



11 January 2023

Committee Secretary  
Legal Affairs and Safety Committee  
Parliament House  
George Street  
BRISBANE QLD 4000  
Via email: [lasc@parliament.qld.gov.au](mailto:lasc@parliament.qld.gov.au)

Dear Committee,

**SUBMISSION ON MONITORING OF PLACES OF DETENTION (OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE) BILL 2022**

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to provide this submission in relation to the Committee's current Inquiry into the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022 (the **Bill**).

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practises and protects universally accepted standards of human rights throughout Australia and overseas.

In October 2022, ALHR, along with more than 95 other key signatories, expressed profound concern in an open letter when the United Nations Subcommittee on Prevention of Torture (the **Subcommittee**) was forced to suspend its visit to Australia, as a result of obstruction, when attempting to carry out its mandate. In Queensland, this opposition was said to be on the basis of state laws preventing access to mental health in-patient settings. ALHR therefore welcomes the Attorney-General's and Minister for Justice's introduction of the Bill to allow the Subcommittee access to places of detention, to fulfill its mandate under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment of Punishment (the **OPCAT**).



The OPCAT is designed to protect the fundamental human rights of people detained in places including, but not limited to, prisons, juvenile detention centres, immigration detention centres, hospitals, mental health facilities, aged care facilities and facilities for people with disability. Together, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the **CAT**) and the OPACT 'create a system of accountability' and 'provide the basic structure of this accountability system'.<sup>1</sup>

Rather than establishing a complaint mechanism for individuals who have been deprived of their liberty and are subject to torture or other forms of ill treatment, the OPCAT seeks to embody a 'preventative approach'<sup>2</sup> by identifying and addressing concerns at an early stage.<sup>3</sup> The way in which the OPCAT achieves this is by providing the Subcommittee with almost unrestricted authority to perform its functions under the OPCAT to inspect and monitor places of detention. Consequently, in order to meet obligations under the OPCAT, any limitations imposed by the Bill on the Subcommittee's powers within it should be minimal, human rights-focused, and consistent with the Subcommittee's authority contained in the OPCAT.

## **1. Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022**

**1.1.** Having regard to standards set in similar legislation in other jurisdictions,<sup>4</sup> and commentary on the OPCAT, ALHR believes the Bill falls short of meeting the OPCAT's aims, namely to promote better adherence to the substantive human rights obligations contained in the CAT.

**1.2.** While ALHR believes the introduction of the Bill is a much-needed move towards OPCAT compliance, a number of the Bill's clauses raise some concern; these include:

- restrictive definition of 'places of detention';
- objection and restriction processes; and
- form of consent required to participate in an interview with the Subcommittee.

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<sup>1</sup> Australian Human Rights Commission, *Implementing OPCAT in Australia* (29 June 2020) 47 < <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/implementing-opcat-australia-2020> >.

<sup>2</sup> Australian Human Rights Commission, *Implementing OPCAT in Australia* (29 June 2020) 13 < <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/implementing-opcat-australia-2020> >.

<sup>3</sup> Australian Human Rights Commission, *Implementing OPCAT in Australia* (29 June 2020) 13 < <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/implementing-opcat-australia-2020> >.

<sup>4</sup> *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018* (ACT) and *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018* (NT).

## 2. Definition of ‘places of detention’

- 2.1. ALHR’s first concern is the limiting definition of ‘place of detention’ contained within clause 4 of the Bill.
- 2.2. Clause 4 of the Bill provides an exhaustive list of places of detention for the purpose of the Subcommittee’s work within Queensland. The nine areas defined by clause 4 of the Bill to be considered a ‘place of detention’ do not cover all areas anticipated by the OPCAT and appear to be more in line with the Commonwealth Ombudsman’s concept of ‘primary places of detention’.<sup>5</sup> These places of detention provided for in the Bill include youth detention centres, mental health units, and a watch-house, for example.
- 2.3. While the OPCAT does not define the term ‘place of detention’, it offers some guidance on the scope of its application by providing that it applies to:
- ‘any place under [the State Party’s] jurisdiction and control’;
  - ‘where persons are or may be deprived of their liberty’; and
  - ‘either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence’.<sup>6</sup>
- 2.4. The Australian Human Rights Commission (**AHRC**) understands this broad definition to mean the OPCAT applies ‘to any place where an individual cannot leave of their own free will and where that place of detention is linked, either directly or indirectly, to a public authority’.<sup>7</sup> As such, the AHRC considers any setting where a person is unable to leave on their own will, including because of chemical restraint and not just locked settings, are included by this definition.<sup>8</sup> The OPCAT’s ‘preventative approach’ means the most expansive interpretive approach possible should be given to maximise its impact.<sup>9</sup>

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<sup>5</sup> Commonwealth Ombudsman, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)*, Report No. 3 of 2019, 5 < [https://www.ombudsman.gov.au/data/assets/pdf\\_file/0025/106657/Ombudsman-Report-Implementation-of-OPCAT.pdf](https://www.ombudsman.gov.au/data/assets/pdf_file/0025/106657/Ombudsman-Report-Implementation-of-OPCAT.pdf) >.

