



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

Submission to Legal Affairs and Safety Committee

11 January 2023

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Summary

1. The Queensland Human Rights Commission (the **Commission**) supports the passage of the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022 (the **Bill**), which creates a legal framework for the United Nations Subcommittee on the Prevention of Torture (**UN SPT**) to visit places of detention in Queensland.
2. It is unfortunate that measures were not already in place when the UN SPT visited in late 2022, which would have prevented the Subcommittee being refused entry to a place of detention under the control of Queensland Health. The Commission acknowledges that in contrast, Queensland Corrective Services publicly committed to facilitate unimpeded access by the UN SPT during its visit to Queensland.
3. However, even with the passage of this Bill, the Queensland Government must still take steps to:
 - i. fully participate in Australia's National Preventive Mechanism (**NPM**) under the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**) which is due to commence in early 2023; and
 - ii. clarify the roles and responsibilities of various agencies with oversight functions in Queensland.
4. The Explanatory Notes state that 'the Bill demonstrates Queensland's support for the principles of OPCAT'.¹ If this is the case, the Commission repeats its previous recommendations for the Queensland Government to take urgent steps to properly implement OPCAT.²

Recommendations

5. In summary, the Committee should recommend in its report that:
 - a. The Bill be amended to better reflect OPCAT requirements and related guidance, particularly to:
 - o broaden the definition of 'place of detention'; and
 - o amend clause 10 regarding the additional 'temporary' grounds for a place of detention. The UN SPT should only be refused entry to a place of detention on the grounds set out in OPCAT. The Bill should also confirm that the responsible Minister can override a detaining authority's decision to refuse access.

¹ Explanatory Notes, Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022, 2.

² Queensland Human Rights Commission, Submission No 16 to Legal Affairs and Safety Committee, Queensland Parliament, *Inquiry into the Inspector of Detention Services Bill 2021* (19 November 2021) 2.

- b. Further justification is provided for the restriction on the SPT receiving information about an individual only after it has visited a place of detention.
 - c. The Queensland Government urgently introduce legislation that sets out how Queensland will meet its obligations under OPCAT to ensure adequate preventive monitoring of all places of detention.
6. The Commission continues to recommend improvements to the related *Inspector of Detention Services Act 2022* as set out in our previous submission.³

Introduction

7. The Commission is a statutory authority established under the Queensland *Anti-Discrimination Act 1991 (AD Act)*.
8. The Commission has functions under the AD Act and the *Human Rights Act 2019 (HR Act)* to promote an understanding and public discussion of human rights in Queensland, and to provide information and education about human rights.
9. The Commission also deals with complaints of discrimination, sexual harassment, vilification, and other objectionable conduct under the AD Act, reprisal under the *Public Interest Disclosure Act 2009*, and human rights complaints under the HR Act. This includes complaints made by prisoners about the conditions of their detention and related concerns.
10. The Commission supports the policy intention of the Bill, but submits that amendments must be made if the Bill is to achieve its objective of facilitating visits by the UN SPT to places of detention in Queensland. In the Commission's view, the Bill is not compliant with OPCAT.
11. The Explanatory Notes state that to enable the SPT to fulfill its mandate, state parties must provide the Subcommittee with 'unrestricted access to all places of detention'.⁴ Clause 2 of the Bill states that the main purposes include to facilitate visits to places of detention by the UN SPT. However, the proposed Bill does not provide such access, for example, to a disability group home.

Role of the UN SPT

12. The UN SPT visit in 2022 sparked public debate about the need for international observers to attend Australian places of detention.

³ Queensland Human Rights Commission, Submission No 16 to Legal Affairs and Safety Committee, Queensland Parliament, *Inquiry into the Inspector of Detention Services Bill 2021* (19 November 2021).

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

13. The SPT is composed of 25 independent and impartial experts from different backgrounds and various regions of the world. Its preventive mandate is outlined on the United Nations website:

The SPT examines the way in which detainees are treated whilst in detention, as well as looking at the conditions of detention. SPT members talk in private with people in custody, without the presence of prison or other staff or of Governmental representatives.

