



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

Submission by Queensland Advocacy for Inclusion

**to
Legal Affairs and Safety Committee
January 2023**

About Queensland Advocacy for Inclusion

Queensland Advocacy for Inclusion (**QAI**) (formerly Queensland Advocacy Incorporated) is an independent, community-based advocacy organisation and community legal service that provides individual and systems advocacy for people with disability. Our purpose is to advocate for the protection and advancement of the fundamental needs, rights and lives of people with disability in Queensland. QAI's Management Committee is comprised of a majority of persons with disability, whose wisdom and lived experience is our foundation and guide.

QAI has been engaged in systems advocacy for over thirty years, advocating for change through campaigns directed at attitudinal, law and policy reform. QAI has also supported the development of a range of advocacy initiatives in this state. For over a decade, QAI has provided highly in-demand individual advocacy services. These services are currently provided through our four advocacy practices: the Human Rights Advocacy Practice (which provides legal advocacy in the areas of guardianship and administration, disability discrimination and human rights law and non-legal advocacy support with the Disability Royal Commission and the justice interface); the Mental Health Advocacy Practice (which supports people receiving involuntary treatment for mental illness); the NDIS Advocacy Practice (which provides support for people challenging decisions of the National Disability Insurance Agency and decision support to access the NDIS); and the Disability Advocacy Practice (which operates the Pathways information and referral line, and provides non-legal advocacy support with Education and other systems that impact young people with disability).

From 1 January 2022, we have been funded by the Queensland Government to establish and co-ordinate the Queensland Independent Disability Advocacy Network (QIDAN), which includes operating the Disability Advocacy Pathways Hotline, a centralised phone support providing information and referral for all people with disability in Queensland. We have also been funded to provide advocacy for young people with disability as part of the QIDAN network, which we provide in addition to our non-legal education advocacy for Queensland students with disability. Our individual advocacy experience informs our understanding and prioritisation of systemic advocacy issues.

The objects of QAI's constitution are:

- To advocate for the protection and advancement of the needs, rights and lives of people with disability in Queensland;
- To protect and advance human rights including the Convention on the Rights of Persons with Disabilities (CRPD);
- To be accountable to the most disadvantaged people with disability in Queensland; and
- To advance the health, social and public wellbeing of disadvantaged people with disability.

QAI's recommendations

1. Amend Clause 4 so that it defines a place of detention as *"any place that the Subcommittee must be allowed to visit under the Optional Protocol, Article 4, that is subject to the jurisdiction and control of Queensland."*
2. Include provisions in Clauses 7 and 8 that make it an offence for a Minister or detaining authority to fail to comply with their statutory obligations under these Clauses.
3. Consider removing Clause 10 altogether, or, if the Clause 10 is to be retained, it should be amended to:
 - Include clear definitions of the terms *"essential operations"* and *"prevent the maintenance of"*;
 - Require the responsible Minister to table a copy of the written record in Parliament, within a specified and limited number of sitting days after receiving it; and
 - Require the detaining authority to make subsequent arrangements for the visit to occur as soon as is reasonably practicable.
4. Amend Clause 11 to read *"The Subcommittee and accompanying persons should conduct their visit in accordance with directions provided by an authorised officer of the place of detention, including directions that ensure free access to all parts of the place of detention. Such directions should not unnecessarily limit the Subcommittee's ability to undertake the visit and perform its functions under OPCAT."*
5. Include a provision in Clause 11 that requires Subcommittee members and accompanying persons to provide evidence of their identities and authorisation to conduct visits under OPCAT.
6. Remove Clause 14 in its entirety.
7. Remove Clause 15 and introduce a provision that requires the Subcommittee to treat all identifying information confidentially and to protect it from further disclosure, with a requirement to return or destroy the information within a specified period of time after the completion of its reporting function. Further, in the event that the Subcommittee wishes to publish personal data, require the Subcommittee to obtain the express consent from the person concerned.
8. Remove Clause 16 in its entirety.
9. Include provision for detainees to access the support and information they require in order to exercise their legal capacity and to make or participate in decision-making regarding their engagement with the Subcommittee on an equal basis with others.

