

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

Statement of Compatibility

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019* (Human Rights Act), I, the Honourable Shannon Fentiman MP, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, make this statement of compatibility with respect to the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022 (the Bill).

In my opinion, the Bill is compatible with the human rights protected by the Human Rights Act. I base my opinion on the reasons outlined in this statement.

Overview of the Bill

The purpose of the Bill is to facilitate visits by the United Nations Subcommittee on Prevention of Torture (the Subcommittee) to places of detention in Queensland.

The Subcommittee conducts visits to Australia under the Optional Protocol to the Convention Against Torture (OPCAT). The Commonwealth Government ratified OPCAT on 21 December 2017.

OPCAT aims to prevent torture and cruel, inhuman or degrading treatment or punishment by establishing a two-part system of regular visits to places where people are deprived of their liberty. OPCAT requires ratifying state parties to:

- accept periodic visits by the Subcommittee to places of detention; and
- establish a domestic national preventive mechanism (NPM) to conduct regular visits to places of detention.

The Subcommittee is established under Article 2 of OPCAT and has a mandate to conduct periodic visits to monitor places of detention; and to make recommendations to state parties concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment.

To enable the Subcommittee to fulfil its mandate under OPCAT, Articles 12 and 14 outline that state parties that ratify OPCAT undertake to provide the Subcommittee with:

- unrestricted access to all places of detention as defined in Article 4, including unrestricted access to their installations and facilities, subject to particular grounds for objecting to a visit;
- unrestricted access to all information concerning the number of persons deprived of their liberty in places of detention, as well as the number of places of detention and their location;
- unrestricted access to all information referring to the treatment of those persons as well as their conditions of detention;

- the ability to privately interview persons (either personally or with a translator if deemed necessary) deprived of their liberty and any other person the Subcommittee believes may supply relevant information; and
- the liberty to choose the places it wants to visit and persons it wants to interview.

State parties must also encourage and facilitate contact between the UN Subcommittee and NPMs and examine the recommendations of the UN Subcommittee and enter into dialogue with it on possible implementation measures.

The Bill establishes a standalone legislative framework to facilitate Subcommittee visits to places of detention in Queensland, being:

- a community corrections centre (the Helana Jones Centre), prison or work camp under the *Corrective Services Act 2006*;
- a detention centre under the *Youth Justice Act 1992*;
- an inpatient unit of an authorised mental health service under the *Mental Health Act 2016*;
- the forensic disability service under the *Forensic Disability Act 2011*;
- a court cell;
- a watch-house;
- a holding cell or another place in a police station where a person is detained;
- another place where a person is detained (other than a private residence) prescribed by regulation; or
- a vehicle primarily used or operated for the purpose of transporting a person who is detained to or from a place mentioned above.

The purpose of defining places of detention is to provide clarity as to the procedures to be followed to facilitate a visit by the Subcommittee. The Bill does not operate to prevent the Subcommittee from visiting other places where a person may be deprived of their liberty.

The Bill provides that the Minister with responsibility for the place of detention and the detaining authority must ensure the Subcommittee and accompanying persons have unrestricted access to any part of the place of detention.

The Bill provides the Subcommittee with unrestricted access to information relevant to the Subcommittee's purpose that is in the possession or under the control of the relevant Minister or the detaining authority for a place of detention. This encompasses any information that is relevant to the Subcommittee's purpose in evaluating any needs or measures that should be adopted to strengthen the protection of people deprived of their liberty against ill-treatment.

The Bill also allows the Subcommittee to conduct interviews with any person at a place of detention or any other person the Subcommittee considers may be able to provide relevant information.

Human Rights Issues

Human rights relevant to the Bill (Part 2, Division 2 and 3 *Human Rights Act 2019*)

In my opinion, the human rights relevant to the Bill are:

- protection from torture and cruel, inhuman or degrading treatment (section 17);
- right to privacy and reputation (section 25); and
- humane treatment when deprived of liberty (section 30).