During its country visits, SPT members also talk with Government officials, custodial staff, lawyers, and doctors, and can recommend immediate changes intended to improve the situation of detainees. Their work is governed by strict confidentiality and they do not reveal who they have spoken to, or what they have been told. People who provide information to the SPT must not be subject to sanctions or reprisals for having provided information to the SPT.

The SPT is guided by the principles of confidentiality, impartiality, non-selectivity, universality and objectivity. The SPT conducts its work in a spirit of co-operation. It aims to engage with States parties through a process of constructive dialogue and collaboration rather than condemnation.⁵

14. In the Commission's view, Queensland as well as Australia would benefit from the invaluable expertise that these visiting delegates bring in identifying opportunities for improvement. Inquires and reviews in several jurisdictions have found that places of detention often cause harm and trauma to detainees. The whole community suffers when our places of detention fail, not only individual detainees and their families, but also victims of crime when the system drives recidivism.
15. UN SPT visits are an opportunity to identify and implement international best practice in our places of detention.

Definition of places of detention

16. Articles 1 and 4 of OPCAT refer to any place under the State's jurisdiction where people are, or may be, deprived of their liberty. The UN SPT has interpreted the OPCAT mandate as encompassing any place where persons are deprived of their liberty, in the sense of not being free to leave, and in which the State either exercises, or might be expected to exercise, a regulatory function.⁶ The UN SPT recommends allowing NPMs (National Preventive Mechanisms) to visit any such

⁵ United Nations Office of the High Commissioner for Human Rights, 'Introduction to the Committee – Subcommittee on Prevention of Torture' (Web Page) <<https://www.ohchr.org/en/treaty-bodies/spt/introduction-committee>>.

⁶ Committee against Torture, *Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc CAT/C/57/4 (22 March 2016) Annex: Compilation of advice provided by the Subcommittee in response to requests from national preventive mechanisms [1]-[3].

places, including where the NPM suspects a location is a place of deprivation of liberty.⁷

17. The *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018 (ACT)* and *OPCAT Implementation Act 2021 (Tas)*, which similarly provide a right of access for the SPT to visit in these jurisdictions, define a place of detention by reference to article 4 of OPCAT.
18. In contrast, the Queensland Bill narrows the definition to certain specific places only. The Explanatory Notes suggest this 'is to provide clarity as to the procedures to be followed to facilitate a visit by the Subcommittee.'⁸ Both the Explanatory Notes and Statement of Compatibility explicitly state that the Bill 'does not operate to prevent the Subcommittee from visiting other places where a person may be deprived of their liberty'.⁹
19. However, specific legislative provisions are necessary because the Queensland Government formed a view at the time of the visit that existing legislation applied to prevent the SPT legally visiting certain places of detention. While the policy intention is to facilitate access, the Commission is concerned about the risk that there will not be a clear legislative basis for the UN SPT to visit all relevant places of detention when they return in 2023. Relying on additional places being prescribed by regulation risks causing further delays and confusion.
20. Excluding a place of detention from coverage in the Bill undermines the claim in the Statement of Compatibility that the Bill promotes rights, and may also unjustifiably limit the right to equality of individuals in a place of detention to which the SPT cannot visit.
21. In order to fulfil its purpose of providing unfettered access to all places of detention in Queensland to the UN SPT, the Bill should be amended, and the Commission makes the following recommendation:

Recommendation 1:

The Bill be amended to define places of detention as set out in OPCAT.

Unrestricted access

22. Under OPCAT, the UN SPT has unrestricted access to all places of detention, their installations and facilities, and to all relevant information relating to the treatment of persons and to conditions of detention.

⁷ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on national preventive mechanisms*, UN Doc CAT/OP/12/5 (9 December 2010) [24]-[25].

⁸ Explanatory Notes, Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022, 2.

⁹ Explanatory Notes, Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022, 2.

