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OFFICE OF THE INSPECTOR
OF CUSTODIAL SERVICES

COMMONWEALTH
OMBUDSMAN



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Tasmanian NPM



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

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

Dear Committee Secretary

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

We write to you as the following bodies, members of Australia's National Preventive Mechanism (NPM):

- Commonwealth Ombudsman
- Australian Capital Territory (ACT) Human Rights Commission
- ACT Inspector of Correctional Services
- ACT Ombudsman
- Office of the Children's Commissioner (Northern Territory (NT))
- NT Community Visitor Program
- Office of the Ombudsman (NT)
- Official visitor scheme (South Australia (SA))
- Training Centre Visitor (SA)
- Tasmanian NPM
- Office of the Inspector of Custodial Services (Western Australia)

We write in response to the call for submissions by the Legal Affairs and Safety Committee (the Committee) on the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022 (Qld) (the Bill), introduced to the Queensland Parliament on 1 December 2022.

Part of the role of NPMs, in accordance with Article 19(c) of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (OPCAT), is to submit proposals and observations concerning existing or draft legislation. Australia's NPM is also, along with the United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), part of the system of regular visits to places where people are deprived of their liberty, provided for by the OPCAT.¹

We understand the purpose of the Bill is to remove legislative barriers to visits to places of detention by the SPT. We welcome the introduction of the Bill to support the fulfilment of Australia's obligations under OPCAT.

¹ See [OPCAT](#), Article 1.

The Bill would give effect to core obligations under OPCAT including allowing for the SPT's access to places, access to information, and their ability to conduct interviews. The Bill would provide protections from reprisals for giving information to, and engaging with, the SPT, and would create immunity for any person who honestly and on reasonable grounds gives information to the SPT.

There are some aspects of the Bill which do not fully align with the requirements of OPCAT, and which may impact the SPT's ability to fulfil its mandate. While the drafting of the Bill is a matter for the Queensland Government and Parliament, we provide comments and suggestions below to assist the Committee in its consideration of the Bill.

Definition of 'place(s) of detention'

Article 4(1) of OPCAT defines places of detention as 'any place under [a state's] jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence'.

Section 5 of the *OPCAT Implementation Act 2021 (Tas)* (the Tasmanian Act) defines a place of detention as any place, subject to the jurisdiction and control of Tasmania, that the SPT must be allowed to visit under Article 4 of OPCAT. The Tasmanian Act then provides an example list of places, while clarifying that such a list does not limit this definition.² Section 4(1) of the *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018 (NT)* takes a similar approach.³

Clause 4 of the Bill adopts a more limited approach. Clause 4 provides an exhaustive list of particular types of places (narrowing the scope from that of Article 4(1) of OPCAT), along with a regulation-making power to allow expansion of this list. The Bill's explanatory notes state that the inclusion of the regulation-making power is to provide for flexibility to add other places of detention later. However, an open definition which reflects Article 4 of OPCAT would provide this flexibility without the need for additional regulations.

The Bill's explanatory notes recognise there are other places beyond the scope of the Bill where a person may be deprived of their liberty. While the explanatory notes indicate the Bill would not operate to *prevent* the SPT from visiting such places, as drafted the Bill would not necessarily enable the SPT to visit them, for example if there are impediments in other regulatory frameworks.

We recommend the definition of 'place of detention' in clause 4 of the Bill be amended from its present form, to ensure consistency with OPCAT.

Restricting access to places of detention

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'.

² [OPCAT Implementation Act 2021 \(Tas\)](#) section 5.

³ [Monitoring of Places of Detention \(Optional Protocol to the Convention Against Torture\) Act 2018 \(NT\)](#) section 4(1).

Clause 9 of the Bill would allow the *responsible Minister* for a place of detention to temporarily prohibit access by the SPT to that place, consistent with the grounds set out in Article 14(2) of OPCAT.