<sup>6</sup> Article 4(1).

<sup>7</sup> Australian Human Rights Commission, *Implementing OPCAT in Australia* (29 June 2020) 42 < <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/implementing-opcat-australia-2020> >.

<sup>8</sup> Australian Human Rights Commission, *Implementing OPCAT in Australia* (29 June 2020) 42 < <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/implementing-opcat-australia-2020> >.

<sup>9</sup> Australian Human Rights Commission, *Implementing OPCAT in Australia* (29 June 2020) 43 < <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/implementing-opcat-australia-2020> >.

- 2.5. Similar legislation in the Australian Capital Territory (the **ACT**), for example, provides a broader definition of the term ‘place of detention’ to more accurately capture the OPCAT’s purpose. The ACT legislation defines the term ‘place of detention’ to mean ‘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’.<sup>10</sup> An almost identical definition is also found in the Northern Territory Act.<sup>11</sup>
- 2.6. ALHR submits that the definition of ‘places of detention’ contained within the proposed clause 4 of the Bill should be amended to reflect the intended broad scope of application anticipated by article 4(1) of the OPCAT and as provided in other territory legislation. This is critical to the Bill’s credibility.

### 3. Accessing places of detention and information

- 3.1. The further, and related, concerns ALHR holds is the objection and prohibition processes contained in clauses 9 and 10 of the Bill, as well as clause 14, which limits the Subcommittee’s access to certain information. .
- 3.2. Clause 9 of the Bill empowers the responsible Minister for a place of detention to object to the Subcommittee visiting a place of detention on a particular day, or days, if the Minister believes there is an ‘urgent and compelling reason to temporarily prevent’ the Subcommittee’s access for that day or days. Subclause 9(2) of the Bill provides that these ‘urgent and compelling’ grounds include national defence, public safety, natural disaster, and serious disorder in the place of detention. If the responsible Minister objects to a visit on a ground in subclause 9(2), the Minister must give a notice to the Subcommittee and, if notice is given, the responsible Minister and a detaining authority for a place of detention (**detaining authority**) are not required to provide the Subcommittee with access to a place of detention on the day/s stated in the notice.
- 3.3. Clause 10 confers a similar power on a detaining authority. This clause provides that a detaining authority may ‘temporarily prohibit or restrict access to a place or part of the place’ if allowing access:
- would prevent the maintenance of security, good order and management of the place of detention or the health and safety of a person in the place of detention; or
  - may prevent the conduct of essential operations by the detaining authority.

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<sup>10</sup> *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018 (ACT)*, s 7.

<sup>11</sup> *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018 (NT)*, s 4(1).

If any of the grounds mentioned above are satisfied, the detaining authority must make a written record of the reason and date and time the restriction began and its duration and give a copy of this record to the responsible Minister. Any prohibition or restriction must 'only be for the shortest period reasonable in the circumstances'.

- 3.4. Article 14(2) of the OPCAT authorises a State Party to object to the Subcommittee visiting to a particular place of detention, by temporarily suspending the visit, 'only on urgent and compelling grounds'. The Article continues by providing these grounds may be national defence, public safety, natural disaster, or serious disorder in the place of detention (the **Urgent and Compelling Grounds Exemption**). While the Urgent and Compelling Grounds Exemption may be reflected in the responsible Minister's objection process in clause 9 of the Bill, the detaining authority's powers conferred by clause 10 far exceed the 'serious disorder' exemption offered by Article 14(2) of the OPCAT. As such, any power conferred on a detaining authority to 'temporarily prohibit or restrict access' must be in line with the Urgent and Compelling Grounds Exemption and consistent with the responsible Minister's in clause 9 of the Bill.
- 3.5. Further, and as highlighted by the Subcommittee's recent commentary related to State parties' conduct during the COVID-19 pandemic, there are real and significant risks to people deprived of their liberty during events such as those listed in the Urgent and Compelling Grounds Exemption, such as public health events.<sup>12</sup> As such, the Bill should contain contingencies to ensure compliance with the CAT during prolonged periods of Urgent and Compelling Grounds Exemptions that may impact the Subcommittee's ability to safely access a place of detention.
- 3.6. Finally on the issue of accessing places of detention, and to ensure the objection process is not arbitrarily used to avoid OPCAT compliance, the Bill should contain provisions that require the responsible Minister and/or the detaining authority to arrange, as soon as reasonably practicable after day/s stated in the objection and/or prohibition or restriction notice. While this may not be contained within the OPCAT, it will provide a legislative protection to the OPCAT monitoring process in the event of an objection or restriction/prohibition. The Explanatory Notes to the Bill explain that it is intended that any restriction on the Subcommittee's access to a place of detention be temporary and that the Subcommittee may resume 'the visit after circumstances that required the temporary prohibition or restriction have ended'.<sup>13</sup> While it is the stated legislative intention for Subcommittee visits to commence after the temporary restriction has concluded, this intention needs to be grounded in express legislative terms of the Bill to safeguard this

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<sup>12</sup> See CAT/OP/10 - Advice of the Subcommittee on Prevention of Torture to States parties and national preventive mechanisms relating to the coronavirus disease (COVID-19) pandemic (7 April 2020).