Introduction

The purpose of this Bill is to facilitate visits by the United Nations Subcommittee on Prevention of Torture (the Subcommittee) to places of detention in Queensland. QAI welcomes this Bill following the Subcommittee's failed visit to Australia in October 2022 when it was denied access to several places of detention in both Queensland and New South Wales and was forced to suspend its visit.¹

In ratifying the Optional Protocol to the Convention Against Torture (OPCAT), Australia committed to facilitating visits by both the Subcommittee and a National Preventive Mechanism (NPM) to any place under its jurisdiction where persons are, or may be, deprived of their liberty.² The purpose of these visits is to make recommendations to States Parties to strengthen, if necessary, the protection of these persons against torture and other cruel, inhuman, or degrading treatment or punishment.

This Bill purportedly enables the Subcommittee to fulfil its mandate by facilitating access to places of detention, access to information that will assist the Subcommittee to perform its role, removing legislative barriers and introducing safeguards. Despite its stated intention however, the Bill does not provide adequate access to all places of detention, nor does it facilitate access to all information required by the Subcommittee. It also contains clauses regarding issues of consent that risk introducing barriers to the Subcommittee achieving its purpose under OPCAT.

Whilst the Bill represents a welcome step towards Australia satisfying its obligations under OPCAT, the Bill in its current form is insufficient and there remains much to be done to ensure persons deprived of their liberty are adequately protected against torture, and other cruel, inhuman, or degrading treatment or punishment.

QAI's submission provides feedback on the following clauses of concern; 4, 7, 8, 10, 11, 14, 15 and 16.

Clause 4 – Meaning of place of detention

Clause 4 provides a list of facilities that fall within the definition of a 'place of detention' for the purposes of the Bill. QAI welcomes the inclusion of inpatient units at authorised mental health services and the Forensic Disability Service as identified places of detention. This will enable the Subcommittee to visit the places of detention QAI raised concern about in a letter sent to the Subcommittee prior to their visit in October 2022³. We note with concern that these places of detention remain outside the scope of the *Inspector of Detention Services Act 2022* (Qld) and any other publicly detailed plan for an NPM in Queensland.

However, while the explanatory notes state that the Bill "does not operate to prevent the Subcommittee from visiting other places where a person may be deprived of their liberty"⁴, the wording of the Bill does not reflect this intention, nor does it clearly state that the list of places is non-exhaustive. It would be preferable for the Bill to clearly state that the list of places of detention "includes but is not limited to", or words to that effect. It is imperative that the definition of places of detention remains flexible to include emerging places of detention, such as quarantine facilities used during the height of the Covid-19 pandemic. This was in fact recommended by the Subcommittee in advice letters issued to States Parties during the pandemic. It is equally imperative that the definition includes all accommodation facilities in which people with disability reside in a group setting, regardless of whether the facilities are State or Commonwealth funded. This includes privately owned (yet government subsidised) supported independent living arrangements or specialist disability accommodation facilities funded by the National Disability Insurance Scheme. QAI is similarly concerned to ensure residential aged care facilities, including locked aged care wards in Queensland public hospitals, can be accessed by the Subcommittee and we endorse the submissions of Townsville Community Law in this regard.

¹ Office of the United Nations High Commissioner for Human Rights, "UN torture prevention body suspends visit to Australia citing lack of co-operation", 23 October 2022.