23. As discussed in the Explanatory Notes, article 14(2) of OPCAT does provide that access to a place of detention by the SPT may be temporarily postponed on specific grounds, which have been described as 'exceptional'.¹⁰ These grounds of national defence, public safety, natural disaster, or serious disorder are reflected in clause 9 of the Bill. Legislation in other jurisdictions, such as the *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018* (ACT) and *OPCAT Implementation Act 2021* (Tas) both only restrict access to a place of detention by reference to article 14.
24. However, clause 10 of the Bill provides that a detaining authority may temporarily restrict or prohibit access to the facility on additional grounds not contained in OPCAT where:
- (a) allowing access to the place or part of the place may prevent the maintenance of—
 - (i) security, good order and management of the place of detention; or
 - (ii) health and safety of a person in the place of detention (including a member of the subcommittee and an accompanying person);
 - (b) allowing access to the place or part of the place may prevent the conduct of essential operations by the detaining authority.
25. The Explanatory Notes seek to justify these additional grounds because:
- The Subcommittee's visiting itinerary will remain confidential during a visit.
 - A detaining authority may temporarily restrict the Subcommittee's access to part of a facility if a person who is detained there becomes distressed and presents a risk to themselves or the Subcommittee.
 - Access may also be temporarily restricted for the purpose of conducting essential operations. It is intended that any restriction or prohibition to access is temporary and does not prevent the Subcommittee from resuming the visit after circumstances that required the temporary prohibition or restriction have ended.¹¹
26. The Commission submits that these reasons do not adequately justify the additional temporary grounds of refusal. The UN SPT must keep its itinerary confidential during a visit to ensure the effectiveness of its work. OPCAT has been drafted with that very practice in mind. The confidentiality of the itinerary is therefore not a reasonable justification for the insertion of additional grounds of refusal in clause 10 as currently set out.
27. The Commission accepts that clause 10(2)(a) grounds may be seeking to clarify the situations that fall into the area of 'serious disorder' as set out in article 14 of OPCAT. If the clause is intended to provide clarity as to what is meant by that

¹⁰ Association for the Prevention of Torture and the Inter-American Institute for Human Rights, *Optional Protocol to the UN Convention against Torture: Implementation Manual* (2010), 78-79.

¹¹ Explanatory Notes, Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022, 2-3.

term, then the provision should be amended to refer to 'serious disorder' with good order and security or health and safety as subsets of that ground.

28. Clause 10(2)(b) would appear to go well beyond 'serious disorder' and merely refers to 'the conduct of essential operations'. Such a ground could potentially be used in many situations in which the UN SPT should still be permitted entry, such as periods of staff shortage or lockdown. The clause therefore undermines the purpose of the Bill and the assertion in the Statement of Compatibility that it fulfils relevant sections of the HR Act which prevent harm and mistreatment in places of detention.¹²
29. While clause 10(4) is welcome in providing for a written reason to be recorded and given to the responsible Minister when a detaining authority refuses entry to the SPT, the Commission recommends that, for the avoidance of any doubt, the provision should explicitly state that the responsible Minister can override the decision of the detaining authority and grant entry to the SPT.
30. The Commission is concerned that clause 14 restricts the SPT to only receive information about a person if the SPT has already visited that place of detention. There is a risk that this clause could undermine the work of the UN SPT.¹³ During a visit, the SPT must be provided with all necessary information, including all documentation it requests, both prior to and during the visit.¹⁴ For instance, if the UN SPT discovers that people have been transferred from one detention setting to another prior its arrival, the UN SPT is likely to enquire about what prompted such a move. This provision would prohibit the UN SPT from accessing the files of those people to determine if the transfer was in any way an act to frustrate the UN SPT from conducting its mandate. The Commission makes the following recommendations:

Recommendation 2:

Clause 10 be amended to ensure it restricts the UN SPT accessing a place of detention only in the most serious and exceptional of circumstances, and to ensure the responsible Minister can override a detaining authority's decision to refuse access.

Recommendation 3:

Further justification is sought for the restriction on the SPT receiving information about an individual only after it has visited a place of detention.

¹² *Human Rights Act 2019*, s 17 and s 30.

¹³ See OPCAT, Articles 11 (iii), 12(b) and 14(b).

¹⁴ 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*, UN Doc CAT/OP/24/1 (09 December 2014) [2].

Conclusion

31. Thank you for the opportunity to comment on the Bill, which the Commission supports, subject to the above recommendations.