive role OPCAT gives to the United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the UN Subcommittee).[17]

We note that the Bill is intended to address legislative barriers that interfered with the UN Subcommittee's ability to access particular places of detention in Queensland as part of a planned monitoring visit to Australia in October 2022.[18] On 23 October 2022, the UN Subcommittee suspended its visit to Australia, citing a 'lack of co-operation stemming from internal disagreements, especially with respect to the States of Queensland and New South

12 Royal Commission, *Final Report: Volume 15, Contemporary Detention Environments*, pp. 20–21.

13 Justice Reform Initiative, *Jailing is Failing: State of Incarceration*, November 2022, p. 1, <assets.nationbuilder.com/justicereforminitiative/pages/318/attachments/original/1668450143/JRI_Insights_QLD.pdf?1668450143>.

14 Justice Reform Initiative, *Jailing is Failing: State of Incarceration*, p. 14.

15 knowmore has previously made a submission to the Queensland Parliament's Community Support and Services Committee, providing detailed reasoning in support of raising the minimum age of criminal responsibility in Queensland from 10 to 14 years old. See knowmore, *Submission on the Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021*, 29 November 2021, <knowmore.org.au/wp-content/uploads/2021/12/knowmore.-Committees-version.-Submission-on-Raising-the-Age-of-Criminal-Responsibility-Bill.pdf>.

16 Royal Commission, *Final Report: Volume 15, Contemporary Detention Environments*, p. 67.

17 Royal Commission, *Final Report: Volume 15, Contemporary Detention Environments*, pp. 20–21.

18 Queensland Legislative Assembly (Hon. SM Fentiman), *Record of Proceedings (Hansard): First Session of the Fifty-Seventh Parliament*, Explanatory Speech — Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022, 1 December 2022, p. 3844, <documents.parliament.qld.gov.au/events/han/2022/2022_12_01_WEEKLY.pdf#page=29>.

Wales'.[19] We note the Queensland Attorney-General's statement about these events in the Explanatory Speech to the Bill:

> *Access was provided to all facilities in Queensland as far as was permitted under the existing legislation, policies and procedures. The introduction of this bill will address those legislative barriers around access, such as the issues faced in accessing authorised mental health services and the Forensic Disability Service.*[20]

Access to places of detention

knowmore welcomes the Bill's objective of addressing legislative barriers around the UN Subcommittee's access to places of detention in Queensland. In particular, we support clauses 7(1) and 8(1) of the Bill, which require that the UN Subcommittee has unrestricted access to places of detention, consistent with article 14(1)(c) of OPCAT. While clause 9 of the Bill allows the responsible Minister to object to the UN Subcommittee visiting a place of detention, the grounds of objection are limited and mirror the grounds of objection allowed by article 14(2) of OPCAT.[21]

We are, however, concerned by the broader powers granted to detaining authorities to temporarily prohibit or restrict access to a place of detention under clause 10(2) of the Bill. Under clause 10(2), a detaining authority can exercise these powers for:

- the 'security, good order and management of the place of detention'
- the 'health and safety of a person in the place of detention'
- 'the conduct of essential operations by the detaining authority'.

These grounds are broad and unclear in scope, and inconsistent with OPCAT. We see that they have the potential to produce conflict between the responsible Minister and detaining authorities, and to interfere with the UN Subcommittee's proper access to places of detention in Queensland.

In knowmore's view, the grounds for a detaining authority to temporarily prohibit or restrict the UN Subcommittee's access to a place of detention should be limited to those allowed by article 14(2) of OPCAT. This would strike a better balance between facilitating improved access for the UN Subcommittee and maintaining adequate safeguards for detaining authorities to respond to exceptional circumstances. Further, the Bill should explicitly state

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19 United Nations Office of the High Commissioner for Human Rights, 'UN torture prevention body suspends visit to Australia citing lack of cooperation', 23 October 2022, <www.ohchr.org/en/press-releases/2022/10/un-torture-prevention-body-suspends-visit-australia-citing-lack-co-operation>.