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 *Human Rights Act 2019*)

(a) the nature of the right

Right to privacy and reputation (section 25)

Section 25 of the Human Rights Act protects a person from unlawful and arbitrary interferences and attacks upon their privacy, family, home, correspondence and reputation. The underlying purpose of the right is to protect a person from unjustified involvement of public authorities in their private sphere.¹

While the concept of ‘privacy’ is not defined in the Human Rights Act, it has been interpreted broadly and encompasses a person’s right to information privacy, including personal and confidential information. Information can be considered private if, in all the relevant circumstances, a person has a reasonable expectation of privacy. Section 12 of the *Information Privacy Act 2009* (Qld) defines personal information as information or an opinion about an individual whose identity is apparent, or can be reasonably ascertained, from the information or opinion.

A person’s right to privacy in relation to information privacy will be limited by clause 13 of the Bill, which requires the responsible Minister or a detaining authority for a place of detention to ensure the Subcommittee has unrestricted access to all information in their possession or control that is relevant to the Subcommittee purpose, as set out in clause 13(1). Clause 14 of the Bill allows the Subcommittee to access identifying information, including confidential information, about a person at a place of detention, including a person who is detained, if the Subcommittee visits the place of detention. The operation of these clauses may result in the Subcommittee being provided with access to information about a person detained at the facility that can be considered private, such as confidential, personal or health information.

Privacy also includes a person’s geographical or spatial privacy and property. A person’s right to privacy in this sense will be limited by clauses 7 and 8, which require the responsible Minister and detaining authority for a place of detention to allow the Subcommittee and accompanying persons to have unrestricted access to any part of the facility. This may result in the Subcommittee and accompanying persons entering the personal space of a person who is detained, such as a prison cell or hospital room, without the agreement of the person.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

¹ *Director of Housing v Sudi* [2010] VCAT 328 [29].

The purpose of the limitation on the right to privacy is to allow the Subcommittee to fulfil its mandate under OPCAT; and provide it with unrestricted access to information for the purpose of evaluating any needs or measures that should be adopted to strengthen the protection of people deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment. This purpose is consistent with a free and democratic society based on human dignity, equality and freedom as it promotes the rights to protection from torture and cruel, inhuman or degrading treatment (section 17) and humane treatment when deprived of liberty (section 30).

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The limitation on the right to privacy in relation to information privacy and spatial privacy will achieve the purpose by allowing the Subcommittee to fulfil its mandate and gather relevant information to make recommendations to protect people who are detained from ill-treatment.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill.

There are no less restrictive or reasonably available ways to achieve the purpose of the Bill, particularly as the Bill is intended to allow the Subcommittee to fulfil its mandate which stipulates unrestricted access to a place of detention and information about a place of detention.

Clause 15 of the Bill includes a safeguard to protect a person's privacy. If the Subcommittee intends to retain, copy or include in any notes taken identifying information, including confidential information (defined in clause 12), about a person, the consent of the person or their legal guardian must be given for the Subcommittee to do so. This is intended to mitigate the limitation on the right to privacy by allowing a person to decide whether or not the Subcommittee can retain identifying information, including confidential information, about them.

An additional safeguard is contained in Article 16(2) of OPCAT, which outlines that the Subcommittee cannot publish personal data without the express consent of the relevant person. In addition, members of the Subcommittee are required to adhere to the principle of confidentiality during and after their membership, as outlined in Rule 14 of the Subcommittee Rules of Procedure (CAT/OP/3/Rev.3).

Clause 13 includes a further protection on the right to privacy in that it prevents access by the Subcommittee to 'excluded information' in the possession or control of the Minister or detaining authority for a place of detention. This includes Cabinet documents, documents subject to legal professional privilege or client privilege or any information of a kind prescribed under a regulation.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On balance, the importance of the purpose of the Bill, which aims to protect people from torture and cruel, inhuman or degrading treatment and humane treatment, outweighs the limitation on the right to privacy, particularly as a limitation on an individual's right to privacy may allow the Subcommittee to identify circumstances that could result in ill-treatment of persons who are detained and make relevant recommendations to address these circumstances. Safeguards in the Bill, under OPCAT and the Subcommittee Rules of Procedures mitigate the limitation on the right to privacy.

(f) any other relevant factors

Nil.

Conclusion

In my opinion, the Bill is compatible with human rights under the Human Rights Act because it limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the Act.

SHANNON FENTIMAN MP

Attorney-General and Minister for Justice

Minister for Women and Minister for the Prevention of Domestic and Family Violence

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