Clause 10 of the Bill would also allow a *detaining authority* for a place of detention to temporarily prohibit the SPT's visit to a facility to maintain security, good order, management, health, and safety, and/or so as not to prevent the conduct of essential operations. The explanatory notes indicate clause 10 is intended to allow detaining authorities to respond to critical incidents. However, it is unclear how the presence of the SPT would inhibit their ability to do so, other than in the urgent and compelling circumstances in which a Ministerial objection could be made under clause 9. The presence of the SPT during critical incidents or essential operations would be an opportunity for the SPT to monitor the treatment and conditions of the people detained in such circumstances.

Clause 10 is also based on the belief of the detaining authority, but there is no reference to that belief needing to be on a reasonable or objective basis.

Terms in the clause such as 'essential operations' are also not defined, creating a risk the provision could inhibit a visit beyond the circumstances contemplated by Article 14(2) of OPCAT. Concerns that the SPT's presence may create complexities or risks are matters which the relevant detaining authorities should discuss openly with the visit delegation, consistent with OPCAT's critical focus on dialogue and cooperation.

While OPCAT foresees circumstances in which it is reasonable and appropriate to restrict access by the SPT, its threshold for doing so is intentionally high. The grounds in clause 10 for a detaining authority to restrict or prohibit access to a detention facility go beyond the grounds outlined under OPCAT for objecting to a visit.

We recommend clause 10 be amended to reflect the grounds outlined in Article 14(2).
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Procedures for visiting a place of detention

Clause 11 provides a general rule that the SPT must abide by any procedures which apply to a person visiting the relevant place of detention. It then provides a discretionary power to the relevant detaining authority to allow the SPT not to comply with requirements; for example, holding approval for access to facilities, being searched or providing identification or identifying information.

This clause provides discretion to detaining authorities which may impact the free access, privileges and immunities which should be afforded to the SPT in accordance with OPCAT.

We recommend clause 11 be removed to ensure the SPT's privileges and immunities under OPCAT are not undermined.
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Access to information

Clause 13 of the Bill allows for certain information to be excluded from provision to the SPT. This is Cabinet information, information subject to legal professional privilege, and other information of a kind prescribed by regulation.

Article 14(1) of OPCAT requires the SPT be given unrestricted access to all information:

a) concerning the number of persons deprived of their liberty in places of detention, as well as the number of places and their location, and

b) referring to the treatment of those persons as well as their conditions of detention.

The ability to exclude kinds of information under clause 13 risks inconsistency with Article 14(1).

We recommend clause 13 be amended, at a minimum, to remove the ability to exclude further information by regulation.

Further, clause 14 of the Bill prevents the SPT from being provided with identifying information about a person at a place of detention unless the SPT visits or has visited that place. The basis for this restriction is unclear, is not explained by the Bill's explanatory notes, and is not reflected in OPCAT. The SPT's powers to access information under Article 14(1)(a) and (b) are additional to and independent from their power under Article 14(1)(c) to access all places of detention.

Given the SPT's inability in practice to visit all places of detention (due to the high number of these places), the SPT's ability to seek information about all places which fall within their remit is important. This is particularly the case should the SPT's power to visit any place be restricted on the urgent and compelling grounds available under Article 14(2) of OPCAT.

We recommend clause 14 be removed to improve consistency with OPCAT.

Information retention by the SPT

Clause 15(2) of the Bill requires the SPT to obtain consent from a person (or their legal guardian where relevant) before retaining, copying, or including in their notes any identifying information relating to that person. The Bill's explanatory notes refer to the requirements of Article 16(2) of OPCAT. However, Article 16(2) does not restrict the information the SPT can gather under Article 14.

We recommend clause 15 be amended to allow for the SPT to retain, copy or take notes of any information they are given access to, but prevent publication of identifying information without the express consent of the person.

Contact with NPMs

Under Article 11(1)(b)(ii) of OPCAT the SPT must be allowed to maintain direct and confidential contact with NPMs. Under Article 11(1)(b)(iii) of OPCAT the SPT is to be allowed to advise and assist NPMs in the evaluation of the needs and the means necessary to strengthen protections against torture and ill-treatment. Under Article 12(c), contact between the SPT and NPMs is to be encouraged and facilitated.