20 Queensland Legislative Assembly (Hon. SM Fentiman), *Record of Proceedings (Hansard): First Session of the Fifty-Seventh Parliament*, Explanatory Speech — Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022, p. 3844.

21 Article 14(2) of OPCAT provides that 'Objection to a visit to a particular place of detention may be made only on urgent and compelling grounds of national defence, public safety, natural disaster or serious disorder in the place to be visited that temporarily prevent the carrying out of such a visit'.

that the responsible Minister can override a detaining authority's decision to temporarily prohibit or restrict the UN Subcommittee's access to a place of detention. This would address the issue of whose decision prevails in the event of a conflict between the responsible Minister and the detaining authority, and reinforce that the decision to prohibit or restrict the UN Subcommittee's access to a place of detention should be reserved for exceptional circumstances.

Access to information

knowmore supports clauses 13(1)–(5) of the Bill, which require that the UN Subcommittee has unrestricted access to relevant information, consistent with articles 14(a)–(b) of OPCAT. We are, however, concerned by clause 13(6)(c) of the Bill, which grants the Queensland Government a broad power to make regulations to exclude information. The Bill contains no requirement to exercise this power consistently with the principles of OPCAT and it is unclear to us how this power is intended to be used. As access to information is vital to the UN Subcommittee's ability to effectively monitor places of detention, we consider that any exceptions to what information the Subcommittee can access should be narrowly framed and clearly stated in legislation. Clause 13(6)(c) of the Bill does not meet these requirements and, in our view, should therefore be removed.

It is also unclear to us why clause 14 of the Bill does not allow the UN Subcommittee to access identifying information about a person at a place of detention unless the UN Subcommittee visits (or has visited) that place of detention. Given that clause 15 of the Bill restricts when the UN Subcommittee can retain identifying information, it is difficult to see why visiting or not visiting a particular place of detention should affect what information the UN Subcommittee can access about people at that place of detention. We are concerned that the requirement to visit a place of detention to access identifying information places unnecessary restrictions on the UN Subcommittee's access to information. We also question how this would interact with the responsible Minister's power to object to the UN Subcommittee visiting a place of detention or a detaining authority's power to temporarily prohibit access. This may result in a situation where the UN Subcommittee is both prevented from visiting a place of detention and prevented from accessing important information about people at that place of detention. This would significantly interfere with the UN Subcommittee's ability to perform its role. We therefore recommend that clause 14 of the Bill be removed.

Interviews

Article 14(1)(d) of OPCAT requires that the UN Subcommittee has the opportunity to conduct private interviews. The powers granted to the UN Subcommittee by part 4 of the Bill are a step towards compliance with this article. However, part 4 of the Bill presently has several shortcomings, as discussed below.

First, clause 16(1) of the Bill raises the same concerns for us as clause 14, in that it requires the UN Subcommittee to visit a place of detention in order to interview a person at that place of detention. It is unclear to us why the UN Subcommittee should not be able to interview a person remotely — for example, by phone or video call — without needing to

visit the particular place where the person is detained. As with clause 14, it is difficult to see why visiting or not visiting a place of detention should affect who the UN Subcommittee may interview, and we are concerned that this places unnecessary restrictions on the UN Subcommittee's ability to interview people. The requirement to visit a place of detention to interview a person does not arise from OPCAT. In our view, it should be removed from clause 16(1) of the Bill.

Second, while clause 18 requires that the detaining authority allows the UN Subcommittee to privately interview people at a place of detention, the Explanatory Notes to the Bill express an unsatisfactory view of what 'privately' means.[22] According to the Explanatory Notes, it is sufficient if an interview is conducted 'out of earshot of other people who are in the same room or area'.[23] In our view, this invites debate about exactly where people must be positioned for an interview to be out of earshot, distracting from the proper focus of the provision — namely, the comfort and safety of the person being interviewed.

