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

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Submission to the Legal Affairs and Safety Committee regarding the *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022*

Queensland Youth Policy Collective

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Summary

The Queensland Youth Policy Collective (QYPC) applauds the aims of the *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022* (OPCAT Bill) to legislate mechanisms for compliance with the *Optional Protocol to the Convention Against Torture* (OPCAT). The OPCAT Bill is in response to the appalling failure of Queensland in October 2022, in which New South Wales and Queensland governments did not cooperate with the United Nations' anti-torture body, and so it suspended its tour of Australian prisons. The Subcommittee on Prevention of Torture (OPCAT Committee) said it encountered 'obstructions' in investigating Queensland and New South Wales prisons in its mandate under the OPCAT, to which Australia is a party. Australia now joins Rwanda, Ukraine & Azerbeijan as the only countries which have not cooperated with OPCAT inspectors. The QYPC condemns that situation as shameful for Queensland's international reputation. It is vital that Queensland implements the OPCAT Bill so that Australia can comply with its obligations under OPCAT to prevent inhumane treatment in detention.

The Queensland Youth Policy Collective makes the following points in this submission:

1. We strongly support the aims of the OPCAT Bill, as Queensland's appalling human rights records in detention centres demonstrate the urgent need for the Queensland Government to give an independent body, such as the UN Subcommittee on the Prevention of Torture, unrestricted access to places of detention to ensure such atrocities do not continue.
2. We recommend that the Legal Affairs and Safety Committee (LAS Committee) recommend an amendment to the maximum penalty for the offence of taking a reprisal against persons who share information with the OPCAT Subcommittee to provide vulnerable detainees with increased protection against harm.
3. To ensure that similar international embarrassments do not happen again, the QYPC has reviewed the seven other international human rights instruments which Australia is a party to and made recommendations as to whether Queensland needs to legislate with respect to those obligations. Our review demonstrates that the OPCAT Bill is a piecemeal response to a systemic issue, and further legislation is required to ensure Queensland does not prevent Australia from abiding by its international human rights investigation obligations.

Support for the aims of the OPCAT Bill

Queensland urgently requires review by an international, impartial body such as the OPCAT Subcommittee.

Between September 2016 and January 2018, Human Rights Watch interviewed people with disabilities, prison-related and government professionals, mental health experts, academics, lawyers and civil society representatives regarding the treatment of people with disabilities in Australia's prisons.[1] It documented 32 cases of sexual and 41 cases of physical violence against prisoners with disabilities that prisoners said were perpetrated by fellow prisoners or prison staff.[2] In all prisons visited in Queensland, Human Rights Watch found that people with disabilities are repeatedly bullied and harassed by inmates or staff due to their disability.[3]

Furthermore, in 2016, Amnesty International obtained over 1000 pages of government documents detailing abuse and mistreatment at the Cleveland Youth Detention Centre (CYDC) in Townsville and the Brisbane Youth Detention Centre (BYDC).[4] For example, in 2010 at CYDC there were four incidents where children's wrists were fractured as a result of control and restraint techniques.[5] Three years later, a 17-year-old boy identified as being a high suicide risk had his clothing and underwear cut off by staff members and was left naked in a tiny isolation cell for more than an hour.[6]

> Appalling human rights records in Queensland detention centres demonstrate the urgent need for the Queensland Government to allow an independent body such as the UN Subcommittee on the Prevention of Torture unrestricted access to places of detention to ensure such atrocities do not continue.

The QYPC supports the aims of the OPCAT Bill as cruel and inhumane detention should always be condemned. The purpose of corrective services in Queensland is 'community safety and crime prevention through the humane containment, supervision and rehabilitation of offenders'.[7] The detention of an offender can have one of two possible objectives: the punishment (and punishment alone) of the offender; or to rehabilitate the offender where they can safely re-enter the larger community. It has been shown that there have been instances where Queensland does not conform to the 'humane containment …. and rehabilitation of offenders'.[8]

This is against human rights standards, and cruel detainment has been shown to lead to reoffending.[9] Jason Payne and Don Weatherburn's research evidences that, when juvenile offenders are exposed to harsher detainment practices, this leads to 'drug and alcohol use, poor

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1 "*I Needed Help, Instead I was Punished": Abuse and Neglect of Prisoners with Disabilities in Australia* (Report, February 2018) 2.