² Optional Protocol to the Convention Against Torture, Articles 2, 3 and 4

³ The Central Queensland Hospital Health Service (CQHHS) Rockhampton Mental Health Inpatient Unit (MHIPU); Queensland's Forensic Disability Service (FDS); and West Moreton High Security Inpatient Service (HSIS) at The Park. QAI's concerns regarding these facilities are documented in our submission 'Places of Detention' to the Disability Royal Commission (<https://qai.org.au/2022/09/02/places-of-detention-in-queensland/>)

⁴ Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022 Explanatory Notes, page 2

The explanatory notes state that “to enable the Subcommittee to fulfil its mandate, State parties that ratify OPCAT undertake to provide the Subcommittee with...unrestricted access to *all* places of detention...”⁵ (emphasis added), yet the Bill as currently drafted does not do this. QAI notes the approach taken by the Australian Capital Territory in its equivalent piece of legislation, which defines a place of detention as “any place that the Subcommittee must be allowed to visit under the Optional Protocol, article 4, that is subject to the jurisdiction and control of the Territory”.⁶ QAI urges the Committee to consider taking the same approach.

Clauses 7 & 8 – Responsible Minister & Detaining authority to ensure subcommittee permitted to visit and access a place of detention

Clause 7 states the responsible Minister must ensure that the Subcommittee is permitted to enter and visit the place of detention and have unrestricted access to any part of the place of detention. Clause 8 imposes the same obligation on the detaining authority.

QAI observes that neither clause makes provision for an offence or penalty in the event that a Minister or detaining authority fails to comply with these clear statutory obligations. QAI recommends the Committee consider including such provisions in both Clauses.

Clause 10 – Detaining authority may temporarily prohibit or restrict access to place of detention

QAI is concerned that Clause 10 provides too much discretion for a detaining authority to temporarily prohibit or restrict the Subcommittee accessing a place of detention. Consequently, it undermines the integrity of the Bill and its stated purpose which is to facilitate visits by the Subcommittee to places of detention in Queensland. QAI notes that Article 14 of OPCAT states an “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.”⁷ We note that Clause 9 already provides for such restrictions, and that other jurisdictions such as the Australian Capital Territory have not included additional grounds for limiting visits by the Subcommittee as proposed in Clause 10.

Clause 10(2)(b) lists one such additional ground as when allowing access to “the place may prevent the conduct of *essential operations* by the detaining authority” [emphasis added]. The term “essential operations” is not defined in the Bill. If Clause 10 is to be retained, QAI recommends this term is defined and that the definition ‘sets the bar high’ to ensure that access by the Subcommittee is not prohibited or limited for minor or trivial reasons. Including examples of what would constitute “essential operations” would be helpful, though considering Clause 10(2)(a) already provides for restriction on the basis that allowing access may prevent the maintenance of “security, good order and management of the place of detention”, it is difficult to envisage what other activities amount to “essential operations” that would justify restricting access by the Subcommittee to the place of detention.

Indeed, restricting access on the grounds that it may “prevent the maintenance of security, good order and management of the place of detention”⁸ is ambiguous and efforts to extrapolate the meaning of the phrase “prevent the maintenance of”, for example, could cause unnecessary disruptions to the Subcommittee’s visit. A preferable alternative would be it is “likely to interfere with” or “likely to disrupt”. The use of the word “may” throughout this Clause is also of concern as it has the effect of lowering the threshold further still.

Moreover, restricting access on the grounds that it may disrupt “the management” of a place of detention is materially different to allowing a detaining authority to respond to critical incidents in exceptional circumstances, as is purportedly the intention behind Clause 10 according to the explanatory notes.⁹ QAI is concerned that such a phrase

⁵ *Ibid*, page 1

⁶ *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018* (ACT), section 7

⁷ Optional Protocol to the Convention Against Torture, Article 14(2)

⁸ *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022*, section 10(2)(a)(i)

⁹ *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022 Explanatory Notes*, page 3

could be satisfied too easily and would therefore unnecessarily compromise the ability of the Subcommittee to fulfil its mandate under OPCAT.