<sup>13</sup> Explanatory Notes, Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022, 3.



process and ensure the Subcommittee can visit the place of detention as soon as possible after its original visitation date.

- 3.7. ALHR also holds concerns about the restrictive nature of clause 14 in limiting the Subcommittee's access to 'identifying information' from places of detention unless the Subcommittee visits the place of detention. Noting the brief period in which the Subcommittee has to conduct its visits within Australia, there may be many places the Subcommittee is unable to visit during its time. Having unrestricted access to information will assist the Subcommittee in identifying any issues of concern and/or prioritising its visits. ALHR also echoes the concerns of the AHRC in its submission and also supports for the removal of clause 14 of the Bill.

#### 4. Interviews

- 4.1. The final concern ALHR has with the Bill is clause 16, which relates to the Subcommittee's interview processes.
- 4.2. Clause 16(1) of the Bill provides that the Subcommittee may interview either a person at a place of detention during a visit, as well as any other person the Subcommittee considers may provide relevant information about the detention of a detainee. Much of this clause relates to the person's consent to the interview and their ability to withdraw consent at any time, however, ALHR holds some concerns about the involvement of consent from 'the person's guardian' contained in subclause 16(2)(b), which is not provided for in the OPCAT.
- 4.3. While ALHR acknowledges that an individual's consent to participating in these interview processes is a fundamental requirement, the level of formal consent required by clause 16 of the Bill is not reflected in the OPCAT. For example, article 14(1) of the OPCAT provides that the Subcommittee shall have the 'opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the Subcommittee [...] believes may supply relevant information'. The Article does not contemplate that formal/legal consent, as required by clause 16(2), is necessary for the Subcommittee to adequately perform its functions. In fact, the involvement of substitute decision-makers in this process may have a significant impact on the ability of many people in places of detention to freely, and quickly, speak about their experiences. This clause is likely to impose a significant burden on people in detention who often have formal guardians, such as children and people with disability.
- 4.4. Subclause 16(2)(b) does not provide further context around the person's ability to consent to the interview with the Subcommittee. However, general principles may be taken from

Queensland's guardianship laws, which presumes all adults have capacity to consent and, where a substitute decision-maker is appointed, involve the adult in decision-making about the particular decisions.<sup>14</sup> The inclusion of a substitute decision-maker to this significant monitoring process removes a person's autonomy to speak of their experiences in a place of detention freely and in a timely manner with the Subcommittee. Further, there is a real possibility that the person in detention may not wish to inform their guardian that they wish to speak with the Subcommittee and this may offer another unnecessary obstacle for an already vulnerable group of people.

- 4.5.** ALHR recommends a similar approach to consent to the interview process as implemented in other jurisdictions. For example, section 14(5) of the ACT's legislation provides that '[n]othing in this section requires a person who objects or does not consent to being interviewed by the subcommittee to participate in an interview'.<sup>15</sup> A similar approach could be adopted by Queensland, while still respecting a person's fundamental need to consent to an interview, without requiring 'legal' consent in certain circumstances as drafted.

## **5. National Preventive Mechanisms**

- 5.1.** While not currently the subject of the Bill's drafting, ALHR notes that further legislation will need to be enacted, beyond this Bill, for greater OPCAT compliance as it relates to the functions of National Preventive Mechanisms (**NPMs**). In addition to the Subcommittee, NPMs perform crucial preventative and proactive roles in OPCAT compliance.<sup>16</sup> In the Australian context, the federal government has elected a 'multiple-body monitoring system', requiring states and territories to designate their own NPMs.<sup>17</sup> Queensland is still to designate its NPMs. However, given the similar powers and functions afforded to NPMs and the Subcommittee under the OPCAT, similar legislative measures as noted throughout this submission will also need to be considered in any future NPM legislation.
- 5.2.** To this end, ALHR supports the recommendations of the AHRC concerning the Queensland Government's promptly designate its NPMs before the 20 January 2023 deadline.

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<sup>14</sup> *Guardianship and Administration Act 2000* (Qld), ss 11 & 11B (General Principle 1).

<sup>15</sup> *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018* (ACT), s 14(5).

<sup>16</sup> Australian Human Rights Commission, *Implementing OPCAT in Australia* (29 June 2020) 28 <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/implementing-opcat-australia-2020>>.

<sup>17</sup> Australian Human Rights Commission, *Road Map to OPCAT Compliance* (17 October 2022) 3 <[https://humanrights.gov.au/sites/default/files/opcat\\_road\\_map\\_0.pdf](https://humanrights.gov.au/sites/default/files/opcat_road_map_0.pdf)>.



Thank you in advance for your consideration of this submission and the recommendations ALHR has made.

If you would like to discuss any aspect of the submission with us, please do not hesitate to contact [president@alhr.org.au](mailto:president@alhr.org.au)

Kind regards,

Kerry Weste  
President