2 Ibid 29.

3 Ibid 37.

4 'Australia: Official documents reveal serious incidents of abuse in Queensland juvenile detention centres' *Amnesty International* (Web Page, 18 August 2016) < https://www.amnesty.org/en/latest/news/2016/08/australia-official-documents-reveal-serious-incidents-of-abuse-in-queensland-juvenile-detention-centres/>.

5 Ibid.

6 Ibid.

7 *Corrective Services Act 2006* (Qld) s 3(1).

8 "*I Needed Help, Instead I was Punished": Abuse and Neglect of Prisoners with Disabilities in Australia* (Report, February 2018) 2.

9 Recidivism: how can we keep prisoners from returning', *The Feed* (SBS, 2015)

mental and physical health, low levels of education and exposure to violence'[10] By comparison, since the early 1990s, the Norwegian prison system has been reformed, placing a primary emphasis on rehabilitation and respect for the human dignity of both staff and prisoners.[11] The prisons are designed to foster a sense of normality and community for the inmates, assisting their transition back to life on the outside upon their release. As a result, recidivism rates have fallen to just 20% over two years, and approximately 25% over five years.[12]

The QYPC supports the aims of the OPCAT Bill because cruel and inhumane detention should always be condemned: such treatment is contrary to human rights and contrary to an effective criminal justice system.

Punishments for reprisals are inadequate under the current Bill

The Explanatory Notes to the Bill state that that the OPCAT Bill achieves its policy objectives by establishing a standalone legislative framework to facilitate Subcommittee visits to places of detention in Queensland by *inter alia* 'protecting persons who provide information to, or assist the Subcommittee, from reprisals'.[13]

Three clauses of the Bill relate to this protection. Clause 19 establishes the protection of any person who has provided or may provide information or other assistance to the Subcommittee from reprisals. Clause 20 makes it an offence to take a reprisal and clause 21 protects any persons who honestly and on reasonable grounds gives information or makes disclosures to the Subcommittee in support of its purpose from any civil or criminal liability. This applies despite any other duties (for example of secrecy or confidentiality).

According to the Explanatory Notes, these clauses are intended to facilitate full and frank sharing of information, particularly by detained persons, with the subcommittee and to fulfill a key principle of OPCAT.

Queensland Youth Policy Collective supports the intent of the protection clauses against reprisals (clause 19, 20, 21). However, QYPC is concerned about the effectiveness of penalties for reprisals against young detainees who share information.

Young detainees are some of the most disadvantaged and vulnerable people in Queensland. They are likely to identify as Aboriginal or Torres Strait Islander, have received child protection services after experiencing trauma, abuse, harm, neglect or parental death or incapacitation and suffer from a mental or physical impairment. Through its membership to the United Nations Convention on the Rights of the Child, State Parties recognise that children are

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10 Jason Payne and Don Weatherburn, '*Juvenile reoffending: A ten- year retrospective cohort analysis.* (2015) 50(4) *Australian Journal of Social Issues'.* 349

11 Janelle Guthrie, 'Looking to Norway for Inspiration on Reducing the Use of Solitary Confinement' *Vera Institute of Justice* (Web Page, 11 March 2020) <https://www.vera.org/news/addressing-the-overuse-of-segregation-in-u-s-prisons-and-jails/looking-to-norway-for-inspiration-on-reducing-the-use-of-solitary-confinement>; 'How Norway turns criminals into good neighbours' BBC News (Web Page, 7 July 2019) < https://www.bbc.com/news/stories-48885846>.