Finally, Clause 10(4)(b) requires the detaining authority to make a written record of each temporary prohibition or restriction of access to a place of detention or part thereof and give a copy of the record to the responsible Minister for the place of detention. If Clause 10 is to be retained, for the purpose of transparency QAI recommends this Clause be amended to require the responsible Minister to table the written record in Parliament within a specified and limited number of sitting days after receiving it. The detaining authority should also have an obligation to make arrangements for the visit to occur as soon as is reasonably practicable.

Clause 11 – Procedures for visits to places of detention

Clause 11(1) provides that visits by the Subcommittee and accompanying people “must be conducted in accordance with any procedures that apply to a person visiting the place of detention.”¹⁰ QAI submits that this Clause is too broad in its operation. Generally, people visiting a place of detention such as a prison do not have free access to all parts of the place of detention, as is provided to the Subcommittee under Clauses 7 and 8 of the Bill. Clause 11(1) seemingly seeks to limit the free access of the Subcommittee by requiring the visit be conducted in accordance with usual visiting procedures.

The Subcommittee must have wide-ranging access to all parts of places of detention that is limited only by safety and security considerations. Ordinary visitors to prisons and other places of detention are only permitted to access very limited and specific parts of these facilities, for example, a visiting area. Accordingly, it is inappropriate to seek to apply the usual visiting procedures for these facilities to the very specialised visits of the Subcommittee.

While Clause 11(2) does permit the detaining authority to allow the Subcommittee or accompanying people access to the place of detention *without* complying with such requirements, this seemingly leaves it to the discretion of the detaining authority which undermines the unrestricted access provided for in Clauses 7 and 8 and contravenes Article 14(1)(c) of OPCAT. It appears to create a conflict between the provisions which is likely to lead to confusion and interfere with the efficient and effective conduct of visits by the Subcommittee.

QAI respectfully suggests that clause 11(1) be amended to read as follows, or something similar:

The Subcommittee and accompanying persons should conduct their visit in accordance with directions provided by an authorised officer of the place of detention, including directions that ensure free access to all parts of the place of detention. Such directions should not unnecessarily limit the Subcommittee's ability to undertake the visit and perform its functions under OPCAT.

QAI supports the exemptions under clause 11(2)(a) and (b) in relation to holding an approval for the access and being searched. However, QAI is of the position that Subcommittee members and accompanying persons should have to provide some evidence of their identities such as their passports and some evidence from the United Nations that they are authorised to undertake visits under OPCAT. We would suggest that inquiries be made about the usual forms of identification used by Subcommittee members and accompanying persons and that these processes be included in a re-drafted Clause.

Clause 14 – Access to identifying information

QAI is particularly concerned about the drafting of, and intention behind, Clause 14. Clause 14 seeks to limit the Subcommittee's unrestricted access to information relevant to its purpose as requested under Clause 13. Clause 14 states that “...the subcommittee must not be given access under section 13 to identifying information (including confidential information) about a person at a place of detention (including a detainee) unless the subcommittee visits that place of detention or has visited that place of detention.”¹¹

Firstly, it is unclear whether “...unless the subcommittee visits that place of detention...” means unless the subcommittee *intends* to visit that place of detention. The ambiguity leaves open the possibility that the Subcommittee

¹⁰ Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022, section 11(1)

¹¹ Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022, section 14

will only be able to access information about a person at a place of detention that it is *presently visiting* or has already visited, thus potentially preventing the Subcommittee from accessing information *prior* to a visit. Even if the intention is to allow the Subcommittee access to information about a person at a place of detention prior to a visit to the facility in question, the operation of the Clause as currently drafted could result in a cumbersome and obstructive process that could prevent the Subcommittee from accessing timely and relevant information that is essential to its mandate.

It is feasible that the Subcommittee may request access to identifying information about detainees prior to visiting a facility, and QAI is eager to ensure there are no unnecessary legislative barriers that would prevent the Subcommittee from accessing the information it requires to properly carry out its functions, providing that this information is handled and used in an appropriate manner. The Subcommittee is likely to have information from civil society organisations, such as QAI, raising concerns about conditions in certain facilities and the treatment of certain individuals, with a request that the Subcommittee visit the facility and detainee or, at the least, examine their circumstances. For the Subcommittee to use its time most effectively, it may seek access to relevant information from detaining authorities before it undertakes a visit. This information could help direct the focus of a visit, including identifying parts of the facility it might want to inspect, the questions it might want to ask of the administrators and the detainees it might want to meet with.