On the Explanatory Notes' view, an interview could be considered private if it took place in a crowded room or even within the line of sight of people the interviewee might wish to talk about. Given the serious matters that a person at a place of detention might wish to discuss with the UN Subcommittee and the fear of retaliation that a person may have (discussed further on page 11 below), this would not be a safe environment for an interview. It would likely deter people from sharing serious concerns with the UN Subcommittee. It is also inconsistent with article 14(1)(d) of OPCAT, which requires that the UN Subcommittee have the opportunity to have private interviews with people in detention 'without witnesses'.

knowmore is especially concerned about the impact this interviewing environment would have on survivors of child sexual abuse who are detained in Queensland. The Royal Commission reported that many survivors experience 'an ongoing distrust and fear or institutions and authority' as a result of child sexual abuse in institutional settings.[24] Based on this and our experience working with survivors, we consider that many survivors would be unwilling to share information with the UN Subcommittee in the unsafe circumstances contemplated by the Explanatory Notes. Survivors who experienced sexual abuse as children while in places of detention are especially unlikely to feel safe to disclose what happened to them in such circumstances.[25]

22 The Explanatory Notes can be used to interpret the Bill. See *Acts Interpretation Act 1954* (Qld) sections 14B(1) and 14B(3)(e).

23 Explanatory Notes, Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022, p. 5.

24 Royal Commission, *Final Report: Volume 3, Impacts*, 2017, pp. 138–140, <www.childabuseroyalcommission.gov.au/impacts>.

25 For more information about the barriers to disclosure for survivors of child sexual abuse, see Royal Commission, *Final Report: Volume 4, Identifying and Disclosing Child Sexual Abuse*, 2017, p. 77, <www.childabuseroyalcommission.gov.au/identifying-and-disclosing-child-sexual-abuse>.

Protections for people who provide information to the UN Subcommittee

knowmore supports strong protections for people who provide information to the UN Subcommittee, consistent with article 15 of OPCAT. We therefore support the broad protections from reprisals in part 5 of the Bill. However, clause 21 of the Bill provides different protections against 'actions, claims and demands'. In our view, these protections are inadequate and should be strengthened.

We note that the protections in clause 21 are only provided to a person who gives information to the UN Subcommittee 'honestly and on reasonable grounds … in the course of, and for the purpose of, the subcommittee performing its mandate'. This amounts to 4 separate criteria that people must meet to avail themselves of the protections. It is inconsistent with article 15 of OPCAT, which protects people in relation to 'any information [communicated to the UN Subcommittee], whether true or false'.

We are concerned that the limited protections in clause 21 of the Bill may deter some people from providing information to the UN Subcommittee, including information about serious matters, such as child sexual abuse. We are particularly concerned that a person who wishes to give information to the UN Subcommittee may face the risk of legal action being taken against them and having to establish, as part of a legal process, that the 4 criteria in clause 21 of the Bill apply to their situation. Faced with this prospect, many survivors will choose not to share the information.

We see this particularly in the area of defamation law, although it is also likely to apply to other forms of legal action. In our experience, the risk of a defamation claim frequently silences survivors of child abuse. It is not only successful defamation claims that have this effect — the threat of a claim, or even just the knowledge that perpetrators frequently threaten survivors with legal action, can be enough to prevent a survivor from speaking about their experience. This would interfere with the UN Subcommittee's preventive role.