12 'How Norway turns criminals into good neighbours' BBC News (Web Page, 7 July 2019).

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

entitled to special safeguards through appropriate legal protection,[14] additional to those received by adults. The Convention Committee has stated that this recognition imposes heightened obligations on States to protect children from foreseeable harm.[15] The OPCAT Bill could do more to provide this.

Children detainees are, tragically, the most likely to have information to share with the OPCAT Subcommittee. The Australian National Preventative Mechanism appointed or nominated by the Commonwealth, ACT, Northern Territory, South Australian and Western Australian Governments stated in its November 2022 joint statement that it is 'deeply concerned at the treatment of children and young people in youth justice centres' because of reports of incidents of 'children being subjected to extended periods in solitary confinement or being confined to cells 23 hours a day, and incidents of physical and sexual abuse'.[16] The members of the NPM called on Australian governments to 'protect the rights of children and young people who are deprived of their liberty, and ensure their safety and dignity, consistent with the international human rights standards Australia has committed to uphold'.

The maximum penalty for the offence in clause 20 is 100 penalty units. While this aligns with the reprisal offences in the *Inspector of Detention Services Act 2022* (Qld) and *Ombudsman Act 2001* (Qld), it fails to account for the greater vulnerability of young detainees and is weaker than penalties under the *Public Interest Disclosure Act 2010* (Qld) and the cognate provisions in the corresponding legislation of other states.

The maximum penalty for taking a reprisal is less than that under the *Public Interest Disclosure Act 2010* (Qld) and corresponding Acts in other states. The *Public Interest Disclosure Act 2010* (Qld) not only imposes higher maximum monetary penalties, but also make the offence indictable with a term of imprisonment, confers a liability to pay tortious damages *and* includes a provision making a public sector entity severally vicariously liable.[17]

The cognate provisions in the corresponding acts in other states all impose higher maximum penalties:

- ACT Act, passed in 2018, imposes a maximum penalty of 110 penalty units, or two years imprisonment or both;[18]
- Victorian Act, passed in 2022, imposes a maximum penalty of 120 penalty units or one year imprisonment;[19] and
- Tasmanian Act, passed in 2021, imposes a maximum of 240 penalty units or two years of imprisonment.[20]

These are far more stringent penalties that could be applied to deter offending. Increasing the maximum penalty for the offence would increase the deterrent effect of the provision. That

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14 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), Preamble.

15 Committee on the Rights of the Child, *Views: Communication No. 107/2019*, 88th Sess, UN Doc CRC/C/88/D/107/2019 (22 September 2021), [9.6].

16 https://www.ombudsman.gov.au/__data/assets/pdf_file/0025/117745/NPM-statement-detention-of-children-and-young-people.pdf

17 *Public Interest Disclosure Act 2010* (Qld) ss 40-43.

18 *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018* (ACT) s 16.

19 *Monitoring of Places of Detention by the United Nations Subcommittee on Prevention of Torture (OPCAT) Act 2022* (Vic) s 15.

20 *OPCAT Implementation Act 2021* (Tas) s 36.

effect would be reinforced by the inclusion of a possible term of imprisonment and the possibility of vicarious liability of a public entity.

> The maximum penalty for the offence of taking a reprisal against persons who share information with the OPCAT Subcommittee should be increased to provide vulnerable detainees with increased protection against harm.

Does Queensland need to legislate for Australia to be compliant with other international human rights instruments?

Australia is a party to the seven core international human rights treaties: the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD).

This section reviews those instruments and makes recommendations as to whether Queensland needs to legislate mechanisms for compliance with international UN investigators.

> Our review demonstrates that the OPCAT Bill is a piecemeal response to a systemic issue, and further legislation is required to ensure Queensland does not prevent Australia from abiding by its international human rights investigation obligations.