Secondly, Clause 14 takes the concerning step of limiting the Subcommittee's access to identifying information to that of detainees only at the places of detention it has visited, or (potentially) intends to visit. The Subcommittee's access to information, be it identifying or non-identifying, should not be dependent upon it conducting a visit to that place of detention. This constitutes an unjustifiable curtailment of the Subcommittee's need for *unrestricted* access to information as required by OPCAT. In October 2022, the Subcommittee had a two-week period in which to visit places of detention throughout the entire country. The Subcommittee, given its time and resourcing limitations, will not be able to visit all places of detention, including all places of interest to the Subcommittee following concerns raised by civil society organisations. This should not mean that the Subcommittee cannot access identifying information about detainees at other places of detention, as this information could be critical to informing the Subcommittee's deliberations and reporting on the treatment of people at those places of detention. Further, this Clause could be misused by detaining authorities who, in the knowledge of a pending visit by the Subcommittee, relocate certain detainees to other facilities, thereby preventing the Subcommittee from accessing identifying information about the treatment of those detainees.

The inclusion of Clause 14 will likely have the effect of obstructing the Subcommittee in performing its function and could result in further international criticism of the Queensland and Australian governments. It is not consistent with the content or spirit of OPCAT and significantly narrows the range of information the Subcommittee can access with the effect of limiting the effectiveness of its visits and capacity to identify opportunities to strengthen protections for people deprived of their liberty.

Accordingly, QAI objects to the inclusion of Clause 14 and respectfully requests the Committee recommend this Clause be removed.

Clause 15 – Subcommittee may retain, copy, or take notes of information

QAI has similar concerns about the operation of Clause 15 and its obstructive effect on the Subcommittee's ability to perform its functions. Clause 15(2) provides that the Subcommittee may retain, copy, or include in any notes taken identifying information about a detainee in a place of detention *only* if the detainee or the detainee's guardian consents. There are numerous difficulties with this Clause. It seemingly takes a simplistic, and potentially misguided and misunderstood approach to the issues of consent and capacity and fails to acknowledge the complex decision-support needs of many people deprived of their liberty in places of detention.

If the Subcommittee is to write reliable and accurate reports about its inspections under OPCAT, especially where it may be raising concerns about individuals who are being subjected to inappropriate treatment and conditions, it is feasible that it will need to retain identifying information, at least for a limited time, in order to adequately complete its

reporting functions. QAI notes that no such equivalent restriction is included in OPCAT, which instead provides limitations on the Subcommittee's ability to *publish* identifying information.¹²

Clause 15 is silent on the issue as to who would make the decision under Clause 15(2)(b) that a detainee does not have the capacity to consent to the Subcommittee retaining their identifying information, creating significant uncertainty. It could also be interpreted as meaning detainees will need to be individually assessed as to whether they have the capacity to consent to the Subcommittee retaining their identifying information. This then raises the question as to who will complete this assessment. It would be highly inappropriate and a conflict of interest if professionals employed by the place of detention are responsible for assessing and/or deciding whether a detainee has capacity to consent to the Subcommittee retaining their identifying information.