In our view, strong consideration should be given to removing the four criteria for protections against actions, claims and demands in clause 21 of the Bill. This would bring these protections into alignment with the protections from reprisals in part 5 of the Bill. Alternatively, clause 21 should be amended so that the protections apply to any person who gives information to the UN Subcommittee 'in good faith'. This would remove some barriers to disclosing information, better protect survivors and others, and assist the UN Subcommittee in its preventive role. It is also broadly consistent with Recommendation 7.5 of the Royal Commission, which states:

> *The Australian Government and state and territory governments should ensure that legislation provides comprehensive protection for individuals who make reports in good faith about child sexual abuse in institutional contexts. Such*

> *individuals should be protected from civil and criminal liability and from reprisals or other detrimental action as a result of making a complaint or report…*[26]

We note that the Queensland Government has accepted Recommendation 7.5 in principle.[27]

Provisions specific to youth detention centres

The Bill includes some provisions specific to youth detention centres. knowmore supports these provisions. In particular, we support clause 29 of the Bill, which prohibits communications between children detained in youth detention centres and the UN Subcommittee from being recorded. We consider that this will assist children in youth detention centres to feel safe and comfortable to provide information to the UN Subcommittee, and therefore help to prevent child abuse in youth detention centres. We also support clause 30 of the Bill, which exempts the UN Subcommittee from the ordinary procedures for visitors to youth detention centres. We consider that this removes unnecessary barriers to the UN Subcommittee's work.

26 Royal Commission, *Final Report: Volume 7, Improving Institutional Responding and Reporting*, 2017, p. 23, Recommendation 7.5, <www.childabuseroyalcommission.gov.au/improving-institutional-responding-and-reporting>.

27 Queensland Government, *Queensland Government Response to the Royal Commission into Institutional Responses to Child Sexual Abuse*, June 2018, p. 27, <www.cyjma.qld.gov.au/resources/dcsyw/about-us/reviews-inquiries/qld-gov-response/rc-child-sexual-abuse-response.pdf>.

Conclusion

The Bill has significant potential to improve Queensland's compliance with international human rights standards and to contribute to ongoing efforts to prevent child abuse in places of detention in Queensland. knowmore particularly supports provisions that strengthen the UN Subcommittee's access to places of detention, access to information and ability to interview people. We also support provisions that strengthen protections for people who provide information to the UN Subcommittee and the provisions of the Bill that are specific to youth detention centres.

At the same time, we consider that the Bill as presently drafted has some significant shortcomings and have recommended a number of amendments to improve the Bill. Key issues to address include:

- amending clause 10(2) so that the grounds for a detaining authority to temporarily prohibit or restrict the UN Subcommittee's access to a place of detention are limited to those allowed by article 14(2) of OPCAT
- amending the Bill to explicitly state that the responsible Minister can override a detaining authority's decision to temporarily prohibit or restrict the UN Subcommittee's access to a place of detention
- removing the requirement for the UN Subcommittee to visit a place of detention to interview a person from clause 13(6)(c)
- clarifying that the UN Subcommittee must be able to conduct private interviews in a separate room away from other people
- amending clause 21 to strengthen protections against actions, claims and demands for people who provide information to the UN Subcommittee.

We respectfully encourage the Committee to recommend that the Bill be passed with the amendments we have proposed.

Adelaide
Level 1, 99 Gawler Pl, Adelaide SA 5000
GPO Box 1365, Adelaide SA 5001
t 08 7092 2740

Brisbane
Level 20, 144 Edward St, Brisbane QLD 4000
PO Box 2151, Brisbane QLD 4001
t 07 3218 4500

Melbourne
Level 15, 607 Bourke St, Melbourne VIC 3000
PO Box 504, Collins St West VIC 8007
t 03 8663 7400

Perth
Level 5, 5 Mill St, Perth WA 6000
PO Box 7072, Cloisters Sq WA 6850
t 08 6117 7244

Sydney
Level 7, 26 College St, Darlinghurst NSW 2010
PO Box 267, Darlinghurst NSW 1300
t 02 8267 7400

Image inspired by original artwork by Ngunawal man Dean Bell, depicting knowmore's connection to the towns, cities, missions and settlements within Australia.

knowmore acknowledges the Traditional Owners of the lands and waters across Australia upon which we live and work. We pay our deep respects to Elders past and present for their ongoing leadership and advocacy.

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