Special Procedures of the Human Rights Council

The special procedures of the Human Rights Council are independent human rights experts with mandates to report and advise on human rights from either a thematic or country-specific perspective. The special procedures are either an individual (a Special Rapporteur or Independent Expert) or a Working Group appointed by the Human Rights Council.

The Special Procedures are entitled to undertake country visits at the invitation of states. Australia extended a standing invitation to thematic special procedures on 7 August 2008, meaning we are prepared to receive a visit from any thematic mandate-holder at any time.

Australia has been visited by 12 different special procedures, with the Special Rapporteurs on racism and Indigenous Peoples visiting twice each. The most recent visit was by the Working Group on people of African Descent between 12 December 2022 and 20 December 2022.

At the conclusion of their visit, special procedures' mandate-holders engage in dialogue with the State on their findings and recommendations and present a report to the Human Rights Council.

As of October 2022, there are 41 thematic special procedures. The most relevant thematic procedures that may require access to penitentiaries, prisons, police stations, immigration detention centres, military prisons, detention centres for juveniles and psychiatric hospitals are, in our view, the following:

- Working Group on arbitrary detention
- Special Rapporteur on the rights of persons with disabilities
- Special Rapporteur on the rights of Indigenous Peoples
- Special Rapporteur on minority issues

- Special Rapporteur on racism
- Special rapporteur on torture
- Special Rapporteur on violence against women and girls
- Working Group on discrimination against women and girls

Generally, the Revised Terms of Reference for country visits by Special Procedures mandate holders of the United Nations Human Rights Council provides that during country visits, special procedures mandate holders, as well as United Nations staff accompanying them, should be given:[21]

- Freedom of movement in any part of the country, including facilitation of transport, particularly to restricted areas;
- Freedom of inquiry, in particular as regards, *inter alia*:
    - Confidential and unsupervised contact with witnesses and other private persons, including persons deprived of their liberty, considered necessary to fulfil the mandate of the mandate holder; and
    - Access to all prisons, detention centres and places of interrogation as considered necessary by the mandate holder to fulfil his or her mandate.

In addition, a number of the special procedures mandate holders have specific methods of work that provide for country visits. Without legislative or other intervention, the Human Rights Council's country visits may encounter obstructions as the OPCAT Subcommittee experienced in Queensland in October 2022. The below section examines the most relevant thematic procedures which may seek to enter hospitals and places of detention.

Working Group on arbitrary detention

The methods of work of the Working Group on Arbitrary Detention[22] provide that the working group may conduct country visits on official missions. One of the requirements is that the relevant government must assure the Working Group that, during the visit, the Working Group will be able to visit penitentiaries, prisons, police stations, immigration detention centres, military prisons, detention centres for juveniles and psychiatric hospitals. It also notes that during the visit, the Working Group shall respect the legislation of the host country.

We note that Australia was last visited by the Working Group in 2002.

Given the similarity between this working group's work and the OPCAT Subcommittee's work, it is necessary to implement legislation to ensure that the investigations team does not encounter 'obstructions' by Queensland prisons as the OPCAT Subcommittee experienced in 2022. As Australia has a standing invitation to the Committee, Queensland needs to create measures for compliance for when the working group on arbitrary detention visits Australia again.

Special Rapporteur on the rights of persons with disabilities

Resolution 44/10 of the Human Rights Council[23] provides that States should give serious consideration to responding favourably to the Special Rapporteur's requests to visit their countries. These visits are described as being an important component of the Special Rapporteur's mandates, as they allow them to obtain first-hand information on the rights of persons with disabilities, to report on the findings and to propose recommendations to improve situations identified as matters of concern.

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21 Document adopted at the 23rd Annual Meeting of Special Procedures on 6 to 10 June 2016.

22 A/HRC/36/38.

23 A/HRC/44/10.

For example, the Special Rapporteur visited Canada in April 2019. The report produced[24] specifically commented on the legislative allowance for the involuntary hospitalisation and treatment of persons with severe mental illness, and that persons can be involuntarily admitted and treated without consent.