There are complex legal considerations in terms of whether a person has capacity. There are also different tests for capacity in relation to criminal responsibility, capacity under the *Mental Health Act 2016* (Qld) and a person's civil legal capacity for personal and financial decision-making under the *Guardianship and Administration Act 2000* (Qld), the latter of which relates to the appointment of guardians for adults. Capacity is also time and decision specific, meaning that a person's capacity can fluctuate from time to time, and they may have capacity for one type of decision but not have capacity for another. Accordingly, the fact that a person is detained under the *Mental Health Act 2016* (Qld), for example, does not mean that they will be unable to consent to the Subcommittee retaining their identifying information. Acknowledging the nuances of capacity, the *Guardianship and Administration Act 2000* (Qld) allows for the appointment of a guardian for "a personal matter",¹³ which is defined by the Act to include individual "matters".¹⁴ For example, the Act provides that a "personal matter" includes "day-to-day issues", "who may have access visits, or other contact with, the adult", and "a legal matter not relating to the adult's financial or property matter".¹⁵ It is difficult to envision the type of "personal matter" this type of consent would be classified as and the Clause seemingly requires the person to have a guardian appointed for that particular "personal matter" in place.

The drafting of Clause 15, and the Bill more generally, also overlooks the need to ensure people who are detained have access to the support they may require to exercise their capacity to consent on an equal basis with others.¹⁶ In other words, detainees must be afforded their right to supported decision-making under Article 12 of the Convention of the Rights of Persons with Disabilities (CRPD) and Section 15 of the *Human Right Act 2019* (Qld) which provides for the right to equality before the law.¹⁷ Provisions for supported decision-making would allow detainees to access the appropriate support necessary to facilitate their consenting to engagement with the Subcommittee's visit, including whether to participate in an interview, and remove any requirement of consent from a guardian.

Nevertheless, there is likely to be many people in places of detention in Queensland who may have impaired decision-making capacity, at least to some degree, that could potentially impact their capacity to consent for the purposes of Clause 15. People's capacity can also deteriorate as a direct result of their detention. QAI recalls the case of a detainee in an authorised mental health service who was subjected to an eight-month regime of seclusion and twice-weekly electroconvulsive therapy (ECT).¹⁸ The detrimental impact of ECT on a person's cognitive function is well recognised, with the New South Wales ECT practice guidelines noting that continued ECT has been demonstrated to cause deficits in learning and frontal function.¹⁹ To use a detainee's impaired capacity as a reason to potentially prevent the Subcommittee retaining and using the detainee's identifying information for the purpose of fulfilling its mandate is therefore inappropriate, particularly if the very treatment which may have contributed to the detainee's impaired capacity falls within the purview of the Subcommittee's mandate. In other words, is potentially a form of torture, and other cruel, inhuman, or degrading treatment or punishment.

Further, what will happen if a detainee is deemed not to have capacity to consent to the Subcommittee retaining their information, and the detainee does not have a legal guardian appointed? Only a small proportion of people with impaired capacity who are held in places of detention in Queensland may have a guardian appointed by the

¹² Optional Protocol to the Convention Against Torture, Article 16

¹³ *Guardianship and Administration Act 2000* (Qld), s 12(1)

¹⁴ *Guardianship and Administration Act 2000* (Qld), Schedule 2, Part 2

¹⁵ *Guardianship and Administration Act 2000* (Qld), Schedule 2, Part 2

¹⁶ Convention on the Rights of Persons with Disabilities, Article 12

¹⁷ *Human Rights Act 2019* (Qld), section 15

¹⁸ Public Advocate (Queensland), 2018, Annual Report 2017-18, pp i-ii.

¹⁹ *Ibid*

Queensland Civil and Administrative Tribunal (QCAT) or a valid Enduring Power of Attorney. Will the outcome of an assessment that finds a detainee does not have the requisite capacity nor a guardian set in motion an application to QCAT for the appointment of a guardian? If so, this is likely to create practical barriers to the Subcommittee being able to perform its function while also significantly impacting the person's decision-making autonomy and human rights. If not, the Subcommittee will potentially be denied the opportunity to use relevant identifying information in a way that best supports the fulfilment of their mandate.

