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Office of the President

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Our ref: HRPL/BDS

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

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

Dear Committee Secretary

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

Thank you for the opportunity to provide feedback on the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022. The Queensland Law Society (QLS) appreciates being consulted on this important piece of legislation, which will facilitate visits, by the United Nations Subcommittee on Prevention of Torture (the Subcommittee) to places of detention in Queensland.

1. Preliminary matters

The Society commends the Government for the introduction of the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022 (the Bill). The Society strongly supports the full implementation of Australia's obligations under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

As there has been only a very brief opportunity to review the amendment to the Bill, an in-depth analysis has not been conducted. It is possible that there are issues relating to fundamental legislative principles or unintended drafting consequences which we have not identified. We request that the government extend the period by which to provide feedback and also extend the reporting date of the Committee, so that the Committee has a reasonable opportunity to consider the draft legislation and provide more useful and in-depth feedback which will hopefully assist in improving the quality of the legislation being passed.

Whilst supportive of the Bill, the Society has some concerns, which we have outlined below. We have limited our comments to clauses 2, 4, 10 and 14 of the Bill.

The Society has also had the benefit of viewing the document, "Civil Society's Six Recommendation for Effective OPCAT Implementation in Queensland" and are supportive of the sentiments contained therein.

Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022**2. Clause 2 – Main purposes and clause 10 – Detaining authority may temporarily prohibit or restrict access to place of detention**

Clause 2(c) states that the main purposes of this Act are, “to provide for necessary safeguards to enable detaining authorities to preserve privacy, security, good order, welfare and safety in places of detention during visits by the subcommittee.”

Clause 10 provides that the detaining authority for a place of detention may temporarily prohibit or restrict access to the place or part of the place by the subcommittee and an accompanying person if:

- (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.

The Society understands the underpinning rationale of these provisions. However, we note that the grounds that a detaining authority for a place of detention may use to temporarily prohibit or restrict access to the place or part of the place by the subcommittee are very broad in scope. The grounds for refusal set out in clauses 2 and 10 appear to introduce grounds additional to those contained in article 14 of OPCAT. Article 14(2) of OPCAT states:

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.

The Society is concerned that the broad wording contained in clauses 2 and 10 of the Bill have the potential to be used to limit the visits of independent international and national bodies to places where people are deprived of their liberty. While article 14 of OPCAT does not specifically use the term “exceptional circumstances”, the phrase “urgent and compelling grounds” might be interpreted as meaning that visits should only be postponed in exceptional circumstances.¹ We note that this is not a feature of the ACT legislation.

We support the amendment of clauses 2 and 10 of the Bill to reflect article 14 of OPCAT.

Recommendation: Amend clauses 2 and 10 of the Bill to reflect article 14 of OPCAT. Therefore, the detaining authority for a place of detention may temporarily prohibit or restrict access to the place or part of the place by the subcommittee and an accompanying person if there are 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.

¹ Optional Protocol to the UN Convention against Torture Implementation Manual.

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3. Clause 4 – Meaning of place of detention

Clause 4 defines what constitutes a place of detention. This definition is a salient feature of OPCAT implementation as it governs where National Preventive Mechanisms (NPM) and Sub Committee for the Prevention Against Torture (SPT) inspectors can visit. OPCAT does not contain a definition of what constitutes a place of detention. However, the Subcommittee on the Prevention of Torture has stated that, “the preventive approach which underpins the OPCAT means that as expansive an interpretation as possible should be taken in order to maximise the preventive impact of the work of the NPM.”²

The Society makes the following comments in relation to the scope of the definition of ‘place of detention’ as set out in clause 4 of the Bill. We welcome the clear requirements enabling the SPT to visit places of detention such as inpatient units in hospitals and the forensic disability service. However, clause 4 does not fully implement article 4 of the OPCAT, which mandates that:

1. Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 to any place under its 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 (hereinafter referred to as places of detention). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.
2. For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting in which that person is not permitted to leave at will by order of any judicial, administrative or other authority.

The Society is concerned about the narrowness of the definition of place of detention as contemplated by clause 4. While we understand that a narrow approach is taken in the Victorian legislation, the Society is concerned that the current definition will not guarantee coverage of OPCAT to all places of detention in Queensland. In addition, the exhaustive list of places of detention will not be flexible enough to respond to emerging places of detention as seen during the COVID-19 pandemic.

In order to give full realisation to Australia’s obligations and secure compliance with the treaty, it is essential that the definition of, ‘place of detention’ be broad. It is our respectful submission that clause 4 of the Bill should be amended to adopt articles 1 and 4 of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment to define places of detention. This would ensure that NPM and SPT inspectors have the power to inspect all places of detention, including;

- Residential Aged Care Facilities’ as defined by the *Aged Care Act 1997* (Cth) and residential homes
- Forensic Disability Service (for example, for those in involuntary detention under the *Forensic Disability Act 2011*) and disability group homes
- Facilities that use seclusion and physical and chemical restraints

² Response to the New Zealand Human Rights Commission’s request for interpretative guidance on Article 4.2 of the OPCAT, 2015.

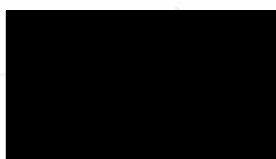
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- Hospital emergency rooms
- Locked wards
- Immigration detention facilities

Recommendation: Clause 4 of the Bill should be amended to adopt articles 1 and 4 of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment to define places of detention.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [REDACTED] or by phone on [REDACTED]

Yours faithfully



Rebecca Fogerty
Vice President