In the event that the Special Rapporteur on the rights of persons with disabilities requests to visit Australia, and Australia accedes that request, Queensland will need to legislate to ensure that the Rapporteur can enter hospitals and care homes without obstructions.

Special Rapporteur on the rights of Indigenous Peoples

Resolution 51/16 of the Human Rights Council[25] strongly encourages all Governments to give serious consideration to responding favourably to the requests made by the Special Rapporteur to visit their countries to enable the Special Rapporteur to fulfil their mandate effectively.

In 2017, the Special Rapporteur visited Australia.[26] In her report, she noted that she visited two detention facilities, including the Cleveland Youth Detention Centre in Townsville, and detailed the conditions in that detention centre. Further, the Special Rapporteur noted the extraordinarily high rate of incarceration of Aboriginal and Torres Strait Islander people, and specifically noted the issue of the incarceration of Aboriginal and Torres Strait Islander children.

It appears that in her visit in 2017, the Special Rapporteur did not encounter obstructions. However, if Queensland's prisons practices have changed such that obstructions are likely to occur in future visits, as occurred with the OPCAT Subcommittee in 2022, legislation or a change in practice will be required so that Australia can abide by its obligations as a member of the Human Rights Council.

Special Rapporteur on contemporary forms of racism

The mandate of the Special Rapporteur includes undertaking fact finding country visits.

In November and December of 2016, the Special Rapporteur visited Australia. In that report, he specifically noted the overrepresentation of Aboriginal and Torres Strait Islanders in the prison population, and the policing of Indigenous peoples being too punitive.

Queensland prisons may be inspected in future investigations by the rapporteur and so legislation or a change in practice may be required to facilitate those investigations.

Special Rapporteur on torture

The methods of work of the Special Rapporteur on torture[27] include carrying out visits *in situ* with the consent of the Government concerned.[28] It notes that the Special Rapporteur carries out visits on invitation, but also takes the initiative of approaching Governments with a view to carrying out visits to countries on which he has received information indicating the existence of a significant incidence of torture.

For example, in November 2019, the then-Special Rapporteur conducted a visit to the Maldives and visited ten "facilities of deprivation of liberty", where the Special Rapporteur specifically noted that they were able to have meaningful meetings with representatives of the management, security and medical staff, and were able to confidentially interview male, female and juvenile inmates and residents of their choosing.[29]

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24 A/HRC/43/41/Add.5.
25 A/HRC/RES/51/16.
26 A/HRC/36/46/Add.2.
27 Annex to E/CN.4/1997/7/
28 A/HRC/RES/43/20.
29 A/HRC/46/26/Add.1.

Queensland prisons may be inspected in future investigations by the rapporteur and so legislation or a change in practice may be required to facilitate those investigations.

Special Rapporteur on violence against women and girls

Resolution 50/7 of the Human Rights Council calls upon States to consider favourably the Special Rapporteur's requests for visits and implementing recommendations.[30] In a report on her visit to Canada in 2018, the Special Rapporteur noted her visits to two women's correctional facilities, particularly noting the value of interviewing women inmate about the issues of violence against women in detention, and the incarceration of women with mental health conditions.[31]

Queensland prisons may be inspected in future investigations by the rapporteur and so legislation or a change in practice may be required to facilitate those investigations.

Working Group on discrimination against women and girls

The Working Group conducts country visits to enable it to fulfil its mandate effectively. The Working Group regularly visits detention centres during these visits. For example, during its February and March 2020 visit to Bulgaria, the Working Group visited a women's prison.[32]

Queensland prisons may be inspected in future investigations by the rapporteur and so legislation or a change in practice may be required to facilitate those investigations.