Accessing personal information is an important aspect of the Subcommittee's role and it would frustrate the Subcommittee's function if it could not access or fully utilise information about some detainees owing to their impaired capacity and vulnerability. People who are detained are some of the most vulnerable people in Queensland and their treatment behind closed doors must be subject to the upmost scrutiny. It is also not unusual for monitoring and investigative bodies to access identifying information in this way. For example, the case of the detainee who was subject to eight months of seclusion and twice-weekly ECT was reported by the Public Advocate who accessed the individual's information under a similar mandate. Without such unfettered access, the disturbing treatment of the detainee would not have been made public.

Accordingly, QAI respectfully requests the Committee recommend removal of this provision and instead, consider a provision that requires the Subcommittee treat all identifying information confidentially and protect it from further disclosure, with a requirement to return or destroy the material within a specified period after the completion of its report. Questions of consent should instead be raised in relation to the Subcommittee's *publication* of identifying information, rather than their confidential access to, and recording of, such information. This would be in keeping with the contents of OPCAT which contains reference only to the publication of identifying information.²⁰

Clause 16 – Subcommittee may interview any person

QAI has similar concerns with the operation of Clause 16 which provides that the Subcommittee cannot interview a person unless the person consents to the interview, or if the person is unable to consent, the person's guardian consents to the interview.

This Clause is arguably redundant, as the Subcommittee is extremely unlikely to carry out an interview with a detainee who does not consent to the interview, or rather, is unwilling to participate in the interview. The reference to a guardian consenting "if the person is unable to consent" also raises questions about decision-making capacity. Regardless of whether the detainee has impaired decision-making capacity, no interview should occur without the individual's express consent. Similarly, assessments about decision-making capacity should not deny a detainee the opportunity and fundamental right to be interviewed by the Subcommittee. A person who may be considered to not have capacity to consent may still be willing to participate in an interview, even if their guardian declines to consent for this to occur. Further, a person whose guardian consents to them being interviewed, may not wish to participate. It is concerning that this provision has been drafted in such a way that detainees who are deemed unable to provide consent must seek permission from a guardian in order to participate in an interview with the Subcommittee, particularly in light of the fact that the interview relates to a fundamental human rights issue and only the individual concerned should be able to decide whether they are willing to share their experiences.

It also raises the possibility that a detainee's legal capacity to consent will be inappropriately examined. If this occurs, as with Clause 15, whose assessment of the detainee's capacity will be used and what will happen if the detainee does not have a guardian appointed? While a person may lack capacity to consent to some decisions, they may still have the capacity to speak about their treatment to the Subcommittee and should be supported to do so to the greatest extent possible.

QAI respectfully suggests the removal of, or significant amendment to, Clause 16 in order to address these issues. There should also be provision in the Bill for detainees to access the support and information they require in order to exercise their legal capacity and to make or participate in decision-making regarding their engagement with the Subcommittee on an equal basis with others. Furthermore, QAI endorses Prisoners' Legal Service's position that the right contained

²⁰ Optional Protocol to the Convention Against Torture, Article 16

within Clause 17 for a person being interviewed to request a support person is insufficient and inappropriately places the onus on a detainee who may have limited capacity to seek support.

Conclusion

QAI thanks the Legal Affairs and Safety Committee for the opportunity to contribute to this inquiry. We are happy to provide further information or clarification of any of the matters raised in this submission upon request.

QAI would also like to reiterate the six recommendations for effective implementation of OPCAT in Queensland that were presented to the Attorney-General in a letter from civil society in December 2022. A copy of that letter is included with this submission.

12th December 2022

The Hon. Shannon Fentiman MP
Attorney-General & Minister for Justice
1 William Street
BRISBANE QLD 4000

Delivered via email: attorney@ministerial.qld.gov.au

Dear Attorney-General,

Civil Society recommendations for an effective implementation of OPCAT in Queensland

On 1st December 2022, The Public Advocate, the Queensland Human Rights Commission and Queensland Advocacy for Inclusion (QAI) co-hosted the Queensland OPCAT Forum at the Queensland Multicultural Centre. This event brought together key stakeholders from government and civil society across Queensland to discuss implementation of the Optional Protocol to the Convention Against Torture (OPCAT).