In the Bill, while clause 13 deals with the SPT's access to information and clause 15 with the SPT's ability to retain, copy, or take notes of information, there is no corresponding provision explicitly allowing the SPT to provide information to an NPM. By contrast, section 22(2)(e) of the Tasmanian Act provides the SPT may provide the Tasmanian NPM with any information they consider relevant

to the exercise of the NPM's functions raised by, or in the course of, the SPT's exercise of their own functions.⁴

We recommend the inclusion of a provision in the Bill allowing the SPT to provide information to the NPM.

Consent to interview

Clause 16 of the Bill provides for the SPT's capacity to interview persons, and clause 16(2) provides that the SPT must not interview a person unless they or their legal guardian, where relevant, consents.

Establishing consent should be a matter for the SPT and the person concerned. If an individual does not wish to speak to the SPT they should not be required to, even if their legal guardian consents. Similarly, if an individual does wish to speak to the SPT, they should be able to even if their legal guardian does not consent.

By way of example, section 33(4) of the Tasmanian Act provides: "Nothing in this section requires a person, who objects to, or who does not consent to, being interviewed by the Subcommittee, to participate in an interview."⁵

We recommend an amended approach to clause 16 emphasising that persons are not compelled to speak with the SPT.

Protection against reprisals

Clauses 19 and 20 of the Bill would criminalise reprisal activity, in the sense of causing detriment to another person. This extends to attempts to cause, and conspiracy to cause, detriment. The provisions extend to circumstances where the person causing detriment acts *in the belief that* the other person has provided information to, or otherwise assisted, the SPT, whether or not they have actually done so.

Under clause 20, the maximum penalty for taking a reprisal is 100 penalty units. This is a lesser maximum penalty than in other jurisdictions which provide for a maximum penalty of imprisonment and alternatives such as employment misconduct findings.⁶

We recommend the Committee consider the penalty for reprisals in clause 20.

Additionally, the examples of what might constitute detriment are narrow. OPCAT Article 15 states that "[n]o authority or official shall order, apply, permit or tolerate *any sanction* against any person or organization" (emphasis added). However, while they are examples, the Bill focuses solely on a person's safety or career, not recognising the other measures that could be taken in retaliation against detained people, such as limiting contact with family or moving a person to another facility.

⁴ [OPCAT Implementation Act 2021 \(Tas\)](#) section 22.

⁵ [OPCAT Implementation Act 2021 \(Tas\)](#) section 33(4).

⁶ See e.g. [Monitoring of Places of Detention \(Optional Protocol to the Convention Against Torture\) Act 2018 \(NT\)](#) section 15(1) and 15(2), [Monitoring of Places of Detention \(Optional Protocol to the Convention Against Torture\) Act 2018 \(ACT\)](#) section 16(1), and [OPCAT Implementation Act 2021 \(Tas\)](#) section 36, each providing a maximum penalty of imprisonment for 2 years. In the ACT and Tasmania, this may be in addition to a fine, while in the NT this may be as an alternative to a fine.

We recommend changing the language of clause 19 to reflect the language on reprisals in OPCAT.

Relationship to the *Inspector of Detention Services Act 2022* (Qld)

The Bill does not deal with NPMs, with its scope restricted to matters relating to the SPT. However, we acknowledge the yet to commence *Inspector of Detention Services Act 2022* (Qld) (the Act). While not creating any NPM body/bodies or referencing OPCAT, the Queensland Government has indicated the Act was drafted with OPCAT in mind. The Act creates the new position of 'inspector of detention services', and it is open to the Government to appoint the inspector as an NPM if it so decides.

Differences in scope exist between the Act and the Bill. Under OPCAT, both the SPT and NPM are to have access to the same places of detention within scope of the definition in Article 4(1). However, the Act defines places of detention more narrowly than the Bill (and in both cases, more narrowly than OPCAT). This means that even if the inspector were to be appointed as an NPM for Queensland, there would remain places of detention under the control of the Queensland Government beyond the inspector's legislative scope as an NPM.

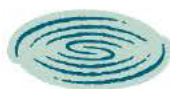
If you wish to discuss any of our comments further, you can contact the Commonwealth Ombudsman and Coordinator of Australia's NPM Network, Mr Iain Anderson:

Email: [REDACTED]
Post: [REDACTED]

Yours sincerely



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