Convention on the Elimination of All Forms of Discrimination Against Women

Australia is a party to the CEDAW. Additionally, Australia acceded to the Optional Protocol to the CEDAW on 23 June 2003. The Optional Protocol establishes a complaints and inquiry mechanism for violations of the CEDAW. It allows the Committee on the Elimination of Discrimination against Women to hear complaints, or inquire into grave and systematic violations of the CEDAW.

Article 8(2) of the Optional Protocol provides that if the Committee receives reliable information indicating grave or systematic violations by a State party of the rights set forth in the Convention, after inviting the State Party to submit observations, the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the State Party, the inquiry may include a visit to its territory. This may require state-based legislation to facilitate a visit from the Committee to Queensland.

International Covenant on Civil and Political Rights

Australia is a party to the ICCPR and its two Optional Protocols.

The United Nations Human Rights Committee is the body of independent experts that monitors implementation of the ICCPR by State parties. On our review, there does not appear to be a provision for the Committee to visit a State party.

International Covenant on Economic, Social and Cultural Rights

Australia is a party to the ICESCR. Australia has not, however, signed or ratified the Optional Protocol to the ICESCR, which establishes the ability of the Committee on Economic, Social and Cultural Rights to make inquiries into communications received alleging a violation of any of the economic, social and cultural rights contained in the ICESCR.

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30 A/HRC/RES/50/7.

31 A/HRC/41/42/Add.1.

32 A/HRC/47/38/Add/1.

Article 11(3) of the Optional Protocol provides that the inquiry procedure may include a visit to a State Party's territory, where it is warranted and with their consent.[33]
As Australia has not ratified the Optional Protocol, the Committee does not have jurisdiction to hear a complaint originating in Australia. However, if this were to change and an inquiry were to be made, the Committee on Economic, Social and Cultural Rights may request to make a visit. In that instance, State based legislation would become necessary when Australia ratifies the Optional Protocol.

International Convention on the Elimination of All Forms of Racial Discrimination

Australia ratified the ICERD in 1975. The Committee on the Elimination of Racial Discrimination monitors implementation of the ICERD. On our review, there does not appear to be a provision for the Committee to visit a State party.

Convention on the Rights of the Child

The third Optional Protocol to the CRC establishes a mechanism for children to make individual complaints to the UN Committee on the Rights of the Child where domestic remedies have been exhausted.
Article 13(3) of the third Optional Protocol provides that, where the Committee receives reliable information indicating grave or systematic violations by a State party of rights set forth in the CRC or its first two Optional Protocols (which Australia has ratified), the inquiry may include, where warranted and with the consent of the State party, a visit to its territory.
We note that Australia has not agreed to this Optional Protocol so this is not a present concern. However, if Australia were to ratify the third Optional Protocol, Queensland would need to legislate state-based legislation to facilitate the inquiry process under the CRC complaints process.

Convention on the Rights of Persons with Disabilities

Article 6(1) of the Optional Protocol to the CRPD, which Australia acceded to on 21 August 2009, provides that if the Committee on the Rights of Persons with Disabilities receives reliable information indicating grave or systematic violations by a State party of rights set forth in the Convention, the Committee shall invite that State Party to cooperate in the examination of the information and to this end submit observations with regard to the information concerned.
Article 6(2) provides that taking into account any observations that may have been submitted by the State Party concerned as well as any other reliable information available to it, the CRPD Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted, and with the consent of the State Party, the enquiry may include a visit to its territory.
Inquiries have occurred pursuant to article 6 in other countries. For example, in 2017, the CRPD Committee received reliable information alleging grave and systematic violations of the rights of persons with disabilities in Hungary.[34] As a result, the Committee decided to conduct an inquiry. Hungary accepted the Committee's request to conduct a confidential visit.
In the instance in which Australia accepts the Committee's request to conduct a visit, Queensland should consider how it can facilitate a potential future visit as required by the Optional Protocol to the CRPD, such as by legislating to allow such a committee to attend hospitals, care centres and prisons without obstruction.

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33 A/RES/63/117.
34 CRPD/C/HUN/IR/1.