The forum heard powerful presentations from people with lived experience of detention and included a Civil Society Forum facilitated by QAI, the Aboriginal and Torres Strait Islander Legal Service, Prisoners Legal Service and Sisters Inside. During the Civil Society Forum, six recommendations for an effective implementation of OPCAT in Queensland were presented.

Several other Civil Society organisations have also endorsed these six recommendations. A full list of signatory organisations is included at the end of this letter.

The six recommendations are provided to you here for your attention:

1. Coverage of OPCAT to all places of detention in Queensland

A NPM needs to ensure all places of detention in Queensland are monitored. Currently there is only coverage of prisons, watch houses and youth detention. OPCAT must extend beyond traditional sites of detention to include any place where a deprivation of liberty occurs. This includes mental health wards, aged care facilities, and disability specific institutions, such as the Forensic Disability Service and disability group homes.

2. Create a standalone independent statutory entity

A well-funded oversight body is needed to collate and monitor the recommendations and activities of the Inspectors of various places of

detention. This body should be a separate stand-alone body, such as in the UK. Alternatively, the Queensland Human Rights Commission (QHRC) is already responsible for accepting complaints of torture, cruel, inhumane and degrading treatment under the *Human Rights Act (2019)* Qld and understands the systemic issues impacting the human rights of people in places of detention, making them an appropriate oversight body for this function.

3. Formal collaborations with Civil Society Organisations (CSOs)

CSOs can help strengthen the mandate of the NPM by exchanging information on best practice inspection processes and working together by forming formal coalitions on monitoring activities. We call for the formal integration of CSOs into a Queensland NPM as recommended by the Subcommittee on Prevention of Torture. This integration should include funding to participate in OPCAT monitoring and to prepare a shadow report to parliament.

4. Formal collaborations with people with lived experience of detention in monitoring activities

People who have personal experience in sites of detention provide invaluable insight as to where torture can occur in these settings. People in detention also find it easier to communicate with and express concerns to 'Experts by Experience.' We call for the establishment of transparent legislated and policy pathways for consultation with, and involvement of people with lived experience of detention in monitoring activities, including clear quantitative targets for engagement and a paid position for a prisoner to be a monitoring advocate.

5. Clear communications to people in detention

To make OPCAT real, people in detention need accessible communication to understand their human rights and to realise them via appropriate complaints mechanisms. Culturally appropriate and disability informed dialogue with people in detention must be a priority of the NPM, which must be culturally and disability inclusive from the outset.

6. Improvements to *Inspector of Detention Services Act 2022* (Qld)

- Increase the frequency of visits to places of detention in order to ensure adequate oversight is a legislative rather than political commitment.
- When reports are made with concerns of torture or ill-treatment of a detainee, that detainees are provided with legal representation and a right of reply to submissions made by the responsible person before the Inspector decides whether further action is required.
- Expand the role of the Inspector to include:
 - The power to investigate critical incidents;

- The power to submit proposals and observations on existing and draft legislation, and undertake public advocacy, awareness raising and capacity building;
- Access to information relating to proceedings of Cabinet or a committee of Cabinet.
- Publish a framework about how the Inspector will interact with existing oversight agencies, including the Official Visitor Regime and the QHRC.
- Consult with CSOs about the regulation which determines which areas of the detention facility will be inspected. This will ensure that all places susceptible to abuse receive appropriate oversight.

Yours faithfully,

Aboriginal and Torres Strait Islander Legal Service
Aged and Disability Advocacy Australia
Caxton Legal Centre
First Peoples Disability Network (FPDN)
Mackay Advocacy
Prisoners Legal Service
QCOSS
Queensland Advocacy for Inclusion
Sisters Inside
Speaking Up For You
Steven Caruana, Australia OPCAT Network
Uniting Church of Australia Queensland Synod





The Uniting Church in Australia
QUEENSLAND SYNOD